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SPOUSAL MEDICAID

1. Initial Eligibility

- A. Get all assets possible to the name of the healthier community spouse, to let the assets be protected later, if not breaching a fiduciary duty owed to an ill spouse or having an incapacitated spouse signing documents! Does current financial power of attorney permit spousal transfers?
- B. See if non-exempt assets qualify for protection under the simplest rule:
If total countable assets are less than \$18,552 - the healthier spouse can keep it all; or keep one-half up to \$92,760.00 (i.e. if \$150,000 countable assets, spouse can keep \$75,000.00).
- C. Protect the assets above the \$18,552.00 minimum level with various techniques - these rules and techniques change monthly.
- D. Check ill spouse's income - if above \$1,692.00 from pension, SS, etc, will need income cap trust.

As of September, 2004, some of the spousal resource protection techniques are:

1. **court orders of protection (up to \$170,000 without state objection)**
(Allows transfer of assets for incapacitated spouse who did no prior planning. Requires appointment of a guardian ad litem, who may not consent to the spousal protection (common problem in second marriages, or in situations where the ill spouse or relatives object to public welfare for personal reasons, despite hardship for healthier spouse)
2. **commercial annuities [risks - must state be beneficiary? For spouse annuity as well?],**
3. **purchase of exempt assets [smart spend down on exempt items - house, car, repairs, etc.]**
4. **dissolution - split of assets "equitably" or as set out in prenuptial agreement**
[Note: prenuptial agreement may waive support - or give less than 50% to ill spouse, and if spouse in consequence is placed on Medicaid, there May be a challenge by the state or spouse to enforceability of the agreement]

- E. Check for disqualifying gifts - \$4,700/month penalty (AS OF 10/1/2004), three year lookback period for most transfers; five year lookback for transfers to/from trusts
- F. Look for potential "blessed" transfers to spouse, disabled child, caregiving child, etc. - NO PENALTY!

2. Payback from Estate of Both Spouses

Oregon and federal law permit the state to do **payback**, that is, to collect Medicaid benefits back from (A) the estate of the ill spouse, if he or she has an interest in assets at death, and (B) from the estate of the surviving healthy spouse, if the assets of the surviving spouse at death can be traced to the ill spouse.

To limit the tracing payback claim against a surviving spouse's estate, the simplest technique is to get the assets out of the name of the ill spouse before Medicaid starts (if ill spouse is not too incapacitated to consent, or if a court approves a transfer from the ill spouse to the healthier spouse).

If the healthy spouse dies first, will he or she leave all of the assets held solely in his or her name to the sick spouse? **Alternative:** Partial bypass will, leaving something to children, something in trust to spouse. Usually the elder law attorney will recommend the healthier spouse redo his or her estate planning.

3. Elective Share Claim

If the non-Medicaid spouse dies first, the state will assert an **elective share claim** of 25 % for the sick Medicaid recipient, against the estate of the first spouse to die.