

The Estate Planning Advisor

Preserving Assets for the Community Spouse

By Richard J. Shapiro, J.D.

When one spouse seeks Medicaid coverage for long-term care costs, the “well” or “Community Spouse” is entitled to retain maximum assets (not including the home) of \$104,400. However, this sum – the Community Spouse Resource Allowance (“CSRA”) – may be increased if the Community Spouse’s income falls below the Minimum Monthly Maintenance Needs Allowance (“MMMNA”), which in 2008 is \$2,610 per month. For example, if a person has only \$2,285 of total monthly income, they are entitled to retain assets above the CSRA as are necessary to produce additional income of \$325 to meet the MMMNA level. Even assuming a bank savings account rate of 3%, a person would need about \$130,000 invested in the account to produce the \$325.00 per month shortfall. Under such a circumstance, a community spouse would be able to retain liquid assets of \$234,400 rather than the standard \$104,400 allowance, thereby reducing the need for a “spend down” of the community spouse’s asset before the “ill” spouse is Medicaid eligible.

When a Community Spouse is able to retain more resources than permitted under the standard CSRA, the state is concerned that it will bear a greater burden of long-term care costs. As a result of numerous fair hearing decisions providing Community Spouses with enhanced CSRA’s that New York regulators deemed to be overly generous, on September 24, 2007, the New York State Department of Health (“DOH”) issued an “Informational Letter” to the county Departments of Social Services and DOH hearing examiners providing guidance on this issue.

In the informational Letter, the DOH stated that instead of permitting the lower bank savings rates to calculate the appropriate rate of return needed to provide for an enhanced CSRA, Community Spouses were to be required instead to utilize the higher amount of income that would be available from the purchase of a single premium immediate life annuity (“SPIA”). Using the same \$325 monthly income shortfall as above, the Informational Letter noted that a SPIA purchased for only \$39,538 could be anticipated to produce monthly income of \$325, versus the \$130,000 required to be invested in a bank savings account. Under the DOH model, the Community Spouse would be permitted to retain about \$90,000 less in assets than if the lower bank savings account rate were approved.

Note that the Informational Letter does not require a community spouse seeking an enhanced CSRA to in fact purchase a SPIA; rather, the enhanced CSRA is simply to be calculated by referring to the then current rate of return that a SPIA would produce.

The SPIA methodology specified in the Informational Letter has been criticized under the rationale that annuity payments are not comprised solely of income, but are rather a combination of income and a return of principal. Some case law is now emerging on this issue, and so far DOH’s position has been upheld. In the 2008 decision of *In Re Lynch*, an Albany County Supreme Court judge held that while payments from an immediate annuity do in fact constitute a return of both income and principal, both Federal and New York State law authorize a State Medicaid agency to determine that,

“these additional resources are available to the community spouse to assist him in closing an MMMNA shortfall over his lifetime, precisely the purpose for which such additional resources are allowed.”

We can anticipate further litigation on this issue. For now, however, it should be assumed that the county Departments of Social Services will be utilizing the SPIA method in calculating enhanced CSRA’s for spouses whose incomes fall below the MMMNA.

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