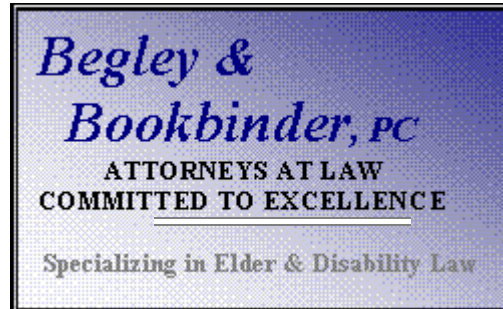


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Protection From Spousal Impoverishment

By Thomas D. Begley, Jr., Esquire

In 1988, Congress passed the Medicare Catastrophic Coverage Act (MCCA). Pub. L. No. 100-360 codified at 42 U.S.C. § 1396p(c) as amended by 42 U.S.C. § 1396r-5. Provisions of this Act were designed to avoid impoverishing the community spouse. For example, since October 1, 1989, the income of the community spouse is no longer deemed available to the institutionalized spouse at any time for the cost of care. In addition, the community spouse is entitled to a Minimum Monthly Maintenance Needs Allowance (MMMNA), which may come in whole or in part from the income of the institutionalized spouse.

Minimum Monthly Maintenance Needs Allowance. Under MCCA, the community spouse is entitled to a MMMNA. *N.J.A.C. 10:71-5.7(c)*. For the period July 1, 2006 through June 30, 2007, the figure is \$1,650. Medicaid Communication 06-06. This figure is adjusted on July 1 of each calendar year. The actual income of the community spouse is subtracted from this figure. In addition, the community spouse is allowed an "excess shelter allowance" to the extent that the living expenses of the community spouse exceed \$495 dollars per month. This figure is also adjusted as of July 1 of each calendar year.

The Minimum Monthly Maintenance Needs Allowance and the excess shelter allowance combined cannot exceed \$2,541.50 in 2007. This is adjusted annually.

The excess shelter allowance is calculated by totaling the shelter expenses of the community spouse. These expenses are limited to rent, a mortgage (including principal and interest), taxes and insurance, a utility standard for the individual's utility expenses, and maintenance charges for a condominium or co-op. *N.J.A.C. 10:71-5.7*. A standard utility charge is permitted. Medicaid Communication 05-09. For the period October 1, 2006 through September 30, 2007, a person paying for heat is entitled to a standard allowance of \$286. A person not paying for heating fuel, but paying for utility expenses other than telephone, water, sewerage, or garbage collections is entitled to an allowance of \$211, and if a person pays only for telephone, the allowance is \$29. This is adjusted annually on October 1 of each calendar year.

Expansion of MMMNA. Under *N.J.A.C. 10:71-5.7(e)*, the MMMNA may be increased at a Fair Hearing in accordance with *N.J.A.C. 10:71-8.4*. It must be established at the Fair Hearing that the MMMNA is inadequate due to exceptional circumstances resulting in financial duress. Upon such a showing, a larger MMMNA will be substituted for as long as directed in the Fair Hearing.

In *E.S. v. DMAHS*, OAL Dkt. No. HMA-3166-00, J.S. applied for an increase in her MMMNA based on exceptional circumstances resulting in significant financial distress. E.S. and J.S. are married and E.S. is a Medicaid recipient. For many years E.S. and J.S. had suffered severe medical problems and had two loans from J.S.'s 401k. The loans were repayable at the rate of \$239.10 per month. They also had credit card bills totaling approximately \$220.00 per month. The Administrative Law Judge held and the Director agreed that this constituted exceptional circumstances resulting in significant financial duress and authorized an increase in the MMMNA in the amount of \$239.10 per month to pay the 401k loan.

A similar case, *S.M. v. DMAHS*, OAL Dkt. No. HMA-2398-01, involved S.M., who had credit card debt of approximately \$22,036.30, requiring minimum payments of \$455.00. All of the debt was incurred prior to petitioner's institutionalization. The Administrative Law Judge found that these facts constituted exceptional circumstances resulting in significant financial duress. The Director agreed, noting, "However, I find that repayment of the credit card debt to be an expense warranting additional income only to the extent that the debt was incurred prior to the Petitioner's husband's institutionalization."

Community Spouse Resource Allowance. For individuals institutionalized on or after September 30, 1989, MCCA provides for the pooling and division of the couple's total resources and allows the community spouse to retain a Community Spouse Resource Allowance (CSRA) as a protection against impoverishment.

The CSRA is composed only of countable resources. The community spouse is entitled to one-half of the couple's pooled countable resources. For 2007, there is a minimum of \$20,238 and a maximum of \$101,640. Some states have adopted the top figure (\$101,640) as a maximum and minimum resource allowance. New Jersey has not done so.

If a court of competent jurisdiction has entered an order that the community spouse is to receive greater resources than that authorized by Medicaid, the court ordered amount is recognized as the community spouse's share. *N.J.A.C. 10:71-4.8(a)4*. Medicaid will not recognize a divorce that it perceives to be a "Medicaid divorce" done simply for purposes of expanding the CSRA.

The snapshot of the couple's resources is taken as of the first day of the first month of the first period of continuous institutionalization beginning on or after September 30, 1989. The individual is entitled to a resource assessment as of the beginning of the continuous period of institutionalization. 42 U.S.C. § 1396r-5(c)(1)(B). *N.J.A.C. 10:71-4.9*. The regulations differentiate between types of facilities for purposes of deeming whether an individual is "institutionalized." In regulation *N.J.A.C. 10:71-4.10(b)2*, individuals are not presumed "institutionalized" if they are residing in an acute care general hospital. Individuals are to be deemed institutionalized, on the other hand, if they are residing in a Medicaid-certified nursing facility, an intermediate care facility for the mentally retarded, a licensed special hospital, and a Title XIX psychiatric hospital (if he or she is under age 21 or over age 65). Individuals can also be deemed to be institutionalized if they are applying for benefits under a home and community-based waiver program.

The assessment of the couple's resources can be made upon request of either party in accordance with *N.J.A.C. 10:71-4.9* or at the time of application for Medicaid benefits. The community spouse's share is determined as of the first moment of the first day of the month of the current period of institutionalization. *N.J.A.C. 10:71-4.8(a)*. A continuous period of institutionalization is broken by absences from the institution for 30 consecutive days. *N.J.A.C. 10:71-4.8(a)7*.

The Medicaid statute is silent as to the treatment of resources acquired between the date of institutionalization and the application for Medicaid. The practice in New Jersey, however, is to take a second snapshot at the time of Medicaid application.

Expansion of Community Spouse Resource Allowance. A hearing may be requested for purposes of increasing the CSRA if it is necessary to raise the community spouse's income to the level of the MMMNA. 42 U.S.C. § 1396r-5(e)(2)(C). *N.J.A.C. 10:71-5.7(d)*. The theory is that if the community spouse's income is below the MMMNA, the community spouse should be given additional assets to invest to make up the deficiency in income.

Whether the community spouse must first look to the income of the institutionalized spouse to make up the deficiency has been questioned. The language in *N.J.A.C. 10:71-5.7(d)* "when the institutionalized individual's income is insufficient to provide the maximum authorized deduction for the community spouse," requires that the community spouse look first to the income of the institutionalized spouse. This is known as the "income first" rule. The Deficit Reduction Act § 6013 makes clear that the "income first" rule applies in all states.

In a case of first impression, the U.S. District Court of Appeals held that Social Security payments are non-assignable, and even if a state adopts an income first rule it cannot apply it to Social Security benefits. *Robbins v.*

DeBuono, 218 F.3d 197 (2d Cir. 2000). However, a subsequent U.S. District Court case reached the opposite conclusion, *Ruck v. Novello*, 295 F. Supp.2d 258 (W.D. N.Y. 2003), and a Massachusetts court held that deeming of the institutionalized spouse's Social Security for the community spouse does not violate the anti-alienation provisions of the Social Security Act. 42 U.S.C. § 407a. The Massachusetts court held that the Social Security Act protects benefits from "execution, levy, attachment, garnishment, and other judicial process." The court held *Robbins* to be "unpersuasive." *Bianconi v. Preston*, D. Mass., Civil Action No. 03-30268-MAP, August 23, 2005.

In *S.N. v. DMAHS*, OAL Dkt. No. HMA-7382-00, Mr. and Mrs. N. had countable assets totaling \$53,664.00. The CSRA was \$26,832. The applicable MMMNA was \$1,383. Petitioner's total monthly income was \$1,070.00. Mrs. N.'s total monthly income was \$419.00. They had a shelter expense of \$781.00. The Administrative Law Judge held that, utilizing a five percent rate of return, the monthly income generated from Mrs. N.'s share of resources is \$120.00 which was a shortfall of \$176.00 for June 2000 and \$193.00 for July 2000. The ALJ held that Mrs. N. was entitled to retain an additional \$24,832, generating an income at five percent to make up the difference. The Director agreed.

Thomas D. Begley, Jr. spoke at the Florida Bar Association Program for Out-of-State Lawyers held on February 10th in New York City on the topic of Medicaid Planning After Reform.



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