The *Blumberg* Election

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THE *BLUMBERG* ELECTION 1

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Author's Note

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Overview

Prior to the enactment of the Medicare Catastrophic Coverage Act (MCCA) in 1988, a married couple was expected to impoverish themselves before the institutionalized spouse became Medicaid eligible. This is still the rule for the unmarried person. The MCCA set aside allowances in assets and income for the institutionalized person's spouse at home.[2] These special protections for the community spouse allow significant planning opportunities.

Medicaid's Two-Step Application Process

Medicaid's special rules for spouses provide that getting Medicaid approved for the spouse in the nursing home is a two-step process. The first step entails an assessment of the couple's resources; at the second step, Medicaid determines the eligibility of the institutionalized spouse for Medicaid.

The Resource Assessment

In most cases, the first step in the two-step application process is begun by scheduling a meeting with a caseworker at the county office of the State Medicaid agency, in my state the Tennessee Department of Human Services. This meeting is called the resource assessment. This is *not* an application for Medicaid. The application for Medicaid occurs at the second step, once the institutionalized spouse's allocated share of the countable assets are reduced sufficiently so that the institutionalized spouse will qualify for benefits.

There are two purposes for the resource assessment.

1. *The Snapshot.* At the resource assessment, the couple's resources are categorized as either countable or exempt and values placed on the *countable* assets. But the identity of these assets, and their values, change over time. What date does Medicaid use to fix the assets owned by the couple? It is the day that the institutionalized spouse became a patient in a health care facility for more than 30 continuous days. It is not always the date the institutionalized spouse entered the nursing home, but may be the date he went into the hospital before becoming a resident of a nursing home. For administrative convenience, some states set an arbitrary date, such as the first of the month of the month in which the spouse is institutionalized. This is sometimes called the "snapshot date."

2. *Community Spouse Resource Allowance.* A portion of the couple's *countable* assets is set aside as protected for the community spouse. This amount is called the Community Spouse Resource Allowance or, in Tennessee, the "Protected Resource Amount." Under Medicaid's default rules, one-half of the countable assets up to a maximum amount ($92,760 in 2004) is set as the Community Spouse Resource Allowance. This is the portion of the couple's countable assets that are set aside ("protected") for the community spouse.

At this point, the resource assessment typically ends, even though the DHS caseworker may ask for more information. If errors are made in the resource assessment, an effort should be made to correct them at this time; a resource assessment cannot be appealed unless an application for benefits is filed.

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[2] 42 U.S.C. § 1396r-5.

The Application for Medicaid Nursing Home Benefits

The second step in the approval process for an institutionalized spouse is the actual application for benefits. There are three steps to this process.

1. *The Pre-Admission Evaluation (PAE).* Before a person in the nursing home can be approved for Medicaid nursing home benefits, an evaluation must be performed to determine whether he requires daily nursing home care. This is called meeting the *medical* criteria for Medicaid eligibility.

2. *The Determination of Eligibility.* Once the institutionalized spouse is determined to be eligible for Medicaid, he will be deemed to have met the *financial* criteria for Medicaid eligibility.

At the resource assessment, the identity and value of the couple's countable assets were determined and an amount set aside as protected for the community spouse. Upon application for benefits, the community spouse may keep the protected resource amount and the institutionalized spouse may keep $2000 and qualify for Medicaid. The rest of the countable assets is at risk for the nursing home.

Example: At the resource assessment, Mr. and Mrs. Jones have $100,000 in countable assets. Half of this amount, $50,000, is set aside as Mrs. Jones' community spouse resource allowance. Of the other half, $50,000, Mr. Jones can keep $2000 as his Medicaid resource limit. In order for Mr. Jones to be eligible for Medicaid, he and Mrs. Jones must show the DHS caseworker that they have no more than $52,000 in countable assets (her $50,000 community spouse resource allowance and his $2000 Medicaid resource limit).

3. *The Spousal Income Allocation.* Once the spouse in the nursing home becomes eligible for benefits, the caseworker will compare the monthly income received by the community spouse and the institutionalized spouse. If the community spouse's income does not reach a certain level, income of the institutionalized spouse will be allocated to the community spouse up to a monthly Standard Maintenance Amount set by the State.[3] This is called the community spouse monthly income allowance or, as it is known in Tennessee, the "Spousal Income Allocation." The remainder of the institutionalized spouse's income is paid to the nursing home, less a few allowable deductions such as the personal needs allowance and health insurance premiums. The amount that is paid to the nursing home is called the "Patient Liability Amount."

Increasing the Spousal Allowances

*The "*Blumberg *Election"*

In 2000, the Tennessee Court of Appeals issued a decision that may prove of major significance to the rights of married couples, one of whom is facing a long-term stay in a nursing home. In *Blumberg v. Tennessee Department of Human Services*,[4] Mr. Blumberg, the community spouse, asked a circuit court judge for an order of support requiring his wife Mrs. Blumberg, the institutionalized spouse, to pay him her monthly Social Security check. The trial court entered the order. On Mrs. Blumberg's application for benefits, the Tennessee Department of Human Services refused to recognize the court order in the setting of Mr. Blumberg's community spouse monthly income allowance post-eligibility, and he appealed.

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[3] In other states the Standard Maintenance may be called the minimum monthly maintenance needs allowance, or MMMNA.

[4] Blumberg v. Tennessee Department of Human Services, No. M2000-00237-COA-R3-CV (Tenn. App. 2000), available online at http://www.tsc.state.tn.us/OPINIONS/tca/PDF/004/blumbergf.pdf.

The Court of Appeals ruled that under MCCA, either spouse or the State has an absolute right to ask a court to set aside more resources or more income, or both, for the support of the community spouse. Or, they could choose to go through the Medicaid administrative process. If the court sets higher amounts for the community spouse, upon application for Medicaid benefits the Department of Human Services must use the court-ordered amounts instead of the minimums that would otherwise set by the State Medicaid agency.

It is the responsibility of the Medicaid applicant or his (community) spouse to initiate measures to increase the spousal allowances above the minimums set by the Department of Human Services. 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.[5]

So, in the first instance, a "*Blumberg* election" must be made. Will the married couple seek an increase in the community spouse allowances through the Medicaid administrative process, or will they apply to the court for an increase in these allowances? Or will they choose neither of these options, but instead go through the two-step process outlined above?

The Medicaid Appeal for Fair Hearing

MCCA provides that if the monthly income generated by the community spouse resource allowance is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance (MMMNA; that is, the Standard Maintenance Amount), the community spouse is entitled to an increase in the CSRA.[6]

The most common procedure utilized by elder law attorneys for increasing the allowances for the community spouse is to make application for Medicaid and then appeal the denial.

Whether her income is above or below the Standard Maintenance Amount, the monthly income allowance to the community spouse will be increased either by:

1. Allocating additional resources to the community spouse from resources otherwise allocated to the institutionalized spouse (that is, expanding the community spouse resource allowance). This is an application of the resources-first rule; or
2. Diverting income from the institutionalized spouse to the community spouse that would otherwise be applied to the institutionalized spouse's nursing home bill. If income is allocated to the community spouse before resources, the income-first rule is being applied. Tennessee utilizes the income-first approach.

Example: Mr. Jones enters a nursing home on March 1, 2004. He and Mrs. Jones have total countable assets of $100,000. His monthly income is $700; Mrs. Jones' is $400, the total of which is $415 less than the Standard Maintenance Amount for 2003-04 ($1515). Mr. Jones applies for Medicaid. The DHS caseworker sets aside $50,000 as Mrs. Jones' Community Spouse Resource Allowance and $2000 as Mr. Jones' exempt amount. His application is therefore denied because he has excess resources ($48,000). Mr. and Mrs. Jones appeal for a fair hearing[7] on the ground that she is entitled to an allocation of excess resources to bring her income up to the Standard Maintenance Amount of $1515.

The hearing officer will calculate the amount of the increased Community Spouse Re-

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[5] 42 U.S.C. § 1396r-5(c), (e), and (f).

[6] 42 U. S. C. § 1396r-5(e)(2)(c). See § 3(b) *infra*.

[7] In Ohio, the hearings are not called "fair," but "State"; hence, "State hearings."

source Allowance to which Mrs. Jones is entitled by dividing the yearly income shortfall ($4980) by an interest rate. In our example, we'll use a three percent interest rate (.03). Using Tennessee's income-first approach, the fair hearing officer calculates that Mrs. Jones needs $166,000 in countable assets in order to generate sufficient income to bring her total income up to the Standard Maintenance Amount. This amount, $166,000, becomes the increased Community Spouse Resource Allowance for Mrs. Jones. Note that in times of higher interest rates, the result of the calculation will be a lower figure. If an interest rate of five percent were used, the Community Spouse Resource Allowance would be set at $99,600 ($4980 / .05).[8]

Here's a simple table for making the calculation:

Standard Maintenance Amount (MMMNA)	$1515
Less Total Monthly Income	$1100
Equals Monthly Shortfall	$415
Multiplied by 12 equals Yearly Shortfall	$4980
Divided by Interest Rate	.03
Equals CSRA	$166,000

The Standard Maintenance Amount itself may be increased if the couple presents proof at a fair hearing that the community spouse's minimum monthly need is greater than the Standard Maintenance Amount. To obtain an increase, the community spouse must show the existence of "exceptional circumstances" resulting in significant financial duress.[9] Upon a determination by the fair hearing officer that "exceptional circumstances due to financial distress" exist, the community spouse may receive a higher allocation of income from the institutionalized spouse in order to bring her total income up to the revised Standard Maintenance Amount.[10]

Example: Mr. Jones enters a nursing home on March 1, 2004. He and Mrs. Jones have countable assets of $100,000. His monthly income is $1100; Mrs. Jones' is $600, the total of which is more than the Standard Maintenance Amount for 2003-04 ($1515). Her monthly expenses are $2000. Mr. Jones applies for Medicaid. The DHS caseworker approves him for Medicaid and sets Mrs. Jones' spousal income allocation at $915, bringing her total monthly income to $1515, which is the Standard Maintenance Amount. Mr. and Mrs. Jones appeal for a hearing on the grounds that she is entitled to an increase in the Standard Maintenance Amount to $2000. If Mrs. Jones is able to prove that her monthly expenses are due to the existence of exceptional circumstances resulting in significant financial duress, the hearing officer will increase the Standard Maintenance Amount to her actual monthly need, thereby entitling her to an increase in her spousal income allocation and community spouse resource allowance.

Here's the table again, but inserting the actual monthly need set by the hearing officer:

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[8] In *Burinskas v. Department of Social Services*, a 5 perent rate of return was used. 691 A.2d 586 (Conn. 1997).

[9] 42 U.S.C. § 1396r-5(e)(2)(B). The Tennessee Medical Assistance Manual uses instead the awkward (and inaccurate) phrase "exceptional circumstances due to financial duress." MEDICAL ASSISTANCE MANUAL, I, Ch. 15, §II, B.

[10] MEDICAL ASSISTANCE MANUAL, I, Ch. 15, § II, B, 6. See also Ron M. Landsman, *Going to Court to Improve Spousal Benefits*, ELDERLAW REPORT, Sept. and Oct. 1998.

MMMNA set by hearing officer	$2000
Less Total Monthly Income	$1700
Equals Monthly Shortfall	$300
Multiplied by 12 equals Yearly Shortfall	$3600
Divided by Interest Rate	.03
Equals CSRA	$120,000

The Judicial Option

The Tennessee Department of Human Services contends that the maximum Standard Maintenance Amount ($2319 in 2004) cannot be increased through the Medicaid appeal process. If her monthly expenses exceeds the maximum Standard Maintenance Amount, the community spouse instead may elect go to court, which is not bound by this limit. If a court has entered an order of support against the institutionalized spouse, "the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered."[11]

The rule is similar with respect to assets ordered to be transferred from the institutionalized spouse to the community spouse in order to increase the CSRA. The CSRA is the greatest of (1) the minimum CSRA set by the state; (2) the lesser of one-half of the total countable resources or the maximum CSRA; (3) an amount established pursuant to a fair hearing; or (4) an amount transferred to the community spouse under court order.[12] In practice, this rule means that the community spouse cannot do worse by asking the court to set the CSRA. The worst outcome for the community spouse is that the court would grant no increase. In that event, the CSRA would be either (1) the minimum CSRA or (2) the lesser of one-half of the total countable resources or the maximum CSRA. There is therefore minimal downside to asking the court to set the CSRA.

Conceptually, the court steps into the shoes of the DHS caseworker who initially sets the Community Spouse Resource Allowance at the resource assessment. The community spouse who seeks an increase in her CSRA by court order need not, therefore, obtain a resource assessment at the Department of Human Services.

Example: Mr. Jones enters a nursing home on March 1, 2004. He and Mrs. Jones have total countable assets of $100,000. His monthly income is $1500; Mrs. Jones' is $750, the total ($2250) of which is more than the Standard Maintenance Amount for 2003-04 ($1515). Her monthly expenses are $2750, which is more than the couple's total monthly income. Mrs. Jones requests that the court set her income and resource allowances, on the grounds that her monthly need exceeds the maximum Standard Maintenance Amount ($2319) that may be set by a Medicaid hearing officer and that her anticipated future need merits an increase in the protected resource amount (CSRA). The court agrees and enters an order setting her CSRA at $100,000 and orders monthly income support for Mrs. Jones at $1500. Mr. Jones applies for Medicaid. His application is granted. Recognizing the court order, the Department of Human Services sets her Spousal Income Allocation (CSMIA) at $1500.

The court may enter an order of support to increase resources or income or both any time prior to the filing of an application for Medicaid, either before or after the DHS re-

[11] 42 U.S.C. § 1396r-5(d)(5).

[12] 42 U.S.C. § 1396r-5(f)(2).

source assessment. If the community spouse does not seek a court order until after the Medicaid application is filed, she risks a ruling that she is bound by her *Blumberg* election.

Example: Mr. Jones enters a nursing home on March 1, 2004. He and Mrs. Jones have total countable assets of $100,000. His monthly income is $1500; Mrs. Jones' is $750. Her monthly expenses are $2750. At the resource assessment, the Department sets Mrs. Jones' CSRA at $50,000. Although they consider asking the court to increase her CSRA, instead Mr. and Mrs. Jones make fair market value purchases to reduce their countable assets to $52,000 ($50,000 CSRA + $2000 Medicaid resource limit). Mrs. Jones asks that the court enter an order of income support only, contending that her minimum monthly need exceeds the maximum Standard Maintenance Amount of $2319 (in 2004) and thus above the maximum amount of Mr. Jones' monthly income that can be set for her by a Medicaid fair hearing officer. The court agrees and enters an order requiring Mr. Jones to pay her monthly support of $1500. Mr. Jones applies for Medicaid. His application is granted. The Department sets Mrs. Jones' Spousal Income Allocation equal to the court-ordered support amount of $1500.

While MCCA and *Blumberg* provide that court orders directing the transfer of resources and income between spouses pre-empt the default federal Medicaid formulas, federal law does not prescribe the standards to be applied by the court entering an order of support against the institutionalized spouse.[13] A few states have legislated that standard (for example, Connecticut, Nevada, and Virginia, each of which requires state courts in Medicaid spousal litigation to follow Medicaid's "exceptional circumstances" test.[14]) In 2002, Tennessee enacted legislation directing state courts not to apply standards applicable to domestic relations cases, but how this statute will be interpreted by the courts is difficult to predict.[15] In the absence of a state statute specifically setting the criteria, therefore, one possibility is that the criteria followed by Medicaid hearing officers be used. In Medicaid appeals, the hearing officer limits relief to cases in which the community spouse needs more income due to exceptional circumstances resulting in significant financial duress. A case espousing this view is *Gombrecht v. Sabol*, in which the New York Court of Appeals held that the standard to be applied by the New York family courts is the "exceptional circumstances" test.[16]

Even though *Gombrecht* implies that only one standard should be applied, and that is the standard applied in Medicaid administrative appeals, this view has not gone unchallenged. In *Jenkins v. Fields*, a federal district court case in which the plaintiff sought to overturn the holding in *Gombrecht*, the district court concluded that Congress did not seek to prevent state courts from changing their local standards and procedures when issuing spousal support orders to community spouses. Neither, however, did Congress intend to mandate a uniform standard to be applied in all 50 states.[17] In short, state courts are authorized, but not required, to incorporate the Medicaid administrative standard into local

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[13] See Nicola Jay Boone, *Increasing the Community Spouse Income Allowance Through the Judicial Process: What Standard Applies?*, FLORIDA BAR J. 58 (January 1997).

[14] See CONN. GEN. STAT. Tit. 45A, § 655(d)(1)(A); NEV. REV. STAT. Tit. 11, § 123.259(4); and VA. CODE ANN. Tit. 20, § 20-88.02:1.

[15] "In all actions for the transfer of income or resources from an institutionalized spouse for the support of the community spouse, the court shall apply the standards utilized to determine medicaid eligibility in this state, regardless of any state laws relating to community property or the division of marital property." TENN. CODE ANN. § 71-5-1xx. (Public Acts 2002, ch. 880).

[16] 86 N.Y.2d 47, 652 N.E.2d 936 (N.Y. 1995).

[17] Jenkins v. Fields, 95 Civ. 9603 (JSM), 1996 U.S. Dist. LEXIS 5852 (S.D.N.Y. 1996).

court orders. Congress left it to the discretion of the courts, that are better equipped to analyze the particular facts of each case, to determine if in light of the goal of the Medicaid spousal impoverishment act, local law and the facts of the case a transfer of income and resources to the community spouse is warranted.

After deciding *Gombrecht*, the New York Court of Appeals limited its holding to its specific situation. In the 2000 decision of *In re Shah*, the Court of Appeals held that a lower court decision permitting a community spouse as guardian to transfer all of her institutionalized husband's property to herself was correct. In doing so, the Court of Appeals declined to incorporate into New York guardianship law the state's enactment of the federal Medicaid provision governing the administrative proceedings standard for increasing the community spouse resource allowance, as it had the income allowance standard in *Gombrecht*.[18]

Exceptional Circumstances. "Exceptional circumstances" has been defined as one caused by financial hardship that is thrust upon the community spouse by circumstances over which he or she has no control, such as extraordinary medical expenses, the need to preserve the marital residence, or the need to preserve an income-producing asset.[19] This does not mean that in order for an expense to qualify under this standard, the expense must be an exceptional circumstance. In a Connecticut Medicaid case, the hearing officer had held that expenses associated with such things as snow removal and lawn care were "expected everyday expenses" and thus insufficiently exceptional to warrant resource reallocation. The language of 42 U.S.C. § 1396r-5(e)(2)(B), said the Connecticut Supreme Court, entails a finding of core "exceptional circumstances" that may give rise to expenses causing "significant financial duress." This language does not require that the expenses themselves be exceptional.[20]

Support under State Domestic Relations Law. A second possibility is that the standard ordinarily applied in domestic relations cases under state law be used.

In the typical family law setting, Tennessee's domestic relations statute governs in cases where one spouse seeks an order of support from the other spouse. "Whether the marriage is dissolved absolutely, or a perpetual or temporary separation is decreed, the court may make an order and decree for the suitable support and maintenance of either spouse by the other spouse, or out of either spouse's property."[21] Instead of the exceptional circumstances test, the trial court applies the statutory criteria applied in spousal support cases.[22] The usual formula is abbreviated as "the need of the obligee spouse and the ability to pay of the obligor spouse."[23] Using this standard, the "exceptional" nature of the community spouse's circumstances may seldom come into play in the analysis.

Example: Mr. Jones enters a nursing home on March 1, 2004. His monthly income is $2500; Mrs. Jones' is $800, which is $715 less than the Standard Maintenance Amount for 2003-04. Her ordinary living expenses are $1700 a month. Under the spousal support standard, Mrs. Jones is in need of $900 a month; Mr. Jones has an ability to pay this

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[18] In re Shah, 95 N.Y.2d 148, 733 N.E.2d 1093 (N.Y. 2000).

[19] Schachner v. Perales, 85 N.Y.2d 316 (1995), cited *id.* at 60, n. 2.

[20] Burinskas v. Department of Social Services, 240 Conn. 141 (Conn. 1997).

[21] TENN. CODE ANN. § 36-5-101(a)(1).

[22] TENN. CODE ANN. § 36-5-101(d)(1)(A) to (L).

[23] See, e.g., Lancaster v. Lancaster, 671 S.W.2d 501 (Tenn. App. 1984) ("Along with the ability to pay, need is the cornerstone for the award of alimony." *Id.* at 503.).

amount. Under the exceptional circumstances test, the trial court must inquire into the "exceptional genesis"[24] of Mrs. Jones' expenses to determine whether she is entitled to an increase in the Standard Maintenance Amount.

Court-Fashioned Medicaid Law. A third possibility is that the state court will fashion its own standard, borrowing perhaps from state domestic relations law but overlaying concepts of spousal support with the overriding purpose of the Medicare Catastrophic Coverage Act (that is, avoid impoverishment of the community spouse).

Trying the Medicaid Spousal Case

Litigating a Medicaid spousal case presents unique challenges for the elder law attorney. First, and perhaps most important, judges in most states are completely unfamiliar with the judicial option permitted by the Medicare Catastrophic Coverage Act. Most judges will be keenly interested in your presentation. Because you as the petitioner's counsel get to speak first, don't waste your opportunity to educate the court about the MCCA, the *Blumberg* elections that are available to your client, and the inadequacy of the Medicaid defaults in protecting your client from financial devastation.

Second, it seems to me that many elder law attorneys seldom try cases; some may never have tried a lawsuit before. If you cower at the prospect of going to court to try a Medicaid spousal case and you tailor your advice to avoid the courtroom, you are not giving your client the full measure of your services. Trying a Medicaid spousal case is akin to a spousal support case. The law is different, but the judge you are trying your case in front of has heard hundreds if not thousands of divorces and spousal support cases, and your judge will listen to your case through the lens of that experience. If you lack that experience, you should associate a domestic relations attorney to show you the ropes and teach you what judges look for in the typical spousal support case.

Third, while the parties are awaiting their court date, the institutionalized spouse's nursing home bill continues to mount. Your client, the community spouse, is already emotionally devastated by the loss of her spouse to the nursing home. Adding to that stress the wait for her day in court that will decide her financial future is almost too much for some of our spouses to bear. Although you will never guarantee a successful outcome to a Medicaid spousal case, you want to pick the cases you take to court carefully. If a better alternative to going to court is available, you may want to go that route instead, often simply because your client cannot afford to go to court.

Fourth, you still want to pick the cases you take to court carefully, even if your community spouse is convinced she will get a better deal in court than by electing the Medicaid minimum defaults. Remember that in many cases the Medicaid minimums are actually fairly generous, and your job is to persuade the court that good grounds exist for deviation from these defaults. Once you begin trying Medicaid spousal cases, you do want a reputation as a litigator who files only meritorious cases that deserve careful consideration by the court. You will not always get the relief you ask for, but you will be taken seriously. That's the best you can ask for.

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[24] Burinskas v. Department of Social Services, 240 Conn. 141 (Conn. 1997).

Which to Choose: Medicaid Fair Hearing or Court?

Here are some general rules.

Fair Hearing

a. Increase MMMNA by a showing of exceptional circumstances resulting in significant financial distress. 42 U.S.C. § 1396r-5(e)(2)(B).

b. Increase CSRA to generate enough income so that total income from the enhanced CSRA = MMMNA. 42 U.S.C. § 1396r-5(e)(2)(C), (f)(2)(A)(iii).

The fair hearing is focused primarily on protecting or generating income for the community spouse. Upon a showing of "exceptional circumstances," the hearing officer may increase the MMMNA, thereby increasing the CSMIA. The hearing officer may increase the CSRA only in the event that is necessary to raise community spouse's monthly income up to the MMMNA. "Manifestly, the narrow purpose of the legislation providing for the spousal allowance is to protect the community spouse from financial disaster when the primary income-providing spouse becomes institutionalized." *Schachner v. Perales*, 85 N.Y.2d 316, 323, 624 N.Y.S.2d 558, 648 N.E.2d 1321, 1324 (1995).

Court

a. Enter any order of income support to meet the community spouse's monthly need. A showing of exceptional circumstances may not be required (for states that have not adopted the Medicaid standard).

b. Increase the CSRA to generate enough income so that total income from the enhanced CSRA equals the community spouse's minimum monthly need. The court sets the minimum monthly need and enters an order of income support. In a Medicaid appeal, the fair hearing officer will be bound by the court's finding. The community spouse may elect this approach where her actual monthly need exceeds the maximum amount that the hearing officer may set ($2319 in 2004).

c. Increase the CSRA to provide for community spouse's current or reasonably anticipated future needs. Example: Court might increase the CSRA by $50,000 to preserve and maintain the homestead.

d. Increase CSRA to protect an IRA or qualified retirement plan.

e. Enter an order of income support so that Medicaid rules do not discourage the community spouse from working. For example, Marie earns $1000/month selling real estate. Dave's monthly income is $1000 from Social Security and $1500 from pension. Once Dave's Medicaid application is approved, Marie would have almost no financial incentive to continue working, unless the court orders monthly income from Dave of $1000. She can continue to work and get $1000/month from Dave.

f. State Medicaid rules do not allow the Medicaid hearing officer to increase the minimum monthly need above the maximum MMMNA.

g. Special circumstances justify a deviation from the Medicaid defaults, e. g. age of community spouse, dependents, disabled child.

h. Increasing the CSRA is an alternative to divorce or spousal refusal.

i. Increasing the CSRA is an alternative to Medicaid planning.

Forms

Petition to Increase CSRA and CSMIA

This is a basic form petition we file. The facts are based on an actual case that I recently tried in the Putnam County, Tennessee, Circuit Court. The Court set the community spouse resource allowance at $230,000 and the community spouse monthly income allowance at $2300.

The Petitioner Charlotte D. Jones ("Wife") states as follows:

I. Introduction, Purpose for Petition.

1. *Statistical Information.* Andrew B. Jones ("Husband") was born on June 6, 1926. He is 77 years old at the time of the filing of the Petition. Wife was born July 27, 1943. She is 60. Wife resides at 123 Main Street, Cookeville, Tennessee. Husband resides at the Master's Health Care Nursing Home in Algood, Tennessee. Wife and Husband were married at Las Vegas, Nevada, on August 16, 1985.

Wife's Social Security Number is:

Husband's Social Security Number is:

2. *Children.* Wife has two adult children, and Husband has two adult children.

3. *Estate Planning Documents.* Husband has executed a durable power of attorney in which he names Wife as his Attorney-in-Fact.

4. *Reason Relief Is Requested.* Husband suffers from Alzheimer's disease and dementia and has been residing at the nursing home for more than 30 days since the filing of this Petition. Husband is substantially unable to manage his finances.

The purposes of the transactions proposed in this Petition are:

1. To provide Wife maximum flexibility in the management and control of her property;
2. To allow Wife to carry out Husband's agreements and continue the course of action that he would continue to carry out if he were capable of doing so;
3. To provide Wife with the maximum amount of income from Husband's income in order to provide for her proper support and maintenance to prevent her financial destitution;
4. To protect the estate of each spouse; and
5. To increase Wife's Community Spouse Resource Allowance (CSRA) to minimize or prevent the likelihood that Husband's long-term care expenses will impoverish Wife.

II. Medicaid Eligibility for Spouses.

5. *Status of Each Spouse under Medicare Catastrophic Coverage Act.* Under the Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396r-5, Husband is an "institutionalized spouse," due to Husband's admission to the hospital in November 2002, thereby initiating more than 30 days' continuous institutionalization in a health care facility under 42 U.S.C. § 1396r-5(c)(1)(B) and (h)(1). Wife is a "community spouse" under 42 U.S.C. § 1396r-5(h)(2).

6. *Resources.*

The parties' assets (exempt and countable) and income are listed in Exhibit A to this Petition. Under Medicaid law, assets are either exempt or countable. Assets that are exempt are not counted toward the institutionalized individual's $2000 Medicaid resource limit. All other assets are considered to be countable, and therefore do count toward the Medicaid resource limit.

7. *Expenses.*

A. Wife. The total monthly expenses of the Wife are approximately $2800, listed in Exhibit A to this Petition.

B. Husband. Husband's total monthly expenses are approximately $4300, including nursing home, prescriptions, and other medical necessities for him.

As a result of the monthly deficiency between the total ordinary expenses of Wife and Husband and their income, Wife has had and will continue to invade their savings to meet their monthly expenses.

8. *Husband's Eligibility for Medicaid.*

A. Medicaid in Tennessee provides medical assistance for public assistance recipients and other low income persons. An individual who is aged 65 or older, blind or disabled will be eligible for Medicaid in a skilled nursing facility or intermediate care facility if certain resources and limitations are met. An individual must deplete resources to $2000 in order to establish Medicaid eligibility.

B. The Federal Medicaid law enacted in 1988, the Medicare Catastrophic Coverage Act (MCCA), is intended to prevent "spousal impoverishment"—that is, to eliminate the requirement that the Wife and Husband spend down all of the couple's assets on the institutionalized spouse's nursing home care before the spouse is eligible for Medicaid benefits. Congress therefore permits that an allowance from the total resources of the Wife and Husband, up to a maximum of $89,280 for 2002, be set aside for the benefit of the community spouse. This set aside is called the Community Spouse Resource Allowance (CSRA).

This amount is computed by first establishing the total amount of resources available to the couple during the month the spouse enters the nursing home and dividing by two. 42 U.S.C. § 1396r-5(c). The institutionalized spouse is then allowed to transfer some or all of his or her share to the community spouse as the latter's CSRA. Absent a court order setting a greater amount, this amount is the maximum amount that can be transferred from the institutionalized spouse to the community spouse. All other resources above this amount are attributed to the institutionalized spouse.

C. As countable or non-exempt resources, the remainder of the parties' funds in checking and savings accounts must be spent down before Husband becomes eligible for Medicaid public benefits unless specific steps are taken to protect Wife, the community spouse.

III. The Community Spouse Monthly Income Allowance Should be Increased.

9. *Minimum Monthly Maintenance Needs Allowance.*

Once eligibility for Medicaid is established, a determination is made of the allocation of income to the community spouse. The Medicare Catastrophic Coverage Act provides that a community spouse would be entitled to support from the income of an institutionalized spouse in the amount of a minimum monthly maintenance needs allowance (MMMNA) to be set by the States. Adjusted annually on the first of July, the MMMNA set by Tennessee is currently $1515. The maximum that may be set upon a Medicaid appeal by a fair hearing officer in an administrative proceeding is $2267, an amount that changes annually on the first of January. The remainder of the income of an institutionalized Medicaid recipient that exceeds the MMMNA for the community spouse plus a personal needs allowance of $30 per month is then paid to the nursing home. In Tennessee, this is called the "Patient Liability Amount."

10. *Medicaid Law and Increase in Community Spouse Monthly Income Allowance.*

A. Federal and state law clearly give the Court discretion to increase the monthly income

referred to as the Community Spouse Monthly Income Allowance (CSMIA) of the community spouse, Wife, where the Court finds it necessary for the support and well-being of the community spouse to prevent impoverishment and where the MMMNA is insufficient to meet her monthly need. Unlike the fair hearing officer in a Medicaid appeal, the court is not bound by the maximum MMMNA. Such court order upon entry does not prejudice the institutionalized spouse's eligibility for Medicaid.

> 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. 42 U.S.C. § 1396r-5(d)(5).

If this Court, therefore, enters an order of monthly support against Husband in favor of Wife in order to meet her minimum monthly need, then Wife's CSMIA shall not be less than the amount of the monthly income so ordered.

B. Under MCCA, 42 U.S.C. § 1396r-5(d)(5), the community spouse may seek a court order increasing the CSMIA. MCCA, however, provides little guidance for the court to rely on when presented with a petition to increase the CSMIA. The statute says only that an order increasing the CSMIA must be "against an institutionalized spouse for the monthly income for the support of the community spouse."

One standard is that utilized by courts in Tennessee in traditional support cases, when one spouse seeks an order of support against the other spouse, or a complaint for separate maintenance is filed. TENN. CODE ANN. § 36-5-101. Requests for spousal support in a separate maintenance petition do not require that divorce proceedings be instituted. In addition to the criteria set forth in the statute, Tennessee's courts have used as a touchstone "the need of the obligee spouse and the ability to pay of the obligor spouse." *Lancaster v. Lancaster*, 671 S.W.2d 501 (Tenn. App. 1984), and numerous other Tennessee domestic cases.

Another standard, which is used in Medicaid fair hearing appeals, is that the community spouse needs a greater amount of income "due to exceptional circumstances resulting in significant financial duress." 42 U.S.C. § 1396r-5(e)(2)(B).

11. *Reasons Justifying an Increase in the CSMIA.*

- Wife's current monthly expenses exceeds the maximum MMMNA of $2319.
- Upon Husband's death, his Navy retirement, which exceeds $1000 a month, will cease. Wife will receive his Social Security income. Her total guaranteed monthly will be from Husband's Social Security and pension, a total of less than $1500.
- At age 60, Wife has a life expectancy of probably 25 years. She needs all of the Husband's income in order to retain her savings so that she herself does not become destitute.

She therefore needs an order of support from this Court of all or a portion of Husband's income in order to have a sufficient amount of funds in which to support herself and avoid impoverishment.

IV. The CSRA Should be Increased for the Support of the Community Spouse.

12. *Medicaid Law and Increase in Community Spouse Resource Allowance.*

In a Medicaid administrative fair hearing, an increase in the CSRA is required by law in order to bring community spouse monthly income allocation at least up to the MMMNA.

Likewise, under 42 U.S.C. § 1396r-5(f), the CSRA may be increased by a court order setting the CSRA. *Blumberg v. Tennessee Department of Human Services,* 2000 Tenn. App. LEXIS 709 (Tenn. App. 2000).

13. *Justification for Increase in Community Spouse Resource Allowance.*

A. Husband's Nursing Home Expenses Threaten Wife's Financial Security. Unless the Court increases her CSRA, resources that would otherwise be available to meet Wife's needs will have to be spent on his nursing home care.

B. Wife's Income Is Below her Minimum Monthly Need. Once Husband becomes eligible for Medicaid, Wife will be entitled to retain up to $1515 of Husband's monthly income. Nonetheless, her expenses will still exceed the income.

C. Set Aside for Wife's Future Needs. Wife's needs are likely to change in the future. As she ages and her physical and mental condition declines, her monthly expenses will increase. The intent of the Medicare Catastrophic Coverage Act is to prevent the impoverishment of the community spouse. This can only be done in this forum so that the Court can raise the CSRA above the "default" levels to which the Tennessee Department of Human Services is limited.

D. Loss of Monthly Income Upon Husband's Death. If Wife survives Husband, which is likely, her total income will be reduced. This reduced income plus her savings will have to meet her monthly expenses for the remainder of her life. At age 60, her life expectancy is probably 25 years. It is therefore imperative that she retain as much of the parties' assets as she can now in order to provide for her needs for the future.

V. The Court Should Order that the Institutionalized Spouse's Marital Interest in the Countable Assets Be Transferred to the Community Spouse.

14. *Transfer of Assets.*

A. Medicaid law, 42 U.S.C. § 1396p(c)(2)(A)(I), permits one spouse to transfer assets to another spouse without incurring a period of ineligibility, which is roughly the period during which nursing home care could have been purchased with the value of the transferred assets, 42 U.S.C. § 1396p(c)(1). Husband, therefore, can transfer his interest in the parties' assets to Wife without penalty.

B. Wife therefore seeks an order from this Court in which the Husband's interest in the couple's assets is vested out of him and vested solely in her, to do with as she believes necessary in order to support herself now and in the future.

For the foregoing reasons, all cash and other countable assets should be transferred to the Wife as her sole and separate property.

15. *Authority of this Court.*

The community spouse is permitted to retain what is termed the "community spouse resource allowance" ("CSRA"). 42 U.S.C. § 1396r-5 (f)(2). The CSRA is the greatest of (1) the minimum CSRA; (2) the lesser of 1/2 total joint resources or the maximum CSRA; (3) an amount established pursuant to a fair hearing; or (4) an amount transferred under court order. 42 U.S.C. § 1396r-5(f)(2). All other resources above this amount are attributed to the institutionalized spouse. 42 U.S.C. § 1396r-5(f).

The Medicare Catastrophic Coverage Act, therefore, clearly gives the Court discretion to order that assets be transferred to the community spouse for the sole benefit of the community spouse in order to meet the community spouse's current and reasonably anticipated needs. Such court order upon entry does not prejudice the institutionalized spouse's eligibility for Medicaid.

If this Court, therefore, orders an increase in Wife's CSRA, and the Court enters this order against Husband, then the amount of Wife's Community Spouse Resource Allowance shall not be less than the amount so ordered.

16. *Effect of Transfers.* The transfer of assets will not adversely affect Husband's Medicaid eligibility. 42 U.S.C. § 1396p(c)(2)(B) states: "An individual shall not be ineligible for medical assistance. . .to the extent that the resources were transferred to the individual's spouse."

The transfer of the couple's assets to Wife will be in the best interests of both spouses because it will enable Wife to manage the estate and not affect Husband's entitlement to public benefits, and it will provide her for a sufficient means of support for the remainder of her anticipated lifetime.

An order should be entered authorizing Wife to execute any and all documents necessary to effect the allocations of assets and income to her as requested in this Petition.

Petitioner therefore prays for an order:

1. Finding that the proposed transactions are authorized under the provisions of state and federal law.
2. Against Respondent for monthly income for the support of the Petitioner, authorizing an increase in Petitioner's Community Spouse Monthly Income Allowance and permitting an adjustment upwards annually.
3. Against Respondent, authorizing an increase in Petitioner's Community Spouse Resource Allowance and requiring that this amount be transferred to the Petitioner as her Community Spouse Resource Allowance.
4. Authorizing Petitioner to do and perform all acts and to execute and deliver all papers, documents, and instruments necessary to consummate the proposed transactions.
5. Granting such other and further relief as may be necessary and proper.

Exhibit A: Income, Resources, and Expense Statement

I. Resources

Non-Investment Income	*Andrew*	*Charlotte*	
Social Security	$810.00	0	
Navy Retirement	1,098		
Pension	50		
Teachers Retirement	520		
Totals	$2,478	0	$2,478

Exempt Assets		*Countable Assets*	
Residence	$92,900	Checking account	$7,000
Household furnishings	Exempt	Savings account	2,000
Motor vehicle	20,000	Savings account	6,000
		Edward Jones account	240,000
		Life insurance cash value	20,000
		Total	$275,000

II. Monthly Expenses of Charlotte Jones

Property tax	64.08
Home maintenance and upkeep	226.89
Homeowners insurance	51
Utilities (gas, electric, water & sewer, security)	149.40
Telephone	118.12
Cable television	88.72

Auto operation (gas and maintenance, includes car payment)	574.88
Auto insurance	50.26
Clothing	46.99
Groceries and other household	357.21
Hair cuts, personal grooming	54.67
Laundry and cleaning	6.22
Checking account charges/bank fees	3.09
Newspapers and magazines	19.61
Recreation, vacation, entertainment	155.34
Health insurance	51.34
Unreimbursed medical expense (such as for drugs)	256.27
Life insurance	114.13
Charitable contributions	5
Income taxes and tax preparation services	218.42
Pet care	16.50
Miscellaneous cash expenses	150
Total Monthly Expenses:	**$2778.14**

Anticipated maintenance items:

Repave driveway: $6000

Replace roof: $5000

Practice Note: Pursuant to *Blumberg,* we always mail copies of the Petition and subsequent pleadings to the Office of General Counsel, Tennessee Department of Human Services, 312 8th Avenue North, Tennessee Tower, 26th Floor, Nashville, Tennessee 37243.

Order Increasing CSRA and CSMIA

Order

This matter was before the Court, the Honorable John Turnbull, presiding, on January 23, 2004, upon the Petition by Charlotte D. Jones for an order of support in her favor against her husband Andrew B. Jones, that would allocate and set her Community Spouse Resource Allowance (CSRA) out of the parties' countable assets, and for an order of monthly income support in her favor against her husband Andrew B. Jones.

Present at the hearing were Timothy L. Takacs, Attorney for the Petitioner; Gary A. Hain, Attorney for the Respondent; Francis M. Bass, Jr., Attorney for Intervenor, Tennessee Department of Human Services; and Charlotte D. Jones.

Mr. Hain informed the Court that he had explained the contents of the Petition to Andrew B. Jones, who demonstrated to Mr. Hain's satisfaction that he understood the nature and contents of it, and consented to the relief requested therein.

After considering the record, the statements of counsel and the testimony, and the entire record, the Court makes the following findings:

The Petitioner's monthly income from Social Security and pension is $_____; the Respondent's monthly income from Social Security and pension is $_____. Total countable assets are $275,000.

Under the authority of federal and state law, the court finds that the Petitioner is a spouse in need of support from her husband, the Respondent.

The Petitioner has therefore established to the satisfaction of the Court that she is entitled to a deviation from the starting point of the allocation of resources and income set forth in the Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396r-5. In making this determination, the Court has weighed and considered various factors, including among others the intent of the Medicare Catastrophic Coverage Act, the detriment to the State, the relative ages and life expectancies of the parties, and the current and anticipated monthly expenses of the parties.

Choose one set of paragraphs (1. 100% of income and assets; or 2. Specific amounts set)

1. The Petitioner's community spouse resource allowance (protected resource amount) should therefore be raised to 100% of the couple's countable assets as of DATE.[25] The Respondent should pay as spousal support to the Petitioner 100% of his monthly income, less any deductions required such as the $30 Personal Needs Allowance. Upon approval of the Respondent's application for Medicaid, under the authority of state and federal law the Petitioner's community spouse monthly income allocation shall not be less than the amount of monthly income so ordered.

OR

2. The Petitioner has established to the satisfaction of the Court that she has actual and anticipated needs that are greater than can be met if her income and resource allowances were set at the Medicaid starting points of $1515/month for income and $92,760 for assets. The Petitioner's CSRA should therefore be raised to $230,000 and her CSMIA should be set at $2300. In making this determination, the Court finds that the increases will minimize the likelihood of spousal impoverishment and are necessary in order to carry out the intent of the Act. [OR: the Court finds exceptional circumstances resulting in significant financial duress to the Petitioner.]

The Respondent should therefore pay as spousal support to the Petitioner the sum of $2300 a month. Upon approval of the Respondent's application for Medicaid, under the authority of state and federal law the Petitioner's CSMIA should therefore be set at $2300.

It is therefore Ordered:

1. That, of the total countable assets of $275,000 of the parties on the date of the Respondent's institutionalization, the Petitioner shall retain thereafter for her sole benefit and support the sum of $230,000, to be transferred to Petitioner by the Respondent pursuant to 42 U.S.C. § 1396r-5(f), and this transferred amount is hereby declared to be her Community Spouse Resource Allowance.

OR

1. That, of the total countable assets of the parties as of DATE/date of institutionalization, the Petitioner shall retain thereafter for her sole benefit and support 100 percent thereof, to be transferred to Petitioner by the Respondent pursuant to 42 U.S.C. § 1396r-5(f), and this transferred amount is hereby declared to be her Community Spouse Resource Allowance. Accordingly, any right, title, and interest of Respondent in the parties' countable

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[25] This date is usually when the Petition is filed.

assets, including his IRAs, shall be vested out of Respondent and in Petitioner. For the purposes of Internal Revenue Code § 408(d)(6) governing the transfer of IRAs from one spouse to another, this order shall be deemed to be a decree of separate maintenance.

2. That the Respondent shall pay to the Petitioner as support, for Petitioner's sole benefit and support, $2300 a month. The amount of income allocated to her by this Order shall be deemed her community spouse monthly income allowance under 42 U.S.C. § 1396r-5(d)(5), and her community spouse monthly income allowance shall not be less than the amount of the monthly income so ordered.

OR

2. That the Respondent shall pay to the Petitioner as support, for Petitioner's sole benefit and support, the entire amount of the Respondent's monthly income, which is currently $2557.

It is the intent of this Order that the entire amount of Respondent's monthly income shall be allocated to the Petitioner pursuant to this Order, including future cost of living adjustments, increases, and the like, with the exception of the mandatory, current $30 deduction from his Social Security income for his Personal Needs Allowance. The entire amount of income allocated to her by this Order shall be deemed her community spouse monthly income allowance under 42 U.S.C. § 1396r-5(d)(5), and her community spouse monthly income allowance shall not be less than the amount of the monthly income so ordered.

3. That Petitioner, and any person lawfully acting on behalf of Petitioner, is authorized to do and perform all acts and to execute and deliver all papers, documents, and instruments necessary to consummate the proposed transactions.

4. The Court dispenses with the requirement of bond and notice in these transactions.

5. The attorney's fee for the Respondent of $1500 is approved. These fees are taxed as costs to the Petitioner and Respondent, for which let execution issue if necessary.

6. Court costs are taxed to the Petitioner and Respondent, for which let execution issue if necessary.

Entered on ______________________________, 2004.

Brief in Support of Petition to Increase CSRA and CSMIA

Counsel for the Tennessee Department of Human Services typically argues that the Medicaid scheme set out by Congress in MCCA provides a "fair financial plan" for the community spouse. Counsel may even suggest to the Court that it lacks authority to increase the spousal resource and income allowances above the Medicaid default amounts. I've used the following to persuade judges unfamiliar with the *Blumberg* judicial option that the court has such authority and that in appropriate cases Congress expected courts to exercise it.

Brief of Petitioner

Transfer of Assets Under a Court Order

Under the Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396r-5, a court is authorized, in a proceeding under the Act, to order a transfer of resources for the support of the community spouse, thereby setting the amount of the transferred resources as her Community Spouse Resource Allowance.

42 U.S.C. § 1396r-5(f)(2) provides:

(f) Permitting transfer of resources to community spouse ***

(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) of this section), 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) of this section, or (II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; 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 1396p of this title 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) of this section).

The legislative history of 42 U.S.C. § 1396r-5(f) reveals the intent of Congress. The Conference Report on H.R. 2470 provides:

House bill: ***

(F) COURT ORDERED SUPPORT. –

(1) Provides that if a court has entered an order against an institutionalized spouse for monthly income support for the community spouse, the community spouse monthly maintenance needs allowance must be at least as great as the court ordered amount.

(2) Provides that if a court has entered a support order against an institutionalized spouse requiring the spouse to transfer countable resources to the community spouse, such transfer will not be considered in violation of transfer of assets prohibitions.

(3) Provides that if a court has entered an order against an institutionalized spouse requiring the spouse to transfer resources, the community spouse resource allowance is the amount transferred up to the ceiling ($48,000 in 1988, indexed to the CPI in future years). ***

Senate amendment: ***

(F) COURT ORDERED SUPPORT. –

(1) Similar provision.

(2) Similar provision.

(3) Similar provision, *except ceiling does not apply*. (emphasis supplied) ***

Conference agreement: ***

(f) COURT-ORDERED SUPPORT. -- The conference agreement *follows the Senate amendment*. (emphasis supplied)

100 Cong. Rec. H 3765 (H. Rept. 100-661) (June 1, 1988).

In the House-Senate Conference, the Senate bill was accepted and in the final bill the ceiling removed:

> (c) RULES FOR TREATMENT OF RESOURCES. -- The conference agreement follows the Senate amendment with the following modifications. If the spousal share of the couple's total resources is greater than $60,000 (indexed by CPI beginning in 1990), amounts in excess of $60,000 would be attributed to the institutionalized spouse. A level higher than $60,000 could be established by fair hearing or court order.

Conference Report on H.R. 2470, 100 Cong. Rec. H 3765 (H. Rept. 100-661) (June 1, 1988).

Clearly, this Court is authorized to increase the Community Spouse Resource Allowance above the maximum amount set annually by the Department of Human Services.

Court Order Against Institutionalized Spouse for Monthly Income

Likewise, a court may enter an order requiring the institutionalized spouse to pay monthly income to the community spouse. Such relief is specifically authorized in MCCA, 42 U.S.C. § 1396r-5(d)(5):

> (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.

In the Conference Report, the conferees affirmed that when the court enters an order for monthly income support against the institutionalized spouse for the benefit of the community spouse, the Community Spouse Monthly Income Allowance must be set at that figure:

> (F) COURT ORDERED SUPPORT. –
> (1) Provides that if a court has entered an order against an institutionalized spouse for monthly income support for the community spouse, the community spouse monthly maintenance needs allowance must be at least as great as the court ordered amount.

Similar to the authority granted to a court to increase the CSRA, therefore, a court may enter an order requiring the institutionalized spouse to pay monthly income to the community spouse.

That this is the intent of Congress is once again supported by the legislative history of the Medicare Catastrophic Coverage Act:

> (F) COURT ORDERED SUPPORT. –
> (1) Provides that if a court has entered an order against an institutionalized spouse for monthly income support for the community spouse, the community spouse monthly maintenance needs allowance must be at least as great as the court ordered amount. ***
> The community spouse monthly maintenance needs allowance may not exceed

$1500 [since adjusted for cost of living, and now $2175], except where a higher level is determined to be necessary through a fair hearing or by a court order.

Conference Report on H.R. 2470, 100 Cong. Rec. H 3765 (H. Rept. 100-661) (June 1, 1988).

Recent court cases in Tennessee and Maryland affirm the binding effect of a court order on the State Medicaid agency. *Blumberg v. Tennessee Department of Human Services*, No. M2000-00237-COA-R3-CV (Tenn. App. October 25, 2000), held that MCCA provides for an absolute alternative procedure (court or fair hearing) that either the spouses or the State Medicaid agency may elect to set the spousal allowances. In *Blumberg*, the Tennessee Court of Appeals held that the State Medicaid agency "was without the authority to ignore the Circuit Court Order of spousal support."

The Maryland Court of Special Appeals, in *McGhee v. Secretary, Department of Health and Mental Hygiene*, No. 02837, entered a similar order dated December 26, 2000, three weeks after the Department received a letter from the U. S. Health Care Financing Administration (HCFA, now the U. S. Centers for Medicare & Medicaid Services) concluding that the State's refusal to honor appropriate court orders awarding income to a community spouse was inconsistent with MCCA.

Outline of Testimony by Community Spouse

I use the following outline as a guide to remind me to cover all of the bases with the community spouse during her testimony.

1. Community spouse
   a. Marital and familial status (children, etc.)
   b. Current residence
   c. Age, physical and mental condition; limitations on ADLs and disability, if any
   d. Present needs (describe)
   e. Future needs (describe)

2. Institutionalized spouse
   a. Marital and familial status (children, etc.)
   b. Previous residence
   c. Current residence
   d. Age, physical and mental condition, disability
   e. Prognosis

3. Resources, income, and expenses: Exhibit
[Remember to make the community spouse's income, resources, and monthly expenses statement an exhibit to her testimony.]
   a. Sources of income
   b. Exempt assets (home, etc.)
   c. Countable assets (checking and savings, CDs, etc.)
   d. Monthly expenses: these are reasonable and necessary for the CS's support
   e. Anticipated changes to any of the above

4. Alternatives, if any, to court relief

[5. Request for relief by the court
a. Findings: likelihood of spousal impoverishment if relief not granted, grounds for deviations from Medicaid defaults, monthly need
a. Order increasing CSRA
b. Order of income support][26]

Typical Questions

From time to time I am asked questions about the *Blumberg* litigation option from elder law attorneys who are interested in filing in their states.

Jurisdiction

Under what law do you file your petition for relief? The Medicare Catastrophic Coverage Act provides its own independent grounds for relief. You do not need to ask for a divorce or a legal separation or separate maintenance. Those are state actions. Your case arises under the federal Act.

In the *Blumberg* case, the DHS caseworker, the Medicaid hearing officer, and the chancery court all refused to recognize a circuit court order entered pursuant to 42 U.S.C. § 1396r-5. As the Tennessee court of appeals said, "it is obvious the Blumberg's rights have been prejudiced because DHS' administrative findings were: (1) in violation of the Act; (2) in excess of their statutory authority; and (3) made upon unlawful procedure when they essentially used an administrative hearing and Chancery Court to act as an appellate court with regard to a Circuit Court ruling."

If you are not convinced, and you question whether your court will find the holding in *Blumberg* persuasive, consider this: In enacting 42 U.S.C. § 1396r-5, Congress interjected federal law into state domestic relations law. Absent the Act, an institutionalized spouse would have a right to seek financial support from the community spouse. But Congress turned state domestic relations law upside down. For spouses who invoke the protection of the Act, the community spouse is entitled at least to the CSRA and the MMMNA, regardless of a court order (set pursuant to a state domestic relations statute) to the contrary. Furthermore, the provision 42 U.S.C. § 1396r-5(f) that sets the CSRA at a court-ordered amount makes no sense unless an action is authorized under the Act in state court to set the CSRA.

Ripeness

"Doesn't a Medicaid application have to be filed before you can go to court?" A court action *would* be premature if we didn't have an institutionalized spouse. After all, how can a CSRA be set when there is no community spouse? Once institutionalization occurs, however, we now have an institutionalized spouse and a community spouse. That triggers the right of either spouse to invoke the protections of the Act, by making the *Blumberg* election. If the question comes up, you can tell the judge that one of the *Blumberg* options is for married couples go to the State Medicaid agency to let the caseworker set their CSRA at the Medicaid default amount. Not all of them wind up applying for Medicaid.

[26] You may wish to reserve for closing argument a discussion of the requested findings and relief for your client.

Criteria for Review

In Tennessee, the Department of Human Services always intervenes and urges the court not to deviate from the Medicaid minimums set by the statute. How does the court decide how much to set the CSRA and the CSMIA? In Medicaid appeals, hearing officers are pretty much bound by the Medicaid formula for increasing the CSRA to generate income for the community spouse. What discretion the hearing officer enjoys is limited to finding "exceptional circumstances." Fortunately, courts are not bound by these limitations.

In one of my cases, I was in front of a good judge who had never heard a Medicaid spousal case. So he did what good judges do: he looked at what the intent of the legislature was. Clearly, the intent of the Medicare Catastrophic Coverage Act is to avoid or minimize the likelihood that the long-term care expenses of the institutionalized spouse will impoverish the community spouse. In his ruling from the bench, he articulated a half-dozen considerations in setting the community spouse resource allowance or the community spouse monthly income allowance. To his list I've added several more:

1. Ordinary and necessary expenses of the community spouse
2. Ordinary and necessary expenses of the institutionalized spouse (including cost of nursing home care)
3. Total assets of the parties
4. Other resources available to the community spouse (exempt assets such as an IRA)
5. Income of the institutionalized spouse
6. Income of the community spouse
7. Other sources of payment for nursing home care (such as long-term care insurance)
8. Earning potential of the community spouse
9. Effect of the institutionalized spouse's death on the community spouse's income
10. Ages of the spouses (actuarial life expectancies)
11. Actual life expectancies of the spouses
12. Physical and mental condition of the community spouse
13. Likelihood of material change in the community spouse's circumstances (due to disability or other reasonably foreseeable occurrences)
14. Special needs of the community spouse
15. Dependents of the parties
16. Duration of the marriage
17. Separate property of each spouse
18. Reasonable expectations (if any) of the spouses' heirs
19. Stability of the marital relationship (divorce as option?)
20. Impact on the state budget
21. Public policy as set forth in State law, regulations, and policy

Why Not Try These Cases?

Recently, on the NAELA listserv, I wrote: "I am simply unable to understand why elder law attorneys continue to talk so casually about divorce, when seeking court-ordered support by way of 42 USC 1396r-5 is clearly a route contemplated by Congress. Why aren't we trying these cases?" We're lawyers and we're supposed to try cases. What have we got to lose by going this route?