



# Medicaid, Nursing Home Care, and Spousal Responsibility: For Richer or Poorer, in Sickness and Health?

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This *Elder Law Bulletin*, written primarily for district and superior court judges, clerks and assistant clerks of superior court, attorneys who practice elder law, attorneys and employees who work for state or county social services or aging agencies, and state policymakers, discusses the often-confusing interplay between North Carolina's laws regarding spousal support and responsibility and the provisions of the federal Medicaid statute that apply to income and assets of a married couple when one spouse is a nursing home patient and applies for Medicaid payment for nursing home care while the other spouse continues to live in the community.

## Paying for Nursing Home Care: The Challenge for Elderly and Disabled Patients, Their Spouses and Families, and Taxpayers

Although most elderly or disabled North Carolinians who need long-term care live in their own homes or with others in the community<sup>1</sup> and receive care, if needed, from family members or through home- and community-based programs,<sup>2</sup> many elderly or disabled persons with severe and chronic health care needs require skilled nursing care in a licensed nursing facility (nursing home).<sup>3</sup>

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1. Fewer than 10 percent of all persons aged seventy-five years or older live in nursing homes. Of those aged seventy-five or older who live in the community, almost half live with their spouses, more than a third live alone, and almost all of the remainder live with other relatives. U.S. Bureau of the Census, *65+ In the United States: 2005* (Current Population Reports, P23-209, Dec. 2005), [www.census.gov/prod/2006pubs/p23-209.pdf](http://www.census.gov/prod/2006pubs/p23-209.pdf) (last visited June 11, 2009).

2. Approximately 80 percent of persons who are aged seventy-five to eighty-four years and need long-term care and 70 percent of persons with long-term care needs who are aged eighty-five years or older live in the community rather than in nursing homes. U.S. Bureau of the Census, *65+ In the United States: 2005* (Current Population Reports, P23-209, Dec. 2005), [www.census.gov/prod/2006pubs/p23-209.pdf](http://www.census.gov/prod/2006pubs/p23-209.pdf) (last visited June 11, 2009).

3. Approximately 38,000 elderly and disabled North Carolinians are patients in nursing homes in the state. Email from Samuel B. Clark, Director of Finance, North Carolina Health Care Facilities Association

While skilled nursing care is necessary for some elderly and disabled persons, it is expensive—for those individuals, for their families, and for the public. The average cost of nursing home care in North Carolina currently ranges from approximately \$153.42 to \$197.26 per day (or \$59,000 to \$72,000 per year).<sup>4</sup> In 2007 spending for nursing home care in the United States totaled approximately \$131.3 billion and accounted for approximately 6 percent of total health care spending.<sup>5</sup>

Some elderly nursing home patients or their families are able to pay all or part of the cost of the nursing home care they need.<sup>6</sup> Few elderly or disabled individuals or their families, however, have sufficient income or assets to pay the cost of extended nursing home care.<sup>7</sup> And, in the

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to John L. Saxon, June 19, 2009. There are approximately 422 licensed nursing facilities in North Carolina with a capacity of approximately 43,770 patients. *Id.* In 2007 approximately 1.8 million Americans lived in skilled nursing facilities. U.S. Census Bureau, *2007 American Community Survey*, Table S2601B, <http://factfinder.census.gov> (last visited June 10, 2009). Approximately 10 percent of men aged eighty-five years or older and 20 percent of women aged eighty-five or older live in nursing homes, and there is an approximate 40 percent probability that a person who is aged sixty-five years or older will be admitted to a nursing home at some point during the remainder of his or her life. U.S. Bureau of the Census, *65+ In the United States: 2005* (Current Population Reports, P23-209, Dec. 2005), [www.census.gov/prod/2006pubs/p23-209.pdf](http://www.census.gov/prod/2006pubs/p23-209.pdf) (last visited June 11, 2009). “The aging of the baby boom generation and the projected substantial increase in the size of the older population, particularly those above age eighty-five, is expected to result in an unprecedented surge in demand for long-term care to the elderly over the next few decades. Although informal caregivers remain the primary source of assistance to frail elderly . . . , formal long-term care arrangements are critical, particularly to severely disabled elderly. Formal long-term care is provided by a variety of institutions and arrangements, including home health care, assisted living facilities, and residential nursing home facilities. Among these, nursing home care has a unique importance because it generally caters to severely disabled elderly who suffer from chronic long-term disabilities associated with old age and require extensive medical assistance as well as assistance with their basic daily needs.” Claire Noel-Miller, “Adult Children and the Risk of Nursing Home Admission Following Spousal Loss,” <http://paa2009.princeton.edu/download.aspx?submissionId=90547> (last visited June 10, 2009).

4. Genworth Financial, “Cost of Long Term Care Across the Nation,” [www.genworth.com/content/products/long\\_term\\_care/long\\_term\\_care/cost\\_of\\_care.html](http://www.genworth.com/content/products/long_term_care/long_term_care/cost_of_care.html) (last visited June 9, 2009).

5. Claire Noel-Miller, “Adult Children and the Risk of Nursing Home Admission Following Spousal Loss,” <http://paa2009.princeton.edu/download.aspx?submissionId=90547> (last visited June 10, 2009). Centers for Medicare and Medicaid Services, “National Health Expenditures: 2007 Highlights,” [www.cms.hhs.gov/NationalHealthExpendData/downloads/highlights.pdf](http://www.cms.hhs.gov/NationalHealthExpendData/downloads/highlights.pdf) (last visited June 10, 2009); Centers for Medicare and Medicaid Services, “National Health Expenditure Data,” [www.cms.hhs.gov/NationalHealthExpendData/02\\_NationalHealthAccountsHistorical.asp](http://www.cms.hhs.gov/NationalHealthExpendData/02_NationalHealthAccountsHistorical.asp) (last visited June 10, 2009).

6. Ellen O’Brien, “Medicaid’s Coverage of Nursing Home Costs: Asset Shelter for the Wealthy or Essential Safety Net?” *Georgetown University Long-Term Care Financing Project Issue Brief*, May 2005, <http://ltc.georgetown.edu/pdfs/nursinghomecosts.pdf> (last visited June 9, 2009), citing Brenda Spillman and Peter Kemper, “Lifetime Patterns of Payment for Nursing Home Care” *Medical Care* 33(3): 280–96 (1995). According to that study, 44 percent of elderly nursing home patients paid for their care from private funds only, while another 16 percent began as private payers before applying for Medicaid. In 2007 nursing home patients or their families paid more than one-fourth of the total cost of nursing home care (\$35.3 billion). Centers for Medicare and Medicaid Services, “National Health Expenditure Data,” [www.cms.hhs.gov/NationalHealthExpendData/02\\_NationalHealthAccountsHistorical.asp](http://www.cms.hhs.gov/NationalHealthExpendData/02_NationalHealthAccountsHistorical.asp) (last visited June 10, 2009).

7. Most elderly or disabled persons who need nursing home care have limited incomes and assets. The per capita annual income of nursing home patients is approximately \$12,000. U.S. Census Bureau, *2007*

past, paying the cost of care for a husband or wife who was admitted to a nursing home could impoverish the patient's spouse who continued to live in the community.<sup>8</sup>

Many elderly or disabled persons who need nursing home care, therefore, rely on other sources of assistance or payment for nursing home care, including long-term care insurance, Medicare, and Medicaid.<sup>9</sup>

### Medicaid Eligibility for Nursing Home Care

Medicaid is a public assistance program that pays for health care for the poor, including elderly or disabled persons with limited financial resources.<sup>10</sup>

In 2007 state Medicaid programs paid \$54.8 billion, or more than 40 percent, of the total cost of nursing home care in the United States, and more than half of all nursing home patients received Medicaid assistance with respect to their nursing care.<sup>11</sup> North Carolina's Medicaid

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*American Community Survey*, Table S2601B, <http://factfinder.census.gov> (last visited June 10, 2009). Excluding home equity, the median net worth of elderly households is approximately \$24,000 and only 5 percent of elderly households have assets (excluding home equity) of more than \$300,000. Ellen O'Brien, "Medicaid's Coverage of Nursing Home Costs: Asset Shelter for the Wealthy or Essential Safety Net?" Georgetown University Long-Term Care Financing Project Issue Brief, May 2005, <http://ltc.georgetown.edu/pdfs/nursinghomecosts.pdf> (last visited June 9, 2009). Elderly individuals who are in poor health or have functional impairments that require long-term care "have even more limited financial resources than the non-disabled elderly and those in good health." *Id.*

8. Most nursing home patients are widowed or unmarried. Approximately one-fifth of nursing home patients in the United States, however, are married. Many of those who are widowed or unmarried, however, were married at the time they were admitted to skilled nursing care. U.S. Census Bureau, 2007 *American Community Survey*, Table S2601B, <http://factfinder.census.gov> (last visited June 10, 2009). More than half of all nursing home patients are widowed, about one in six was never married, and about one in nine is divorced. *Id.*

9. In 2007 long-term care insurance payments accounted for less than 8 percent of the total cost of nursing home care (\$9.8 billion), and Medicare payments funded approximately 18 percent of the total cost of nursing home care (\$23.2 billion). Centers for Medicare and Medicaid Services, "National Health Expenditure Data," [www.cms.hhs.gov/NationalHealthExpendData/02\\_NationalHealthAccountsHistorical.asp](http://www.cms.hhs.gov/NationalHealthExpendData/02_NationalHealthAccountsHistorical.asp) (last visited June 10, 2009). Medicare is a federal health insurance program for elderly and disabled persons who are eligible for Social Security retirement, disability, or survivors' benefits. Medicare covers up to 100 days of skilled nursing care in a Medicare-approved skilled nursing facility when a beneficiary enters a nursing home within thirty days of a hospitalization of at least three days for the same medical condition and meets other Medicare requirements. Medicare pays the full cost of nursing care for the first twenty days. After twenty days, Medicare patients are required to pay a copayment (\$133.50 per day in 2009) for their nursing care.

10. The Medicaid program was created in 1965 and is funded jointly by the federal government and each participating state. North Carolina's Medicaid program is summarized in John L. Saxon, *Social Services in North Carolina* (Chapel Hill: UNC School of Government, 2008), 183–85. Additional information about North Carolina's Medicaid program is available on the state Division of Medical Assistance's website, [www.dhhs.state.nc.us/dma](http://www.dhhs.state.nc.us/dma) (last visited June 10, 2009), and in the division's annual report, [www.dhhs.state.nc.us/dma/2007report/2007report.pdf](http://www.dhhs.state.nc.us/dma/2007report/2007report.pdf) (last visited June 10, 2009).

11. Centers for Medicare and Medicaid Services, "National Health Expenditure Data," [www.cms.hhs.gov/NationalHealthExpendData/02\\_NationalHealthAccountsHistorical.asp](http://www.cms.hhs.gov/NationalHealthExpendData/02_NationalHealthAccountsHistorical.asp) (last visited June 10, 2009); Center on Budget and Policy Priorities, "Policy Basics: Introduction to Medicaid," [www.cbpp.org](http://www.cbpp.org) (last visited June 9, 2009). Approximately two-thirds of all nursing home patients in North Carolina receive

program spent approximately \$2.9 billion for long-term care (approximately one-third of total Medicaid spending) in state fiscal year 2007.<sup>12</sup> Of that amount, the state Medicaid program paid approximately \$1.06 billion for nursing home care.<sup>13</sup>

To qualify for Medicaid coverage of nursing home care, a nursing home patient's countable resources must be less than the Medicaid resource limit, *and* the patient's income must be less than the special Medicaid income limit for nursing home patients.<sup>14</sup>

### Medicaid Resource Limits for Nursing Home Patients

In general a married nursing home patient is not financially eligible for Medicaid payment for nursing home care if the value of his or her "countable" resources exceeds \$2,000.<sup>15</sup> Countable resources are assets that (1) a Medicaid applicant or recipient owns (individually or jointly with others), (2) are available for his or her support, and (3) are not excluded under federal and state law or rules in determining his or her eligibility for Medicaid.<sup>16</sup> Countable resources, however,

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assistance from the state Medicaid program with respect to the cost of their nursing home care. Email from Samuel B. Clark, Director of Finance, North Carolina Health Care Facilities Association to John L. Saxon, June 19, 2009.

12. North Carolina Division of Medical Assistance, "Medicaid in North Carolina: Annual Report, State Fiscal Year 2007," [www.dhhs.state.nc.us/dma/2007report/2007report.pdf](http://www.dhhs.state.nc.us/dma/2007report/2007report.pdf) (last visited June 10, 2009). Long-term care includes nursing care in nursing homes, home health care, private duty nursing, home infusion services, hospice care, durable medical equipment, adult care home and personal care services, and health care provided through the state's Medicaid community alternatives programs. In state fiscal year 2007, North Carolina's community alternatives program for disabled adults (a program that allows disabled adults to receive home- and community-based services rather than being admitted to a nursing home) served approximately 11,000 persons each month and cost approximately \$256 million (or not quite \$2,000 per recipient per month).

13. North Carolina Division of Medical Assistance, "Medicaid in North Carolina: Annual Report, State Fiscal Year 2007," [www.dhhs.state.nc.us/dma/2007report/2007report.pdf](http://www.dhhs.state.nc.us/dma/2007report/2007report.pdf) (last visited June 10, 2009). According to the state Division of Medical Assistance, approximately 42,721 to 44,843 Medicaid recipients received Medicaid payment for nursing home care during state fiscal year 2007, and, based on this figure, the average Medicaid nursing home payment would have been approximately \$2,000 per patient per month. *Id.*

14. To qualify for Medicaid, the patient also must satisfy Medicaid's nonfinancial eligibility requirements and meet the state's standards regarding need for institutional nursing care. Medicaid eligibility for aged, blind, and disabled persons in North Carolina is discussed in more detail in Douglas S. Sea, "Medicaid for the Aged, Blind, and Disabled in North Carolina," [www.healthlaw.org/search/item.173192](http://www.healthlaw.org/search/item.173192) (last visited June 11, 2009).

15. The \$2,000 limit also applies to unmarried nursing home patients. The Medicaid resource limit is \$3,000 (for a nursing home patient and the patient's spouse) rather than \$2,000, if a nursing home patient is married and the patient's spouse lives with the patient in the same room and is also applying for or receiving Medicaid for nursing home care.

16. Countable resources generally include bank accounts, investments, cars, boats, life insurance, revocable trust funds, certain irrevocable trusts and annuities, and other personal or real property (unless the property or asset is designated as a noncountable asset). Countable resources, however, may not be counted unless they are, in fact, available to the patient (i.e., the patient, or someone acting on his or her behalf, has the legal and practical ability to convert the asset to cash to pay for his or her care). And, some assets are not counted in determining an individual's Medicaid eligibility. For example, the equity value of property that is (or was) used by the patient as his or her home is not counted as long as the patient's spouse or minor or disabled child is living in the home, a dependent relative of the patient is living in the home, *or* the patient subjectively intends to return home (regardless of whether there is medical

also include assets that are owned by the *spouse* of a nursing home patient who applies for Medicaid for nursing home care *unless* (a) the assets are protected under Medicaid's community spouse rules (discussed below) or otherwise excluded under federal and state law or rules in determining an individual's eligibility for Medicaid, (b) the patient and his or her spouse were separated for at least twelve months before the patient was admitted to a nursing home, or (c) the patient's spouse is also a nursing home patient and does not live in the same room with the patient.<sup>17</sup>

If a nursing home patient's countable resources (including, to the extent allowed under federal law, the countable resources owned by his or her spouse) exceed the Medicaid resource limit, the patient may qualify for Medicaid if the patient (and, if applicable, his or her spouse) "spends down" the patient's (or couple's) "excess" countable resources on medical care or other expenses.<sup>18</sup>

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evidence to support that intent). If a person applies for Medicaid coverage of nursing home care on or after November 1, 2007, Medicaid rules generally impose a \$500,000 cap on home equity that is excluded in determining Medicaid eligibility for nursing home services unless the patient's spouse or a child of the patient who is disabled or under the age of twenty-one years lives in the home.

17. Like other states, North Carolina recognizes the common law duty of spouses to support each other. And, in recognition of this general duty of spousal support, the federal Medicaid statute generally allows an individual's income and resources to be deemed available to his or her spouse in determining his or her spouse's eligibility for Medicaid. *See* 42 U.S.C. § 1396a(a)(17)(D). *See also* *Herweg v. Ray*, 455 U.S. 265, 102 S. Ct. 1059 (1982) and *Schweiker v. Gray Panthers*, 453 U.S. 34, 101 S. Ct. 2633 (1981) (upholding Medicaid provisions regarding spousal deeming). Federal and state Medicaid rules, however, do not always take into account the legal obligation of spouses to support each other when determining a married nursing home patient's financial eligibility for Medicaid payment for nursing home care or the amount that a married nursing home patient must contribute toward the cost of his or her nursing home care. Federal Medicaid regulations, for example, prohibit state Medicaid programs from counting the income of a Medicaid applicant's spouse in determining whether the applicant is eligible for Medicaid when the applicant and his or her spouse are not living together. 42 C.F.R. § 435.602(a)(3). And, as discussed below, the federal Medicaid statute establishes special rules regarding the income and resources of individuals whose spouses are nursing home patients and apply for Medicaid payment for nursing home care.

18. "Medicaid estate planning" strategies may allow some elderly or disabled persons and their spouses to preserve some or all of their "excess" resources for themselves, their spouses, or their families rather than spending them for nursing home care. Medicaid estate planning, however, has been, and remains, controversial. *See* Stephen A. Moses, "The Fallacy of Impoverishment," *The Gerontologist* 30(1): 21–25 (1990). Critics of Medicaid estate planning contend that, as the result of the efforts of "a veritable cottage industry of elder law attorneys . . . whose mission is to advise clients with sizable assets about how they can preserve those assets and get Medicaid to pay for nursing home care when they need it," Medicaid "has been stretched beyond its original purpose of providing a safety net for the poor," and, instead, "has evolved into a middle class entitlement and an asset shelter for the rich." *See* Ellen O'Brien, "Medicaid's Coverage of Nursing Home Costs: Asset Shelter for the Wealthy or Essential Safety Net?" *Georgetown University Long-Term Care Financing Project Issue Brief*, May 2005, <http://ltc.georgetown.edu/pdfs/nursinghomecosts.pdf> (last visited June 9, 2009). In response to concerns regarding the potential abuses of Medicaid estate planning, Congress has enacted legislation limiting some forms of Medicaid estate planning. For example, federal law limits an individual's eligibility for Medicaid payment for nursing home care if the patient or the patient's spouse transfers assets for less than market value in order to qualify for Medicaid. 42 U.S.C. § 1396p, as amended by the federal Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2005). One study, however, concludes that there is little evidence that elderly individuals or couples transfer assets in order to become eligible for Medicaid nursing home care and

### Medicaid Income Limits for Nursing Home Patients

If a nursing home patient meets all of Medicaid's nonfinancial eligibility requirements, his or her countable resources are less than the \$2,000 Medicaid resource limit, and he or she has been a nursing home patient for at least thirty consecutive days, the patient will be eligible for Medicaid payment for his or her nursing home care if (1) his or her countable monthly income is less than the nursing home's monthly Medicaid reimbursement rate,<sup>19</sup> (2) his or her *net* countable monthly income is less than the nursing home's private rate,<sup>20</sup> or (3) his or her net countable monthly income is less than the nursing home's private rate plus other predictable medical expenses that will not be covered by the nursing home.

In determining a nursing home patient's eligibility for Medicaid, however, the income of the individual's spouse is *not* considered unless the spouse is also a nursing home patient, lives in the same room with the individual who is applying for Medicaid payment for nursing home care, and is also applying for Medicaid payment for nursing home care. When income is paid jointly to a nursing home patient and his or her spouse, each spouse generally is presumed to receive half of the income.

### Medicaid Payment for Nursing Home Care

If a nursing home patient meets all of Medicaid's financial and nonfinancial eligibility requirements and is in a Medicaid-certified nursing care bed, North Carolina's Medicaid program will pay at least part of the cost of the patient's nursing home care.

The amount that Medicaid pays on behalf of an eligible Medicaid recipient is determined by subtracting the patient's monthly liability (PML)<sup>21</sup> from the nursing home's Medicaid reimbursement rate.<sup>22</sup> And a Medicaid recipient's PML, in turn, is equal to his or her countable income

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that legislation designed to curb asset transfers and other forms of "Medicaid estate planning" produces only small savings in federal and state spending for Medicaid. O'Brien, "Medicaid's Coverage of Nursing Home Costs: Asset Shelter for the Wealthy or Essential Safety Net?" *Georgetown University Long-Term Care Financing Project Issue Brief*, May 2005, <http://ltc.georgetown.edu/pdfs/nursinghomecosts.pdf> (last visited June 9, 2009).

19. Each nursing home in North Carolina is assigned a daily Medicaid reimbursement rate. See North Carolina Division of Medical Assistance, "Nursing Facility Rates," [www.ncdhhs.gov/dma/fee/NurFacRates.pdf](http://www.ncdhhs.gov/dma/fee/NurFacRates.pdf) (last visited June 9, 2009). A facility's monthly Medicaid reimbursement rate is calculated by multiplying the daily rate by 31 and rounding up to the next dollar. In 2009 the average Medicaid reimbursement rate for North Carolina nursing homes was approximately \$156.88 per day (or \$4,864 per month).

20. Net countable income is determined by subtracting the exclusions, deductions, disregards, exemptions, and the medically needy maintenance allowance that would be allowed in determining the eligibility of Medicaid applicants in private living arrangements. A nursing home's monthly private rate is determined by multiplying its daily private rate by 31. The average cost of nursing home care in North Carolina currently ranges from approximately \$153.42 to \$197.26 per day (or \$4,757 to \$6,116 per month). Genworth Financial, "Cost of Long Term Care Across the Nation," [www.genworth.com/content/products/long\\_term\\_care/long\\_term\\_care/cost\\_of\\_care.html](http://www.genworth.com/content/products/long_term_care/long_term_care/cost_of_care.html) (last visited June 9, 2009).

21. The patient monthly liability (PML) is, in essence, a required copayment that the patient must make to the nursing home.

22. For example, if a facility's monthly Medicaid reimbursement rate is \$4,200 per month and a Medicaid recipient's PML is \$1,600, Medicaid will pay \$2,600 to the nursing home and the patient must pay \$1,600 of the cost of his or her nursing home care.

minus (1) a personal needs allowance of \$30; (2) an additional allowance of up to \$25 for guardianship fees; (3) income paid to the patient's community spouse under Medicaid's community spouse protection rules (discussed below); (4) an allowance of \$242 per month *if* the patient does not have a community spouse and can reasonably be expected to return to a private living arrangement within six months; (5) an allowance for dependent children, parents, or siblings; and (6) an allowance for any out-of-pocket expenses for current and future unmet medical needs, as well as payments for medical care received while the patient was not eligible for Medicaid.

### Protecting the Income and Assets of Spouses of Nursing Home Patients under the MCCA

On June 8, 1988, Congress passed the Medicare Catastrophic Coverage Act of 1988 (MCCA), which was signed into law by President Ronald Reagan on July 1, 1988.<sup>23</sup>

Before enactment of the MCCA, state Medicaid rules often required a married couple to spend virtually all of the couple's financial resources for the nursing home care of a spouse who was admitted to a nursing home (the "institutionalized spouse") before providing Medicaid coverage for the institutionalized spouse's nursing home care. Often, this left the spouse who remained at home (the "community spouse") destitute because the couple's assets had been spent down to pay the cost of the institutionalized spouse's nursing home care before the institutionalized spouse qualified for Medicaid, and, after the institutionalized spouse qualified for Medicaid, all or most of the institutionalized spouse's income had to be used to pay part of the cost of his or her nursing home care rather than for the support of his or her community spouse.<sup>24</sup> To prevent or mitigate these forms of so-called spousal impoverishment, the MCCA established special rules allowing married couples to protect a specified portion of the couple's income and resources for the benefit of the community spouse of a nursing home patient.<sup>25</sup>

The requirements of the MCCA's community spouse protection rules are binding on all state Medicaid programs and, in determining the Medicaid eligibility of an institutionalized spouse, supersede the other provisions of the federal Medicaid law to the extent they are inconsistent with the community spouse protection rules.<sup>26</sup>

The MCCA generally defines "institutionalized spouse" as a person who (1) is likely to be in a nursing facility for at least thirty consecutive days and (2) is married to a spouse who is not in a

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23. Pub. L. No. 100-360, 102 Stat. 683 (1988).

24. *See* Wisconsin Dept. of Health and Family Services v. Blumer, 534 U.S. 473, 122 S. Ct. 962 (2002).

25. 42 U.S.C. § 1396r-5. It is also important to note, though, that in enacting the MCCA, "Congress sought to protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." Wisconsin Dept. of Health and Family Services v. Blumer, 534 U.S. at 480, 122 S. Ct. at 968 (emphasis added).

26. 42 U.S.C. § 1396r-5(a)(4); 42 U.S.C. § 1396r-5(a)(1). North Carolina's Medicaid program appears to deny the MCCA protections to community and institutionalized spouses who have been separated for more than twelve months immediately preceding the institutionalized spouse's admission to a nursing facility. This policy, however, appears to be inconsistent with the MCCA's community spouse protection rules.

nursing facility; “community spouse” is defined as a person who (1) is married to an institutionalized spouse and (2) is not a patient in a nursing facility.<sup>27</sup>

Under the MCCA a community spouse’s income may not be deemed available to his or her institutionalized spouse when a state Medicaid program is determining the institutionalized spouse’s eligibility for Medicaid.<sup>28</sup> And, if an institutionalized spouse is determined eligible for Medicaid (applying the community spouse resource rules discussed below), no resources owned by the community spouse may be deemed available to the institutionalized spouse after the month in which the institutionalized spouse was determined eligible.<sup>29</sup>

The MCCA also protects community and institutionalized spouses by requiring state Medicaid programs to implement

- a community spouse resource allowance (CSRA) that must be applied in determining whether an institutionalized spouse is eligible for Medicaid payment for nursing home care and
- a minimum monthly maintenance needs allowance (MMMNA) for community spouses and a community spouse monthly income allowance (CSMIA) that apply in determining how much of an institutionalized spouse’s income must be used to pay part of the cost of his or her nursing home care and how much may be provided for the community spouse’s support.<sup>30</sup>

The community spouse protection rules, however, apply only as long as one spouse is an institutionalized spouse and the other spouse is a community spouse. A couple, therefore, is not protected by the community spouse protection rules if they divorce, if the community spouse dies, if the community spouse is admitted to a nursing home, or if the institutionalized spouse ceases to receive nursing home care.

### **The MCCA’s Community Spouse Resource Allowance**

The purpose of Medicaid’s CSRA is to reserve a portion of a married couple’s countable resources for the benefit of the community spouse. Under the MCCA, the value of the CSRA is deemed unavailable to the institutionalized spouse in determining his or her eligibility for Medicaid payment nursing home care, while all countable resources owned by the institutionalized spouse, the community spouse, or both in excess of the CSRA are counted in determining the institutionalized spouse’s Medicaid eligibility for nursing home care.

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27. 42 U.S.C. § 1396r-5(h). A state may include within the definition of “institutionalized spouse” a person who is eligible for home- and community-based services in lieu of nursing home care (for example, persons are eligible for Medicaid under North Carolina’s community alternatives program for disabled adults) and is married to a spouse who is not in a medical institution or nursing facility. The MCCA rules also apply to individuals who receive institutional or noninstitutional services under a Medicaid PACE (Program of All Inclusive Care for the Elderly) demonstration waiver program. 42 U.S.C. § 1396r-5(a)(5).

28. 42 U.S.C. § 1396r-5(b)(1). In determining the incomes of the community spouse and the institutionalized spouse, the MCCA generally uses the “name on the check” method under which payments made solely in the name of one spouse are attributable to that spouse only and when payments are made jointly to both spouses one-half of the income is attributed to each spouse. 42 U.S.C. § 1396r-5(b)(2).

29. 42 U.S.C. § 1396r-5(c)(4).

30. The MCCA’s rules do not apply to couples if the institutionalized spouse has been continuously institutionalized since September 30, 1989.

Under the MCCA each state Medicaid program is required to establish a CSRA in accordance with the requirements and limitations set forth in 42 U.S.C. § 1396r-5(f)(2)(A).<sup>31</sup> Under those requirements and limitations a state's CSRA generally must be the greater of

1. \$21,912 (as of January 1, 2009) or a higher amount, not to exceed \$109,560 (as of January 1, 2009), established by the state Medicaid program, or
2. one-half of the total value of the resources [other than a home, household goods, and other resources excluded under the federal Supplemental Security Income statute (42 U.S.C. § 1382b)] owned by the institutionalized spouse, the community spouse, or both *as of the date of the institutionalized spouse's first continuous period of institutionalization*, but not more than \$109,560 (as of January 1, 2009).<sup>32</sup>

In North Carolina the "minimum" CSRA is \$21,912 and the "maximum" CSRA is \$109,560 (as of January 1, 2009).<sup>33</sup>

Assume, for example, that John and Mary are married; that John is admitted to a nursing home in North Carolina on January 1, 2009; that John owns countable resources valued at \$25,000 as of that date; that Mary owns countable resources valued at \$5,000; and that they jointly own countable resources valued at \$90,000 in addition to their home, household furnishings, and one car, and that John applies for Medicaid payment for nursing home care on July 1, 2009. If, as of that date, John and Mary jointly own countable resources valued at \$50,000 (in addition to their home, household furnishings, and a car), Mary owns countable resources valued at \$7,000, and John owns countable resources valued at \$5,000, then Mary's CSRA will be \$60,000 (one-half of the \$120,000 in countable resources that John and Mary owned when John was admitted to the nursing home).<sup>34</sup>

When a state Medicaid agency determines the value of resources available to an institutionalized spouse at the time the institutionalized spouse applies for Medicaid payment for nursing

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31. Read literally, 42 U.S.C. § 1396r-5(f)(2) defines "community spouse resource allowance" as the amount determined under 42 U.S.C. § 1396r-5(f)(2)(A) minus the amount of countable resources otherwise available to the community spouse. This definition, however, applies only with respect to determining the amount of assets that may be transferred from the institutionalized spouse to the community spouse pursuant to 42 U.S.C. § 1396r-5(f)(1). The provisions of 42 U.S.C. § 1396r-5(c) apply with respect to determining whether an institutionalized spouse meets the Medicaid eligibility requirements related to countable resources and those provisions refer to the amount computed under 42 U.S.C. § 1396r-5(f)(2)(A). This bulletin, therefore, will use the term community spouse resource allowance (CSRA) to refer to the allowance computed under 42 U.S.C. § 1396r-5(f)(2)(A) rather than the difference between that amount and the amount of resources otherwise available to the community spouse, even though defining CSRA as the amount computed pursuant to 42 U.S.C. § 1396r-5(f)(2)(A) is not, strictly speaking, correct.

32. The state Medicaid agency must notify both spouses of the CSRA when the agency makes a determination that the institutionalized spouse is eligible for Medicaid payment for nursing home care, as well as providing notice of the CSRA to the institutionalized spouse, the community spouse, or the spouse's representative upon request. 42 U.S.C. § 1396r-5(e)(1).

33. Some states, including Florida, have provided additional protection to community spouses by increasing the "minimum" CSRA to \$109,560 (allowing a community spouse to retain *all* of the couple's resources up to \$109,560 rather than only half of the couple's resources up to \$109,560). North Carolina, however, has not chosen to increase its "minimum" CSRA as allowed by federal law.

34. If the value of John's and Mary's countable resources on January 1, 2009, had been less than \$43,824, Mary's CSRA would have been \$21,912. If the value of John's and Mary's countable resources on January 1, 2009, had been more than \$219,120, Mary's CSRA would have been \$109,560.

home care, all resources of the community spouse and the institutionalized spouse generally will be deemed available to the institutionalized spouse *to the extent that the couple's combined resources exceed the community spouse's resource allowance*.<sup>35</sup>

So, in the example regarding John and Mary, the value of the couple's combined countable resources at the time of John's application for Medicaid would be \$62,000, but only \$2,000 (the amount that exceeds Mary's \$60,000 CSRA) would be deemed available to John and considered in determining his Medicaid eligibility for nursing home care. And, because the value of the couple's countable resources deemed available to John does not exceed Medicaid's \$2,000 asset limit, John will be eligible for Medicaid if he meets Medicaid's other financial and nonfinancial eligibility requirements. In order to remain eligible for Medicaid, however, John will need to convert his interest in the \$50,000 in countable resources that he and Mary own jointly and \$3,000 of the \$5,000 in countable resources that he owns into assets that are not counted in determining his Medicaid eligibility or transfer those assets to Mary as soon as practicable after the date he is determined to be eligible for Medicaid payment for nursing home care.<sup>36</sup>

### **The MCCA's Community Spouse Monthly Income Allowance**

The MCCA also requires state Medicaid programs to establish a minimum monthly maintenance needs allowance (MMMNA) for community spouses, to use that MMMNA in determining a spouse's CSMIA, and to use a spouse's CSMIA in determining the amount of an institutionalized spouse's income that may be used for the community spouse's support. Under federal law a state's MMMNA for community spouses generally must be at least \$1,823 per month (as of July 1, 2009) plus (if applicable) an excess shelter allowance, but not more than \$2,739 per month (as of July 1, 2009).<sup>37</sup> The amount of a spouse's CSMIA is equal to the amount

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35. 42 U.S.C. § 1396r-5(c)(2).

36. See 42 U.S.C. §§ 1396r-5(f)(1) and 1396r-5(c)(4). If Mary subsequently applies for Medicaid, her countable resources, including those transferred to her by John, will be considered in determining her Medicaid eligibility. If Mary transfers any of her countable resources, including those transferred to her by John, for less than fair market value, she may be subject to Medicaid's transfer-of-assets penalty. See 42 U.S.C. § 1396p(c). Mary's subsequent transfer of assets for less than fair market value, however, should not affect John's continued Medicaid eligibility. See 42 U.S.C. §§ 1396r-5(c)(4) and 1396p(c)(2)(C)(ii). If John subsequently acquires additional countable resources, he will need to convert those resources into assets that are not counted in determining his Medicaid eligibility or transfer them to Mary (or to another person for Mary's sole benefit). If he transfers those assets to Mary (or to another person for Mary's sole benefit), he will not be subject to Medicaid's penalty for transferring assets for less than market value for the purpose of establishing Medicaid eligibility because the federal Medicaid statute allows a spouse to transfer assets to his or her spouse without being subject to the transfer-of-assets penalty, and this provision applies regardless of whether the transfer would provide Mary with resources in excess of her CSRA. 42 U.S.C. § 1396p(c)(2)(B)(i).

37. See 42 U.S.C. § 1396r-5(d)(3). A community spouse is eligible for the MCCA's excess shelter allowance if his or her expenses for rent or mortgage payments, taxes and insurance, an allowance for utilities (\$266 to \$350 per month in 2009), and (for condominiums and housing cooperatives) required maintenance charges exceed \$547 per month (as of July 1, 2009). The minimum monthly maintenance needs allowances (MMMNAs) and excess shelter allowance standards for community spouses are higher in Alaska and Hawaii.

by which his or her MMMNA exceeds his or her monthly income (determined without regard to the allowance).<sup>38</sup>

It is important to note that the CSMIA is *not* relevant in determining whether an institutionalized spouse is *eligible* for Medicaid. Instead, it applies to *post-eligibility* determinations regarding an eligible institutionalized spouse's PML for the cost of nursing home care.<sup>39</sup>

For example, assume that John and Mary are married, that John was admitted to a nursing home in North Carolina and has been found to be eligible for Medicaid payment for nursing care, and that Mary continues to live in the couple's home. If John receives \$1,600 per month in Social Security retirement benefits and \$2,400 per month in other retirement benefits, Mary receives \$800 per month in Social Security benefits, and Mary pays \$874 per month in shelter costs (mortgage, utilities, taxes, and insurance), then Mary's MMMNA is \$2,150 per month (\$1,823 plus a \$327 excess shelter allowance), and her CSMIA is \$1,350 per month (\$2,150 minus \$800). This means that if John makes available to Mary (or for Mary's benefit) up to \$1,350 of his income each month, the amount that he otherwise would be required to pay for his nursing care will be reduced by the amount that he gives Mary (or uses for her benefit) and the amount that the state Medicaid program would otherwise pay for John's nursing home care will be increased by that amount.

### Exceptions to the MCCA's CSMIA and CSRA Rules

What happens, though, if either John or Mary feels that Mary's CSMIA or CSRA is insufficient to meet her needs?

The short answer is that the MCCA includes provisions (discussed in the following sections of this bulletin) that allow a spouse to obtain a CSMIA or CSRA that is higher than that otherwise allowed under the community spouse protection rules discussed above.

### Increasing the Community Spouse's Monthly Income Allowance

Under the MCCA there are two separate and distinct situations in which a state Medicaid agency must allow a CSMIA that is higher than the amount otherwise allowed under 42 U.S.C. § 1396r-5(d)(2) through (d)(4).<sup>40</sup>

38. 42 U.S.C. § 1396r-5(d)(2). The state Medicaid agency must notify both spouses of the community spouse's monthly income allowance when the agency makes a determination that the institutionalized spouse is eligible for Medicaid payment for nursing home care, as well as providing notice of the community spouse's monthly income allowance to the institutionalized spouse, the community spouse, or the spouse's representative upon request. 42 U.S.C. § 1396r-5(e)(1).

39. 42 U.S.C. § 1396r-5(d)(1)(B). An institutionalized spouse also is eligible for an additional family allowance if he or she makes available a portion of his or her income for the support of his or her dependent or minor child(ren), dependent parent(s), or dependent sibling(s). 42 U.S.C. § 1396r-5(d)(1)(C). Absent a court order requiring the institutionalized spouse to pay support for a community spouse, the institutionalized spouse is not required to provide any or all of the CSMIA to the community spouse. The institutionalized spouse, therefore, may choose not to provide any support to the community spouse, to provide support in an amount less than the CSMIA, or to provide support equal to the CSMIA; the community spouse may prefer not to receive any support or support in an amount less than the CSMIA in order to protect the community spouse's eligibility for needs-based public assistance benefits.

40. See *M.E.F. v. A.B.F.*, 925 A.2d 12, 16 (N.J. App. Div. 2007); *H.K. v. New Jersey Division of Medical Assistance and Health Services*, 878 A.2d 16 (N.J. App. Div. 2005); *In re Tyler*, 2002 WL 1274125 (D.C.

### Increasing the CSMIA Based on Exceptional Circumstances

Under the MCCA, a state Medicaid agency is required to increase the CSMIA if an institutionalized or community spouse requests a fair hearing and establishes that, due to “exceptional circumstances resulting in significant financial duress,” the community spouse needs income above the level otherwise provided by the state’s MMMNA.<sup>41</sup>

In North Carolina a request for a fair hearing seeking an increase in the CSMIA may be made orally or in writing to the social services department of the county in which the institutionalized spouse applied for Medicaid.<sup>42</sup> The county social services director (or the director’s designee) generally must hold a hearing within five days of the request and issue a written decision within five days of the hearing.<sup>43</sup> If the spouse disagrees with the director’s decision, he or she may request, within fifteen days, a *de novo* hearing before a hearing officer employed by the state Department of Health and Human Services (DHHS).<sup>44</sup>

Although federal law requires North Carolina’s Medicaid program to increase the CSMIA if a county social services director or DHHS hearing officer determines that the institutional or community spouse has established that the community spouse needs income above the level otherwise provided by the state’s MMMNA, North Carolina’s Medicaid statute, rules, and policy do not provide any guidelines or standards for determining what constitutes the “exceptional circumstances” and “significant financial duress” that require an increase in the CSMIA.<sup>45</sup>

If a final decision by DHHS fails to increase the CSMIA or to increase the CSMIA to the extent requested by the institutionalized or community spouse, the spouse may seek judicial review of the agency’s decision by filing a petition in superior court within thirty days.<sup>46</sup>

### Basing the CSMIA on a Court Order for Spousal Support

The MCCA also provides that if a court has entered an order against an institutionalized spouse for monthly income for the support of a community spouse, the amount of the CSMIA for the institutionalized spouse may not be less than the amount of income that the institutionalized spouse pays pursuant to that court order.<sup>47</sup>

It is important to note that the MCCA does *not* create an independent, federally based cause of action for increasing the CSMIA, and 42 U.S.C. § 1396r-5(d)(5), therefore, does not give a

Super. Ct. 2002); *Gomprecht v. Gomprecht*, 652 N.E.2d 936 (N.Y. 1995).

41. 42 U.S.C. §§ 1396r-5(e)(2)(A) and 1396r-5(e)(2)(B).

42. See N.C. GEN. STAT. (hereinafter G.S.) § 108A-79(c).

43. G.S. 108A-79(e), (f).

44. G.S. 108A-79(g). The hearing must be conducted according to the procedures set forth in G.S. 108A-79(i), Article 3 of North Carolina’s Administrative Procedure Act (G.S. Ch. 150B), and applicable federal law and regulations.

45. According to Nicola J. Melby, an elder law attorney who practices in Brevard, North Carolina, case law from other states interpreting the “exceptional circumstances” and “significant financial duress” standard under 42 U.S.C. § 1396r-5(e)(2)(B) varies widely. See *Burinskas v. Dept. of Social Services*, 240 Conn. 141 (Conn. 1997); *Anderson v. Thomas*, 1999 Conn. Super. LEXIS 2162 (Conn. Super. Ct., Aug. 9, 1999); *Genser v. Thomas*, 2000 Conn. Super. LEXIS 1 (Conn. Super. Ct., Jan. 10, 2000); *Davis v. Pennsylvania Dept. of Public Welfare*, 776 A.2d 1026 (Pa. Comm. 2001); *Schachner v. Perales*, 648 N.E.2d 1321 (N.Y. 1995); *Balxarini v. Suffolk County Dept. of Social Services*, 863 N.Y.S.2d 706 (N.Y. App. Div. 2008).

46. G.S. 108A-79(k). See also *Meza v. Division of Social Services*, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 571 (2008) (appeal pending).

47. 42 U.S.C. § 1396r-5(d)(5). This frequently is referred to as the “judicial” option.

North Carolina court subject matter jurisdiction to order North Carolina's Medicaid program to increase the amount of the CSMIA.<sup>48</sup>

There are, however, at least two instances (discussed below) in which state law authorizes a North Carolina court to enter a spousal support order requiring an institutionalized spouse to pay support for his or her community spouse.<sup>49</sup> And, if a North Carolina court does so and the amount of support provided under the court order exceeds the CSMIA that would otherwise be allowed under 42 U.S.C. § 1396r-5(d)(2) through (d)(4), the MCCA requires North Carolina's Medicaid program to increase the CSMIA to the amount that the institutional spouse pays to the community spouse pursuant to the court order for support.<sup>50</sup>

### **Orders for Postseparation Support and Alimony**

Under North Carolina law a dependent spouse may obtain a court order requiring his or her spouse to pay postseparation support or alimony.<sup>51</sup>

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48. See letter dated Feb. 13, 2003, from Ginni Hain, Centers for Medicare and Medicaid Services, to Francis M. Bass, Jr., Tennessee Department of Human Services (copy provided to author by Pamela A. Hayden-Wood, Tennessee Attorney General's Office). See also *Arkansas Dept. of Health and Human Services v. Smith*, 262 S.W.3d 167 (Ark. 2007); *Huynh v. King*, 269 S.W.3d 540 (Mo. App. 2008); *Amos v. Amos*, 267 S.W.3d 761 (Mo. App. 761 2008). It should be noted that although the decisions in *Smith*, *Huynh*, and *Amos* refer to the community spouse's failure to exhaust her administrative remedies by applying to a state court for a spousal support order before her institutionalized spouse applied for Medicaid payment for nursing home care, it seems clear that the real reason the trial courts lacked subject matter jurisdiction to enter an order to increase the CSMIA was *not* because the community spouse failed to exhaust her administrative remedies by not asking (or, given the fact that her institutionalized spouse had not yet applied for Medicaid payment for nursing home care, not being able to ask) the state Medicaid agency to increase her CSMIA, but rather that (1) the MCCA does not create an independent cause of action allowing a state court to increase the CSMIA beyond an amount greater than that otherwise allowed under the state's Medicaid community spouse protection rules, *and* (2) the states' family and probate laws apparently did not provide a legal basis for the court to enter a spousal support order under the particular circumstances of those cases.

49. See also G.S. 14-322(b), (e) (allowing a court to order a supporting spouse to pay spousal support for his or her dependent spouse if the supporting spouse has willfully "abandoned" the dependent spouse and is convicted for willfully failing to provide adequate support for his or her dependent spouse).

50. See *Blumberg v. Tennessee Dept. of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000).

51. G.S. 50-16.2A (postseparation support); G.S. 50-16.3A (alimony). Postseparation support and alimony are discussed in detail in chapters 8 and 9 of Suzanne Reynolds, *Lee's North Carolina Family Law* (Charlottesville: Lexis Publishing, 1999). The district court is the proper division for determining claims involving postseparation support or alimony. Reynolds, *Lee's North Carolina Family Law*, §§ 8.33 and 9.55. Spouses may enter into an agreement under which one spouse will pay postseparation support or alimony to the other spouse and, with the approval of a district court judge, have their agreement entered as a consent order for postseparation support or alimony. Reynolds, *Lee's North Carolina Family Law*, §§ 8.44 and 9.68. In addition, a supporting spouse may execute a confession of judgment under Rule 68.1 of North Carolina's Rules of Civil Procedure providing for the payment of alimony to his or her dependent spouse. G.S. 50-16.10. A court may modify or vacate an order for postseparation support or alimony upon a motion by either spouse or anyone interested in the order and a showing of changed circumstances. G.S. 50-16.9(a). See Reynolds, *Lee's North Carolina Family Law*, §§ 9.71 through 9.77.

### **Postseparation Support**

Postseparation support is a form of temporary, court-ordered spousal support.<sup>52</sup> A dependent spouse may bring a claim for postseparation support by filing a complaint, motion, counterclaim, or cross-claim in district court in a civil action for annulment of the parties' marriage, absolute divorce, divorce from bed and board, alimony without divorce, or any other civil action under Chapter 50 of North Carolina's General Statutes (hereinafter G.S.) in which the spouses are parties.<sup>53</sup>

In order to be entitled to a court order for postseparation support, a spouse must prove that (1) he or she and his or her spouse are separated,<sup>54</sup> (2) he or she is a "dependent spouse,"<sup>55</sup> (3) his or her resources are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to support the dependent spouse,<sup>56</sup> and, (4) if there is evidence of marital misconduct by either spouse, an award of postseparation support is equitable after considering the marital misconduct.<sup>57</sup>

In determining the amount of postseparation support payable to a dependent spouse, a district court judge must consider the parties' financial needs, the parties' accustomed standard of living, the parties' present incomes and earnings and income-earning abilities, the parties' separate and marital debt service obligations, the parties' reasonable expenses, each party's legal obligations for the support of other persons, and, if applicable, evidence of marital misconduct by either party.<sup>58</sup> The amount of postseparation support payable to a dependent spouse, however, lies within the judge's sound discretion and will not be set aside on appeal absent a showing that the judge abused his or her discretion in determining the amount of postseparation support.<sup>59</sup>

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52. G.S. 50-16.2A; G.S. 50-16.1A(4). A court may order payment of postseparation support for either a definite or indefinite period of time, but an order for payment of postseparation support terminates on the date specified in the order, the entry of an order awarding or denying alimony, the dismissal of the alimony claim, entry of a judgment for absolute divorce (unless a claim for alimony is pending when the divorce judgment is entered), when the dependent spouse remarries or engages in cohabitation, or upon the death of either spouse, whichever is earlier. G.S. 50-16.1A(4).

53. G.S. 50-16.1A(4); G.S. 50-16.2A(a).

54. See Reynolds, *Lee's North Carolina Family Law*, § 8.35.

55. G.S. 50-16.2A(c). A spouse is a "dependent spouse" if he or she is "actually substantially dependent" upon his or her spouse for his or her maintenance or support *or* is substantially in need of maintenance and support from his or her spouse. G.S. 50-16.1A(2). A spouse is a "supporting spouse" if he or she is the spouse of a "dependent spouse." G.S. 50-16.1A(5). See also Reynolds, *Lee's North Carolina Family Law*, §§ 8.3 through 8.5.

56. A court's decision regarding the dependent spouse's need for support and the supporting spouse's ability to provide support must be based on its consideration of the parties' financial needs, the parties' accustomed standard of living, the parties' present incomes and earnings and income-earning abilities, the parties' separate and marital debt service obligations, the parties' reasonable expenses, and each party's legal obligations for the support of other persons. G.S. 50-16.2A(c), (b). See also Reynolds, *Lee's North Carolina Family Law*, §§ 8.6 through 8.11.

57. G.S. 50-16.2A(d). A spouse is not entitled to postseparation support if he or she has executed a valid separation agreement or premarital agreement that expressly waives his or her right to postseparation support and the agreement has been performed. G.S. 50-16.6(b).

58. G.S. 50-16.2A(b), (d). See also Reynolds, *Lee's North Carolina Family Law*, §§ 8.20 through 8.28.

59. See Reynolds, *Lee's North Carolina Family Law*, § 8.19.

A court may order a supporting spouse to pay postseparation support to his or her dependent spouse through periodic payments, by lump sum payment, or by transfer or possession of real or personal property or any interest therein.<sup>60</sup>

### **Alimony**

Alimony refers to a more permanent form of court-ordered support paid to a spouse or former spouse for either a specified or indefinite term.<sup>61</sup> A dependent spouse may bring a claim for alimony by filing a complaint, motion, counterclaim, or cross-claim in district court in a civil action for absolute divorce, divorce from bed and board, alimony without divorce, or any other civil action under G.S. Chapter 50 in which the spouses are parties.<sup>62</sup>

In order to be entitled to a court order for alimony, a spouse must prove that (1) he or she is a “dependent spouse,”<sup>63</sup> and (2) an award of alimony is equitable considering all of the relevant factors, including the relative needs of the spouses, their relative assets and liabilities, the standard of living established by the spouses during their marriage, the duration of their marriage, the amount and sources of their incomes (including medical benefits), their ages and physical and mental conditions, marital misconduct by either spouse, and any other factor relating to the economic circumstances of the parties that the court finds just and proper.<sup>64</sup>

In determining the amount and duration of alimony payable to a dependent spouse, a district court judge must consider and weigh all relevant factors, including the relative needs of the spouses, their relative assets and liabilities, the standard of living established by the spouses during their marriage, the duration of their marriage, the amount and sources of their incomes (including medical benefits), their ages and physical and mental conditions, marital misconduct by either spouse, and any other factor relating to the economic circumstances of the parties that the court finds just and proper.<sup>65</sup> These factors could include the fact that the supporting spouse is a nursing home patient who is or could be eligible for Medicaid payment for his or her nursing

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60. G.S. 50-16.1A(4); G.S. 50-16.7(a).

61. G.S. 50-16.1A(1); G.S. 50-16.3A. The duration of court-ordered alimony lies within the sound discretion of the district court judge. G.S. 50-16.3A(b). An order for payment of alimony terminates on the date specified in the order, when the dependent spouse remarries or engages in cohabitation, or upon the death of either spouse, whichever is earlier. G.S. 50-16.3A; G.S. 50-16.9(b). It is important to note that when a nursing home patient is ordered to pay alimony for the patient’s *former* spouse, the MCCA’s provisions regarding CSMIAs do not apply because the patient’s *former* spouse is no longer married to the patient and, therefore, does not fall within the MCCA’s definition of “community spouse.”

62. G.S. 50-16.1A(1); G.S. 50-16.3A(a).

63. G.S. 50-16.3A(a). A spouse is a “dependent spouse” if he or she is “actually substantially dependent” upon his or her spouse for his or her maintenance or support *or* is substantially in need of maintenance and support from his or her spouse. G.S. 50-16.1A(2). A spouse is a “supporting spouse” if he or she is the spouse of a “dependent spouse.” G.S. 50-16.1A(5). *See also* Reynolds, *Lee’s North Carolina Family Law*, §§ 9.4 through 9.13.

64. G.S. 50-16.3A(a), (b). *See also* Reynolds, *Lee’s North Carolina Family Law*, §§ 9.4 through 9.13, and §§ 9.20 through 9.49. A court may not award alimony to a dependent spouse if it finds that the dependent spouse participated in an act of uncondoned illicit sexual behavior during the marriage and before or on the date of separation. G.S. 50-16.3A(a). A spouse is not entitled to alimony if he or she has executed a valid separation agreement or premarital agreement that expressly waives his or her right to alimony and the agreement has been performed. G.S. 50-16.6(b).

65. G.S. 50-16.3A(b). *See also* Reynolds, *Lee’s North Carolina Family Law*, §§ 9.4 through 9.13, and §§ 9.20 through 9.49.

home care even if he or she is required to pay alimony in an amount that exceeds his or her spouse's CSMIA. The amount of alimony payable to a dependent spouse, however, lies within the judge's sound discretion and will not be set aside on appeal absent a showing that the judge abused his or her discretion in determining the amount of alimony.<sup>66</sup>

A court may order a supporting spouse to pay alimony to his or her dependent spouse through periodic payments, by lump sum payment, or by transfer or possession of real or personal property or any interest therein.<sup>67</sup>

### ***Spousal Support Orders in Guardianship Proceedings***

Spouses have a common law obligation to support each other.<sup>68</sup> The precise parameters of this obligation and the means through which it may be enforced, however, are not entirely clear. The North Carolina Court of Appeals, though, has issued one reported decision regarding a spouse's right to bring a claim for spousal support against his or her spouse when the spouse from whom support is sought has been adjudicated incompetent under G.S. Chapter 35A and the court has appointed a guardian of the estate for the incompetent spouse.<sup>69</sup>

In that case, *Cline v. Teich*, a couple (Mr. and Mrs. Cline) married on May 2, 1986, and lived together in Mr. Cline's home until November 21, 1987, when Mr. Cline was admitted to a nursing home due to a medical condition that left him permanently brain damaged. Mr. Cline was subsequently determined to be mentally incompetent, and a guardian was appointed for him pursuant to G.S. Chapter 35A. After Mr. Cline's guardian refused to provide support for Mrs. Cline from Mr. Cline's estate, Mrs. Cline brought an action in district court seeking spousal support from Mr. Cline's estate. Despite the absence of any statutory provisions authorizing a spouse to seek support from the estate of an incompetent spouse,<sup>70</sup> the court of appeals held that a spouse has a common law duty to support his or her spouse and that a dependent spouse may enforce this duty against the estate of a spouse who has been adjudicated incompetent.<sup>71</sup> The appellate court, however, also went on to state that the rule it was announcing was "narrow" and applied only "in the limited instance in which an incompetent's estate is [sufficiently] ample to provide for his [or her] own care and maintenance," as well as support for the incompetent ward's spouse.<sup>72</sup>

66. G.S. 50-16.3A(b). See also Reynolds, *Lee's North Carolina Family Law*, § 9.21.

67. G.S. 50-16.1A(1); G.S. 50-16.7(a).

68. See Reynolds v. Reynolds, 208 N.C. 254, 180 S.E. 70 (1935); Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 472 (1988). See also Reynolds, *Lee's North Carolina Family Law*, §§ 5.10 through 5.13.

69. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 472 (1988).

70. Cline predated the 1989 amendment to G.S. 35A-1251, which expressly allowed the guardian of the estate of an incompetent ward to expend estate income (and to seek court approval for the expenditure of estate principal) for the support and maintenance of the ward's spouse and children. 1989 N.C. Sess. Laws, ch. 473, sec. 13 (G.S. 35A-1251(21)).

71. Cline, 92 N.C. App. at 260–61, 374 S.E.2d at 464–65. The appellate court explicitly noted that Mrs. Cline's claim for spousal support was based on her right to spousal support under the common law and was not a claim for alimony (which, at that time, would have required her to prove not only that she was a dependent spouse in need of support but also that her husband was "at fault" as defined by former G.S. 50-16.2). *Id.*, 92 N.C. App. at 263, 374 S.E.2d at 466.

72. Cline, 92 N.C. App. at 262; 374 S.E.2d at 465. More specifically, the court stated: "We do not hold that the estate of an incompetent may be so depleted in favor of a spouse as to compromise the quality of care provided to the incompetent, or to force the incompetent to become a public charge." *Id.* (emphasis added).

After the decision in *Cline v. Teich*, North Carolina's General Assembly amended G.S. 35A-1251 to allow the guardian of the estate of an incompetent ward to expend estate income (and to seek court approval for the expenditure of estate principal) for the support and maintenance of the ward's spouse and children, and provided that, in determining whether support should be provided for the ward's spouse and the amount of spousal support that should be provided, the guardian (or court) must consider the ward's legal obligation to his or her spouse, the sufficiency of the ward's estate to meet the ward's needs, the needs and resources of the ward's spouse, and the ward's conduct or expressed wishes, prior to becoming incompetent, regarding support of his or her spouse.<sup>73</sup>

#### ***Spousal Support Orders and the MCCA's "Exceptional Circumstances" Standard***

As noted above, the MCCA allows a state Medicaid agency to increase the CSMIA if, as the result of an administrative fair hearing process, the agency determines that there are "exceptional circumstances resulting in significant financial duress."<sup>74</sup> But the MCCA also requires a state Medicaid agency to increase a spouse's CSMIA if a state court has entered a spousal support order that exceeds the CSMIA that would otherwise be allowed under state law. And North Carolina's statutes governing spousal support [G.S. 50-16.2A, G.S. 50-16.3A, and G.S. 35A-1251(21)] do not require a finding of exceptional circumstances, financial duress, or undue financial hardship to support an award of spousal support.

The question, therefore, in North Carolina and in other states, is whether the MCCA's standard regarding "exceptional circumstances resulting in significant financial duress" may, must, or should apply with respect to spousal support orders involving institutionalized spouses when Medicaid pays part of the cost of their nursing home care.

Although North Carolina's General Assembly and its appellate courts have not yet addressed this question, it has been addressed in several different ways by legislators and judges in several states.

Several courts, for example, have held that the MCCA "does not prescribe a standard" to be applied in spousal support proceedings in state courts and *does not require* that states adopt the standard of "exceptional circumstances resulting in significant financial duress" with respect to spousal support orders that provide the basis for increasing a spouse's CSMIA under 42 U.S.C. § 1396r-5(d)(5).<sup>75</sup> According to those courts, a state may, if it chooses, make the MCCA's "exceptional circumstances" standard applicable to spousal support orders involving institutionalized spouses.<sup>76</sup> But under the MCCA, a state that chooses not to adopt the "exceptional circumstances" standard is free to apply its own different, and perhaps more lenient, standard with respect to spousal support proceedings involving institutionalized spouses.<sup>77</sup>

Some courts, therefore, have held that questions regarding eligibility for and the amount of spousal support are determined by state, not federal, law and that, unless state law incorporates the MCCA's "exceptional circumstances" standard, a valid spousal support order that is entered by a state court without a finding of "exceptional circumstances resulting in significant financial

73. G.S. 35A-1251(21).

74. 42 U.S.C. §§ 1396r-5(e)(2)(A) and 1396r-5(e)(2)(B).

75. *Jenkins v. Fields*, 1996 WL 221614 (S.D.N.Y. 1996); *In re Tyler*, 2002 WL 1274125 (D.C. Super. Ct. 2002).

76. *Id.*

77. *Id.*

duress” must, nonetheless, be recognized by a state Medicaid agency in determining the amount of a spouse’s CSMIA under 42 U.S.C. § 1396r-5(d)(5).<sup>78</sup>

Some courts, however, have held that their state laws regarding spousal support *allow* a state court to take the MCCA’s “exceptional circumstances” standard and other community spouse protection rules into consideration in determining whether an award of spousal support is warranted under state law or in determining the amount of spousal support that should be ordered.<sup>79</sup>

In addition, at least one state appellate court has held that family courts are *required* to apply the state Medicaid program’s MMMNA and the “exceptional circumstances” standard in determining the amount of spousal support that may be ordered for a community spouse.<sup>80</sup> And at least three states have enacted legislation that incorporates the MCCA’s community spouse protection rules and “exceptional circumstances” standard into state laws governing court orders for spousal support.<sup>81</sup>

### Other Potential Limitations on the “Judicial Option”

Although the MCCA clearly recognizes both an “administrative option” and a “judicial option” for increasing the CSMIA, some state courts have imposed additional limitations with respect to use of the MCCA’s judicial option.

One trial court, for example, held that the exception for spousal support orders in 42 U.S.C. § 1396r-5(d)(5) applies only with respect to spousal support orders that are entered *before* a supporting spouse is admitted to a nursing home or is determined eligible for Medicaid payment for nursing home care.<sup>82</sup> And, in the same case, one of the state’s appellate courts held that the judicial option was not available to the community spouse who filed an action for spousal support almost a year *after* her spouse was found eligible for Medicaid payment for his nursing care and then asked the state Medicaid agency to increase her CSMIA.<sup>83</sup>

Another appellate court held that a state Medicaid agency is not required to recognize a spousal support order when determining the amount of an institutionalized spouse’s patient monthly liability if the spousal support order was entered as a consent order *after* the supporting spouse was admitted to a nursing home and *without* a court hearing or independent judicial review of the community spouse’s needs or the state’s countervailing interest in requiring the

78. *Blumberg v. Tennessee Dept. of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000); *M.E.F. v. A.B.F.*, 925 A.2d 12, 20–21 (N.J. App. Div. 2007) (holding that an award of spousal support entered against an institutionalized spouse prior to Medicaid eligibility is governed by the standards articulated in New Jersey’s laws governing spousal support rather than the “exceptional circumstances” standard in 42 U.S.C. § 1396r-5(e)(2)(B), and that there is “no principled reason why those standards should change simply because the spouse [is] . . . eligible for Medicaid and subject to the spousal income protection provisions” of the MCCA).

79. *In re Tyler*, 2002 WL 1274125 (D.C. Super. Ct. 2002); *M.E.F.*, 925 A.2d at 21.

80. *Gomprecht v. Gomprecht*, 652 N.E.2d 936, 938 (N.Y. 1995).

81. VA. CODE § 20-88.02:1; CONN. GEN. STAT. § 45a-655(d)(1); NEV. REV. STAT. § 123.259(4).

82. *See M.E.F.*, 925 A.2d at 16, 18–19. Although the appellate court agreed with the trial judge that the use of the past tense in 42 U.S.C. § 1396r-5(d)(5) (if a court “has entered” a support order against an institutionalized spouse) suggests that the CSMIA may not be based on a spousal support order that is entered after the institutionalized spouse becomes eligible for Medicaid payment for nursing care, it affirmed the trial court’s decision on other grounds.

83. *M.E.F.*, 925 A.2d at 20. The appellate court’s decision appears to have been based on the doctrines of exhaustion of administrative remedies, election of remedies, or prohibited forum shopping.

institutionalized spouse to use his or her income to pay a fair share of the cost of his or her nursing home care.<sup>84</sup> And the same decision also suggested that a state Medicaid agency is not required to base a spouse's CSMIA on the amount of a spousal support order against an institutionalized spouse if the community spouse obtained the spousal support order *without* having given the state Medicaid agency notice of the pending spousal support proceeding.<sup>85</sup>

### **Increasing the Community Spouse's Resource Allowance**

As discussed above, North Carolina's minimum CSRA (as of January 1, 2009) is \$21,912 or one-half of the combined value of the countable resources owned by the institutionalized spouse, the community spouse, or both on the date of the institutionalized spouse's first continuous period of institutionalization, whichever is greater, and the maximum CSRA in North Carolina (as of January 1, 2009) generally is \$109,560 or one-half of the combined value of the countable resources owned by the institutionalized spouse, the community spouse, or both on the date of the institutionalized spouse's first continuous period of institutionalization, whichever is less.

The MCCA, however, includes several exceptions that may allow a couple to increase the CSRA that would otherwise be available to the community spouse or allow the community spouse to retain resources that exceed the couple's CSRA rather than "spending down" the "excess" resources for the institutionalized spouse's nursing home care or other expenses.

### **Increasing the CSRA Based on a Spousal Support Order**

The MCCA expressly provides that if (1) a court has entered an order against an institutionalized spouse for the support of his or her community spouse, and (2) the amount of assets transferred pursuant to that order for the support of the community spouse or a minor or dependent child or dependent parent or sibling of the institutionalized spouse who resides with the community spouse exceeds the maximum CSRA that would otherwise be allowed, the couple's CSRA is equal to the amount of assets transferred pursuant to the spousal support order.<sup>86</sup>

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84. *H.K. v. New Jersey Div. of Medical Assistance and Health Services*, 878 A.2d 16, 20–21 (N.J. App. Div. 2005) (characterizing the couple's agreement regarding alimony as "an undisguised attempt to circumvent the Medicaid regulations concerning the appropriate level of the spousal allowance").

85. *H.K.*, 878 A.2d at 21. By contrast, the Tennessee Court of Appeals has held that although it would be "good policy" to require that the state's Medicaid agency be given notice of a spousal support proceeding that might affect Medicaid payment for an institutionalized spouse's nursing home care, neither the MCCA nor state law required such notice, and unless or until an order for spousal support is modified or vacated, it must be honored by the state's Medicaid agency in determining the amount of a spouse's CSMIA despite the fact that the state Medicaid agency did not receive timely notice of the proceeding. *Blumberg v. Tennessee Dept. of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000). *See also* Tennessee Op. Att'y Gen. No. 08-31 (Feb. 20, 2008) (unpublished, on file with the author) (holding that neither federal nor state law requires that notice be given to the state Medicaid agency when a proceeding for divorce or legal separation is filed by or against an institutionalized spouse who is or may be eligible for Medicaid payment for nursing home care).

86. 42 U.S.C. §1396r-5(f)(2)(A)(iv).

### Increasing the CSRA to Supplement the Community Spouse's Income

Under the MCCA a spouse may request, through the administrative fair hearing process, a state Medicaid agency to increase the amount of the couple's CSRA above the amounts described above if

1. the institutionalized spouse has applied or been determined eligible for Medicaid payment for nursing home care;
2. the community spouse's income (including any income from the community spouse's share of the couple's resources and any income of the institutionalized spouse that could be made available to the community spouse via the CSMIA) is less than the state's MMMNA; *and*
3. an additional allocation of resources to the community spouse is required in order to generate the additional income necessary to raise the community spouse's income to an amount equal to the state's MMMNA.<sup>87</sup>

### Waiving the CSRA Rules Based on Undue Hardship

The MCCA also provides that an institutionalized spouse will not be ineligible for Medicaid payment for nursing home care under the MCCA's rules regarding availability of "excess" resources owned by the institutionalized spouse, the community spouse, or both if the state Medicaid agency determines that denying the institutionalized spouse's Medicaid eligibility would cause "undue hardship."<sup>88</sup>

### Spousal Refusal and Assignment of Support Rights

Finally, the MCCA includes two exceptions, commonly referred to as the "spousal refusal" exceptions, providing that an institutionalized spouse will not be ineligible for Medicaid payment for nursing home care under the MCCA's rules regarding availability of "excess" resources owned by his or her community spouse if (1) the institutionalized spouse assigns to the state Medicaid agency any rights he or she has to spousal support from the community spouse,<sup>89</sup> *or* (2) the institutionalized spouse lacks the capacity, due to physical or mental impairment, to execute such an assignment, and the state Medicaid agency has the right to bring a spousal support proceeding against the community spouse without an assignment of spousal support rights by the institutionalized spouse.<sup>90</sup>

87. 42 U.S.C. §§ 1396r-5(e)(2)(C) and 1396r-5(d)(6). After the U.S. Supreme Court's 2002 decision in *Wisconsin Dept. of Health and Family Services v. Blumer*, Congress amended the federal Medicaid statute in 2006 (section 6013(a) of Pub. L. No. 109-171, 120 Stat. 64 (2006)) to require state Medicaid programs to use the "income first," rather than the "resources first," method in determining whether to increase a spouse's CSRA.

88. 42 U.S.C. § 1396r-5(c)(3)(C). North Carolina's Medicaid program has not adopted rules or policies defining "undue hardship."

89. The assignment of the institutionalized spouse's rights to support from the community spouse must be such that, under applicable state law, the state Medicaid agency may seek reimbursement from the community spouse for some or all of the medical care provided to the institutionalized spouse. Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 3260.1, [www.cms.hhs.gov/Manuals/PBM/itemdetail.asp?itemID=CMS021927](http://www.cms.hhs.gov/Manuals/PBM/itemdetail.asp?itemID=CMS021927) (last visited June 17, 2009).

90. 42 U.S.C. § 1396r-5(c)(3)(A) and (B). *See also* Centers for Medicare and Medicaid Services, *State Medicaid Manual* § 3262.2, [www.cms.hhs.gov/Manuals/PBM/itemdetail.asp?itemID=CMS021927](http://www.cms.hhs.gov/Manuals/PBM/itemdetail.asp?itemID=CMS021927) (last visited June 17, 2009). The MCCA's "spousal refusal" exception is discussed in detail in Andrew D. Wone, "Don't Want to Pay for Your Institutionalized Spouse? The Role of Spousal Refusal and Medicaid

The MCCA's "spousal refusal" exceptions have not yet been addressed by North Carolina's General Assembly, the state's Division of Medical Assistance, or the state's appellate courts.<sup>91</sup> They have, however, been discussed by elder law attorneys in North Carolina<sup>92</sup> and have been the subject of litigation in other states.<sup>93</sup>

The MCCA's "spousal refusal" exceptions, therefore, *may* allow an institutionalized spouse to qualify for Medicaid payment for nursing home care when (1) the value of the institutionalized spouse's countable resources (including the institutionalized spouse's share of any countable resources owned jointly with the community spouse) is less than \$2,000, and (2) the value of the community spouse's resources *exceeds* the amount of the couple's CSRA.

It is important to note, though, that the "spousal refusal" exception does *not* limit the community spouse's legal responsibility under state law to support the institutionalized spouse or the authority of a state Medicaid agency, under state and federal law, to require the community spouse to reimburse the state Medicaid program for at least part of the cost of the institutionalized spouse's nursing home care.<sup>94</sup> A state Medicaid agency, therefore, may be able to seek reimbursement from the community spouse for the amount it has paid for the institutionalized spouse's nursing home care, either by virtue of the institutionalized spouse's assignment of support rights or through other applicable legal procedures.<sup>95</sup>

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in Funding Long-Term Care," 14 ELDER L.J. 485 (2006). Although the MCCA does not refer expressly to "spousal refusal," establishing Medicaid eligibility under 42 U.S.C. § 1396r-5(c)(3)(A) generally involves situations in which a community spouse refuses or fails to use his or her "excess" resources to pay for the institutionalized spouse's nursing home care.

91. A 1994 letter from the U.S. Health Care Financing Administration (the predecessor to the Centers for Medicare and Medicaid Services) to North Carolina's Division of Medical Assistance concluded that the MCCA's "spousal refusal" exception did not apply in North Carolina because, under the state's pre-1995 fault-based alimony statute, state law did not provide for the valid assignment of an institutionalized spouse's right to support from his or her community spouse. See "Note, Morenz v. Wilson-Coker," 1 NAT'L. ACAD. ELDER L. ATT'YS. J. 327, 328 (2005). One might argue, however, that this conclusion was based on a mistaken understanding of North Carolina's law regarding spousal support rights and, in any case, that it is no longer accurate given the 1995 revision of North Carolina's statutes governing postseparation support and alimony.

92. "Judicial Options for Raising the CSRA or MMNA? What About Spousal Refusal?" (presentation by Nicola J. Melby at the 13th Annual Elder Law Symposium sponsored by the North Carolina Bar Association's Elder Law Section, Feb. 27, 2009).

93. See *Morenz v. Wilson-Coker*, 415 F.3d 230 (2d Cir. 2005); *Gorlick v. Florida Dept. of Children and Families*, 789 So. 2d 1247 (Fla. App. 2001); *In re Shah*, 733 N.E.2d 1093, 1100 (N.Y. 2000).

94. See Marvin Rachlin, "Liability for Medicaid: What Is a Spouse's Liability for Medicaid Benefits Paid?" 30 EST. PLANNING 117 (2003).

95. See *New York City Dept. of Social Services v. Spellman*, 661 N.Y.S.2d 895 (N.Y. Sup. Ct. 1997); *Poin-dexter v. Illinois Dept. of Human Services*, 869 N.E.2d 139 (2007). See also Rachlin, 30 EST. PLANNING 117; and Wone, 14 ELDER L.J. at 508–54, 520–27. See also G.S. 108A-57 (providing that the state Medicaid agency is subrogated to all rights of recovery that a Medicaid recipient has against any person with respect to medical care provided by the state Medicaid program); G.S. 108A-59 (providing for the assignment to the state Medicaid program of a Medicaid recipient's right to "third party benefits" with respect to medical care provided by the state Medicaid program); 42 U.S.C. § 1396k(a)(1)(A); 42 U.S.C. § 1396a(a)(25). See also *North Carolina Baptist Hospitals, Inc. v. Harris*, 319 N.C. 347, 354 S.E.2d 471 (1987) (holding that a husband or wife may be held liable by a medical provider, doctor, or hospital for the cost of necessary medical care provided to his or her spouse).

## How Will the MCCA's Spousal Protection Rules Affect North Carolina?

Although the MCCA's spousal protection rules have been in effect for almost twenty years and North Carolina's Medicaid program has implemented almost all of the MCCA's requirements regarding CSRAs, MMMNAs, and CSMIAs, there are still a number of questions that may need to be answered by the state Division of Medical Assistance, county social services departments, clerks of superior court, district and superior court judges, elder law attorneys, and, perhaps, the General Assembly. These questions include:

- When determining the amount of spousal support paid to a community spouse under state law, should North Carolina's courts apply the standards set forth in state law or, instead, should they require a finding of "exceptional circumstances" resulting in undue financial hardship if the amount of spousal support payable would exceed the spouse's CSMIA?
- When a community spouse files a legal proceeding seeking spousal support from an institutionalized spouse who is or may be eligible for Medicaid payment for nursing home care and is seeking spousal support in an amount that would exceed the spouse's CSMIA, should the spouse be required to notify the state Medicaid agency of the pending proceeding?
- Should the state Medicaid agency have the right to intervene in any legal proceeding in which a community spouse is seeking or has received spousal support in excess of the spouse's CSMIA?
- May the state Medicaid agency file a motion seeking to modify or set aside a spousal support order that exceeds a spouse's CSMIA?
- Must the state Medicaid agency honor a confession of judgment or consent order for spousal support that exceeds a spouse's CSMIA?
- In determining whether to increase a spouse's CMISA, how should the state Medicaid agency define "exceptional circumstances" resulting in financial duress?
- What standards should the state Medicaid agency apply in determining whether to waive the MCCA's CSRA limit for "undue hardship?"
- May an institutionalized spouse be found eligible for Medicaid payment for nursing home care under the MCCA's "spousal refusal" and "assignment of rights" exception?
- If an institutionalized spouse is found eligible for Medicaid payment for nursing home care under the MCCA's "spousal refusal" and "assignment of rights" exception, may the state Medicaid agency attempt to obtain reimbursement from the community spouse for the institutionalized spouse's care?

In answering these questions, lawyers, judges, and policymakers may look for guidance in the statutory and case law of other states that is discussed in this bulletin and elsewhere. But the answers to these questions will not always be clear, and the answers provided by other states may not always be the right answers for North Carolina.

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