

Latest Developments in the Protection of the Community Spouse¹

The necessity of nursing home placement of a spouse is a source of enormous anxiety for the spouse at home, financially no less than emotionally. In fact, the law is more protective of the financial status of the community spouse than most people assume.

The MassHealth (Medicaid) regulations intended to protect the community spouse from impoverishment relate in different ways to assets and to income.

As to assets, the basic rule is that the community spouse is entitled to keep the house,² the car, and all personal effects and household furniture and furnishings. In addition, the community spouse may keep up to a maximum of \$115,920, regardless of whether the assets are owned jointly or by either spouse individually.³ (The institutionalized spouse may keep only \$2,000 for personal needs.) The amount the community spouse may keep is called the community spouse asset allowance (CSAA). Unless further steps are taken as discussed below, the state will consider the assets over the basic CSAA level to be available to pay for care until exhausted before MassHealth is available.

As to income, several rules apply. First, the community spouse may keep all her own income, including the interest and dividends earned by the CSAA. Thus, she need not spend any of her own income on the care of the institutionalized spouse once on MassHealth.

Often, however, the income of the community spouse alone is not enough to meet her needs. The MassHealth regulations address the

¹ This paper was prepared to provide general background information. It is not intended to be and should not be taken as legal advice. For that, consult with a knowledgeable attorney in your state who is knowledgeable about estate planning and elder and disability law, and who is thoroughly familiar with all the circumstances of your particular case.

² The house is protected regardless of its value if it is occupied by the spouse, a child of either spouse under age 21, or a child of either spouse who is blind or permanently and totally disabled. Otherwise, the house is protected to the extent of \$802,000 of its net equity value (fair market value less outstanding mortgages).

³ This limit applies only as of the first date for which MassHealth eligibility is sought. The community spouse may accumulate and retain assets in excess of this level in subsequent months, without effect on eligibility.

problem in only limited ways. Ordinarily, the spouse in the nursing home is able to deduct only \$72.80 per month for his own personal needs, and enough to pay the premiums on any health insurance (such as Medex), before applying the balance of his monthly income toward the nursing home bill. However, under certain circumstances, he is permitted to deduct a portion or even all his remaining income and apply it to the support of his wife at home. Such a "spousal support deduction" is permitted only when the income of the community spouse is below a certain level, supposedly reflecting the minimum she needs to live independently in the community. This level is called the "community spouse minimum monthly maintenance needs allowance" (MMMNA). The MMMNA takes into account certain living expenses that vary from person to person, for example, rent or mortgage expense, real estate taxes, and homeowner's or tenant's insurance, but is determined mostly by a formula within a minimum and maximum level adjusted from time to time. As of January 1, 2013, the MMMNA cannot be less than \$1,891.25 nor more than \$2,898 per month, in the absence of special circumstances as discussed below or a court order of support. For example, if the state calculates the MMMNA of the community spouse to be \$1,900 per month, but the community spouse has only \$1,200 of her own income, the state will allow a spousal support deduction of \$700 from the income of the institutionalized spouse for the support of the community spouse.

The regulations provide that the MMMNA may be raised above the normal ceiling if the community spouse is able to demonstrate that she faces "exceptional circumstances" and would experience "significant financial duress" if a higher MMMNA is not authorized. Since the basic MMMNA formula already supposedly takes into full account basic necessities of food, shelter, clothing and utilities, exceptional circumstances are limited to those arising from medical conditions, frailty, or other special need. Examples include special housing (such as assisted living placements) and extraordinary uncovered medical care. Specifically excluded are car and home maintenance expenses. We have found MassHealth to be reasonably responsive on this issue, especially in situations where the community spouse requires an assisted living placement or other special residential alternatives, short of nursing home care. Unfortunately, workers do not have the authority in processing an application to make adjustments in the MMMNA. Instead, the procedure limits the worker to awarding an MMMNA at ordinary levels. Only the Board of Hearings, or a court, has the power to raise the MMMNA over \$2,898.

Sometimes, even adding all the income of both spouses together is not enough to raise the income of the community spouse to the MMMNA level. In such cases, the state must allow the community spouse to retain marital assets in excess of the normal CSAA level (which is \$115,920). The idea is, by retaining additional assets to invest, she will have more income from interest and thus total income closer to the MMMNA level. The amount of additional assets that the community spouse may retain in excess of the normal CSAA depends basically on the size of the MMMNA shortfall, and on interest rates used by the state for this computation.

Unfortunately, the MassHealth worker does not have the authority to make the determination that a higher than normal CSAA is justified; such findings can by law be made only by a Hearing Officer, after a hearing in which a higher CSAA is requested.

We consider three primary strategies to protect the community spouse beyond the levels we can achieve through taking full advantage of the approaches already discussed. All three involve the reduction of excess assets in a way that enhances or at least does not degrade the community spouse's overall financial status, but that also does not run afoul of the state's punitive transfer penalties.⁴

One involves spending excess assets in some constructive way. For example, if the community spouse is renting, she might consider using excess assets to purchase a condominium, the value of which would be disregarded for MassHealth eligibility purposes. Use of excess assets to perform house repairs or renovations necessary for health, safety or accessibility is also permissible, as would be the purchase of replacement car. Also, money may be set aside for future funeral and burial arrangements.

While transfers within five years of applying for MassHealth for nursing home services ordinarily result in MassHealth disqualification, there are exceptions that may apply. For example, transfers outright or in trust for the benefit of a son or daughter who is blind or permanently and totally disabled are permitted without penalty.

The purchase of an immediate annuity can be a valuable strategy for protecting all or a portion of the couple's excess assets for the community spouse. An immediate annuity is a contract to receive periodic (ordinarily monthly) payments for a designated period of time. The period of time might be for life, or for a specified number of years, or for life subject to a guarantee period (providing for continuing payments to other designated beneficiaries despite an early death).

The rules are complex, but basically for the purchase of an annuity not to be considered a disqualifying transfer, the annuity must be payable to the community spouse, and the terms of the annuity must be "actuarially sound." The basic idea is that the annuity must be structured so that it either ends at the death of the community spouse, or, if there is a term certain or guarantee period, the term or period is not longer than the community spouse's life expectancy under certain actuarial tables.

⁴ Gifts or transfers (with a few exceptions, such as between spouses) within five years of applying for MassHealth for nursing home services may result in ineligibility.

The determination of whether a strategy based on the CSAA and MMMNA regulations, or one based on the purchase of an immediate annuity, is preferable in a particular case takes careful thought. Sometimes, only the annuity approach is available. This would be the case where, for example, the community spouse's income was itself higher than the MMMNA. Sometimes, the CSAA/MMMNA approach is needed because only it allows for an application seeking retroactive Medicaid approval. The annuity strategy is less expensive to implement, since no hearing is required. On the other hand, the annuity results in a stream of income to the community spouse, rather than excess assets, and a stream of income is much more difficult to protect if the community spouse herself later requires nursing home care.

An alternative to the purchase of an immediate annuity as a vehicle for effectively sheltering excess assets is the making of a loan. If the community spouse loans excess assets to a friend or family member, and the terms of the loan as expressed in the "promissory note" meet the requirements of the MassHealth regulations, then the making of the loan should not be considered a transfer. However, while authorized by the regulations, this approach seems to be drawing the ire of MassHealth, and should probably at this point only be considered where other strategies are inadequate to meet the couple's needs and objectives, if at all.