STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

GEORGE DEUKMEJIAN, *Governor*

DEPARTMENT OF HEALTH SERVICES
714/744 P STREET
SACRAMENTO, CA 95814

July 18, 1988

TO: All County Welfare Directors
All County Administrative Officers

Letter: 88 -52

REFERENCE: ALL COUNTY WELFARE DIRECTORS LETTERS
85-78, 85-57

This letter provides further instructions on implementing the provisions for dividing community property contained in Assembly Bills (AB) 987 and 2615. The attachment contains answers to the most frequently asked questions about administrating the division of community property. The first set of questions deal with the "automatic" division of property provided in AB 987 and performed by the counties. The second set addresses issues arising from property divisions performed through interspousal agreements (AB 2615).

The issues relating to the legal character of property, i.e., whether it is separate or community, are complex. You may want to consult with your county counsel on certain complicated cases.

If you have questions regarding community income, please call Toni Bailey at (916) 324-4967. If you have questions regarding community property, please call Sharyl Shanen-Raya at (916) 323-4124 or Yvonne Lee at (916) 323-4129.

Sincerely,

Original signed by

Frank S. Martucci, Chief
Medi-Cal Eligibility Branch

Attachment

cc: Medi-Cal Liaisons
Medi-Cal Program Directors

Expiration Date: July 1, 1989

A. PROPERTY DIVISION PERFORMED BY COUNTIES (THE "AUTOMATIC" DIVISION - AB 987)

1. "The long-term care (LTC) spouse entered LTC in 1981. The LTC spouse's income is being deposited in a joint account shared with the at-home spouse. Do we look at current balances of joint checking accounts in which an LTC spouse's income is being deposited? If so, in what way?"

Answer:

Yes. Money deposited in a joint checking account is treated as community income in the month received and as community property thereafter. When the Medi-Cal application is made, the county should subtract the income received in the current month from the account's balance. The remainder is presumed to be community property.

Prior to application, the county need not concern itself with how the community income was allocated or spent by the couple. Income is divided only when eligibility is determined. Before eligibility, any income that remained after the month of receipt, becomes part of the community property subject to a 50/50 split. Therefore, in addition to the property the couple owned when one spouse entered long term care (LTC) in 1981, the county will include as community property any monies accumulated and still remaining in the joint account since 1981. Any increase in the community property since the date of LTC entry is considered community property subject to a 50/50 split.

2. "What if the LTC spouse's income is deposited into the at-home spouse's separate account?"

Answer:

By "separate" account, we assume an account with only the at-home spouse's name on it. Absent an interspousal agreement, all the couple's property is presumed to be community, even accounts with only one name on them. The mere fact that an account has only one spouse's name on it does not make the account "separate property." All County Welfare Directors (ACWD) letter 85-78, page 6, item 6 instructed counties, "It is to be presumed that all property owned by either spouse is community property. This presumption, however, can be rebutted by either spouse." The LTC spouse's income is presumed to be community income in the month received and community property thereafter even if it is deposited in the at-home spouse's "separate" account.

3. "What if the income (of the LTC spouse) is not spent, but is kept with the at-home spouse's community share of income which is not spent either? Does it become community property once more subject to a half-and-half division at any point in time?"

Answer:

As you surmised, income not spent in the month of receipt becomes community property and is subject to an equal division.

Note: Although Medi-Cal cannot require couples to segregate their shares of the community property during spenddown, such a strategy should be strongly recommended to couples. That way, each spouse's share is more easily identified and the reduction of property is more easily verified.

4. "An LTC spouse and an at-home spouse jointly own a mobile home which was their exempt residence. After the LTC spouse entered convalescent care, the couple sold the exempt mobile home. May the county divide the proceeds 50/50 even though the home was exempt at time of the spouse's entry into LTC?"

Answer:

Yes. State statute establishes that a LTC spouse's "other resources" which must be reduced to the Medi-Cal limits include "one-half of all the community property, or the proceeds from the sale or exchange of that property, that would not have been exempt..." Once the home is converted to cash, it becomes nonexempt. However, the proceeds from the sale of the mobile home (or any exempt residence) may be exempt for six months if the home was considered real property and the proceeds are to be used to purchase another principal residence. (See Section 50426 of Title 22, California Code of Regulations (CCR), formerly California Administrative Code). Before including the proceeds from the sale of a principal residence in the property reserve, the county should establish if the applicant/beneficiary intends to use the monies to purchase a new residence.

5. "Please define 'his or her own benefit.'

Answer:

AB 987 stipulated that a resident of a SNF or ICF, in order to qualify for Medi-Cal, is required to expend resources for his or her "own benefit." Currently, "own benefit" is interpreted broadly and includes expenditures, whether for goods or services, in which the LTC spouse has any ownership interest as well as expenditures on his/her own medical expenses. This broad interpretation is necessary because AB 987 failed to provide a precise definition of what constituted "own benefit." An LTC spouse for example could pay for the entire cost of repairs on a car he/she jointly owns with the at-home spouse and receive credit for the entire expenditure as a reduction of his/her share of the community property.

However, Department sponsored legislation SB 1134 (Statutes 1987, chapter 1455) recently signed by the Governor adds a more precise definition of "own benefit". As soon as regulations addressing the new definition are effective, "own benefit" will mean expenditures "associated with or for improvements to property... to the extent that the expenditures are proportionate to the ownership interest the individual has in the property".

Under the new definition, for example, a spouse in LTC may pay off up to half of the mortgage on a home jointly owned with the at-home spouse since he/she is a half owner. If the LTC spouse pays off the entire mortgage on a jointly owned home, he/she will get credit for only half of that expenditure. The other half of the expenditure will be treated as a transfer without adequate consideration and it will be presumed that the transfer was made to establish eligibility. Unless rebutted, the presumption will result in a period of ineligibility. The period of ineligibility may be reduced in accordance with Section 50411(b)(5) CCR. Similarly for example, an LTC spouse may pay off his/her one-third share of a debt held equally with two other people for his/her "own benefit", but cannot pay off the entire debt and reduce his/her property reserve by the full amount.

CAUTION: Counties should wait for publication of regulations governing the "automatic" division of property before implementing this new definition of "own benefit".

6. "Would this ('own benefit') include repairs to the couple's jointly owned home or vehicle?"

   Answer:

   Yes, under current policy a LTC spouse may pay up to the full cost and receive full credit toward reducing his/her property. Under the new definition, only up to half of the cost could be borne by the spouse in LTC.

7. "What if the home had been quit-claimed over to the at-home spouse prior to the home repairs?"

   Answer:

   Expenditures made for home repairs would not be for the LTC spouse's "own benefit" under the old or new definition since he/she no longer has an ownership interest.

8. "What evidence is acceptable for proof of community property at time of entry into LTC?"

Answer:

Assuming you are referring to a county's "automatic" division, the same verification is required as that required for verification of resources during the month of application (See Title 22, Section 50167 (CCR)). No specific proof of the community property status of resources is needed however, since Medi-Cal presumes that property owned by a couple is community. That presumption can be rebutted.

9. "Can we accept a client's statement in absence of any other verification?"

Answer:

Verification regulations at Section 50167 (c) of the CCR contain a "diligent search" requirement. The regulation states, "[s]uch a search shall include, at a minimum, one contact with the appropriate person/organization from which this documentation would be obtained." This standard should be applied in division of community property cases. Even though individuals are only required to maintain financial records for five years for tax purposes, banks and other institutions may maintain records dating further back. If, after a diligent search, complete verification cannot be obtained in a timely manner, the county should follow the actions listed in Section 50167(c)(1) and (2). These actions are: 1) listing the actions taken by the applicant or the county to obtain verification and 2) obtaining an affidavit under penalty of perjury from the applicant listing the items not verified and their estimated value. Community income need not be verified in prior months since income is not divided until eligibility is established at application and the share of cost is being determined.

10. "Can we accept an attorney's statement even if he did not represent them at the time of entry in LTC?"

Answer:

An attorney's statement certainly can be retained in the case file as evidence that a diligent search has taken place. However, it will have little weight unless the attorney can provide <u>independent</u> information concerning the value of the applicant's unverified property. Otherwise, an attorney's statement merely confirms the information given to him/her by the applicant. Whatever the case, an attorney's statement should not be substituted for an applicant's affidavit, except in specific cases were the applicant/beneficiary is incompetent and the attorney is acting as a conservator or with other legal authority over the person's estate.

11. "If an individual remains in an acute care hospital for more than 30 days, can an automatic division of property occur before they are transferred to a skilled nursing facility?"

Answer:

Yes. Although AB 987 defines the automatic division of community property provision as applying to a married individual who resides in a skilled nursing facility (SNF) or intermediate care facility (ICF), and who is in a Medi-Cal family budget unit (MFBU) separate from that of his or her spouse... a person who obtains LTC status and is in his/her own MFBU while in an acute care hospital is similarly situated. As soon as one spouse is in his/her own MFBU, each spouse's share of community property is one-half of the total community property (See Sections 50403(b) and 50076). Under Medi-Cal MFBU procedures, an aged, blind or disabled individual is in his/her own MFBU in the month long term care status begins without regard to the type of medical facility in which he/she resides (see Section 50056 (CCR) and 8B of the Medi-Cal Eligibility Manual). Once in a separate MFBU, that individual's share of community property is one-half of the community property.

12. What is the procedure for handling increased assets at the time of redetermination?

Answer:

First recall we are dealing with a division performed by the county, an "automatic" division created by AB 987. All the couple's property therefore retains its community property status after eligibility is granted (unless some of it was already legally separate property before the automatic division). The county, at the time initial eligibility is determined, should verify the interest income the couple's total community property is currently generating each month (using the at-home spouse's half share and what remains of the LTC spouse's property). Since new interest income from community property is community income, the LTC spouse is presumed to have a half interest in that new income. Therefore, the county will include half of the estimated monthly interest income from the property in the SOC calculation for the LTC spouse.

Example. Mr. Clay Ment applies for Medi-Cal on behalf of his wife who entered Mello Oaks Convalescent Hospital a year ago. They had $45,000 of nonexempt community property at date of entry in a certificate of deposit at 7.5% interest. The county determines that his wife has reduced her share of the couple's community property within the property limits for one person ($1900 in 1988) based on an automatic division of property. Husband retains $23,750 as his share ($22,500 at date of entry plus half ($1,250) of the $2,500 interest their property generated over the year).

When computing the wife's SOC, the county estimates the total monthly interest income the couple will receive from their property (at this point, the husband's share of the $45,000 and the amount of the wife's share which remains) following the regulations for fluctuating income Section 50518 ($23,750 + $1900 = $25,650 X 7.5% interest = $1923.75 divide by 12 months = $160.31/mo). The county then divides this amount by 2 to compute Mrs. Clay Ment's share of interest income per month ($80.15) month and includes this amount in her SOC computation.

If the county has followed this procedure for determining the LTC spouse's SOC liability at application, all increased assets should be the at-home spouse's at redetermination. The LTC spouse's share has already been accounted for in her SOC calculation. A new SOC calculation will probably be necessary at redetermination however, to take into account new interest rates, any significant changes in amounts of community property, or new interest income amounts being generated by the couple's community property.

13. What happens to the couple's community property if the spouse in LTC leaves the facility and returns home?

Answer:

The property recombines once the couple is in the same MFBU again and spouse-for-spouse responsibility is restored. The automatic division is an administrative division <u>for Medi-Cal purposes only</u> The property never changed its legal character if the county performed the division. When the LTC spouse rejoins the at-home spouse, they will be considered in the same MFBU and again have spouse- for-spouse responsibility for support (section 50351). All community <u>and</u> any separate property owned by the couple will be considered together in determining eligibility when they are in the same MFBU. If the one spouse subsequently reenters a nursing home, the community property is divided equally again as of the date of the new entry.

14. How should the county treat a spouse's property that was once separate property but is now commingled with the couple's community property?

Answer:

The question of when separate property loses its identity and becomes community property when commingled is a complex and changing area of family law. We will be providing a separate response to this specific question in the future.

15. When should EWs allocate community income to family members when the spouses are in separate MFBUS (part III of form MC 176 W)?

Answer:

(SEE CHART BELOW)

Treatment of Income;
Spouses in Separate MFBUS

| Living Situation | Community Division of Income | Allocation (part III, MC 176 W) |
|---|---|---|
| 1. Both Spouses in LTC | NO | NO |
| 2. One Spouse in LTC, one Spouse In board & care (B & C) | NO | NO |
| 3. One spouse in LTC; one PA Spouse at home | YES | NO |
| 4. One spouse in LTC; one non-PA Spouse at home (with or without Children) | YES | YES |
| 5. Both spouses in B & C | NO | NO |
| 6. One spouse in B & C; one PA spouse at home | NO | NO |
| 7. One spouse in B & C; one non-PA Spouse at home (with or without children) | NO | YES |

PROPERTY DIVISIONS AS A RESULT OF INTERSPOUSAL AGREEMENTS-(AB 2615)

1. "What procedures do we follow if there is an interspousal agreement which does not divide the nonexempt community property into equal shares?

   Answer:

   Assume the at-home spouse is not a Medi-Cal applicant or beneficiary. After advising the couple that the interspousal agreement did not meet Medi-Cal requirements, the county should inform the couple that if the larger share went to the at-home spouse, a transfer without adequate consideration for purposes of qualifying for Medi-Cal is presumed and a period of ineligibility may be assessed against the LTC spouse. (A more detailed explanation is given in #2 below.)

   (Note: The interspousal agreement with an unequal division of property is a valid legal document for purposes other than Medi-Cal eligibility. State statute however, gives the Director of Health Services, and by delegation the counties, the authority to examine agreements for an equal division of the nonexempt property for Medi-Cal purposes).

2. "If the agreement divided property into percentages such as 60% - 40%, what impact would this have?"

   Answer:

   Assume the agreement was drawn up within two years of application for Medi-Cal. The answer depends on who receives the greater share. If the spouse in LTC receives the larger percentage, the county shall consider the extra "made available" to the LTC spouse and include it as part of his/her separate property. If the at-home spouse receives the larger share, the county should advise the couple that half of the difference between the two shares will be presumed a transfer without adequate consideration for purposes of qualifying for Medi-Cal. For example, if the LTC spouse received $40,000 and the at-home spouse $60,000, the LTC spouse has given $10,000 of his/her half share to the at-home spouse, since he/she would have received $50,000 if the assets had been divided equally. A reconveyance of half the difference back to the LTC spouse would eliminate the period of ineligibility. Finally, if both spouses are included in the same MFBU, the unequal division has no impact since all the separate and community property is considered in determining the eligibility of the spouses.

3. "If the agreement was made over two years ago, do we still need to look at it?"

   Answer:

   Assume this question refers to the application of Medi-Cal transfer of assets rules. An interspousal agreement over two years old need not be examined to determine if an equal division has occurred. Medi-Cal transfer rules, as modified by the Beltran v. Myers lawsuit, apply only to property transferred within two years of application.

Nevertheless the agreement should be examined and a copy retained for the case files because the agreement specifies who owns what portions of the former community property assets and in what amounts. This information is important in determining which spouse owns what property and whether the LTC spouse has reduced his/her property to the eligibility limits for Medi-Cal.

4. "Which date would we use if entry into LTC was later than the interspousal agreement?"

Answer:

The date of the execution of the agreement.

State Statute, when referring to the property which must be reduced to the Medi-Cal limits before eligibility can be granted, identifies "All of his or her separate property that would not have been exempt...at the time when he/she entered a skilled nursing or intermediate care facility, or at the date of execution of the agreement (interspousal agreement) referred to in this section, whichever is earlier." (W&I Code 14006.2(c)(1) emphasis added).

5. Which date should be used if the interspousal agreement was later than the entry into LTC?

Answer:

The date of entry into LTC. If the date of entry is earlier than the agreement, the property owned at entry is subject to the "automatic" division. In general then, any subsequent division after date of entry of the same property or a portion thereof through an interspousal agreement should be disregarded. If the agreement includes property which was not the community or separate property of either spouse on the date of entry (for example new community property or newly inherited separate property), the disposition of this specific property in the agreement should not be disregarded. The agreement should be examined to determine the impact of this specific property on the beneficiary's eligibility.

6. All County Welfare Director's letter 85-57 states on page 2, "If one member is incapable of giving such assent (to enter into an interspousal agreement), someone (other than that person's spouse) must act on his/her behalf in drawing up the agreement." Is this still a requirement?

Answer:

Many attorneys have protested that neither the counties nor the Department have the authority to require someone other than the spouse to sign for an incompetent spouse, especially if the competent spouse has a durable power of attorney. These attorneys are maintaining that the guidelines published in All County Welfare Directors' letter 85-57 regarding who may sign for an incompetent spouse are overreaching.

Upon further review, the Department agrees. AB 2615 gave the Director of Health Services the power to examine the division of property as set forth in an interspousal agreement. However, the Department does not have the power to question the legality of who may sign the interspousal agreement for the incompetent spouse. Nevertheless, the Department maintains its reservations regarding the practice of a spouse executing an interspousal agreement on his/her own behalf, and then executing the same document again as attorney-in-fact for the incompetent spouse. There is potential for fraud or abuse to the detriment of the incompetent spouse and the Department believes the conservator/attorney-in-fact spouse is not adequately supervised by the courts. Counties may want to refer certain cases to protective services if financial exploitation of the incompetent spouse is strongly suspected.

From an administrative point of view, however, it is not necessary or appropriate for the counties to routinely question the legality of interspousal agreements. The Department <u>recommends</u> that someone other than a person's spouse sign the interspousal agreement for an incompetent person but this is <u>not a requirement</u> for granting Medi-Cal eligibility or honoring a written division of property.

7. An elderly couple drew up an agreement two years ago. The husband has reduced his share of property below the Medi-Cal limits. When they applied however, they came across a life insurance policy with a face value over $1500 whose cash value was not included in the agreement. May the county perform an "automatic" division on the cash value on this property giving each spouse half?

<u>Answer</u>:

Yes. Any nonexempt property not included in an interspousal agreement and which was not clearly separate property prior to the agreement is presumed community property and subject to an equal division between the spouses.

8. "How should a county treat cases where a married couple claims they divided their community property through an oral agreement?"

Answer:

Married couples have been allowed, under the California Civil Code, to freely transmute the community and separate status of their property. Therefore, from time to time counties will come across interspousal agreements executed for reasons other than Medi-Cal eligibility.

Before January 1, 1985, the Civil Code allowed a husband and wife to freely transmute their community property to separate property by written or oral agreement. Agreements executed prior to January, 1, 1985 do not need to follow any particular formalities. In order to show that an agreement was executed, parties must provide proof of their intent as demonstrated by their conduct in dealing with the property. For example, a couple maintains that in June of 1984, they divided a joint bank account containing community property into two unequal shares of separate property. As evidence, they show that a joint account was closed and two separate accounts opened by each spouse in July 1984. In addition, they also show that each spouse made deposits and withdrew funds from his/her separate accounts and did not commingle the funds. In support they also submit an affidavit by a third party who was aware of the oral agreement and its terms. This is an example of the kind of conduct which demonstrates that an oral agreement exists. The county should also secure an affidavit from at least one spouse attesting to the alleged oral agreement and its terms. These cases may also be referred to county counsel for an opinion.

For agreements entered into after January 1, 1985 the California Civil Code (Section 5110.730) requires that certain formalities be followed in order to be valid.

1) They must be in writing by an express declaration that the agreement is made, joined in, consented to, or accepted by the spouse whose interest in property is adversely affected.

2) Transmutations of real property are not effective as to third parties unless recorded. (e.g., with the County Recorder's Office).

3) These requirements do not apply to gifts between spouses of clothing, jewelry, or other personal effects used solely by the spouse receiving the gift.

Currently, if an agreement to transmute property allegedly occurred within two years of application for Medi-Cal, it has to be in writing because it has been more than two years since the change in the Civil Code requiring that spousal agreements be written. The county should

examine the agreement to determine whether the division produced equal shares of nonexempt property. If not, the agreement must be examined as a possible transfer without adequate consideration as in #B2.

Confirmed oral agreements entered into before January 1, 1985 are valid and do not have to be examined for an equal division since they are now more than two years old. Once verification has been submitted showing the couple made the agreement (e.g. an affidavit) and evidence is presented showing that they followed through with the agreement (e.g. changed names on bank accounts, opened separate accounts, put real property in the name of one spouse only) the county should accept the division as reported by the couple and determine eligibility accordingly.