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Special Report

Community Spouse Planning Considerations and Techniques

Applying for Medicaid for a spouse can be emotionally difficult but add the application and eligibility criteria on top and the whole process can be daunting. Community Spouses hear stories of houses being taken and having to spend down all their assets to qualify their spouse for Medicaid. The alternative to Medicaid is not overly enticing either, as the cost of care for facilities keeps rising. For 2024, the average cost of skilled care in Colorado is $9,479.95 per month. For most people this cost alone would decimate a couple's savings in no time. Add the community spouse's living expenses on top of that and couples sometimes spend $12,000 - $15,000 a month just to live minimally. Rightfully so, we see many community spouses in a manic state trying to decide how to adequately care for their spouse and still be able to pay for their own living expenses.

The good news is that Medicaid regulations carve out protections for Community Spouses. The Department understands Community Spouses need to afford to continue to live in the community and sustain expenses unrelated to the Institutionalized Spouses. The three main protections afforded Community Spouses are the following:

1. Community Spouses can keep $154,140 for the calendar year 2024 of additional assets above the exempt resources. The amount available to the Community Spouse is determined by the date of the application for benefits for the Institutionalized Spouse.

2. Community Spouses are allocated a portion of the Institutionalized Spouses income depending on certain factors.

3. The Department treats gives separate treatment to resources post-eligibility.

These three protections allow Community Spouses to have a nest egg of money they can use for their own expenses and their long-term care in the future. Additionally, in some circumstances income can be diverted to the Community Spouse from the Institutionalized Spouse's income, as opposed to having it used for payment to the facility caring for the Community Spouse. This increases the monthly income for the Community Spouse to assist with paying bills. Finally, once the institutionalized individual has been approved for Medicaid, there is a separate treatment of resources between spouses. This allows the Community Spouse to plan for his or her own long term care planning and for the disposition of his or her assets to his or her heirs.

When assessing whether a married individual can qualify for Medicaid it is important to review both the assets and income of the couple. The assets of the couple are combined regardless of how they might be titled, i.e.- jointly or individually. The income of the couple is considered separate, although once one of the individuals qualifies for Medicaid, the income of the institutionalized spouse may be used by (or transferred to) the Community Spouse, based on the needs of the Community Spouse.

When reviewing the couple's assets keep in mind some assets are exempt (or non-countable) and some assets are non-exempt (countable). Part of planning involves assessing the type of assets and converting the non-exempt (countable) assets into exempt (non-countable) assets.

To best explain the planning considerations and techniques, let's look at John and Mary, our imaginary couple. John is 85, recently suffered a stroke and will need skilled care for the remainder of his life. Mary is 83, lives at home and is in relatively good health. Their resources include a house owned free and clear worth approximately $400,000, investments worth $120,000, checking and savings accounts worth $75,000 and two vehicles (one worth $5,000 and the other worth $10,000). John's gross monthly income is $4,500 and Mary's is $1,000.

John and Mary's house is deemed to be an exempt asset and is not counted in qualifying for benefits regardless of its value. (Note: for a single individual applying for Medicaid in 2024 he or she can have a house valued up to $1,071,000. It seems too strange to be true, but it is. (It is beyond the scope of this Special Report, but there are estate recovery issues, which would need to be addressed in the case of the single Medicaid applicant with an expensive residence. Remember, all that glitters is not gold.). John and Mary can have one vehicle of unlimited value, which would also be exempt.

From the asset perspective, John and Mary only have the investment accounts and their checking and savings accounts in the amount of $195,000 to consider in their planning, as they look at the possibility of qualifying John for Medicaid benefits. Assuming John applies for Medicaid benefits in 2024, Mary will be able to retain $154,140 of their combined non-exempt assets, commonly referred to as her Community Spouse Resource Allowance or CSRA. This means they only have $40,860 of excess resources which they need to consider before John becomes eligible for Medicaid benefits.

What does it mean to qualify for Medicaid benefits? Well, it means John's cost of care, say it is $9,479.95, would be paid for by Medicaid. John will need to contribute a portion of his income toward this cost of care, which is discussed below. Some of his income may be allocated or paid to Mary on a monthly basis.

So, keeping John and Mary in mind, here are the techniques and planning considerations they need to consider.

<u>Income techniques and planning considerations.</u>

- **Paying down debt**

If we change the facts of John and Mary's financial situation slightly and add credit card debt of $10,000 and an encumbrance on the $10,000 vehicle of $8,000, you can see how this approach works. This technique can be used for all kinds of debt, but some debt is more advantageous to eliminate than others. We will discuss this more later. The monthly payments on credit card debt and car loan can be daunting along with all the other house bills if John's income is not available to assist with those bills. Paying down debt so there are no monthly payments can ease the monthly financial burden on Mary. Using $18,000 of the $40,860 excess resources is a good way to spend down the non-exempt assets, so Mary does not have monthly payments. Again, this strategy likely will need to be implemented along with another strategy to spend down the excess non-exempt assets of John and Mary's assets.

- **Purchasing a Medicaid compliant annuity**

The Community Spouse, i.e.- Mary has the ability to convert assets into income by purchasing an annuity to increase her income. Medicaid compliant annuities are used as a spend-down technique to turn a lump sum of money into an income stream for the Community Spouse. In our example, Mary may require $3,000 a month to pay for her living expenses. Under the spousal income rules, she would only be entitled in 2024 to a minimum of $3,715.50 or a maximum of $3,853.50 of the couple's income. This is referred to as the Minimum Monthly Maintenance Needs Allowance (MMMNA).

Because Mary only has $1,000 of income and her needs are an additional $2,000 per month she can look to increase her income through the Monthly Income Allowance (MIA). This allows her to re-direct some of John's income to herself to reach her needed income goal. The payment amount from John is referred to as the MIA. In the alternative it may be in Mary's best interest to purchase an income stream as the spend-down technique. This would allow Mary to spend all or a portion of the excess resources, i.e.- $40,860 by purchasing an annuity, which generates income for her.

This type of planning should be done with much consideration because there are certain restrictions when using these types of annuities. For example, the term of the annuity cannot exceed the life expectancy of the Community Spouse. Additionally, the income generated by the annuity cannot exceed the needs of the Community Spouse for his or her living expenses, which is deemed to be the maximum MMMNA. Does this all sound complicated? The answer is yes. It is complicated.

Additionally, beneficiary designations must comply with the Medicaid Regulations in order to effectuate the purchase without causing a transfer penalty. This type of planning is especially important if the Institutionalized Spouse is not likely to live very long and there are no survivor benefits associated with the Institutionalized Spouse's income. Protecting the Community Spouse in this way is extremely important.

- **Increase expenses**

The amount of the Institutionalized Spouse's income which will be transferred to the Community Spouse (the MIA) is dependent on the expenses of the Community Spouse. In some circumstances, it makes sense to increase the Community Spouse's expenses, so more income is allocated to the Community Spouse. In our example, if Mary and John's non-exempt resources were only $50,000 (rather than $175,000) and they owned their house free and clear, it may be a good idea to take out a mortgage on their house of say $50,000 (or more, but not in an amount which would give John and Mary cash in excess of the CSRA amount of $154,140) and pocket the loan proceeds. If they did so, their resources would be increased and they would have a monthly mortgage expense. Mary would be allocated additional income (a shelter allowance of up to $739.50 per month in 2024) from John each month to pay the mortgage. This is referred to as the Shelter Allowance. The effect of this type of planning would be to free up additional cash for Mary if she needs it, while also paying for the mortgage with John's income, which Mary otherwise would not have received. This can work nicely in certain circumstances.

<u>Resource techniques and planning considerations.</u>

- **Upgrading a residence or vehicle**

One planning tool Mary has is to use some of the excess resources of $40,860 which needs to be spent down on making upgrades or modifications to her home. Keeping her own long term needs in mind, she may want to install grab aides and/or ramps or remodel her bathroom or bedroom to anticipate her future needs. Improving the house, so Mary can stay at home as long as possible, is good forethought and planning. Additionally, Mary may want to sell both cars and purchase a newer vehicle which will provide her safe, comfortable transportation as she ages. The proceeds from the sale of the two cars, plus using some of the excess resources of $40,860, to acquire the new car could be a good financial move.

- **Prepaying for funeral and burial plans**

Converting non-exempt assets to exempt assets has long been a tried and true way to spend down assets to qualify for Medicaid. With the Mary and John needing to spend down $40,860, they can purchase funeral and burial plans. Unless they intend to have exceptionally extravagant funerals, they will likely not spend the entire $40,860 on prepaid funeral plans so additional spend-down techniques will need to be employed. This strategy allows John and Mary to be able to use the spend-down money on something which will retain value. One concern many of our clients share is not burdening their children financially after their death with funeral costs. This is an excellent way to pass value on to their children.

Estate Planning techniques and planning considerations.

- **Transfer assets to Community Spouse**

During the application process and within a year from the determination of eligibility for the Institutionalized Spouse, all of the assets should be transferred into the Community Spouse's name. This is important to make sure the Institutionalized Spouse is not over-resourced at their redetermination, which usually occurs annually. It is important also because if the Community Spouse dies, any assets held jointly between the spouses will be transferred back to the Institutionalized Spouse, which could be problematic.

- **Updating estate planning to protect the institutionalized spouse**

One of the most important things a Community Spouse needs to do is to update his or her estate planning. A typical estate plan for a married couple is what we call "I Love You" wills where the spouses leave everything to each other. This type of planning is counterproductive once one spouse is on Medicaid. If the Community Spouse dies and is survived by the Institutionalized Spouse, with an "I Love You" will, then all the "probate" assets in the Community Spouse's name, which are controlled by the terms of the will, will be transferred to the Institutionalized Spouse, causing the Institutionalized Spouse to likely lose Medicaid benefits. It is important to update the Community Spouse's estate plan to protect the Institutionalized Spouse as much as possible.

It is also important to know a Community Spouse cannot disinherit the Institutionalized Spouse. Colorado has statutory law which does not allow for one spouse to disinherit completely the other spouse. This is called a spousal election. The law allows for a disinherited spouse to elect against the other spouse's estate plan and take some of the assets, depending on the asset's allocation. In the Medicaid regulations, if Mary tries to disinherit John, the regulations will require John to make an election against Mary's estate. This election right needs to be considered when preparing estate planning for the Community Spouse. If John refuses to elect against Mary's estate then his refusal will be considered to be a transfer making John ineligible for Medicaid benefits.

- **Make transfers after institutionalized spouse is on Medicaid**

The regulations state after an Institutionalized Spouse has been determined eligible for Medicaid, the Community Spouse's assets are no longer considered for redetermination purposes. This allows a Community Spouse to employ long-term care strategies which may include making transfers of assets which do not impair the Institutionalized Spouse's benefits. In our example, Mary may want to make a transfer of her residence or cash to implement an asset protection long-term care plan. She will need to wait until John has been determined eligible for Medicaid and then she can make the transfer.

- **Using a Personal Service Contract to stay at home**

In some circumstances Community Spouses discover living alone is more difficult than they anticipated. To facilitate the Community Spouse staying at home as long as possible, we often use Caregiver Agreements (also known as Personal Service Contracts) in which the Community Spouse hires a family member or friend to provide services for them at home. This allows for a transfer of assets between the Community Spouse and children or other relatives. In our case, if Mary needs assistance with personal care or financial management, she can enter into an agreement with her daughter to provide care. The agreement spells out exactly the services to be provided and compensation to be paid. Keep in mind, this is income to the child and must be reported. It is imperative under the rules the agreement be in writing prior to any services being commenced.

<u>What NOT to do when planning for the Institutionalize Spouse.</u>

- **Don't hide assets**

When filing an application for Medicaid it is important to disclose all of the required information, which includes information about the assets and income of the applicant, Failure to accurately disclose the information could result in criminal fraud charges. Nothing good comes from not being truthful and following the rules.

- **Don't give away (transfer) assets to third parties without seeking professional advice**

This rule goes hand in hand with the rule regarding the hiding of assets. You are allowed to give away assets. If you do so to avoid having to disclose them on a Medicaid application, there is a penalty (or period of ineligibility) which you must wait out before becoming eligible. In an application for Medicaid you are asked to disclose any gifts (or transfers) which the applicant has made in the previous 5-year period. The amount or value of the transfer is then divided by the average state-wide cost of skilled care per month, which in 2024 is $9,479.95. To illustrate, if a gift were made within the five-year period of $94,799.50 then a 10 month period of ineligibility would be imposed.

Often, a plan is adopted involving the gift of assets combined with the purchase of an annuity making up the cost of care during the period of ineligibility. This is used more often with an unmarried individual and can be an effective way of preserving assets for the family of an institutionalized individual.