

# THE EFFECT OF DIVORCE ON PUBLIC BENEFITS

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This program will explore the effect of divorce on the primary public benefits received by seniors and disabled persons. These benefits include the following:

- Social Security Retirement Benefits
- SSI
- Medicaid
- SSD
- Medicare
- Section 8 Housing
- PAAD and Senior Gold

Each benefit program will be described briefly and the effect of the divorce will be discussed.

## 1. SOCIAL SECURITY RETIREMENT BENEFITS

1.1. **Who Benefits.** Social Security Retirement is a monthly income payable to eligible workers, spouses and former spouses.

1.2. **The Benefit.** Benefits are based on a worker's primary insurance amount (PIA).<sup>1</sup> The benefit equal to 100% of PIA is paid to a fully-insured worker at normal retirement age.<sup>2</sup> Normal retirement age for individuals born in 1937 or earlier is 65. The maximum benefit for a person retiring at normal retirement age is approximately \$1,600 per month. It is indexed for inflation. For individuals in 1938 or later normal retirement age is determined as follows:<sup>3</sup>

<u>Year of Birth</u>	<u>Normal Retirement Age</u>
1938	65 years plus 2 months
1939	65 years plus 4 months
1940	65 years plus 6 months
1941	65 years plus 8 months
1942	65 years plus 10 months
1943-54	66 years

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<sup>1</sup>42 USC § 415; 20 CFR §§ 404.201 - 404.290.

<sup>2</sup>42 USC § 402(a); 20 CFR § 404.310.

<sup>3</sup>42 USC § 416(I).

<u>Year of Birth</u>	<u>Normal Retirement Age</u>
1955	66 years plus 2 months
1956	66 years plus 4 months
1957	66 years plus 6 months
1958	66 years plus 8 months
1959	66 years plus 10 months
1960 or later	67 years

Workers may retire as early as age 62 with a reduced benefit. Reduction is 5/9ths of 1% for each month of early retirement up to 36 months and 5/12ths of 1% for each additional month. A worker applying early is not eligible for benefits until one month after attaining age 62. Therefore, the maximum reduction is 20% for a worker attaining age 62 in 2002.

Benefits are increased by delaying retirement until after the normal retirement age. Delayed retirement credit is 5.5% per year for workers reaching age 65 in 1998. The credit increases by .5% per year in subsequent even numbered years until the year 2008 when the credit will reach 8% per year.

There are various formulas for calculating the worker's PIA, but basically they involve the amount of worker's contributions into the system.

A spouse or divorced spouse is entitled to the benefits on a fully-insured worker's earnings record. While the worker is alive and receiving benefits the spouse's benefit equals 50% of the worker's primary insurance amount, if the spouse applies at normal retirement age. After the worker's death a spouse or divorced spouse aged 65 or older may receive survivorship benefits equal to the payment the worker was receiving or eligible to receive. In other words, the spouse receives the higher of the worker's benefit or the spouse's benefit.

There is a family maximum that can be paid to the worker, the worker's spouse, the worker's divorced spouse or certain eligible surviving children.

### **1.3. Eligibility for Benefits.**

**1.3.1. Coverage.** The person is "fully insured"<sup>4</sup> for life if the person has 40 covered quarters (Quarters of Coverage). To over-simplify a Quarter of Coverage is a quarter in which the worker worked and paid into the system. Fully-insured status is necessary for a worker to receive retirement benefits. Retirement benefits are called "old age" benefits by the Social Security Administration.

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<sup>4</sup>42 USC § 413(c); 20 CFR § 404.110(d).

The individual must have been an employee or been self-employed.<sup>5</sup> An individual's job must be covered employment.<sup>6</sup> Most employment is covered except for federal employees hired prior to January 1, 1984, state and local government employees who have elected not to participate, employees of non-profit organizations prior to January 1, 1984, railroad workers and some agricultural and domestic workers.

Effective October 1999 the Social Security Administration (SSA) must provide all persons age 25 and older with an annual account statement.<sup>7</sup>

**1.3.2. Tax.** The Social Security tax is based on wages paid and is 7.65%. There is a maximum for Social Security tax of \$87,000 for 2003. Employers pay a matching tax. For self-employed persons the withholding rate is 15.30. Social Security is considered an insurance program not a welfare program. This is because the worker pays into the system.

**1.3.3. Spouse.** Whether or not a person is a worker's spouse depends on the law of the state where the worker had a permanent home when the spouse applied for spousal benefits.<sup>8</sup> For example, some states do not recognize common law marriages. Other states do recognize these marriages. To be eligible for benefits the spouse must have been married to the worker for at least one year.

**1.3.4. Divorced Spouse.** In the case of a divorced spouse, the person must be at least 62 years of age, not presently married, not entitled to old age or disability benefits that would be larger than a spouse's full benefit and have been married to the worker for at least 10 years. The worker must be entitled to benefits but need not have applied for benefits. There must be at least a two year gap between the divorce and the application, except if the divorce occurred after the worker had become entitled to benefits. The divorced spouse meeting these criteria is entitled to benefits notwithstanding the fact that the worker is retired or is remarried. The divorced spouse loses these benefits if the divorced spouse remarries. If a divorced spouse remarries, he or she may again

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<sup>5</sup>42 USC § 410(j); 20 CFR §§ 404.1005 - 404.1008.

<sup>6</sup>42 USC § 410(a); 20 CFR §§ 404.1003 - 404.1004.

<sup>7</sup>42 USC § 1320b - 13(c).

<sup>8</sup>42 USC § 416(h)(1)(A); 20 CFR § 404.345.

become eligible for benefits if the new spouse is also entitled to Social Security Retirement Benefits in his or her own right.

**1.3.5. Widow or Widower's Benefits.** A surviving spouse or surviving divorced spouse is entitled to survivorship benefits based on the earnings record of a fully insured worker. This benefit is usually the same as the deceased worker was entitled to receive.<sup>9</sup> Whether the spouse or divorced spouse was receiving benefits while the worker was alive is immaterial; however, the survivorship benefits will be increased if the spouse delays application beyond normal retirement age and will be decreased if the spouse applies between the age 60 and normal retirement age.

**1.4. Effect of Divorce.**

**1.4.1. Both Spouses Entitled to Social Security Based on Their Respective PIA.** Assuming each spouse is entitled to benefits based on their own PIA, and assuming such benefits are greater than the benefit payable to the worker's spouse or former spouse then divorce will have no effect on the divorced spouse's Social Security Retirement Benefit.

**1.4.2. Spouse Not Entitled to Benefits Based on Spouse's Own PIA.** The divorce will have no effect on the divorced spouse's right to Social Security based on the worker's PIA, if the couple is married for at least 10 years immediately before the divorce became final. If the divorce took place before the marriage reached its 10<sup>th</sup> anniversary, then the divorced spouse would lose retirement benefits. If the worker was not yet entitled to benefits, the divorced spouse would have to wait two years.

**1.4.3. Divorced Spouse Remarries.** If the divorced spouse remarries, he or she will lose the retirement benefits based on the former spouse's PIA. After one year, he or she will be entitled to retirement benefits based on the PIA of the new spouse, assuming the new spouse is eligible in his or her own right.

**2. SSI**

**2.1. Who Benefits.** SSI is an income maintenance program designed for eligible aged, blind and disabled persons. SSI is a welfare program and is means-tested.

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<sup>9</sup>42 USC § 402(e)(2)(B), (f)(3)(B); 20 CFR § 404.338.

**2.2. The Benefit.** The purpose of the SSI payment is to provide the recipient with income to be used for food, clothing and shelter.<sup>10</sup> The amount of the federal SSI benefit for eligible individuals is \$552 for individuals and \$829 for a couple,<sup>11</sup> plus a small state supplement minus other available income.

**2.3. Eligibility Requirements.** There are five eligibility requirements for SSI:

- Categorical
- Residence
- Financial
- Application for Other Benefits
- Non-Institutionalization

**2.3.1. Categorical.** An applicant for SSI must be at least 65 years of age, blind, or disabled.<sup>12</sup>

**2.3.2. Residence.** An SSI recipient must be a citizen of the United States or a qualified alien and a resident of the United States. Residency must be for a period of 30 consecutive days.<sup>13</sup> Absence from the United States for a period of 30 consecutive days terminates a person's rights to SSI, but a new application can be made after a new 30-day period of residency is established.

**2.3.3. Financial.** SSI recipients must first meet financial tests. SSI is a means-tested program.

**2.3.3.1. Income.** SSI categorizes income as countable and non-countable, earned or unearned, and cash or in-kind. The first \$20 of most income received in a month is disregarded. Income is defined as "anything a person receives in cash or in-kind that can be used to meet a person's needs for food, clothing or shelter."<sup>14</sup> Certain items cannot be used for food, clothing and shelter and are, therefore, not counted as income. These are found at 20 C.F.R. §416.1103. Receipt of cash income reduces SSI payments dollar-for-dollar.

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<sup>10</sup>20 CFR § 416.110.

<sup>11</sup>42 USC § 1382f(a); 67 Fed. Reg. 65620 (October 25, 2002).

<sup>12</sup>42 USC § 1382c(a)(1)(A).

<sup>13</sup>42 USC § 1382(f).

<sup>14</sup>20 CFR § 416.1102.

**2.3.3.2. Earned Income.** Earned income is defined as wages before deductions and net earnings from self-employment.<sup>15</sup> However, there are certain exclusions from earned income. These exclusions include: federal assistance payments; \$10 per month of infrequent income; \$65 plus one-half of remaining income per month.<sup>16</sup> Certain special exclusions apply to blind and disabled persons.

**2.3.3.3. Unearned Income.** Unearned income is defined as all income that is not earned.<sup>17</sup> Examples of unearned income include: interest; dividends; alimony; annuities; pensions; and, inheritances. Exclusions from unearned income are limited to tuition scholarships, \$20 of infrequent income, and one-third of child support payments to the disabled child.

**2.3.3.4. ISM Rules.** In-kind Support and Maintenance (ISM) is the receipt of food, clothing or shelter furnished by a third party.<sup>18</sup> This will reduce a recipient's benefits.<sup>19</sup> The idea is that since SSI benefits are specifically intended to pay for a person's food, clothing and shelter, if that person receives food, clothing and shelter from another source, then less SSI benefits are needed. The reduction of SSI benefits for ISM is not on a dollar-for-dollar basis as with cash. A recipient's living arrangements determine whether in-kind support and maintenance is valued by the one-third reduction rule or the presumed-value rule. If a recipient lives in the household of another, the SSI benefit would be reduced by one-third.<sup>20</sup> However, there is no reduction if the recipient pays a *pro rata* share of the food or shelter expenses.<sup>21</sup>

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<sup>15</sup>42 USC § 1382a(a); 20 CFR § 416.1110.

<sup>16</sup>20 CFR §§ 416.1112(b) and (c).

<sup>17</sup>42 USC § 1382a(a)(2); 20 CFR § 416.1120.

<sup>18</sup>20 CFR § 416.1130(b).

<sup>19</sup>20 CFR §§ 416.1100 and 416.1130(b).

<sup>20</sup>42 USC § 1382a(a)(2)(A); 20 CFR § 416.1131.

<sup>21</sup>20 CFR § 416.1133(a).

Where the recipient lives in his or her own household, the "presumed-value" rule does apply.<sup>22</sup> This means that the payment is reduced by one-third of the benefit rate plus \$20.

**2.3.3.5. Deeming of Income.** Income of an ineligible spouse or ineligible parent or sponsor of an alien is deemed to the SSI applicant.<sup>23</sup> Living arrangements determine when deeming occurs. If the claimant lives in the same household as the ineligible spouse or parent, deeming will occur. This means that in calculating the income of the SSI applicant, the income of the ineligible spouse or parent living in the same household will be attributed to the SSI applicant. Income from the sponsor of an alien is deemed to the SSI applicant, even if a residence is not shared. If a child under 18 lives in the household of a parent, the income of the parent is deemed to the child. This is why children under 18 seldom receive SSI payments unless their parents have income below the poverty line. Once a child reaches 18, the income of the parent is no longer deemed to the child.

**2.3.3.6. Resources.** As a general rule, the countable resources of a single person cannot exceed \$2,000, and the countable resources of a married couple cannot exceed \$3,000 if they are living together.<sup>24</sup> "Resources" means cash or other liquid assets, or any real or personal property that a person or his/her spouse own and can convert to cash for support and maintenance.<sup>25</sup>

As with income, resources are deemed. Living arrangements determine the deeming of resources. A person living with an ineligible spouse has the resources of the ineligible spouse deemed himself or herself. A child under 18 years of age living with an ineligible parent suffers the same result. However, upon the child attaining 18, the resources of the parent are no longer deemed to the child living in the

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<sup>22</sup>20 CFR § 416.1140.

<sup>23</sup>20 CFR § 416.1160(a).

<sup>24</sup>20 CFR § 416.1205(c).

<sup>25</sup>20 CFR § 416.1201(a).

household of a parent. Similarly, resources of an alien's sponsor in excess of \$2,000 for an individual, \$3,000 for a couple, are deemed to the alien.

However, certain resources are non-countable. These include: the individual's home, if it is occupied by the individual as his or her principal residence or, if the person is institutionalized, if the home is occupied by the spouse, or by a child under 21 blind or disabled;<sup>26</sup> household goods and personal effects with a value of not more than \$2,000; an automobile with a value of \$4,500, unless used for employment or medical treatment or specially-equipped for a handicapped person in which event there is no dollar limit; the cash values of life insurance policies are excluded if the face value does not exceed \$1,500 on all such policies; and, burial plot and funds for burial up to \$1,500 per individual are also excluded.

**2.3.3.7. Application for Other Benefits.** A person must file an application for SSI benefits and also for any other benefits to which the person may be entitled.<sup>27</sup> Receipt of the other benefits will reduce or eliminate the SSI benefit. Reduction is on a dollar-for-dollar basis. This explains why certain disabled persons receive SSI, Medicaid, as well as SSD and Medicare. For this combination to occur, the SSD payment must be lower than the SSI benefit, which the individual would have received if he or she were not also eligible for SSD.

**2.3.3.8. Transfer Penalties.** An individual or spouse who disposes of resources for less than fair market value during a 36-month lookback period,<sup>28</sup> the individual is ineligible for benefits for a period of time. The period is calculated by dividing the uncompensated value of the transfer by the amount of the maximum monthly benefit payable, including any state supplement.<sup>29</sup> The penalty is rounded to the nearest whole number with a

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<sup>26</sup>42 USC § 1382b(a); 20 CFR §§ 416.1210 and 416.1212.

<sup>27</sup>42 USC § 1382(e)(2); 20 CFR §§ 416.210(a) and (b).

<sup>28</sup>HR 3443 Foster Care Independence Act of 1999 § 206(c)(ii)(I).

<sup>29</sup>*Id.* at § 206(iv).

cap of 36 months.<sup>30</sup> The penalty begins the first month in or after which resources were transferred which does not occur during any other period of ineligibility.<sup>31</sup>

## **2.4. The Effect of Divorce on an SSI Recipient.**

**2.4.1. Recipient Already Receiving SSI.** If a recipient is already receiving SSI, the divorce in and of itself will have no effect. However, if as a result of the divorce the SSI recipient receives equitable distribution and/or alimony, this may have a serious effect. Equitable distribution will likely result in the SSI recipient having excess resources and, therefore, a loss of the SSI benefit.

Alimony will reduce the SSI benefit dollar-for-dollar and if the alimony is equal to or greater than the SSI payment, SSI will be lost.

The solution to this problem is to establish a self-settled special needs trust<sup>32</sup> to receive the equitable distribution and/or alimony. The trust is a Special Needs Trust structured in such a way as to preserve the recipient's SSI payment and the accompanying Medicaid.

If the SSI recipient is over 65 years of age a (d)(4)(A) trust cannot be established, but the funds could be placed in a Pooled Trust under 42 USC § 1396p(d)(4)(C). There is no transfer penalty for transferring an SSI payment to a Pooled Trust. There would be no Medicaid transfer penalty unless the person is receiving an institutional level of Medicaid.

**2.4.2. Person Not Currently Receiving SSI.** A person may not be eligible for SSI because of the deeming of the spouse's income and/or resources. If the couple is divorced, the income and resources of the spouse would no longer be deemed to the SSI applicant. If the applicant meets the income and resource tests, the divorce may in fact render him or her eligible for SSI.

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<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at § 206(iii).

<sup>32</sup>42 USC § 1396p(d)(4)(A).

### 3. MEDICAID

3.1. **Who Benefits.** Generally, Medicaid is a welfare program that pays medical bills for the aged, blind and disabled who meet certain requirements. It is a medical *payment* program, not a medical *insurance* program. Medicaid is means-based with both income and resource testing. The law is found at 42 U.S.C. §1396 and 42 C.F.R. § Parts 430, 431, and 435. The Medicaid law is Title XIX of the Social Security Act.

3.2. **The Benefit.** Medicaid pays for a very broad spectrum of medical services including hospital stays, physician services, community-based health care and nursing services, and prescriptions. It also pays certain housing costs, and for some, vocational and employment services and transportation. There are no deductibles, co-payments or financial limits on coverage.

3.3. **Eligibility Requirements.** For non-institutional Medicaid SSI rules are followed. In other words, in New Jersey a person receiving SSI automatically receives Medicaid.

3.3.1. **Citizenship and Residence.** To be eligible for Medicaid a person must be a resident of the United States and either (1) a citizen or (2) an alien lawfully admitted for permanent residence, or otherwise permanently residing in the United States under color of law.<sup>33</sup> The applicant must be a resident of the state to which the Medicaid application is made.<sup>34</sup> Resident means a person who is living in the state voluntarily and not for a temporary purpose, and who has no intention of presently removing from the state.

3.3.2. **Categorically Needy.** Medicaid must cover the aged, blind and disabled. These are known as the categorically needy.<sup>35</sup> An applicant is eligible for Medicaid based on age alone if he or she is 65 years of age or older.<sup>36</sup> An applicant is eligible for Medicaid regardless of age, if he is blind or disabled.<sup>37</sup> For purposes of determining blindness or disability the standards are the same as the SSI program. Medicaid will accept a previous Social Security Disability determination. If there has been no prior determination

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<sup>33</sup>42 USC § 1382c(a)(3)(B).

<sup>34</sup>20 CFR §§ 435.403, 435.406.

<sup>35</sup>20 CFR §§ 435.2-436.170, 436.1-436.128.

<sup>36</sup>20 CFR § 435.520.

<sup>37</sup>20 CFR § 435.133.

of disability, a Medicaid medical review team makes the final determination. An individual is blind for purposes of the regulations if he or she has a central visual acuity of 20/200 or less in the better eye with the use of a correcting lens.<sup>38</sup> Disability is defined as the inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months (or, in the case of a child under the age of 18, if he or she suffers from any medically determinable physical or mental impairment of comparable severity).<sup>39</sup>

### **3.3.3. Financial Eligibility.**

**3.3.3.1. Income Eligibility.** For institutional Medicaid many states, including New Jersey, have an income cap of \$1,656 per month. However, for nursing home Medicaid New Jersey also has a medically needy program. The cap for this program is 30 times the Medicaid daily reimbursement rate for a given facility. This varies from facility to facility, but is generally in the neighborhood of \$4,000 per month. The income cap for New Jersey for calendar year 2003 is \$1,656 per month. Persons whose income exceeds that amount are ineligible for a home care program known as CCPED and are also ineligible for the Medicaid assisted living program.

**3.3.3.2. Resources.** A Medicaid applicant is generally not entitled to have resources in excess of \$2,000.<sup>40</sup>

In a situation where there is a married couple, the community spouse remaining at home is entitled to a Community Spouse Resource Allowance.<sup>41</sup> For calendar year 2003 there is a maximum of \$90,660 and a minimum of \$18,132.

Some resources are not countable for determining Medicaid eligibility. These include:

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<sup>38</sup>20 CFR § 416.981.

<sup>39</sup>20 CFR § 416.905.

<sup>40</sup>42 USC § 1382a(3)(B); 20 CFR § 416.1205.

<sup>41</sup>42 USC § 1396r-5(f)(2).

- The family home, if the applicant intends to return home<sup>42</sup> or if it is occupied by the community spouse,<sup>43</sup> a child under age 21 or a child of any age who is blind or disabled,<sup>44</sup> or a sibling who has occupied the home for at least one year and has an equitable interest in the home<sup>45</sup> or a caregiver child.<sup>46</sup>
- An automobile, if the individual or a member of the individual's household uses the vehicle for employment or medical transportation, or if it is modified for operation by, or transportation of, a handicapped person. Otherwise, only \$4,500 of the value of the automobile is excluded from the resource limit.<sup>47</sup>
- Property used in a trade or business.<sup>48</sup>
- Personal effects up to \$2,000.<sup>49</sup>

A complete list of non-countable assets is contained at 42 USC § 1382(b).

**3.3.3.3. Minimum Monthly Maintenance Needs Allowance (MMMNA).** A community spouse is also entitled to a Minimum Monthly Maintenance Needs Allowance.<sup>50</sup> If the community spouse's income falls below the MMMNA, the community spouse can receive

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<sup>42</sup>20 CFR § 416.1216.

<sup>43</sup>42 USC § 1396p(c)(2)(A)(i).

<sup>44</sup>42 USC § 1396p(c)(2)(A)(ii).

<sup>45</sup>42 USC § 1396p(c)(2)(A)(iii).

<sup>46</sup>42 USC § 1386p(c)(2)(A)(iv).

<sup>47</sup>42 USC § 1382(b).

<sup>48</sup>42 USC § 1382(b)(a)(3).

<sup>49</sup>42 USC § 1396a(m)(1)(C); 42 USC § 1382b(a).

<sup>50</sup>20 CFR § 435.725(c).

additional income from the institutionalized spouse to bring the community spouse up to the MMMNA. The MMMNA is made up two components: a basic allowance and an excess shelter allowance. For the period July 1, 2003 through June 30, 2004, the basic allowance is \$1,515 per month and the excess shelter allowance is \$455 per month. The maximum MMMNA for calendar year 2003 is \$2,266.50 per month.

**3.3.3.4. Expansion of CSRA.** If the income of the community spouse is less than the MMMNA and the income of the institutionalized spouse is insufficient to make up the difference, the community spouse can petition for a Fair Hearing to expand the Community Spouse Resource Allowance. This means that the community spouse will be allowed to keep additional assets to invest those assets to produce income sufficient to satisfy the MMMNA.

#### **3.4. The Effect of Divorce on a Medicaid Recipient.**

**3.4.1. Applicant Already Receiving Non-Institutional Medicaid.** If the applicant is already receiving non-institutional Medicaid and is divorced, any monies received via alimony and/or equitable distribution may render the recipient ineligible for Medicaid. This is the same as SSI. As with SSI the solution to this problem is to establish a Self-Settled Special Needs Trust.<sup>51</sup>

**3.4.2. Applicant Requiring But Not Receiving Non-Institutional Medicaid.** If a person needs non-institutional Medicaid but is not eligible because the income and/or assets of the spouse are deemed to the potential Medicaid applicant, then the divorce would have the effect of terminating this pooling of income and assets. In some cases, the divorce may render the person eligible for Medicaid.

**3.4.3. Applicant Applying for Institutional Level of Medicaid.** There are situations where divorce is a viable option. However, there may be significant emotional damage to the community spouse. Generally, the community spouse feels guilty for placing his or her loved one in an institution. The divorce is a difficult for the community spouse to accept emotionally. However, the divorce may have several potential benefits from a financial standpoint:

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<sup>51</sup>42 USC § 1396p(d)(4)(A).

- Pooling - The assets of the community spouse would no longer be pooled with the assets of the institutionalized spouse in determining the amount of the Community Spouse Resource Allowance and the amount of the spend down required by the institutionalized spouse. An analysis must be made as to the effect of equitable distribution.
- Community Spouse Resource Allowance (CSRA) - If the combined countable assets exceed \$181,320, the maximum CSRA to be retained by the community spouse would be \$90,660. It is possible that by obtaining a divorce the community spouse will be awarded equitable distribution in excess of that amount. In some situations, Medicaid will consider a divorce to be a “Medicaid divorce” and will not recognize it for Medicaid eligibility purposes. The earlier the divorce takes place in relation to the application for Medicaid or the institutionalization of the institutionalized spouse, the more likely it will be approved by Medicaid.

In a normal Medicaid planning situation one elder law attorney represents both husband and wife. Obviously, in situations where a divorce is contemplated, there must be separate representation. Before pursuing the divorce the implications on estate planning, income taxation, insurance, pensions and other public benefits must be fully explored.

- MMMNA - If a community spouse divorces the institutionalized spouse, he or she would lose his/her entitlement to the MMMNA.

**3.4.4. QDRO.** Under federal law pensions are subject to equitable distribution. Under ERISA, a Qualified Domestic Relations Order (QDRO) can be used to divide pension income.<sup>52</sup> The New Jersey Supreme Court has recognized QDROs as a valid method for changing ownership of pension income for Medicaid purposes.<sup>53</sup>

A QDRO is an excellent Medicaid planning technique in situations where a significant portion of the couple’s assets are in a qualified

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<sup>52</sup>IRC § 414(p)(1)(A)(i).

<sup>53</sup>LMVDMAHS, 140 N.J. 480, 659 A 2d 450 (Sup. Ct. 1995).

retirement plan for the benefit of the institutionalized spouse. Typically, these are IRA accounts. If the money is removed from the retirement account, the withdrawal is taxable. However, by utilizing a QDRO money can be transferred into a retirement plan for the community spouse maintaining the tax deferral. A QDRO is a domestic relations order recognizing the right of a spouse, former spouse, child, or other dependent as an alternate payee to the participant's benefit under an ERISA-qualified plan.<sup>54</sup> The criteria for a valid QDRO are set forth in IRC § 414(p)(2) and ERISA § 206(d)(3)(C). Assignments of military retirement benefits, railroad retirement benefits, and civil service benefits are treated as if made pursuant to a QDRO under federal tax law.<sup>55</sup> QDROs may also be used for tax-qualified retirement plans, tax-sheltered annuities,<sup>56</sup> as well as employer stock bonuses and profit-sharing plans.<sup>57</sup>

It should be noted that cases have held that for income eligibility purposes monies paid pursuant to an assignment of a retirement benefit pursuant to a valid QDRO count as income to the institutionalized individual, if that income is used to discharge a legal obligation of support. Support of the community spouse is considered then a support obligation.<sup>58</sup>

#### **4. SOCIAL SECURITY DISABILITY**

**4.1. Who Benefits.** The disabled wage-earner is entitled to benefits. The spouse and children of a disabled wage-earner are entitled to Dependent's Benefits based on the record of the retired wage-earner. A disabled surviving spouse and surviving disabled or non-disabled children may all be entitled to Survivor's Benefits based on the record of the deceased wage-earner.

**4.2. The Benefit.** This program is known as the Old-Age, Survivors, and Disability Insurance (OASDI). It is found at Title II of the Social Security Act.<sup>59</sup> The regulations are found at 20 C.F.R. §404.1 *et seq.* Unlike SSI,

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<sup>54</sup>ERISA § 206(d)(3); IRC § 414(b)(1)(A); Treas. Reg. § 1.401(a)-13(g)(1).

<sup>55</sup>IRC § 414(p)(11).

<sup>56</sup>IRC §§ 401(a)(13), 414(b)(9).

<sup>57</sup>IRC § 401(a)(13)(A) and (B).

<sup>58</sup>Himes v. Shalala, 999 F. 2d 684, 688-91 (2d Cir. 1993); LMVDMAHS, 140 N.J. 480, 659 A 2d 450 (1995).

<sup>59</sup>42 USC § 401 *et seq.*

which is a means-tested welfare program, Social Security Disability (SSD) is an insurance program. Coverage is based on quarters of Social Security insurance coverage during the applicant's employment.

**4.2.1. Wage Earner.** A wage earner's benefit are predicated on his or her primary insurance amount (PIA).<sup>60</sup> The formula for determining the PIA is found in the Regulations.<sup>61</sup> A disabled wage earner, even under age 65, can receive 100% of the PIA.

**4.2.2. Spouse.** An eligible spouse is entitled to one-half of the wage-earner's PIA, if the wage earner is drawing or will be entitled to draw, disability or retirement benefits. Generally, the current spouse must be 62 years of age.<sup>62</sup>

An eligible divorced spouse is entitled to monthly benefits equal to one-half of the insured ex-spouse's PIA.<sup>63</sup> Generally, the insured wage-earner must be at least 62 years of age and the marriage must have lasted at least 10 years. The divorced spouse must also be at least 62 years of age and be unmarried. They must have been divorced for at least two years.<sup>64</sup>

The benefit of a surviving widow/widower or divorced or surviving divorced spouse of a fully-insured deceased wage-earner is, usually 100% of the wage-earner's PIA.<sup>65</sup>

**4.2.3. Child.** If the wage earner is retired or disabled, the child's benefit is one-half of the insured's PIA. If the wage-earner is deceased, the child's benefit is 75% of the deceased wage-earner's PIA.<sup>66</sup>

**4.2.4. Limitations.**

**4.2.4.1. Family Maximum.** Payments to all beneficiaries in the family are limited by a family maximum.<sup>67</sup> The

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<sup>60</sup>42 USC § 415; 20 CFR § 404.201.

<sup>61</sup>20 CFR § 404.212.

<sup>62</sup>42 USC § 404(b)(2), (c)(3); 20 CFR § 404.333.

<sup>63</sup>*Id.*

<sup>64</sup>42 USC § 404(b)(2), (c)(3); 20 CFR § 404.333; 20 CFR § 404.331.

<sup>65</sup>42 USC § 402(e)(2)(A), (f)(3)(A); 20 CFR § 404.338.

<sup>66</sup>42 USC § 402(d)(2); 20 CFR § 404.353(a).

<sup>67</sup>42 USC § 403a; 20 CFR § 404.403(a).

formula for calculating the family maximum is complex and is found in the Regulations.<sup>68</sup> When both spouses are wage-earners both records are considered and calculated in the family maximum.<sup>69</sup>

**4.2.4.2. Multiple Benefits.** Persons entitled to more than one benefit under the Social Security program will receive only the highest benefit.<sup>70</sup> For example, if someone is entitled to Social Security Retirement Benefits exceeding the Social Security Disability Benefit would be entitled to only the highest benefit. Therefore, payments received under SSD reduce payments received under SSI. However, if the SSI payment is higher than the SSD payment, SSI would pay the difference. These recipients receive SSI and SSD and Medicare and Medicaid.

### **4.3. Eligibility for Benefits.**

**4.3.1. Quarters of Coverage.** With respect to insured status a wage-earner must accumulate a certain number of quarters of coverage. A quarter of coverage (QC) is earned by a wage-earner who is paid wages or earned self-employment income during any calendar quarter.<sup>71</sup> Insured status is based on an accumulated number of QCs. This determines whether or not benefits are payable to a wage-earner. For 2003 a quarter is credited if a wage-earner earns \$890 during the quarter. The wage-earner is “fully insured” for life if he or she has 40 QCs.<sup>72</sup>

A wage-earner is currently insured if he or she has six QCs during a 13 quarter period ending with the quarter in which the person became entitled to disability.<sup>73</sup> However, a quarter is not counted if any part was included during the period of disability other than the first and last quarters of the period of disability.<sup>74</sup> The wage-

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<sup>68</sup>20 CFR § 404.403(d).

<sup>69</sup>20 CFR § 404.403(f).

<sup>70</sup>42 USC § 402(k); 20 CFR § 404.407.

<sup>71</sup>42 USC § 413(a); 20 CFR § 404.140.

<sup>72</sup>42 USC § 414(a)(2); 20 CFR §§ 414.110(b)(1), 404.115.

<sup>73</sup>42 USC § 414(b); 20 CFR § 404.120(a).

<sup>74</sup>42 USC § 414(b); 20 CFR § 404.120(b).

earner is insured for disability benefits if he or she would have been fully insured had he or she attained age 62 and applied for old age benefits when the disability began and had at least 20 QCs in the 40-quarter period ending with that quarter or if the wage-earner became disabled in a quarter before attaining age 21 and had QCs in one-half of the quarters during which the period beginning with the quarter after the quarter in which the person attained age 21 and ending with the quarter in which the person became disabled; or if the wage-earner is disabled by blindness.<sup>75</sup>

However, there are certain additional requirements.

**4.3.2. Currently Disabled.** The wage-earner is currently disabled if he or she is currently disabled or had a disability that ended less than 12 months prior to the application.<sup>76</sup>

**4.3.3. Waiting Period.** The wage-earner must establish a period of disability for five months. This means there is a waiting period of five consecutive months from the time the wage-earner is both disabled and has insured status for the disability.<sup>77</sup> Benefits are paid retroactively for this period. Benefits can be retroactive for 12 months prior to the date of application.

**4.3.4. Spouse.** The spouse of a disabled wage-earner is eligible for benefits. The disabled surviving spouse, including a surviving divorced spouse, may claim disability benefits. These are known as dependent's benefits if the wage-earner is still living, and survivor's benefits if the wage-earner is deceased.

#### **4.4. The Effect of Divorce.**

**4.4.1. Spouse Entitled to Disability Benefits Based on Spouse's Own PIA.** If the spouse is receiving disability benefits based on his or her own PIA, the divorce will have no effect on those benefits.

**4.4.2. Spouse Receiving SSD Based on the PIA of the Other Spouse.** If the marriage has lasted less than 10 years, the divorce would terminate the SSD benefit of the disabled spouse. If the marriage lasted more than 10 years and the divorced spouse is at least age 62 and unmarried, then the divorce would terminate the SSD benefit

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<sup>75</sup>42 USC § 423(c)(1); 20 CFR §§ 404.130-132.

<sup>76</sup>42 USC §§ 402(a)(C); 20 CFR § 404.315.

<sup>77</sup>42 USC § 416(i)(2)(A); 20 CFR § 404.320(a).

for two years, but after two years the divorced disabled spouse could reapply.

## 5. MEDICARE

5.1. **Who Benefits.** Persons attaining age 65 and certain disabled persons are eligible for Medicare. Persons receiving SSD are eligible for Medicare two years after the determination of disability.

5.2. **The Benefit.** Medicare is a program that pays the medical costs of eligible beneficiaries. Unlike Medicaid, which is a welfare program, Medicare is an insurance program. Medicare pays for acute-care, hospitalization, limited skilled nursing care, doctor's fees, drugs and medications used in the hospital and home care under certain circumstances. Home care is the fastest growing area of the Medicare budget and includes some care for the chronically ill. Medicare has open enrollment at any time without any problem with pre-existing conditions. This is true of traditional Medicare and Medicare managed care. The law is found at 42 U.S.C. §1395. Regulations are found at 42 C.F.R. Parts 405-421.

Medicare is divided into three parts. Part A covers hospital care, Part B covers physician and outpatient services. Part C is a new managed care program called Medicare Part C Plus Choice Program, which is essentially a Medicare HMO.

5.3. **Eligibility Requirements.** Generally persons age 65 or older or persons who are disabled automatically receive Medicare.

5.4. **The Effect of Divorce on Medicare.** A divorce should have no effect on a recipient's eligibility for Medicare.

5.5. **SSI/SSD and Medicaid/Medicare Comparison Charts.**

These two charts are designed to indicate, at a glance, the differences between SSI and SSD, and Medicaid and Medicare.

The first chart is designed to show at a glance the principal differences between SSI and SSD.

<b>ISSUE</b>	<b>SSI</b>	<b>SSD</b>
Basis	Welfare	Insurance
Benefit	75% of Federal Poverty Level	Based on Earnings Record
Must Apply for Other Benefits	Yes	No
Income Limits	Yes	No
Resources	\$2,000	Unlimited
Transfer Penalty	Yes	No
Medical	Medicaid	Medicare After Two Years
Disability	SSA Definition	SSA Definition

The second chart is designed to show at a glance the principal differences between Medicaid and Medicare.

<b>ISSUE</b>	<b>MEDICAID</b>	<b>MEDICARE</b>
Hospital Coverage	Yes	Yes
Doctor Coverage	Yes	Yes
SNF Coverage	Yes	Severely Limited
Home Care	Limited	Limited
Deductible, Co-Payments and Limits	None	Yes
Financing	Federal and State Tax Funds	Payroll Deduction Taxes and Premiums

## **6. SECTION 8 HOUSING**

**6.1. Who Benefits.** Section 8 Housing provides for rental assistance for low-income families and individuals. Income of such applicants cannot be higher than 80% of the locality's median income.<sup>78</sup>

<sup>78</sup>42 USC §§ 1437f, 1437a(b).

**6.2. The Benefit.** While the program is not limited to the elderly and disabled this group tends to benefit significantly because many live on low fixed incomes. Section 8 rental housing can be using anywhere. Assistance is provided to the tenant rather than the project. The idea is to scatter low-income residence throughout the community. HUD pays the difference between 30% of the individual's or family's income and the established fair market rent.<sup>79</sup>

**6.3. Eligibility Requirements.** Eligibility for Section 8 Housing is income-based rather than asset-based. Eligibility is based on income not in excess of 80% of the area's median income.<sup>80</sup> Annual income is defined as "all amounts, monetary or not, which (1) go to, or on behalf of the family head or spouse...or to any other family member, or (2) are anticipated to be received from a source outside the family during the 12-month period following admission or annual reexamination effective date, and (3) which are not specifically excluded under paragraph (c) of this section, (4) annual income also means amounts derived...from assets to which any family member has access."<sup>81</sup>

Earned and unearned incomes are included. Income also includes all income from assets with a total value exceeding \$5,000 or a percentage value of those assets based on the current passbook savings rate. Income does not include inheritances, insurance payments, personal injury awards, capital gains, gifts, or other non-recurring items.<sup>82</sup>

While there are no transfer penalty rules per se for Section 8 Housing HUD continues to impute income to the individual for the individual's transferred resources based upon the current passbook savings rate as determined by HUD. HUD looks back two years preceding the date of application.<sup>83</sup>

**6.4. The Effect of Divorce on Section 8 Housing Applicant/Recipient.** In determining income eligibility for Section 8 Housing family income is included. Therefore, divorce often has the effect of reducing each spouse's income and it is more likely that that spouse would qualify for Section 8 Housing.

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<sup>79</sup>20 CFR § 813.106.

<sup>80</sup>42 USC § 1437a(a); 24 CFR § 813.101.

<sup>81</sup>24 CFR § 5.609(a).

<sup>82</sup>24 CFR § 5.609(c)(3).

<sup>83</sup>24 CFR § 5.603(b)(3).

## 7. **PAAD AND SENIOR GOLD**

- 7.1. **Who Benefits.** PAAD and Senior Gold are pharmaceutical programs for elderly and disabled persons.<sup>84</sup>
- 7.2. **The Benefit.** For PAAD the participant pays a \$5.00 copayment for each prescription and the program pays the difference.<sup>85</sup> For Senior Gold the participant pays the first \$15.00 per prescription and one-half of the balance of the cost of the prescription.<sup>86</sup> Once the participant has expended \$3,000 in any one calendar year, the copayment drops to \$15.00 per prescription.
- 7.3. **Eligibility.** Both PAAD and Senior Gold are income-tested. There is no asset test. For an individual, the income limit is \$20,016 per year for PAAD and \$30,016 per year for Senior Gold. For a married couple the income limit is \$24,542 for PAAD and \$34,542 for Senior Gold. For PAAD once the institutionalized spouse is in a nursing home for a period of 30 days, the community spouse is treated as a single individual for income eligibility purposes.
- 7.4. **The Effect of Divorce on PAAD/Senior Gold.** If a person is divorced, the single income limit applies and it is much easier to achieve eligibility for either PAAD or Senior Gold. However, if a person has a spouse already in a nursing home, the divorce would have no effect with respect to PAAD.

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<sup>84</sup>N.J.S.A. 30:4D-20 *et seq.* & N.J.S.A. 30:4D-43 *et seq.*

<sup>85</sup>N.J.S.A. 30:4D-22.

<sup>86</sup>N.J.S.A. 30:4D-47.