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PLANNING FOR COMMUNITY SPOUSES

By: Thomas D. Begley, Jr.

On December 14, I had the privilege of speaking at the Florida Bar Association Seminar for out of state members held in New York City. My topic was planning for community spouses. I thought we would incorporate a few of those ideas in this report. In order to obtain Medicaid eligibility, the community spouse can have no more than one half of the countable assets, or \$90,660 whichever is less, and generally, the institutionalized spouse can have only \$2,000. There are a number of strategies available:

1. Spending down
 - Prepay real estate taxes. In New Jersey there are four quarters: August 1, November 1, February 1, and May 1. It is possible to prepay these real estate taxes to relieve the community spouse of that burden in the future.
 - Pay off debts. Clients often have mortgages, home equity loans, car loans and credit card debt. These can be paid.
 - Payment for services. Payments of all medical bills and legal fees can be made.

2. Convert countable assets to non-countable assets
 - Buy household goods and personal effects. Personal effects and household goods are non-countable assets. Buying needed new appliances often makes sense in a Medicaid planning context.
 - Make home improvements. The home of the community spouse is a non-countable asset. By making necessary repairs on a home, the spouse lives more comfortably and the home is prepared for eventual resale.
 - Purchase new home. If the community spouse sells the existing home and purchases a new home for more money, then the proceeds of sale for the old home, the additional funds are

protected. Be sure the spouse can afford the taxes and maintenance on the new home.

- Purchase life estate from children. A life estate has a value. Payment to the child for the life estate is a transfer for value.
- Prepaid funeral. Funerals can be purchased for the institutionalized spouse, the community spouse, and even children.
- Purchase new car. If the community spouse is driving an old car with high mileage, it may make sense to buy a new car.

3. Exempt transfers

- Transfer home to community spouse.
- Transfer non-home assets to community spouse.
- Transfer assets to disabled children. All of these transfers are exempt from Medicaid transfer penalties.

4. Transfers for value not subject to penalty.

- Annuity. The aggressive Medicaid planner might consider purchasing an annuity. Under the current New Jersey Medicaid regulations, annuities are virtually prohibited. However, these regulations appear to be in violation of federal law. A recent Pennsylvania Commonwealth Court held that the value of the annuity combined with other countable assets would not exceed the maximum Community Spouse Resource Allowance. The court's reasoning was flawed in that the annuity would not be a countable asset and the Community Spouse Resource Allowance is composed only of countable assets. New Jersey seems to have based its regulations on that case. A federal court in Pennsylvania has held that a proper annuity is a viable Medicaid planning strategy. Similar results were reached in Delaware, Arkansas, and Wisconsin. A letter from Richard Hamilton, Director, Disabled and Elderly Health Programs Group, Department of Health and Human Services, to Ramon B. Harvey, P.A. dated January 19, 2001, clearly states that a property structured annuity is a viable Medicaid planning strategy.
- Disability Annuity Trust. Disability annuity trusts are specifically authorized by HCFA Transmittal 64. The issue is whether or not the trust must contain a payback provision under which the trust would be required to pay back Medicaid for any monies expended on the deceased Medicaid recipient. New Jersey contends that such a payback provision is required. Again, this appears to violate federal law. Federal law required a payback only in the cases of a Self-Settled Special Needs Trust, a Pooled Trust or a Miller Trust.

- Care Agreement. A community spouse can enter into a care agreement with a family member provided the agreement is in writing, the agreement is prospective only and the compensation is reasonable.
- Family Reverse Mortgage. In many situations, children help support their parents through monthly contributions or payment of expenses on an “as needed” basis. The children are in effect acting as a bank in a reverse mortgage situation. By documenting the transaction and placing a lien on the property in favor of the children, the children’s loan is protected.



Begley & Bookbinder, P.C. is a law firm that concentrates on Estate & Tax Planning, Elder Law, Estate Administration, Guardianship and Will Contests, Real Estate, as well as Medicaid Planning. We are based in Moorestown, NJ, with offices in Stone Harbor, Lawrenceville & Philadelphia, PA.

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