

3700. INTRODUCTION

Subsequent to determining Medicaid eligibility for persons living in medical and remedial care institutions, and persons receiving services under home and community-based waivers, determine how much such persons contribute to the cost of their institutional care and/or waiver services. This latter calculation is referred to as the post-eligibility process. This chapter sets forth requirements for the post-eligibility process for institutionalized persons and for a select subset of persons receiving home and community-based waiver services. Chapter VI, §3590 describes the general rules for the post-eligibility process as it relates to persons receiving home and community-based waiver services. This chapter sets forth rules to use for all persons in medical and remedial care institutions, and also includes rules governing persons receiving home and community-based waiver services which you have elected to include under the provisions of §1924 of the Act. (See §§3270-3273.6 for persons subject to §1924.)

3700.1 Background.--Section 1902(a)(17) of the Act is the general authority for the post-eligibility process. However, other provisions have been added to refine and clarify the rules governing this process. Specifically, the Medicare Catastrophic Coverage Act (MCCA) of 1988 includes a number of different provisions affecting post-eligibility policies. The policies covered by various sections of law are highlighted below.

- o Section 1902(a)(17)--General authority.
- o Section 1902(o)--Requires that Supplemental Security Income (SSI) payments made under §1611 (e)(1) (E) and (G) be deducted in the post-eligibility process.
- o Sections 1902(a)(50) and 1902(q)--Set a minimum deduction for the personal needs of institutionalized persons.
- o Section 1924--Special rules governing institutionalized spouses with community spouses.
- o 38 U.S.C. §5503, amended by §601 of Public Law 102-568 (the Veterans' Benefits Act of 1992), §12005 of Public Law 103-66 (Omnibus Budget Reconciliation Act of 1993), and §8015 of Public Law 105-33 (the Balanced Budget Act of 1997) cap the monthly amount of VA pensions for certain institutionalized individuals at \$90. These individuals are institutionalized Medicaid recipients who are veterans with neither a spouse nor child or are childless surviving spouses of veterans. It also provides that Medicaid may not reduce the amount paid to a nursing facility by virtue of this capped VA payment. (VA interprets this reduction as applying only to the VA improved pension.) The Balanced Budget Act of 1997, extended the sunset date of this provision from September 30, 1998 until September 30, 2002. State veterans homes to which the Secretary of the Department of Veterans Affairs makes per diem payments are exempted from this reduction.
- o Section 4715 of Public Law 105-33 amended §1902(r)(1) of the Social Security Act to change the Medicaid treatment of veteran's pension payments made by the VA, to a veteran who receives a veteran's pension in excess of \$90 a month, for Medicaid eligible veterans who reside in a State veterans home to which the VA makes per diem payments for nursing home care. Under this provision, any such pension payments, including payments made for aid and attendance or for unreimbursed medical expenses, in excess of \$90 a month, shall be counted as income in the determination of total income in the post-eligibility process. The provision applies to a veteran without a spouse or a child, and to a surviving childless spouse of a veteran.

3701. GENERAL STATEMENT OF POST-ELIGIBILITY PROCESS

Reduce Medicaid payments to medical and remedial care institutions and for home and community-based waiver services by the amount remaining after specified deductions are made from the income of institutionalized persons or persons receiving home and community-based waiver services. Income remaining after these deductions are applied is the amount persons are liable to pay for institutional and/or waiver services.

Except as provided in §3710, use the policies described in §§3701-3708 for the post-eligibility treatment of income for institutionalized persons. Section 3710 describes the rules used for persons who are subject to the special provisions of §1924 of the Act.

Apply the following steps:

- o Determine the individual's total income; (See §3701.2.)
- o Deduct the required and (if you have elected to do so) optional amounts from the individual's total income; (See §3702.)
- o Reduce your payment to the institution by the amount of the individual's liability; and
- o The individual is liable to pay the institution the amount of the remaining income.

3701.1 Affected Individuals.--The post-eligibility process applies to all individuals (both categorically needy and medically needy) who are in Medicaid reimbursable institutions (e.g., medical institutions or intermediate care facilities including intermediate care facilities for the mentally retarded) and have been determined eligible for Medicaid.

3701.2 Determination of Total Income.--For purposes of the post-eligibility process, total income includes all amounts of income available to the individual (whether received regularly, irregularly, or if it fluctuates in amount) from all sources, which are considered to be income for purposes of eligibility whether counted or disregarded. Total income (as determined for purposes of post-eligibility) is distinguished from countable income (as determined for purposes of eligibility). In the eligibility determination, countable income is income remaining after certain eligibility income disregards are applied.

Determine the amount of an individual's total income, for purposes of the post-eligibility process, using one of the following methods:

- o Method 1.--Consider as total income the amount of income actually available each month to the individual; or
- o Method 2.--Consider projected monthly income during a prospective period not to exceed 6 months. Base the projection on actual income received in a preceding period (not to exceed 6 months), and on income expected to be received by the individual during the prospective period that you select. You may not use a strict retrospective budgeting method for determining income under Method 2. In retrospective methods, future income is estimated solely on the basis of income actually received in a previous period. There is no consideration of anticipated income under retrospective methods, even when an individual's income fluctuates irregularly. Therefore, a strict retrospective budgeting approach is precluded under this method.

If you use Method 2, make an adjustment at the end of the prospective period, or when any significant change occurs which would cause the projected income to change. This adjustment is required in order to reconcile the estimates with the actual income received during the prospective period. Reconcile projected income with actual income at least once every 6 months. Define the term "significant change" in appropriate program materials.

3701.3 Determination Of Amounts Of Medical Expenses.--In determining the amounts of the individual's liability for the costs of institutional care, certain required and optional amounts for medical or remedial expenses are deducted from the individual's income. (See §§ 3703.7, 3704.1, and 3704.2.) Determine the amounts of the medical or remedial expenses to be deducted from total income, for purposes of the posteligibility process, using one of the following methods:

- o Method 1.--Consider the expenses as actually incurred each month; or
- o Method 2.--Consider projected medical or remedial expenses during a prospective period not to exceed 6 months. Base the projection on actual expenses experienced in a preceding period (not to exceed 6 months) and on any expenses expected to be incurred by the individual during the prospective period.

If you use Method 2, make an adjustment at the end of the prospective period, or when any significant change occurs which would cause the projected medical or remedial expenses to change, in order to reconcile the estimates with the actual expenses incurred during the prospective period. Reconcile projected expenses with actual expenses at least once every 6 months. Define the term "significant change" in appropriate program materials.

3702 DEDUCTIONS FROM THE INDIVIDUAL'S TOTAL INCOME.

Under the posteligibility process, all of an individual's total income is not considered available to pay for the costs of institutional care. Rather, certain amounts of the individual's total income are protected (i.e., deducted) for the personal needs of the individual.

The mandatory and optional deductions are outlined below.

o Required Deductions (see §§3703)

- Certain SSI Benefits (see §§3703.1);
- Personal Needs Allowance (see §§3703.2);
- Maintenance Needs Of A Spouse At Home (see §§3703.4);
- Maintenance Needs Of A Family At Home (see §§3703.7); and
- Expenses for Health Care (see §§3703.8).

o Optional Deductions (see §§3704)

Maintenance Of The Home (See §§3704.1).

3703 REQUIRED DEDUCTIONS

3703.1 Certain SSI Benefits.--Under §§1902(o) of the Act, in determining the amounts of the individual's income to be applied towards the costs of care provided by the medical institution under the posteligibility process, disregard certain SSI benefits including State supplementary payments indicated in subsections A and B which are paid to an individual who has been determined eligible for Medicaid and enters a medical institution. The following describes the SSI benefits which must be disregarded in the posteligibility process under this provision.

A. SSI Benefits Paid Under §§1611(e)(1)(E) of the Act.--Effective July 1, 1987 (under §1611(e)(1)(E) of the Act, as amended by §3 of the Employment Opportunities for Disabled Americans Act (P.L. 99-643, EODAA)), individuals eligible for SSI benefits

and/or State supplementary payments under §1619 of the Act in the month preceding the first full month of institutionalization in a hospital, extended care facility, skilled nursing facility, intermediate care facility, or public mental or psychiatric facility, remain eligible for SSI and State supplementary payment benefits based on the full benefit rate paid in the community for the first full month of institutionalization, and if they remain institutionalized, for the subsequent month. (See §3410 for further details regarding the provisions of §1619 of the Act under the Medicaid program.)

Disregard any SSI/State supplement benefits paid under the authority of §§1611(e)(1)(E) of the Act from an institutionalized individual's income in the post-eligibility process.

B. SSI Benefits Paid Under Section 1611(e)(1)(G) of the Act.--Effective July 1, 1988, under §1611(e)(1)(G) of the Act (as amended by §9115 of the Omnibus Budget Reconciliation Act of 1987 (OBRA 87, P.L. 100-203), SSI and State supplementary payment benefits are based on the full community rate for up to the first 3 full months after the month of entry under certain conditions for individuals who enter a public medical or psychiatric institution or medical institution approved under Medicaid. Typically, when an individual enters an institution, the SSI rate is reduced from the community rate to \$30 per month. Furthermore, there may be a lower State supplementary payment for institutionalized individuals than for individuals living in the community. However, in general under §1611(e)(1)(G) of the Act the continued full SSI benefits are payable if, as determined by the Social Security Administration, the individual's stay in the institution is not likely to exceed 3 months, the individual is likely to return home in 3 months, and the individual needs to continue to maintain and provide for the expenses of the home or living arrangement to which he/she may return upon leaving the institution. Where the Social Security Administration has made the determination that the individual is likely to return home in 3 months, the full SSI/State supplementary payment level is payable.

Disregard any SSI/State supplement benefits paid under the authority of §1611(e)(1)(G) of the Act from the institutionalized individual's income in the post-eligibility process for contributions of the individual's income to the costs of care. With respect to the above referenced SSI/State supplement benefits, the law provides only for the disregard of SSI/Supplement benefits in the posteligibility process.

C. Disregard of Other Income Under These Provisions.--Section 1902(o) of the Act requires only the disregard of SSI and State supplementary payments paid under §§1611(e)(1)(E) or (G) of the Act. There is no requirement for the disregard of any other income under these provisions. For example, an individual with \$0 in other income would receive \$354/month in SSI benefits (representing the full benefit rate in the community). Under those provisions, this entire amount would be disregarded under the posteligibility process. However, if the individual had \$274 in other unearned income, and thus, received only \$100 in SSI benefits (i.e., \$354-(\$274-\$20 exclusion)'\$100 SSI benefit), under §1902(o) of the Act, only the \$100 SSI benefit amount would be disregarded in the posteligibility process. You are permitted to protect amounts of other income in the posteligibility process for the maintenance of the home. See §3704.1 for the deduction of other income for the maintenance of the home.

D. Identification of Individuals Receiving Continued Benefits.-- SSA is developing system support regarding individuals receiving the continued benefits described in subsections A and B (i.e., §1611(e)(1)(E) and (G) benefits, respectively) which is expected to be completed sometime in 1989. At that time an indicator will appear on the State Data Exchange (SDX) tape to identify individuals receiving these continued benefits.

With respect to benefits described in subsection A, SSA will provide a manual notice to the individual and the institution the individual is in indicating the individual will be receiving continued benefits under §1611(e)(1)(E) of the Act. SSA will not be maintaining a listing of individuals receiving benefits described in subsection A. This notice will serve as verification of receipt of benefits paid under § 1611(e)(1)(E) of the Act. If you need further verification of these benefits, contact the SSA field office (e.g. district office) servicing the individual.

With respect to benefits described in subsection B, SSA will provide a notification to, and maintain a manual listing by name and Social Security number of, individuals receiving such benefits. SSA will send a copy of the manually prepared notice to the appropriate State agency, but only with respect to individuals receiving a State supplementary payment paid under § 1611(e)(1)(G) of the Act which is administered by the State. This manual notice will identify the individuals receiving the continued SSI/State supplement benefits, at the community level. If you need verification of benefits paid under §1611(e)(1)(G) for any other individuals, contact the SSA field office servicing the individual.

3703.2 Personal Needs Allowance.--Deduct from the individual's total income an allowance that is reasonable in amount for the personal needs of the individual (e.g., for clothing) while in the institution. The minimum monthly personal needs allowance (PNA) must be:

- o \$30 per month for an aged, blind, or disabled individual, including a child applying for Medicaid on the basis of blindness or disability;

- o \$60 per month for an institutionalized couple if both spouses are aged, blind, or disabled and their income is considered available to each other in determining eligibility; and

- o For other individuals, a reasonable amount based on a reasonable difference in their personal needs from those of aged, blind and disabled individuals.

A. Minimum Personal Needs Allowance.--Prior to July 1, 1988, the minimum personal needs allowance was \$25 per month for an individual and \$50 per month for a couple. Under §9119 of The Omnibus Budget Reconciliation Act of 1987 (OBRA 87, P.L. 100-203), the SSI payment standard for an individual and couple who are institutionalized was increased from \$25 to \$30 for an individual and from \$50 to \$60 for a couple. These changes were effective July 1, 1988. Section 9119 of OBRA also requires State to "pass-through" these SSI increases in their State supplementary payment programs. Thus, States previously supplementing the SSI \$25/\$50 payment levels for institutionalized

individuals/couples, must adjust their supplementary levels for individuals and couples so that the amount of the supplementary levels for individuals and couples is no less than it was prior to the increase in the SSI institutional payment levels to \$30/60.

Section 411(n)(3) of the Medicare Catastrophic Coverage Act of 1988 (MCCA, P.L. 100-360), amended §9119 of OBRA 87. Under the MCCA, the Act was amended at §§1902(a)(50) and 1902(q). These sections require you to deduct from an institutionalized individual's or couple's monthly income in the posteligibility process a monthly personal needs allowance which is reasonable in amount for clothing and other personal needs while in an institution and which is not less than \$30 for an individual and \$60 for a couple. The personal needs allowance may, at State option, be greater than the minimum personal needs allowance.

You may increase the personal needs allowance to include an amount to specifically reflect any State supplementary payments received as a result of the pass-through provisions of §9119 of OBRA 87. That is, a personal needs allowance which is increased to account for the receipt of a State Supplement paid under this provisions of §9119 is considered reasonable. It is your option to increase the personal needs allowance in this manner.

EXAMPLE. Prior to the enactment of §9119 of OBRA 87, the State had a PNA of \$30 for an individual. The State also supplemented the \$25 SSI payment level with a \$5 State supplement. Thus, SSI/State supplement recipients (with no countable income) received a total of \$30 in cash payments. Furthermore, because the PNA was \$30, the \$30 in cash payments were protected for the recipient's personal needs.

Under §9119 of OBRA 87, the SSI payment level was increased from \$25 to \$30. Additionally, because of the maintenance of effort provision in §9119, the State must continue to maintain the \$5 State supplementary payment level. Thus, subsequent to enactment of §9119 of OBRA 87, an individual (with no other countable income) will receive a total of \$35 in cash payments.

Under this example, you must increase the PNA to at least \$30, and therefore, the SSI benefit would be protected in the post-eligibility process. At your option, you may increase the PNA to protect the \$5 State Supplementary payment for the individual's personal needs.

B. Other Personal Needs Allowance.--At your option, amounts exceeding the minimum personal needs allowance may be protected for groups of persons who have greater personal needs. Such higher amounts must be based on actual differences in personal needs, and must be applied to all persons with similar needs in the group. For example, where residents in Intermediate Care Facilities (ICFs) are considered to be more active than Skilled Nursing Facility (SNF) patients, a higher amount could be set for all persons in ICFs.

Similarly, a higher amount could be protected for all institutionalized persons who regularly engage in organized activities, such as those employed in sheltered workshops. Such persons could be recognized as a group which has greater need for personal income

because of the nature of their activities, or because retention of additional income derived from work is considered essential toward satisfying their developmental need to achieve a certain degree of independence.

Increased amounts protected for such needs may be related to the level of earnings (for example, as a percentage of earnings above the basic personal needs amount). In no case may the total amount retained exceed maintenance amounts recognized by the State for noninstitutionalized persons. It would not be reasonable for the personal needs allowance for an institutionalized individual (whose food and shelter needs are taken care of by Medicaid) to be higher than the maintenance amount which the State recognizes for individuals living in the community where Medicaid does not cover food and shelter costs.

If you choose to protect additional amounts of income for groups of individuals with greater needs, indicate the method of determining the additional amounts and the maximum amount which may be protected in your State plan for approval by HCFA.

3703.4 Maintenance Needs Of A Spouse At Home--For an individual with only a spouse at home, deduct from the individual's total income an amount for the maintenance needs of the spouse. Base this amount on a reasonable assessment of the needs of the spouse which includes consideration of the spouse's income and resources. The amount deducted for the needs of the spouse must be reduced dollar for dollar for each dollar of the noninstitutionalized spouse's own income. Sections 3703.5 and 3703.6 provide the limits on this deduction in the States and Territories, respectively.

3703.5 In the States--

A. States Covering Individuals Receiving SSI--Deduct from the individual's total income an amount for the maintenance needs of a spouse at home which must not exceed the highest of:

o The amount of the income standard used to determine eligibility for SSI for an individual living in his own home;

o The amount of the highest income standard, in the appropriate category of age, blindness, or disability, used to determine eligibility for an optional State supplement for an individual in his own home, if you provide Medicaid to optional State supplement recipients and the State supplement program meets Federal requirements; and

o The amount of the medically needy income standard for one person, if you provide Medicaid under the medically needy coverage option. (See §§ 3600 for provisions regarding coverage of the medically needy.)

B. States Using More Restrictive Requirements Than SSI--Deduct an amount from the individual's total income for the maintenance needs of a spouse at home which must not exceed the higher of:

o The more restrictive income standard established under the requirements of §§1902(f) of the Act;

o The medically needy income standard for one person.

3703.6 In the Territories.--Deduct an amount from the individual's total income for the maintenance needs of a spouse at home which must not exceed the higher of:

o The amount of the highest need standard for an individual without income and resources under the State's approved plan for OAA, AFDC, AB, APTD, or AABD;

o The amount of the highest medically needy income standard for one person.

3703.7 Maintenance Needs Of A Family At Home.--For an individual with a family at home, deduct from the individual's total income an amount for the maintenance needs of the family in addition to any amounts deducted for a spouse at home. This amount must:

o Be based on a reasonable assessment of the family's financial need which includes consideration of the family's income and resources;

o Be adjusted for the number of family members living in the home; and

o Not exceed the higher of the need standard for a family of the same size used to determine eligibility under the State's AFDC plan or the medically needy income standard for a family of the same size.

3703.8 Expenses for Health Care.--Deduct from the individual's total income amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including:

o Medicare and other health insurance premiums, deductibles, or coinsurance charges; and

o Necessary medical or remedial care recognized under State law but not covered under the State plan, subject to reasonable limits the agency may establish on amounts of these expenses.

Reasonable limits (if any) must be submitted by you for approval by HCFA in the Medicaid State plan. The reasonable limits must ensure that institutionalized individuals be able to use their own funds to purchase necessary medical or remedial care not covered by the Medicaid program, while minimizing opportunities for providers to take financial advantage of either the Medicaid program or the individuals. For example, it would be reasonable for you to provide that only uncovered services prescribed by a physician may be deducted. It would also be reasonable for you to impose specific dollar limits for specific services or items, provided that these limits reflect annual increases in the cost of medical or remedial services and supplies. It would not be reasonable for you to set an overall dollar limit, such as \$50 per month, for all noncovered services. Similarly, it would not be reasonable for you to impose a limit on the number of medically necessary services or items that an individual could deduct each month.

3704. OPTIONAL DEDUCTIONS

3704.1 Maintenance Of The Home.--For single individuals and couples (both members of which are institutionalized), you may deduct from total income an amount for the maintenance of the individual's or couple's home. If you choose to deduct an amount for the maintenance of the home, the following conditions must apply:

- o The amount is deducted for a period which does not exceed 6 months; and
- o A physician has certified that the individual or either member of the couple is likely to return to the home within that period.

3705. POST-ELIGIBILITY TREATMENT OF CERTAIN PAYMENTS MADE BY THE DEPARTMENT OF VETERANS AFFAIRS

A. VA Allowances for Unusual Medical Expenses and Aid and Attendance.--As of July 1, 1994, neither VA allowances for unusual medical expenses or for aid and attendance may be counted as income for eligibility, except as provided in §3705.C., for post-eligibility purposes, unless you are a State that uses more restrictive eligibility criteria than SSI and the approved State plan provides for counting the amount as income for eligibility purposes under the authority of §1902(f) of the Act.

B. Limitation on Pension for Certain Recipients of Medicaid-Covered Nursing Home Care.--VA Law (38 U.S.C. 5503), provides that the amount of the VA pension for an institutionalized Medicaid recipient having neither a spouse nor child (or in the case of a surviving spouse having no child) cannot exceed \$90 per month, and may not be used to reduce the Medicaid payment to the institution.

The limited VA pension, up to the amount of \$90, is not counted as income in the eligibility or post-eligibility process (except as described below for certain 209(b) States). There is no interaction between the reduced pension and the personal needs allowance. If the veteran has income from other sources, that is considered countable for the purposes of post-eligibility, you must perform the post-eligibility calculations to determine the amount of the veteran's liability toward his/her cost of care.

VA law precludes 209(b) States from counting the reduced VA pension as income in the post-eligibility process even if the State counts the reduced pension as income in the eligibility process, under the authority of 1902(f) of the Act. Therefore, a 209(b) State that counts the veterans' pension as income in the eligibility process must protect the amount of the VA pension plus the amount of the maintenance allowance specified in the approved State plan for the veterans' maintenance allowance.

C. Treatment of Veterans' Pensions Under Medicaid.--Pension payments made by the VA, to veterans residing in State veterans homes that also participate in Medicaid, in excess of \$90 a month (including payments made for aid and attendance and unreimbursed medical expenses) must be counted as income in the post-eligibility process. The provision applies only to a veteran without spouse or child and to a surviving childless spouse of a veteran.

Payments made by the VA up to \$90 per month are not counted as income in the post-eligibility computation for these veterans. Payments made by the VA in excess of \$90 per month, as well as, countable income from other sources is used in determining the veteran's liability toward the his/her cost of care. Income left over after amounts have been protected for the veteran's maintenance allowance and for remedial and other medical care is used to reduce Medicaid payments to the State veterans home for the veteran's cost of institutional care.

3708 POST-ELIGIBILITY TREATMENT OF CERTAIN DISABLED
INSTITUTIONALIZED INDIVIDUALS

Section 3 of the Employment Opportunities for Disabled Americans Act (P.L. 99-643) provides that if an individual is eligible for SSI under §1619(a) or §1619(b) of the Social Security Act (the Act) in the month before entering a public institution whose primary purpose is medical treatment (including mental institutions) or a Medicaid facility, the individual remains eligible for a Supplemental Security Income (SSI) benefit based on the full Federal benefit standard for up to 2 months. This additional receipt of regular SSI payments is intended for the recipient's use in meeting expenses outside the institution (e.g., maintaining his/her place of residence). This provision imposes a new State plan requirement by amending §1902 of the Act. A State plan must provide that any SSI benefits paid under §1611(e)(1)(E) of the Act must be disregarded for up to 2 months for purposes of determining the amount of any post-eligibility contribution by the individual to the cost of the care and services provided by the hospital, skilled nursing facility, or intermediate care facility.

3710 SPECIAL POST-ELIGIBILITY PROCESS FOR INSTITUTIONALIZED PERSONS WITH COMMUNITY SPOUSES

Use the policies described in this section in post-eligibility calculations for persons--

- o who are likely to be institutionalized in a medical institution and/or nursing facility for a continuous period;
- o who have a spouse living in the community; and
- o who live in one of the 50 States or the District of Columbia (i.e., these rules do not apply in the territories).

NOTE: YOU MAY APPLY THESE POLICIES TO PERSONS WHO ARE LIKELY TO RECEIVE SERVICES UNDER 1915(c) HOME AND COMMUNITY-BASED WAIVERS FOR A CONTINUOUS PERIOD. THUS, IF YOU ELECT THIS OPTION, PERSONS RECEIVING WAIVER SERVICES OR A COMBINATION OF INSTITUTIONAL AND WAIVER SERVICES ARE SUBJECT TO THESE RULES.

ALL REFERENCES TO INSTITUTIONALIZED SPOUSES AND CONTINUOUS PERIODS OF INSTITUTIONALIZATION INCLUDE SPOUSES WHO ARE RECEIVING HOME AND COMMUNITY-BASED WAIVER SERVICES WHEN YOU HAVE ELECTED TO APPLY THESE POLICIES TO SUCH PERSONS.

These rules apply even if they are inconsistent with other rules under the Medicaid statute. See §§3250-3253.6 for further description of eligibility rules governing persons subject to these special post-eligibility provisions.

These rules apply the first month of eligibility in an institution and cease the first full calendar month following changes in circumstances resulting in an institutional spouse no longer being in an institution or no longer having a community spouse.

3710.1 Definitions.--Use the following definitions for purposes of this section.

Spouse.--Person legally married to another under State law. Depending on State law, this definition may be more restrictive than that of the SSI program because the SSI program uses a definition of couples that is very close to the definition of a "common-law marriage" which is no longer recognized by most States.

Institutionalized Spouse.--Institutionalized spouses include spouses who are likely to reside in a medical institution and/or nursing facility for a continuous period of institutionalization.

Community Spouses.--Spouses who are not living in a medical institution or nursing facility.

Medical Institutions and Nursing Facilities.--Hospitals, skilled nursing facilities and intermediate care facilities (including ICF-MRs) facilities under 42 CFR §§435.1009,440.40 and 440.150. Effective October 1, 1990, the terms "skilled nursing facility"and "intermediate care facility" are replaced by the term "nursing facilities".

Continuous Period of Institutionalization.--At least 30 consecutive days of institutionalization in medical institutions and/or nursing facilities.

Pending publication of regulations defining when a continuous period of institutionalization ends, you must adopt a reasonable policy. Absences from an institution for 30 consecutive days or a full calendar month are reasonable criteria. Thirty days if the same criteria used for defining when institutionalization begins for purposes of §1924 and absence from an institution for a calendar month is the criteria used under the SSI program to define when a period of institutionalization ends.

Other Family Members.--Children who are minors or dependent, dependent parents and siblings of either member of a couple and who reside with community spouses.

Minors.--Pending publication of regulations, a reasonable definition is: Couples' minor children as defined under State law who live with a community spouse.

Dependent Children.--Pending publication of regulations, a reasonable definition is: Couples' children minor who live with a community spouse and who may be claimed as dependents by either member of a couple for tax purposes under the Internal Revenue Code (IRC) or any other reasonable definition of dependency which States submit as part of their plans and is approved by HCFA.

Dependent Parents.--Pending publication of regulations a reasonable definition is: Parents of either member of a couple (including parents by adoption) who reside with community spouses and who may be claimed as dependents by either spouse for tax purposes under IRC or any other reasonable definition of dependency which States submit as part of their plans and is approved by HCFA.

Dependent Siblings of a Couple.--Pending publication of regulations, a reasonable definition is: A brother or sister of either member of a couple (including half-brothers and half-sisters and siblings gained through adoption) who reside with community spouses and who may be claimed by either member of a married couple for tax purposes under IRC or any other reasonable definition of dependency which States submit as part of their plan and is approved by HCFA.

Federal Poverty Level.--Annual Federal Poverty Levels (FPL) computed by the Office of Management and Budget and published in the Federal Register.

Otherwise Available Income .--Income to which community spouses have access and control.

Gross Income.--Income which would be used to determine eligibility under your plan without benefit of income disregards used to determine eligibility.

Exceptional Circumstances Resulting in Extreme Financial Duress.--Pending publication of regulations, a reasonable definition is: Circumstances other than those taken into account in establishing maintenance standards for spouses. An example is incurment by community spouses for expenses for medical, remedial and other support services which contribute to the ability of such spouses to maintain themselves in the community and in amounts that they could not be expected to pay from amounts already recognized for maintenance and/or amounts held in resources.

Standard Maintenance Amount.--1/12 of the FPL for 2 persons x 122%. The later percentage is adjusted upward to 133%, July 1991 and to 150%, July 1992. Annual changes in FPL must be reflected the first day of the second quarter following publication of new levels in the Federal Register. For example, a new level published in February must be incorporated by July 1st of that same year.

Maintenance Needs Standards.--Income standards to which community spouses' and other family members' income is compared for purposes of determining the amount of allowances used in the post-eligibility calculation. Standards may be rounded up or down to the nearest dollar.

Monthly Income Allowances.--Amount deducted in the post-eligibility calculation for maintenance needs of community spouses and other family members. These allowances are based on the deficit (or a percentage of the deficit) remaining after spouses' and other family members' income is compared to appropriate maintenance needs standards. Allowances may be rounded to the nearest dollar.

Maximum Maintenance Standard.--Effective October 1, 1989 the maximum amount of the maintenance needs standard for community spouses is \$1500. It is increased for each calendar year after 1989 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.

3711. INCOME USED IN THE POST-ELIGIBILITY PROCESS

Determine couples' ownership in income using the following rules, irrespective of State laws governing community property or division of marital property.

A. Income from Non-Trust Property.--Unless institutionalized spouses establish by a preponderance of evidence (through the fair hearings process) that ownership in non-trust property is other than that prescribed below, use the following criteria to establish ownership in non-trust property.

o Consider available to each member of a couple, one-half of any income paid to both spouses.

o Consider income paid in the name of another party and both spouses, or one spouse, available to each spouse in proportion to each spouse's interest (or, one-half of the joint interest is considered available to each when payment is made to both spouses).

o Consider available to each member of a couple, one-half of any income which has no instrument establishing ownership.

B. Income from Trust Property.--Use usual plan methods and standards to evaluate income from trust property, except as provided below:

o Consider available to each member of a couple income from trust property in accordance with the specific terms of the trust.

o When a trust instrument is not specific as to couples' ownership interest in income, determine ownership as follows:

- Consider income paid to one spouse to be the income of that spouse.

- Consider available to each member of a couple one-half of income paid to both spouses.

- Consider income paid in the name of another party and both spouses, or one spouse, available to each spouse in proportion to each spouse's interest (or, one-half of the of the interest paid to both spouses when the trust does not specify each spouse's individual interest).

Determine the amount of income owned by other family members.

Total separately income owned by each member of a couple and each family member. Income computed for this purpose includes income which has been deducted in determining eligibility, or which would be deducted in determining eligibility for community spouses and other family members if they applied for Medicaid.

3712. MANDATORY DEDUCTIONS FROM INCOME

Deduct from the total income of an institutionalized spouse the following amounts:

- o A personal needs allowance of no less than \$30.
- o Community spousal monthly income allowances calculated in accordance with instructions contained in §3713, A. when made available to (or for the benefit of) a community spouse.
- o Family monthly income allowances calculated in accordance with instructions contained in §3713, B.
- o Subject to reasonable limits you impose consistent with §3701.3, incurred medical and remedial care expenses recognized under State law, not covered under the plan, and not subject to payment by a third party.

When allowances are not made available to (or for the benefit of) community spouses, do not deduct these allowances. Deduct allowances for other family members, irrespective of whether institutionalized spouses make their income available to such persons.

3713. MONTHLY INCOME ALLOWANCES FOR COMMUNITY SPOUSES AND OTHER FAMILY MEMBERS

Unless alternative methods described in subsection C. apply, use the following methods to calculate maintenance needs allowances.

A. Spousal Monthly Income Allowance.--Unless a spousal support order requires support in a greater amount, or a hearings officer has determined that a greater amount is needed because of exceptional circumstances resulting in extreme financial duress, deduct from community spouses' gross monthly income which is otherwise available the following amounts up to the maximum amount allowed:

- o A standard maintenance amount.
- o Excess shelter allowances for couples' principal residences when the following expenses exceed 30% of the standard maintenance amount. Except as noted below, excess shelter is calculated on actual expenses for --
 - rent;
 - mortgage (including interest and principal);
 - taxes and insurance;
 - any maintenance charge for a condominium or cooperative; and

- an amount for utilities, provided they are not part of the maintenance charge computed above. Utility expenses are calculated by using the standard deduction under the Food Stamp program that is appropriate to a couple's particular circumstance (or, at your option, actual utility expenses), unless such expenses are included as maintenance charges for condominiums or cooperatives. When utility expenses are included as part of a maintenance charge reduce the amount of actual expenses by the amount included in the maintenance charge.

When there is a deficit remaining after a community spouse's gross income is compared to the total standard computed above, the remaining deficit is the amount of the community spousal income allowance. When there is no deficit, there is no monthly spousal income allowance.

You may not use different standard maintenance amounts because of geographical areas.

EXAMPLE: The 1989 annual FPL for two persons is \$8,020. Actual shelter expenses are:

a) mortgage, taxes and insurance, \$437 per month and b) utilities, \$75 per month for a total actual shelter costs of \$512 per month. Thirty percent of the minimum maintenance needs standard is \$244. The community spouse's monthly gross income is \$800.

(FPL) for 2) (Divided by 12) (x 122)

$$\frac{(\$8,020)}{12} \div \$668.33 \times 122\% \div \$815.36$$

\$815 rounded to the nearest dollar is the minimum monthly maintenance need standard.

Total shelter costs of \$512 exceed \$244 which is 30% of \$815. So an excess shelter allowance of \$268 (\$512 total shelter costs - \$244 minimum shelter allowance based on 30% of minimum standard maintenance amount) is added to the the standard maintenance amount of \$815 for a revised maintenance need standard of \$1083.

The community spouse's monthly income is \$283 less than the maintenance needs standard. Therefore, the monthly income allowance used in the institutionalized spouse's post-eligibility calculation is \$283.

B. Other Family Members' Monthly Income Allowances.--Deduct for maintenance from each family member's income no less than an amount equal to one-third of any deficit remaining after gross income is applied to a family maintenance standard equal to the community spouses' standard maintenance amount.

EXAMPLE: A community spouse's dependent father has \$300 per month gross income. The minimum monthly standard maintenance amount is \$815.

Monthly income is \$515 less than the standard maintenance amount of \$815. One-third of \$515 is \$172 rounded to the nearest dollar. Therefore, \$172 is the minimum family monthly income allowance used in the post-eligibility calculation for the institutionalized spouse.

C. Alternative Methods for Computing Monthly Income Allowances for Spouses and other Family Members.--In lieu of the methods described above, you may use:

o standards equal to the greatest amounts which may be deducted under the formula outlined in subsection A. and B. above, or

o standard maintenance amounts greater than the amount computed in A. and B. and in the case of community spouses, an additional amount for excess shelter costs described in subsection A. provided the total maintenance need standard for community spouses does not exceed the maximum.

D. Option to Estimate Income of Institutionalized Spouses, Spousal and Family Monthly Income Allowances and Incurred Medical and Remedial Care Expenses.--Subject to periodic reconciliations of actual income, maintenance allowances and medical and remedial expenses, you may project any one or more of the following for a prospective period not to exceed six months:

o income institutionalized spouses expect to receive;

o spousal monthly income allowances based on standards, or shelter expenses spouses expect to incur, and income community spouses expect to receive;

o monthly income allowances for other family members based on income family members expect to receive; and

o medical and remedial care expenses expected to be incurred in the next six months based on a relationship to expenses incurred in the immediately preceding six months.

Projection is based on no more than six month periods. However, adjustments must be made sooner when there are significant changes in specific projected amounts. You must establish in your operating instructions and criteria for determining when significant changes occur. See §§3701.2 and 3701.3 for more detailed discussion of projections and reconciliations.

3714 NOTICE, HEARINGS AND APPEALS

3714.1 Required Notices.--Provide written notice to both spouses advising them--

- o of the amounts deducted for spousal monthly allowances used in post-eligibility calculations; and

- o of their rights to appeal:

- amounts deducted in those calculations; and

- determinations of ownership and availability of income.

3714.2 Hearings and Appeals.--Hearings and appeals must conform to 42 CFR §431 Subpart E.

When spousal maintenance allowances are based on amounts determined necessary by hearings officers to avoid extreme financial duress, you may:

- o have hearings officers grant greater amounts conditioned on the existence of exceptional circumstances determined to be the cause of extreme financial duress; or

- o request that hearings officers reopen and review cases in which you believe exceptional circumstances no longer exist; or

- o have hearings officers schedule future hearings to review individuals' circumstances to determine if financial duress still exist.

When hearings officers condition additional allowances based on the existence of the exceptional circumstances, it is your responsibility to monitor cases to assure that the exceptional circumstances continue to exist and that you make necessary adjustments in maintenance allowances when the special conditions no longer exist.