

The CSRA, MMMNA and Related Issues

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To many, Medicaid is an enigma. The program's complexity surrounding who is eligible, what services are paid for, and how those services are reimbursed and delivered is one source of this confusion.¹

For unprepared couples, financial disaster waits at the door when a married individual is admitted to a nursing home.² The spouse with declining health, known as the "Institutionalized Spouse,"³ may incur nursing home expenses in excess of \$5,000 per month.⁴ These costs, which are often preceded by home health care expenses, are illustrated as follows:⁵

Month	Average Monthly Cost	Total
Month 1	\$4,894.44	\$4,894.44
Month 2	\$4,894.44	\$9,788.88
Month 3	\$4,894.44	\$14,683.32
Month 4	\$4,894.44	\$19,577.76
Month 5	\$4,894.44	\$24,472.20
Month 6	\$4,894.44	\$29,366.64
Month 7	\$4,894.44	\$34,261.08
Month 8	\$4,894.44	\$39,155.52
Month 9	\$4,894.44	\$44,049.96
Month 10	\$4,894.44	\$48,944.40
Month 11	\$4,894.44	\$53,838.84
Month 12	\$4,894.44	\$58,733.28
Month 13	\$4,894.44	\$63,627.72
Month 14	\$4,894.44	\$68,522.16

¹ *Background Material and Data on the Programs within the Jurisdiction of the Committee on Ways and Means* (informally known as the Green Book (WMCP 108-6)), updated March 17, 2004, available at <http://waysandmeans.house.gov/media/pdf/greenbook2003/MEDICAID.pdf>.

² Aslan, *The Lady and the Tiger*.

³ 42 U.S.C. § 1396r-5(h)(1).

⁴ A GE Financial survey released in November, 2003 reported the average annual cost of nursing home care as \$57,700; in some States, such as Alaska, the average annual cost is as high as \$166,700. See *Survey: What Nursing Homes Cost*, at <http://www.msnbc.msn.com/id/3076978/>.

⁵ This table assumes the average nursing home stay is 30 months, assume no increased costs (inflation) and assumes a monthly rate which is the average of rates for Memphis (TN), Nashville (TN), Alpharetta (GA), Atlanta (GA) and the United States as reported in a survey by Metlife Mature Market Institute, dated August 5, 2003; available at: <http://www.metlife.com/WPSAssets/22802718901060258447V1F2003%20NH%20HC%20Market%20s%20survey.pdf>.

Month	Average Monthly Cost	Total
Month 15	\$4,894.44	\$73,416.60
Month 16	\$4,894.44	\$78,311.04
Month 17	\$4,894.44	\$83,205.48
Month 18	\$4,894.44	\$88,099.92
Month 19	\$4,894.44	\$92,994.36
Month 20	\$4,894.44	\$97,888.80
Month 21	\$4,894.44	\$102,783.24
Month 22	\$4,894.44	\$107,677.68
Month 23	\$4,894.44	\$112,572.12
Month 24	\$4,894.44	\$117,466.56
Month 25	\$4,894.44	\$122,361.00
Month 26	\$4,894.44	\$127,255.44
Month 27	\$4,894.44	\$132,149.88
Month 28	\$4,894.44	\$137,044.32
Month 29	\$4,894.44	\$141,938.76
Month 30	\$4,894.44	\$146,833.20

While nursing home bills accrue, the healthy or well spouse, known as the “Community Spouse,”⁶ struggles to identify and keep income and assets that are necessary to support herself.⁷ To remedy this situation, Congress enacted spousal impoverishment provisions as part of the Medicare Catastrophic Coverage Act of 1988 (“MCCA”).⁸ The purpose of this article is to summarize the MCCA spousal impoverishment provisions and how they work.⁹

The spousal impoverishment provisions were designed to end the pauperization of Community Spouses by allowing them to protect a sufficient, but not excessive, spousal share of the marital assets to meet their own needs while the Institutionalized Spouse is in a nursing home at Medicaid’s expense. The spousal impoverishment provisions are codified at 42 U.S.C. § 1396r-5 (Appendix A).

⁶ 42 U.S.C. § 1396r-5(h)(2).

⁷ Throughout this article, we assume that the husband is the Institutionalized Spouse and the wife is the Community Spouse. The analysis, however, would be identical if the situation were reversed.

⁸ 100 P.L. 360; 102 Stat. 683; 1988 Enacted H.R. 2470; 100 Enacted H.R. 2470 (enacted July 1, 1988). “Prior to 1988, a married individual who was institutionalized was required to “spend down” all of the couple’s jointly held assets in order to become eligible for Medicaid benefits. H.R.Rep. No. 100-105(II), 100th Cong., 2nd Sess., at 65-67 (1988), reprinted in 1988 U.S.C.C.A.N. 857, 888-90. That policy had the effect of forcing the community spouse to “spend down” virtually all of the marital assets before the institutionalized spouse could be eligible for Medicaid and resulted in “community spouses” having to sue their institutionalized spouses for support or become prematurely institutionalized themselves. See 1988 U.S.C.C.A.N. at 892.” *Johnson v. Guhl*, 166 F.Supp.2d 42, 46 (D. N.J. 2001); *See also Dullard v. Minnesota Department of Human Services*, 529 N.W.2d 438, 443 (Minn. App. 1995).

⁹ Any study of Medicaid is an on-going process at best and persons using this article should review current developments before it is applied. “There can be no doubt that the statutes and provisions in question, involving the financing of ... Medicaid, are among the most completely impenetrable texts within human experience. Indeed, one approaches them at the level of specificity herein demanded with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase.” *Johnson v. Guhl*, 91 F.Supp.2d 754, 758 (D. N.J. 2000).

In this article, we will examine spousal impoverishment provisions relating to both income and assets. However, in light of *Wisconsin Department of Health and Family Services v. Blumer*, 534 U.S. 473, 478 (2002), and how that decision impacts income determinations, we will examine assets first.

Part 1: Assets

The spousal impoverishment provisions governing resources, or assets,¹⁰ will be considered first. They are codified at 42 U.S.C. § 1396r-5(c). The text of Section 1396r-5 appears in Appendix A.

Marital assets the Community Spouse can keep are called the Community Spouse Resource Allowance (the “CSRA”).¹¹ In calculating the CSRA, the first step is to calculate the total value of all assets owned by either spouse, jointly or individually.¹² This calculation, sometimes called a “snapshot,”¹³ is done as of the first date of continuous institutionalization. 42 USC § 1396r-5(c)(4)(1). Initially, the spousal share is one-half the total of all marital assets. 42 USC § 1396r-5(c)(4)(1)(A)(ii). However, the spousal share is subject to minimum and maximum limits which are indexed for inflation.¹⁴ Either spouse may ask the State to calculate the spousal share prior to seeking eligibility. 1396r-5(c)(1)(B).

The CSRA minimums and maximums are calculated in 1988 dollars, which are adjusted each year.¹⁵ In 2004, the minimum CSRA is \$18,552 and the maximum is \$92,760.¹⁶ Some States, such as Georgia, allow the Community Spouse to retain the maximum CSRA. Others, such as Tennessee, apply a formula as permitted in Subsection (f)(2).

The subsection (f)(2) formula is the greatest of:

- The spousal resource amount,
- The State spousal resource standard, which is the amount that the State has

¹⁰ The term “assets” is defined at 42 U.S.C. § 1396p(e)(1). In this article, we are referring to countable assets or resources. The CSRA discussed in this article is comprised of countable assets. The Community Spouse will also retain all exempt assets. Exempt assets are defined at 42 U.S.C. § 1382b, which is incorporated by reference in 42 U.S.C. § 1396r-5(c)(5). Among others, a home and adjoining land, household goods, the value of any burial space, and property essential to self-support are excluded assets. *See also* 42 C.F.R. § 416.1201 to § 416.1239.

¹¹ [MCCA] shelters from diminution a standard amount of assets (called the “community spouse resource allowance.” *Wisconsin Department of Health and Family Services v. Blumer*, 534 U.S. 473, 478 (2002).

¹² “For purposes of this pooling of resources, title, community property laws, or state laws regarding interspousal transfers are disregarded.” Regan et al., *Tax, Estate & Financial Planning for the Elderly* § 10.11[3] (Matthew Bender 2003).

¹³ *See Johnson v. Guhl*, 91 F.Supp.2d at 761.

¹⁴ *Blumer*, 482.

¹⁵ 42 U.S.C. § 1396r-5(g).

¹⁶ The figures are adjusted for inflation each January. The current figures are available at <http://www.cms.hhs.gov/medicaid/eligibility/ssi0104.asp>. Note, the average cost of nursing home care would exceed the “maximum resource allowance.”

- determined will be protected for the community spouse,
- An amount transferred to the community spouse for her support as directed by a court order, or
- An amount designated by a State hearing officer to raise the community spouse's protected resources up to the minimum monthly maintenance needs allowance.

In applying the first two prongs of subsection (f)(2), States must allow the Community Spouse to keep the minimum CSRA (\$18,552 in FY2004) and, if the marital assets exceed twice the minimum CSRA (meaning, in FY2004, if the marital estate exceeds \$37,104), then States must adjust the CSRA so that the Community Spouse keeps one-half of marital resources up to the maximum CSRA.¹⁷

Example 1: Kevin and Sally own a home valued at \$250,000. They have a van valued at \$20,000. Kevin has \$20,000 in a checking account and has a CD in the amount of \$30,000. Sally has CDs in her name in the amount of \$50,000. They have a joint mutual fund account in the amount of \$100,000. Kevin is admitted to a nursing home on October 1st. Sally requests a determination of the spousal share. The "snap-shot" is as follows:

Excluded (Non-countable) Assets		Countable Assets	
Asset	Value	Asset	Value
Home	\$250,000	Checking Account	\$20,000
Van	\$20,000	CDs	\$80,000
		Mutual Fund	\$100,000
Totals	\$270,000	Totals	\$200,000

The Medicaid office determines that Sally may keep the non-countable assets, plus a CSRA in the amount of \$92,760 (the maximum CSRA). Kevin would keep \$2000 as his Medicaid resource limit. The remaining \$105,240 is at risk for payment of Kevin's nursing home bills.

Example 2: Example: John and Mary own a house with no mortgage valued at \$75,000. John has a certificate of deposit in his name in the amount of \$35,000. Mary owns stock worth \$60,000. Together they own a mutual fund worth \$25,000, and an automobile. Mary also has an irrevocable burial trust valued at \$5,000.

John is admitted to a nursing home for long-term custodial care on May 1. The State Medicaid agency takes a "snapshot" of the couple's countable assets as of May 1st, the first date of continuous institutionalization. The "snapshot" is as follows:

Excluded (Non-countable) Assets		Countable Assets	
Asset	Value	Asset	Value

¹⁷ Where assets comprising the CSRA are in the Institutionalized Spouses' name, they must be transferred into the sole name of the Community Spouse. The deadline for this process varies, but is generally 90 days. Resources that are not shifted prior to the deadline will be considered available to the Institutionalized Spouse. See *Regan, supra*, § 10.11[3]; 42 C.F.R. § 416.1242.

Home	\$75,000	CD (John)	\$35,000
Burial Trust	\$5,000	Stock (Mary)	\$60,000
		Mutual Fund (joint)	\$25,000
Totals	\$80,000	Totals	\$120,000

In Georgia, Mary would keep the non-countable assets and \$92,760 as her CSRA, John would keep \$2,000 as his Medicaid resource limit, and the remaining \$25,240 is at risk to pay nursing home bills. In Tennessee, where the subsection (f)(2) formula is applied, Mary would keep \$60,000 as her CSRA, John would keep \$2,000 as his resource limit, and the remaining \$58,000 is at risk to pay nursing home bills.

In summary, all countable marital resources, except the sum of the countable resources that are protected for the benefit of the Community Spouse and the Medicaid resource limit, are considered available to the Institutionalized Spouse for use in paying health care costs. 42 U.S.C. § 1396r-5(c)(2).¹⁸ Conversely, the “CSRA is not considered available to pay for the care of the institutionalized spouse and need not be ‘spent down’ in order for the applicant to be Medicaid eligible.”¹⁹

Practice Tip: In making these calculations, neither the duration of the marriage nor the manner in which the assets are titled matters is considered. All marital assets are pooled, regardless of the length of marriage (whether fifty years or five months).

One observation we should make is that, subject to asset transfer penalties (that is, gifts), Kevin and Sally (or John and Mary) may spend down assets on anything. Although assets over the sum of the CSRA and resource allowance are “at risk” to pay nursing home bills, the couple is not required to spend down on nursing home care (although, as a practical matter, absent planning, that is what happens).²⁰ Thus, once the State Medicaid agency makes the resource assessment, Kevin and Sally should not touch the assets allocated to her as the CSRA until Kevin spends down his portion and becomes eligible for Medicaid.

Example 3: Assume Kevin and Sally have the same assets described in example 1, but they owe \$90,000 on their home. After the resource assessment, Sally uses the “at-risk” assets to pay off the mortgage (converting countable assets into an exempt asset). She purchases prepaid burial contracts (non-countable assets) in the amount of \$7,000 each for herself and Kevin. She spends the remaining \$1,240 on a trip to visit her son in Arizona. The “at-risk” assets have been spent and Kevin is now eligible for Medicaid benefits.

Although the CSRA and resources subsequently gained by the Community Spouse are not available to pay the health care expenses of the Institutionalized Spouse, see 42

¹⁸ “The CSRA is considered unavailable to the institutionalized spouse, but all resources above the CSRA (excluding a small sum set aside as a personal allowance for the institutionalized spouse, currently \$2,000, see 20 C.F.R. ' 416.1205 (2001) must be spent before eligibility can be achieved.” Blumer, 483.

¹⁹ Johnson v. Guhl, 91 F.Supp.2d at 761.

²⁰ Johnson v. Guhl, 166 F. Supp.2d at 47.

U.S.C. § 1396r-5(c)(4),²¹ several courts have crafted an exception to this rule where the application for benefits is delayed. That exception is discussed in the next section.

Delayed Applications for Medicaid Benefits:

In *A.K. v. Division of Medical Assistance and Health Services*, 794 A.2d 835 (N.J. 2002), the Institutionalized Spouse was admitted to a nursing home in September, 1995. On October 1, 1995, New Jersey calculated the couple's total countable resources, but no application for benefits was filed. Resources were calculated as \$219,725.40 and, at that time, the CSRA was \$80,760. New Jersey informed the Community Spouse that his wife would not be eligible for Medicaid benefits until he spent down the balance over the CSRA, less his wife's personal needs allowance. During the subsequent three years, the Community Spouse spent \$136,965.40 on his wife's care and, thereafter, applied for Medicaid benefits. However, during that time, his Mobile stock appreciated in value. New Jersey took the position that, while the CSRA is fixed as of the "snapshot" date, the application of the CSRA to the marital estate (or determination of how much must be spent down to reach the CSRA) occurs, not at the time of institutionalization, but at the time of application. On appeal, the New Jersey Supreme Court affirmed the department's ruling, finding that "the community spouse's share of the resources is subtracted from the couple's total combined resources as of the first moment of the first day of the month of application for Medicaid." *Id.*, at 839. The Court went on to find that, absent an application for benefits, a valuation requested pursuant to Subsection (c)(1)(B) is "informational only." The Court held that "the plain language of the federal and state statutes [is that] the spousal share is to be fixed based on the couple's assets as of institutionalization, but eligibility is to be determined by reference to the total assets owned by the couple at the time of application for medical benefits." *Id.*, at 842. *See also Estate of Atkinson v. Minnesota Department of Human Services*, 564 N.W.2d 209 (Minn. 1997) (reaching the same result).²²

Asset Transfer Penalties:

At first glance, the couple might consider reducing the size of the marital estate by giving their assets away. That, however, would trigger a period of ineligibility. 42 U.S.C. 1396p(c).²³

If an Institutionalized Spouse or a Community Spouse disposes of assets for less than fair market value (gives them away) *on or after* the look-back date,²⁴ then the State must impose a Medicaid eligibility penalty. 42 U.S.C. § 1396p(c)(1) (emphasis added). The penalty is calculated by dividing the value of assets given away by the average

²¹ *Blumer*, 483, fn.4.

²² In *Dullard*, *supra*, re-valuation was allowed after a couple moved from Illinois to Minnesota. In that case, Illinois (like Georgia) allowed the Community Spouse to keep the maximum CSRA, while Minnesota (like Tennessee) applied a formula which would result in a lower CSRA.

²³ The text of 42 U.S.C. § 1396p appears in Appendix B.

²⁴ The look-back date is 36 months before the first date when the Medicaid applicant is both institutionalized and has applied for Medicaid benefits. 42 U.S.C. § 1396p(c)(1)(B). If there is a transfer to or from a trust, then the look-back date is extended to 60 months. *Id.*

monthly cost of nursing home care (the “divisor”). The divisor varies from State-to-State. In FY2004, the Georgia divisor is \$3,860 and the Tennessee divisor is \$3,394.²⁵ Thus, if \$100,000 was given away in Tennessee, then the applicant would be disqualified from receiving Medicaid for 29 months.²⁶ In simple terms the penalty precludes Medicaid eligibility for a number of months equal to the amount of nursing home care that was given away.²⁷

Similarly, transfers to trusts may trigger a penalty. *See* discussion of *Johnson v. Guhl, infra*.

The lesson here is that gifting assets away requires careful planning. If it is not done carefully, the cost of providing nursing home care during a penalty period may exceed the value of the gift.

Because our focus is on MCCA’s spousal impoverishment provisions, we touch on transfer penalties only to the extent they relate to Section 1396r-5. A more detailed discussion of transfer penalties is found in T. Takacs, *Elder Law Practice in Tennessee, 2nd Edition* § 5.08 (Lexis-Nexis 2004).

Transfers to the Community Spouse and disposition of Assets After Eligibility is Determined:

The transfer of all marital assets from the Institutionalized Spouse to the Community Spouse is a common Medicaid Planning technique. *See e.g.*, T. Takacs, *supra*, § 7.02(b) (Lexis-Nexis 2004). The reasons for these transfers are twofold. First, if the Community Spouse predeceases the Institutionalized Spouse, then at her death, the spousal impoverishment provisions no longer apply and the Institutionalized Spouse will be over-resourced and will lose eligibility. By placing assets in the Community Spouse’s name, she can leave assets in a testamentary special needs trust for the benefit of the Institutionalized Spouse without over-resourcing him and causing him to lose Medicaid eligibility.²⁸ Second, assets removed from the Institutionalized Spouse’s estate are not subject to estate recovery.

Most commentators opine that, after eligibility is established, the Community Spouse may dispose of the CSRA and exempt assets without triggering a Medicaid Penalty. *See e.g.*, T. Begley & J. Jeffreys, *Representing the Elderly Client: Law and Practice* § 8.07[E] (Aspen Publishers 2003 Supp.). In support, Begley reproduces a letter, dated

²⁵ *See Key Medicaid Information for Tennessee*, <http://www.elderlawanswers.com/resources/s7/r35333.asp>.

²⁶ Fractions are disregarded.

²⁷ *See* H. R. 103-111 (May 25, 1993), Section 5111, discussing transfers of assets in connection with the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66.

²⁸ 42 U.S.C. § 1396p(d)(2)(A). The text of the statute renders trusts that are established “other than by will” available to funds nursing home expenses. *See Skindzier v. Commissioner of Social Services*, 784 A.2d 323 (Conn. 2001).

April 5, 2000, from Ronald Preston, Associate Regional Administrator to Brian E. Barreira which reads as follows:²⁹

This is in reply to your letter concerning transfer of assets by community spouses. You advised us that it is the position of the Division of Medical Assistance (DMA) that the post-eligibility transfer made by community spouses causes Medicaid disqualification. Thus, you requested that we notify DMA of its need to come into compliance with federal law.

Under the transfer of assets provisions in § 1917(c) of the Social Security Act (the Act), transfers between spouses are exempt from any transfer penalty. Under the spousal impoverishment provisions of § 1924 of the Act, once eligibility is determined, the resources of the community spouse are no longer considered available to the institutionalized spouse. Thus, after the month in which an institutionalized spouse is determined to be eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse. That is, the community spouse can do whatever he or she wants with them.

Notwithstanding the Preston letter, at least one court has taken a different view. In *Thompson v. State of Connecticut Department of Social Services*, 1999 Conn. Super. LEXIS 3174 (CV 980063936 November 23, 1999), a Community Spouse transferred an exempt asset, first from the Institutionalized Spouse to himself, then to his daughter. The second transfer was challenged. In reviewing the transactions, the court found that while the transfer from the Institutionalized Spouse was an appropriate transfer, the second transfer from the Community Spouse to his daughter “was an obvious attempt to place the property beyond the reach of the State Department of Social Services.” *Id.*, at *5. As a result, the spousal exemption was lost thereby losing [the Institutionalized Spouse’s] eligibility for [Medicaid Benefits].” *Id.*, at *6. The Court found that “at the moment the community spouse moved out of the marital residence, the recipient’s eligibility for [Medicaid] would have been lost, since the value of the property would no longer be exempt.” *Id.*, at *7.

The *Thompson* decision appears to be both incorrect and an aberration; apparently it was a case of bad facts making bad law and was result driven. No other case has been found reaching a similar conclusion or following its holding. Further, the language in both 1396r-5 and 1396p support a conclusion more consistent with the Preston letter. Section 1396r-5 terminates deeming of marital assets at the time of eligibility. 42 U.S.C. § 1396r-5(c)(4). Thereafter, the only resources deemed available to the Institutionalized Spouse are those exceeding the CSRA. 1396r-5(c)(2)(B). Exempt resources, such as those discussed in *Thompson*, are specifically “carved out” for the benefit of the Community Spouse. 1396r-5(c)(5). Likewise, 1396p does not create a claim against

²⁹ Begley & Jeffreys, *Representing the Elderly Client: Law and Practice* Appendix 8B; see also <http://www.tn-elderlaw.com/000405-HCFA.jpg>. The position taken in the Preston letter is consistent with *Mohrmann v. Mohrmann, Wilson County Circuit Court, Tennessee, No. 11584*, an unpublished opinion cited in Takacs, *Elder Law Practice in Tennessee* § 8.05(f). There, the Tennessee Department of Human Services filed a notice, stating in part: “The Department recognizes that the proceeds [from the sale of a home] would have been separate property of the community spouse, and not a countable resource to the institutionalized spouse if the institutionalized spouse had transferred the exempt homestead prior to its sale (and it sold for fair market value) under the non penalty transfer of assets provisions.”

resources held by the Community Spouse.³⁰ Instead, it preserves a claim against “the property of an individual on account of medical assistance rendered to him.” 1396p(a). Since 1396p(c)(2) authorizes interspousal transfers without penalty, then assuming good planning occurs, the Institutional Spouse will not own assets subject to a lien at death.³¹

In *Nevada Department of Human Resources v. Ullmer*, 2004 Nev. LEXIS 20 (Nev. April 1, 2004), the court took a position that is at odds with the notion that exempt assets may be transferred for less than market value after eligibility is determined. There, Nevada placed a lien on the deceased Institutionalized Spouse’s interest in a homeplace prior to the Community Spouse’s death. The Community Spouse argued that the lien was in impermissible recovery and that it should be dissolved. The court found affirmed the use of pre-death liens as long as the lien is limited to the Medicaid applicant’s interest in the property, that the liens are released if the Community Spouse transfers the property for fair market value and the lien includes notice that surviving spouses are free to use or dispose of property through bona-fide transactions as a method of avoiding impoverishment. “Although the government is prohibited from executing its interest until the surviving spouse’s death, the government’s interest survives and continues with the property. Any individual who takes property upon the death of a Medicaid recipient, through inheritance, assignment, joint tenancy, etc., takes it subject to the government’s interest. ... [A]ny person who acquires an interest in the property through gift or fraudulent transfer, takes the property subject to the State’s interest granted by the estate recovery statutes.” *Id.*, at *13. The court held that this approach balances two important interests: avoiding spousal impoverishment and estate recovery. The effect, however, is that while the Community Spouse may spend the equity in the homeplace, she cannot give it away.³²

Interspousal Transfers that Exceed the CSRA:

As a general rule, there is no Medicaid penalty for asset transfers between spouses. 42 U.S.C. § 1396p(c)(2)(B). However, that does not mean interspousal transfers are without limit. In *McNamara v. Ohio Department of Human Services*, 744 N.E.2d 1216 (Ohio App. 2000), the court negated a transfer of assets beyond the CSRA by looking through a spousal trust to find the corpus available to pay the Institutionalized Spouse’s health care bills. There, Mr. McNamara transferred more than \$200,000 into an actuarially sound spousal trust for his benefit. His argument was that Section 1396p(c)(2)(B) permits unlimited transfers to or for the benefit of a spouse. The court rejected Mr. McNamara’s argument finding that permitting unlimited interspousal transfers would render the CSRA limits in Section 1396r-5 meaningless. Specifically, the court held that

³⁰ Beyond the fact that there is no statutory basis for a claim against the Community Spouse’s resources, allowing such claims would be contrary to the stated purpose of MCCA, to wit: to avoid impoverishing the Community Spouse.

³¹ An in-depth discussion of estate recovery is beyond the scope of this article. For a discussion of that topic, see D. McGuffey & T. Takacs, *Finishing Strong: Protecting the Recovery After Settlement or Verdict*, available at <http://www.mcguffey.com/ProtectingRecovery.pdf>.

³² In *Ullmer*, the homeplace was owned in joint tenancy when the Institutionalized Spouse died. *Ullmer* does not address whether the result would be different if the Institutionalized Spouse had transferred his interest in the homeplace to the Community Spouse prior to his death.

“the amount of funds that one person may transfer to his or her spouse under Section 1396p(c)(2)(b) is limited to the maximum accounts the community spouse may retain under CSRA provisions in Section 1396r-5(f).” *Id.*, at 1220.³³ The reasoning here is similar to a circumstance where an individual attempts to shield assets from his own creditors by making himself the beneficiary of a self-funded spendthrift trust; trusts of that sort are generally pierced for the benefit of creditors. Although the concepts are not identical, the result reached in *McNamara* is similar.

This begs the question: would the result have been different if Mr. McNamara owned the assets in his own name prior to Mrs. McNamara’s institutionalization? The answer, under *A.K. v. Division of Medical Assistance and Health Services* would be “no.” This is because (1) all assets are counted when the snapshot is taken, regardless of whose name they are in, and (2) other than the CSRA, all assets are deemed available to pay for the Institutionalized Spouse’s nursing home care.

In *Johnson v. Guhl*, 91 F.Supp.2d 754 (D. N.J. 2000), a group of individuals brought suit where Community Spouse Annuity Trusts (“CSATs”) were deemed available assets. There, assets beyond the CSRA were placed in a trust for the sole benefit of the Community Spouse. The trusts were actuarially sound, meaning that all income and principal would be paid out to the Community Spouse within her lifetime as calculated in life tables approved by CMS.³⁴ The plaintiffs’ contended that resources placed in an actuarially sound trust ceased to be “resources” and that they should be examined under 1396r-5(b)(1) rather than 1396r-5(c). Although the court agreed that placing assets into a sole benefit trust did not trigger a penalty under 1396p, that did not preclude the State from deeming the assets as “available” under 1396r-5(c). *Id.*, at 778. The court concluded that, under the plain meaning of the statute, a CSAT is a resource to the Community Spouse and therefore, is part of the total value of resources in determining the spousal share. *Id.*, at 779. In a later proceeding, the court affirmed its prior ruling. *Johnson v. Guhl*, 166 F.Supp.2d at 51-52.

In *Mertz v. Pennsylvania Department of Welfare*, 155 F. Supp.2d 414 (E.D. Pa. 2001), a different conclusion was reached. There, the Community Spouse converted \$106,600 in joint assets into two actuarially sound annuities paying him just under \$2,000 per month for five years (his life expectancy was 9.4 years), with a total payout of \$119,917.80.³⁵ Although Pennsylvania admitted the transaction was one for fair market value, it argued that the transfer was made for the purpose of qualifying for Medicaid and was, therefore, impermissible. Pennsylvania argued that MCCA supersedes 1396p(c)(2)(B). Citing Transmittal 64 (§ 3258.11), the court disagreed. The court found that, as long as the transaction was for fair market value (meaning that it is actuarially sound), Transmittal 64 authorizes the purchase of commercial annuities. Thereafter, the

³³ In reaching its decision, the Court noted that Section 1396r-5 supersedes other inconsistent provisions of Section 1396. See 42 U.S.C. § 1396r-5(a)(1). See also *Dempsey, Department of Public Welfare*, 756 A2d 90 (Pa. Commw. 2000) (finding that a commercial annuity which paid the Community Spouse income “far in excess of” the maximum allowance was not permitted).

³⁴ Centers for Medicare and Medicaid Services, www.cms.gov.

³⁵ By taking this action, the Community Spouse converted countable resources into an income stream and, as discussed below, income payable to the Community Spouse is unavailable.

“return on the annuities is not countable as federal law provides that no income of the community spouse may be deemed available to the institutionalized spouse.” *Mertz*, at 426-427.³⁶

Part 2: Income

Income and assets are treated differently. Unlike assets, income is not pooled in determining eligibility; the Community Spouse’s separate income is never considered available to the Institutionalized Spouse.³⁷ Thus, the standard income eligibility process for one person applies.

First, all income earned by the Community Spouse is hers and is unavailable to pay nursing home bills, regardless of the amount. *See* § 1396r-5(b)(1). This applies whether the income is pension income, annuity income or otherwise and is known as the “name on the check” rule. *See* § 1396r-5(b)(2)(A)(i). Further, MCCA protects a minimum amount of the couple’s combined income for the benefit of the Community Spouse.³⁸ If the Community Spouse’s separate income is less than a minimum amount (\$1,515 per month until July 1, 2004), then a portion of the Institutionalized Spouse’s income may be transferred to the Community Spouse to bring her monthly income up to certain minimum levels.

Post-Eligibility Treatment of the Institutional Spouse’s Income:

As eligibility is being determined, if the Community Spouse’s monthly income falls below the Minimum Monthly Maintenance Needs Allowance (“MMMNA”), then MCCA contemplates two methods of raising her income up to the MMMNA. First, a portion of the Institutionalized Spouse’s income may be transferred to her to bring her income up to the MMMNA. Second, the CSRA may be increased by an amount sufficient to purchase additional income for the Community Spouse. Each process would take place after the Institutionalized Spouse is determined eligible for Medicaid.

The MMMNA is the minimum amount of the couple’s income that may be allocated to the Community Spouse.³⁹ It is calculated as 150 percent of the poverty level for a two-person household.⁴⁰ If her separate income does not reach that threshold, then she is entitled to have a portion of the Institutionalized Spouse’s income transferred to her equal to the difference between her income and the MMMNA. In addition, the

³⁶ *See also Dean v. Delaware Department of Health and Social Services*, 2000 Del. Sup. LEXIS 490 (Del. Superior Ct. December 6, 2000). Although commercial annuities have been used successfully, private annuities have been deemed to be transfers without value (and subject to penalty) in a number of cases. *See, generally*, L. Frolik & M. Brown, *Advising the Elderly or Disabled Client*, 2nd Edition ¶ 14.03[2][c][iii] (Warren, Gorham & Lamont 2004).

³⁷ The State may, however, seek to enforce spousal support laws where the Community Spouse’s income exceeds the MMMNA. *See* Frolik, *supra*, ¶ 14.03[2][c][i].

³⁸ The spousal Impoverishment income rules are codified at 1396r-5(b) and (d).

³⁹ In Tennessee, this is called the Standard Maintenance Amount (SMA).

⁴⁰ 42 U.S.C. § 1396r-5(d)(3). The federal poverty level (and thus, the MMMNA) is adjusted every July 1st. From July 1, 2003 through June 30, 2004, the MMMNA is \$1,515.

Community Spouse may qualify for an excess shelter allowance if her combined housing and utility expenses exceed 30 percent of the MMMNA.⁴¹

The Institutionalized Spouse's remaining income, after certain deductions, is applied toward the payment of his nursing home bills. Deductions are made from the total income of the Institutionalized Spouse in the following order:

- A personal needs allowance (\$30 or less in many states, higher in a few);
- The Community Spouse's monthly income allowance (an amount set by the State annually based on the federal poverty level for a married couple), as long as the income is actually made available to her;
- A family monthly income allowance;
- An amount for medical expenses incurred by the institutionalized individual.

Since the Institutionalized Spouse' income (or a portion of his income) is applied toward his nursing home bills, Medicaid should be thought of as a "cost-share" program rather than a pure benefit.

If Kevin goes into the nursing home and Sally's income is less than the MMMNA, Sally will want to bring her income up to (at least) the MMMNA. In doing so, Sally would be better off if, instead of having part of Kevin's income, resources beyond the CSRA are used to purchase an additional income stream for her lifetime. The reason is that Kevin's income (Social Security and pension) may terminate at his death. If so, at Kevin's death, Sally will have a monthly budget deficit and will be forced to spend her CSRA to support herself. Where Sally's life expectancy exceeds a few years, she may exhaust her CSRA prior to death. The purchase of additional income is contemplated in 1396r-5(d)(1)(B) and was the subject of *Blumer, supra*.

Under the analysis described above, an income stream, or "annuity" in the name of the Community Spouse is not available to pay the Institutionalized Spouse's nursing home bills. An annuity could be purchased using non-exempt assets, thereby creating a new source of income for the Community Spouse. In *Blumer*, the Community Spouse she should be allowed to use non-exempt assets to purchase such an annuity rather than having a portion of her husband's assets transferred to her to bring her income up to the MMMNA. She argued that MCCA required a resource first analysis when bringing the enhancing the CSRA. Wisconsin, on the other hand, argued that an income first analysis is appropriate. The difference between the two is as follows:

Income First:

"Under the income-first method, 'community spouse's income' is defined to include not only the community spouse's actual income at the time of the 1396r-5(e) hearing, but

⁴¹ 42 U.S.C. § 1396r-5(d)(4). Where housing and utility costs exceed 30% of the MMMNA, the income allowance is adjusted upward to a maximum (in FY2004) of \$2,319. See Frolik, *supra*, ¶ 14.03[2][c][ii]. Some States, such as Georgia, allow the Community Spouse to keep the maximum.

also a potential posteligibility income transfer from the institutionalized spouse.” Blumer, at 484.

Resources First:

“The resources-first method, by contrast, excludes [posteligibility transfers] from consideration. ‘Community spouse’s income’ under that approach includes only income actually received by the community spouse at the time of the 1396r-5(e) hearing, not any anticipated posteligibility income transfer from the institutionalized spouse pursuant to § 1396r-5(d)(1)(B). If the community spouse’s income so defined will fall below the MMMNA, the CSRA will be raised to reserve additional assets sufficient to generate income meeting the shortfall, whether or not [a transfer of income from the Institutionalized Spouse] could also accomplish that task.” *Id.*, at 484.

The Community Spouse in *Blumer* argued that the resources first method is required under MCCA and that the State could not force her to use an income first approach. Unfortunately, the Court found that MCCA does not mandate one approach over another and that either may be used. Since *Blumer*, many States (including Tennessee) have adopted the income first method.

Part 3: Adjusting the CSRA & MMMNA

MCCA includes a mechanism for increasing both the CSRA and the MMMNA in certain cases. The methods by which this can be effected are described in 1396r-5(e), (d)(5) and (f)(3). In considering why an increase might be sought, consider the following extension of the “Kevin and Sally” example cited above:

I. Resources

<u>Non-Investment Income</u>	<u>Kevin</u>	<u>Sally</u>	
Social Security	\$1,400	\$750	
Pension	800	400	
Totals	\$2,200	\$1,150	\$3,350

II. Sally’s Monthly Expenses

Property tax	\$150.00
Home maintenance and upkeep	186.67
Homeowners insurance	40.50
Utilities (gas, electric, water & sewer, security)	250.00
Telephone	115.00
Cable television	60.00
Auto operation (gas and maintenance)	350.00
Auto insurance	60.00
Clothing	100.00
Groceries and other household	400.00

Hair cuts, personal grooming	80.00
Laundry and cleaning	20.00
Checking account charges/bank fees	8.00
Newspapers and magazines	30.00
Recreation, vacation, entertainment	285.00
Health insurance (such as Medicare supplement)	286.77
Unreimbursed medical expense (such as for drugs)	75.00
Life insurance	35.00
Charitable contributions	75.00
Internet service	16.16
Pest control service	33.00
Dentist	40.66
Optometrist	15.00
Veterinarian	8.00
Birthdays and Christmas gifts	70.00
Total Monthly Expenses:	\$2,789.76

In this example, assuming we are in Tennessee, Sally may keep all of her income. 1396r-5(b)(1). In addition, she is entitled to keep \$365 of Kevin's monthly income, which brings her up to the MMMNA (\$1,515).⁴² Further, because Sally's housing and utility expenses are \$627.17, which exceeds 30% of the MMMNA (\$454.50), she is entitled to an excess shelter allowance of \$172.67. However, \$1,687.67 will not meet Sally's monthly expenses as shown on this budget. Therefore, she will need to seek an increase in her MMMNA.

Kevin and Sally always have the option of accepting the Medicaid office's calculation of the CSRA and MMMNA and then doing nothing. However, if either Kevin or Sally believe the State's calculation is inadequate, it is their responsibility to initiate measures to increase the CSRA and/or the MMMNA. This is done in one of two ways:

1. By requesting an increase through the fair hearing process; or
2. By seeking a court order of support against the institutionalized spouse.⁴³

So, in the first instance, a "*Blumberg* election" must be made.⁴⁴ Which will they chose?

⁴² In Georgia, Sally would be entitled to the maximum community spouse allowance and, thus, would keep \$1,169 of Kevin's income.

⁴³ 42 U.S.C. § 1396r-5(d), (e), and (f).

⁴⁴ The phrase "Blumberg election" was coined by Timothy L. Takacs, the attorney who successfully litigated *Blumberg v. Tennessee Department of Human Resources*, 2000 WL 1586454 (Tenn.Ct.App.). See T. Takacs, *The Blumberg Election: Going to Court to Increase the Medicaid Spousal Allowance*, 3 NAELA Quarterly 8 (Summer 2003). The significance of *Blumberg* cannot be understated; prior to *Blumberg*, divorce was a much discussed tool in the Medicaid Planner's toolbox; since *Blumberg*, practitioners have a working model showing how they may protect the Community Spouse by seeking a support order without the emotional trauma of divorce. Since *Blumberg*, unless the couple *wants* a divorce, it is irresponsible to use divorce as a protective device without first seeking separate support.

In Blumberg v. Tennessee Department of Human Resources, 2000 WL 1586454 (Tenn.Ct.App.):

Frederic Blumberg ('Blumberg') filed a petition against his wife in the Sumner County Circuit Court, seeking all his wife's marital assets and an increase in his minimum monthly maintenance needs allowance. On September 16, 1998, the Sumner County Circuit Court issued an Order requiring Mrs. Blumberg to pay as support for the benefit of Mr. Blumberg, all of her monthly income. Subsequently, Blumberg applied for Medicaid benefits on behalf of Mrs. Blumberg, administered by the Tennessee Department of Human Services ("DHS"), for which he was approved. On October 26, 1998, Blumberg received notice from DHS that his request for an income allocation was denied. Thereafter, Blumberg requested an administrative hearing appealing the denial of spousal allocations. On December 8, 1998, an administrative hearing with DHS was held, and Blumberg's appeal was denied. The Chancery Court affirmed the decision of the DHS, finding that the support order was not validly adjudicated because of lack of notice to DHS.

On August 27, 1998, Mr. Blumberg had filed a petition in Circuit Court against his wife seeking a transfer of her marital property⁴⁵ and an increase in the MMMNA.⁴⁶ The court ordered Mrs. Blumberg to pay all of her monthly income to her husband as a community spouse allowance (increased MMMNA). Thereafter, Blumberg filed an application for Medicaid benefits and was denied. Blumberg appealed from that denial. On appeal, the Court of Appeals found that where a spouse seeks to increase the MMMNA, MCCA "sets out two different and independent avenues of procedure that can be followed in setting the increase." *Id.*, *2. First, 1396r-5(e)(2) gives the Community Spouse an opportunity to demonstrate needs beyond the MMMNA in an administrative Medicaid fair hearing. Alternatively, 1396r-5(d)(5) gives the Community Spouse a judicial option, by permitting her (or in this case, him) to seek court ordered support. "If a court has entered an order against an Institutionalized Spouse for monthly income for the support of the Community Spouse, the Community Spouse monthly income allowance for the spouse shall not be less than the amount of the monthly income so ordered." *Id.*, at *3.

The advantage of pursuing the judicial option, in part, is the court's familiarity with real life budgeting needs. Since MCCA does not prescribe the standard applied by the court when entering an order of support, the court has two options: first, apply the same standard used in fair hearing; second, apply the standard ordinarily applied in domestic relations cases.⁴⁷

If you go to court, be prepared to tell the judge why you are there. This author does not presume to improve on Takacs' suggestions, which are as follows:

"[T]ell the trial judge why you opted to take this Medicaid case into her court. Here are the facts, your Honor, that justify our coming here. The Medicaid minimum spousal allowances, applied to this case, do not advance the goal of avoiding the prospect of

⁴⁵ 42 U.S.C. § 1396r-5(f)(3).

⁴⁶ 42 U.S.C. § 1396r-5(d)(5).

⁴⁷ See *Takacs, The Blumberg Election*, *supra*, at 11-12. A number of States (including Tennessee as of 2002) have attempted to limit court authority by requiring use of the fair hearing standard. Although no case has been found addressing this issue, such action may be inconsistent with the intent of 1396r-5 since MCCA clearly envisions that courts may adjudicate support issues.

spousal impoverishment for this lonely, frightened woman here in your courtroom whose husband of 50-plus years is now in a nursing home and is not likely ever to come home. Your judge wants to know what the intent of the legislature was, and how the court can carry out that intent. **Your job, in a nutshell, is to convince the judge why she should deviate from the default allowances set for the community spouse in the Medicare Catastrophic Coverage Act. The intent of the Act is [to] avoid impoverishment of the community spouse, without eliminating Medicaid's share-of cost requirement.** Are these allowances not sufficient to avoid this result? (Emphasis added).⁴⁸

The circumstances of each case should be considered when determining which direction to go. Where the circumstances warrant it, to prevent Sally's impoverishment, she should go to court.⁴⁹

Conclusion

Just as Mr. Miyagi told Daniel, "wax on, wax off" (and so on) in preparing Daniel to learn Karate, this article focuses on MCCA's spousal impoverishment provisions. A proper understanding of the rules is a necessary predicate to Medicaid Planning.⁵⁰ Nonetheless, an understanding of the rule is simply the beginning. What distinguishes the asset protection lawyer from the Elder-centered lawyer is not be mastery of this subject, since both should understand it. The Elder centered lawyer masters these rules as the first step in helping her clients engage in Life Care Planning. The Life Care Planning process is where we use protected assets to improve the quality of our clients' lives. Just as Blumberg faced his election, we have ours. After we master the mechanics of MCCA's spousal impoverishment provisions, will we go the next step?⁵¹

Appendix A

42 U.S.C. § 1395r-5

Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses.

⁴⁸ *The Blumberg Election, supra*, 15.

⁴⁹ Takacs provides his analysis of which option should be chosen in *The Blumberg Election, supra*, at 14-15.

⁵⁰ For a discussion of Medicaid Planning, see Takacs, *Elder Law Practice in Tennessee, supra*, Chapter 6; Frolik, *Advising the Elderly or Disabled Client, supra*, ¶ 14.04 – 14.06; Begley, *Representing the Elderly Client, supra*, Chapter 8; and R. Fleming, *Elder Law Answer Book, 2nd Edition* Q. 14:54-14:98 (Aspen Publishers 2004). For a discussion of ethical issues related to Medicaid Planning, see T. Takacs & D. McGuffey, *Medicaid Planning: Can It Be Justified?: Legal and Ethical Implications of Medicaid Planning*, 29 William Mitchell Law Review 111 (2002).

⁵¹ Although "the next step" is not the subject of this article, it is addressed in T. Takacs & D. McGuffey, *The Elder Centered Law Practice: What it is, How to attain it*, at <http://www.tn-elderlaw.com/eldercentered.pdf>.

(1) Supersedes other provisions. In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1)), the provisions of this section supersede any other provision of this title (including sections 1902(a)(17) and 1902(f) [42 USCS § 1396a(a)(17) and (f)]) which is inconsistent with them.

(2) No comparable treatment required. Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1902(a) [42 USCS § 1396a(a)(10) or (17)], require such treatment for other individuals.

(3) Does not affect certain determinations. Except as this section specifically provides, this section does not apply to--

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories.

(A) Application in States operating under demonstration projects. In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1115 [42 USCS § 1315], the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this title [42 USCS §§ 1396 et seq.].

(B) No application in commonwealths and territories. This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs. This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1934(a)(7) [42 USCS § 1396u-4(a)(7)]) or under a PACE program under section 1934 or 1894 [42 USCS § 1396u-4 or 1395eee].

(b) Rules for treatment of income.

(1) Separate treatment of income. During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income. In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d), except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property. Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides--

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property. In the case of a trust--

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this title [42 USCS §§ 1396 et seq.] (including sections 1902(a)(17) and 1917(d) [42 USCS §§ 1396a(a)(17) and 1396p(d)]), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust--

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(C) Property with no instrument. In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) Rebutting ownership. The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources.

(1) Computation of spousal share at time of institutionalization.

(A) Total joint resources. There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)--

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment. At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this title [42 USCS § § 1396 et seq.], the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2).

(2) Attribution of resources at time of initial eligibility determination. In determining the resources of an institutionalized spouse at the time of application for benefits under this title [42 USCS § § 1396 et seq.], regardless of any State laws relating to community property or the division of marital property--

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) (as of the time of application for benefits).

(3) Assignment of support rights. The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where--

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established. During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this title [42 USCS § § 1396 et seq.], no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined. In this section, the term "resources" does not include--

(A) resources excluded under subsection (a) or (d) of section 1613 [42 USCS § 1382b(a) or (d)], and

(B) resources that would be excluded under section 1613(a)(2)(A) [42 USCS § 1382b(a)(2)(A)] but for the limitation on total value described in such section.

(d) Protecting income for community spouse.

(1) Allowances to be offset from income of institutionalized spouse. After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1902(q)(1) [42 USCS § 1396a(q)(1)]), in an amount not less than the amount specified in section 1902(q)(2) [42 USCS § 1396a(q)(2)].

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1902(r) [42 USCS § 1396a(r)]).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined. In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e), the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance.

(A) In general. Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981 [42 USCS § 9902(2)]) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent. For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of--

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance. The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed \$ 1,500 (subject to adjustment under subsections (e) and (g)).

(4) Excess shelter allowance defined. In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of--

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 5(e) of the Food Stamp Act of 1977 [7 USCS § 2014(e)]) or, if the State does not use such an allowance, the spouse's actual utility expenses, exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support. If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(e) Notice and fair hearing.

(1) Notice. Upon--

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B)), of the amount of any family allowances (described in subsection (d)(1)(C)), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f), and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing.

(A) In general. If either the institutionalized spouse or the community spouse is dissatisfied with a determination of--

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B));

(iii) the computation of the spousal share of resources under subsection (c)(1);

(iv) the attribution of resources under subsection (c)(2); or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2));

such spouse is entitled to a fair hearing described in section 1902(a)(3) [42 USCS § 1396a(a)(3)] with respect to such determination if an application for benefits under this title [42 USCS § § 1396 et seq.] has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance. If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A), an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance. If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse.

(1) In general. An institutionalized spouse may, without regard to section 1917(c)(1) [42 USCS § 1396p(c)(1)], transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined. In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which--

(A) the greatest of--

(i) \$ 12,000 (subject to adjustment under subsection (g)), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1), or (II) \$ 60,000 (subject to adjustment under subsection (g)),

(iii) the amount established under subsection (e)(2); or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders. If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1917 [42 USCS § 1396p] shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1)).

(g) Indexing dollar amounts. For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions. In this section:

- (1) The term "institutionalized spouse" means an individual who--
 - (A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI) [42 USCS § 1396a(a)(10)(A)(ii)(VI)], and
 - (B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.
- (2) The term "community spouse" means the spouse of an institutionalized spouse.

Appendix B

42 U.S.C. § 1396p.

Liens, adjustments and recoveries, and transfers of assets

(a) Imposition of lien against the property of an individual on account of medical assistance rendered to him under a State plan.

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except--

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual--

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home, except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if--

(A) the spouse of such individual,

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under title XVI [42 USCS § § 1381 et seq.]) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [42 USCS § 1382c], or

(C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), is lawfully residing in such home.

(3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall dissolve upon that individual's discharge from the medical institution and return home.

(b) Adjustment or recovery of medical assistance correctly paid under a State plan.

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical

assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B), the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of--

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan.

(C) (i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, which provided for the disregard of any assets or resources--

(I) to the extent that payments are made under a long-term care insurance policy; or

(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time--

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under title XVI [42 USCS § § 1381 et seq.]) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [42 USCS § 1382c]; and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B), when--

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution),

is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual--

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(c) Taking into account certain transfers of assets.

(1) (A) In order to meet the requirements of this subsection for purposes of section 1902(a)(18) [42 USCS § 1396a(a)(18)], the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in

subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

(B) (i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d), 60 months) before the date specified in clause (ii).

(ii) The date specified in this clause, with respect to--

(I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan, or

(II) a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value.

(C) (i) The services described in this subparagraph with respect to an institutionalized individual are the following:

(I) Nursing facility services.

(II) A level of care in any institution equivalent to that of nursing facility services.

(III) Home or community-based services furnished under a waiver granted under subsection (c) or (d) of section 1915 [42 USCS § 1396n(c) or (d)].

(ii) The services described in this subparagraph with respect to a noninstitutionalized individual are services (not including any services described in clause (i)) that are described in paragraph (7), (22), or (24) of section 1905(a) [42 USCS § 1396d(a)(7), (22), or (24)], and, at the option of a State, other long-term care services for which medical assistance is otherwise available under the State plan to individuals requiring long-term care.

(D) The date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.

(E) (i) With respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to--

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

(ii) With respect to a noninstitutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall not be greater than a number equal to--

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

(iii) The number of months of ineligibility otherwise determined under clause (i) or (ii) with respect to the disposal of an asset shall be reduced--

(I) in the case of periods of ineligibility determined under clause (i), by the number of months of ineligibility applicable to the individual under clause (ii) as a result of such disposal, and

(II) in the case of periods of ineligibility determined under clause (ii), by the number of months of ineligibility applicable to the individual under clause (i) as a result of such disposal.

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that--

(A) the assets transferred were a home and title to the home was transferred to--

(i) the spouse of such individual;

(ii) a child of such individual who (I) is under age 21, or (II) (with respect to States eligible to participate in the State program established under title XVI [42 USCS § § 1381 et seq.]) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [42 USCS § 1382c];

(iii) a sibling of such individual who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date the individual becomes an institutionalized individual; or

(iv) a son or daughter of such individual (other than a child described in clause (ii)) who was residing in such individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who (as determined by the State) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility;

(B) the assets--

(i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,

(ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,

(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or

(iv) were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)];

(C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual; or

(D) the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary;[.]

(3) For purposes of this subsection, in the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

(4) A State (including a State which has elected treatment under section 1902(f) [42 USCS § 1396a(f)]) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance under a State plan for such individual, a State shall, using a reasonable methodology (as specified by the Secretary), apportion such period of ineligibility (or any portion of such period) among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State plan.

(5) In this subsection, the term "resources" has the meaning given such term in section 1613 [42 USCS § 1382b], without regard to the exclusion described in subsection (a)(1) thereof.

(d) Treatment of trust amounts.

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this title [42 USCS §§ 1396 et seq.], subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2) (A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to--

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

- (iv) any restrictions on the use of distributions from the trust.
- (3) (A) In the case of a revocable trust--
 - (i) the corpus of the trust shall be considered resources available to the individual,
 - (ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and
 - (iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c).
- (B) In the case of an irrevocable trust--
 - (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income--
 - (I) to or for the benefit of the individual, shall be considered income of the individual, and
 - (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and
 - (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed of by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.
- (4) This subsection shall not apply to any of the following trusts:
 - (A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1614(a)(3) [42 USCS § 1382c(a)(3)]) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [42 USCS §§ 1396 et seq.].
 - (B) A trust established in a State for the benefit of an individual if--
 - (i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),
 - (ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [42 USCS § 1396 et seq.], and
 - (iii) the State makes medical assistance available to individuals described in section 1902(a)(10)(A)(ii)(V) [42 USCS § 1396a(a)(10)(A)(ii)(V)], but does not make such assistance available to individuals for nursing facility services under section 1902(a)(10)(C) [42 USCS § 1396a(a)(10)(C)].
 - (C) A trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] that meets the following conditions:
 - (i) The trust is established and managed by a non-profit association.
 - (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
 - (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
 - (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title [42 USCS § 1396 et seq.].
- (5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.
- (6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

(e) Definitions. In this section, the following definitions shall apply:

(1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action--

(A) by the individual or such individual's spouse,

(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or

(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(2) The term "income" has the meaning given such term in section 1612 [42 USCS § 1382a].

(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1902(a)(10)(A)(ii)(VI) [42 USCS § 1396a(a)(10)(A)(ii)(VI)].

(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii).

(5) The term "resources" has the meaning given such term in section 1613 [42 USCS § 1382b], without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.