



THE “NAME ON THE CHECK RULE” MEDICAID COMPLIANT ANNUITY STRATEGY

An overview of the legal authority for naming the community spouse as payee of a Medicaid Compliant Annuity funded with the institutionalize spouse’s IRA



Background of the “Name on the Check Rule”

The “Name on the Check Rule” is based on the proposition that for Medicaid purposes, income should be attributed to the person whose name is on the instrument constituting payment. More simply, we look to whose “name is on the check.” This rule is based in federal law and comes into play when the state Medicaid office attributes income for purposes of an eligibility determination. More specifically, this rule allows an institutionalized spouse to transfer qualified funds from an account solely in their name to their community spouse despite the requirement that the institutionalized spouse maintain ownership of the account.



The institutionalized spouse owns an IRA that is countable for Medicaid eligibility purposes.

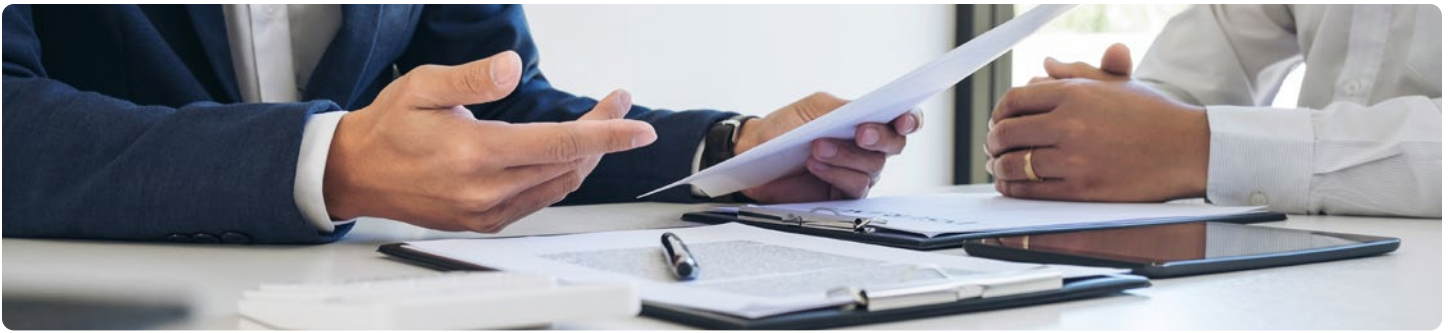


The IRA funds are transferred from the IRA to a Medicaid Compliant Annuity (MCA) owned by the institutionalized spouse.



The MCA payments are made payable to the community

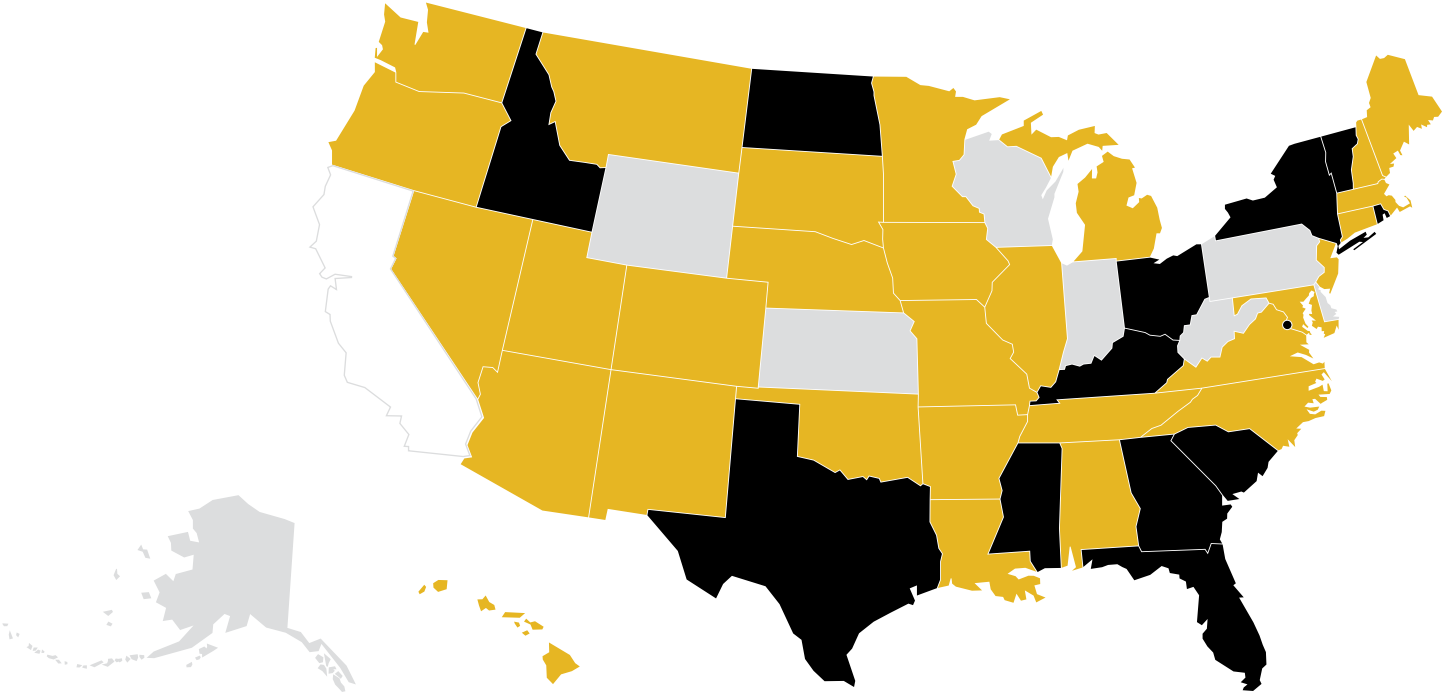




The “Name on the Check Rule” is only utilized in states where IRAs and other retirement accounts are considered countable for purposes of Medicaid eligibility. The reason being, if the IRA is exempt, no action needs to be taken with respect to that account to assist with Medicaid eligibility. If the IRA is countable and in the institutionalized spouse’s name, the “Name on the Check Rule” provides an option that would prevent the institutionalized spouse from overpaying for nursing home care by exhausting the IRA funds.

CONSIDER USING THE “NAME ON THE CHECK RULE” STRATEGY:

- ✓ In states where IRAs and other retirement accounts are countable assets
- ✓ For IRAs owned by the institutionalized spouse
- ✓ To prevent overpaying for the nursing home



■ IRAs of both spouses are countable
■ IRAs of community spouse are exempt

■ IRAs of both spouses are exempt*

**In some states, an IRA is only exempt if the owner is taking their Required Minimum Distributions.*

How to Use the “Name on the Check Rule”

THE “NAME ON THE CHECK RULE” STRATEGY WORKS AS FOLLOWS:

- 1 The institutionalized spouse owns a qualified account (typically an IRA) and lives in a state where that account is countable for purposes of Medicaid eligibility.
- 2 The institutionalized spouse works with an elder law attorney to purchase a Medicaid Compliant Annuity that satisfies the requirements of the Deficit Reduction Act (DRA).
- 3 The institutionalized spouse serves as owner and annuitant on the annuity and the payments are scheduled to be paid out over the institutionalized spouse’s life expectancy.
- 4 At the time the annuity contract is formed, the institutionalized spouse irrevocably assigns the annuity payments to their spouse.
- 5 The institutionalized spouse, through his or her attorney, instructs the insurance carrier issuing the annuity make payments to the community spouse using paper checks.



This strategy essentially converts an asset that is problematic for Medicaid eligibility purposes into an income stream available to the community spouse.

BENEFITS OF THE “NAME ON THE CHECK RULE” STRATEGY

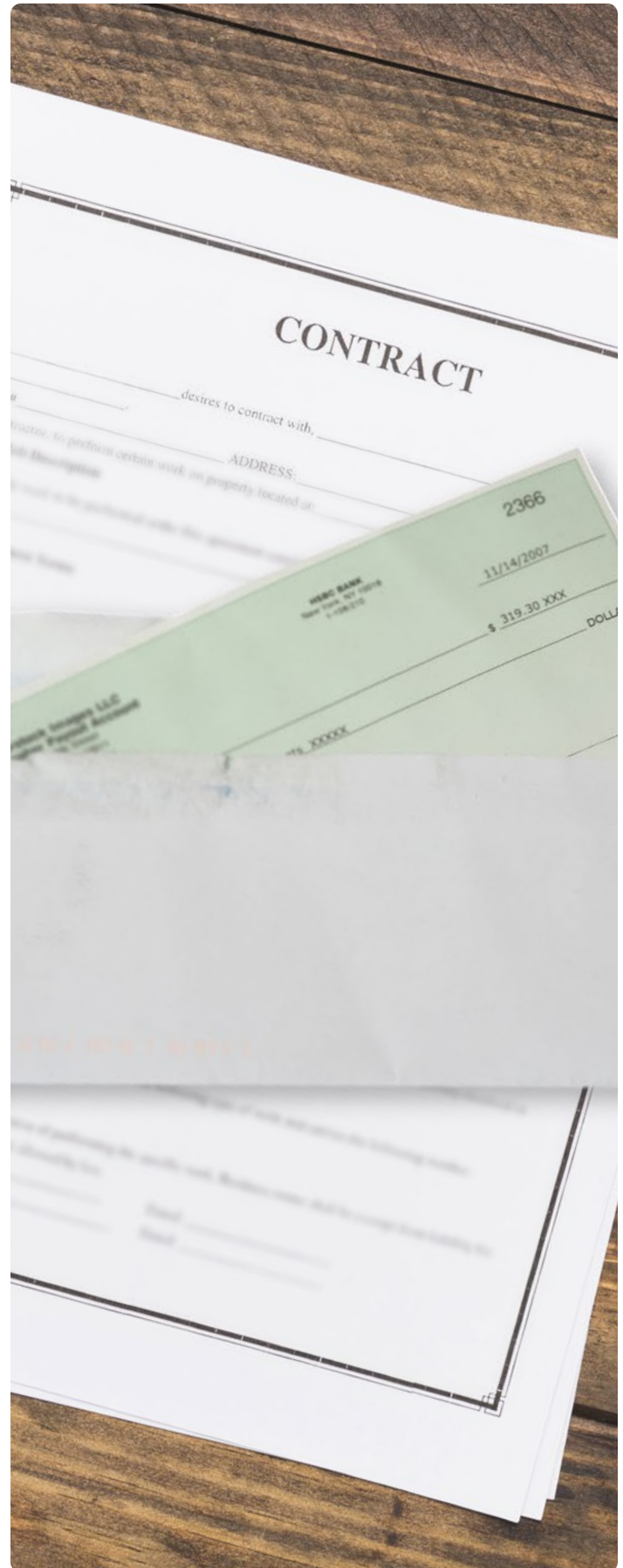
- 1 **First**, it supports public policy against spousal impoverishment.
- 2 **Second**, it prevents the institutionalized spouse from overpaying for nursing home care.
- 3 **Third**, by utilizing paper checks, the institutionalized spouse is able to produce evidence to the case worker should they have questions regarding the operation of the strategy and ownership of the income.



Benefits and Considerations When Using the “Name on the Check Rule”

KEY POINTS TO UNDERSTAND WHEN USING THIS STRATEGY:

- 1 First**, while the strategy is founded in federal law, it is not a rule based on the Internal Revenue Code. It is important to consult with a tax professional to discuss any tax implications of using the strategy.
- 2 Second**, while the strategy is effective in states where it has been approved, it has not been approved in all states where institutionalized spouse IRAs are countable.
- 3 Third**, for reasons made clear in points one and two, it is essential to work with an elder law attorney given the number of legal issues involved with this type of planning.
- 4 Fourth**, it is important to stretch the annuity as long as possible within the institutionalized spouse’s life expectancy to minimize the negative impact that a mis-attribution by the Medicaid office might have in the event of an adverse decision.
- 5 Fifth**, if you do receive an adverse decision, it is important to contact our office as soon as possible so we can assist with litigation support.



Legal Authority for the “Name on the Check Rule”

Contrary to the perception some may have that this is a “loophole,” it is in fact based on a simple reading of a federal statute.

“During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), **no income of the community spouse shall be deemed available to the institutionalized spouse.**” 42 U.S.C. § 1396r-5(b)(1)

This is a rule of general applicability and is excepted by situations described in subsection (b)(2), which identifies specific rules for “post-eligibility income determination.” 42 U.S.C. § 1396r-5(b)(2). These specific rules for post-eligibility are broken into subtypes – those applying to “trust” property and “non-trust” property. Id.

Pursuant to Transmittal 64, also identified in the CMS manual at subsection 3258.9 (B) regarding annuities:

“...the term ‘trust’ includes an annuity **to the extent and in such manner as the Secretary [of Health and Human Services] specifies.**” CMS State Medicaid Manual 3258.9(B), 3-3-109.15

To date, there has been no such inclusion by the Secretary. Accordingly, annuities are not considered “trust” property, and, under federal law, such income should be analyzed under the non-trust property rules identified at 42 U.S.C. § 1396r-5(b)(2)(A).

The non-trust property post-eligibility rules indicated the following:

- (i) If payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse.
- (ii) If payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them.
- (iii) If payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse’s interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

42 U.S.C. § 1396r-5(b)(2)(A)(i)-(iii)

Accordingly, to the extent income is analyzed from a post-eligibility perspective, a “Name on the Check Rule” income stream should be viewed as non-trust income solely in the name of the community spouse to prevent his or her spousal impoverishment because the income is “available only to that respective spouse” as evidenced by their name on the instrument. Considering this situation from a practical standpoint, assuming an institutionalized spouse had physical possession of the annuity check made payable to his or her spouse, they would not be able to cash, deposit, or otherwise negotiate the check because the institutionalized spouse’s name is not on the instrument.

While the “Name on the Check Rule” has been acknowledged in many states, some Medicaid offices have fashioned creative arguments in an attempt to circumvent the plain meaning of the statute. For example, it has been argued that because the language specifically addressing income made “solely in the name” of one spouse is under the post-eligibility rules, it does not apply to pre-eligibility determinations. However, this is an incomplete analysis. Because there is no express counterpart to the post-eligibility language, the analysis would return to the rule of general application, which is that **no income of the community spouse shall be counted for purposes of the institutionalized spouse’s eligibility during any month in which the institutionalized spouse is in the institution.** See 42 U.S.C. § 1396r-5(b)(1). However, if applying for a program other than a traditional long-term care facility, it is important to verify that the level of care the individual would receive satisfies the jurisdiction-specific definition of “institutionalization.”



Summary of Using the “Name on the Check Rule”

The “Name on the Check Rule” strategy is an effective way to convert an asset that would be countable under the state’s Medicaid rules into an income stream for the community spouse. Further, this conversion is consistent with public policy against spousal impoverishment and prevents the institutionalized spouse from overpaying for nursing home care. Moreover, this strategy is not a loophole but rather springs from a plain reading of federal statute.



- ✓ Convert a countable asset into an income stream
- ✓ Prevent spousal impoverishment
- ✓ Avoid overpaying for the nursing home

SCHEDULE A CALL

Schedule a call with one of our advisors to discuss your case in more detail.

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