National Academy of Elder Law Attorneys, Inc.

REPORT TO ERISA ADVISORY COUNCIL OF THE UNITED STATES DEPARTMENT OF LABOR

PROTECTING PLAN PARTICIPANTS IN
IN A RISK TRANSFER TRANSACTION

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The ERISA Advisory Council has requested recommendations on information needed to adequately explain to participants risk transfer transactions. These transactions generally take two forms: the purchase of an annuity from a private insurance company or paying the participant a lump sum payment. Most of the January 2015 Report of the General Accountability Office (GAO) titled "Private Pensions/Participants Need Better Information When Offered Lump Sums that Replace Their Lifetime Benefits." The issues raised in this report include:

1. Risks and challenges of asset management;
2. Outliving assets;
3. Finding trusted professional advice;
4. The potential for elder abuse.

Little is said of the issues arising due to health issues and diminished capacity. Conspicuously absent is any mention that IRA accounts are not covered by ERISA and do not have the inherent protection granted qualified plans under ERISA. This is more important as the Internal Revenue is encouraging the use of SEP IRA plans for smaller businesses. There is no consistent treatment of IRA accounts if a catastrophic illness occurs. In most states, the rollover IRA accounts will be exhausted if a catastrophic illness occurs and the impoverish the surviving spouse.

In 2012 an United States Census Bureau reported nearly 1 in 5 people have a disability (CB12-134).About 56.7 million people — 19 percent of the population — had a disability in 2010, according to a broad definition of disability, with more than half of them reporting the disability was severe,

People in the oldest age group — 80 and older — were about eight times more likely to have a disability as those in the youngest group — younger than 15 (71 percent compared with 8 percent). The probability of having a severe disability is only one in 20 for those 15 to 24 while it is one in four for those 65 to 69. The report found:

1. About 8.1 million people had difficulty seeing, including 2.0 million who were blind or unable to see.
2. About 7.6 million people experienced difficulty hearing, including 1.1 million whose difficulty was severe. About 5.6 million used a hearing aid.
3. Roughly 30.6 million had difficulty walking or climbing stairs, or used a wheelchair, cane, crutches or walker.

[1] *The author wished to thank William J. Browning, Esq., CELA, Fellow, for his generous permission to utilize various material written by him.*

4. About 19.9 million people had difficulty lifting and grasping. This includes, for instance, trouble lifting an object like a bag of groceries, or grasping a glass or a pencil.
5. Difficulty with at least one activity of daily living was cited by 9.4 million noninstitutionalized adults. These activities included getting around inside the home, bathing, dressing and eating. Of these people, 5 million needed the assistance of others to perform such an activity.
6. About 15.5 million adults had difficulties with one or more instrumental activities of daily living. These activities included doing housework, using the phone and preparing meals. Of these, nearly 12 million required assistance.
7. Approximately 2.4 million had Alzheimer's disease, senility or dementia.

The lack of knowledge and expertise in state Medicaid agencies relating to retirement and pension plans has created a hodgepodge of confusing and inconsistent administrative rules. This is further confused by the legislative efforts in many states to protect retirement plans and particularly IRAs from creditors. These efforts have led to inconsistent policies where the following results are likely to occur:

1. Government pension plans, including state deferred compensation plans, enjoy protections greater than any other retirement plan.
2. Regulations in most states contradict state and federal pension and tax law.
3. Those that work for large corporations with pension plans are more likely to be protected than those employed by small companies, or who are self-employed.
4. The national policy to encourage retirement saving contradicts Medicaid eligibility rules in many states.
5. The retirement plan of the community spouse will likely be easier to salvage than the retirement plan of the institutionalized spouse.
6. Rollovers or rollouts from existing 401(k) and qualified benefit plans may have disastrous consequences.

A. <u>THEORIES FOR INCLUSION</u>.

Medicaid, like SSI, is a "needs-based" program. The ability of the owner to liquidate or access those funds is paramount. If you can access those monies they are countable, and conversely, if you cannot access the monies they are not countable. This approach could be called the "availability doctrine." Social Security Regulation. 20 C.F.R. § 416.1201 (2013) states:

> (a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

(2) Support and maintenance assistance not counted as income under § 416.1157(c) will not be considered a resource.

(3) Except for cash reimbursement of medical or social services expenses already paid for by the individual, cash received for medical or social services that is not income under § 416.1103(a) or (b), or a retroactive cash payment which is income that is excluded from deeming under § 416.1161(a)(16), is not a resource for the calendar month following the month of its receipt. However, cash retained until the first moment of the second calendar month following its receipt is a resource at that time.

(i) For purposes of this provision, a retroactive cash payment is one that is paid after the month in which it was due.

(ii) This provision applies only to the unspent portion of those cash payments identified in this paragraph (a)(3). Once the cash from such payments is spent, this provision does not apply to items purchased with the money, even if the period described above has not expired.

(iii) Unspent money from those cash payments identified in this paragraph (a)(3) must be identifiable from other resources for this provision to apply. The money may be commingled with other funds, but if this is done in such a fashion that an amount from such payments can no longer be separately identified, that amount will count toward the resource limit described in § 416.1205.

(4) Death benefits, including gifts and inheritances, received by an individual, to the extent that they are not income in accordance with paragraphs (e) and (g) of § 416.1121 because they are to be spent on costs resulting from the last illness and burial of the deceased, are not resources for the calendar month following the month of receipt. However, such death benefits retained until the first moment of the second calendar month following their receipt are resources at that time.

(b) Liquid resources. Liquid resources are cash or other property which can be converted to cash within 20 days, excluding certain non-work days as explained in § 416.120(d). Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts (including savings, checking, and time deposits, also known as certificates of deposit) and similar items. Liquid resources, other than cash, are evaluated according to the individual's equity in the resources.

20 C.F.R. § 416.1201 establishes the guidelines, after which most states pattern their individual regulatory schemes. Most state regulatory schemes, however, stay relatively close to this section, whether those states are 209(b) states or 1364 states. 20 C.F.R. § 416.1202, however, states:

> (a) Married individual. In the case of an individual who is living with a not eligible under this part and who is considered to be the husband or wife of individual under the criteria in §§ 416.1802 through 416.1835 of this part, such individual's resources shall be deemed to include any resources, not otherwise excluded under this subpart, of such spouse whether or not such resources are available to such individual. In addition to the exclusions listed in § 416.1210, we also exclude the following items: (1) Pension funds that the ineligible spouse may have. Pension funds are defined as funds held in individual retirement accounts (IRA), as described by the Internal Revenue Code, or in work-related pension plans (including such plans for self-employed persons, sometimes referred to as Keogh plans);

20 C.F.R. § 416.1202(a) further provides that the Pension Funds of an ineligible spouse are excluded. Pension Funds as defined include defined benefit, money purchase, profit sharing 401(k), IRA Accounts, and other work-related pension plans. Based upon these definitions, it appears IRAs, 401(k), SEPs, ESOPs, defined benefit plans, defined contribution plans, and government pensions "in pay" status should be unavailable.

Based upon 20 C.F.R. § 416.1202(a) an ownership interest in an IRA, 401(k), or other work-related pension plan for a non-institutionalized spouse, should be treated as excluded, many states are rejecting this position.

The distinctions between the 1634 states and 209(b) states, while pronounced in other areas, are becoming blurred. While it would appear that 209(b) states may employ more restrictive eligibility criteria, some 209(b) states are taking a more balanced approach. This is due, in part, to the 209/1634 distinction, and not ERISA.

With the focus of the SSI regulatory scheme on availability, as opposed to the financial security of the individuals, or even on the long-term financial requirements, it surprises that more federal case law has not arisen.

B. <u>RELATED CASE LAW</u>.

While there is little available case law, two SSI related cases set forth below are interesting both in terms of the underlying policy issues being decided and in stark contrast with the state regulatory scheme; both in drafting issues, and in terms of implementation. Government retirement benefits receive a more favorable treatment for required distributions.

Distinguish the litigation relating to retirement plans from the litigation involving immediate annuities. In most states, the regulations relating to the annuities are based on or deviate from CMS transmittal number sixty-four (64). The better litigation approach is to focus on the regulations relating to retirement plans, avoiding CMS Transmittal 64.

Blaylock v. Harris, 531 F. Supp. 24 (W.D. Mo. 1981), deals with the SSI regulations regarding monies deposited on behalf of the beneficiary during his employment. The monies were in a civil service retirement plan. Due to the termination of his employment, he withdrew those monies. The court reviewed 42 U.S.C. §§ 1382a, 20 (2012) id. § 416, and found the funds available for withdrawal, and resources for SSI eligibility purposes. The Court stated in its decision:

> The regulations, therefore, provide that the retirement account may not be excluded as property essential to self-support of the claimant if the account is a liquid resource.
>
> The test therefore becomes where the plaintiff's civil service retirement account was a liquid resource. The plaintiff initially argues that the retirement account was not a liquid resource because it is not specifically mentioned in the series of examples listed in the regulations. See 20 CFR 416.1201(b).
>
> The court considered a retirement account to be property similar to a savings account; the $4,250 credited to the plaintiff's civil service retirement account was treated as a liquid resource. See 20 CFR 416.1201(a) and (b). As the plaintiff was presently entitled to a full refund of the amount credited to his retirement account, he could convert the $4,250 credit to cash and use the cash for his support and maintenance.

In SSR No. 8136, again, an SSI beneficiary had monies retained in the civil service retirement account. This beneficiary was no longer employed by the federal government and possessed the power to withdraw the funds. The administrative law judge ruled that under the regulations, "[t]he amount in the claimant's retirement fund, which he may withdraw at any time, constitutes a liquid resource."

What if the beneficiaries made an irrevocable election to take the plan payments in equal payments over ten years? Had that election been made, would the state agency have attempted to treat the election as a transfer for less than fair market value?

More recent cases also rely on the ability of the applicant to withdraw the monies from these accounts. These decisions fail to address the issues of withdrawal or elections made during retirement or the impact of the Medicare Catastrophic Coverage Act (MCCA) spousal impoverishment sections. Based and regulations, the individual had just retired and still had the option to take either a lump sum or an annuity payout scheme, the Social Security Administration under SSI or the state agency under the Medicaid regulations could deny Medicaid and require those monies from the retirement plan be withdrawn. It is the goal to have the retirement plan of the community spouse excluded to preserve his or her ability to retire either at some later date and utilize those funds to enhance their current retirement.

The lower court decision in *Mistrick v. Div. of Med. Assistance & Health Servs.*, 690 A.2d 651 (N.J. Super. Ct. 1997) follows that premise. The *Mistrick* case at the trial court level relied upon the SSI rules in excluding the retirement plan of the community spouse in nearly all circumstances. On June 8, 1998, the New Jersey Supreme Court reversed the lower court decision in *Mistrick* (see 1998 N.J. Lexus 562) and made some astonishing findings. The court found that MCCA superseded any other provisions of the Medicaid law deemed as contradictory. The court found that MCCA did not specifically exclude retirement plans of the community spouse, and they are included as an asset. It must be noted, however, that the facts and circumstances in front of the court will permit that court and other courts to create again two separate and distinct classes of citizens for retirement savings.

The best example of those two separate classes is set forth in three Ohio cases: *Martin v. State Dep't of Human Servs.*, 720 N.E.2d 576 (Ohio Ct. App. 1998) and its sister case *Routzong v. Ohio Dept. Of Human Services*, Franklin County Common Pleas Court Case No. 97CVF-01-2598. The current Ohio regulation reflects a very aggressive approach that threatens all retirement plans of either the community spouse or institutionalized spouse. In Routzong, the husband was in his early 60's and had Alzheimer's while his wife (slightly younger) still was employed by a governmental entity. While she had a balance in her Public Employees Retirement System fund as a government employee, the State agency did not include those funds as an asset, but attempted to include her Ohio "deferred compensation" plan as an asset. While the deferred compensation plan had no large amount of assets (approximately $22,000), those funds represented approximately 70 percent of the couple's purported countable resources. The State of Ohio chose not to appeal this decision, which was favorable to Mrs. Routzong.

Mrs. Martin represents the second class of citizens because she is not a government employee and had no governmental retirement plan. Rather, one portion of her appeal considered the inclusion of her small IRA as a countable asset. The State agency included her IRA. The County Common Pleas Court reversed the decision. The State of Ohio successfully appealed that decision.

In *Mannix v. Ohio Department of Human Services*, 134 Ohio App. 3rd 594, (1994), the Court rejected the "Just Say No" approach regarding the community spouse's retirement plan that totaled $45,000 was rolled over to an IRA. The Court properly found ERISA arguments were not appropriate as an IRA was the custodian of the funds.

The Tenth U.S. Circuit Court of Appeals decision in Houghton v. Colorado Department of Health Care Policy and Financing addresses multiple issues for retirement planning. Mr. and Mrs. Houghton was one of several Plaintiffs involved in a case. Mrs. Houghton required nursing home care in 1996 and was granted Medicaid eligibility almost immediately after application. Her husband was employed. Based upon the prior Colorado Regulation, his 401(k), and Pension Plans were not available resources for Medicaid eligibility purposes. In 2000, Mr. Houghton, at age 70, retired and enrolled his 401(k) and Pension Plan into a Rollover IRA. In 2001, while performing its annual review, the Department of Health determined the 401(k) and Pension Plan were countable assets, recalculated the Resource Assessment, and determined that due to this new calculation, that Mrs. Houghton was ineligible for Medicaid. The Department then terminated her Medicaid eligibility, and the Plaintiff filed a Federal Court Action against the State of Colorado. There were multiple other Plaintiffs, two of which passed away prior to the case being pursued.

The District Court found, on behalf of the State, and the Court of Appeals reversed on one ground. The Court of Appeals found that based upon. Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002), and the Federal Statute, there can only be one Resource Assessment at the time of institutionalization, and subsequent events, including savings or conversion of an asset based on retirement, did not allow the State to re-determine eligibility, and to reverse the Resource Assessment.

On the primary issue, however, where the Plaintiffs asked the Court to strike down implementing the Regulation, the Court found that the State's actions were not prohibited by Federal Law. Plaintiffs argued, as in *Mistrick*, 20 C.F.R. § 416.1202(a) specifically excludes the retirement plan of ineligible spouses, as a resource for eligibility determinations. The Court as in *Mistrick* found this Section was not applicable to the Medicaid Program, and that the State was not required to adhere to the SSI Section. The Court further found that Section would only apply if the husband and wife are still residing together, and as by definition the Spousal Impoverishment Rules only applies where one of the spouses requires institutionalization. Interestingly, in the new Ohio Regulation there is an exception for waiver cases where waiver benefits are being extended, and the community spouse has retirement funds.

The Court adopted much of the reasoning from *Mistrick*, which contradicts the intentions of MCCA, and with *Blumer*, eliminated many of the protections afforded a community spouse. The Court noted that the Federal Statute did not specifically exclude retirement plans in MCCA and that the States may interpret the Federal Statutes, under "cooperative federalism."

As in *Blumer*, the Tenth Circuit Court also noted that the Centers for Medicaid and Medicare Services had not issued regulations for MCCA since 1988. The Court, did not admonish the Agency but granted the Agency a level of deference for an "opinion letter", which mostly blessed any of the State's actions.

While the Federal Agency with oversight responsibilities for the Social Security, Medicare and Medicaid programs, the Center for Medicare and Medicaid Services (commonly called CMS) is charged with safeguarding the beneficiaries of these programs, and assure compliance with Federal Statutes, the CMS has increasingly become an ally to state Medicaid agencies.

Nearly all the reported decisions have considered individuals in the private sector, and on each occasion, the ultimate decision resulted in those individuals being stripped of their retirement savings with the execption of *Routzong* cited above, which which involved a public employee was not appealed.

C. NATIONAL RETIREMENT POLICY.

It is the policy of the United States government and most state governments to encourage savings for retirement. This is the basis for IRC Sections 401-403 and ERISA. The federal government encourages us to save for retirement by deferring taxation on the monies placed in one of these retirement plans. These accounts include everything from Simple IRAs to defined benefit plans and include both government pensions and private pensions.

Congress has recently liberalized many of the planning rules that make it possible to reconstitute a retirement plan when monies were rolled out of a 401(k) or pension or defined benefit plan. These new rules provide the ability to set aside a larger fund for retirement.

This governmental policy contradicts the Medicaid policy of forcing impoverishment prior to Medicaid eligibility. The government policy encouraging us to save is at the best an admission that the Social Security system was not intended to supply 100% of our retirement income. This government policy discourages us from withdrawing monies until age fifty-nine and a half (59½) and penalizes the withdrawal of monies prior to fifty-nine and a half (59½), with certain exceptions.

D. STATE BY STATE.

Requiring that a single individual utilize all of his or her funds to pay for their care, is logical and consistent with the national welfare and Medicaid policies. If there is virtually no opportunity for the individual to live independently, the arguments supporting the public policy are perhaps stronger. Where one spouse is in the nursing home, and one spouse is and will continue to live independently, the logic of this policy becomes inconsistent with the MCCA and ERISA.

Consider the following fact scenario:

> Husband, age 51, has been diagnosed with Lou Gehrig's disease and will soon require nursing care. He has a 401(k) with $50,000 while his wife, also 51 and still employed, has a 401(k) with $175,000. They have a $200,000 residence with a $100,000 mortgage, and miscellaneous savings of $10,000.

Various states have adopted policies that range from mean-spirited and short sighted to consistent with MCCA. New regulations for Wisconsin provide a policy that permits the community spouse to preserve his or her retirement account without divorce and without spend down. This new Wisconsin regulation further permits the retention of the institutionalized spouse's retirement account by making regular withdrawals. This Wisconsin regulation entirely follows the national policy of promoting savings for retirement. Whether Wisconsin ultimately pursues estate recoveries against these accounts at second death is an entirely different subject.

Pennsylvania regulation and policy are best described as "bi-polar." Based upon the Medicaid Handbook in Section 440.4, the retirement fund of the community spouse is exempt. This manual section is similar to the Wisconsin regulation. Will such an informal policy (no regulation or statute) be applied with a large 401(k) or IRA of the community spouse? Will the regulation be reconsidered if Pennsylvania Medicaid Agency receives several applications where the retirement plan of the community spouse exceeds $175,000?

If the IRA, 401(k), or 403(b) of an institutionalized spouse or a single person, is accessible, the account is treated as available. Pennsylvania like many other states provides for a set-off for any penalty due to early withdrawal. Under the Pennsylvania regulations, the institutionalized spouse may be able to annuitize his or her retirement plan prior to being placed in a nursing home. The risk of litigation (in any state) increases if the purchase of an annuity occurs after institutionalization and involves the definition of the "snap-shot". If the annuitization occurs several years prior to placement in a nursing home, the issue is not likely to arise. However, should the annualization occur weeks prior to institutionalization or after institutionalization, greater scrutiny is likely? In some counties in Pennsylvania, case workers are also not counting IRA's, 401(k), or 403(b) plans where regular withdrawals are being made under the Required Minimum Distribution Rules. Ohio has had a similar history, although one cannot rely on such an application of the rules.

Pennsylvania's rules are also complicated by a series of cases relating to annuities. These annuity cases did not involve IRAs or similar retirement funds. The Pennsylvania Medicaid Agency has proven willing to litigate regularly. *With Bird v. Pa. Dep't of Pub. Welfare, 731 A.2d 660* (Pa. Commw. Ct. 1999), the State Medicaid agency ruled that purchase of an immediate annuity, after institutionalization was an improper transfer. The State prevailed. The more recent case of *Mertz v Houston* 155 F, Supp. 2d 415 (ED. Pa. 2001), allowed the spouse of the Medicaid applicant to purchase an immediate annuity, so long as it was "actuarially sound," within the limitations of CMS Transmittal No. 64.

The Pennsylvania Medicaid Retirement Plan policy is treacherous, particularly where one of the spouses suffers a debilitating illness at a relatively young age, and planning will continue to be difficult and the outcome potentially disastrous.

The Massachusetts regulation is an example of a muddled approach that excludes governmental pensions, excludes 401(k) plans for those in larger companies, but targets 401(k) plans for small family run businesses. This policy also contains an escape clause that would allow, in most circumstances, the owner of the retirement plan to annuitize for their life and the life of their spouse.

The Michigan rule in PEM 400 is very similar to the Ohio rule, although it may be very different in application. Apparently his retirement plan of the community spouse is not considered as a resource.

The Tennessee law excludes the retirement plan of the community spouse. It does not appear to distinguish between plans that are "in pay" status versus plans still accumulating. Also, it does not seem to distinguish between IRA, 401(k), or company qualified plans. However, the retirement plan of the institutionalized spouse is counted, and, therefore, planning relating to that retirement plan is vitally important. In the example cited below, planning for the spouse is vitally important. In some circumstances, divorce and using QDRO may be advisable.

The administrative rules in Alabama do not address retirement plans. In Alabama if the account can be liquidated, it is countable.

The final example for comparison is the new Ohio regulation. This new regulation (effective 12/01/04) severely limits the planning options of the community spouse and will either encourage divorce or result in impoverishment. The Ohio regulation is the most punitive enacted.

In December of 2004, the Ohio Department of Job and Family Services promulgated a new regulation that profoundly affects retirement plans in the State of Ohio. This is perhaps the most detailed and aggressive position taken by a State Medicaid Agency. Combined with a newly enacted expanded estate recovery, and an aggressive policy of placing liens on assets, spouses of Ohio nursing home residents are the least secure.

Under this new Ohio Regulation by definition, target benefit plans, and particularly the Public Employees Retirement System, State Teacher's Retirement System, and School Employees Retirement System, are not considered as a "countable resource."

The Florida regulations regarding retirement plans are somewhat more specific. Under Florida Administrative Code § 1640.0505.05, retirement funds of the community spouse are excluded if they are "in pay" status. Assuming that the community spouse is withdrawing monies from the retirement plan, those monies withdrawn are counted as unearned income and would affect the Community Spouse Monthly Income Allowance (SMIA). If monies are being withdrawn based upon the life expectancy of the community spouse, the retirement plan is not included if distributions are based on the Required Minimum Distribution rules, These retirement plans, whether they be an IRA, 401(k), ESOP, SEP, or any other retirement plan, will not be counted as a resource if the spouse is receiving a monthly distribution under the Required Minimum Distribution rules. As opposed to other states, where a community spouse may be required to purchase an IRA immediate annuity, in Florida no such purchase is required.

Under Florida Administrative Code, 42 U.S.C. §1640.0505, the retirement plan of the institutionalized spouse will be counted. The major exception to this rule involves a statement in the regulations that states if "legal restrictions" exist; the retirement fund is not available. If for any reason or under any circumstance the institutionalized spouse is eligible for payments from the plan, which would likely include payments under a hardship provision within the plan, the plan would be included based on the amount which can be withdrawn. This follows the regulations of many states. The example in the Administrative Code Section seems confused, misleading and is somewhat at odds with the actual drafting of the regulation itself. Further, portions of the regulations seem confused with the annuity regulations. The Florida regulations protect the retirement plan of the community spouse and do not unnecessarily restrict the planning for the retirement plan of the institutionalized spouse.

E. PLANNING OPTIONS.

1. STAY IN THE EMPLOYER SPONSORED RETIREMENT PLAN. Where the employer has offered a defined contribution plan, a defined benefit plan, or a government pension, the employee may consider leaving the retirement monies in the plan. Rolling over the funds from the employer pension plan into an IRA converts the money from being "unavailable" resource in many states to being an available resource, Where both individuals are in good health and the company pension plan has underperformed or there are concerns regarding the management of the employer pension plan, those concerns may override any consideration regarding Medicaid benefits. For those with significant assets in the pension plan, the purchase of long-term care insurance may be advisable to reduce the risks, without unduly restricting investment strategies. If the spread between likely investment return more than pays for the insurance, why not roll out and pay for the insurance?

2. ANNUITIZE IRAs. Under the new Ohio Administrative Code Section, the owner of the IRA must attempt to convince his or her spouse they should waive all ERISA protections and allow for a single life immediate annuity within the Plan. What is not clear from this rule is the penalty should you fail to make that effort. If the individual converts his IRA an annuity after retirement and prior to requiring nursing home care, most state agencies would permit such actions and not determine those actions to be an "improper transfer." It appears from the Ohio regulation, however, that they may consider such an action to be an improper transfer. Such a

conclusion would likely be contrary to basic Medicaid principal that transfers may to a spouse are exempt. Such a decision would be based upon the economics in most marriages and the possibility that the wife in many circumstances will outlive her husband and not based on efforts to obtain Medicaid eligibility. The primary negative aspect to an immediate annuity is the relatively poor investment realization and the underlying costs and risk factors in a variable immediate annuity. Based upon the regulation in most states, it would still be appropriate to annuitize an IRA, or other retirement plan, and convert the asset into an income stream. Where the owner of the retirement plan is the likely institutional spouse, a joint and survivor annuity would be appropriate; however, it must conform to HCFA Transmittal No. 64, which dictates the accepted duration of any guaranteed term to the annuity. If the husband is age 85, and the wife is the age of 65, a joint and survivor annuity may be an improper transfer. If the wife's life expectancy is considered, or if the guaranteed term for the annuity are based on the wife's age. HCFA Transmittal No. 64 limits the guaranteed term of the annuity for a 65-year-old female at 18.96 years, while, an 85-year-old male, the term is 6.63 years. If the spouses are approximately the same age, a joint and survivor annuity would be appropriate. It is also important to consult any new annuity rules passed by the State, which may conflict with the rules relating to pension plans.

For a single individual, in most states, using an immediate annuity for IRA funds is also considered appropriate, again considering HCFA Transmittal No. 64, and using a guaranteed term for the annuity.

When planning for disabilities, our strategies should include avoidance, and attempts to address the issue with pre-planning where possible without violating ERISA, and ultimately planning for those who are already at risk.

3. ROLLOVER TO TARGET BENEFIT TYPE PLAN. Individuals may transfer their 401(k) or IRA funds into a Target Benefit Type Plan, managed by a new employer. Payments commene once the employment is terminated (typically within 30 days of the termination of employment), these plans maintain individual accounts and several payment elections are available.

4. GIFTING PLAN. Based on the current trends towards expanding estate recoveries to include probate and non-probate assets, and assets owned by the community spouse, gifting plans may become a more definitive planning option. The chief underlying problem with gifting retirement plan funds involves the requirement income taxes be paid on funds withdrawn from the retirement plans. These tax obligations are all incurred in one year, and likely exceed the nursing home deduction for that same year. However, once the look-back period has expired, the realized savings are more secure. A typical calculation in this circumstance involves a set aside for the spousal allowance, a set aside for the spend down for the institutionalized spouse based on the institutionalized spouse's current condition, an expected date of placement for nursing home care, and the expected monthly shortfall, multiplied by the number of months of the period of ineligibility. For larger estates, this would involve a sixty month determination while smaller estates would represent a lesser sum. The amount gifted would then also be reduced by paying income tax due and owing. The final piece of planning involves utilizing

retirement funds as the set aside for the community spouse and utilizing retirement funds for to spend down in the years following the year of the gift.

Assume a husband of age 65 has an IRA of $250,000.00, and will soon require institutionalization. Wife has an IRA of $200,000.00, and they have joint savings of $150,000.00. They also own their residence, which is worth $200,000.00. They first set aside $95,000.00 of the wife's IRA for her spousal share, and $162,000.00 to pay for husband's care, which is retained in his IRA. A gift of $342,900.00 is made by withdrawals from the IRA. This gift of $342,900.00 would be further discounted by approximately $90,000.00 to pay income tax on the IRA withdrawals.

5. JUST SAY NO. In New York, the New York Bar has implemented the Just Say No approach, whereby under 42 U.S.C. § 1396, the community spouse may refuse to cooperate with the Medicaid Application process, and may refuse to disclose assets, or contribute to the other spouse's costs for care. This approach was also recently implemented successfully in Connecticut, by New York Attorney, Renee Reixach, in the case of *Morenz v. Wilson-Coker* (2nd Cir., No. 04-4107-cv, July 14, 2005). Under this Federal Code Section, the institutionalized spouse, or his representative, must assign any or all rights to support to the state. While based upon expanded estate recoveries in some states, this approach may have lesser value. If a Pre-Marital Agreement was signed and contains the language, the assignment of the spousal support rights may be defeated by the Pre-Marital Agreement.

Based on the new estate recovery trends, the State might get a second bite at the apple. If successful at the time of application, the State may either lien assets of the community spouse or pursue a recovery against the community spouse's estate.

6. TERMINATION OF MARRIAGE. Based upon the aggressive approach utilized in some states, and dependent upon the factual circumstances, divorce may be a planning tool. For those circumstances where the community spouse has little by way of savings and the institutionalized spouse has a large IRA, there are both tax and Medicaid issues which may lead the family to utilize divorce to preserve sufficient assets for the community spouse. This is not a favored approach, but will become more prevalent, based upon the negative decison in *Blumer*.

Prior to the passage of the MCAA, many spouses of nursing home residents were forced to consider divorce as their only means of retaining sufficient assets and income to continue living independently. Many women only had their social security income and were forced to spend nearly all of their savings for a spouse's nursing home care. This phenomenon was "spousal impoverishment."

Congress passed MCCA which addressed the "spousal impoverishment" phenomenon. MCAA provided that the community spouse could keep one-half of the couple's countable assets (excluding a house and car). This allowance is called the community spouse resource allowance (CSRA). MCAA also granted the states the authority to establish a minimum and maximum level of assets. Some states adopted a relatively high figure while other states such as Ohio chose the most minimal standard.

The second component of the MCCA involves income protections for the community spouse. MCAA created minimum and maximum figures for the community spouse's income and allowed the states discretion to choose a standard within those parameters. While many states, such as New York adopted higher income standards, the majority of states, including Ohio, have adopted for budgetary reasons the lowest standard.

Finally, Congress also provided in 42 U.S.C. § 1396 r-5(c)(2) if the community spouse's income can not meet the minimum monthly needs allowance, the community spouse could go through a revision process which would increase the community spouse resource allowance to ensure that the community spouse had sufficient income and resources to live "with dignity and independence."

IV. CONCLUSION.

State agencies should try to act in a fashion consistent with the national policy relating to retirement savings. Instead, these agencies have contradicted the national policy. These efforts by the state agencies brought upon the "availability doctrine" and should limit expenditures in the Medicaid program. A simple, revenue neutral solution is to extend the anti-alienation provisions of Internat Revenue Code §401(a)(13) to IRA accounts

These agencies often implement policies even inconsistent with their regulations and state statutes.

These issues are now further muddled by the Supreme Court "waiver" issued by Justice Ginsburg in *Blumer*, which permits the state to adopt any policy not specifically prohibited by the Congress.

The conflicts between the tax law and state Medicaid regulations make this one of the most difficult areas of elder law. Until there is consistency in applying the laws, further litigation is likely.