IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JO CAROL ALFORD	**APPELLANT**
V.	**NO. 2008-CA-01984**
ARTHUR RANDALL ALFORD and the DIVISION OF MEDICAID	**APPELLEES**

BRIEF OF JO CAROL ALFORD, APPELLANT

ORAL ARGUMENT IS REQUESTED

On Appeal from the Madison County Chancery Court, Canton, Mississippi
Cause no. 2008-993-B
The Honorable Cynthia L. Brewer Presiding

Respectfully Submitted,

Ronald C. Morton (MS Bar no. [redacted]
A. Elizabeth Whitaker (MS Bar no. [redacted]
Morton Law Firm, PLLC
132 Fairmont St.
Suite A
Clinton, MS 39056
601.925.9797

COUNSEL FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal:

1. Jo Carol Alford;
2. Estate of Arthur Randall Alford, Deceased;
3. Ronald C. Morton and A. Elizabeth Whitaker of the Morton Law Firm, PLLC of Clinton, Mississippi;
4. William B. Howell, III and R. Scanlon Fraley of William B. Howell, Ltd. of Ridgeland, Mississippi;
5. William H. Mounger of the Office of the Attorney General for the Division of Medicaid; and
6. Honorable Cynthia L. Brewer, Madison County Chancery Court Judge

Respectfully submitted, this, the 12th day of May, 2009.

Ronald C. Morton, MS Bar no. 9415

Morton Law Firm, PLLC
132 Fairmont St.
Suite A
Clinton, MS 39056
601.925.9797

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STATEMENT OF THE CASE

A. Nature of the Case

The Division of Medicaid in Mississippi provides medical assistance for public benefit recipients and other low income persons. An individual who is aged 65 or older, blind or disabled will be eligible for Medicaid in a skilled nursing facility or intermediate care facility if the individual falls below certain resource and income limitations. R. at 3. An individual may own non-exempt resources of no greater than $4,000 in order to establish Medicaid eligibility. R. at 3.

However, where an applicant is married, the non-institutionalized spouse is entitled to retain resources in excess of this limit. The Federal Medicaid law enacted in 1988, the Medicare Catastrophic Coverage Act (MCCA), was intended to prevent "spousal impoverishment"—that is, to eliminate the requirement that a married couple spend down all of their joint countable assets on the institutionalized spouse's nursing home care before the ill spouse is eligible for Medicaid benefits. Congress permits an increased sum of the Husband and Wife's total resources may be retained for the benefit of the community spouse. R. at 4. This set aside is called the Community Spouse Resource Allowance (CSRA). R. at 4. In 2009, this allowance is set at $109,560, and changes annually. The community spouse is allowed to retain non-exempt assets valued not in excess of the CSRA without disqualifying the institutionalized spouse

from benefits. The couple's remaining non-exempt resources will serve to disqualify the institutionalized spouse from Medicaid benefits. R. at 4.

Additionally, the community spouse is also permitted to retain income of the institutionalized spouse up to a maximum of $2,739 per month in 2009. This transfer of income to the Community Spouse is called the Minimum Monthly Maintenance Needs Allowance ("MMNA"), and is also designed to prevent spousal impoverishment of the Community Spouse. 42 U.S.C. § 1396r—5 (c) The MMNA spousal allowance is reduced by the Community Spouse's own income. 42 U.S.C. § 1396r—5 (c)(3). The MMNA and CSRA are designed to prevent spousal impoverishment of the Community Spouse, and in Mississippi, each are set to the maximum amount permitted under Federal law, unless increased by a court Order of Support. R. at 4; Mississippi Division of Medicaid, Medicaid Eligibility Manual, Vol. III, Section I, 9210; 42 U.S.C. § 1396r—5 (c), (f); See App. 56.

B. Course of the Proceedings and Disposition of Case in the Trial Court

Federal law provides for an increase of these limits by court order where a community spouse cannot be adequately provided for by the statutory allowance. 42 U.S.C. 1396r—5 (West current through 2008). In the instant case, Jo Carol Alford ("Appellant" or "Wife"), a relatively young spouse, age 58, found herself in exactly that circumstance and petitioned the trial court for an increase in both the MMNA and CSRA on the basis of 42 U.S.C. 1396r—5. Upon hearing this important case of first

impression in Mississippi, the Chancellor wrongly determined she did not have subject matter jurisdiction to increase the CSRA or the MMNA under Federal law. R. at 52-53; Trial Tr. 41-42. However, she did order a partial transfer of assets to Wife under the domestic relations laws of the state of Mississippi. R. at 52-53.

C. Statement of the Facts

In December of 2007, Arthur Randall Alford ("Husband") and Wife traveled from Maine to Madison County, Mississippi to visit family for Christmas. Trial Tr. 11:15-20. Husband had been previously diagnosed with Multiple Sclerosis in 1986, but his condition was manageable. Trial Tr. 11:16. However, during the visit, Husband's health began rapidly "spiraling downward" and he lost his ability to travel. Trial Tr. 12:11-12. Because of a blood clot in his thigh in January of 2008, Husband lost his ability to walk. Trial Tr. 12:12-13. After each new problem, he was placed in Methodist Rehab to regain strength, and then something else would happen causing a transfer back to St. Dominic's. Trial Tr. 12. In a matter of a few months, Husband suffered through a severe staff infection, bladder infection and hydrocephalus. Trial Tr. 12.

In September of 2008, Husband's condition had reached a point that placement of Husband in a skilled nursing facility was inevitable and paying for that care became paramount. R. at 13. Wife was 58 years old at the beginning of this proceeding and as a housewife, was essentially unemployed for almost twenty (20) years. R. at 1; Trial Tr. 11-12. Further, she had various medical problems of her own making it difficult for her

to sit for any appreciable period of time. Trial Tr. 14:25 to 15:12. For those reasons, the likelihood of Wife gaining meaningful employment to support herself was low.

Likewise, Wife was completely dependent on her husband, the family's sole income producer, to provide for their well-being. Trial Tr. 14:16-18. The couple owned approximately $679,000 in countable and non-countable assets, and Husband received $4,300 per month in Social Security Disability and University of Maine Disability. Exhibit 1 to Trial Tr. The couples' ordinary expenses totaled $5,112.50 without the added expenses of around the clock care or nursing home expenses which Medicaid estimates average over $4,600 per month. Mississippi Division of Medicaid Manual, Vol. III, Section F, 6337. As such, without Husband being placed on public benefits to assist with the costs of his medical care, the couple would have been completely destitute, possibly as early as 2011. Exhibit 7 to Trial Tr. Wife's life expectancy is approximately twenty-five (25) years; thus, leaving her with the very real prospect of the last twenty-three (23) years of life completely destitute. R. at 7.

For this reason, Wife petitioned the Chancery Court of Madison County to enter an Order of Support transferring certain assets and income of Husband to her as an increase in the CSRA and MMNA. R. at 1. At the time of the trial, both Wife and Husband met the requirements to be considered "community spouse" and "institutionalized spouse", respectively within the meaning of the statute. R. at 2. Husband had been residing in a hospital for more than thirty (30) days which qualified

him as an "institutionalized spouse" under the MCCA, and thus, be able to apply for public benefits. R. at 2. Wife was a spouse that was not institutionalized, making her a Community Spouse. R. at 2.

The trial proceeding was an adversarial action filed by Wife against Husband with both sides represented by separate counsel. Additionally, the Division of Medicaid was named as an interested party out of an abundance of caution.[1] The court heard evidence of the Husband's tragic circumstances, as well as Wife's bleak financial outlook.

Multiple scenarios were presented to the Court through expert testimony regarding the financial situation of the Wife. Trial Tr. 23:14-32:39. The uncontroverted testimony at trial of this matter revealed that, while currently having a joint $679,000 net worth, that the admission of husband to the nursing home under private pay status while limiting the community spouse's retained assets and income at the federally permitted default values would result in dire circumstances for wife. Specifically, the testimony of a certified public accountant serving as an expert calculated at that, depending upon the actions of the court in increasing the CSRA or the MMNA, that wife could run out of funds as early as 2011. Trial Ex. 7; Tr. act 32. Indeed, even his best projections which assumed that the wife would receive all of the relief she was seeking,

[1] The Tennessee Attorney General has opined the Division of Medicaid of that state is not required to be named as a party in such actions; however, Mississippi has no such opinions and this appears to be a case of first impression on this issue in Mississippi.

resulted in her exhaustion of funds by 2022. While the default provisions of the Federal Medicaid law are intended and designed to avoid spousal impoverishment, they are most frequently used in cases where the community spouse is a person in their 70s or 80s, married to a person of like age, and as such would have a reduced spending habits due to their frailty and advanced age, and a limited life expectancy. This typical community spouse would be well protected from impoverishment by the $109,560 currently permitted by the state. However, the Wife in this case does not fit this mold. She is a young 58-year-old housewife who suffers from significant health issues of her own, and has no recent work history or job experience, and therefore limited income prospects, due to their family decision that she remain a housewife. For such an individual in the prime of her life, and with an anticipated life expectancy of another 25 years, the default $109,560 spousal impoverishment allocation is woefully inadequate. Trial Ex. 2 through 7; Tr. 23 through 33. It is precisely this type of atypical circumstance that Congress sought to address by providing the remedy of an increased MMNA and/or CSRA by court order.

Upon hearing the evidence, the Court, while sympathetic to wife's circumstances, concluded that 42 U.S.C. §1396r—5 did not give it subject matter jurisdiction to increase the MMMNA or CSRA. However, the Court did grant Wife other relief under Mississippi's domestic relations laws, and awarded Wife a support transfer of the retirement accounts in the form of a QDRO order as a result of

Husband's absence from the marital home at no fault of Wife. Husband did not oppose this ruling or appeal this decision. During the trial court proceedings, Husband never objected to the Petition of Wife to transfer assets or increase the CSRA and the MMNA. Trial Tr. 35:12.

On or about February 9, 2009, Husband passed away. Wife, in her capacity as Executrix, was substituted as one of the Appellees in this matter.

STANDARD OF REVIEW

Conclusions of law by a Chancellor are to be reviewed *de novo,* and the trial court's holdings and interpretation of law will not be disturbed unless "the chancellor erroneously interpreted or applied the law". *Gannett River States Pub. Co., Inc. v. Entergy Mississippi, Inc.*, 940 So.2d 221 (Miss. 2006) citing *Gannett River States Publ'g Corp. v. City of Jackson*, 866 So.2d 462, 465 (Miss.2004) (citing *Bank of Miss. v. Hollingsworth*, 609 So.2d 422, 424 (Miss.1992)). In the instant case, the facts as presented are undisputed. The sole issue is whether the Chancellor erred in her conclusion that she lacked subject matter jurisdiction under 42 U.S.C. 1396r—5 to increase the MMNA and/or CSRA through entry of an Order of Support. This legal conclusion should be reviewed by this Court *de novo.*

SUMMARY OF THE ARGUMENT

The MCCA provides for two methods by which a Community Spouse may retain resources above the federal maximum or retain a portion or all of the institutionalized spouse's income above the federal maximum amounts: (1) by and through a fair administrative hearing or (2) through a judicial method.

In the instant case, the trial court failed to find subject matter jurisdiction under the MCCA to increase resources Wife could retain upon Husband's application for Medicaid benefits. Wife asserts that the specific language in the MCCA as well as the interpretation of various state courts and federal agencies indicates that a Mississippi trial court does have jurisdiction solely on the basis of the MCCA.

The Mississippi Division of Medicaid, however, wrongfully interprets the MCCA to mean that the only available option to increase the amount of resources and income held by the Community Spouse is through the administrative fair hearing method. The agency relies on an Arkansas Supreme Court case which is highly distinguishable from the case at bar. Wife asserts that the Mississippi Division of Medicaid regulations are so different from that of Arkansas's that the case cannot be applicable, and as such, the exhaustion of administrative remedies should be inapplicable.

In the instant case, there are no administrative remedies available because the Mississippi Medicaid regulations do not allow the Division to increase the amount of resources retained by the Community Spouse above the federal maximum without a

court order. Accordingly, pursuit of non-existent administrative remedies would be futile and as such, the "exhaustion doctrine" does not apply. It would only serve to delay the matter going before the Chancery Court, which is the same Court that could rule on the matter initially under the MCCA.

Therefore, the trial court erred in failing to find subject matter jurisdiction in the instant case on the sole basis of the MCCA.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT 42 U.S.C. §1396R–5 DID NOT GIVE IT SUBJECT MATTER JURISDICTION TO INCREASE THE COMMUNITY SPOUSE RESOURCE ALLOWANCE AND/OR THE MINIMUM MONTHLY MAINTENANCE NEEDS ALLOWANCE THROUGH A SUPPORT ORDER.

The Medicare Catastrophic Coverage Act (hereinafter referred to as the "MCCA") was developed to prevent community spouses from becoming destitute in order for their spouse to qualify for public benefits. The law sets minimum CSRA and MMNA figures, and for cases where there defaults are inadequate, provides method of obtaining additional relief. Courts in at least two other jurisdictions as well as the federal agency charged with Medicaid oversight have concluded that there are two alternative methods for obtaining an increase in the amount of income and resources under MCCA to which a community spouse is entitled. *Blumberg v. TN Dep't of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000); *M.E.F. v. A.B.F.*, 925 A.2d 12 (N.J. Super. A.D. 2007); See also App. 15-32.

The first method is through a fair Medicaid hearing which occurs after application for Medicaid has been made and a determination of eligibility has been issued. *Blumberg v. TN Dep't of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000). If the institutionalized spouse is denied due to excess marital resources and the community spouse wishes to increase the Community Spouse Income Allowance

("CSIA"), MMNA or CSRA, then they can take an administrative appeal to a Medicaid hearing officer, known as a Medicaid "fair hearing". *Blumberg v. TN Dep't of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000). If they are dissatisfied with that result, then an appeal may be taken to a court of proper jurisdiction where the standard of review is much higher and review is more limited. *Blumberg v. TN Dep't of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000); Tenn. Op. Att'y Gen. No. 08-31, 2008 WL 509075 (Tenn. Att'y Gen. 2008); See also App. 15-19, 85-90. Once an applicant begins the administrative review process through making application, the parties must exhaust all administrative remedies prior to a judicial proceeding unless an exception to the exhaustion doctrine applies. See Section II.

The second method is a pre-application judicial proceeding in which a prospective applicant first seeks judicial determination of a permitted asset division, prior to applying for benefits. *Blumberg v. TN Dep't of Human Services*, 2000 WL 1586454 (Tenn. Ct. App. 2000). "Either spouse may ask a Court to enter an Order specifying the monthly income required for support of the community spouse" or for a transfer of assets pursuant to the MCCA. Tenn. Op. Att'y Gen. No. 08-31, 2008 WL 509075, 3 (Tenn. Att'y Gen. 2008); See also App. 85. It is this second pre-application judicial relief that Wife sought in the instant case. Authority for this method is founded in the clear unambiguous language of the federal statutes. 42 U.S.C. 1396r–5 (West current through 2008). Further, Congress unequivocally stated that a separate judicial remedy existed

for cases analogous to the instant action. House Committee Report, 1988 U.S.C.C.A.N. 857 (1987); See App. 51. Courts and secondary authorities throughout the country have found such a dual track to relief to exists. Yet despite abundant authority to the contrary, the trial court failed to find subject matter jurisdiction based on this judicial remedy, and it is this sole finding that Wife now appeals.

A. The unambiguous language in the MCCA provides authority for a state court to increase the CSRA and/or the MMNA through an Order of Support entered against an Institutionalized Spouse.

The federal statutes relied upon by wife specifically provide that

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

42 U.S.C. § 1396r–5 (d)(5) (West current through 2008) (emphasis added).

The statutes further provide:

> [i]f a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse ...

42 U.S.C. § 1396r–5 (f)(3) (West current through 2008) (emphasis added). Both statutes indicate that the court order must be entered prior to the Medicaid application by their use of the past tense language found directly in the statute. The Division of Medicaid asked the trial court, and undoubtedly, will ask this Court to read "has entered" to

really mean "will enter after application for Medicaid and exhaustion of all administrative remedies." The law already addresses specifically the administrative fair hearing process in 42 U.S.C. 1396r—5(e). What the code refers to in these provisions is something different that pre-dates the application itself, and is not simply a later part of the administrative appeal process as asserted by Medicaid. Such a reading is contrary to the express language of federal law. Additionally, the statutes governing the fair hearing process refer back to these specific statutes to determine how an increase may be made if one is awarded in the fair hearing process which indicates that the fair hearing method should be considered separately from the judicial court order method. 42 U.S.C. § 1396r–5(e) (West current through 2008). Under the fair hearing option, "if the institutionalized spouse or the community spouse is dissatisfied with a determination of (1) the CSIA [...]" then "spouse is entitled to a fair hearing described in 1396a(a)(3). 42 U.S.C. § 1396r–5(e) (West current through 2008). However, the statute separately provides in 42 U.S.C. 1396r—5 (d)(5) that the amount cannot be less than a previously entered court order thus rendering two separate options. 42 U.S.C. § 1396r–5(d)(5) (West current through 2008).

The importance of this verb tense has been recognized by other courts. The New Jersey Superior Court Appellate Division specifically held that "the use of the past tense in the court ordered support provisions" in the Federal statute does not allow a community spouse such as M.E.F. to "seek such an order, not having previously

obtained one." *M.E.F. v. A.B.F.*, 925 A.2d 12, 18 (N.J. Super. A.D. 2007). In that case, M.E.F., the community spouse, filed an action to increase her MMNA after the institutionalized spouse was already receiving Medicaid benefits. *M.E.F. v. A.B.F.*, 925 A.2d 12 (N.J. Super. A.D. 2007). The New Jersey Superior Court ultimately determined that once the administrative process began with the initial application for Medicaid, the community spouse was barred from to taking advantage of the court ordered relief without first exhausting all administrative remedies of a fair Medicaid hearing. *M.E.F. v. A.B.F.*, 925 A.2d 12 (N.J. Super. A.D. 2007). Implicit in the New Jersey decision is the fact that federal law gave M.E.F. a choice between (a) court determination and (b) administrative remedy. It was only because M.E.F. chose path (b) that she was subsequently denied a remedy under path (a). However, where, as in this case, a party elects to obtain a court order prior to making application for benefits, the Court, and not the Division of Medicaid, has jurisdiction to make the increase determination.

B. Federal agencies recognize a separate method of increasing the CSRA and/or the MMNA through a Judicial Method under 42 U.S.C. 1396r—5.

The Centers for Medicaid and Medicare services ("CMS"), a division of the Department of Health and Human Services, is the federal department responsible for the oversight and administration of the Medicaid system in this country. The CMS specifically interprets 42 U.S.C. 1396r—5 to include a separate judicial method of

determining the amount of countable assets a Community Spouse is able to retain. According to CMS, the "Protected Resource Amount" (PRA):

> is the greatest of: (1) the spousal Share, up to a maximum of $109,560 in 2009; (2) the state spousal resource standard, which a state can set at any amount between $21,912 and $109,560 in 2009; (3) an amount transferred to the community spouse for her/his support as directed by court order; (4) or an amount designated by a state hearing officer to raise the community spouse's protected resources up to the minimum monthly maintenance needs standard.

See Centers for Medicare & Medicaid Services, Spousal Impoverishment, App. 71 (emphasis added). Further, the State Medicaid manual published by CMS, a model eligibility manual to assist states in drafting their own regulations that do not conflict with Federal law, also provides that "unless a spousal order requires support in a greater amount", the income the spouse is able to keep will match the standard amounts. State Medicaid Manual, § 3713.A; See App. 68. Further, the State Medicaid Manual provides that "in no instance is the protected amount lower than an amount ordered by a court of competent jurisdiction." State Medicaid Manual, § 3260.1; See App. 93.

Further, the Department of Health and Human Services issued a publication in April of 2005 also indicated the judicial remedy was an entirely separate option from the "fair hearing" administrative remedy. Specifically, "Medicaid rules provide three pathways for the community spouse to receive a larger MMNA" and those methods are listed as follows: (1) it may be raised by those community spouses who show that they

have "exceptional housing costs", (2) after a state Medicaid hearing finding extreme financial hardship, and (3) the community spouse "may seek a court order for additional support." Spouses of Medicaid Long-Term Care Recipients, Dep't of Health & Human Services, Policy Brief #3, 4-5; See App. 76-77. This publication further provided the following regarding resources:

> The community spouse may be able to retain more than the maximum protected amount by: (1) obtaining a court for more; (2) requesting a hearing to petition for an amount sufficient to generate income consistent with Medicaid income protection guidelines for spouses [...]

Spouses of Medicaid Long-Term Care Recipients, Dep't of Health & Human Services, Policy Brief #3, 6; See App. 78.

While these regulations are not binding on Mississippi state courts, they certainly make clear that the Federal agency that is exclusively charged with the oversight of the Medicaid program in all fifty (50) states recognizes the existence of dual remedies from the pre-set MMNA and CSRA amounts – (a) a Court remedy and (b) an administrative remedy. CMS clearly recognizes that a Court order is one means to increase the CSRA or MMNA amounts that a community spouse is able to retain for self-support.

C. The Mississippi Division of Medicaid's Regulations confer an independent basis of jurisdiction to the Mississippi state courts to increase the Community Spouse Resource Allowance and/or the Monthly Maintenance Needs Allowance.

Eligibility for Medicaid in Mississippi is governed by the Medicaid Eligibility Manual, Volume III. With respect to the issues before this Court, Mississippi's manual provides as follows:

> In order for a community spouse to receive a share larger than the federal maximum, a court order would be required granting the community spouse a greater share of total resources after Medicaid has made a decision regarding spousal shares.

Mississippi division of Medicaid Eligibility Manual, Section I, Page 9210; See App. 56-60. This regulation confers an independent basis of jurisdiction to Mississippi trial courts to increase the CSRA or MMNA. In fact, the Mississippi Division of Medicaid does not even allow itself to increase the spousal share of the countable assets above the federal maximum. See App. 56-60. The only method for a Mississippi applicant, to increase the spousal share above the federal maximum under the Manual is to obtain an order of support from a court. Not only do the Mississippi Division of Medicaid's own regulations recognize the ability of a court order to increase the CSRA/MMNA, they are required to do so by federal law. Where the Division of Medicaid errs is its insistence that the court order can only be obtained after a decision has been made by Medicaid. Neither party disagrees that a Court order can increase the CSRA and MMNA. The objection raised by the Division of Medicaid is over "when" a court can make such an order. The state's policy and regulations cannot be inconsistent with Federal law. Federal law makes clear, not only that court orders can increase the spousal support,

but also that it is anticipated that these court orders will be in place prior to an application for benefits or administrative appeal. The only way to accomplish this is through a separate pre-application filing.

The Division of Medicaid points out that other jurisdictions, such as Arkansas, have held that raising the spousal share through a court order is not a separate method from the administrative remedy. *AR Dep't of Health and Human Services v. Honorable Vann Smith,* 262 S.W.3d 167 (Ark. 2007); See App. 5. Wife asserts that the Arkansas Court is incorrect on this point, and contrary to the holdings of better reasoned opinions on this issue. *Blumberg v. TN Dep't of Human Services,* 2000 WL 1586454 (Tenn. Ct. App. 2000); *M.E.F. v. A.B.F.,* 925 A.2d 12 (N.J. Super. A.D. 2007); See also App. 15-32. Additionally, the Arkansas case is interpreting the law under a very different set of regulations than apply in Mississippi. The Medicaid regulations in Arkansas permit the spousal share to be increased above the federal maximum through a fair Medicaid hearing as well as by court order. See App. 61-67. Read in that light, the Arkansas Supreme Court's ruling is understandable. In other words, the courts in Arkansas have said that since an individual can get an increase through the administrative process, we as a matter of judicial efficiency are going to require that Plaintiffs seek that remedy from the Department of Medicaid first, before going to court and asking for that relief.

In Mississippi, such administrative relief is not permitted because the Division of Medicaid cannot award the Community Spouse "a share larger than the federal

maximum" without a court order. Mississippi Division of Medicaid Eligibility Manual, Volume III, Section I, 9210; See App. 56-60. Yet, the Mississippi Division of Medicaid's position is that Husband and Wife must have first filed for Medicaid benefits and asked Medicaid for an increase which Medicaid by its own regulations, does not have the power to give. Upon denial of the request for increase, Medicaid would then have the applicant appeal the decision to a local "fair hearing" and then to a "state hearing" before Medicaid hearing officers who do not have authority under the state regulations to grant an increase. It is only then, after exhaustion of pursuit of a remedy that the agency does not have the power to grant, that the applicant could appeal to a court for an increase to the CSRA and/or MMNA, to be reviewed by the Chancery Court under an "arbitrary and capricious" standard. *PERS v. Ross*, 829 So. 2d 1238 (Miss. 2002); Miss. Bureau of Narcotics v. Stacy, 817 So. 2d 523 (Miss. 2002). Such a standard could never be met, since a hearing office who denied relief that it did not have the power to grant could only act arbitrarily if they actually granted the relief. The Arkansas court reached its ruling under a far different set of regulations than those present in Mississippi, and as such, is not a valid basis to deny relief in this case. In Arkansas, the plaintiff had another method of obtaining an increase. In Mississippi, no path to relief other than a court order of support exists.

In addition to the considerable difference between the remedies available between the two states, the Arkansas case failed to recognize the importance of the past

tense contained in the federal law. The court's reading of the statute was not based on any recognized rules of statutory interpretation. This Court's interpretation of the language is even more critical, not only because the past tense is contained in both the federal statute and the state's own regulations, but also because to rule otherwise renders the "court order" exception meaningless in both. Without the ability to obtain a court order prior to filing, a Mississippi applicant will effectively be denied the ability to obtain any spousal support increase at all. Therefore, this Court should not apply the Arkansas Supreme Court's reasoning to the case at bar because of the differences in the state regulations being interpreted.

D. The legislative intent and purpose of the MCCA is to prevent Spousal Impoverishment.

The original purpose of the MCCA was to "end spousal impoverishment" and "assure that the community spouse in these circumstances has income and resources sufficient to live with independence and dignity." *M.E.F*, 925 A.2d at 18 (citing 1988 U.S.C.C.A.N. 857, 892 (1987)); See App. 26, 51-55. Additionally, the Committee of the House of Representatives noted "'that there will be some instances in which the rules set forth in the bill do not take adequate account of the special circumstances affected a particular spouse. The Bill therefore provides, that if a court has entered an order'" for monthly income or transfer of resources for support of the community spouse such order may be complied with "'without running afoul of the transfer of assets

prohibition'". *M.E.F*, 925 A.2d at 18 (citing 1988 at 895-896); See App. 26, 51-55. Accordingly, an order for support is exactly what is required in the instant case and precisely the reason that Congress gave the courts the pre-application authority to order the increase. The legislative intent was to provide for situations outside of the state administrative rules which is why the "court ordered" provisions remain in the federal statutes. The Chancery Courts of this state have the explicit authority under the language and the legislative intent of the statute to provide for the relief requested herein just as they have enforcement authority in any number of other Federal statutes, such as HIPAA, Federal Drug and Cosmetic Act, Fair Debt Collection Practices Act, and the Federal Employers Liability Act. The provisions in the statute itself create a pre-application domestic relations cause of action in the context of Medicaid which are enforceable by State courts.

A community spouse is not authorized to obtain a court order of support once an administrative proceeding has begun "nor does [the statute] explicitly permit parallel proceedings. [The statute] merely recognized the effect of an order of support if it has been previously obtained." *M.E.F*, 925 A.2d at 19. Thus, if this Court ignores this language, as the Division of Medicaid urges, Wife will be stripped of her specific remedies provided by federal law particularly designed for her circumstance. As previously noted, Wife's life expectancy is approximately twenty-five (25) years. Had Husband not died, and this Court were to affirm the ruling of the trial court, in favor of

Medicaid's limited interpretation, the uncontroverted expert testimony was that Wife could have been completely destitute in as few as four (4) years. This is the exact result these statutory provisions were designed to prevent. This is not, as Medicaid will no doubt assert, an individual seeking to game the system for their own self-greed. Rather this is a young spouse who, through no fault of her own, has found herself in the untenable position of losing a spouse to a horrible disease and without court relief, being left with only $109,560 to support herself for the next twenty-five (25) years. These exceptions were written precisely for circumstances like these. Failure to recognize the "court ordered" provisions of 42 U.S.C. 1396r—5 as an avenue to increase the community spousal support essentially renders those provisions meaningless.

E. Other Jurisdictions recognize judicial authority to enter support orders against the Institutionalized Spouse to increase the CSRA and/or the MMNA.

Both the Tennessee Appellate Court and the New Jersey Superior Court Appellate Division recognized that there are essentially two methods by which a community spouse can increase their available resources to which they are entitled – (1) an administrative process through the state Medicaid agency or (2) a judicial action seeking an order of support for the spouse. *Blumberg*, 2000 WL 1586454; *M.E.F*, 925 A.2d 12.

In *Blumberg*, the community spouse elected to follow the judicial remedy, just as Wife did in this case, and filed a request for an order of support prior to any contact with the Tennessee Division of Medicaid. *Blumberg*, 2000 WL 1586454. The trial court entered an order transferring the necessary assets and allocating the available income to the community spouse for support. The couple then proceeded to begin the Medicaid application. *Blumberg*, 2000 WL 1586454. The Tennessee Division of Medicaid refused to recognize the validity of the support order, and the couple appealed the decision, first to a fair hearing and then to the Chancery Court which upheld the administrative decision of Medicaid. *Blumberg*, 2000 WL 1586454. The Chancery Court decision was then appealed on the issue of whether or not an order of support was valid. *Blumberg*, 2000 WL 1586454. The Tennessee Court of Appeals held that the original support order entered prior to application for Medicaid was valid, and validated the Blumbergs' right to choose the route – judicial or administrative – from which to seek an increase of the support. *Blumberg*, 2000 WL 1586454. The Court stated that "this route is within the ambit of the statute". *Blumberg*, 2000 WL 1586454 at 3 discussing 42 U.S.C. § 1396r – 5 (West current through 2008).

The Superior Court of New Jersey took great care to distinguish the difference between the authority a court has to enter an order of support prior to any administrative action and the lack of authority a court has to enter an order of support after administrative proceeding starts. *M.E.F*, 925 A.2d 12. As previously stated, because

the spouse in that case first sought remedies through the administrative application process before seeking court interventions, the facts of that case were substantially different than those of the instant case. *M.E.F*, 925 A.2d 12. However, the court's thorough analysis of the statutes on point is instructive to this Court. *M.E.F*, 925 A.2d 12. In fact, the Court held these statutory provisions essentially provide that

> "after an institutionalized spouse is determined to be eligible for medical assistance," in determining the amount of that spouse's income to be applied to the costs of care, a deduction shall be recognized for the community spouse's monthly income allowance (as subject to modifications through the fair hearing process), except "[i]f a court has entered" a support order, in which case the court order has preemptive effect.

M.E.F, 925 A.2d 12 at 19 (emphasis added). The Division of Medicaid has argued that Wife's action is premature, given that Husband had not made application for benefits and it was not within the Chancery Court's authority to grant them. Wife did not seek from the Chancery Court a determination of whether Husband is entitled to benefits, but rather sought a preemptive support order should Husband later qualify for Medicaid.

II. "EXHAUSTION DOCTRINE" DOES NOT PRECLUDE THE CHANCERY COURT'S SUBJECT MATTER JURISDICTION OVER A COMMUNITY SPOUSE'S PETITION FOR INCREASED SUPPORT.

The Division of Medicaid argued that Husband must first have filed for benefits and exhausted his administrative remedies before seeking relief before a court. There is

no question that generally, a party is required to exhaust all available administrative remedies before seeking judicial review. *Public Employees Retirement System of Miss. v. Hawkins*, 781 So.2d 899 (Miss. 2001). However, it is also well settled law in Mississippi that the exhaustion doctrine can be excepted by evaluating the following factors: (1) whether the pursuit of the administrative remedy would result in irreparable harm, (2) whether the agency clearly lacks jurisdiction to hear the matter, (3) whether the agency's position is clearly illegal, (4) whether the dispositive question is one of law, (5) whether exhaustion of the available administrative remedy would be futile, and (6) whether the action can be resolved with less expense and more effectively in a judicial arena. *Town of Bolton v. Chevron Oil Co.*, 919 So.2d 1101 (Miss. App. 2005); *Public Employees*, 781 So.2d 899; *Miss. Dept. Of Envtl. Quality v. Weems*, 653 So. 2d 266 (Miss. 1995); *Davis v. Barr*, 157 So.2d 505 (Miss. 1963). In previous actions, Mississippi courts have also considered three other variables when determining if the exhaustion doctrine is applicable - (1) the extent of the injury from pursuit of administrative remedies, (2) the degree of apparent clarity or doubt about administrative jurisdiction, and (3) the involvement of specialized understanding in the question of jurisdiction. *Town of Bolton*, 919 So.2d 1101; *Public Employees*, 781 So.2d 899; *Miss. Dept. Of Envtl. Quality*, 653 So. 2d 266; *Davis*, 157 So.2d 505; *Campbell Sixty-Six Exp., Inc. V. J&G Exp., Inc.*, 141 So.2d 720 (Miss. 1962). Counsel opposite correctly stated the general rule with regard to exhaustion of all available administrative remedies; however, he failed to account for

the established exceptions to the exhaustion of administrative remedies doctrine. See R. at 000023. Several of the above listed factors and variables are applicable in the instant action and weigh heavily in favor of the resolving this matter in the judicial arena. An evaluation of the factors and variable required to apply the exception to the exhaustion doctrine indicates that the case at bar fell within the trial court's immediate jurisdiction.

A. Exhaustion of Administrative Remedies is Futile.

The exhaustion of available administrative remedies through a fair Medicaid hearing would be futile in this matter because the Division of Medicaid is not allowed under its own regulations, to increase the monthly support and allowed resources for the Community Spouse above the federal maximum amount. "In order for a [community spouse] to receive a share larger than the federal maximum, a court order would be required granting the [community spouse] a greater share of total resources [...]"Miss. Div. of Medicaid Eligibility Manual, Vol. III Section I, B, 3 p. 9210 (current through 2008); See App. 56-60. In other words, the Division of Medicaid's manual gives no discretion to case workers or hearing officers to make a spousal increase. Only a court can do that under Medicaid's rules. Which begs the question, if Medicaid cannot give the relief anyway, what is the applicant supposed to exhaust?

In this case, Wife requested an amount above the federal maximum in an effort to support herself for the remainder of her lifetime and avoid her own poverty. She

sought this relief through the required court order, the only authority available to her capable of granting the relief. Considering Wife's life expectancy is over twenty-five (25) years, and that she has no means with which to support herself, requesting an amount above the federal maximum is warranted and not without basis. Indeed, the Division of Medicaid never raised a challenge to Wife's need for the support order, limiting its arguments solely to the trial court's authority to enter the order. If the Division of Medicaid is unable to award an amount above the federal maximum of $109,560 then a hearing and the appeal before that agency would be futile, and ultimately, an appeal would be made to the Chancery Court to seek the exact same relief originally sought before the Chancery Court. What Medicaid calls the "exhaustion doctrine" is actually the "futility doctrine".

The authority upon which the Division of Medicaid relied in the trial court proceedings is distinguishable and inapplicable in the case at bar. The Arkansas Supreme Court held that all administrative remedies must be exhausted prior to a court retaining proper jurisdiction over a matter involving an increase in support for the community spouse. *AR Dep't of Health and Human Services v. Honorable Vann Smith,* 262 S.W.3d 167 (Ark. 2007). However, in Arkansas, there were other available remedies to exhaust. The Arkansas state Medicaid manual unlike its Mississippi counterpart does not explicitly prohibit a hearing officer from granting an increase above the federal maximum for the community spouse's support. Arkansas DHS Medical Services Policy

Manual s. 3337.9, 3338.7 (Current through 2008); See App. 61-67. Accordingly, exhaustion of all administrative remedies prior to court action would not be futile in Arkansas. Further, Wife was not asking the trial court to determine the eligibility of Husband for Medicaid benefits, but simply asking for an Order providing for spousal support for her well-being, should he need to apply for Medicaid benefits. The federal law provides for such an order, counsel for Husband did not oppose such an order, and it is clear based upon the alternative relief that the trial court did grant, that had the court concluded that it had jurisdiction, it would have granted the relief originally sought. This Court should find that such authority does lie with the Chancery Court, and is provided by Federal law. Wife is not demeaning or seeking to do an "end run" around the Division of Medicaid, but simply seeking relief which Medicaid is not authorized to grant, and which federal law and Medicaid's own regulations place exclusively before a Mississippi trial court. Our dispute is not over whether the Chancery Court can grant the relief, but when said relief can be granted.

B. Pursuit of Administrative Remedies would Result In Unnecessary Expenses and Delay and Render Irreparable Harm to the Parties.

Pursuit of the available administrative remedies in a case such as this would have been wasteful and caused unnecessary delay expenses. When a court hearing would be comparatively less expensive than solving this issue in an administrative

arena, then the exhaustion of administrative remedies is not required. *Public Employees,* 781 So.2d 899. Requiring an individual to first file for administrative relief which the agency itself cannot, by its own admission, grant is a complete waste of resources and will multiply the attorneys' fees and costs of all parties many times over. Because the Division of Medicaid is unable to give the relief requested herein, and further, because no dispute exists that a "court" is the only authority that can grant the relief requested, there is no question that ultimately a court proceeding would be necessary to give Wife the sought relief. The only question before this Court is the timing of that court proceeding. Wife asserts that Federal law permits her to seek that relief pre-application. The Division of Medicaid takes the position that it can only be taken post-application and after exhaustion of all administrative remedies, of which there are none.

Given Medicaid's conflicting position, a cynical person might question the Division of Medicaid's motives in seeking a futile delay. Sadly, Counsel for Medicaid likely revealed those true motives at the trial. "If anybody can come into a court and ask authority to transfer all of their assets over, then everybody could qualify for Medicaid. Trial Tr. 40. Yet, under Medicaid's own rules, applicants can do just that. A skeptic might conclude that Medicaid seeks to delay such relief not out of some basis that they are better qualified to determine where the relief is appropriate, but rather as an attempt to make it so difficult and expensive as to effectively deny an applicant this alternative.

Indeed, following the futile course of action urged by the Division of Medicaid will result in significant delay in an applicant's ability to obtain an ultimate decision and exhausting appeals. Specifically, Medicaid has forty-five (45) days to make an initial determination, and as long as ninety (90) days on difficult or unusual files such as those seeking this type of relief. Then, appeal before a local hearing officer may take an additional thirty (30) days or more. A state hearing frequently can take as long as an additional ninety (90) days, and then Medicaid has an unspecified time in which to render a decision or remand the case for further information gathering. Miss. Code Ann. §43-13-116 (West current through 2008). During each month this is occurring the Medicaid applicant is required to privately pay for his nursing home stay which the Division of Medicaid estimates to be, on average, $4,600 per month. Then and only then, according to the Division of Medicaid should an applicant be allowed to seek relief from a court, which has its own built in delays due to docket crowding.

This a process makes planning for individuals in such circumstances nearly impossible and a true gamble. The applicant and spouse will be forced to endure months, or even years, of private payment while their case is on the path of a futile administrative review, before finally reaching court, the only entity in the entire process with the ability to grant the requested relief. If the relief is then ultimately denied by the

court, the applicant would have to re-structure their remaining assets which will have been significantly reduced during the administrative delay, before re-applying.[2]

The Federal lawmakers' intended that the support order by a court could be granted prior to application for benefits, which allows the Medicaid applicant to plan and structure his or her assets in the manner most beneficial to his or her spouse. Both the state and the federal government have strong public policies against the impoverishment of a spouse. By recognizing that court orders of support in 42 U.S.C. 1396r—5 can be entered prior to application, and that this statute gives the trial courts the subject matter jurisdiction to accomplish this, this Court will serve the interest of spousal self-reliance. Medicaid urges this Court to encourage spousal impoverishment by asking that it ignore "court has entered" language contained in the Federal code and state regulations, and instead insists on acts of administrative futility as the exclusive basis of seeking a support increase.

[2] Numerous legal methods of asset protection planning are available to shelter assets, such as purchase of a more expensive house, up to $500,000 in value, purchase of burial plots and funeral trusts, and purchase of annuities; however, these do not serve the best interest of a Community Spouse such as Wife, and would only be utilized if the preferred relief of spousal support increase were unavailable.

CONCLUSION

Wife ultimately urges this Court to reverse the trial court's finding that it lacked subject matter jurisdiction to increase the amount of resources and income retained by Wife through a support order solely on the basis of the MCCA, and further, that this Court will find the "exhaustion doctrine" of administrative remedies inapplicable in the instant case.

RESPECTFULLY SUBMITTED,
JO CAROL ALFORD, APPELLANT

By: _____
Ronald C. Morton (MS Bar no. [redacted])

Of Counsel:

Ronald C. Morton (MS Bar no. [redacted])
A. Elizabeth Whitaker (MS Bar no. [redacted])
Morton Law Firm, PLLC
132 Fairmont St., Suite A
Clinton, MS 39056
601.925.9797

CERTIFICATE OF SERVICE

I, the undersigned counsel of record herein, do hereby certify that I have this day, May 12, 2009, via U.S. Mail prepaid, delivered a true and correct copy of the above and foregoing pleading, to the below listed counsel of record.

William B. Howell, Esq.
R. Scanlon Fraley, Esq.
406 Orchard Park
Ridgeland, MS 39157

William H. Mounger, Esq.
Division of Medicaid
550 High St., Suite 1000
Jackson, MS 39201

Honorable Cynthia Brewer
Madison County Chancellor
P.O. Box 404
Canton, MS 39046

Ronald C. Morton

Appendix