STATE OF CALIFORNIA–HEALTH AND HUMAN SERVICES AGENCY

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June 10, 1999

TO: All County Welfare Directors
All County Administrative Officers
All County Medi-Cal Program Specialists/Liaisons
All County Public Health directors
All County Mental Health Directors

Letter No.: 99- 29

GUIDELINES USED BY ADMINISTRATIVE LAW JUDGES WHEN AN INCREASE IN THE COMMUNITY SPOUSE RESOURCE ALLOWANCE (CSRA) HAS BEEN REQUESTED THROUGH A FAIR HEARING

A number of counties have requested information on how Administrative Law Judges determine whether to increase the CSRA and, if so, how the amount of the new CSRA is established. The Administrative Adjudications Division's Training Bureau has recently published those guidelines in their newsletter and has given permission to release this information.

If you have any questions on this issue, please feel free to contact Sharyl Shanen-Raya of my staff at (916) 657-2942.

Sincerely,

ORIGINAL SIGNED BY

ANGELINE MRVA, Chief
Medi-Cal Eligibility Branch

Enclosure

NOTES FROM THE TRAINING BUREAU

State Hearings Division
California Department of Social Services
Item 99-4-1
April 29, 1999

ITEM 99-4-1: Community Spouse Resource Allowance

Issue

In state hearings, a common issue involves a county denial of a Medi-Cal application for an institutionalized spouse due to excess property. The institutionalized spouse has an at-home spouse (herein community spouse). The couple has countable community and separate resources in excess of the Community Spouse Resource Allowance (CSRA) and wishes to raise the CSRA at the state hearing so that Medi-Cal eligibility can be established for the institutionalized spouse.

Note: During the initial month for which Medi-Cal is being requested, the property held in the name of either or both of the institutionalized spouse and the community spouse is considered available to the institutionalized spouse in determining his/her eligibility. Once Medi-Cal eligibility is established, the couple has a time period (approximately 90 days from the date the Notice of Action approving Medi-Cal is sent) to transfer the property into the name of the community spouse. At the state hearing, the Judge is evaluating the property for the initial month Medi-Cal is being requested. The property at issue at the hearing may therefore be held in the name of either or both spouses.

Authority

Under federal law, if either spouse establishes that the CSRA, in relation to the amount of income generated by such an allowance, is inadequate to raise the community spouse's income to the Minimum Monthly Maintenance Needs Allowance (MMMNA), there shall be substituted for the CSRA under Subsection (f)(2) an amount adequate to provide such an MMMNA. (42 U.S.C.§§1396r-5(e)(2) and (f)(2))

The CSRA, as defined in Subsection (f)(2) is the greatest of four calculations. In California, the second option, $60,000 plus an indexed figure, is used. This figure was $81,960 in 1999. (42 United States Code (U.S.C.) §1396r-5(f)(1), All County Welfare Directors Letter (ACWDL) No. 98-49)

The MMMNA as set forth in 42 USC §1396r-5(d)(3)(C) shall not exceed $1,500, subject to adjustment under Subsections (e) and (g).

Subsection (g) provides for an indexing of the $1,500. (In California, this basic MMMNA is thus raised to $2,049 effective January 1, 1999 per ACWDL No. 98-49.)

Questions and Answers

For questions 1 through 9 below, assume that the community spouse has $500 in Social Security benefits, but no other income. Assume further based on the prevailing Certificate of Deposit (C.D.) rates, the community spouse is allowed to retain $250,000 in

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Community Spouse Resource Allowance

property in order to generate $1549 in income which together with the $500 in Social Security meets the $2049 MMMNA. The current CSRA is $81,960.

1. Must the $81,960 standard CSRA generate income before the CSRA may be raised at a hearing?

   ANSWER: No. There is no requirement that the standard CSRA generate income nor is there any requirement for there to be any "plan" for the standard CSRA to generate any income. There must, however, be a "plan" to generate income if the couple has resources in excess of the standard CSRA.

2. What do you mean by a "plan"?

   ANSWER: A "plan" is information submitted that theoretically establishes what amount of resources the community spouse may retain to generate income to provide for the MMMNA. As long as the CSRA has an "adequate amount" of resources based on a reasonable standard, it is not essential that the CSRA actually generate the income pursuant to the "plan".

3. Must either spouse testify at the hearing that he/she intends to invest the income so as to generate the $2049 for the community spouse as suggested by his/her "plan"?

   ANSWER: No. 42 U.S.C.§1396r-5(e)(2)(C) states that if either the community or institutionalized spouse "establishes that the CSRA (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the MMMNA, there shall be substituted for the CSRA an amount adequate to provide for the MMMNA." This section <u>does not</u> say that the CSRA must actually generate such income.

4. If the couple has $200,000 in a non-interest bearing checking account or a 1% interest bearing account, can the institutionalized spouse be eligible for Medi-Cal?

   ANSWER: Yes. There is no requirement that the standard CSRA actually generate income and the couple's $200,000 in property is less than the $250,000 that has been established is necessary to raise the community spouse's income to the MMMNA. There is also no requirement that any property in excess of the CSRA generate any income in the initial month for which Medi-Cal is requested as long as either spouse submits a "plan" to show how the additional resources <u>could</u> generate income. When the claimant presents satisfactory evidence that the community spouse could retain up to $250,000 in a C.D. at prevailing rates, he/she has met the burden of 42 U.S.C.1396r-5 (e)(2)(C) by showing that such amount would be needed to raise the community spouse's income to the MMMNA.

   Note: Initial eligibility is the only time when the law allows the state to consider the community spouse's resources as available to the institutionalized spouse. After eligibility is established in the initial month, the CSRA and any newly acquired property of the community spouse may not be considered available to the institutionalized spouse. Counties may therefore not look beyond the initial month in which eligibility is established in evaluating the community spouse's resources, nor require the "plan" be carried out.

5. What if the couple has $300,000 invested in a 1% interest bearing checking account which together with the Social Security income generates less than the $2049 MMMNA?

   ANSWER: If the "plan" presented is that $250,000 deposited into C.D.s will generate the MMMNA, there is excess property. The Judge could approve an expanded CSRA (i.e. in excess of the standard

$81,960) for $250,000 and give the couple an opportunity to establish Medi-Cal eligibility for the institutionalized spouse by spending down the remaining $50,000.

Note: Spendddown may be retroactive to the month of application if the excess resources are spent on medical expenses per Principe v. Belshe. (see CDHS All County Welfare Director's Letter (ACWDL) No. 97-41, October 24, 1997).

Depositing money in a safe investment such as a C.D. is a reasonable method for investing assets. Thus while a community spouse is not required to actually invest in such an account he/she should be allowed to retain assets up to the amount established by prevailing C.D. rates (in this case $250,000).

The community spouse is initially entitled to an $81,960 CSRA. While there is no requirement that the standard $81,960 CSRA generate any income, when either spouse seeks to raise the CSRA, he/she may only do so pursuant to 42 U.S.C. §§1396r-5(e)(2) which provides that the expanded CSRA "shall be substituted for" the CSRA. Thus when either spouse establishes that $250,000 is needed to generate the MMMNA for the community spouse, this amount replaces the $81,960 CSRA. The $81,960 is not added to the $250,000.

On its face, investing $300,000 in a 1% interest checking account is not a reasonable method for requesting additional resources to generate income up to the MMMNA. However, if either spouse presented some other "plan", the Judge could evaluate such "plan" to consider increasing the CSRA up to the entire $300,000. Such plan would have to be reasonable. (see also question and answer #9).

6. If the community spouse had $500 in Social Security plus a $1600 pension for a total of $2100 in income, and the couple also had $150,000 in property, could the couple have the $81,960 CSRA raised in a state hearing?

ANSWER: No. There is only authority in federal or state law to increase the CSRA through a state hearing when the community spouse's income is less than the MMMNA. Since the community spouse has $2100 in income which is in excess of the $2049 MMMNA, the $81,960 CSRA cannot be raised. The couple's $150,000 is thus in excess of the allowable $83,960 (i.e. the $81,960 CSRA plus the $2000 property limit for the institutionalized spouse). The couple could spend down to $83,960 per Principe (see question and answer 5 above).

7. If the couple has property that is generating income in excess of the prevailing C.D. rate, but such income (including noninvestment income and investment income) is less than the $2049 MMMNA, can the community spouse have an expanded CSRA based on the prevailing C.D. rate?

ANSWER: Yes. Generally speaking, it would be prudent for individuals near retirement age to invest assets in low risk accounts. The state would have no authority to penalize an individual for converting assets from higher interest bearing, higher risk investments into lower risk investments. When the community spouse comes to a hearing, the ALJ is limited to looking at the "plan" submitted by the spouse which establishes that investment in a C.D. at prevailing C.D. rates generates income sufficient for the community spouse to meet the MMMNA.

8. Assume the claimant owns a second home, which is not or will not be rented or placed on the market for sale. Can the second home be part of an expanded CSRA or must the second home be excluded from the expanded CSRA and evaluated under the standard property limits?

ANSWER: If the total net market value of the second home plus all other property was under the expanded CSRA (in the example used $250,000), then the home still would not need to generate income as the community spouse would be able to retain $250,000 without generating income. (see the answer to question 4)

If the total value of all property including the second home exceeded $250,000, the second home would have to be listed for sale and meet the requirements of draft regulations Title 22, CCR Sections 50402 or 50416. Section 50402 specifies that if there is excess property and the applicant or beneficiary provides evidence that he/she is making a good faith and bona fide effort to liquidate property, the property is considered unavailable. A bona fide effort includes listing the property for sale with a licensed real estate broker for fair market value among other requirements.

9. Is the "plan" to generate income by investing in prevailing C.D. rates the only "plan" that the CDHS finds to be reasonable?

ANSWER: At present, no other "plan" has come to the attention of the CDHS. Each "plan" must be evaluated on a case by case basis. When considering whether a "plan" is reasonable, Judges should consider whether the community spouse could have needs that may outlast his/her resources when either spouse seeks an amount of property that is greater than that generated by prevailing C.D. rates.

For example, a 40 year old wife with three children has a husband who will be permanently institutionalized. She needs money to care for her children and also to care for her own needs for the rest of her life. If the wife who has property in excess of that amount generated by prevailing C.D. rates, submits a "plan" to invest in non-income producing investments such as growth stocks, the Judge could consider raising the CSRA above that which would be indicated based on prevailing C.D. rates.

The burden would be on the claimant to establish why assets are needed to generate income at a rate below the prevailing C.D. rates.

There are no specific criteria to determine what is a reasonable plan, although the CDHS has determined that presently, investing assets in accounts at prevailing C.D. rates is a reasonable plan. It is not the role of the Judge to act as an investment counselor, but simply to determine whether the "plan" to generate income adequate to provide for the MMMNA is reasonable.

10. Can either spouse seek to increase the MMMNA for the community spouse at the same time he/she is seeking to increase the CSRA?

ANSWER: No. A spouse may only seek to increase the MMMNA for the community spouse when the county is computing the share of cost for the institutionalized spouse. It is never proper to increase the MMMNA when determining if the institutionalized spouse is property eligible. (42 U.S.C. §1396r-5(b)(2) refers to attribution of institutionalized or community spouse's income <u>post eligibility</u>.)

Once the Judge authorizes an expanded CSRA for the community spouse, the institutionalized spouse meets Medi-Cal property limits. When the institutionalized spouse is determined eligible for Medi-

Cal, the county will compute a share of cost.

The institutionalized spouse may allocate income to the community spouse. The reason the institutionalized spouse would allocate income to the community spouse to supplement the community spouse's income is to reduce his/her income and thus reduce the share of cost.

The amount of income that the institutionalized spouse may allocate to the community spouse is that amount which when added to the community spouse's nonexempt income adds up to the MMMNA. If either spouse establishes that the community spouse needs income above the MMMNA due to exceptional circumstances resulting in significant financial duress, there shall be substituted an amount adequate to provide such additional income (see 42 U.S.C.§1396r-5(e)(2)(B)).

If either spouse establishes that the community spouse has exceptional circumstances resulting in financial duress, and the community spouse is allowed to retain income above the MMMNA, the institutionalized spouse allocates income to supplement the community spouse's income up to the substituted amount. By so doing, the institutionalized spouse further reduces his/her share of cost.

(QUESTION AND ANSWER 11 APPLIES TO ALL PROPERTY, NOT JUST THE CSRA)

11. In which of the following situations are the assets considered unavailable?

a) Family members or others, take the applicant's assets without the applicant's knowledge or permission.
b) The applicant is suffering from dementia or is comatose and the person filing the Medi-Cal application is unable to locate any assets. These assets are later discovered by the county via Social Security number match.
c) The applicant owns property in joint tenancy and the joint tenant refuses to sell his/her share of the property.

ANSWER: In all the above examples, the property may be unavailable under draft regulation Title 22, CCR §50402. CDHS ACWDL No. 97-41 specifically states that an individual's property is unavailable when that individual is unconscious, comatose or incompetent at any time during the month, since that person would not have the legal capacity to liquidate the property.

Whether the property is unavailable in a specific case depends on the facts of that case.

See also Medi-Cal Eligibility Procedures Manual §9H-3 regarding legal obstacles to the sale of other real property that render such property unavailable under draft regulation Title 22, CCR § 50402.