

The Tax Practitioner's Plight After Tax Reform

By Randall W. Roth

Background

The present federal income tax system traces its heritage back to 1913, to a set of rules that were simple and straightforward. Relatively few people actually incurred income taxes in those days and those who did paid relatively little. The typical lawyer did not spend much time dealing with the tax law.

Things changed with the passage of time. The tax laws became more and more complex and ever increasing numbers of people began to incur ever increasing amounts of taxes. Lawyers were called upon not just to explain and apply the intricacies of the tax law but also to figure out ways to minimize taxes. They functioned as true advocates, able to recommend any strategy that was "reasonable"—even those unlikely to prevail in litigation. Creative lawyers devised countless strategies based upon reasonable interpretations of the law that offered the possibility of illogically attractive tax consequences for their clients. The system did not require disclosure of questionable positions and, typically, there was little downside risk to taking an aggressive position. "Victory" was common, usually by default. As such, experienced lawyers generally agreed that the tax system inadvertently encouraged and rewarded this sort of aggressive tax planning.

People who could not afford the help of tax-savvy lawyers began to suspect, and eventually believed, that the lack of such help caused them to incur more than their fair share of taxes. This was especially true when they read about giant corporations and wealthy individuals who paid no taxes at all. Even people

who could afford the help of tax-savvy lawyers sometimes complained of tax laws that encouraged them to enter into artificial arrangements that complicated their lives.

The Tax Reform Movement

The Tax Reform Act of 1986 ("TRA 86") is certainly the major component of the current tax reform movement but it does not stand alone. Like TRA 86, the Tax Equity and Fiscal Responsibility Act of 1982, the Tax Reform Act of 1984 and the Revenue Act of 1987 plugged many perceived loopholes and discouraged tax planning in general (and aggressive tax planning in particular), in a variety of ways. Also, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinions 346 and 352, both of which pulled back the reins on aggressive tax lawyers. Finally, the Treasury has proposed changes to Circular 230 that would force lawyers who practice before the IRS to function more like quasi-agents and less like advocates.

Faced with the unenviable task of learning the details of tax reform, many lawyers have not yet taken time to consider what the eventual impact of tax reform might be on them—not as taxpayers, but as lawyers who generate fees by performing tax planning, tax compliance and/or tax controversy services. Will tax reform result in more work or less work, higher fees or lower fees, similar tasks or different tasks?

The Goals of Tax Reform

A quick review of the stated reasons for TRA 86 may provide illumination. According to the

legislative history to TRA 86, Congress had concluded that a dangerously high percentage of taxpayers considered the existing tax system "unfair and overly complex." Also, Congress believed that the economy could function more efficiently with reformed tax laws. Consequently, the goals of TRA 86 were **fairness, simplicity and efficiency.**

Supporters of tax reform will tell you that TRA 86 promotes fairness by reducing high income taxpayers' ability to use tax planning strategies to reduce taxes. For example, the passive activity rules may lead to the virtual elimination of traditional tax shelters, and the fortified alternative minimum tax system may insure that taxpayers with substantial amounts of "economic income" will always incur significant amounts of taxes.

Supporters of tax reform also argue that TRA 86 promotes simplicity in a variety of ways, not the least of which is by deterring taxpayers from engaging in complex tax planning. Indeed this might be achieved if (1) lower maximum rates reduce taxpayers' motivation to do tax planning, (2) fewer "preferences" means fewer opportunities to do tax planning, (3) a strengthened alternative minimum tax system effectively limits the amount of taxes that can be saved in any one year, and (4) special rules (e.g., "kiddie" taxes) douse former hotbeds of planning activity.

According to legislative history, TRA 86 will promote economic efficiency by reducing the role taxes will play in labor, investment and consumption decisions of taxpayers. The idea is that markets function best free of excessive "outside" influences like tax considerations. Resources will be allocated in a more efficient manner

if people try harder to make sound "business" and "investment" decisions and less hard to make clever "tax planning" decisions.

Tax Reform Means Less Tax Planning

The interesting thing about the stated goals of TRA 86—fairness, simplicity and efficiency—is that tax planning has been attacked in the name of all three.

Consequently, if TRA 86 accomplishes one or more of Congress' stated goals, it will do so in large part by reducing the amount of tax planning that is being done. What does this portend for lawyers who do a significant amount of tax planning for their clients?

To approach the same question from a different angle, consider the major pre-reform goals of tax planning: 1) **conversion** of ordinary income into long term capital gain, 2) **sheltering** of income with artificial losses from an unrelated activity, 3) **shifting of income** from a high bracket taxpayer to a related low bracket taxpayer, and 4) **deferral** of income to a future taxable year.

How important is **conversion** in a world devoid of a long term capital gain deduction? How interested can one be in tax **shelters** if losses cannot be used to offset income from dissimilar sources? How motivated can one be to **shift** income as the spread between high and low brackets is compressed? Does shifting income within the family still make sense if

Clifford Trusts are not available and children under 14 are treated almost like extensions of their high bracket parents? Even if one can overcome the new barriers to **deferral** (e.g., year end conformity and various accounting rules), does one want to defer income if rates are likely to go up in future years? Finally, does any amount of significant sacrifice in the name of tax planning make sense when the range between the regular tax rate and the alternative minimum tax rate is only 7%?

Even if tax planning still makes sense in any given situation, how anxious might one be to take an aggressive approach, especially if the proposed changes to Circular 230 are finalized and lawyers must insist upon adequate disclosure of less than conservative positions?

The point is simple: Congress has tried in a variety of ways and for a variety of reasons to curtail the amount of tax planning being done. It makes sense for lawyers who do tax planning for a living to consider the possibility that Congress' efforts will sooner or later result in a significant, if not dramatic, reduction in demand for their tax planning services.

What Some Lawyers Are Thinking

A survey of roughly 1,000 lawyers which was mailed with the March/April 1988 issue of this magazine reveals the following:

84% agree or strongly agree with the statement, "Prior to tax

reform, the tax system generally seemed to encourage and reward aggressive tax planning."

63% agree or strongly agree with the statement, "As a result of tax reform (including proposed changes to Circular 230), savvy tax practitioners will be less inclined to recommend and/or implement aggressive tax planning strategies."

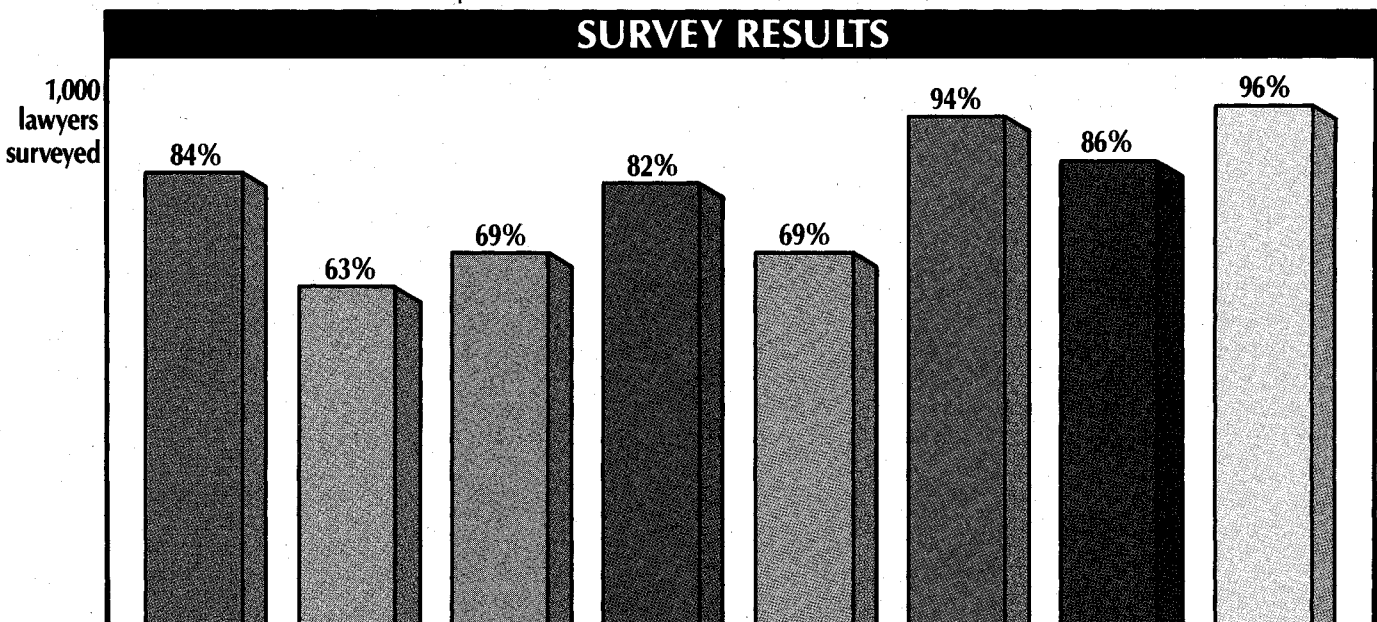
69% agree or strongly agree with the statement, "Given low maximum rates now and the possibility of higher rates in future years, a significant number of clients will probably prefer to be taxed now on any given amount of income rather than defer that income for a year or two beyond 1988."

82% agree or strongly agree that clients will be far less likely to utilize family income shifting strategies as a result of tax reform.

69% agree or strongly agree with the statement, "As a result of tax reform, many practitioners who specialize in tax planning will eventually need to broaden out into compliance work, controversy work and/or nontax areas if they are to increase their level of income."

Tax Compliance

Congress said TRA 86 would promote simplification. In a strange sort of way it may simplify life, at least for taxpayers who cut way back on tax planning. Perhaps practitioners who find themselves doing less tax planning will also find that their practices have been simplified.



But in other ways, TRA 86 did not just fall short of simplification, it greatly magnified the existing degree of complexity. A few minutes of studying rules regarding, for example, the alternative minimum tax, interest allocations and passive activity loss limitations, leaves one's head spinning. And these are only the tip of the iceberg. Below the surface lurks a new level of complexity that can be appreciated fully only by the relatively few lawyers who have somehow found the time to master it.

At first glance, this may seem like a positive business development for lawyers who do tax compliance work. (For purposes of this article, tax compliance is defined as the process of applying the tax law to events that have already occurred). After all, the greater the level of complexity, the greater the need for expert assistance.

"Below the surface lurks a new level of complexity that can be appreciated fully only by the relatively few lawyers who have somehow found the time to master it."

TRA 86 has put taxpayers behind the eight ball and lawyers who do tax compliance work might be expected to benefit from this. But a potentially explosive combination of factors may leave lawyers who do tax compliance work less than thrilled with the consequences of tax reform.

First, a tremendous amount of nonbillable time must be spent mastering the new law. Lawyers who do not do this will inevitably commit malpractice on a regular basis. Those who do make the required effort will, presumably, want to increase their billing rate by an appropriate amount.

Second, even after spending a great deal of time learning the new law, lawyers generally will find that any given fact pattern will require a greater amount of billable time as a result of the new complexities. More time and a higher billing rate will combine to create a significantly higher fee.

Third, from the client's standpoint, it may not look as though a higher fee is appropriate, especially if the bulk of additional time is spent applying rules that tend to increase rather than decrease taxes. Most of these new, outrageously complex rules, if correctly applied, result in higher taxes.

Fourth, many clients will not be able to deduct the lawyer's fee (or will be able to deduct it but because of lower tax rates the deduction will be less valuable than before TRA 86). Clients who think in terms of after-tax dollars will recognize that the lawyer's fee has gone up (as expressed in after-tax dollars) even if it is no higher than it was the preceding year.

Fifth, clients who in the past have appreciated having a lawyer who could watch out for their interests and take any reasonable position that could save them taxes may grow increasingly irritated as they begin to sense that their lawyer is now far more conservative.

More Survey Results

■ 94% of lawyers surveyed agree or strongly agree that practitioners will experience an increase in demand for their tax compliance services during the next few years.

■ 86% agree or strongly agree that a long-term effect of tax reform will be an increase in demand for tax compliance services.

■ 96% agree or strongly agree with the statement, "Practitioners are well advised to discuss the nontax impact of tax reform with certain individual clients to avoid misunderstandings down the road."

Tax Controversy Work

The impact of TRA 86 on tax controversy work may be especially difficult to gauge. But consider several important factors. First, now that interest on a tax deficiency is partially nondeductible (and will be completely nondeductible after 1990), taxpayers have a new incentive to settle their controversies as quickly as possible. Second, tax planning tends to breed controversies; if TRA 86 results in less tax planning, perhaps a ripple effect will be an eventual reduction in controversies. Third, aggressive tax planning and contro-

versy go hand in hand. If the collective roar of formerly aggressive practitioners eventually turns into a whispered meow, the amount of controversy work arguably will be greatly affected.

"... lawyers whose livelihood depends upon a substantial number of time-consuming tax controversies and the continued viability of tax planning may want to consider broadening out their range of activities."

What It Might Mean

The purpose of this article is to suggest that lawyers whose livelihood depends upon a substantial number of time-consuming tax controversies and the continued viability of tax planning may want to consider broadening their range of activities. Lawyers whose livelihood depends upon tax compliance may want to consider the immediate need to prepare their clients for a combination of factors which, if ignored, could result in irreparable damage to the practitioner-client relationship. The key is to think through the possibilities and to formulate a game plan.

The survey mentioned above was designed primarily to stimulate thought. Copies of the tabulated results can be obtained by writing Ms. Susan Lynch, ABA Section of Real Property, Probate & Trust Law, 750 North Lake Shore Drive, Chicago, Illinois 60611. Written comments submitted by the surveyed lawyers illustrate widely divergent views regarding the impact of tax reform. Many foresee an impact that is as great as that suggested herein. Most do not. Ultimately, each lawyer is an experiment of one.

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CASES

- **Irrevocable trust cannot be terminated by income beneficiary.** A husband and wife created a trust with a parcel of land as the trust asset. The wife died, making the trust irrevocable as to her one-half interest. Subsequently, the husband properly revoked the trust as to his one-half interest and sued for partition of the land. The trial court ordered a sale of the land and distribution of the proceeds, giving the husband his one-half interest plus the value of his life estate in the one-half interest held by the trust through the wife. The balance of the trust's interest was to be paid to the remaindermen. The appellate court determined, however, that a trust purpose remained (payment of income, and principal as the trustee found advisable, to the husband) and the trust could not be terminated. It ordered that funds derived from the trust's interest in the land continue to be held in trust. *Townsend v. Rainier National Bank*, 751 P.2d 1214 (Wash. Ct. App. 1988).
- **Disclaimer not valid after interest claimed by creditor.** An heir may not disclaim an interest in property from a decedent under Kansas law after the interest has been disposed of by judicial process. A judgment creditor garnished a survivorship interest in a bank account and the survivor's interest as heir of the decedent. The court held that the applicable statute bars a right to disclaim when the individual disclaiming is estopped by a voluntary transfer of the interest or has waived the interest in writing or when the interest has been disposed of by judicial process. The court rejected the argument that the statute refers only to judicial process undertaken by the person disclaiming. *Citizens State Bank of Grainfield v. Kaiser*, 750 P.2d 422 (Kan. Ct. App. 1988).
- **Citizens of Hawaii can enforce terms of trust.** When land is given to a government for a specific public purpose, the government holds it as trustee subject to all the limitations imposed by the transfer. The legislature cannot change the terms of the trust. If the governmental trustee does not file periodic accountings and does not seek instructions from a court when a proposed action is doubtful and the attorney general supports the trustee, the citizens have standing to enforce the terms of the trust. *Kapiolani Park Preservation Society v. City and County of Honolulu*, 751 P.2d 1022 (Hawaii Ct. App. 1988).
- **The liability of coexecutors is joint and several.** Settlement by the estate with one coexecutor does not reduce the liability to the estate of the other coexecutor. The coexecutor who has not settled may seek contribution from a coexecutor of equal or greater guilt who has settled with the estate. *In re Estate of Chrisman*, 746 S.W.2d 131 (Mo. Ct. App. 1988).
- **Absolute power of sale still held in fiduciary capacity.** In *Lucas v. Mannering*, 745 S.W.2d 654 (Ky. Ct. App. 1988), the court held that an absolute, discretionary power of sale given to an executor is held in a fiduciary capacity and can be exercised only for the benefit of the estate. Use of the power to protect lessees of estate land was improper when the heirs wanted the land.

**RULINGS
AND
REGULATIONS**

- **Parent-child relationship is not per se fiduciary relationship.** In *In re Estate of Kieras*, 521 N.E.2d 263 (Ill. App. Ct. 1988), the court determined that an adult child's power to sign checks on a parent's account creates a fiduciary relationship only as to that account. It held that further evidence of a confidential relationship is necessary to create a presumption that gifts from the parent to the child were the result of undue influence by the child.
- **Divorce does not revoke will.** The parties had been living together before the marriage and continued living together on an intermittent basis after the divorce. The court determined that a statute providing for revocation by divorce of will provisions for the spouse does not apply to a will executed before the marriage. *In re Estate of Carroll*, 749 P.2d 571 (Okla. Ct. App. 1988).
- **Claim of cohabitant is not claim against estate.** A claim by an unmarried cohabitant of a decedent that the parties had agreed to share all their property is not a claim against the estate subject to the time limits of the nonclaim statute. In *Knott v. Vachal*, 752 P.2d 39 (Ariz. Ct. App. 1988), the court held instead that it is a claim that property held by the estate is not estate property.
- **Brokerage firm customer's allegation of ERISA fiduciary breach subject to standard arbitration agreement.** In *Sulit v. Dean Witter Reynolds, Inc.*, ___ F.2d ___, 9 E.B.C. 1857 (8th Cir. 1988), the U.S. Court of Appeals for the Eighth Circuit held that nothing in ERISA precludes the arbitration of disputes between a stockbroker and an employee benefit plan over the operation of the plan's trading account. The case involved charges that the broker was an ERISA fiduciary and, as such, had violated its duties under the statute. The lower court had denied motions by the defendant-broker to stay proceedings and compel arbitration, holding that the plan's agreement that all controversies should be settled by arbitration was unenforceable under ERISA's ban on exculpatory agreements. In reversing the decision, the Eighth Circuit more narrowly interpreted the ERISA provision.
- **Exchange of policy by irrevocable life insurance trust does not start new three year inclusion.** In Technical Advice Memorandum P.L.R. 8819001, the Service ruled that a life insurance policy acquired by an irrevocable life insurance trust less than three years before the insured's death, in exchange for a policy which had been transferred to the trust by the insured more than three years prior to death, was not includable in the insured's gross estate under Section 2035(d)(2). At the time of the exchange, the decedent owned no interest in the prior policy. The exchange was initiated by the trustees and the decedent's only involvement was signing the application for the exchange policy as the insured. However, the tax counsel for the insurance company stated that the exchange policy could have been issued without the decedent's signature. The ruling might have been different if the decedent's signature had been essential. The Service also ruled that a provision in the trust terminating the interests of the decedent spouse in the event of a divorce did not constitute an incident of ownership for purposes of Section 2042 or a power of revocation under Section 2038. Divorce is an act of independent significance and determination of the spouse's interest in the trust would be merely an incidental and collateral consequence.
- **Service rules commutation power disqualifies charitable annuity lead trust.** The Service has finally confirmed in a public ruling the position taken earlier in technical advice memoranda and private letter rulings (see P.L.R. 8745002) that a provision in a charitable lead trust permitting the trustee to prepay the charitable annuity on the basis of the discount rate and valuation method used in the gift tax regulations in effect either as of the time of creation of the trust, or as of the time of commutation, will disqualify the trust for the gift tax charitable deduction under Section 2522(c)(2)(B). Rev. Rul. 88-27, 1988-17 I.R.B. 40.

- **State statute charging death taxes to non-marital property upheld.** In 1978, South Carolina amended its estate tax law to provide that in the absence of a contrary provision in a will, a spouse's residuary share would not be charged with any death taxes to the extent that it qualified for the marital deduction. However, the spouse's share was to be charged with a pro rata share of debts, funeral expenses and expenses of administration. In Revenue Ruling 88-12, the Service recognized the effect of the statutory provision so that the value of the property interest passing to the surviving spouse under a residuary clause of a will is to be reduced by a pro rata portion of the estate's debts and expenses, but not by any death taxes.

LITERATURE

- **Proposed regulations for the generation-skipping transfer tax.** Two recent articles overview the proposed generation-skipping transfer tax regulations issued in Spring 1988. Huffaker, *Generation-Skipping Temporary Regulations Issued by IRS*, 68 Journal of Taxation 390 (June 1988). Mulligan, *Prop. generation-skipping tax Regs. grandfather QTIP, but add complexities*. 15 Estate Planning 194 (July/August 1988).
- **Estate freeze attack.** Two recent articles discuss the new assault on estate freezes. One discusses recently enacted Section 2036(c). The other explores several private letter rulings in which the IRS is asserting the *Dickman* rationale to attack freezes. Foster, *Planning strategies to cope with the limits imposed on estate freezes by RA '87*, 15 Estate Planning 130 (May/June 1988); Kelly, *IRS expands definition of gift to launch new attack on two estate freeze techniques*, 15 Estate Planning 230 (July/August 1988).
- **How practitioners can use the Estate Tax Examiner's Handbook.** The December 1987 edition of the Estate Tax Examiner's Handbook is available to the public. A recent article suggests that the book may be used as a guide by the practitioner to avoid audit problems, especially with special use valuation. Cummins, *Using the Service's New Handbook for Estate Tax Examiners*, 68 Journal of Taxation 276 (May 1988).
- **Income tax consequences of powers of withdrawal.** Adams, *Beware the Consequences of Powers of Withdrawal*, 127 Trusts and Estates No. 5, p. 37 (May 1988), discusses the income tax consequences of powers of withdrawal, such as a five and five power.
- **S Corporation issues.** Katzenstein, *Strategies for saving the S election upon the death of an S corporation shareholder*, 15 Estate Planning 210 (July/August 1988), discusses the issues that arise when S corporation stock is part of a decedent's estate.

LEGISLATION

- **Termination of small trusts.** In Connecticut, certain small trusts may be terminated by a probate court upon the application of a trustee, beneficiary or beneficiary's legal representative. Reasonable notice must be given to beneficiaries with contingent or vested interests and the following conditions must apply: 1) continuation of the trust must be either uneconomical or not in the beneficiaries' best interest; 2) termination must be equitable and practical; and 3) the current market value of the trust must not exceed \$20,000. The probate court may issue orders regarding distribution and in order to protect the beneficiaries. The trust may not be terminated if the settlor objects or the beneficiaries cannot be ascertained. The Act applies to testamentary and inter vivos trusts but not to spendthrift trusts. Act of May 2, 1988, P.A. No. 88-95, 1988 Conn. Legis. Serv. (No. 3) 141 (West).
- **Adoption of uniform acts.** The following states have adopted uniform laws affecting probate practices:
 - Maine—Uniform Transfers to Minors Act; Act of April 19, 1988, ch. 734, 1988 Maine Legis. Serv. (No. 3) 402 (West).
 - Wisconsin—Uniform Transfers to Minors Act; Act of March 31, 1988, Act

- **Access to deposit boxes for will searches.** A new Minnesota law specifies when a safe deposit company should search a customer's box for a will. The person seeking to have the box opened first must present to the company proof of the renter's death and an affidavit indicating that the person believes the box contains a will or information relating to burial. The person seeking to have the box opened must be decedent's named or designated representative, surviving spouse, heir or devisee, or a deputy lessee of the box. If the safe deposit company has received letters of office from a representative of the deceased's estate or a court order, the box may not be opened. The company is not required to open the box if the box has previously been opened under this law, if the company has notice of an objection or if the lessee's key is not available. Under this section, a will includes a will or a codicil. If a box is opened and a will discovered, the company must remove the will, make a copy of the document, forward the original to the clerk of court and place the copy in the box. A deed to a burial lot or burial instructions may be copied and the copy delivered to the interested person. Act of April 21, 1988, ch. 581, 1988 Minn. Sess. Law Serv. (No. 5) 436 (West).

- **Medicaid eligibility affected by new federal law.** Significant new provisions regarding Medicaid eligibility of institutionalized individuals are included in the Medicare Catastrophic Coverage Act of 1988. The following selected provisions protect income and resources for the maintenance of a spouse remaining in the community and impose a new mandatory penalty for certain transfers of assets to establish eligibility:
 - ▲ After an institutionalized individual has established eligibility for Medicaid, states must allow a spouse living in the community to receive a sufficient portion of the institutionalized individual's income to raise the spouse's monthly income to at least specified minimum levels. Effective September 30, 1989, the specified minimum is 122% of the federal poverty level for a couple (currently \$786 per month); the minimum increases to 133% effective July 1, 1991, and to 150% effective July 1, 1992. In some cases the community spouse is entitled to an additional amount for excess shelter costs. This monthly protected income level for the spouse may not exceed \$1,500 unless a higher level is determined necessary after a fair hearing or by a court. These provisions on income treatment take effect on September 30, 1989.
 - ▲ In determining eligibility for Medicaid of an institutionalized individual with a spouse in the community, states will be required to total all non-exempt resources held by either or both individuals and divide them equally, subject to the requirement that states allocate a minimum of \$12,000 for the non-institutionalized spouse. States may raise the minimum allocation as high as \$60,000. The maximum share that may be protected for the community spouse is \$60,000, unless a higher amount is set after a fair hearing or by a court. These provisions also take effect on September 30, 1989.
 - ▲ States must deny Medicaid eligibility to an institutionalized person who has transferred any asset, including certain transfers of a residence, for less than fair market value within 30 months prior to application for Medicaid. The individual will be disqualified for benefits for either 30 months after the transfer or for a number of months equal to the quotient of the value of the assets transferred divided by the cost of nursing home care, whichever period is shorter. Transfer of a residence is not disqualifying if the home was transferred to a spouse or other specified family members. No transfer will be disqualifying if the asset was transferred to the community spouse or to a blind or disabled child; if the individual intended to transfer for fair market value; if the asset was not transferred to establish Medicaid eligibility; or if undue hardship would result. This disqualification applies to all transfers made on or after July 1, 1988.

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