No. 00-952

In the Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, PETITIONER

v.

IRENE BLUMER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT IV

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Through the Medicaid program, 42 U.S.C. 1396 *et seq.*, the federal government provides funding to the States for the provision of medical services to eligible needy persons. This case arises out of a special statutory provision, 42 U.S.C. 1396r-5 (1994 & Supp. V 1999), that establishes minimum requirements for determining the eligibility of a married individual who is institutionalized (such as in a nursing home), but who has a spouse (the "community spouse") who is not. In particular, those provisions address the allocation of income and resources between such spouses for purposes of determining the institutionalized spouse's Medicaid eligibility and the extent of medical assistance. The question presented is:

Whether, in a "fair hearing" proceeding to consider whether to raise the community spouse's resource allowance (CSRA) pursuant to 42 U.S.C. 1396r-5(e)(2)(C) in order to protect additional income-generating resources to meet the community spouse's monthly maintenance needs, Wisconsin's "income first" requirement, Wis. Stat. Ann. § 49.455(8)(d) (West 1997), which treats excess income of the institutionalized spouse as available to the community spouse, is consistent with the federal statute, 42 U.S.C. 1396r-5.

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INTEREST OF THE UNITED STATES

Medicaid is a means-based medical care program administered by the States with federal financial assistance and subject to federal standards. This case involves the special eligibility requirements for Medicaid where one spouse resides in an institutional setting, such as a nursing home, and the other does not. At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of this case.

STATEMENT

This case concerns the Medicaid eligibility of an applicant (the "institutionalized spouse") who lives in a nursing facility, while her husband (the "community spouse") does not. In such circumstances, Medicaid protects a certain portion of the couple's resources for the benefit of the community spouse and seeks to ensure that the community spouse has sufficient income to meet his monthly maintenance needs, without rendering the institutionalized spouse ineligible for Medicaid. The federal Medicaid statute establishes a special "fair hearing" procedure in which a State may consider whether to increase the amount of resources the statute

protects for the benefit of the community spouse if such an increase is necessary to generate additional income to meet the community spouse's monthly maintenance needs.

The question in this case is whether, in determining whether to increase the amount of protected resources, a State may first consider whether the institutionalized spouse could transfer income to the community spouse and thereby bring his income up to the level set by statute to meet his monthly needs, making it unnecessary to protect additional resources. Under one calculation method, known as "income-first," States may consider such potential income transfers. Under another method, known as "resources-first," they may not. The Wisconsin Court of Appeals held that the Medicaid statute bars States from using the income-first method, notwithstanding the consistent position of the Secretary of Health and Human Services that the Medicaid statute permits that method.

1. The Medicaid program, established in 1965 as Title XIX of the Social Security Act, Pub. L. No. 89-97, 79 Stat. 343, as amended 42 U.S.C. 1396 *et seq.*, "provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). Under the program, "[e]ach participating State develops a plan containing 'reasonable standards . . . for determining eligibility for and the extent of medical assistance.'" *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981) (quoting 42 U.S.C. 1396a(a)(17)). State standards must "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17)(B); see *Gray Panthers*, 453 U.S. at 42-43.

The income and resource calculations necessary to make eligibility determinations for married couples have proven to be a matter of great complexity. When Congress established the Medicaid program, Congress found it "proper to expect

spouses to support each other." *Gray Panthers*, 453 U.S. at 45 (quoting S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1, 78 (1965)). Consistent with that judgment, "States adopted plans that considered the spouse's income in determining Medicaid eligibility and benefits." *Id.* at 37. States thus calculated the amount they "considered necessary to pay the basic living expenses of" the non-applicant spouse "and 'deemed' any of the spouse's remaining income to be 'available' to the applicant." *Id.* at 38. In *Gray Panthers*, this Court concluded that such an approach is consistent with the text of the Social Security Act, the Act's legislative history, and the Secretary's regulations. *Id.* at 44-48.

Before 1989, an individual in a nursing home (the "institutionalized spouse") with a spouse living in the community (the "community spouse") was often ineligible for Medicaid until the institutionalized spouse exhausted resources that were in her own name or were jointly held, without regard to the needs of the community spouse. Moreover, even when the institutionalized spouse became eligible for Medicaid, much of her income would be used to reduce the amount that Medicaid would pay for her institutional care, leaving the community spouse with little means of support if he had insufficient income of his own; States often reserved only $250 to $350 per month—sometimes less—of the institutionalized spouse's income for the benefit of the community spouse. See H.R. Rep. No. 105, 100th Cong., 1st Sess., Pt. 2, 68 (1987) (listing States). See also H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. 258 (1988).[1] The net effect of those

[1] In the program's early years, some States apparently treated much of the community spouse's income as available to pay for the care of the institutionalized spouse, even if the community spouse's income was modest. In 1974, the Secretary promulgated regulations that placed time limits on the extent to which so-called "SSI States" (see H.R. Rep. No. 105, Pt. 2, at 65-66) could deem the community spouse's income to be available to the institutionalized spouse after the spouses no longer lived together. See *Herweg* v. *Ray*, 455 U.S. 265, 269-270 (1982). Under those regulations, SSI States generally had to disregard the community spouse's

requirements was the "pauperization" of many community spouses. H.R. Rep. No. 105, Pt. 2, at 65.

Congress sought to alleviate that hardship and close potential loopholes when it enacted the Medicare Catastrophic Coverage Act of 1988 (MCCA), Pub. L. No. 100-360, Tit. III, § 303(a)(1)(B), 102 Stat. 754. See 42 U.S.C. 1396r-5 (1994 & Supp. V 1999). In particular, Congress "attempted to strike a balance between preventing impoverishment of the community spouse by excluding minimum amounts of resources and income for that spouse from eligibility considerations, and preventing a financially solvent institutionalized spouse from receiving Medicaid benefits." *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 798 (6th Cir.), cert. denied, 525 U.S. 964 (1998). See H.R. Rep. No. 105, Pt. 2, at 65 (bill seeks to "end th[e] pauperization" of the community spouse "by assuring that the community spouse has a sufficient—but not excessive—amount of income and resources available"). That balance is achieved through a complex set of minimum requirements for allocating income and resources between community and institutionalized spouses.

a. *Income.* The MCCA separately addresses income allocation for initial Medicaid *eligibility* determinations and for post-eligibility determinations regarding the *extent* of assistance to be furnished to persons who have already been found eligible.

For initial eligibility determinations, the MCCA imposes a single restriction regarding the attribution of income: "During any month in which an institutionalized spouse is in the

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income in determining the institutionalized spouse's eligibility in the first month following the month in which the spouses stopped living together; if both spouses were Medicaid eligible, the community spouse's income had to be disregarded after six months. See *Gray Panthers*, 453 U.S. at 39-40 (citing 42 C.F.R. 435.723(d) (1980)). So-called "Section 209(b)" States (see H.R. Rep. No. 105, Pt. 2, at 66), however, could treat the community spouse's income as available to the institutionalized spouse, after the two ceased living together, to the extent the State did so on January 1, 1972. *Id.* at 40.

institution, * * * no income of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(b)(1). Thus, subsection (b)(1) establishes a special rule that protects the *income of the community spouse* by excluding that income from consideration by the State when determining whether the institutionalized spouse is eligible for Medicaid. Subsection (b)(1), however, does not address whether, when States initially determine the eligibility of the institutionalized spouse, the institutionalized spouse's income may be considered to be available to the community spouse for purposes of deciding whether the latter will have sufficient income and resources to meet his monthly maintenance needs.

With respect to post-eligibility determinations regarding the extent of assistance, the MCCA provides more explicit guidance. For example, subsection (b)(2) provides that, if payment of income is made solely in the name of one spouse, that income is generally treated as available only to the named spouse. 42 U.S.C. 1396r-5(b)(2). That requirement is called the "name-on-the-check" rule. Subsection (d) in turn provides a number of exceptions to that rule to ensure that the community spouse has sufficient income to meet his basic monthly needs. Among other things, it establishes a "minimum monthly maintenance needs allowance" or "MMMNA." 42 U.S.C. 1396r-5(d)(3). The MMMNA for a community spouse is relatively generous: Although the MMMNA supports only the community spouse while the other spouse is in an institution, it is set at 150% of the poverty line for a *couple*, plus an "excess shelter allowance" that reflects certain housing expenses to the extent they consume more than 30% of the 150% figure. 42 U.S.C. 1396r-5(d)(3) and (4).

If the income of the community spouse (as determined under 42 U.S.C. 1396r-5(b)(2)) is less than the MMMNA, the amount of the shortfall is "deducted" from the income of the institutionalized spouse—reducing the amount of income that would otherwise be considered available for the institutional-

ized spouse's care—so long as that income is actually available to the community spouse. 42 U.S.C. 1396r-5(d)(1)(B) and (2). The amount of that deduction is the "community spouse monthly income allowance." *Ibid.* The MCCA thus prevents money the community spouse receives from the institutionalized spouse to meet his needs from also being considered available for the care of the institutionalized spouse; it thereby permits Medicaid to defray a greater portion of the costs of institutionalized care than it otherwise would.[2]

b. *Resources*. The MCCA provides extensive rules regarding the attribution of resources (*e.g.*, assets). First, assets such as the family home, an automobile, and certain other forms of personal property are excluded from the definition of "resources" and thus are exempt from resource limits. See 42 U.S.C. 1396r-5(c)(5), 1382b(a) and (b).

For initial eligibility determinations, the total of all of the couple's resources (whether owned jointly or separately) is calculated as of the beginning of the institutionalized spouse's first period of institutionalization. One half of that total (the "spousal share") is allocated to each spouse. 42 U.S.C. 1396r-5(c)(1)(A). Nevertheless, as a general rule, all of the resources owned jointly by the couple or by either spouse separately are considered available for the care of the institutionalized spouse, 42 U.S.C. 1396r-5(c)(2)(A), *but only to the extent* the value of those resources exceeds the amount protected under a special formula in Section 1396r-5(f)(2)(A). See 42 U.S.C. 1396r-5(c)(2)(B). By carving out that exception, the MCCA limits the extent to which the couple's resources must be exhausted before the institutionalized spouse becomes Medicaid eligible, and protects those resources for the benefit of the community spouse. The amount protected under Section 1396r-5(f)(2)(A) is the greatest of: (i) $12,000

[2] The State also must exclude a personal needs allowance, a family allowance for certain family members residing with the community spouse, and expenses incurred by the institutionalized spouse for (non-covered) medical or remedial care. 42 U.S.C. 1396r-5(d)(1)(A), (C) and (D).

or a State standard up to $60,000, indexed for inflation under subsection (g) (for 2001, the indexed ceiling amount is $87,000); (ii) the lesser of the spousal share (computed under subsection (c)(1)) or $60,000, indexed for inflation (now $87,000); (iii) the amount set at a "fair hearing" under 42 U.S.C. 1396r-5(e)(2) (see pp. 7-9, *infra*); or (iv) the amount transferred pursuant to a court order. 42 U.S.C. 1396r-5(f)(2)(A). If the portion of the couple's resources available to the community spouse is less than the protected amount under subsection (f)(2)(A), the institutionalized spouse may transfer the difference—known as the "community spouse resource allowance" or "CSRA"—to the community spouse. See 42 U.S.C. 1396r-5(f)(1) and (2).

Once the institutionalized spouse is determined to be eligible, the resources of the community spouse are not considered in making post-eligibility determinations. 42 U.S.C. 1396r-5(c)(4).

c. *The "fair hearing" requirement and the income-first and resources-first methods.* Section 1396r-5(e) provides a mechanism through which an institutionalized or community spouse may challenge in a "fair hearing" the State's determination of any of a number of elements in the statutory formulae governing eligibility for or the extent of medical assistance, including the community spouse monthly income allowance and the CSRA. 42 U.S.C. 1396r-5(e)(2)(A). This case involves Section 1396r-5(e)(2)(C), which addresses the circumstances under which a State must replace the CSRA with a different sum—in effect, increasing the CSRA—during the "fair hearing."[3]

Section 1396r-5(e)(2)(C) provides in relevant part:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of

[3] Both the government and the courts have spoken of "increasing" or "raising" the CSRA. Technically, the statute provides for another allowance to be "substituted" for the CSRA. 42 U.S.C. 1396r-5(e)(2)(C). The difference in terminology is not material.

> income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance * * * , an amount adequate to provide such a minimum monthly maintenance needs allowance.

In essence, Section 1396r-5(e)(2)(C) requires a comparison between the income available to the community spouse, including any income generated by resources protected under subsection (f)(2)(A) for the benefit of the community spouse, with the "minimum monthly maintenance needs allowance" or MMMNA. If the former is less than the latter, the CSRA may be increased.[4] Permitting the community spouse to retain (or obtain from the institutionalized spouse) additional income-generating resources helps enable the community spouse's total income to meet the MMMNA. Absent an adjustment under subsection (e)(2)(C), those additional resources would be considered available to the institutionalized spouse in determining her Medicaid eligibility, and might have to be exhausted before the institutionalized spouse could become eligible.

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[4] Although Section 1396r-5(e)(2)(C) speaks of replacing the "community spouse resource allowance," the CSRA technically is only one component of the total amount of resources protected under the MCCA. The MCCA defines the CSRA as the *difference* between the sums that can be protected (*e.g.*, $60,000, adjusted for inflation) and "the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance)." 42 U.S.C. 1396r-5(f)(2)(A) and (B). At the same time, however, the statute sometimes treats the phrase "community spouse resource allowance" as a short-hand term for the total amount of protected resources under 42 U.S.C. 1396r-5(f)(2)(A). Accordingly, although Section 1396r-5(e)(2)(C) itself speaks in terms of increasing the CSRA, the Secretary has interpreted Section 1396r-5(e)(2)(C) as authorizing an increase in the resources protected by subsection (f)(2)(A). See Pet. App. 80a. That treatment comports with 42 U.S.C. 1396r-5(f)(2)(A)(iii), which provides that the total amount of resources that may be protected for a community spouse may be set at a fair hearing.

The issue in this case is what income a State may regard as available to the community spouse when determining whether to increase the CSRA under Section 1396r-5(e)(2)(C). There are two basic approaches. Under the "income-first" method, income of the institutionalized spouse that could be made available to support the community spouse is allocated to the community spouse for purposes of determining whether the community spouse has sufficient income to meet the MMMNA. The CSRA is not increased unless the community spouse's income will not meet the MMMNA *after* taking into account any income that may be made available from the institutionalized spouse. In contrast, under the "resources-first" approach, the CSRA is increased to the extent necessary to ensure that the community spouse's total income meets the MMMNA *without* first considering the extent to which income from the institutionalized spouse could be made available to the community spouse. In general, the income-first method makes it less likely that the CSRA will be increased; it thus tends to require couples to expend additional resources before the institutionalized spouse becomes Medicaid eligible.

The Department of Health and Human Services (HHS) has stated in memoranda and letters that 42 U.S.C. 1396r-5(e)(2)(C) authorizes consideration of potential income transfers from the institutionalized spouse to the community spouse, so that States may adopt the income-first method. See Pet. App. 81a-90a (reproducing letters and memoranda); see also 66 Fed. Reg. 46,763, 46,765 (2001) (App., *infra*, 25a, 32a) (Secretary has in the past "permitted States to employ income-first or other reasonable methodologies"). On September 7, 2001, the Secretary issued a Notice of Proposed Rulemaking proposing regulations that would codify the Secretary's policy of permitting States to use either methodology as a "reasonable" state-promulgated "standard[] * * * for determining eligibility for * * * medical assistance" under 42 U.S.C. 1396a(a)(17). See 66 Fed. Reg. at 46,765, 46,766

(App., *infra*, 32a, 37a). The State of Wisconsin has, by statute, adopted the income-first method. Wis. Stat. Ann. § 49.455(8)(d) (West 1997); Pet. App. 76a. A majority of other States have also adopted the income-first method. See U.S. Amicus Br. Pet. Stage at 11 n.4.

2. Respondent Irene Blumer was admitted to a nursing facility in 1994 and applied for Medicaid through her husband, Burnett Blumer, in 1996. The Green County Department of Human Resources concluded that, as of respondent's institutionalization in 1994, the couple had $145,644 in resources. The County calculated the amount of the couple's resources that could be protected for Mr. Blumer to be half the couple's resources, $72,822. See Pet. App. 28a; see also 42 U.S.C. 1396r-5(f)(2)(A)(ii) (one measure of protected amount is lesser of spousal share or $60,000, as adjusted for inflation). Respondent, as the institutionalized spouse, was permitted to retain only $2000 in resources. The County determined that, as of the date of respondent's application for Medicaid in 1996, the couple's assets totaled $89,335. That was approximately $14,500 above the resource eligibility threshold of $74,822 ($72,822 for Mr. Blumer and $2000 for respondent). Pet. App. 24a-25a; see also *id.* at 2a.

Respondent sought a fair hearing pursuant to 42 U.S.C. 1396r-5(e)(2)(C). The hearing examiner concluded that, if respondent's income (the income of the institutionalized spouse) were excluded from consideration, Mr. Blumer's total monthly income would be $1702.45, approximately $25 less than the MMMNA of $1727. Pet. App. 25a, 30a; see also *id.* at 2a-3a. Accordingly, respondent argued that, under 42 U.S.C. 1396r-5(e)(2)(C), the CSRA should be raised to generate $25 per month in additional income for Mr. Blumer. Pet. App. 3a.

The hearing examiner concluded that respondent had monthly income of $1262.71, and that the couple's combined income therefore exceeded $2900 per month. Pet. App. 30a-31a. Using the income-first method required by Wisconsin law and permitted by HHS guidance, the hearing examiner

found that Mr. Blumer's income could be raised to the MMMNA level by allocating $25 per month to him from the income of respondent. *Id.* at 31a; see also *id.* at 3a. Accordingly, the hearing examiner declined to increase the CSRA. *Id.* at 31a-32a. The effect of the decision was to defer respondent's eligibility for Medicaid until the $14,500 in excess resources were exhausted (on, for example, respondent's care or Mr. Blumer's needs).

3. Respondent appealed, and the Green County Circuit Court affirmed. Pet. App. 19a-22a. The Wisconsin Court of Appeals, however, reversed. *Id.* at 1a-17a. In that court's view, Section 1396r-5(e)(2)(C) unambiguously mandates the resources-first method, *i.e.*, that the CSRA be adjusted upward to generate additional income to help Mr. Blumer meet the MMMNA, without considering whether respondent, his institutionalized spouse, could make income available to him. *Id.* at 11a. The Wisconsin Supreme Court denied the State's petition for discretionary review. *Id.* at 18a.

SUMMARY OF ARGUMENT

States participating in the Medicaid program must establish "reasonable standards * * * for determining eligibility for and the extent of medical assistance." 42 U.S.C. 1396a(a)(17). This case concerns whether Wisconsin's method for determining Medicaid eligibility is permissible in light of the MCCA, 42 U.S.C. 1396r-5. Under 42 U.S.C. 1396r-5(e)(2)(C), a state examiner conducting a "fair hearing" may increase the community spouse resource allowance (CSRA) if the income generated by the CSRA otherwise would be "inadequate" to raise the community spouse's income to the minimum monthly maintenance needs allowance (MMMNA) set by statute. The Secretary has determined that States, in deciding whether to increase the CSRA, may count as part of the community spouse's income any income the institutionalized spouse could make available to the community spouse. That method is known as "income first."

A. The Medicaid program permits use of the income-first method. When Congress established the Medicaid program, it incorporated the background principle that spouses are responsible for each others' care. *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981). The MCCA establishes a limited exception by precluding income of the community spouse from being treated as available to the institutionalized spouse. 42 U.S.C. 1396r-5(b)(1). On the other hand, the MCCA nowhere prohibits income of the institutionalized spouse from being considered available to the community spouse when determining eligibility, as occurs under the income-first method invalidated by the Wisconsin court. The fact that Congress did not specifically prohibit that practice is strong evidence that the MCAA allows States to utilize it, and thus to adhere to the background principle that spouses may be expected to support each other. The legislative history of the MCCA also supports that conclusion, as does the Secretary's longstanding construction of the Act.

B. In rejecting that interpretation, the Wisconsin Court of Appeals relied on the fact that Congress expressly provided for States, in post-eligibility determinations regarding the extent of assistance, to account for transfers of income made by the institutionalized spouse to help the community spouse achieve the MMMNA, 42 U.S.C. 1396r-5(d)(1)(B) and (2), but that Congress did not include that requirement for initial eligibility determinations. The fact that the MCCA specifically *accommodates* transfers of income from the institutionalized spouse to the community spouse to bring the community spouse's income up to the MMMNA for post-eligibility purposes, however, underscores the reasonableness of taking the possibility of such transfers into account when calculating the income available to the community spouse pre-eligibility. Moreover, almost all of the MCCA's income-attribution rules are mandatory only for "post-eligibility income determination[s]" regarding the extent of assistance. 42 U.S.C. 1396r-5(b)(2) and (d). Under the court

of appeals' approach, Congress's failure to require States to use those income-attribution rules for initial eligibility determinations would bar the States from adapting them for that purpose. Yet the resources-first methodology preferred by the Wisconsin Court of Appeals itself borrows some of those post-eligibility rules for purposes of making initial eligibility determinations.

The Wisconsin Court of Appeals also expressed concern that the income-first method might leave a community spouse with less income than he needs (or than the MMMNA provides) after the death of the institutionalized spouse. In most benefits and pension contexts, however, the surviving community spouse would be entitled to receive a significant portion of the payments that would otherwise have gone to the institutionalized spouse during her life. Moreover, the institutionalized spouse's death eliminates the costs of her care—costs that previously absorbed much of her income. Consequently, the net effect following the institutionalized spouse's death may often be an *increase* in the income available to the community spouse. The MMMNA, in any event, is not the proper measure of the community spouse's needs after the institutionalized spouse's death, since it is set at a level appropriate to a *couple*. Finally, the court of appeals ignored the fact that increasing the resources protected for the community spouse necessarily diverts scarce Medicaid funds from potentially needier persons in order to benefit potentially wealthier community spouses.

ARGUMENT

THE SOCIAL SECURITY ACT PERMITS CONSIDERATION OF INCOME AVAILABLE FROM AN INSTITUTIONALIZED SPOUSE WHEN DETERMINING WHETHER THE COMMUNITY SPOUSE RESOURCE ALLOWANCE SHOULD BE INCREASED

In establishing the Medicaid program, Congress focused principally on assisting those "persons who were most im-

poverished." *Schweiker* v. *Hogan*, 457 U.S. 569, 590 (1982). Under the program, "[e]ach participating State develops a plan containing 'reasonable standards . . . for determining eligibility for and the extent of medical assistance,'" and an "individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36-37 (1981) (quoting 42 U.S.C. 1396a(a)(17)). State standards may "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17)(B); *Gray Panthers*, 453 U.S. at 42-43.

This case concerns whether the standards established by the State of Wisconsin are consistent with requirements added by the Medicare Catastrophic Coverage Act of 1988 (MCCA). The fundamental difference between the two approaches at issue—income-first and resources-first—is whether potential income transfers to the community spouse from the institutionalized spouse may be taken into account when deciding whether to increase the community spouse resource allowance (CSRA). Rejecting the views of the Secretary, Pet. App. 81a-91a, two federal courts of appeals, *Cleary* v. *Waldman*, 167 F.3d 801 (3d Cir.), cert. denied, 528 U.S. 870 (1999); *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 799 (6th Cir.), cert. denied, 525 U.S. 964 (1998), and the highest courts of two States, *Golf* v. *New York State Dep't of Soc. Servs.*, 697 N.E.2d 555 (N.Y. 1998); *Thomas* v. *Commissioner of the Div. of Med. Assistance*, 682 N.E.2d 874 (Mass. 1997), the Wisconsin Court of Appeals held that the MCCA prohibits the income-first method used by most States, under which such potential income transfers are considered. Instead, that court held, the MCCA unambiguously requires use of the resources-first method. In so holding, the court of appeals misconstrued the Act, inappropriately substituted its own views for the reasoned and consistent approach of the federal agency to which Congress entrusted

the statute for administration, and usurped the discretion that Congress afforded the States in this program of cooperative federalism.

A. The Text, Structure, History, And Administrative Interpretation Of The MCCA Establish That States May Use The Income-First Methodology

1. In enacting the Medicaid program, Congress proceeded on the premise that "it is proper to expect spouses to support each other." S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1, 78 (1965); see also H.R. Rep. No. 213, 89th Cong., 1st Sess. 68 (1965). Thus, Congress prohibited States from "tak[ing] into account the financial responsibility of any individual for any applicant * * * *unless* such applicant or recipient is such individual's spouse" or minor child. 42 U.S.C. 1396a(a)(17)(D) (emphasis added). In view of that statutory text, the Secretary and the States for decades deemed each spouse's income and resources to be available for the care of the other, whether or not they were actually furnished, subject to such regulatory restrictions as might be adopted by the Secretary. See pp. 2-4 & note 1, *supra*. Upholding that construction in *Gray Panthers*, this Court concluded that "Congress treated spouses differently from most other relatives by explicitly authorizing state plans to 'take into account the financial responsibility' of the spouse." 453 U.S. at 47 (quoting 42 U.S.C. 1396a(a)(17)(D)).

In enacting the MCCA in 1988, Congress modified that general rule in part. The MCCA provides that, "[d]uring any month in which an institutionalized spouse is in the institution, * * * no income of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(b)(1). The MCCA thus forbids the community spouse's income, even if potentially transferrable, from being deemed available to the institutionalized spouse. But it nowhere precludes the Secretary or the States from treating excess income of the *institutionalized spouse* as available to

the *community spouse* in making initial eligibility determinations, as occurs under the income-first method. The most natural inference to be drawn from that omission is that Congress did not intend to preclude States from treating the income of institutionalized spouses as available to provide financial support for community spouses where that is necessary to raise the income of the community spouse to the minimum monthly maintenance needs allowance (MMMNA). See 66 Fed. Reg. at 46,766 (App., *infra*, 34a) (Secretary's conclusion that omission "supports an inference that it is permissible to consider all or some portion of the institutionalized spouse's income to be available to the community spouse"). The soundness of treating excess income of the institutionalized spouse as available for maintaining the household used by the community spouse is reinforced by the fact that the MMMNA is set at 150% of the poverty level for a *couple*. See 42 U.S.C. 1396r-5(d)(3).

Moreover, when Congress revisited the general subject of spousal attribution in 1988 and adopted the specific income-attribution rules in the MCCA, it acted against a background that included not merely a longstanding agency construction and settled state practices of presuming or requiring spouses to support each other (subject only to certain limits set by the Secretary, see pp. 2-4 & note 1, *supra*), but also express statutory support for that approach and this Court's decisions in *Gray Panthers* and *Herweg* v. *Ray*, 455 U.S. 265 (1982), upholding it. Cf. *United States* v. *Wells*, 519 U.S. 482, 495 (1997); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). These circumstances make all the more compelling the conclusion that Congress's enactment of a specific prohibition against deeming the community spouse's income to be available to the institutionalized spouse, and its failure to adopt any reciprocal prohibition against considering the institutionalized spouse's income as available to the community spouse, leaves the States free to apply the background principle of spousal support when deciding whether to protect

additional resources for the community spouse. See *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986); *Haig* v. *Agee*, 453 U.S. 280, 297-298 & n.37 (1981).

Indeed, for post-eligibility determinations regarding the extent of assistance, Congress expressly provided for the income of the institutionalized spouse to be used to support the community spouse. See 42 U.S.C. 1396r-5(d)(1)(C) and (2) (where community spouse's income is less than MMMNA, difference is deducted from institutionalized spouse's income for post-eligibility purposes, to the extent such amount is actually made available to the community spouse). It follows that a state standard that anticipates such transfers for eligibility purposes (when deciding whether to protect additional resources) is at least a "*reasonable* standard[] * * * for determining [Medicaid] eligibility," 42 U.S.C. 1396a(a)(17) (emphasis added). Compare *Mourning* v. *Family Pubs. Serv., Inc.*, 411 U.S. 356, 372-373 (1973). In determining whether to increase the CSRA in a fair hearing under subsection (e)(2)(C)—where the task is to determine whether the community spouse has sufficient income to meet his needs—the State must determine what income is available to support the community spouse. It would be perverse to construe Section 1396r-5 to require the hearing officer to ignore the income of the institutionalized spouse in making that determination when another provision of the same enactment expressly contemplates that some portion of the institutionalized spouse's income may be made available to the community spouse for that very purpose.

The structure of the MCCA as a whole, in fact, suggests that transfers from institutionalized spouses to community spouses are the ordinary method of bringing the community spouse's income up to the MMMNA. Congress provided an express and precise formula that can be used to account for such transfers for post-eligibility purposes without resort to a hearing. 42 U.S.C. 1396r-5(d)(1)(B) and (d)(2). In addition, Congress provided a precise formula for determining the ex-

tent resources may be protected through the CSRA. 42 U.S.C. 1396r-5(f)(2). In contrast, increases in the community spouse's income through an adjustment to the CSRA can be achieved only by invoking an exception to the statutory CSRA formula; the exception requires use of a hearing process; and the amount of any increase is not governed by a precise formula. It can be inferred from this structure that Congress anticipated that the community spouse ordinarily would "have his or her resources and income protected in the manner dictated by" the MCCA's "precise and detailed formula[e]," and that departure from the statutory CSRA through "fair hearings" would occur only where those formulae cannot "provide the protection that Congress contemplated." See Pet. App. 81a (1993 HCFA memorandum).

2. The legislative history supports the conclusion that the income-first method is permissible. Addressing the very provision at issue here, the Conference Report declares:

> If the State, after such a hearing, determines that the community spouse resource allowance is inadequate, the State must allow the community spouse to retain an adequate amount of resources to provide the minimum monthly maintenance needs allowance (*taking into account any other income attributable to the community spouse*), notwithstanding the amount of the State-established resource allowance.

H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. 265 (1988) (emphasis added); see also *id.* at 267 (similar). The Conference Report thus demonstrates that Congress understood that there might be "other income attributable to the community spouse" that a State may consider when determining whether to raise the CSRA.

3. Consistent with the foregoing analysis, the Secretary has long interpreted the MCCA as permitting States, in establishing "reasonable standards * * * for determining eligibility," 42 U.S.C. 1396a(a)(17), to take into account income of an institutionalized spouse that may be made

available to the community spouse when deciding whether to increase the CSRA. In 1993, the Health Care Financing Administration (HCFA)—now known as the Centers for Medicare and Medicaid Services (CMS)—advised States that they may require "that the institutionalized spouse * * * first make available the maximum amount of income he or she can as a community spouse monthly income allowance * * * before being allowed to raise the [CSRA]," and that States "have the discretion to determine the maximum amount of income that the institutionalized spouse can afford to protect for the community spouse." Pet. App. 81a; see also Pet. App. 86a (Mar. 1994) ("States have the option to use the 'income first' rule or to apply some other reasonable" methodology); Pet. App. 89a (July 1994) (same); Pet. App. 90a (Mar. 1996) (Letter from Secretary Shalala stating that Ohio's income-first policy is "legally permissible").

As the Secretary recently explained in proposing a regulation to formally codify that rule:

> We have previously issued policy memoranda and letters expressing our view that [42 U.S.C. 1396r-5(e)(2)(C)] authorizes a State to consider potential income transfers from an institutionalized spouse to a community spouse, so that a State may adopt the income-first method or apply some other reasonable methodology * * *. In other words, consistent with the statutory requirement that State[s] utilize "reasonable standards" for determining eligibility and the amount of benefits as described in [42 U.S.C. 1396a](a)(17), we have permitted States to employ income-first or other reasonable methodologies.

66 Fed. Reg. at 46,765 (App., *infra*, 31a-32a). Indeed, a provision of the State Medicaid Manual—issued days after the MCCA provisions became effective—explains that, in deciding whether to substitute another amount for (*i.e.*, increase) the CSRA, "[t]here are no substitutions when institutionalized spouses do not make available monthly income

allowances to community spouses." State Medicaid Manual § 3262.3 (Oct. 1989) (*available at* http://www.hcfa.gov/pubforms/pub45pdf/sm3260.pdf)[5]; see also Pet. App. 85a-86a, 88a (HCFA memoranda discussing Manual § 3262.3).

In construing an Act of Congress entrusted to an agency for administration, courts must give respectful consideration to the views of the agency when, as here, Congress has not itself "directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2175 (2001) (remanding court of appeals decision made without any regard to agency's letter ruling). This Court, in fact, has accorded *Chevron*-like deference to the Secretary's view on issues like this one, even when that view is expressed in informal memoranda and letters. In *Lukhard* v. *Reed*, 481 U.S. 368 (1987), a majority of this Court agreed that the Secretary's view—there, that the Social Security Act permits but does not require States to treat tort awards as income when determining eligibility—"is entitled to deference," even though that view was expressed only in letters and memoranda. *Id.* at 378 (plurality); *id.* at 383 (Blackmun, J., concurring) (emphasizing deference). See also *Mead*, 121 S. Ct. at 2176 & n.17 (identifying cases in which agency views expressed in informal or non-binding formats were not given "*Chevron*-style" deference); *Christensen* v. *Harris County*, 529 U.S. 576, 586 (2000).

In any event, considering "the degree of the agency's care, its consistency, formality, and relative expertness, and * * * the persuasiveness of [its] position," there can be little doubt that the agency's longstanding views are entitled to substan-

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[5] The Manual provision is dated "10-89." The relevant provisions of the MCCA apply only where a spouse has been continuously institutionalized on or after September 30, 1989. Pub. L. No. 100-360, § 303(g)(1)(B), 102 Stat. 763.

tial weight here. *Mead*, 121 S. Ct. at 2171. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). The Secretary's views have been consistent. See 66 Fed. Reg. at 46,765 (App., *infra*, 31a-32a); Pet. App. 81a-90a. Respect is "[p]articularly * * * due when," as here, "the administrative practice at stake 'involves a contemporaneous construction of a statute.'" *Udall*, 380 U.S. at 16 (quoting *Power Reactor Dev. Co.* v. *International Union of Elec.*, 367 U.S. 396, 408 (1961)). And, in light of the extreme complexity of the Act's interlocking provisions, the need for the Secretary's expertise is at its apogee. See *Hogan*, 457 U.S. at 571; *Alcoa* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984).

B. The Wisconsin Court Of Appeals' Reasons For Rejecting the Secretary's Construction Are Unpersuasive

1. The Wisconsin Court of Appeals' primary reason for rejecting the Secretary's conclusion that the MCCA allows States to use the income-first approach was its view that the MCCA unambiguously forbids consideration of potential income transfers from the institutionalized spouse to the community spouse when deciding whether to raise the CSRA. To support that view, the court of appeals relied on the fact that Section 1396r-5(e)(2)(C) "very specifically directs the increase" of the CSRA "to an amount sufficient to generate additional income to meet" the MMMNA. Pet. App. 11a. That observation, however, merely begs the question in this case. In deciding whether the unadjusted CSRA "is inadequate * * * to raise the community spouse's income" to the MMMNA for purposes of Section 1396r-5(e)(2)(C), the State necessarily must calculate "the community spouse's income." The MCCA does not define the phrase "community spouse's income," and it provides no rules regarding which potential income sources may be counted in determining that income's adequacy. In particular, subsection (e)(2)(C) does not address whether, in determining the adequacy of the community spouse's income, it is permissible to consider poten-

tial income transfers *from the institutionalized spouse* to the community spouse. Contrast 42 U.S.C. 1396r-5(b)(1) (barring consideration of community spouse income as available to the institutionalized spouse); pp. 15-17, *supra*. As one court has explained, the view adopted by the Wisconsin Court of Appeals fails to confront the question whether "a community spouse's 'income' includes—or does not include—any transfer of income from the institutionalized spouse." *Chambers*, 145 F.3d at 799. Whether such potentially "transferred income is included" is what distinguishes between "the two possible approaches" (income-first and resources-first) "used to implement subsection (e)(2)(C)." *Ibid.*

On that issue, the MCCA is silent. *Chambers*, 145 F.3d at 802. In this context, that silence is fatal to the Wisconsin court's analysis. In the MCCA, Congress included a provision declaring that, "*[e]xcept* as [Section 1396r-5] *specifically* provides," the MCCA "does not apply to" a "determination of what constitutes income or resources" or "the methodology and standards for determining and evaluating income and resources." 42 U.S.C. 1396r-5(a)(3) (emphasis added). Section 1396r-5 nowhere "provides" that income from the institutionalized spouse may not "constitute[] income" of the community spouse when deciding whether to raise the CSRA, and it certainly does not do so "specifically."

2. The Wisconsin Court of Appeals also relied on the fact that the adjustment to the CSRA is a *pre*-eligibility determination. Pet. App. 12a-13a. For *post*-eligibility determinations, the court observed, the MCCA provides specific rules. Under one such rule, if "the amount of monthly income otherwise available to the community spouse" is less than the MMMNA—and if the institutionalized spouse makes the difference available to the community spouse—that amount (the "community spouse monthly income allowance") "shall be deducted from the [institutionalized] spouse's monthly income" in determining the extent of assistance furnished to the institutionalized spouse. 42 U.S.C. 1396r-5(d)(1)(B) and

(2). The court read those provisions as "direct[ing] the institutionalized spouse to transfer income to the community spouse if the community spouse's income falls short of the MMMNA." Pet. App. 12a. Noting that Congress did not specifically provide for such a transfer in the case of initial eligibility determinations, the court inferred that such attribution is prohibited in that setting. It reasoned: "Because § 1396r-5(d) (relating to transferring income) is limited to post-eligibility determination transfers, * * * then increasing the CSRA via resources is the only method by which a community spouse can be afforded more income for the MMMNA at the time [Medicaid] eligibility is being determined for the institutionalized spouse." *Id.* at 13a.

The court of appeals proceeded from an erroneous premise. Subsection (d)(1)(B) does not itself direct the institutionalized spouse to transfer income to the community spouse, and it does not address the question of whether a State may require the institutionalized spouse to do so. Rather, it provides that, *if* the community spouse's income is less than the MMMNA, and *if* the difference (the community spouse income allowance) *is* transferred to the community spouse, then that amount is deducted from the *institutionalized spouse's* income for purposes of determining the extent of assistance the institutionalized spouse will receive. That provision in no way demonstrates that Congress intended to bar a State from treating a portion of the institutionalized spouse's income as available to the community spouse for purposes of determining whether the *community spouse's* income meets or exceeds the MMMNA. To the contrary, the very fact that Congress fashioned special rules accommodating the transfer of such income to the community spouse when the transfer actually occurs post-eligibility strongly reinforces the conclusion that a State may regard such income as available to the community spouse in determining, at the initial eligibility stage, whether the income available to the community spouse falls short of the MMMNA (and,

accordingly, whether an increase in the CSRA is called for). Indeed, while the Wisconsin Court of Appeals posited (Pet. App. 11a) that Congress demonstrated an intent to prohibit imputing the institutionalized spouse's income to the community spouse when deciding whether to raise the CSRA by failing to include "direct or specific language" stating that such "imputation * * * should occur," the legislative history shows the opposite to be true. As pointed out above (p. 18, *supra*), the Conference Report expressly contemplates that there might be "other income attributable to the community spouse" that can be considered when determining whether to increase the CSRA.

The court of appeals' reasoning also proves too much, because Congress did not make *any* of the extensive income-attribution rules—except the prohibition on attributing *community spouse* income *to* the *institutionalized spouse*, 42 U.S.C. 1396r-5(b)(1)—applicable to initial eligibility determinations. See 42 U.S.C. 1396r-5(b)(2) (providing rules for "[a]ttribution of income" for "purposes of the post-eligibility income determination"); H.R. Conf. Rep. No. 661, at 262 (income-attribution requirements in Subsection (b)(2) "appl[y] only to post-eligibility treatment"). For example, "[i]n determining the income of an institutionalized or community spouse for purposes of the post-eligibility income determination," the MCCA provides that non-trust income "shall be considered only available to" the spouse in whose name the "payment of income is made." 42 U.S.C. 1396r-5(b)(2). Thus, under the court of appeals' analysis, the fact that Congress omitted any requirement that States follow that name-on-the-check rule in initial eligibility determinations would preclude States and the Secretary from following that rule in determining eligibility. Similarly, Congress's provision of mandatory rules for allocating payments made in the names of both spouses or in the name of either spouse and a third party for post-eligibility decisions, 42 U.S.C. 1396r-5(b)(2)(A)(ii) and (iii), and its failure to require use of those rules in

making initial eligibility determinations, would preclude States from employing those rules in determining eligibility. That result would frustrate, not further, Congress's intent.

3. Ultimately, a comparison between the extensive rules that Congress established for attributing income post-eligibility, see 42 U.S.C. 1396r-5(b)(2)(A)-(D) and (d)(1)-(5), and the singular prohibition (against attributing community spouse income to the institutionalized spouse) that applies in making initial eligibility determinations, 42 U.S.C. 1396r-5(b)(1), proves just one thing—that Congress did not definitively resolve most of the complex issues concerning income attribution in the context of initial eligibility determinations. The statute thus presents a textbook example of a legislative "gap." Cf. *Chevron*, 467 U.S. at 843. Consistent with the principles of cooperative federalism that undergird the Medicaid program, Congress in 42 U.S.C. 1396a(a)(17) expressed its expectation that the *States* would establish "reasonable standards * * * for determining eligibility for and the extent of medical assistance." Cf. *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 506 (1990) (Medicaid provision requiring States to reimburse hospitals for "reasonable costs" is designed to afford "States some degree of flexibility to adopt their own methods"); *Lukhard* v. *Reed*, *supra* (upholding Secretary's policy of permitting but not compelling States to treat personal injury awards as "income").

Moreover, in Section 1396a(a)(17)(B), Congress expressed its expectation that it would be the *Secretary* who would establish the boundaries of reasonableness. State plans, that Section declares, must "provide for taking into account only such income and resources as are, as determined in accordance *with standards prescribed by the Secretary*, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17)(B) (emphasis added). This Court has recognized that Congress, by using such language, "expressly *delegated* to the Secretary the power to prescribe standards." *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). "In a situation of this kind, Congress

entrusts * * * the primary responsibility for" providing content to the statute "to the Secretary, rather than to the courts." *Ibid.* See also *id.* at 421-422, 429-432 (because the statute permits the Secretary to "prescribe standards," the Secretary may adopt a rule that permits States to choose among reasonable options).

In this case, the Wisconsin court ignored Section 1396a(a)(17)'s express vesting of authority in the States and the Secretary. Confronted with the MCCA's failure to provide extensive rules regarding income attribution between spouses in making initial eligibility determinations, and the absence of a definition of "community spouse's income" for purposes of 42 U.S.C. 1396r-5(e)(2)(C), the court of appeals essentially invented its own. Thus, in announcing a resources-first requirement, the court of appeals borrowed the name-on-the-check rule from the post-eligibility context, so that any income in the community spouse's name is deemed to be the community spouse's alone, and income in the institutionalized spouse's name is deemed to be the institutionalized spouse's alone. 42 U.S.C. 1396r-5(b)(2). At the same time, the court refused to attach any significance to the exception to that rule contained in Section 1396r-5(d), also applicable post-eligibility, under which income of the institutionalized spouse may be transferred and attributed to the community spouse if the income "otherwise available to" the community spouse is less than the MMMNA. See 42 U.S.C. 1396r-5(d)(1)(B) and (2). Such a pick-and-choose approach, given the statute's complexity, may well yield a *permissible* means of implementing the MCCA. But it is hardly compelled by the statutory text. Rather, one would ordinarily think that, if a State may look to the post-eligibility name-on-the-check rule for guidance in making initial eligibility determinations, it may also consider the effect of exceptions to that rule. That has long been the Secretary's view. As the Secretary explained in 1993, "[s]ince the institutionalized spouse must transfer the income

allowance to the community spouse to have it deducted in the post-eligibility calculation, the State should include this income as available to the community spouse when it counts that spouse's own income." See Pet. App. 83a.

The Wisconsin Court of Appeals offered two reasons for declining to accord the Secretary's views any weight. First, the court concluded that deference is inappropriate because the MCCA unambiguously forecloses the income-first approach. Pet. App. 16a. As we have explained above, that conclusion is demonstrably incorrect. Second, the court believed that HHS "has not interpreted the statute consistently." Pet. App. 16a. Not so: HHS without exception has taken the position that the income-first rule is a permissible methodology. See pp. 18-21, *supra*. Indeed, HHS announced its view in the State Medicaid Manual days after the MCCA became effective. See pp. 19-20 & note 5, *supra*. That guidance has not been amended since its adoption, and the Wisconsin court pointed to no HHS document or pronouncement suggesting that the income-first rule is impermissible.[6]

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[6] To the extent the agency has vacillated, it has been on whether resources-first—the alternative approach the state court imposed here—is similarly permissible. The agency policy statement issued in November 1993 suggested that the agency was "requiring" income-first, *i.e.*, "that the institutionalized spouse must first make available the maximum amount of income he or she can as a community spouse monthly income allowance under [42 U.S.C. 1396r-5(d)(1)(B)] before being allowed to raise the [CSRA]." Pet. App. 81a. Later, on March 3, 1994, HCFA issued a memorandum stating that the November 1993 memorandum should not be read as requiring the income-first method. *Id.* at 85a, 88a. Rather, the agency left the States "the option to use the 'income first' rule or to apply some other reasonable" methodology "until we have issued final regulations which specifically address this issue." *Id.* at 86a. Thus, HHS has never departed from its view that Section 1396r-5 permits States to use an income-first method. Rather, the agency has merely indicated that, in view of the ambiguity in the statute, the federal government would pay the resulting federal share of Medicaid benefits to States using either the income-first or resources-first method because each constitutes a "reasonable" standard for determining eligibility. See 66 Fed. Reg. at 46,766 (App., *infra*, 32a).

4. Finally, the Wisconsin court's judgment rested on a policy concern that the income-first method might leave community spouses with income that is less than the MMMNA if the institutionalized spouse dies before the community spouse does. Pet. App. 14a-15a.

As an initial matter, that analysis rests on a dubious factual assumption—that, as a general rule, when the institutionalized spouse dies, her income stream essentially disappears, rather than being transferred in large part to her spouse as a devisee or heir of her estate or as the recipient of survivor's benefits under statutory or private pension arrangements. In most benefits and pension contexts, a surviving spouse is entitled to receive, on his spouse's death, a substantial share of the benefits that were payable to the deceased spouse (or to the two spouses jointly) during her lifetime. For example, the Employee Retirement Income Security Act "requires that every qualified joint and survivor annuity include an annuity payable to a nonparticipant surviving spouse," and that the survivor's annuity be not "less than 50% of the amount of the annuity which is payable during the joint lives of the participant and spouse; * * * The statutory object * * * is to ensure a stream of income to surviving spouses." *Boggs* v. *Boggs*, 520 U.S. 833, 842-843 (1997) (citing 29 U.S.C. 1055(a) and (d)(1)). And the Social Security Act also makes provision for payment of increased old-age benefits to surviving spouses. 42 U.S.C. 402(b)(2) and (c)(3); 42 U.S.C. 402(e)(2)(A) and (f)(3)(A). See also J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 Case W. Res. L. Rev. 223, 242 (1988) ("Federal law provides that surviving spouses normally 'inherit' certain important benefits from the decedent * * *. For example, a surviving non-employee spouse normally inherits the right to receive the monthly Social Security benefits that were paid to the decedent. In addition, the survivor normally will receive a survivor's annuity from the employee's pension plan.") (footnote omitted).

Consequently, the institutionalized spouse's death does not necessarily or even ordinarily cause her income stream to become altogether unavailable to the community spouse. In fact, the institutionalized spouse's death often will *increase* the income available to the community spouse. Before the institutionalized spouse's death, much of her income must be dedicated to the substantial costs of her institutional and medical care; after her death, those costs disappear, and any Social Security, pension or other income becomes directly payable to the community spouse.

The court of appeals was also incorrect to treat the MMMNA as the minimum amount the community spouse needs after the institutionalized spouse dies. The MMMNA is set at 150% of the poverty threshold for a *couple*, plus a shelter allowance where necessary. 42 U.S.C. 1396r-5(d)(3) and (4). It thus ensures that, while the institutionalized spouse is alive, the community spouse can maintain a domicile and lifestyle suitable to a *couple*. That provision affords important protection where the institutionalized spouse may return home at some point. Once the institutionalized spouse is deceased, however, the MMMNA ceases to be a proper measure of the community spouse's needs.

In any event, the income-first method ensures that community spouses are more financially secure than, for example, spouses whose partners are never institutionalized. If a couple lives together continuously, the spouses may need to exhaust almost all of their resources before either of them can qualify for Medicaid; for the surviving spouse in such a relationship, no CSRA or MMMNA protected resources or income for his support. Yet the surviving spouse who lives with his Medicaid-eligible partner during their married life suffers no lesser loss of income upon her death than would the surviving spouse of an institutionalized partner.

Finally, the Wisconsin court's analysis wholly ignores competing policy considerations. As this Court has explained, "the Federal Government cannot finance a program

that provides meaningful benefits in equal measure to everyone. Both federal and state funds available for such assistance are limited." *Hogan*, 457 U.S. at 590. As a result, Medicaid is generally reserved for the Nation's most needy. *Ibid.* The MCCA creates a generous exception to that rule, and to the general rule that spouses are expected to support each other. Under the MCCA, if one spouse is institutionalized, the couple need not exhaust its resources; some resources are protected through the CSRA. By requiring further increases in the CSRA for the benefit of community spouses, even though most other applicants (including other couples) may have much more limited resource allowances, the court of appeals' approach necessarily decreases the funding available for potentially more needy persons in order to make additional dollars available to relatively less needy community spouses. Any policy rationale that may be thought to support such a result must be weighed against that competing concern.

Accordingly, while the resources-first approach constitutes a "reasonable" and permissible method of implementing 42 U.S.C. 1396a(a)(17) and 1396r-5(e)(2)(C), that single approach is by no means compelled by the relevant policy considerations, much less by the text of the MCCA. The income-first approach also is a reasonable and permissible method of implementing the Act, as demonstrated by the structure of the Act as a whole, the legislative history of the MCCA, and the Secretary's longstanding and consistent interpretation.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be reversed.

Respectfully submitted.

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APPENDIX A

1. Section 1902(a) of the Social Security Act, 42 U.S.C. 1396a(a) (1994 & Supp. V 1999), provides in pertinent part:

§ 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must—

(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(2) provide for financial participation by the State equal to not less than 40 per centum of the non-Federal share of the expenditures under the plan with respect to which payments under section 1396b of this title are authorized by this subchapter; and, effective July 1, 1969, provide for financial participation by the State equal to all of such non-Federal share or provide for distribution of funds from Federal or State sources, for carrying out the State plan, on an equalization or other basis which will assure that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan;

(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

* * * * *

(10) provide—

(A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title, to—

(i) all individuals—

(I) who are receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI of this chapter, or part A or part E of subchapter IV of this chapter (including individuals eligible under this subchapter by reason of section 602(a)(37), 606(h), or 673(b) of this title, or considered by the State to be receiving such aid as authorized under section 682(e)(6) of this title),

(II) with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter (or were being paid as of August 22, 1996) and would continue to be paid but for the enactment of that section or who are qualified severely impaired individuals (as defined in section 1396d(q) of this title),

(III) who are qualified pregnant women or children as defined in section 1396d(n) of this title,

(IV) who are described in subparagraph (A) or (B) of subsection (*l*)(1) of this section and whose family income does not exceed the minimum income level the State is required to establish under subsection (*l*)(2)(A) of this section for such a family;

(V) who are qualified family members as defined in section 1396d(m)(1) of this title,

(VI) who are described in subparagraph (C) of subsection (*l*)(1) of this section and whose family income does not exceed the income level the State is required to establish under subsection (*l*)(2)(B) of this section for such a family, or

(VII) who are described in subparagraph (D) of subsection (*l*)(1) of this section and whose family income does not exceed the income level the State is required to establish under subsection (*l*)(2)(C) of this section for such a family;

(ii) at the option of the State, to any group or groups of individuals described in section 1396d(a) of this title (or, in the case of individuals described in section 1396d(a)(i) of this title, to any reasonable categories of such individuals) who are not individuals described in clause (i) of this subparagraph but—

(I) who meet the income and resources requirements of the appropriate State plan described in clause (i) or the supplemental security income program (as the case may be),

(II) who would meet the income and resources requirements of the appropriate State plan described in clause (i) if their work-related child care costs were paid from their earnings rather than by a State agency as a service expenditure,

(III) who would be eligible to receive aid under the appropriate State plan described in clause (i) if coverage under such plan was as broad as allowed under Federal law,

(IV) with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them, aid or assistance under the appropriate State plan described in clause (i), supplemental security income benefits under subchapter XVI of this chapter, or a State supplementary payment;

(V) who are in a medical institution for a period of not less than 30 consecutive days (with eligibility by reason of this subclause beginning on the first day of such period), who meet the resource requirements of the appropriate State plan described in clause (i) or the supplemental security income program, and whose income does not exceed a separate income standard established by the State which is consistent with the limit established under section 1396b(f)(4)(C) of this title,

(VI) who would be eligible under the State plan under this subchapter if they were in a medical institution, with respect to whom there has been a determination that but for the provision of home or community-based services described in subsection (c), (d), or (e) of section 1396n of this title they would require the level of care provided in a hospital, nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan, and who will receive home or community-based services pursuant to a waiver granted by the Secretary under subsection (c), (d), or (e) of section 1396n of this title,

(VII) who would be eligible under the State plan under this subchapter if they were in a medical institution, who are terminally ill, and who will receive hospice care pursuant to a voluntary election described in section 1396d(*o*) of this title;

(VIII) who is a child described in section 1396d(a)(i) of this title—

(aa) for whom there is in effect an adoption assistance agreement (other than an agreement under part E of subchapter IV of this chapter) between the State and an adoptive parent or parents,

(bb) who the State agency responsible for adoption assistance has determined cannot be placed with adoptive parents without medical assistance because such child has special needs for medical or rehabilitative care, and

(cc) who was eligible for medical assistance under the State plan prior to the adoption assistance agreement being entered into, or who would have been eligible for medical assistance at such time if the eligibility standards and methodologies of the State's foster care program under part E of subchapter IV of this chapter were applied rather than the eligibility standards and methodologies of the State's aid to families with dependent children program under part A of subchapter IV of this chapter;

(IX) who are described in subsection (*l*)(1) of this section and are not described in clause (i)(IV), clause (i)(VI), or clause (i)(VII);

(X) who are described in subsection (m)(1) of this section;

(XI) who receive only an optional State supplementary payment based on need and paid on a regular basis, equal to the difference between the individual's countable income and the income standard used to determine eligibility for such supplementary payment (with countable income being the income remaining after deductions as established by the State pursuant to standards that may be more restrictive than the standards for supplementary security income benefits under subchapter XVI of this chapter), which are available to all individuals in the State (but which may be based on different income standards by political subdivision according to cost of living differences), and which are paid by a State that does not have an agreement with the Commissioner of Social Security under section 1382e or 1383c of this title;

(XII) who are described in subsection (z)(1) of this section (relating to certain TB-infected individuals);

(XIII) who are in families whose income is less than 250 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 9902(2) of this title) applicable to a family of the size involved, and who but for earnings in excess of the limit established under section 1396d(q)(2)(B) of this title, would be considered to be receiving supplemental security income (subject, notwithstanding section 1396*o* of this title, to payment of premiums or other cost-sharing charges

(set on a sliding scale based on income) that the State may determine);

(XIV) who are optional targeted low-income children described in section 1396d(u)(2)(B) of this title;

(XV) who, but for earnings in excess of the limit established under section 1396d(q)(2)(B) of this title, would be considered to be receiving supplemental security income, who is at least 16, but less than 65, years of age, and whose assets, resources, and earned or unearned income (or both) do not exceed such limitations (if any) as the State may establish;

(XVI) who are employed individuals with a medically improved disability described in section 1396d(v) (1) of this title and whose assets, resources, and earned or unearned income (or both) do not exceed such limitations (if any) as the State may establish, but only if the State provides medical assistance to individuals described in subclause (XV);

(XVII) who are independent foster care adolescents (as defined in section 1396d(w)(1) of this title), or who are within any reasonable categories of such adolescents specified by the State; or

(XVIII) who are described in subsection (aa) (relating to certain breast or cervical cancer patients);

* * * * *

(17) except as provided in subsections (*l*)(3), (m)(3), and (m)(4) of this section, include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter, based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter) as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in

the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums, payments made to the State under section 1396b(f)(2)(B) of this title, or otherwise and regardless of whether such costs are reimbursed under another public program of the State or political subdivision thereof) incurred for medical care or for any other type of remedial care recognized under State law;

* * * * *

2. Section 1924 of the Social Security Act, 42 U.S.C. 1396r-5 (1994 & Supp. V 1999), provides in pertinent part:

§1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

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

(2) No comparable treatment required

Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1396a(a) of this title, require such treatment for other individuals.

(3) Does not affect certain determinations

Except as this section specifically provides, this section does not apply to—

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

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

(4) Application in certain States and territories

(A) Application in States operating under demonstration projects

In the case of any State which is providing medical assistance to its residents under a waiver granted

under section 1315 of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories

This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs

This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1396u-4(a)(7) of this title) or under a PACE program under section 1936u-4 or 1395eee of this title.

(b) Rules for treatment of income

(1) Separate treatment of income

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

(2) Attribution of income

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

(A) Non-trust property

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

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

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

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

(B) Trust property

In the case of a trust—

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections 1396a(a)(17) and 1396p(d) of this title), and

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

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

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

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

(C) Property with no instrument

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

(D) Rebutting ownership

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

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)—

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

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

(B) Assessment

At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and

shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section.

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property—

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

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

(3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where—

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

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

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

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined

In this section, the term "resources" does not include—

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse

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

(A) A personal needs allowance (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

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

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

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a(r) of this title).

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

(2) Community spouse monthly income allowance defined

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

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

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

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

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

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902(2) of this title) for a family unit of 2 members; plus

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

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

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of—

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

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

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

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g) of this section).

(4) Excess shelter allowance defined

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

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

(B) the standard utility allowance (used by the State under section 2014(e) of Title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under sub-

paragraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

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

(e) Notice and fair hearing

(1) Notice

Upon—

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

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

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

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of—

(i) the community spouse monthly income allowance;

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

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

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

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

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

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level other-

wise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

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

(f) Permitting transfer of resources to community spouse

(1) In general

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

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which—

(A) the greatest of—

(i) $12,000 (subject to adjustment under subsection (g) 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).

(g) Indexing dollar amounts

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

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who—

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

APPENDIX B

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 431

[CMS-2128-P]

RIN 0938-AL06

Medicaid Program; Continue to Allow States an Option Under the Medicaid Spousal Impoverishment Provisions to Increase the Community Spouse's Income When Adjusting the Protected Resource Allowance

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: Section 1924 of the Social Security Act (the Act) sets forth provisions designed to afford financial protection against impoverishment to a non-institutionalized spouse of an institutionalized individual. These provisions contain several formulas to provide this protection and specify how income and resources of spouses separated by institutionalization will be treated for purposes of determining the institutionalized spouse's Medicaid eligibility and calculating the amount the institutionalized spouse must contribute towards the cost of his or her institutional care. This proposed rule would implement certain provisions of section 1924 of the Act, which provides for fair hearings for an increase in the community spouse resource allowance.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on November 6, 2001.

* * * * *

FOR FURTHER INFORMATION CONTACT:

Roy Trudel, (410) 786-3417.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786-0626 or (410) 786-7195.

I. Background

A. Statutory Basis

Title XIX of the Social Security Act (the Act) "provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). Under section 1902(a)(17) of the Act, each participating State must develop a plan containing "reasonable standards * * * for determining eligibility for and the extent of medical assistance." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981). Section 1902(a)(17)(B) of the Act states that those State standards must "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient."

Section 1924 of the Act requires a State with a Medicaid program to use special rules for the treatment of income and resources of married institutionalized individuals who have spouses who are not institutionalized. (Throughout this preamble, we use the term "institutionalized spouses" to mean married institutionalized individuals and the term "com-

munity spouses" to mean spouses who are not institutionalized.) These provisions are referred to as the "spousal impoverishment" provisions. The spousal impoverishment provisions govern the allocation of income and resources between the spouses for determining Medicaid eligibility of the institutionalized spouse as well as allowing the States to determine how much income of the institutionalized spouse is available to be applied toward the cost of his or her institutional care ("post-eligibility determinations").

B. Income and Resource Allocation

Income and resource calculations for married persons have proved to be a matter of great complexity, particularly when one of the spouses is cared for in an institutional setting, such as a nursing home, but the other spouse is not institutionalized. Before 1989, the provisions governing the Medicaid eligibility of institutionalized spouses sometimes left the community spouse with income below the poverty level and with minimal resources as well. At that time, after the month of institutionalization, the income of the two spouses was considered separately in most States for purposes of determining an institutionalized spouse's eligibility. However, very little of the institutionalized spouse's income could be protected for use by the spouse in the community. This often left the community spouse with little income to live on. After the month of institutionalization, most States would consider the joint resources of the community spouse and the institutionalized spouse (subject to a limited exclusion), and any property owned solely by the institutionalized spouse to be available for the care of the institutionalized spouse. (Property owned solely by the community spouse was not considered.) Thus, depending on how resources were owned, many married couples would have to deplete almost all of their resources before the institutionalized spouse would qualify for Medicaid. The net effect of

those requirements in some cases was the "pauperization" of the community spouse. H.R. Rep. No. 105, 100th Cong., 1st Sess. Pt. 2, at 65 (1987).

The Congress attempted to alleviate that spousal impoverishment hardship in the Medicare Catastrophic Coverage Act (MCCA) of 1988, (Public Law 100-360, enacted on December 22, 1988.) The MCCA requires a State to use a complex set of requirements and exclusions when allocating income and resources between community and institutionalized spouses, both when the State makes the initial eligibility determination, and later in post-eligibility determinations.

In section 1924(a)(1) of the Act, it provides that the spousal impoverishment provisions "supersede any other provision" of the Medicaid statute that "is inconsistent with them." However, the MCCA did not repeal the Secretary's authority to prescribe standards (under section 1902(a)(17)(B) of the Act) for determining what income is "available" to a spouse, and the requirement for States to set reasonable standards for determining eligibility and amount of assistance. That section 1902(a)(17) authority may now only be exercised in a manner that does not contravene the specific requirements of the spousal impoverishment provisions.

With respect to the allocation of income as part of an eligibility determination, the spousal impoverishment provisions impose only a single rule. Section 1924(b)(1) of the Act provides that during any month in which an institutionalized spouse is in the institution, no income of the community spouse shall be deemed available to the institutionalized spouse (subject to certain qualifications regarding income attribution). Thus, section 1924(b)(1) of the Act establishes a special rule that protects the income of the community spouse by excluding that income from consideration when determining whether the institutionalized spouse is eligible for Medicaid. Section 1924(b)(1) of the Act, however, does not address the extent to which the State may

consider the institutionalized spouse's income available to meet the needs of the community spouse.

With respect to income attribution after the State makes the initial eligibility determination, the spousal impoverishment provisions provide more extensive guidance and requirements. Specifically, section 1924(b)(2) of the Act provides that, if payment of income is made solely in the name of one spouse, that income is generally treated as available *only* to that spouse. Section 1924(d) of the Act provides a number of exceptions to that rule, which are generally designed to ensure that the community spouse has sufficient income to meet his or her basic monthly needs. In particular, section 1924(d) of the Act provides for the establishment of a minimum monthly maintenance needs allowance for each community spouse. The community spouse's minimum monthly maintenance needs allowance is set at a level that is much higher than the official Federal poverty level. Once income is attributed to each of the spouses according to the general rules in section 1924(b) of the Act, the income attributed to the community spouse is compared to the community spouse's minimum monthly maintenance needs allowance. Section 1924(d)(2) of the Act provides that if the community spouse's income is less than the minimum monthly maintenance needs allowance, the amount of the shortfall can be deducted from the income of the institutionalized spouse that would otherwise be considered available for the care of the institutionalized spouse. The amount of that deduction is referred to as the community spouse monthly income allowance.

The deduction of the community spouse monthly income allowance, in effect, prevents income the community spouse needs to meet basic living expenses from being considered available for the care of the institutionalized spouse. The deduction thus causes Medicaid to assume a greater portion of the costs of institutionalized care. The greater Medicaid

payments for care of the institutionalized spouse would free up income to meet the minimum needs of the community spouse. The community spouse monthly income allowance, therefore, ensures that the community spouse's basic monthly maintenance needs can be met *before* the institutionalized spouse's income is considered available to pay for the costs of his or her own institutional care.

With respect to the attribution of resources between the institutionalized spouse and community spouse, the statute provides extensive rules for both initial and post-eligibility decisions. For initial eligibility determinations, each spouse's share of resources is calculated as of the beginning of the institutionalized spouse's first period of institutionalization. At that time, all of the institutionalized spouse's and community spouse's resources are tallied together, and one half of the total value is allocated to each spouse (the "spousal share"). Often, most of the resources allocated to the institutionalized spouse must be exhausted before the institutionalized spouse is eligible for Medicaid. In contrast, the community spouse's share is protected from complete exhaustion. In particular, the community spouse's resources are not considered available for the care of the institutionalized spouse (and the institutionalized spouse can become Medicaid eligible) so long as the community spouse's share does not exceed the community spouse resource allowance (CSRA). Thus, the CSRA limits the extent to which the spouses must exhaust resources before the institutionalized spouse becomes eligible for Medicaid. Section 1924(f)(2)(A) of the Act specifies that the CSRA is the greatest of (1) $12,000 or a State standard up to $60,000 (indexed for inflation; for 2001 the indexed amount is $87,000); (2) the lesser of the spousal share (approximately one-half of the spouses' pooled resources) or $60,000 (indexed for inflation); (3) the amount set at a fair hearing under section 1924(e)(2) of the Act; or (4) the amount transferred under a court order.

In allocating income and resources between spouses, States have employed two divergent methods. Under the method used by most States, known as the "income-first" method, the institutionalized spouse's income (above the allowances specified in section 1924(d) of the Act) is allocated to the community spouse for purposes of determining the extent to which the community spouse has sufficient income to meet minimum monthly maintenance needs. Under the income-first method, the CSRA is increased only if the community spouse's income will not reach his or her minimum monthly maintenance needs allowance *after* taking into account any income not protected under section 1924(d) that is available or potentially available from the institutionalized spouse. In contrast, under the other method, known as the "resources-first" method, the couple's resources can be protected for the benefit of the community spouse to the extent necessary to ensure that the community spouse's total income, including income generated by the CSRA, meets the community spouse's minimum monthly maintenance needs allowance. Additional income from the institutionalized spouse that may be, but has not been, made available for the community spouse is not considered.

C. *Current Policy and Implementation of the New Provisions*

Section 1924(e)(2)(C) of the Act provides that if either spouse establishes that the CSRA (in relation to the amount of income generated by that allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted an amount adequate to provide a minimum monthly maintenance needs allowance.

We have previously issued policy memoranda and letters expressing our view that section 1924(e)(2)(C) of the Act authorizes a State to consider potential income transfers

from an institutionalized spouse to a community spouse, so that a State may adopt the income-first method or apply some other reasonable methodology until we issue final regulations addressing the issue. Thus, under our present policy, States may clearly use the income-first method, and may be able to use other methods, such as resources-first. In other words, consistent with the statutory requirement that State's utilize "reasonable standards" for determining eligibility and the amount of benefits as described in Section 1902(a)(17), we have permitted States to employ income-first or other reasonable methodologies. In practice, no State has elected to use a method other than income-first or resources-first. The proposed regulation is therefore intended to codify and reflect longstanding State practices.

However, the issue of which criteria may be employed during the fair hearing under section 1924(e)(2)(C) of the Act to determine whether, and if so by how much, to raise the CSRA has been the subject of some dispute. Permitting the community spouse to obtain a larger CSRA can give the community spouse additional income-generating resources to meet minimum monthly needs. Without an increase in the CSRA, the resources would be considered available to the institutionalized spouse and might have to be exhausted before the institutionalized spouse would be Medicaid eligible. On the other hand, permitting the hearing officer to raise the CSRA when the institutionalized spouse has income which could be used to enable the community spouse to meet minimum monthly maintenance needs can, under some circumstances, have unintended consequences for a State's Medicaid program. This policy can create an avenue for a couple to shelter almost limitless amounts of resources, provided these resources currently have minimal incoming-producing value.

Indeed, the legality of the income first rule has been challenged in several courts. The United States Courts of Appeals for the Sixth and Third Circuits have upheld the income-first rule in *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 802 (6th Cir. 1998) and *Cleary* v. *Waldman*, 167 F.3d 801, 811-812 (3d Cir. 1999), respectively. Nevertheless, the Wisconsin Court of Appeals invalidated a Wisconsin statute, which adopted the income-first rule, holding that the spousal impoverishment provisions of the Medicaid program unambiguously preclude the use of an "income-first" methodology. The United States Supreme Court has granted the State of Wisconsin's petition for review of this decision. See *Wisconsin Department of Health and Family Services* v. *Blumer*, No. 00-952.

Because this subject has been a source of some controversy, we believe it is appropriate to codify provisions regarding the community spouse resource allowance before adopting regulations governing all of the spousal impoverishment protection provisions of section 1924 of the Act.

II. Provisions of the Proposed Regulations

We propose to allow States the threshold choice of using either the income-first or resources-first method when determining whether the community spouse has sufficient income to meet minimum monthly maintenance needs. Under our proposal, States would not be able to use different rules on a case-by-case basis, but must apply the same rule to all spouses. Under section 1902(a)(17)(B) of the Act, the Secretary has authority to prescribe appropriate standards for determining whether income is "available." In the exercise of that authority, and in view of the cooperative federalism considerations embodied in the Medicaid program, we have concluded that States may be in the best position to determine the type of protection to afford community spouses and whether to require hearing officers to

take into account any income of the institutionalized spouse before raising the CSRA.

We believe that section 1924 of the Act does not specifically address whether the income-first or resources-first method is appropriate in making the determination on raising the CSRA. Section 1924(e)(2)(C) of the Act directs the State to determine whether the community spouse's income meets his or her minimum monthly maintenance needs. It also provides that, if the community spouse's income falls short of meeting those needs, the CSRA should be increased by an amount that will generate sufficient income *to bring the community spouse's income to the minimum monthly maintenance needs level*. However, this statutory guidance does not address whether the community spouse's income may include the institutionalized spouse's income that could be made available to the community spouse.

In fact, while section 1924(b)(1) specifically prohibits the *community spouse's* income from being considered available for the care of the *institutionalized spouse*, the statute does not preclude the Secretary nor the State from considering the *institutionalized spouse's income* from being available to the *community spouse* for purposes of determining whether the community spouse's needs will be met absent an increase in the CSRA. That supports an inference that it is permissible to consider all or some portion of the institutionalized spouse's income to be available to the community spouse. In addition, the legislative history suggests that Congress contemplated the possibility that, in determining whether to raise the CSRA, States might take into account not only the community spouse's own income but "other income attributable to the community spouse" consistent with the Secretary's rules. H.R. Cong. Rep. No. 661, 100th Cong., 2d Sess 265 (1988). Accordingly, we believe that the

statute permits an income-first rule and does not foreclose a resources-first rule.

Because an income-first rule would conserve scarce resources that States may allocate towards their Medicaid programs, avoid sheltering of high value low income-producing resources, and generally affords the community spouse a significant degree of protection from impoverishment, States may prefer to employ this approach. On the other hand, the resources first rule may in certain cases afford greater protection to the community spouse, especially after the death of the institutionalized spouse. While in our view, the statute certainly does not compel States to adopt the resources-first method, we believe it would be appropriate to afford the option of selecting a resources-first rule.

Section 1924(a) of the Act provides that in determining the eligibility for medical assistance of an institutionalized spouse, its provisions supersede any other provision of title XIX of the Act, "which is inconsistent with them," including section 1902(a)(17). Section 1902(a)(17)(B) of the Act provides that the State plan for medical assistance shall "provide for taking into account only the income and resources, as are, *as determined in accordance with standards prescribed by the Secretary*, available to the applicant or recipient * * * ." (Emphasis supplied.) In *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44, 101 S. Ct 2633, 2640 (1981), the Supreme Court held that the underscored language constituted a delegation of substantive rulemaking authority to the Secretary. Therefore, section 1902(a)(17)(B) of the Act gives the Secretary the authority to promulgate regulations on the matter of how much income and resources are available to applicants for, or recipients of, Medicaid for determining their eligibility and the amount of assistance they may receive. Furthermore, because our proposal to permit States to use either the income-first or resources-

first method does not conflict with section 1924 of the Act, we can issue a proposed rule on this matter.

As noted above, section 1924(e)(2)(C) of the Act authorizes either spouse to establish whether the community spouse resource allowance is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance. However, it does not specify whether in the process of establishing the inadequacy of the community spouse resource allowance, all of the institutionalized spouse's income which could be made available to the community spouse must be taken into account before seeking this adjustment. Because section 1924(e)(2) of the Act is silent on this issue, it does not conflict with the Secretary's authority under section 1902(a)(17)(B) of the Act to prescribe standards for determining the amount of the institutionalized spouse's income that would be available to the community spouse in determining whether it is appropriate to raise the community spouse resource allowance. This determination would have a corresponding impact on the institutionalized spouse's Medicaid eligibility.

Since our decision, under section 1902(a)(17)(B) of the Act, to permit States to use either the income-first or resources-first rule does not conflict with section 1924 of the Act, we are able to issue proposed regulations on this matter. In other words, because the statute does not require nor foreclose States from using either the income-first or resources-first method, we can use the rulemaking authority under section 1902(a)(17) of the Act to leave the choice of method to the States. (This approach is consistent with the Supreme Court's decision in *Batterton* v. *Francis*, 432 U.S. 416 (1977), which upheld a regulation that permitted States to define "unemployed" either to include families participating in a labor strike or to exclude them.) In addition, Section 1902(a)(17) contemplates that States will establish plans containing "reasonable standards" for determining eligibility

consistent with the Act and our regulations. The statute thus contemplates that different States may establish different standards for determining eligibility, so long as all are "reasonable" and all are consistent with the Act and our regulations. Accordingly, as an exercise of our discretion, we propose to leave to the States the option to either use the income-first or resources-first method for purposes of a fair hearing under section 1924(e)(2)(C) of the Act to determine whether, and if so by how much, to raise the CSRA.

As such, we propose to add a new § 431.260 to provide for fair hearings to raise the community spouse resource allowance. At § 431.260(a), we propose to define "institutionalized spouse" as an individual who is married to a person who is not in a medical institution or nursing facility and who is either likely to be in an institution or nursing facility or likely to be receiving services under a home and community-based waiver under section 1902(a)(10)(A)(ii)(VI) of the Act for at least 30 consecutive days. We propose to define the term "community spouse" as the spouse of an institutionalized individual. We would define the term "community spouse resource allowance" as the amount of a couple's combined resources (held jointly and separately), allocated to the community spouse and considered unavailable to the institutionalized spouse when determining his or her eligibility for Medicaid, as specified in section 1924(f)(2)(A) of the Act. Additionally, we would define "minimum monthly maintenance needs allowance" as the minimum amount of an institutionalized spouse's income that is protected for the community spouse.

At § 431.260(b), we would specify that either spouse may request a hearing to establish that the community spouse resource allowance (in relation to the amount of income generated by the allowance) is not adequate to raise the community spouse's income to the minimum monthly maintenance needs allowance. At § 431.260(c), we propose to

provide that the State must choose to use either the income-first method or the resources-first method when determining whether to increase the community spouse resource allowance to ensure the community spouse has sufficient income to meet minimum monthly maintenance needs. We would provide that under the income-first method, the State require that all income of the institutionalized spouse that could be made available to the community spouse after subtracting the allowances specified in section 1924(d) be considered to be available before additional resources are allocated to raise the community spouse's income to meet the minimum monthly maintenance needs allowance. We propose that under the resources-first method, the State allocate additional resources to raise the community spouse's income to meet the minimum monthly maintenance needs allowance without regard to income of the institutionalized spouse that potentially could be made available to the community spouse, but has not been made available.

III. Collection of Information Requirements

Under the Paper Work Reduction Act (PRA) of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment if Office of Management and Budget review and approval is needed because a proposed regulation imposes a collection of information requirement. However, this proposed regulation does not impose any new collection of information requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995. The proposed regulation only codifies the existing State practice of choosing whether to use income-first or resources-first, a matter we have left entirely to each State. We do not currently require States to formally notify us about which approach they take, and the proposed regulation similarly does not require this notifi-

cation. Thus, the proposed rule imposes no new or different processes or information requirements on States.

IV. Response to Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, if we proceed with a subsequent document, we will respond to the major comments in the preamble to that document.

V. Regulatory Impact Statement

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). This proposed rule would give States an option to use either an income-first method or resources-first method when determining whether the community spouse has sufficient income to meet minimum monthly maintenance needs. This proposed rule is not a major rule because it would not impose new costs on State governments or other entities. The proposed rule only codifies existing State practices, and in no way requires

States to take any action that would increase or even change their current program costs.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $25 million or less annually. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. This proposed rule would have no impact on small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in an expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. The proposed rule would have no impact on the private sector. The rule would impose no requirements on State, local or tribal governments. The rule only codifies existing State practices, and thus requires no new or additional expenditures of funds by any entity, government or private.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that would impose substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism

implications. Because this proposed rule only codifies existing State practices, it would impose no requirements on governments, nor does it preempt State law or otherwise have Federalism implications.

B. *Anticipated Effects*

Because the proposed rule only codifies existing State practices, it will have no new effect on State governments, providers, or the Medicaid and Medicare programs. Therefore, we are not providing an impact analyses.

C. *Alternative Considered*

We considered imposing a requirement on all States to use the income-first methodology, or a requirement that all States use the resources-first methodology when determining whether to raise the community spouse resource allowance. However, as explained in the preamble to this proposed rule, we do not believe the statute clearly requires the use of either of those alternatives to the exclusion of the other. Therefore, we believe, in the spirit of Federalism, that we should leave to States the decision as to which alternative to use.

D. *Conclusion*

For these reasons, we are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and we certify, that this rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Sections Affected in 42 C.F.R. Part 431

Grant programs-health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services propose to amend 42 CFR part 431 as follows:

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

1. The authority citation for part 431 continues to read as follows:

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302).

§ 431.200 [Amended]

2. Section 431.200 is amended by adding the sentence, "This subpart also implements section 1924(e)(2)(C) of the Act, which provides for a fair hearing regarding revision of the community spouse resource allowance[,]" at the end of the section.

3. A new undesignated, centered heading, and new § 431.260 are added to read as follows:

Community Spouse Resource Allowance

§ 431.260 Fair hearings to raise the community spouse resource allowance.

(a) *Definitions.* For purposes of this section, the following definitions apply:

Community spouse means the spouse of an institutionalized individual.

Community spouse resource allowance means the amount of a couple's combined jointly and separately-owned re-

sources, as specified in section 1924(f)(2)(A) of the Act, allocated to the community spouse and considered unavailable to the institutionalized spouse when determining his or her eligibility for Medicaid.

Institutionalized spouse means an individual who meets all of the following criteria:

(1) The individual is in a medical institution or nursing facility (or at the State's option, is eligible for home and community-based waiver services under section 1902(a)(10)(A)(ii)(VI) of the Act).

(2) The individual is likely to remain in a medical institution or nursing facility (or satisfy the State option) for at least 30 consecutive days.

(3) The individual is married to a person who is not in a medical institution or nursing facility.

Minimum monthly maintenance needs allowance means the minimum amount of income, as determined under section 1924(d)(3) of the Act, that is protected for the community spouse when determining the amount of the institutionalized spouse's income that is to be applied to the cost of care.

(b) *Request for a hearing.* Either spouse (or authorized representative) may request a hearing to establish that the community spouse resource allowance (in relation to the amount of income generated by the allowance) is not adequate to raise the community spouse's income to the minimum monthly maintenance needs allowance.

(c) *Methodology for determining an increase in the community spouse resource allowance.* For purposes of conducting a hearing to determine whether it is appropriate to raise the community spouse resource allowance (and if so by how much) a State must elect either of the following

methods, which must apply to all hearings of this type under the State's Medicaid program:

(1) *Income-first method.* The State considers that all income of the institutionalized spouse that could be made available to the community spouse, after deducting the allowances specified in section 1924(d) of the Act, has been made available before additional resources are allocated to raise the community spouse's income to the minimum monthly maintenance needs allowance.

(2) *Resources-first method.* The State allocates to the community spouse additional income-producing resources to raise the community spouse's income to the minimum monthly maintenance needs allowance without first considering all income of the institutionalized spouse that could be made available to the community spouse as if it has been made available.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: August 28, 2001

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: August 30, 2001

Tommy G. Thompson,

Secretary.

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