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*22 A GUIDE TO MEDICAID'S SPOUSAL IMPOVERISHMENT RULES

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This article gives a brief overview of the Medicaid program's spousal impoverishment provisions, which are designed to prevent the impoverishment of an at-home spouse when his or her partner enters a nursing home.

I. Introduction

This article will present a practical overview on the issues and mechanics of spousal impoverishment. The federal statute, and subsequent federal and state regulations, could more accurately be called the "spousal impoverishment prevention" provisions. These provisions, originally enacted by Congress in 1988, are designed to prevent the "community spouse" (the spouse that continues to live in the community) from being forced into poverty before the "institutionalized spouse" (the spouse in a nursing home or a Medicaid financed community-based long term care program) becomes eligible for Medicaid. Note that recent moves in Congress to "block-grant" the Medicaid program (with minimal federal conditions upon the states) may result in the repeal of the federal requirement that states have spousal impoverishment policies. Even if Congress does act, however, the spousal impoverishment rules at the state level would continue in effect until changed, although there would be strong budgetary pressures to make changes. No final action is expected before late 1996, if then.

II. Background

The spousal impoverishment statute and rules are part of the Medicaid program. Medicaid is a public assistance program funded jointly by the state and federal governments. The program in Illinois is administered by the Illinois Department of Public Aid (IDPA). Medicaid is based on need and is available to all state residents. There are specific provisions, such as those for long term care, [FN1] that deal predominantly with the needs of people over 60. Prior to 1989, Medicaid regulations often had the unintended effect of encouraging seniors to divorce their spouses in nursing homes rather than be impoverished by the Medicaid requirement that the couple liquidate virtually all of their assets before the institutionalized spouse would be eligible for Medicaid. [FN2] This requirement would often leave the community spouse with very little income or assets, and thus with substandard housing, poor nutrition, and inadequate medical care, and dependent upon the charity of family or friends. The federal spousal impoverishment statute was written into the Medicare Catastrophic Coverage Act of 1988, usually referred to as MCCA (pronounced "mecca"). MCCA required that each state set asset and monthly income allowances for the community spouse when the institutionalized spouse resided in a long term care facility. States are free to establish their own asset and income eligibility allowances within the minimums and maximums set *23 by the federal regulations. [FN3] "The purpose of the [spousal impoverishment provision]...is to end this pauperization by assuring that the community spouse has a sufficient -- but not excessive -- amount of income and resources available for his or her own use while the spouse is in the nursing home at Medicaid expense," stated a Congressional report. [FN4] Because Medicaid is a joint federal and state program, requirements and eligibility vary from state to state. The federal government subsidizes the Medicaid program in all states. In Illinois, federal funds make up approximately 50 percent of the Medicaid budget. [FN5] Currently, the Medicaid program is carrying much of the costs of long term care for the elderly. By 1992, the expenditures for nursing home care in this country came to an estimated \$66.8 billion. Of that, approximately 50 percent is paid for by Medicaid. [FN6] The overall cost of providing long term care, particularly nursing home care, to the growing senior population will explode as the baby boomers "age out." In 1960, there were 16.7 million Americans age 65 or older. By the year 2000, that figure will have doubled to 35.3 million. That number will have doubled again by 2030, when it is projected that there will be over 70 million seniors, comprising 20 percent of the total population (by comparison, the current figure is about 12 percent). [FN7] The growth of nursing home beds has been equally spectacular. In 1933, there were about 25,000 nursing home beds in the United States. By 1973, this had grown to 1,328,000 beds. [FN8] In Illinois alone, there were over 100,000 nursing home residents in 1,141 facilities in 1994. [FN9]

III. Qualifying for Medicaid

Before applying for Medicaid, long term care residents must show that they need nursing home services. Many facilities that participate in the Medicaid program have staff members to assist residents in the application process. These staff members, usually very knowledgeable about Medicaid, can definitely make the application process easier. However, it is important to remember that nursing homes are under no obligation to assist in the Medicaid application process. The ultimate responsibility lies with the resident, the family, or the resident's representative. If the facility cannot or will not assist the resident in the application process, the resident or responsible party can apply directly to the Department of Public Aid local office.

Also, some local long term care ombudsman programs and senior centers can offer assistance with Medicaid applications. Information that must be submitted with the Medicaid application includes copies of bank records for the past 36 months, including all checking, savings, and money market accounts; life insurance policies stating their cash value; deeds to any property held in the resident's name; the Medicare card; and the most recent Social Security check. [FN10] During the application process, the Department may ask for additional information. It is important to respond to requests for information in a timely fashion. Eligibility for Medicaid can be denied if the required information is not supplied.

IV. Application of the Spousal Impoverishment Provisions

Each state was left to designate the Community Spouse Resource Allowance (CSRA) level within the federal minimums and maximums. Illinois currently allows assets of \$74,820 and monthly income of \$1,870, [FN11] the maximum permitted by federal law. These figures represent the assets and monthly income which can be retained by the community spouse from the total assets and income of the couple without penalty to the institutionalized spouse.

The Department of Public Aid does not count all marital assets. [FN12] Certain property is deemed "exempt" under the regulations. Exempt assets include:

Homestead: The homestead is defined as the home where the community spouse actually lives. It does not include vacation or second homes. However, there is no limit on the value of the homestead.

Cars: The IDPA allows one car to the community spouse.

Household goods: The Department allows the community spouse to retain possession/ownership of all furniture and household equipment.

Personal property: The Department does not count personal possessions such as wedding rings, personal jewelry, and clothing as part of the assets.

Burial equipment: The Department allows for the prepayment of burial expenses. There are no limits imposed by the Department on the costs of caskets, urns, headstones, burial plots, etc. In addition, spouses may establish burial trust funds up to \$1,500 for each *24 spouse for payment of services at the time of death. [FN13]

Other than the property listed above as exempt, the Department counts all assets held in either partner's name as a marital asset. This includes all assets that may have been gained prior to the marriage. [FN14]

A typical example might be:

Assets in wife's name:

Savings Account.....	\$ 2,500
CD (owned prior to marriage)	10,000
Homestead (in wife's name)	70,000
Stocks and Bonds (inherited from parents)	5,000
TOTAL	\$87,500

Assets in husband's name:

Savings Account	5,000
CD (owned prior to marriage)	5,000
TOTAL	\$10,000

Assets held jointly:

Stocks and Bonds	40,000
Savings	15,000
Checking	2,000
Furnishings	8,000
Automobile	7,000
TOTAL	\$72,000

Total Assets:

In Wife's Name	87,500
In Husband's Name	10,000
Jointly Held	72,000
TOTAL	\$169,500

In this example, let us suppose that the wife needs to be placed permanently in a long term care facility. To calculate how much the couple is required to spend on his wife's care prior to Medicaid eligibility, we must first deduct the exempt assets:

Homestead.....	(-) \$70,000
Furnishings	(-) 8,000
Automobile	(-) 7,000
Total exempt assets.	\$85,000
Total assets minus exempt assets = assets for Medicaid purposes	
\$169,500 - \$ 85,000 =	\$ 84,500

Under the Illinois Medicaid regulations, the community spouse is entitled to keep \$74,820 of the marital assets. In this case, only \$9,680 of total assets will have to be spent on the institutionalized spouse's care prior to Medicaid eligibility. All of the assets must be

transferred to the community spouse, in this case the husband, within 90 days of Medicaid eligibility. If the institutionalized spouse keeps assets in her own name, the Department can deem the asset available to pay for her care and therefore find her ineligible for Medicaid.

V. Income for Community Spouses

In addition to that share of the marital assets that the community spouse is entitled to keep without penalty, federal law requires states to establish an income level which the community spouse could retain without penalty to the institutionalized spouse. The current level in Illinois is \$1,870 per month, including the housing allowance. Illinois has opted to use the maximum income level. [FN15]

The Department counts all income of both spouses, regardless of the source or the name on the instrument, in calculating total income. For example:

Wife's Social Security	\$ 550
Husband's Social Security	700
Wife's Pension	300
Husband's Pension	400
Total Income	\$ 1,950

*25 In this situation, the couple's income exceeds the maximum allowance permitted of \$1,870. Therefore, the husband will be required to pay \$84 per month to the nursing home (\$1,950 - \$1,870 = \$84).

When the Department finds the spouse eligible for Medicaid, the community spouse will be notified of the amount that must be turned over to the facility. If the couple's total income is less than \$1,870 per month, the community spouse is entitled to keep all of that amount.

VI. Permitted Transfer of the Homestead to Children of Siblings

Department of Public Aid regulations do allow the homestead to be transferred without penalty to a child or sibling in very limited situations.

If a child is minor or permanently disabled, the homestead may be transferred to that child without penalty. [FN16] The homestead may also be transferred to a nondependent adult child if the child has lived in the home for two or more years and has provided care that enabled the parent(s) to remain in the community rather than in a facility.

To transfer the homestead to a sibling, the sibling must show that they have an equity interest in the house and that they have lived in the house for at least one year. [FN17]

VII. Prohibited Transfers and Sanctions: the 36-Month Rule

Closely related to the spousal impoverishment provisions are those relating to transfer of assets. New "transfer of asset" provisions were written into law in the Medicare Catastrophic Coverage Act of 1988 [FN18] The concern, of course, is that individuals contemplating nursing home admissions will divest themselves of enough property and assets to gain quick eligibility for Medicaid.

To avoid this, there is a 36-month "look back" period on all transfers of assets. [FN19] When a person applies for Medicaid, the IDPA will investigate all transfers of assets made during the 36 months prior to the application. Any asset transfer of \$500 or more must be explained to the Department. If the Department finds that assets (cash or property) have been depleted or transferred for less than fair market value (including gifts) to create eligibility for Medicaid, the Department will impose a penalty period.

The length of the penalty period is calculated by taking the fair market value of the asset and calculating how many months of long term care services the asset or proceeds from that asset would have paid for had it not been depleted or given away. [FN20]

For example, if a house with a fair market value of \$100,000 was transferred with no remuneration --i.e., given away-- and the average nursing *26 home cost in the area is \$2,500 per month, then the person would be penalized by being ineligible for Medicaid for 40 months (\$100,000 divided by \$2,500 = 40 months). Federal law permits an indefinite penalty period. [FN21] If, as in the example above, the transferred property could have paid for 100 months of nursing home care, then the penalty period would be 100 months. By way of extreme example, if the transfer involved \$1 million, then the penalty period would be over 37 years.

If the house had been transferred at less than fair market value, but for some remuneration, then the difference between these is what is used to determine the penalty. If the \$100,000 house had been transferred for \$80,000, then the period of ineligibility would be eight months (\$100,000 - \$80,000 = \$20,000; \$20,000 divided by \$2,500 = 8).

The Department of Public Aid may allow exceptions to this rule and its sometimes harsh results. This occurs when the nursing home resident is in danger of being discharged from the facility and it is impossible for the resident to recover the funds or assets. The hardship exception is especially important where financial abuse or exploitation may have occurred. [FN22]

VIII. Medicaid for Unmarried People

The financial eligibility requirements for single or widowed people are extremely restrictive. As opposed to married couples who have a partner in the community, unmarried individuals (or couples where both are in long term care facilities) must be impoverished before becoming eligible for Medicaid.

The total amount of cash assets allowable (apart from a house which the resident may retain for as long as it reasonably appears that they will return to the community) for a single or widowed person is \$2,000. [FN23]

The Department of Public Aid counts all assets which can be converted to cash, such as stocks, bonds, treasury bills, and life insurance policies, toward this limit. Single or widowed Medicaid residents cannot own any real property, unless the placement in the nursing home is temporary.

The Department generally considers stays of more than six months as permanent. If placement is permanent, the homestead and any other real property owned by the resident must be sold and those assets spent down to \$2,000 before Medicaid eligibility can be established or regained. [FN24] The only exempt property an unmarried person may retain is \$2,000, equipment for burial, and a burial trust fund (for burial services) of up to \$1,500.

IX. Medicaid Estate Recovery: Claims and Liens

Though a detailed review of the Medicaid estate recovery program is beyond the scope of this article, several important points should be noted.

On August 11, 1993, Congress acted to change the rules again. The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) contained provisions requiring states to implement "Medicaid estate recoveries." [FN25] Prior to OBRA '93, federal Medicaid law permitted, but did not require, the states to attempt to recover against the estates of recipients.

The core idea, of course, is that the taxpayers should get back some, if not all, of the amounts that were expended for the care of one or both of the spouses. The state can seek to do this by two means: property liens and estate claims. [FN26]

The state may seek to place a lien on the residence of the institutionalized spouse -- unless the community spouse, a disabled or minor child, or a relative who can claim an equity interest in the home continues to live in the residence. This lien would allow the taxpayers to collect on the proceeds of the sale of the house prior to any heir.

In addition, the state may file a claim against the estate of the institutionalized or community spouse. The claim will be filed when the estate is probated. [FN27]

This claim would be equivalent to the claim of any other creditor. It would be a sixth priority claim. [FN28] It would not have priority over certain other claims, such as burial costs, costs of administering the estate, and federal tax liabilities. It would, however, have priority over the expectations of the heirs. The claim would have to be satisfied to the extent of the estate remaining before any distribution to heirs would be made.

X. Conclusion

This article has attempted to present a practical overview of the issues of spousal impoverishment and transfer of assets under the Medicaid program.

As is readily apparent, the related issues of Medicaid eligibility, spousal impoverishment, transfer of assets and (most recently) Medicaid estate recovery makes this an increasingly challenging and ever-changing area for the attorney and estate planner.

[FN1]. State regulations for Medicaid reimbursement for long term care are found in the Illinois Department of Public Aid's Aid to the Aged, Blind and Disabled Manual (hereinafter cited as the "AABD Manual"). The Department publishes updates to the AABD Manual as regulations and policies are changed. You may request to be added to the Departmental mailing list to receive regular updates. The AABD Manual is divided into Chapters 100 through 1700. Each chapter is divided into a policy section (PO) and a procedures section (PR). Sections are cited by either PO or PR and the section number. For example, PO 1620.5 would be found at the policy pages in ch 16, § 20, subsection 5.

[FN2]. One of the authors heard this numerous times at various conferences in the period 1989 to 1992.

[FN3]. Section 303(a) of the Medicare Catastrophic Coverage Act of 1988 (PL 100-360), amending Title XIX of the Social Security Act by adding a new § 1924(c) (assets protections) and § 1924(d) (income protections), codified at 42 USC § 1396r-5. Later this legislation was repealed by the Congress through the Medicare Catastrophic Coverage Repeal Act of 1989 (PL 101-234), but the spousal impoverishment prevention provisions were retained.

[FN4]. HR No 100-391, 100th Cong, 1st Sess 490 (1987).

[FN5]. 1995 Illinois State Budget, ch 2-10 and 2-11 (1994).

[FN6]. The 1995 Universal Almanac 214 (1994).

[FN7]. Id at 299-300 (1994), citing United States Bureau of the Census, Population Projections of the United States by Age, Sex, Race, and Hispanic Origin, 1993-2050.

[FN8]. R. Brown, Social Security Today and Tomorrow 100 (1978).

[FN9]. This total was supplied by the Illinois Department of Public Health, Long Term Care Division, as of August 1995.

[FN10]. AABD Manual, Chapters 300 and 400.

[FN11]. The asset level is found at AABD Manual PO 505.9, and the income level is at AABD Manual PO 620.3(1).

[FN12]. Id at PO 505.1.

[FN13]. Id at PO 505.1(g) and (h).

[FN14]. Id at PR 505.8.

[FN15]. Id at PO 620.3.

[FN16]. Id at PO 505.5(b)(3).

[FN17]. Id.

[FN18]. Section 303(b) of the Medicare Catastrophic Coverage Act, PL 100-360, amending § 1917(c) of the Social Security Act, codified at 42 USC § 1396p. This was later significantly amended by § 13611 of the Omnibus Budget Reconciliation Act of 1993, PL 103-66, amending § 1917(c)(1) of the Social Security Act [42 USC § 1396p(c)(1)].

[FN19]. 42 USC § 1396p(c)(1)(B)(i).

[FN20]. AABD Manual PO 505.5(d).

[FN21]. 42 USC § 1396p(c)(1)(E)(i).

[FN22]. If an application for assistance is denied because the resident is unable to supply needed information due to suspected financial abuse, it is wise to file an appeal with the Illinois Department of Public Aid. The appeal process is described in AABD Manual PO 235.1 through PO 235.15. The Department staff has an obligation to assist applicants in obtaining the required information if the applicant is unable to do so independently. See AABD Manual PO 260. If the resident is unable to obtain records from a third party, the Department will require the applicant to supply whatever information they do have available and to assist in getting the information from the third party. See AABD Manual PO 315.3 and 315.8. If financial abuse has occurred or is suspected, it is helpful to submit a written explanation of the situation with the initial application.

[FN23]. AABD Manual PO 505.2.

[FN24]. Id at PO 620.3(4).

[FN25]. Section 13612 of the Omnibus Budget Reconciliation Act of 1993, PL 103-66, amending § 1917(b)(1) of the Social Security Act [42 USC § 1396p(b)(1)].

[FN26]. AABD Manual PO 1620.

[FN27]. Id at PO 1620.2.

[FN28]. 755 ILCS 5/18-10. The sixth priority claims are those of state and local governments. For more on Medicaid liens, see the "Lawyers Journal" at page 8 of this issue.

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