

Texas Elder Law FaxLetter

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A FREE BUSINESS AND LEGAL UPDATE OF CURRENT EVENTS AFFECTING THE ELDERLY ♦ MARCH 2004 EDITION

STATE STORIES

HHSC Proposes Major Change Concerning Resources and Annuities



At the present time, there are a couple of major planning strategies in situations where one spouse is in a nursing home and the other lives in the "community" (at home, assisted living, etc.) whereby that community spouse can keep significant assets and still obtain Medicaid for the spouse in the nursing home (so the government pays for all or a part of the cost of care plus medication).

One strategy is to purchase a certain type of annuity. Presently, if the annuity meets the guidelines in the Medicaid Eligibility Handbook, then the resource would not count for Medicaid eligibility and the state did not have to be named as a remainder beneficiary. So, some couples have used the strategy of transferring all resources to the community spouse (there is no transfer penalty on transfers between spouses), then purchasing this type of annuity for the community spouse and naming their heirs as beneficiaries.

The Centers for Medicare and Medicaid Services ("CMS") recently informed states that it has finally determined (after many years) that an annuity can be counted if it can be sold. Apparently, even if an annuity is irrevocable (one of the several requirements for the resource not to count), it can be sold.

The proposed change is to make such annuities now count as a resource unless it names the State of Texas, the Texas Department of Human Services (DHS) or its successor agency, as residuary beneficiary. It should be noted that this was usually not the best strategy for preservation of resources, but was often misused by those who sold such annuities to obtain large commissions.

The reason why the purchase of such annuities was usually not the best strategy for asset preservation in obtaining Medicaid eligibility in Texas is due to the fact that Texas is presently a "resource first" state in determining how much of the protected

resource amount can be kept by the community spouse. As a "resource first" state, Texas does not presently require that the income (other than \$1) of the institutionalized spouse be considered in expanding the amount of resources that could be kept by the community spouse.

As a result, if the monthly income of the community spouse is below the minimum monthly maintenance needs allowance (presently \$2,319), the community spouse could often expand the protected resource amount (the maximum being presently \$92,760) to hundreds of thousands of dollars and sometimes more without even having to purchase an annuity. (See the November issue of the *Texas Elder Law FaxLetter* to determine how the protected resource amount is calculated). Thus, it is usually best for the community spouse to expand and not be stuck with an irrevocable, inaccessible annuity.

However, this strategy is also now under attack since DHS has proposed that Texas be an "income first" state, which requires that the income of BOTH spouses be considered prior to expansion under the Federal prevention from spousal impoverishment laws. This was authorized by the U.S. Supreme Court in the case of *Wisconsin Dept. of Health and Family Services v. Blumer* as reported in the *Texas Elder Law FaxLetter* approximately 2 years ago.

Both of these proposed changes will be presented to the Medical Care Advisory Committee on March 11, 2004 and are supposed to be effective as of October 2004.

MEDI-MINUTES

Medicare Savings Program Limits Announced

Now that the federal poverty income limit adjustments for 2004 have been announced (in the Federal Register, in February), we know what the new eligibility limits will be for the Medicare Savings Programs (not to be confused with the Medicaid programs). As of April 1, 2004, those monthly limits will be:

1. QMB – individual -- \$776;
couple -- \$1,041 (QMB pays all Medicare cost-sharing amounts)

2. SLMB – individual -- \$931;
couple -- \$1,249 (SLMB pays the Medicare Part B premium)
3. QI – individual – 1,048;
couple -- \$1,406 (QI pays the Medicare Part B premium; it currently expires on 9/30/04)
4. QDWI – individual -- \$1,552;
couple -- \$2,082. (QDWI pays the Medicare Part A premium for disabled workers)

All of the above limits are the base limits – none of them has factored in the \$20 disregard. None of them has factored in the earned income exclusion of the first \$65 of earned income and one-half the rest of earned income.

All of the above programs exclude countable resources at \$4,000 for an individual and \$6,000 for a couple.

Also the "denominator" for dividing uncompensated transfers within the 3 year "look-back" period (5 years on many trusts) to determine how many months of ineligibility for nursing home Medicaid eligibility remains \$2,908 "until further notice."

NATIONAL NOTES

CMS Proposes Increased Rates for LTC Hospitals



The Centers for Medicare & Medicaid Services have issued a proposed rule that would increase the Medicare payment rates for long-term care hospitals (LTCHs) by 2.9% starting July 1, 2004. CMS is also proposing the expansion of the interrupted stay policy, regulations to enable a satellite location of an LTCH to qualify as a separate certified LTCH, and revision of the procedure for calculating a hospital's average length of stay for purposes of qualifying for payment under the LTCH prospective payment system.

This is the first proposal for which CMS is accepting comments electronically at www.regulations.gov. Comments will be accepted until March 23.

CMS, 1-23-04, 1-30-04