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### **CHALLENGING ISSUES IN ELDER LAW: PART 1**

Remsen Street – Among the "Ten Most Significant Issues" in Elder Law this year, a few sparked controversy and more than a little confusion, at Monday's Elder Law Update 2003 at the Brooklyn Bar Association.

At this annual seminar, Howard Krooks, Esq, identified ten current issues in elder law: public policy and ethics; limited powers of appointment; *the Arnold S.* fair hearing decision; guardianship practice; 2003 regional rates; spousal refusal; *Blummer* and income; arbitration and engagement letters; personal care contracts; the impact of new tax laws on life estates and irrevocable trusts.

Perhaps two most of the most complicated issues are Medicaid eligibility, and the new appointment rules.

#### **Medicaid: Resource & Income Allowances**

For individuals who have the opposition, Krooks confirmed that long-term care insurance is preferable to Medicaid.

To be eligible for Medicaid, an individual must have resources of \$3,850 or less. A person may have any amount of income, but it must all be spent on health insurance and medical expenses, with the following exceptions.

A person living in the community can keep \$642 a month in income, to pay for living expenses. A person living in a nursing home can keep \$50 a month in income for monthly expenses. (Presumably his or her living expenses are included in the cost of the nursing home).

The resource level for two persons is \$5,600, with a monthly income of \$934 if both are trying to qualify for Medicaid at the same time.

Where only one spouse is applying for Medicaid, the non-applying spouse living in the community can keep a Minimum Monthly Maintenance Needs Allowance of \$2,267 in income and \$90,660 in resources (Maximum Community Spouse Resource Allowance or MCSRA).

Krooks noted that New-York is a "spend down" state, and a person with resources or income that exceed the maximums can become eligible for Medicaid by "spending down" to the acceptable level.

#### **IRAs and Medicaid**

"Not all assets are created equal" said Krooks. For SSI and Medicaid purposes, IRAs and other tax-deferred retirement plans are not considered "countable resources" if they are in periodic payment status. Instead, they are considered income.

If a person can access IRA assets, he or she must use those resources to become eligible for Medicaid. For example, if you have an IRA worth one hundred thousand dollars, you are not eligible for Medicaid (unless you spend that down).

If the IRA makes an annual distribution of \$12 thousand a year, Medicaid counts that as income of one thousand dollars a month, said Krooks. If you live in a nursing home, you may be eligible for monthly deductions of \$50 a month plus health and medical costs, but the rest of your income should go to the nursing home.

### **'Spousal Context'**

"in the spousal context, there are two relevant concepts: resources and income", Krooks explained. The status of an IRA in this context determines how it is defined.

Krooks interprets *Arnold S.*, a fair hearing decision that came down last year, as "an affirmation of the existing rules", and a catalyst for discussion.

In the case of *Arnold S.*, Arnold had an IRA of \$55,000 and his wife had an IRA worth \$44,000. Both were in states of periodic payment. Medicaid counted both IRAs as assets, and found Arnold S. ineligible for Medicaid because he had excess resources.

The government argued that Arnold could withdraw all the money at any time, and a Medicaid applicant is required to pursue all relevant payment resources. The case hinged on whether the old Medicaid Assistance Reference Guide (MARG) or the new Medicaid Reference Guide (MRG) applied.

MRG came along just in time for Arnold: under the new, corrected guide, an IRA in the payout status is an income stream and not a relevant resource. Therefore, the \$55,000 IRA had to be budgeted as a monthly income stream and Arnold could be eligible for Medicaid as long as he spent it appropriately.

If the IRA is not in payout status, it is considered a resource. Such an IRA is part of the Community Spouse Resource Allowance (CSRA), which maxes out at \$90,660. "If the IRA has \$90,660, any penny outside the IRA is available for the nursing home", said Krooks.

A person between the ages of 59-and-a-half and 70-and-a-half can elect to receive distributions, which puts the person in payout status. Although Arnold may not apply to individuals under 70 and-a-half (before IRA payments are required), Krooks said Medicaid must abide by the payout option selected by the individual.

Currently, if you have a community spouse and the IRA or pension fund is not payable, it is not income (Krooks noted that the issue is waiting to be litigated). Essentially, "a community spouse's IRA is not available to pay for the cost of care of the institutionalized spouse", Krooks concluded.

When only one spouse applies for Medicaid, the other spouse may keep up to \$2,267 a month, as a maintenance needs allowance. Anything over this amount must be used for the spouse's care, unless there is a "spousal refusal".

### **Spousal Refusal**

Ordinarily, spouses are legally required to support each other, just as parents are required to support each other, just as parents are required to support children under the age of 21. Therefore, Medicaid can normally count a spouse's income and assets in determining whether a person is eligible for Medicaid.

A spouse can avoid this obligation and make his or her partner eligible for Medicaid by signing a "spousal refusal". Essentially, the spouse with resources and income signs a written refusal to

support his or her mate. The statement assigns any claims the mate might have against the spouse's assets, to Medicaid.

Why do it? Krooks offered several reasons. First, Medicaid might not sue. Even if the spouse gets sued, however, recovery is limited to the amount Medicaid paid, which is about 70 percent of the private pay rate for nursing home care.

Krooks interpreted the moral of the *Mandel* case: if sued by Medicaid, settle and avoid the interest payments.