

Recent U.S. Supreme Court Decision Will Lead To More Divorces Among The Elderly

Prior to passage of the Medicare Catastrophic Coverage Act of 1988, many spouses of nursing home residents were forced to consider divorce as their only means of retaining sufficient assets and income to continue living independently. Many women were left with only their social security income and were forced to spend nearly all of their savings for a spouse's nursing home care. This phenomenon was known as "spousal impoverishment."

Congress passed the Medicare Catastrophic Coverage Act (hereinafter MCCA or Act) which addressed the "spousal impoverishment" phenomena. In general terms the MCAA provided that the community spouse could keep one half of the couple's countable assets (excluding a house and car). This allowance is known as the community spouse resource allowance (CSRA). The Act also granted the states the authority to establish a minimum and maximum level of assets.¹ Some states adopted a relatively high figure, while other states such as Ohio chose the most minimal standard. ²

The second component of the MCCA involves income protections for the community spouse. The Act created minimum and maximum figures for the community spouse's income and allowed the states discretion to choose a standard within those parameters (as of the date of this writing, \$1,452 is the minimum and \$2,232 is the maximum). While many states adopted higher income standards, the majority of states, including Ohio, have adopted the lowest standard ³ (for budgetary reasons).

Finally, Congress also provided in 42 U.S.C. § 1396 r-5(c)(2) that should the community spouse's income be insufficient to meet the minimum monthly needs allowance, the community spouse could go through a revision process which would increase the community spouse resource allowance to ensure that the community spouse had sufficient income and resources to live "with dignity and independence."

In *Wisconsin v. Blumer* U.S. 534 U.S. 473 (2002), the U.S. Supreme Court ruled that the states, based upon opinion letters issued by the Centers for Medicare and Medicaid Administration (CMA) (previously known as The Health Care Finance Administration or HCFA) could further reduce the protections afforded to the community spouse. This decision is particularly damaging to families with modest savings and where the community spouse has a very modest fixed income. It is also damaging to those entering into a second marriage that are over the age of 60.

Interestingly, the Ohio Legislature has not addressed this issue. Rather, the Department of Job & Family Services has made the substantive decisions relating to the minimum support levels without legislative direction.

In 1993, after litigation had been initiated in Ohio and several other states, and after Ohio refused to allow any revision of the CSRA, the CMA issued several letters opining that states could adopt an "income first" rule. An "income first" rule would allow the states to count the incomes of both the institutionalized spouse and the community spouse towards the income standard. Litigation which started in Ohio resulted in two decisions (see *Kimnach vs. Ohio Department of Human Services* 96 OH App 3d 640 (1994), and *Gruber vs. Ohio Department of Human Services*, 98 OH App 3d 72 (1994)). The Tenth and Fifth District Courts of Appeals both ruled that the statute was plain and unambiguous and that the Federal Agency's interpretations by letter were not entitled to deference. Ohio argued that it could deem or attribute the institutionalized spouse's income to the community spouse, and of as a result of that attribution, if this joint income would meet the minimum income level, no adjustment was necessary. This argument became known as the "income first" rule. These Agency positions significantly alter the spousal protections, particularly for those in the lower economic classes.

For example:

The husband enters into the nursing home in 2002 with his wife residing in an apartment, with countable assets of \$40,000, and each receiving \$750 per month of Social Security. Under an "income first" approach, the state would deny Medicaid eligibility to the husband and require that he spend down \$20,000 prior to being eligible for Medicaid. Under the "income first" rule, the agency would allow the wife to retain her \$750 of monthly Social Security income, and \$702 per month of her husband's Social Security, equaling the MMMNA of \$1452. If the husband lived two years and then died, under the "income first rule" the wife would be left with \$20,000 and a total of \$750 per month of Social Security. Under a "resource first" rule, during the life of the institutionalized spouse, the community spouse would be permitted to retain all \$40,000, her social security, monthly interest income of \$133, and \$512 of the institutionalized spouse's monthly income (known as the CSMIA), see Ohio Adm. Code Sect.5101:1-39-34 et. seq.

Prior to MCCA, elder law attorneys had an arsenal of planning options used to protect a community spouse. Many of those planning options have been eliminated by statute or regulation, leaving fewer options available for the community spouse.

One option which will again be necessary will be to terminate the marriage in order to preserve financial independence for the community spouse. A host of issues arise in these cases which must be considered by the courts and by counsel and include the following:

A. COMPETENCY.

In many of these circumstances, senile dementia, Alzheimer's or a stroke rob one of the parties of their ability to reason. Other muscular related diseases such as cerebral palsy, Lou Gehrig's disease or muscular dystrophy may also result in institutionalization but may not leave the institutionalized spouse incompetent. Counsel or the court in such cases must consider the level of competency and determine whether a guardian or guardian ad litem should be appointed.

B. FIDUCIARY DUTIES.

The court or counsel must first decide whether it is necessary for a guardian or guardian ad litem. In most domestic actions a guardian ad litem should be sufficient. A guardian ad litem will be empowered to make litigation decisions and negotiate. The decision making process for the guardian ad litem however, is less clear. Under strict fiduciary principles, the guardian ad litem should demand that the institutionalized spouse receive his or her fair share in the divorce settlement proceedings. This is particularly true where the cases involve a long standing marriage. The principles of "zealous advocate" versus "substitute decision maker" will come into play. Likewise, the appointment of a guardian through the Probate Court involves similar conceptual dilemmas and involves yet another judge who may have a differing opinion. If a guardian is appointed, the guardian can seek the guidance of the Probate Court in making these decisions. It would be preferable to simply appoint a guardian ad litem rather than further complicate the process.

C. PUBLIC POLICY.

This decision has profound policy implications both upon the Medicaid program and upon the body of administrative law.

- I. Spousal Impoverishment. At the time of its passage the MCCA was hailed at the time as ending the phenomena known as "spousal impoverishment" and was intended to allow the community spouse to live with dignity and independence. Unfortunately, Justice Ginsburg and those joining in the majority in the Blumer decision will permit states to reduce benefits and impoverish thousands of elderly individuals whose spouses are

placed in the nursing home. This will have a greater impact on elderly women than elderly men, as on the average their income is significantly less. This decision will likely have a lesser impact in states that have a generous CSRA/MMMNA quotient. In states that have adopted the minimum protections such as Ohio 2 [minimum community spouse resource allowance (\$17,856) and a minimum monthly need allowance (\$1,452)(2001 figure)], the impact will be more immediate. The ability to employ an "income first" approach allows for a third factor to further reduce the protections for a community spouse.

- II. Expansion of Chevron Deference. The Chevron Doctrine has been a staple of administrative law, which was intended to limit the powers of governmental agencies and maintain the role of the legislature. The Court went well beyond the Chevron Doctrine and permitted an agency to significantly undermine the stated intent of Congress. The Wisconsin Appellate court properly recognized, as did the first state courts in Gruber and Kimnach, that the court should start with the statute:

We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive.

Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980). Further, the judiciary is the final authority on issues of statutory construction and is obligated to reject administrative constructions that contradict Congress' express intent. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). "The Constitution holds that in decisions left to the democratic process the trade-off we are entitled to be the one the legislature provides. Courts have no apparent mandate to impose a different trade-off" The Tempting of America, page 191, 1990 by Hon. Robert H. Bork.

The Court discovered ambiguity in the statute and effectively rewrote the statute to the State and Court's liking.

- III. Altering the federal-state balance . The Medicaid program from its conception has existed as a confused, muddled, inefficient health care delivery system. The result has been the impoverishment of many elderly women either upon their husbands' admittance to the nursing home, or after their husbands' death. Congress sought to eliminate this hardship, which existed in many states. Congress specifically created two variables which allow the states to limit eligibility. The Ohio Department of Job & Family Services estimated in Chambers vs. Ohio Department of Human Services, (1998) (as set forth in an affidavit filed with the Sixth Circuit Court) that damages were approximately two hundred million dollars (\$200,000,000) per year employing a "resource first" approach. Congress clearly gave the states components for purposes of restricting eligibility. The CMA failed to issue regulations and purposely created confusion by issuing opinion letters. The third component created by the "Ginsburg Grant" could save a state such as Ohio two hundred million dollars (\$200,000,000) per year. It reduced the role of Congress and altered the uneasy and inefficient balance, which was established by Congress and the states many years ago.

Ohio and other states had other options including withdrawing from the Medicaid program, lobbying through their elected representatives in Congress, and in other more generous states, the option of reducing the CSRA and MMMNA. As Ohio's budget tightens due to the events of 2001, this decision will allow the Dept. of Job and Family Services (without enabling legislation) to consider employing an "income first" policy, which will impoverish many community spouses, for budgetary reasons. States can

now ignore the intent of Congress as long as they are able to convince other un-elected representatives at the CMA that their cause is worthy.

The union of the state agencies and the federal administrative agency on this and other causes poses a great threat upon the elderly, disabled and poor population in the country.

Conclusion.

The Blumer decision and the erosion of protections for many elderly citizens will impact planning and force many estate planning attorneys to again consider recommending divorce as an option to avoid impoverishment. Planners must familiarize themselves with the pitfalls and benefits of divorce and rethink premarital agreements and advice to those whose spouse is suffering from an illness which may lead to a nursing home placement.

[1](#) For the year 2002 it ranges from \$17,856 to \$89,280

[2](#) States using the minimum CSRA are: Arizona, Arkansas, Connecticut, District of Columbia, Indiana, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Utah, Virginia and West Virginia. States using the maximum CSRA are: Alabama, Alaska, California, Colorado, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Washington and Wyoming.

[3](#) States using the minimum MMMNA are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, Montana, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington and West Virginia. States using the maximum MMMNA are: Alaska, California, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Mississippi, New York, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming. John J. Regan and Michael Gilfix, Tax Estate and Financial Planning for the Elderly (1999).

[4](#) States using the minimum CSRA are: Arizona, Arkansas, Connecticut, District of Columbia, Indiana, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Utah, Virginia and West Virginia. States using the maximum CSRA are: Alabama, Alaska, California, Colorado, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Washington and Wyoming.