State Retains Medicaid Technique to Help Preserve Spousal Assets

By Wesley E. Wright and Molly Dear Abshire, as published in the Houston Chronicle Senior Living Section on April 1, 2002.

One of the most important techniques utilized by Medicaid planning attorneys has recently been the subject of national attention. Many couples have enjoyed significant protection from seeing their life savings unnecessarily drained by using spousal impoverishment adjustments pursuant to federal law to expand the resources protected for the spouse at home. The technique allows the community spouse (i.e. the spouse who will stay at home while the institutionalized spouse goes into the nursing home) to preserve assets in many cases far beyond the $89,280 ceiling allowed at the initial caseworker level at the Texas Department of Human Services. If the couple have assets that exceed the cap then the excess assets have to be dealt with in some manner. Sometimes the assets are unnecessarily dissipated on the cost of care at the nursing home where the assets could have otherwise been preserved.

If the community spouse lacks the income to arrive at the amount of the Minimum Monthly Maintenance Needs Allowance (MMMNA), currently $2,232 per month, as set by the federal government, then additional assets may be preserved for the community spouse to generate interest income to help the person reach the MMMNA. This method has helped thousands of spouses in the community preserve, in some cases, large amounts of assets while still obtaining Medicaid benefits for the institutionalized spouse. This technique is known as the Asset first technique as assets are preserved first to generate income rather than income being shifted from the institutionalized spouse first.

This opportunity for asset preservation has recently received a severe blow as a result of a United States Supreme Court case decided this year which originated in Michigan and is known as *Wisconsin Department of Health and Family Services v. Blumer* (122S.Ct.585). This case challenged a states right to choose whether the respective state would use the asset first technique, as Texas now uses, or the income first technique. The income first approach forces the community spouse to use the income of the institutionalized spouse first to reach the MMMNA. If there is enough income available from that source to reach the monthly allowance then the result will be that the community spouse will not be able to expand the protected resource amount. The community spouse would be forced to spend the excess assets down. If Texas chose to use this approach, thousands of Texans would be forced to burn up large amounts of assets to qualify for nursing home benefits.

Example, if a couple has $500,000 in countable resources, the community spouse has $1,000 in Social Security and the institutionalized spouse has $1,000 in Social Security, under current Texas policy, the community spouse would be able to keep his or her $1,000 in Social Security, protect all of the $500,000 in assets and still receive some of the institutionalized spouse's income. But in an income first scenario the community spouse would receive his or her $1,000 Social Security, all of the institutionalized spouse=s Social Security of $1,000, minus $60 for the personal needs of the institutionalized spouse, and would only be able to protect approximately $140,000 of the assets.

The income first application would severely restrict a community spouses ability to maintain his or her lifestyle which was the intent of the spousal impoverishment guidelines when they were initially passed by Congress. If a community spouse is required to burn up previously protectable assets by use of this alternative method, what happens when the institutionalized spouse dies? Income that the community spouse was forced to take often evaporates with the death of that spouse and is then no longer available to the survivor. Now the community spouse has not only lost the income she or he was forced to take, but worse has been forced to spend down assets that could have been used to replace that income.

Policymakers for the Texas Department of Human Services in Austin recently announced that they have decided not to switch to the income first approach at this time stating that their analysis found that it would ultimately be more costly to taxpayers. So, for now, Texas will remain an asset first state.