

SENIOR BULLETIN: MEDICAID

The effect of marital separation on Medicaid eligibility

Two people who are married ordinarily have a legal obligation to support each other.³ When one of them applies for Medicaid, the State recognizes the spousal support obligation by taking the other spouse's resources and income into account under certain circumstances. Divorce (effected by a "decree of dissolution of marriage" in Washington) ends a marriage, and so, ends Medicaid's consideration of a *former* spouse's resources or income. Similarly, a separation formalized by a judicial decree of legal separation ends the legal obligation for mutual support (except to the extent provided in the decree). This, in turn, ends the basis for Medicaid's consideration of a *legally separated* spouse's resources or income.⁴

When married couples separate, but do not formalize the separation by getting a court order, questions about the effect of their status on Medicaid eligibility sometimes arise. The combined income and resources of their marital unit after separation may sometimes be presumed to apply towards an individual spouse's Medicaid financial eligibility determination *unless* it is shown that the marriage is defunct. This bulletin discusses the treatment of income and resources of separated spouses for Medicaid purposes.

Non-institutional Medicaid

INCOME

When a married person⁵ applies for SSI-related Medicaid⁶ for non-institutional care (i.e., not for nursing home care or for services under COPES or similar programs), a portion of the income of the non-applicant spouse is presumed to be available to meet the needs of the applicant.⁷

This presumption arises when the non-applicant spouse:

- lives in the same household with the Medicaid applicant; and
- is not receiving SSI; and
- is either not related to SSI or is not applying for medical assistance; and

- is financially responsible for the Medicaid applicant.⁸

According to WAC 388-408-0055(2), “[m]arried persons, living together[,] are financially responsible for each other.” People who are married to, but legally separated from, each other are only financially responsible for each other to the extent that support obligations are contained in their decree of legal separation.⁹

For purposes of non-institutional Medicaid, the income of a spouse who is not living in the same household with an applicant is not counted as available to the applicant.¹⁰ The non-applicant spouse’s income is not counted beginning in the month following the month that the couple separated.¹¹

RESOURCES

Resources of a non-applicant spouse living with an applicant for or recipient of non-institutional Medicaid are generally considered available to the applicant or recipient.¹² (The basic resource limit of \$2,000 is increased to \$3,000 when the applicant or recipient is living with a spouse.) It is unclear whether individuals who are legally separated should be considered “spouses” if they continue to share a residence.

Resources of a non-applicant spouse living separately are not considered available to an applicant or recipient spouse.¹³

Institutional Medicaid

Different Medicaid rules apply to people receiving “institutional services,” that is, services in a nursing home or services under the COPES program or similar programs providing alternatives to nursing-home care. Except for the consideration of resources at the time of application, which is explained below, income or resources of a non-applicant spouse that would not count for purposes of the non-institutional programs would also not count for purposes of institutional Medicaid. In addition, there are some special protections for spousal income and resources in the institutional Medicaid context. (These are explained in detail in the Columbia Legal Services pamphlets “Questions and Answers on Medicaid for Nursing Home Residents” and “Questions and Answers on the COPES Program.” Both are available on the Internet at www.washingtonlawhelp.org. Select “Aging/Elder Law,” and then “long-term care assistance.”

INCOME

For purposes of determining eligibility for institutional services, the income of an applicant's spouse is generally not taken into account. So, marital status is not significant for this purpose.¹⁴

Under certain circumstances, the spouse of an individual receiving institutional Medicaid benefits may be entitled to an allocation from the Medicaid recipient's income, sometimes referred to as a "spousal allowance." The spouse's income will be taken into account in determining whether and how much of a spousal allowance he or she will receive.¹⁵

RESOURCES

At the time of a married person's application for institutional Medicaid services, all resources belonging to either spouse, whether separate or community, are ordinarily taken into account, and must not exceed established resource limits.¹⁶ This approach is based on the assumption that all such resources are available for the support of the applicant spouse. If the applicant is legally separated from his or her spouse, then the extent of resource availability must be determined by reference to the decree of legal separation. Resources that have been allocated by court order to the non-applicant spouse are no longer available to the legally-separated applicant spouse, and may no longer be counted in determining Medicaid eligibility.

If a married applicant is separated from his or her spouse, but there is no decree of legal separation, the question of whether resources held by the other spouse are available to the applicant spouse is more complicated. The mere fact of physical separation when one spouse enters a hospital or nursing home, for example, does not affect the availability of resources as between the spouses. If a marriage is defunct, however, and the applicant spouse cannot, as a practical matter, gain access to the resources held by the other spouse, those resources are not available to the applicant spouse and should not be considered in connection with an eligibility determination.

The Department's regulation about availability of resources appears at WAC 388-475-0250.¹⁷ It specifies in subsection (4) that a "client may provide evidence showing that a resource is unavailable. A resource is not counted if a client shows sufficient evidence that the resource is unavailable."

If the whereabouts of the non-applicant spouse are known, and there has been no judicial decree of legal separation, an applicant spouse might be entitled to sue the absent spouse to obtain a share of the property held by him or her. However, the applicant could not be required to bring a lawsuit at his or her own expense as a condition of obtaining Medicaid eligibility.¹⁸ An applicant who is separated from a spouse might opt for giving the Department a statement assigning to the State any right he or she might have to support from the other spouse. Under federal law, such an assignment would prevent resources held by the other spouse from being considered as a basis for deeming the applicant ineligible for Medicaid.¹⁹

Endnotes:

¹ This updates a bulletin issued in September 2002.

² Joy Ann von Wahlde is an attorney with the Northwest Justice Project.

³ RCW 26.16.205.

⁴ Legal separation, like dissolution of a marriage, is authorized by RCW 26.09.030 when a marriage is “irretrievably broken.” It is an option that accommodates the religious beliefs of those who are opposed to divorce, provided that both spouses agree. The statute mandates that when a petitioner otherwise entitled to a decree of dissolution requests a decree of legal separation instead, “the court shall enter the decree in that form unless the other party objects” RCW 26.09.030(4). While it does not dissolve a marriage, a decree of legal separation signals the end of a marital community. As the Washington Supreme Court has explained, “[t]he law distinguishes between a ‘marital’ and a ‘community’ relationship, the latter concept encompassing more than mere satisfaction of the legal requirements of a marriage. It is the fact of community that gives rise to the community property statute; when there is no ‘community,’ there can be no community property.” *Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 372 (1988). The court in the *Aetna Life* case – in which a legal separation petition had been filed, but no decree had been issued – found the marriage of the parties to be “defunct,” so that the surviving wife had no interest in the proceeds of an insurance policy on the life of her late husband.

⁵ DSHS defines “legally married” persons as persons who are “legally married to each other under provision of Washington state law. Washington recognizes other states’ legal and common-law marriages. Persons are considered married if they are not divorced, even when they are physically or legally separated.” WAC 388-513-1301.

⁶ The notion “SSI related” is explained in WAC 388-511-1105. In general, it refers to an individual who is 65 or older or who meets the SSI disability criteria.

⁷ When determining income eligibility for a legally married Medicaid applicant whose spouse is ineligible, DSHS considers the applicant’s available income to include one-half

of the total income received in the names of both spouses. WAC 388-513-1330(2)(c).

⁸ WAC 388-408-0055(2)

⁹ Consequently, the broad language in WAC 388-408-0055(1)(a) (“Married persons, living together, are financially responsible for each other”) should not be interpreted to apply to legally separated people who live in the same residence but are not living together as husband and wife. Otherwise the regulation would exceed the Department’s authority, since it does not have authority to supercede the order of a court in a legal separation proceeding.

¹⁰ WAC 388-506-0620(2) (“The department shall consider the income and resources of spouses as available to each other through the month in which the spouses stopped living together. See WAC [388-513-1330](#) and [388-513-1350](#) when a spouse is institutionalized.”); *See also* 20 C.F.R. § 416.1163.

¹¹ WAC 388-506-0620(2). *See also* 20 C.F.R. § 416.1163(f)(2) and POMS SI 01320.450.

¹² This follows from the proposition that “[m]arried persons, living together, are financially responsible for each other.” 388-408-0055(2). [find where this explanatory material has gone.]

¹³ See Social Security Administration Program Operations Manual System (POMS) Section SI 01110.530.

¹⁴ This statement requires qualification in one respect in connection with the COPES program. It is true that the COPES eligibility of a married applicant will not be affected by a spouse’s income if the applicant’s income does not exceed 300% of the federal Supplemental Security Income benefit rate (\$1,635 in 2002). If the applicant receives income in his or her name that is more than 300% of the FBR, however, the spouse’s income may be relevant. In such a case, there is an alternative option for establishing eligibility. Under WAC 388-513-1330(4), eligibility may be established by combining all income of both spouses and dividing by 2. If the result is not more than 300% of the FBR, then the applicant’s income will be deemed not to exceed 300% of the FBR.

¹⁵ For an explanation of the spousal allowance allocation, see Columbia Legal Services pamphlets “Questions and Answers on Medicaid for Nursing Home Residents” and “Questions and Answers on the COPES Program.” Both are available on the Internet at www.washingtonlawhelp.org. Select “Aging/Elder Law,” and then “long-term care assistance.”

¹⁶ These resource limits are explained in the pamphlets cited in the previous endnote.

¹⁷ WAC 388-475-0250 provides as follows: “SSI-related medical – Ownership and availability of resources.

(1) Personal or real property is available to the client if the client, client's spouse or other financially responsible person:

- (a) Owns the property;
- (b) Has the authority to convert the property into cash;
- (c) Can expect to convert the property to cash within twenty working days; and
- (d) May legally use the property for his/her support.

(2) A resource is considered available on the first day of the month following the month of receipt unless a rule about a specific type of resource provides for a different time period.

(3) A resource, which ordinarily cannot be converted to cash within twenty working days, is considered unavailable as long as a reasonable effort is being made to convert the resource to cash.

(4) A client may provide evidence showing that a resource is unavailable. A resource is not counted if a client shows sufficient evidence that the resource is unavailable.

(5) We do not count the resources of victims of family violence, as defined in WAC 388-452-0010, when:

- (a) The resource is owned jointly with members of the former household;
 - (b) Availability of the resource depends on an agreement of the joint owner; or
 - (c) Making the resource available would place the client at risk of harm.
- (6) The value of a resource is its fair market value minus encumbrances.

(7) Refer to WAC 388-470-0060 to consider additional resources when an alien has a sponsor.

¹⁸ In its clarifying information under WAC 388-475-0250 in the DSHS Eligibility A-Z Manual, the Department offers the following example: "A separated couple may own a piece of property, which the non-applying spouse refuses to sell, making the resource unavailable to the applying spouse."

¹⁹ See 42 U.S.C. § 1396r-5(c)(3); *Morenz v. Wilson-Coker*, 415 F.3d 230 (2d Cir. 2005). The statement might read as follows: "I assign to the State of Washington any rights to support that I may have from [name of other spouse]." It would allow the State to take legal action against the other spouse for support. Because there is no explicit reference in Washington's regulations to the assignment provision of 42 U.S.C. § 1396r-5(c)(3), DSHS staff members may well be unfamiliar with it and some explanation may be needed.