

**42 USC 1396r-5: Treatment of income and resources for certain institutionalized spouses**

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From Title 42-THE PUBLIC HEALTH AND WELFARE

CHAPTER 7-SOCIAL SECURITY

SUBCHAPTER XIX-GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

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**§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)), 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 1396u-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), 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 ½ 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).

**(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) (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), 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)).