

1987

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Recommended Citation

Paul Drizner, *Medicaid's Unhealthy Side Effect: The Financial Burdens On At-Home Spouses of Institutionalized Recipients*, 18 Loy. U. Chi. L.J. 1031 (1987).

Available at: <http://lawcommons.luc.edu/lucj/vol18/iss3/9>

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Comments

Medicaid's Unhealthy Side Effect: The Financial Burdens On At-Home Spouses Of Institutionalized Recipients

I. INTRODUCTION

The United States is an aging nation. Presently, over eleven percent of this country's population is elderly.¹ This percentage is expected to double by the year 2030 as the "baby-boomers," people born between 1946 and 1964, grow older.² Accompanying the aging of the population is an increased demand for long-term nursing home care for the elderly.³ The cost of nursing home care, however, is continually increasing⁴ and many elderly patients are unable to pay for needed care. Consequently, those people have entered the Medicaid system.

Medicaid, a health plan for the poor, is jointly provided by the federal and state governments.⁵ Because it is a program for the needy, individuals qualify for Medicaid benefits only if they live substantially below the poverty level or reduce their assets below a certain amount.⁶ Essentially, individuals are forced to become destitute before they are eligible for Medicaid.⁷

Spouses of institutionalized Medicaid recipients face incredible financial hardship as a result of the Medicaid program. Although Medicaid takes care of the recipient spouse, it may not help the

1. Rovner, *Long-Term Care: The True "Catastrophe?"*, 44 CONG. Q. 1227, 1228 (1986). "Elderly" refers to individuals who are older than 65 years of age. *Id.*

2. *Id.* The number of people over the age of 85 is expected to increase fivefold by the year 2040. *Id.*

3. *Id.* at 1229. In 1984, there were 1.2 million elderly nursing home residents. It is expected that this number will increase 58% by the year 2003. *Id.*

4. *Id.* In 1984, the total nursing home cost for the nation was \$32 billion, an increase from \$4.7 billion in 1970. *Id.*

5. *Herweg v. Ray*, 619 F.2d 1265, 1277 (8th Cir. 1980) (McMillian, J., dissenting). In 1984, Medicaid paid \$13.9 billion, or 43.4% of the nation's total nursing home costs of \$32 billion. Rovner, *supra* note 1, at 1229.

6. Rovner, *supra* note 1, at 1228.

7. *Id.* The amount of Medicaid assistance that will be contributed depends upon the applicant's state of residence and the type of care he needs. There is some discrepancy between states in the amount paid and the treatment covered.

non-institutionalized spouse who also had to become poor for her⁸ spouse to qualify for Medicaid.⁹ After this, the non-institutionalized, or "at-home," spouse is forced to live at or below the poverty level.¹⁰ To avoid this burden, some at-home spouses have sued their institutionalized spouse for support,¹¹ while others have resorted to divorce.¹²

This comment will trace the development of the eligibility rules in the Medicaid statute. Next, it will describe the practices of the agencies that administer the Medicaid program and illustrate how these practices have resulted in severe financial burdens on at-home spouses. The comment then will analyze the cases that have challenged those practices and evaluate the legislation designed to alleviate the burdens. The comment concludes by recommending changes that will reduce the identified problems.

II. BACKGROUND

A. *The Federal Medicaid Statute*

In 1965, Congress established the Medicaid¹³ program to provide the needy with greater access to medical services.¹⁴ Under the Medicaid program, the federal government provides financial assistance to those states that reimburse health care providers for the cost of certain medical treatment supplied to the needy.¹⁵

Under the original plan, two classes of people received Medicaid assistance. The first class was known as the "categorically needy".¹⁶ Congress determined that the categorically needy de-

8. The use of the word "her" does not imply that the wife is always the at-home spouse. It is just as likely that the husband is the non-institutionalized spouse. The use of the words "his," "her," "he," or "she" do not signify gender but instead serve as generic pronouns.

9. Whether Medicaid helps the at-home spouse varies from state to state. In some states, the spouse herself may qualify for Medicaid or other assistance.

10. *Gray Panthers v. Administrator, Health Care Financing Admin.*, 629 F.2d 180, 186 (D.C. Cir. 1980); *Manfredi v. Maher*, 435 F. Supp. 1106, 1110 n.8 (D. Conn. 1977).

11. *Sullivan, Nursing Costs Force Elderly to Sue Spouses*, N.Y. Times, Mar. 6, 1986, at A1.

12. *Id.* See *Gray Panthers*, 629 F.2d at 186 n. 14; *Burns v. Vowell*, 424 F. Supp. 1135, 1138 (S.D. Tex. 1976).

13. Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396p (1982 & Supp. III 1985).

14. *Norman v. St. Clair*, 610 F.2d 1228, 1230 (5th Cir. 1980).

15. *Harris v. McRae*, 448 U.S. 297, 301 (1980). The type of treatment that Medicaid covers varies from state to state.

16. *Schweiker, Secretary of Health and Human Servs. v. Gray Panthers*, 453 U.S. 34, 37 (1981). The categorically needy included individuals covered by the following programs: Old Age Assistance, 42 U.S.C. §§ 301-306 (1970); Aid to Families with Depen-

served public assistance because of family circumstances, age, or disability.¹⁷ All states participating in Medicaid were required to provide assistance to this group.¹⁸

The second group of recipients under the plan were known as "medically needy." The medically needy included individuals who did not qualify for categorical assistance, but nevertheless lacked sufficient funds to meet their medical expenses.¹⁹ States had the option of providing funds to the medically needy.²⁰ A state electing to supply benefits to both groups, however, was required to use the same eligibility standards for both.²¹

States presently participating in the Medicaid program must submit a plan for medical assistance to the Secretary of Health and Human Services for approval.²² The state's plan must meet certain federal guidelines;²³ describe the nature and scope of the state program, including eligibility requirements; and provide assurances that the state will continue to conform with the federal guidelines.²⁴ State participation in the Medicaid program is, for the most part, optional.²⁵ Once the choice to participate is made, however, the state must follow the federal regulations.²⁶ Under the program, a state whose plan is approved becomes entitled to federal reimbursement for a percentage of the payments made by the state for medical assistance to eligible individuals.²⁷

B. *The State Options*

Presently, states participate in the Medicaid program under one of two categories: the Supplemental Security Income for the Aged, Blind and Disabled program ("SSI")²⁸ or Section 209(b) of the

dent Children, 42 U.S.C. §§ 601-610 (1970); Aid to the Blind, 42 U.S.C. §§ 1201-1206 (1970); Aid to the Permanently and Totally Disabled, 42 U.S.C. §§ 1351-1355 (1970).

17. *See supra* note 16 and accompanying text.

18. *Schweiker*, 453 U.S. at 37 (1981).

19. *Id.*

20. *Id.*

21. *Winter v. Miller*, 676 F.2d 276, 277 (7th Cir. 1982).

22. 42 U.S.C. § 1396 (1982 & Supp. III 1985).

23. 42 U.S.C. § 1396a (1982 & Supp. III 1985).

24. 42 U.S.C. § 1396a(b) (1982).

25. *Norman*, 610 F.2d at 1231.

26. *Id.* Although the state must conform to federal guidelines, those guidelines allow the state substantial autonomy in the administration of its plan. *See, e.g.*, 42 U.S.C. §§ 1396a(a)(4)(A), 1396a(a)(5), 1396a(a)(9)(B) (1982).

27. 42 U.S.C. § 1396a(a)(2) (1982).

28. *Id.* at §§ 1381-1385.

1972 amendments to the Medicaid Act ("Section 209(b)").²⁹ Each state chooses the category best suited for the particular needs of that state.

1. Supplemental Security Income Program

In 1972, Congress, concerned with national uniformity, created the SSI program.³⁰ The SSI program federalized the state-administered programs for the aged,³¹ blind,³² and disabled³³ under which the "categorically needy" previously received assistance.³⁴ Under SSI, the federal government assumed sole responsibility for the program funding and eligibility.³⁵

Because the standards promulgated by SSI were less restrictive than many of the previous state-run categorical needs programs, more individuals within those states became eligible for assistance.³⁶ The increased number of eligible individuals under SSI's less restrictive standards, in turn, threatened to increase those states' Medicaid obligations.³⁷ Congress feared, however, that rather than expand their Medicaid coverage, some states might decide to withdraw from the cooperative Medicaid program.³⁸

2. Section 209(b) Option

In an effort to encourage continued participation of states whose previous standards were more stringent than the new SSI standards,³⁹ Congress enacted the "Section 209(b) option."⁴⁰ States

29. Section 209(b) of the 1972 amendments, as amended, is set forth in 42 U.S.C. § 1396a(f) (1982). See *infra* note 40 and accompanying text.

30. 42 U.S.C. §§ 1381-1385 (1972) (current version at 42 U.S.C. §§ 1381-1385 (1982 & Supp. III 1985)). The legislative history suggests that one of the main purposes of the SSI program was to improve the effectiveness of adult assistance through the use of nationally uniform eligibility requirements. *Case of Hamner*, 427 So. 2d 1188, 1191 (La. 1983) (quoting H. R. REP. NO. 231, 92d Cong., 2d Sess. 4, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4989, 4992).

31. 42 U.S.C. §§ 301-306 (1970).

32. *Id.* at §§ 1201-1206.

33. *Id.* at §§ 1351-1355.

34. See *supra* note 16 and accompanying text. The fourth program under which the categorically needy previously received assistance, Aid to Families with Dependent Children, 42 U.S.C. §§ 601-610 (1970), is not covered by SSI and continues to be state-administered. *Schweiker*, 453 U.S. at 38 n.3.

35. *Id.* at 38.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* (quoting S. REP. NO. 553, 93d Cong. (1973)).

40. 42 U.S.C. § 1396a(f) (1982). The section provides that:

[n]otwithstanding any other provision of this subchapter . . . no State not eligi-

choosing the Section 209(b) option⁴¹ are allowed to retain their standards of eligibility for assistance used on January 1, 1972, but are prohibited from imposing any eligibility limits below those in force on that date.⁴² Section 209(b) states may set income limits higher than those used on January 1, 1972, but may not set them higher than the federal limit under SSI. States opting for the Section 209(b) program must assist both the categorically needy and the medically needy.⁴³ In addition, Section 209(b) option states are required to adopt a "spend-down" provision.⁴⁴ This provision ensures that an individual who is otherwise eligible for SSI, but whose income exceeds the state standard, becomes eligible for Medicaid when the amount of income in excess of the state standard is spent on expenses for medical care.⁴⁵

III. THE BURDENS

The Congressional enactment of the Section 209(b) option caused a special problem for non-institutionalized spouses of institutionalized Medicaid recipients. This problem, known as "deeming," is inherent in the Section 209(b) program.⁴⁶ "Reverse

ble to participate in the State plan program subchapter XVI of this chapter shall be required to provide medical assistance to any aged, blind or disabled individual . . . for any month unless such State would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this subchapter and in effect January 1, 1972, been in effect in such month, except that for this purpose any such individual shall be deemed eligible for medical assistance under such State plan if . . . the income of any such individual as determined in accordance with section 1396b(f) of this title (after deducting any supplemental security income payment and State supplemental payment made with respect to such individual, and incurred expenses for medical care as recognized under State law) is not in excess of the standard for medical assistance established under the State plan as in effect on January 1, 1972.

Id.

41. Fourteen states are presently Section 209(b) option states: Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Utah and Virginia. See MEDICARE & MEDICAID GUIDE (CCH) ¶ 15,550-660 (1985-86). Guam, Puerto Rico and the Virgin Islands are also covered by the section 209(b) option because the SSI program never took effect there. *Schweiker*, 453 U.S. at 39 n.6.

42. *Gray Panthers v. Secretary, Dep't of Health, Educ. and Welfare*, 461 F. Supp. 319, 321 (D.D.C. 1978).

43. *Winter v. Miller*, 676 F.2d 276, 278 (7th Cir. 1982).

44. *Schweiker*, 453 U.S. at 39 n.5.

45. *Id.* See also 42 U.S.C. § 1396a(f) (1982) which provides that "an individual who is eligible for medical assistance by reason of the requirements of this section concerning the deduction of incurred medical expenses from income shall be considered an individual eligible for medical assistance."

46. See *infra* notes 49-81 and accompanying text.

deeming,"⁴⁷ and questions regarding ownership of assets⁴⁸ are two other burdens that face at-home spouses. While deeming basically poses a problem only in Section 209(b) states, the two other problems can occur in any state.

A. Deeming

1. Statutory Provision

Section 1396(a)(17) of the Social Security Act provides for deeming.⁴⁹ Under this section, a state medical assistance plan can consider a non-institutionalized spouse's resources as being available for paying the medical expenses of an institutionalized spouse.⁵⁰ Thus, the funds of the at-home spouse are "deemed" available for the Medicaid recipient spouse regardless of whether the funds are actually contributed.⁵¹

State medical assistance plans must include reasonable eligibility standards that consider only income and resources determined by the Secretary of Health and Human Services to be available to the applicant.⁵² The plan must not take into account any individual's financial responsibility for the applicant, unless that individual is the applicant's spouse.⁵³

In deeming, the state calculates an amount that will cover the basic living expenses of the at-home spouse.⁵⁴ Because the spouse's remaining income is "deemed" available to the Medicaid applicant,⁵⁵ Medicaid will pay only the amount in excess of what the spouse is deemed able to contribute.

47. See *infra* notes 82-114 and accompanying text.

48. See *infra* notes 115-50 and accompanying text.

49. 42 U.S.C. § 1396a(a)(17)(1982) provides that:

(a) A State plan for medical assistance must - (17) include reasonable standards . . . 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 . . . 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

Id.

50. *Schweiker*, 453 U.S. at 37-38.

51. *Id.* at 48.

52. *Id.* at § 1396a(a)(17)(B).

53. *Id.* at § 1396a(a)(17)(C)-(D).

54. *Schweiker*, 453 U.S. at 38.

55. *Id.*

While deeming reduces the state's costs relating to medical care for a needy individual, the practice often forces the at-home spouse to subsist at or below the poverty level.⁵⁶ The non-institutionalized spouse thus faces a dilemma. He can pay that portion of his income the state determines he should contribute to the recipient, and live on a severely fixed income,⁵⁷ or he can refuse to contribute the money and possibly deny his spouse necessary medical care.⁵⁸

Presently, under the deeming regulations for SSI states, when married couples live in the same household, the state must consider the income and resources of each spouse available to the other, regardless of whether the income or resources actually are contributed.⁵⁹ Certain time limits, however, are placed on this consideration when one of the spouses is institutionalized. In those instances, the state must consider each spouse's income as available to the other through the month in which they separate.⁶⁰ Additionally, their resources are considered available to each other during the month in which they part and for the following six months.⁶¹ After the respective time periods have run, the state cannot consider any of the at-home spouse's income or resources "available" unless they are actually contributed to the recipient.⁶²

The standards for Section 209(b) option states are substantially different. Section 209(b) states may either consider income and resources of spouses as available to each other in accordance with the

56. See *Herwig v. Ray*, 619 F.2d 1265, 1289 (8th Cir. 1980) (McMillian, J., dissenting). ("The maintenance allowances [left for the non-institutionalized spouse to live on] are generally based on the income standards used to determine Medicaid eligibility and correspond to welfare subsistence levels.").

The amount left to meet the basic living expenses of the non-institutionalized spouse is not always adequate. See *Burns v. Vowell*, 424 F. Supp. 1135, 1138 (S.D. Tex. 1976). In that case, the at-home spouse had a monthly income of \$561.80 and under Texas law, he was required to pay all but \$167.80 to the nursing home where his wife was a resident. However, the husband testified that this was inadequate to meet his living expenses of \$409.80 per month. *Id.* See also *Schweiker*, 453 U.S. at 54-56 (Stevens, J., dissenting) (stating that the amount of income not deemed, and therefore protected for the non-institutionalized spouse's maintenance, may be set at 1972 levels and, therefore, may be inadequate).

57. Many expenses incurred by both spouses residing at home are not reduced by the absence of one spouse from the home. Examples of such expenses include mortgage or rent payments, property taxes and homeowners' insurance.

58. See *Franssen v. Juras*, 406 F. Supp. 1375, 1377 (D. Or. 1975) ("[The husband] must choose between the certainty that he cannot provide himself with the necessities of life and the probability that his wife will be evicted from the nursing home because her bills are not being paid").

59. 42 C.F.R. § 435.723(b) (1985).

60. *Id.* at § 435.723(c)(1)(i).

61. *Id.* at § 435.723(c)(1)(ii).

62. *Id.* at § 435.723(c).

SSI standards⁶³ or may impose more restrictive standards upon the spouses.⁶⁴ Thus, Section 209(b) states may consider separated spouses as a single economic unit for an indefinite time period. The practical effect of this regulation is to give Section 209(b) states unlimited power to deem. Since they are basically allowed to formulate their own standards, Section 209(b) states potentially can deem income for the entire time the recipient is institutionalized.

2. The Validity of the Deeming Statute

In *Schweiker v. Gray Panthers*,⁶⁵ the United States Supreme Court overturned decisions of the trial and appellate courts and declared deeming valid.⁶⁶ The Gray Panthers, an organization representing the nation's elderly, brought an action challenging the practice of deeming.⁶⁷ They based their argument on Section 1396a(a)(17) of the Social Security Act⁶⁸ and the apparent problem that statute presents.⁶⁹ Though one portion reads that only such income and resources that are "available" to the applicant can be taken into account in deeming,⁷⁰ another portion can be interpreted to mean that a spouse's income and resources always may be considered.⁷¹ The Gray Panthers contended that Section 209(b) states' deeming practices were invalid because they were inconsistent with the Social Security Act, which required the Secretary to make a reasonable evaluation of which resources and income are "available" to the applicant.⁷²

63. *Id.* at § 435.723.

64. *Id.* at § 435.734(a). The state may not use standards that are more restrictive than the standards in effect in the state on January 1, 1972. *Id.*

65. 453 U.S. 34 (1981).

66. *Id.* at 49.

67. *Gray Panthers v. Secretary, Dep't of Health, Educ. and Welfare*, 461 F. Supp. 319, 320 (D. D.C. 1978).

68. *See supra* note 49 and accompanying text.

69. *Schweiker*, 453 U.S. at 40-41.

70. 42 U.S.C. § 1396a(a)(17)(B) (1976).

71. *Id.* at § 1396a(a)(17)(D). *See also supra* notes 49-53 and accompanying text.

72. *Schweiker*, 461 F. Supp. at 320. The plaintiffs' main contention related to 42 U.S.C. § 1396a(a)(17) (1976). *See supra* note 49 and accompanying text. The court, holding for the plaintiffs, indicated that although the phrase "as determined in accordance with the standards prescribed by the Secretary" in 42 U.S.C. § 1396a(a)(17)(B) (1976) allows the Secretary to decide what is "available," it does not allow him to decide availability in an arbitrary manner. *Schweiker*, 461 F. Supp. at 322. The appellate court affirmed on other grounds. *Gray Panthers v. Administrator, Health Care Fin. Admin.*, 629 F.2d 180 (D.C. Cir. 1980). First, the court determined that the Secretary failed to consider that separated spouses should no longer be treated as a single economic unit. *Id.* at 185. Second, the court reasoned that there is a great potential for needless disruption

The Supreme Court rejected the Gray Panthers' contention and ruled that the Secretary's regulations were consistent with the statute.⁷³ The Court noted that the Secretary was given an "explicit delegation of substantive authority" to define the term "available" and his definition was entitled to the same deference as Congressional legislation.⁷⁴ The Court thus concluded that the Secretary did not exceed his authority when deeming income between spouses in accordance with Title 42, Section 1396a(a)(17)(D) of the United States Code, because the statute allows the Secretary to consider the financial responsibility of the applicant's spouse.⁷⁵ The Court reasoned that if deeming was impermissible, subsection (D) would be superfluous because under subsection (D), a contribution by the applicant's spouse actually received by the applicant is automatically taken into account.⁷⁶ The Court determined that the word "available" refers not only to those resources that are actually contributed, but also refers to those resources left to a couple after the at-home spouse deducts the amount the state determines necessary to pay his or her basic living expenses.⁷⁷

The Gray Panthers stressed that subsection (D) prohibits deeming and simply permits states to enforce their "relative responsibility laws"⁷⁸ when an individual does not contribute to the support of his or her institutionalized spouse.⁷⁹ The *Schweiker* Court, how-

of the spouse's lives caused by the requirement that support to the applicant be provided by the applicant's spouse. *Id.* at 186.

Though the Gray Panthers case arguably is the most prominent case to hold deeming invalid, it is neither the first, nor the last to do so. See *Brown v. Stanton*, 617 F.2d 1224 (7th Cir. 1980); *Hanke v. Nyhus*, 420 F. Supp. 742 (D. Minn. 1979); *Burns v. Vowell*, 424 F. Supp. 1135 (S.D. Tex. 1976); *Franssen v. Juras*, 406 F. Supp. 1375 (D. Or. 1975).

73. *Schweiker, Secretary of Health and Human Servs. v. Gray Panthers*, 453 U.S. 34, 49 (1981).

74. *Id.* at 44.

75. *Id.*

76. *Id.*

77. *Id.* at 48.

78. Relative responsibility laws require spouses to provide support for each other. See, e.g., CAL. PENAL CODE § 270a (West 1986); ILL. REV. STAT. ch. 23, para. 10-2 (1983); MAINE REV. STAT. ANN. tit. 22, § 3174 (West 1985); MASS. ANN. LAWS ch. 209 § 32 (Law Co-op. 1986); N.Y. FAM. CT. ACT § 412 (McKinney 1986); OHIO REV. CODE ANN. § 31-3103.03 (Baldwin 1985).

79. *Schweiker*, 453 U.S. at 46. This was not the first time the issue of whether 42 U.S.C. § 1396(a)(17)(D) does nothing more than permit states to enforce their relative responsibility laws when an at-home spouse fails to contribute to the support of the institutionalized spouse had been raised. The court in *Brown v. Stanton*, 617 F.2d 1224 (7th Cir. 1980), holding that deeming was impermissible, affirmatively answered this issue. The court recognized that to hold otherwise would be unfair to the applicant since whether he received assistance would depend upon the action of his spouse. *Id.* at 1231. The court held that the state welfare agency was required to increase the benefits paid to

ever, concluded that the Gray Panthers' interpretation of subsection (D) would allow the spouse to exercise discretion in making the excess payment and thus provide no incentive for voluntary payment.⁸⁰ The Court also reasoned that the Gray Panthers' interpretation of the statute would force the state to engage in a multiplicity of individual lawsuits to enforce the spousal support laws and recover state money previously paid out.⁸¹

B. Reverse Deeming

"Reverse deeming" occurs when the institutionalized spouse is the person receiving the income⁸² that must be used to support the at-home spouse. Cases addressing reverse deeming usually have focused on the issue of whether the amount "deemed" from the institutionalized spouse to the at-home spouse was adequate to meet the at-home spouse's expenses. The amount deemed is referred to as the maintenance needs allowance ("MNA").

In *Mattingly v. Heckler*,⁸³ a husband and wife challenged Indiana's reverse deeming process.⁸⁴ The husband was an institutionalized Medicaid recipient.⁸⁵ At the time he was receiving Medicaid, he and his wife had a joint monthly income of \$743.97.⁸⁶ During this time, his wife was allowed to retain an MNA of \$238.00 and

an institutionalized recipient to cover the amount left unpaid by an unwilling spouse, and then proceed under the spousal support statute to recover from the unwilling spouse. *Id.*

80. *Schweiker*, 453 U.S. at 46.

81. *Id.* The dissent concluded that the District of Columbia Circuit Court was correct in holding that, while deeming was sometimes permissible, virtually unlimited deeming was not. *Id.* at 52 (Stevens, J., dissenting). Justice Stevens reasoned that the statute imposed significant restraints on the amount of income that may be deemed. *Id.* He pointed out that the legislative history indicates that an assumption that spouses pool income and resources together to support each other is not valid when one spouse is institutionalized. *Id.* at 52-53. Because this basic assumption is invalid, the income of the spouse is not "actually available" for payment of medical expenses. *Id.* at 52 n.4. Justice Stevens likened the situation in *Schweiker* to the example of income assumed available in the legislative history. There it was stated that states cannot assume the availability of income that in fact, may not be available. Examples of this, according to the legislature, are support orders from absent fathers which have not been paid and contributions from relatives not actually received. *Id.* Justice Stevens also agreed with the appellate court that the Secretary must consider the changes imposed by institutionalization to what was once, but no longer, a single economic unit and the disruption of the family that deeming causes. *Id.* at 53. He concluded that deeming should be limited in both duration and amount. *Id.* at 56.

82. Examples of common types of income that an institutionalized recipient earns are pension benefits, interest income and stock dividends.

83. 784 F.2d 258 (7th Cir. 1986).

84. *Id.* at 260.

85. *Id.*

86. *Id.*

she was required to pay the remainder to the nursing home.⁸⁷ She contended that she was unable to meet her living expenses on the amount allotted to her.⁸⁸

The Mattinglys argued that the Health and Human Services' ("HHS") regulation that limits the amount of the MNA⁸⁹ and the Indiana regulation limiting that state's MNA⁹⁰ violated Title 42, Section 1396a(a)(17) of the United States Code.⁹¹ That section requires a reasonable evaluation of the "availability" of resources to the applicant.⁹² The plaintiffs contended that Indiana's use of a predetermined, fixed MNA was "unreasonable" and in violation of Section 1396a(a)(17).⁹³ They further argued that the spouse receiving the allowance was forced to live at or below the poverty level. Finally, they argued, it was "unreasonable" for an at-home spouse to retain only \$238.00 from her institutionalized spouse's income as an MNA, while an at-home spouse earning the income retains \$577.00⁹⁴ and is given an opportunity to demonstrate that the \$577.00 is insufficient to meet her needs.⁹⁵

The United States Court of Appeals for the Seventh Circuit concluded that Congress did not intend to subsidize non-Medicaid recipients at a higher level than Medicaid beneficiaries.⁹⁶ The court noted that because Indiana's allowance complied with federal regu-

87. *Id.* Indiana provides for the needs of non-institutionalized spouses of institutionalized Medicaid recipients with a flat maintenance allowance. *Id.*

88. A Mr. and Mrs. Jones, almost identically situated to the Mattinglys, joined in the suit. *Id.* at 261.

89. 42 C.F.R. § 435.733 (c) (1985). This regulation provides in relevant part:

(c) The agency must deduct . . . from the [Medicaid recipient's] total income . . . (2) . . . an additional amount for the maintenance needs of the spouse. This amount must be based on a reasonable assessment of need but must not exceed the higher of - (i) the more restrictive income standard established under § 435.121; or (ii) the medically needy standard for an individual.

Id.

90. IND. CODE § 12-1-7-18.6 (1985). The amount of the allowance when the original suit was filed in 1981 was \$238.00. When the case went to court in 1985, the amount had increased to \$325.00. *Mattingly*, 784 F.2d at 260 n.1.

91. *Mattingly*, 784 F.2d at 260.

92. *See supra* note 49 and accompanying text.

93. *Mattingly*, 784 F.2d at 263. The regulation provides in pertinent part: "A State plan for medical assistance must — include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan." 42 U.S.C. § 1396a(a)(17).

94. *Mattingly*, 784 F.2d at 263. The amount that an income earning, at-home spouse may retain when the original suit was filed in 1981 was \$577.00. By the time the case went to court in 1985, the amount had increased to \$623.12. *Id.*

95. IND. CODE § 12-1-7-18.6 (1985). *See Mattingly*, 784 F.2d at 263 n.6.

96. *Mattingly*, 784 F.2d at 266.

lations⁹⁷ and did not exceed the SSI eligibility level,⁹⁸ providing a higher allowance, in essence, would result in more money to a non-Medicaid recipient than to a recipient.⁹⁹ Additionally, the court stated that increasing the maintenance allowance would decrease Medicaid funds available for the medical care of the needy.¹⁰⁰

The court also addressed the disparity between allowances granted at-home spouses earning income and allowances granted non-income earning at-home spouses.¹⁰¹ The court reasoned that this inequality was justified because a Medicaid recipient who earns income is obligated to pay for his own medical care and contribute a substantial portion of his income to the nursing home.¹⁰² On the other hand, the court reasoned that an at-home spouse who earns income uses it to pay for the care of another.¹⁰³ Therefore, the court concluded that the at-home spouse's obligation to pay is not as great.¹⁰⁴ The court noted that the state has limited funds and, therefore, is justified in preventing Medicaid recipients from shifting the entire cost of medical care to the government.¹⁰⁵

Similarly, in *Turner v. Heckler*,¹⁰⁶ decided the same year as *Mattingly*, a husband and wife challenged the validity of an MNA established under Ohio's reverse deeming practices.¹⁰⁷ In 1982, an amendment to the Ohio Medicaid program was approved by the Secretary of Health and Human Services.¹⁰⁸ The amendment provided that an MNA of \$222.00 per month would be set aside for the at-home spouse when she depended upon the income of the institutionalized recipient for support.¹⁰⁹ If the at-home spouse earned any income from outside sources, however, the MNA would be reduced, dollar for dollar, by the amount of the outside income.¹¹⁰ The plaintiffs in *Turner* argued that the amendment

97. See *supra* note 90 and accompanying text.

98. *Mattingly*, 784 F.2d at 267.

99. *Id.* at 266.

100. *Id.* at 266-67. The court reasoned that, if the at-home spouse retained a larger portion of the couple's income, less would be available to the Medicaid recipient and the government would have to pay the balance. *Id.*

101. *Id.* at 268.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. 783 F.2d 657 (6th Cir. 1986).

107. *Id.* at 658 n.2.

108. *Id.* at 658.

109. OHIO ADMIN. CODE § 5101:1-39-22 (1982). The non-institutionalized spouse in this situation is often referred to as the "community spouse." *Turner*, 783 F.2d at 659.

110. *Turner*, 783 F.2d at 659.

failed to evaluate reasonably the level of the Medicaid recipient's support obligation to his spouse.¹¹¹

The district court, however, never reached the issue of whether the amendments violated the Medicaid statute.¹¹² Instead, the court approved an interim settlement agreement between the plaintiffs and the Ohio Department of Public Welfare. The agreement provided that the MNA would be increased from \$222.00 to \$258.00, and defined spouses eligible for an MNA as those who receive less than \$324.00 per month in income from other sources.¹¹³ Therefore, only income received by the at-home spouse in excess of \$324.00 per month would reduce the MNA.¹¹⁴

C. Ownership of Income

The Medicaid statute does not set forth criteria for determining ownership of income.¹¹⁵ Accordingly, the Health Care Financing Administration ("HCFA") has developed the "name-on-the-instrument" rule to help determine ownership. Under this rule, a couple's income belongs to the spouse whose name appears on the instrument of payment. This rule applies to any type of benefits or income that would be in one spouse's name.¹¹⁶

The name-on-the-instrument rule is important because it is used to calculate the amount of resources available to a Medicaid applicant for eligibility purposes. The rule does not affect spouses who live together, because in those situations, their income and assets are always counted together.¹¹⁷ When one of the spouses is institutionalized, however, the state must determine which resources are available to help pay the cost of his care.

The name-on-the-instrument rule causes special problems in community property states.¹¹⁸ Under community property law, each spouse has an undivided one-half interest in all real and per-

111. *Id.* The reasonableness standard is set out in 42 U.S.C. § 1396a(a)(17) (1982).

112. *Turner*, 783 F.2d 657. The district court granted an injunction of the amendment on finding that the Secretary failed to follow procedural prerequisites when approving the amendments. *Id.* at 660.

113. *Id.* at 661.

114. The Secretary of HHS, however, has objected to this settlement and the State of Ohio has sought reconsideration of the decision. To date, no decision on the petition for reconsideration has been reached. *Id.* at 661 n.15. The appellate court reversed the injunction granted and remanded for reasons that are irrelevant to this discussion.

115. *Purser v. Rahm*, 104 Wash. 2d 159, 169, 702 P.2d 1196, 1201 (1985), *cert. dismissed*, 55 U.S.L.W. 3039 (U.S. July 22, 1986) (No. 85-663).

116. *Id.* at 164, 702 P.2d at 1199. The name-on-the-instrument rule is not set out in any federal regulations or statutes. *Id.*

117. *Id.* at 165, 702 P.2d at 1200 (citing 42 C.F.R. § 435.723 (1985)).

118. The community property states are Arizona, California, Idaho, Louisiana, Ne-

sonal property acquired by either or both of the spouses during the marriage except property acquired by gift, bequest, devise or inheritance.¹¹⁹ Because community property laws mandate that each spouse "own" the income check, a conflict arises between state community property laws and the HCFA's name-on-the-instrument rule.

Two cases in community property states have addressed this conflict, with varied results.¹²⁰ In *Case of Hamner*,¹²¹ the Louisiana Supreme Court held that the HCFA's application of the federal Medicaid law preempted state community property laws.¹²² The Louisiana Department of Health and Human Resources denied the institutionalized applicant's request for Medicaid benefits because his monthly income exceeded the maximum allowed by the state.¹²³ The applicant argued that, because Louisiana is a community property state, his monthly retirement income was community property and only one-half of it was applicable in determining eligibility.¹²⁴ The court, affirming the denial of benefits, stated that the applicant's monthly income "belonged [only] to him." Accordingly, the court reasoned that the federal regulations required that the applicant's income be taken into account when determining eligibility.¹²⁵ The court also determined that, because Louisiana was an SSI state, it was obligated to conform to SSI eligibility standards, "which require national uniformity."¹²⁶ The court, therefore, concluded that Louisiana could not apply differ-

vada, New Mexico, Texas and Washington. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 216 (1984).

119. *Id.* If, when determining the amount of income available to the applicant spouse, the agency uses community property law, then the at-home spouse would always be entitled to one-half of whatever income is received by the applicant, regardless of whose name appears on the check. If the name-on-the-instrument rule is applied, however, the at-home spouse is allowed to retain only such income as is received in her name, plus that portion of the applicant's income needed to make the at-home spouse's total income equal to the SSI grant level. *Purser*, 104 Wash. 2d at 164, 169, 702 P.2d at 1199, 1201.

120. *See Case of Hamner*, 427 So. 2d 1188 (La. 1983); *Purser*, 104 Wash. 2d 159, 702 P.2d 1196. *See also infra* notes 121-32 and accompanying text.

121. *Hamner*, 427 So. 2d 1188 (La. 1983).

122. *Id.*

123. *Id.* at 1189.

124. *Id.* at 1189-90.

125. *Id.* at 1190 (citing 20 C.F.R. § 416.1101 (1980) ("an individual's income includes all of his own income in cash or in kind, both earned income and unearned income.")).

126. *Hamner*, 427 So. 2d at 1191. The court cited legislative history to demonstrate Congress' intent for national uniformity in SSI eligibility standards: "the bill would substantially improve the effectiveness of the adult assistance programs under the Social Security Act by providing — for . . . one combined adult assistance program which would

ent standards than other SSI states merely because Louisiana is a community property state.

An opposite conclusion was reached by the Washington Supreme Court in *Purser v. Rahm*.¹²⁷ The plaintiffs in *Purser* argued that the state's community property laws invalidated the use of the name-on-the-instrument rule.¹²⁸ The court held that federal regulations did not preempt the state's community property laws and thus concluded that the state's community property laws should be used to determine ownership of income.¹²⁹ In making this determination, the court first looked at whether the asserted right, the at-home spouse's right to her share of the income paid to her spouse, conflicted with the express terms of the federal law. The court then examined whether requiring preemption sufficiently interfered with the objectives of the federal program.¹³⁰ Because the Medicaid statute contains no express intent to preempt state community property laws, the court concluded that the asserted right did not conflict with the express terms of the federal law.¹³¹ In addition, the court found that the application of the community property laws did not interfere with the objectives of the Medicaid law.¹³²

Other courts also have applied state property law to determine ownership of income in benefits cases. In *Herrera v. Health and Social Services*,¹³³ the New Mexico Court of Appeals held that the state could consider only one-half of the plaintiff's income as available to him in determining eligibility.¹³⁴ Although the plaintiff's only income came from his pension, the court reasoned that the applicant's wife was entitled to one-half of his pension under applicable community property laws.¹³⁵

In *Nursing Home Residents' Advisory Council v. Kelly*,¹³⁶ the United States District Court for the District of Minnesota addressed the issue of whether the state could consider available to a

be Federally administered by the Social Security Administration and would have nationally uniform requirements for such eligibility factors." *Id.*

127. 104 Wash. 2d 159, 702 P.2d 1196 (1985).

128. *Id.* at 161, 702 P.2d at 1197-98.

129. *Id.* at 178, 702 P.2d at 1206.

130. *Id.* at 165, 702 P.2d at 1199 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979)).

131. *Purser*, 104 Wash. 2d at 178, 702 P.2d at 1206.

132. *Id.*

133. 587 P.2d 1342 (N.M. Ct. App.), *cert. denied*, 588 P.2d 544 (N.M. 1978).

134. *Id.* at 1346.

135. *Id.* at 1345.

136. 470 F. Supp. 747 (D. Minn. 1979).

Medicaid applicant the equity value of a home in which the applicant's wife resided, when she refused to consent to its sale. The court ruled that the home could not be considered available to the applicant because, under Minnesota law, a spouse is unable to liquidate homestead property without the other spouse's consent.¹³⁷

In *Whaley v. Schweiker*,¹³⁸ the United States Court of Appeals for the Ninth Circuit held that pension benefits made payable to a disabled veteran for the support of his children did not constitute income to him in determining eligibility for SSI benefits.¹³⁹ Schweiker, the Secretary of Health and Human Services, contended that, because Whaley received one unapportioned check for both him and his children, he was legally free to apply the funds to his own needs rather than those of the children.¹⁴⁰ Therefore, Schweiker contended, Whaley's entire pension was income to him.¹⁴¹ The court rejected this argument and stated that it was irrelevant that the benefits were sent in one check rather than two.¹⁴² The court reasoned that the legal status of payments is not altered by the mechanism used to distribute them.¹⁴³

Some states have attempted to address the income and asset ownership problem through legislation. For example, in California, spouses may execute a written interspousal agreement that divides community property into equal shares of separate property.¹⁴⁴ The separate property of the applicant's spouse is considered unavailable to the applicant and need not be contributed to the applicant's care.¹⁴⁵ In addition, in the absence of an agreement, the state will consider the assets divided when making eligibility determinations upon institutionalization.¹⁴⁶ Thus, the California statute has the effect of applying only the actual assets of the applicant to the eligibility determination, leaving the spouse's assets untouched.

Illinois has enacted a similar statute. Though Illinois is not a community property state, it is a Section 209(b) state.¹⁴⁷ Because of the practice of deeming, an at-home spouse in a Section 209(b)

137. *Id.* at 749.

138. 663 F.2d 871 (9th Cir. 1981).

139. *Id.* at 872.

140. *Id.* at 873.

141. *Id.*

142. *Id.* at 874.

143. *Id.*

144. CAL. WELF. & INST. CODE § 14006.2(b) (West 1986).

145. *Id.*

146. *Id.* at § 14006.2(e).

147. See *supra* note 41 and accompanying text.

state is in a situation similar to one in a community property state; their resources remain "available" for their institutionalized spouse. Under the Illinois statute, spouses may execute a written agreement dividing their resources into separate but equal shares.¹⁴⁸ The Illinois statute differs from the California legislation by providing that the written agreement will be recognized only if the nonrecipient spouse's share of the property is not made available to the person seeking medical assistance and that person does not reside in the home.¹⁴⁹ In addition, the Illinois statute specifically defers to federal law when federal law is in conflict with the Illinois statute concerning consideration of resources.¹⁵⁰

IV. ANALYSIS

The at-home spouse of an institutionalized Medicaid recipient is often forced to endure an intolerable financial strain as a result of the practices and procedures established by the HCFA and individual state agencies.¹⁵¹ In many of these instances, the financial burdens are unnecessary; the result of the Medicaid Statute's greater concern for managing funds than the welfare of the elderly.

A. *Deeming Problems in Section 209(b) States*

The decision in *Schweiker v. Gray Panthers*¹⁵² appears to have ended the controversy regarding the validity of the deeming statute as applied to Section 209(b) states.¹⁵³ The Supreme Court's ruling that the deeming statute is valid has allowed states to continue their deeming practice and, therefore, the burden associated with deeming has continued. Because deeming of income in SSI states can last for only one month after the spouses have ceased living together,¹⁵⁴ an at-home spouse must suffer the burden only for this limited time period. In contrast, the burden imposed on at-home spouses living in Section 209(b) states may last indefinitely. These states can deem for any time period their self-imposed standards permit.¹⁵⁵ Accordingly, at-home spouses in Section 209(b) states often must suffer the intolerable burden of living at or below the poverty level the entire time their spouse is institutionalized. It is

148. ILL. REV. STAT. ch. 23, para. 5-4 (1986).

149. *Id.*

150. *Id.*

151. *See supra* notes 49-143 and accompanying text.

152. 453 U.S. 34 (1981).

153. *See supra* notes 65-81 and accompanying text.

154. *See supra* note 60 and accompanying text.

155. *See supra* notes 63-64 and accompanying text.

unreasonable to burden an at-home spouse in a Section 209(b) state indefinitely, while an at-home spouse in a neighboring SSI state suffers for only one month.

B. *The Problem of Reverse Deeming*

With deeming and reverse deeming, many times the funds the at-home spouse has to live on (either the amount of their own income that remains after deeming or the amount provided by the MNA) are inadequate. Reverse deeming, however, often has a harsher effect. Because deeming in Section 209(b) states can potentially be of an unlimited duration, reverse deeming, which also can have an unlimited time frame, is no worse than deeming in Section 209(b) states. The difference between deeming and reverse deeming manifests itself in SSI states where time limits restrict only deeming practices.¹⁵⁶ In instituting the time limits for deeming, Congress indicated that an at-home spouse should not be restricted to a fixed income for more than one month. Because similar constraints were not placed on reverse deeming practices, an at-home spouse could remain on a fixed income for the rest of her life, a result that is arguably contrary to Congressional intent.

C. *Problems with the Name-On-The-Instrument Rule*

The question of whether the name-on-the-instrument rule preempts state property law remains unsettled. The *Purser*¹⁵⁷ and *Hamner*¹⁵⁸ courts offered different solutions. While the *Hamner* court concluded that Federal Medicaid laws preempted state community property laws, the *Purser* court determined that instead, community property laws are controlling. In two benefits cases, however, *Herrera v. Health and Social Services*¹⁵⁹ and *Nursing Home Residents' Advisory Council v. Kelly*,¹⁶⁰ the courts applied state property laws to determine ownership of income.¹⁶¹ Those benefit cases, however, addressed only the issue of whether state law or the name-on-the-instrument rule should be used to determine income availability.¹⁶² To date, no case has considered the

156. 42 C.F.R. § 435.723(c) (1986).

157. *Purser*, 104 Wash. 2d 159, 702 P.2d 1196.

158. *Case of Hamner*, 427 So. 2d 1188 (La. 1983).

159. 587 P.2d 1342 (N.M. Ct. App.), *cert. denied*, 588 P.2d 544 (N.M. 1978). *See supra* notes 133-35 and accompanying text.

160. 470 F. Supp. 747 (D. Minn. 1979). *See supra* notes 136-37 and accompanying text.

161. *See supra* notes 133-37 and accompanying text.

162. *Id.*

issue of whether the name-on-the-instrument rule applies where no conflicting state law exists.

The name-on-the-instrument rule fails to consider that a person may have an interest in another person's property or income. A spouse often has an interest in her marital partner's property or income regardless of whether she "earned" it. At least one court has recognized a non-working wife's interest in property based on her contributions as a homemaker.¹⁶³ Moreover, in some jurisdictions, marriage is viewed as a partnership; thus property acquired during the marriage belongs to both spouses regardless of who holds nominal title.¹⁶⁴

The name-on-the-instrument rule also breeds inconsistency. In an SSI state, if the at-home spouse receives income in her name, she is allowed to retain all of it for her own use.¹⁶⁵ If the institutionalized spouse receives the income in his name, however, he must contribute all but his spouse's maintenance allowance to the cost of his care.¹⁶⁶ Therefore, while the name-on-the-instrument rule benefits couples whose income is in the name of the at-home spouse, it burdens couples whose income nominally belongs to the institutionalized spouse.

Although the HCFA has not indicated that it will cease using the name-on-the-instrument rule, at least one court has implied that the rule is improper.¹⁶⁷ In *Whaley v. Schweiker*,¹⁶⁸ the court held that pension benefits received by the applicant should not be included in his income merely because the check is made payable to him.¹⁶⁹ The funds were intended to support his children and the court appropriately concluded that the payment mechanism used is irrelevant.¹⁷⁰

163. *Pepin v. Pepin*, 429 A.2d 1005 (Me. 1981) (divorce proceedings where court held it was proper to award the wife a portion of the marital property based upon her service as a homemaker).

164. *Grant v. Grant*, 424 A.2d 139, 144 (Me. 1981) (Glassman, J., concurring).

165. *See supra* notes 115-17 and accompanying text.

166. *Id.*

167. *Whaley v. Schweiker*, 663 F.2d 871 (9th Cir. 1981). *See supra* notes 138-43 and accompanying text.

168. 663 F.2d 871 (9th Cir. 1981). *See supra* notes 138-43 and accompanying text.

169. *Id.*

170. *Id.* at 873-74. The court in *Tsosie v. Califano*, 651 F.2d 719 (10th Cir. 1981), held that pension benefits received by a surviving spouse and intended to support the spouse's children were not income to the spouse despite the fact that the children's benefits were made payable to the surviving spouse. It stated that "the payee of the check should not be determinative. If the money is to be used for the children, it is not the

V. RECOMMENDATIONS

The best solution to all three burdens would be for states to enact legislation similar to that adopted by Illinois, a Section 209(b) state, and California, a community property state. Those statutes allow spouses to divide their property pursuant to an agreement,¹⁷¹ a practice that has resolved some of the confusion in community property states concerning the ownership of family assets. It also would help eliminate the problems associated with deeming in Section 209(b) states and reverse deeming in all states.

If the individual states do not enact such legislation, the federal government should amend the Social Security Act to force Section 209(b) states to modify their deeming practices. Deeming should be eliminated or, at the very least, time restrictions should be imposed prohibiting Section 209(b) states from deeming for longer periods than allowed in SSI states. Congressional intent in instituting the SSI program was to improve the effectiveness of assistance and promote nationally uniform eligibility requirements.¹⁷² The existence of unlimited deeming in Section 209(b) states, however, inherently conflicts with the ideal of uniformity: while the at-home spouse in a Section 209(b) state must deem a portion of her income to pay for the institutionalized spouse, another individual similarly situated in a neighboring SSI state is allowed to retain all of her income.

Congress provided for the Section 209(b) option because it feared that some states would not participate in the Medicaid program if their cost of instituting a program increased.¹⁷³ But it has been more than a decade since this option was offered and states have had time to adjust to the change brought about by SSI. The federal government should now require Section 209(b) states to change their deeming practices within a specified period of time.

spouse's income . . . Nor is it actually available in any meaningful sense." *Tsosie*, 651 F.2d at 723.

In *Cannuni v. Schweiker*, 740 F.2d 260 (3d Cir. 1984), the court again impliedly invalidated the name-on-the-instrument rule. In *Cannuni*, an SSI applicant was found eligible for benefits even though his name appeared on some bank accounts with his parents and the amounts therein would give him resources above the limits imposed for eligibility. *Id.* at 265. The court concluded that under state property law, the mere creation of a multiple party savings account did not transfer ownership of any funds to the applicant and the funds remained property of his parents and were thus unavailable for his own use. *Id.* at 264-65.

171. See *supra* notes 144-50 and accompanying text.

172. Case of *Hamner*, 427 So. 2d 1188, 1191 (La. 1983) (quoting H.R. REP. NO. 231, 92d Cong., 2d Sess. 4, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4989, 4992).

173. See *supra* notes 39-40 and accompanying text.

This regulation would allow the states time to allocate a larger portion of their budgets for the anticipated increase in payments to recipients. To ensure compliance, the federal government should threaten to cut off other federal aid to states that refuse to comply. Because of the serious nature of the problem, the federal government should take immediate and strong steps to eradicate the inequity inherent in the Section 209(b) option.

An acceptable solution to the problem of reverse deeming is an increase in the amount of the maintenance allowance given to at-home spouse. Many maintenance allowances remain at 1972 levels,¹⁷⁴ failing to account for inflation and cost of living increases.¹⁷⁵ Although increases in maintenance allowances probably would be met with much resistance, other than the abolition of reverse deeming, nothing else could prevent elderly from living at antiquated income levels.

The only plausible solution to the name-on-the-instrument rule is its abolition. The rule is unreasonable, has inconsistent results, and fails to respect the other spouse's interest in that income. Pensions¹⁷⁶ and other retirement income is "acquired" during the marriage and should be shared by the spouses without regard for whose name is on the check. Because the spouse whose name does not appear on the instrument almost certainly contributed to the marital relationship, there is no justifiable explanation why that spouse should be deprived of her share of the family income.

VI. CONCLUSION

The current Medicaid program presents the elderly with intolerable burdens. Elderly individuals should not be forced to choose between contributing their money to their institutionalized spouses' care, thereby forcing themselves to live at or below the poverty level, or refusing to contribute and facing the possibility that their spouses will be denied necessary medical care. Additionally, individuals needing care might not enter nursing homes in order to protect their spouse's remaining resources. The only other alternative may be legal separation or divorce.

174. *Schweiker v. Gray Panthers*, 453 U.S. 34, 55 (1981) (Stevens, J., dissenting).

175. *Id.* See also *id.* at n.11.

176. Pensions are received by husband and wife as a family unit. *Mattingly*, 784 F.2d at 271 (Cudahy, J., dissenting). When the working spouse joins a pension plan, he intends that, in the future, the funds received from the plan will provide support for both husband and wife. A pension fund basically is a form of deferred compensation earned by one spouse and contemplated to be used by both spouses in the future. *Damiano v. Damiano*, 94 A.D.2d 132, 137, 463 N.Y.S.2d 477, 480 (2d Dept. 1983).

The effects that deeming, reverse deeming, and the name-on-the-instrument rule have on elderly Medicaid recipients and their spouses must be closely examined. Solutions must be found that alleviate the burdens associated with these practices. Although states have a legitimate interest in keeping expenditures down and avoiding paying for those people who have the means to pay for themselves, the states' interests should not be pursued at the expense of the health and welfare of our nation's elderly.

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