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Does the "Income First" Rule in the Wisconsin Spousal Impoverishment Statute Conflict With Federal Law?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 127–130. © 2001 American Bar Association.

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Editor's Note: The respondent's brief in this case was not available by *PREVIEW*'s deadline.

ISSUE

Wisconsin's Medicaid spousal impoverishment statute requires that potential income transfers from the institutionalized spouse be considered part of the community spouse's income for purposes of determining whether a higher resource allowance is warranted. The question in this case is whether the Wisconsin statute conflicts with the federal Medicaid Act.

FACTS

In 1994, Irene Blumer was admitted to a nursing home in Wisconsin. Sometime later, Irene, through her husband, Burnett, applied for Medicaid (also referred to as Medical Assistance). The county Department of Human Services conducted an asset assessment to determine whether she was eligible for Medicaid benefits. The county determined that the Blumers had total assets of $145,644 when Irene was admitted to the nursing home in 1994.

The county set Burnett's "community spouse resource allowance" (CSRA) at $72,822, or one-half of the couple's nonexempt assets. On the basis of this CSRA, the county established a total asset limit of $74,822–$72,822 for Burnett, as the community spouse, and $2,000 for Irene, as the institutionalized spouse, before Irene would be eligible for Medicaid. The county then examined the current total assets of the couple as of the date the application for Medicaid was made and concluded that they had assets of $89,335. The county denied Irene's Medicaid application because the Blumers were $14,513 above their asset limit of $74,822.

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WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES v. BLUMER
DOCKET NO. 00-952

ARGUMENT DATE:
DECEMBER 3, 2001
FROM: THE COURT OF APPEALS OF WISCONSIN, DISTRICT IV

Case at a Glance

When determining whether a "community spouse" (a spouse who has not been placed in an institution such as a nursing home) is entitled to shelter resources in excess of the standard resource allowance, Wisconsin first considers whether potential income transfers from the institutionalized spouse will be sufficient to provide for the community spouse's monthly needs once Medicaid eligibility is met. The Court is now asked to decide whether this procedure conflicts with the federal Medicaid Act.

Irene then requested a hearing for the purpose of setting a higher CSRA. At the hearing it was established that Burnett's share of assets generated $377.85 per month in interest and dividends. The hearing examiner concluded that when combined with Burnett's payments from Social Security and an annuity, his total monthly income was $1,702.45. This amount was below the minimum monthly "maintenance needs" allowance of $1,727, which was established by federal law as the minimum monthly income a community spouse would need to live independently. Irene argued that because the CSRA set by the county did not have the capacity to generate sufficient income to meet Burnett's minimum monthly maintenance needs allowance, the examiner should have set a higher CSRA so that Burnett would have more assets to generate more income. Setting a higher CSRA would allow a transfer of assets to Burnett, making Irene eligible for Medicaid sooner.

Relying on Wisconsin's Medicaid spousal impoverishment statute (Wis. Stat. § 49.455(8)(d)), the hearing officer concluded that he could not raise the CSRA and permit a transfer of assets to Burnett until Irene first made all of her income available to him. By imputing Irene's Social Security retirement income and her pension to Burnett, the hearing examiner concluded that he had a monthly income of more than $2,000, well above the minimum monthly maintenance needs allowance established by federal statute. The hearing officer concluded that no additional assets above the initially established CSRA needed to be retained by Burnett and that the county had correctly denied Medicaid benefits to Irene. The Wisconsin Department of Industry, Labor, and Human Resources affirmed the hearing officer's decision, and the Wisconsin circuit court affirmed the agency's decision.

Irene appealed to the Wisconsin Court of Appeals. Reversing the circuit court, the court of appeals held that applying an "income-first" rule rather than a "resource-first" rule when determining whether to increase the CSRA of an applicant's spouse conflicted with federal law. The Wisconsin Supreme Court denied review.

The U.S. Supreme Court thereafter granted the request of the Wisconsin Department of Health and Family Services and agreed to review the Wisconsin Court of Appeal's decision. 121 S.Ct. 2547 (2001).

Case Analysis

Medicaid is a joint federal-state program established in 1965 as Title XIX of the Social Security Act. Among other things, the program provides coverage for elderly persons whose income and resources are insufficient to meet the costs of medical services, such as nursing home care. The federal government provides states that participate in the program with partial funding. The federal government also establishes mandatory and optional categories of eligibility and services covered. No state may adopt programs or policies that violate the mandate of the Social Security Act.

In 1988, Congress enacted the Medicare Catastrophic Coverage Act (MCCA). The MCCA seeks to protect married couples when one spouse is institutionalized in a nursing home by ensuring that that the spouse who continues to reside in the community is not impoverished and has sufficient income and resources to live independently. Before 1988, the Medicaid eligibility rules required a couple to deplete their resources before the institutionalized spouse was eligible for benefits, often leaving the community spouse impoverished and unable to live without public assistance.

When an application for Medicaid is made, the couple's total resources are calculated as of the date the continuous institutionalization began for the institutionalized spouse, and then a share of those resources is allocated to each spouse. As noted above, the amount of resources allocated to the community spouse is called the community spouse resource allowance (CSRA). The CSRA is considered an "unavailable asset" in determining the Medicaid eligibility of an institutionalized spouse.

In addition to the CSRA, when an application for Medicaid is made, a community spouse is entitled to income in an amount sufficient to meet the minimum monthly maintenance needs allowance. The minimum monthly maintenance needs allowance is designed to ensure that, if possible, the community spouse will have income above the poverty level. In 1994, this allowance was $1,727 per month, which is 150 percent of the federal poverty level. Both federal and Wisconsin statutes incorporate the "name on the check" principle, whereby, at the time an application for Medicaid is made, income is considered available only to the spouse in whose name the payment is made.

If either spouse is dissatisfied with the CSRA as set by the county, or if the community spouse's income is insufficient to meet the minimum monthly maintenance needs allowance, the spouse may request a fair hearing. Wisconsin law (Wis.Stat. § 49.455(8)(d)) requires a hearing examiner to first impute all of the institutionalized spouse's

income to the community spouse (the income-first rule) if the community spouse's income is insufficient to meet the minimum monthly maintenance needs allowance, as opposed to transferring more of the couple's income-generating assets to the community spouse (the resource-first rule) in order to ensure that the spouse will have sufficient income-generating capacity to meet the minimum monthly maintenance needs allowance.

In Burnett's situation, when the income in his name was combined with the income-generating capacity of his CSRA, Burnett had insufficient income to meet the minimum monthly maintenance needs allowance. The Supreme Court is now called upon to determine whether the income-first approach used by the hearing examiner to supplement Burnett's minimum monthly maintenance needs allowance is in conflict with federal law.

The applicable federal statute (42 U.S.C. § 1396r-5(e)(2)(C), states:

> Revision of community spouse resource allowance. If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section an amount adequate to provide such a minimum monthly maintenance needs allowance.

The Wisconsin statute (Wis. Stats. § 49.455(8)(d)) regarding requesting a new CSRA is similar to the federal provision but includes the following language not found in the federal law:

> Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an amount to be used under sub. (6)(b)(3) unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b) or, if the institutionalized spouse does not have sufficient income to make available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b), unless the institutionalized spouse makes all of his or her income ... available to the community spouse. ...

By enacting subsection (8)(d), the Wisconsin legislature adopted an income-first approach instead of a resource-first approach in determining whether to raise a community spouse's CSRA.

Irene argues that, when an application for Medicaid is made, the plain language of the federal statute directs a state to increase the CSRA if the community spouse has income that is insufficient to meet the minimum monthly maintenance needs allowance. She claims that the Wisconsin statute requiring the hearing examiner first to impute the institutionalized spouse's income to the community spouse violates federal law and is invalid.

The Wisconsin Department of Health and Family Services (DHFS) argues that the federal spousal impoverishment provisions in 42 U.S.C. § 1396r-5 are ambiguous. Acknowledging that income-first is not mandated under federal law, DHFS asserts that it is permissible. The DHFS relies on its interpretation of the legislative history underlying these provisions in support of its position that the Wisconsin's income-first rule is valid. DHFS also claims that the Secretary of the U.S. Department of Health and Human Services has consistently interpreted the statute to permit states to employ the income-first rule.

Arguing that the transfer of a couple's resources so that the community spouse's income will meet the minimum monthly maintenance needs allowance is consistent with the objectives of the federal statute, Irene contends that under the income-first approach a community spouse would become dependent upon income from the institutionalized spouse in order to meet his or her monthly needs.

The DHFS recognizes that one of the chief purposes of the MCCA is to end spousal impoverishment. However, it also contends that another purpose was to limit the use of public funds to support the institutionalized care of those who can afford to pay for their own health care. DHFS claims that a resource-first rule allows couples to shelter excessive amounts of assets. Irene responds that 42 U.S.C. § 13964-5(e)(2)(C) places a ceiling on the amount of resources a hearing officer can transfer to the CSRA. The examiner may transfer no more than the amount of resources necessary to provide the community spouse with a minimum monthly maintenance needs allowance set at 150 percent of the federal poverty level.

SIGNIFICANCE

A number of courts have held that the federal spousal impoverishment statute is ambiguous. *Cleary v. Waldman,* 167 F.3d 801 (3d Cir.), *cert. denied,* 528 U.S. 870 (1999)

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(holding that New Jersey did not violate MCCA by employing the income-first rule in determining Medicaid eligibility of institutionalized spouse); *Chambers v. Ohio Dept. of Human Services,* 145 F.3d 793, 802 (6th Cir.), *cert. denied,* 525 U.S. 964 (1998) (holding that MCCA does not mandate the resource-first approach in determining nursing home resident's Medicaid eligibility); *In re Golf v. New York State Dept. of Social Services,* 91 N.Y.2d 656, 674 N.Y.S.2d 600, 697 N.E.2d 555 (1998) (a decision to use the income-first rather than the resource-first methodology in determining Medicaid eligibility was not arbitrary and capricious). But see *O'Callaghan v. Commissioner of Social Services,* 53 Conn. App. 191, 729 A.2d 800 (1999) (expressing no opinion on whether the state should use an income-first, a resource-first, or a hybrid method for determining eligibility for Medicaid).

State courts in Ohio have held that the income-first rule is inconsistent with the federal spousal impoverishment statute. See, e.g., *Gruber v. Dept. of Human Services,* 98 Ohio App.3d 72, 647 N.E.2d 861 (Ct.App.1994); *Kimnach v. Dept. of Human Services,* 96 Ohio App.3d 640, 645 N.E.2d 825 (Ct.App.1994). Cf. *Robbins ex rel. Robbins v. DuBuono,* 218 F.3d 197 (2d Cir. 2000) (Attributing the Social Security income of an institutionalized Medicaid recipient to the community spouse for purposes of determining whether to raise the community spouse's resource allowance amounted to a threat to use a legal process to transfer Social Security benefits in violation of the anti-alienation provision of the Social Security Act). But see *George v. Dept. of Human Services,* 2001 WL 1098141 (Ohio App. Sept. 20, 2001) (relying on *Chambers* and holding that the state has discretion to adopt a resource-first approach, an income-first approach, or a hybrid).

Because under the income-first rule the community spouse receives income from the institutionalized spouse, more of the couple's resources would be spent down on the cost of nursing home care. If the institutionalized spouse dies first, the income the community spouse receives from the institutionalized spouse would cease. Thus, if the Supreme Court adopts the income-first rule, the community spouse could be left with income that is less than the monthly minimum maintenance needs allowance. On the other hand, such a ruling would limit the use of public funds to support the institutionalized care of those who can afford to pay for their own health care.

If the Supreme Court adopts the resource-first rule, a community spouse may receive more of the couple's income-generating assets. Under this rule, if the institutionalized spouse dies first, then the community spouse could continue to have resources to use for self-support.

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