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Judicial Deference to Federal Government Erodes Medicaid Protections for Elderly Spouses Impoverished by the High Costs of Nursing Home Care

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**JUDICIAL DEFERENCE TO FEDERAL GOVERNMENT
ERODES MEDICAID PROTECTIONS FOR ELDERLY
SPOUSES IMPOVERISHED BY THE HIGH COSTS OF
NURSING HOME CARE**

Rochelle Bobroff[†]

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I. INTRODUCTION

While Americans are living longer, older age increases the likelihood of needing nursing home care. Approximately forty-three percent of people over the age of sixty-five spend at least some time in a nursing facility.¹ Yet with the cost of nursing home care for one year averaging \$55,000 in 2002,² few Americans can afford to pay for nursing home care for more than a few months. For married couples, the cost of an extended nursing home stay for one spouse can deplete the couple's lifetime savings, impoverishing the other spouse.

In 1988, Congress passed the Medicare Catastrophic Coverage Act ("MCCA"), which included revisions to Medicaid law to prevent the impoverishment of spouses of nursing home residents.³ These provisions, known as "spousal impoverishment" rules, govern the allocation of income and resources between the institutionalized spouse and the spouse living in the community.⁴ The purpose of the spousal impoverishment provisions of MCCA was to protect the community spouse, typically the wife, from being forced into poverty as a result of the overwhelming cost of nursing home care.⁵

In the 2001 term, the United States Supreme Court reviewed one of the provisions of MCCA regarding the asset limit for a couple when one spouse resides in the nursing home and the other lives in the community. The case of *Wisconsin Department of Health and Family Services v. Blumer*⁶ involved a challenge to the state's procedure for allocating income and assets between the spouses. The federal Department of Health and Human Services ("HHS") gave the states wide latitude to interpret the law in the manner least costly to the state.⁷ In a decision highly deferential to the interpretation of the federal government, six Justices disregarded

1. Enid Kassner, *Foreword* to WILLIAM H. CROWN, ET AL., AARP, AN ANALYSIS OF ASSET TESTING FOR NURSING HOME BENEFITS, at i (1994).

2. AARP, BEYOND 50.02: A REPORT TO THE NATION ON TRENDS IN HEALTH SECURITY 87 (2002), http://www.aarp.org/beyond50/graphics/pdfs/beyond50_02three.pdf [hereinafter BEYOND 50.02].

3. 42 U.S.C. § 1396r-5 (1994 Supp. V.).

4. *Wisconsin Dep't. of Health & Family Serv. v. Blumer*, 534 U.S. 473, ___, 122 S. Ct. 962, 966 (2002).

5. H.R. REP. NO. 100-105(II), at 65 (1988), *reprinted in* 1988 U.S.C.C.A.N. 857, 888.

6. 534 U.S. at ___, 122 S. Ct. at 966.

7. *Id.* at ___, 122 S. Ct. at 970 (Stevens, J., dissenting).

the clear language and legislative history of MCCA.⁸ The Court permitted the federal agency to ignore one of the protections for community spouses contained in Medicaid law.⁹ The willingness of the High Court to disregard statutory protections for elderly spouses and to defer to the interpretation of the Medicaid statute by government agencies seeking to minimize their Medicaid budgets reflects a lack of judicial will to protect the rights of the poor.

II. AN EXTENDED NURSING HOME STAY FOR ONE SPOUSE FREQUENTLY IMPOVERISHES THE OTHER SPOUSE

A. *Most Older Americans Require Medicaid Assistance to Finance Nursing Home Costs of More Than a Few Months*

In 1900, life expectancy in the United States was forty-six years.¹⁰ In 1997, the average American lived 76.5 years.¹¹ In the twentieth century, the rate of growth of the elderly American population greatly exceeded the growth rate of the population of the country as a whole, and people eighty-five years and older were the fastest growing segment of the elderly population.¹²

The likelihood of needing long-term care in a nursing home increases with age.¹³ As chronological age increases, people have a greater probability of having multiple chronic illnesses, therefore requiring longer stays in nursing homes.¹⁴ While the American population is living longer, many elderly people “live their increased years with multiple illnesses and disabilities.”¹⁵ In 1990, almost a quarter of Americans eighty-five years of age and older

8. *Id.* at ____, 122 S. Ct. at 980 (Stevens, J., dissenting).

9. *Id.*

10. ARTHUR KORNHABER, *CONTEMPORARY GRANDPARENTING* 10 (1996).

11. DONNA L. HOYERT ET AL., *CENTERS FOR DISEASE CONTROL AND PREVENTION, 47 NATIONAL VITAL STATISTICS REPORTS* 19, 1 (1999).

12. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORTS, SERIES P23-194, POPULATION PROFILE OF THE UNITED STATES: 1997* 50 (1998).

13. *See generally* Joshua M. Wiener et al., *Catastrophic Costs of Long-term Care for Elderly Americans*, in *PERSONS WITH DISABILITIES* 196 (Joshua M. Wiener et al., eds., 1995) [hereinafter *Catastrophic Costs*] (discussing costs of elder care).

14. FRANK B. HOBBS & BONNIE L. DAMON, U.S. DEP'T OF COMMERCE, *P23-190, CURRENT POPULATION REPORTS: 65+ IN THE UNITED STATES* 3-14, 3-17, <http://www.census.gov/prod/1/pop/p23-190/p23-190.html>.

15. *Id.* at 3-14.

resided in nursing homes, and ninety percent of all nursing home residents were over sixty-five years of age.¹⁶

Few Americans can afford to spend more than a short period of time in a nursing home. At well over \$50,000 per year and increasing with the rapid inflation of health care services, the cost of living at a nursing home for a long period of time would bankrupt most older Americans.¹⁷ Neither Medicare nor private health insurance covers any substantial degree of long-term care services.¹⁸ Medicare covers primarily short-term stays (100 days or less in a benefit period) in skilled nursing facilities following a hospital stay.¹⁹ Private long-term care insurance accounts for less than one percent of the financing for long-term care.²⁰ Only a small percentage of the wealthiest Americans have purchased private long-term insurance policies that pay for long-term care in nursing homes.²¹

Approximately seventy percent of nursing home residents rely on Medicaid to help pay for their nursing home care.²² More than one million individuals received Medicaid assistance in paying for nursing home care in 1996.²³ Medicaid, a jointly financed state-federal program designed to pay a portion of health care costs for needy persons of all ages, is the largest source of public financing for nursing home care in this country.²⁴ Indeed, Medicaid is "our nation's primary response to the long-term care needs of its

16. *Id.* at 3-14, 6-9.

17. Jan Ellen Rein, *Misinformation and Self-Deception in Recent long-Term Care Policy Trends*, 12 J.L. & POLITICS 195, 210 (Spring 1996).

18. Wiener et al., *supra* note 13, at 182-83.

19. *Id.* at 182.

20. *Id.*

21. See generally ENID KASSNER & LEE SHIREY, AARP, MEDICAID FINANCIAL ELIGIBILITY FOR OLDER PEOPLE: STATE VARIATIONS IN ACCESS TO HOME AND COMMUNITY-BASED WAIVER AND NURSING HOME SERVICES 1 (2000), available at http://research.aarp.org/health/2000_06_medicaid_1.html (stating few older individuals have purchased private long-term care insurance policies that pay for these services).

22. JOSHUA M. WIENER ET AL., CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, STATE COST CONTAINMENT INITIATIVES FOR LONG-TERM CARE SERVICES FOR OLDER PEOPLE, CRS-1 (2000) [hereinafter STATE COST CONTAINMENT], available at newfederalism.urban.org/health_policy.html; JOSHUA M. WIENER ET AL., AARP, SPENDING DOWN TO MEDICAID: NEW DATA ON THE ROLE OF MEDICAID IN PAYING FOR NURSING HOME CARE 1 (1996) [hereinafter SPENDING DOWN].

23. KASSNER & SHIREY, *supra* note 21, at 11.

24. Marshall B. Kapp, *Options for Long-Term Care Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 724 (1991).

citizens.”²⁵

Medicaid has stringent income and asset limits that exclude all but the poorest Americans. However, due to the exorbitant costs of nursing home care, many older Americans become impoverished when they require extended long-term care. While the elderly are not a majority of this country’s impoverished citizens, older persons are much more likely to become impoverished by nursing home costs. Not only are older Americans more likely to require nursing home care, but also the fixed incomes and limited earnings potential of older Americans make it harder for them to recover from the financial blow of nursing home expenses.

Approximately 9.7% of the nation’s poor in 1999 were over age sixty-five. In addition to the older Americans living below the poverty level, many elderly households are just above the brink of poverty. In 1999, 6.1% of people sixty-five years of age and older were just above poverty but below 125% of poverty.²⁶ An additional 20.1 % of people over age sixty-five were between 125% and 200% of the poverty level.²⁷ The elderly are less likely than other adults to move out of poverty, due to the fixed nature of elderly incomes.²⁸

Similarly, the elderly are less likely than younger adults to be able to replace the assets that they spend.²⁹ So, if an elderly couple spends almost all their assets on nursing home care for one spouse, there is little likelihood of replenishing those assets to support the other spouse.

Most elderly couples do not possess sufficient assets to pay for even a year of nursing home care for only one spouse. Excluding the value of home equity,³⁰ the median net worth for married couple households over sixty-five years of age in 1995 was \$47,741.³¹

25. KASSNER & SHIREY, *supra* note 21, at 1.

26. AARP, BEYOND 50: A REPORT TO THE NATION ON ECONOMIC SECURITY 28 (2001), <http://www.aarp.org/beyond50/2001home.html> [hereinafter BEYOND 50].

27. *Id.*

28. *Id.* at 30; HOBBS & DAMON, *supra* note 14, at 4-16, 4-21, 4-22.

29. HOBBS & DAMON, *supra* note 14, at 4-23.

30. The home is an excluded asset in determining Medicaid eligibility. SPENDING DOWN, *supra* note 22, at 28; 42 U.S.C. § 1382(b)(1)(2002); 42 U.S.C. § 1396r-5(c)(5) (2002). Therefore, in determining whether a couple is eligible for Medicaid, the state will not consider the value of the couple’s home. After the death of both spouses, federal law permits the state to seek recovery of its Medicaid expenditures, including seeking reimbursement from real property that had been owned by the institutionalized spouse, such as the couple’s residence. 42 U.S.C. § 1396p(b) (2002); 42 C.F.R. § 433.36 (2002).

31. MICHAEL E. DAVERN & PATRICIA J. FISHER, U.S. CENSUS BUREAU, U.S. DEP’T

Minority households, specifically black and Hispanic households, have significantly less assets than white households and are even less able to afford the steep cost of nursing home care.³²

Middle class people who have been financially independent all of their lives often begin their stay in nursing homes paying on their own for their care. In 1993, about one-half of nursing home care expenses were paid out of pocket by older Americans.³³ If older persons are discharged in a few months, they often do not seek Medicaid eligibility. Yet, if their care lasts longer, many residents are forced to spend a lifetime of savings, impoverishing themselves prior to obtaining government assistance to pay for their care.³⁴ Indeed, due to the spend down requirements of Medicaid, beginning in 1985 and continuing afterwards, the average older person spent more personal money, both in absolute dollars and as a percentage of income, on total health care than she did prior to the enactment of Medicare and Medicaid in 1965.³⁵

Nearly all individuals with disabilities prefer home and community based long-term care services to nursing home care.³⁶ An AARP survey of persons age fifty and older conducted in 2001 found that seventy-five percent of the people surveyed preferred to receive care in their homes, in the event of a disability requiring help with everyday activities. A significant minority of fifteen percent would prefer care in an assisted living or similar residential setting. Only four percent of the people surveyed stated that their first choice for receiving care would be a nursing home. Even when asked about a disability requiring twenty-four-hour care, twenty-five percent of respondents preferred care in the home,

OF COMMERCE, CURRENT POPULATION REPORTS: HOUSEHOLD NET WEALTH AND ASSET OWNERSHIP: 1995 at xvii tbl. I (2001), <http://www.census.gov/prod/www/abs/popula.html> at P70-71. Additional data regarding net wealth and asset ownership, as it fluctuated between 1995 and 1998, can be found in the Federal Reserve Board's Survey of Consumer Finances. *See generally* ARTHUR B. KENNICKELL ET AL., FEDERAL RESERVE BOARD, RECENT CHANGES IN U.S. FAMILY FINANCES: RESULTS FROM THE 1998 SURVEY OF CONSUMER FINANCES, Fed. Reserve Bull. (January 2000), <http://www.federalreserve.gov/pubs/bulletin/2000/0100lead.pdf> (clicking search, entering "recent changes in U.S. family finances," and selecting paragraph 5 on search results page).

32. DAVERN & FISHER, *supra* note 31, at xv fig. 6; BEYOND 50, *supra* note 26, at 46; HOBBS & DAMON, *supra* note 14, at 4-25.

33. *Catastrophic Costs*, *supra* note 13, at 183.

34. *See* SPENDING DOWN, *supra* note 22, at 19.

35. Kapp, *supra* note 24, at 726.

36. KASSNER & SHIREY, *supra* note 21, at 13; Kapp, *supra* note 24, at 728.

twenty-three percent would seek care in an assisted living setting, and only twelve percent desired nursing home care.³⁷

However, Medicaid coverage of home and community based long-term care services is optional for the states, and in many locations, the financial eligibility criteria for such services are even more restrictive than they are for nursing home coverage.³⁸ Medicare does not cover long-term care in the home, and only a small number of the wealthiest Americans have purchased long-term care insurance to provide assistance with the costs of long-term care in the home.³⁹

Long-term care services in the home are quite expensive. The median basic rate for assisted living ranges from \$21,600 to \$26,300, including meals but excluding transportation, assistance with medication, and therapy.⁴⁰ The average cost of a home health aide in 2002 was eighteen dollars per hour, while a licensed practical nurse charged an average hourly rate of thirty-seven dollars per hour.⁴¹

Many households expend their savings purchasing home- and community-based care. For example, most moderate and low-income persons age seventy-five and older can not afford assisted living unless they use their assets to help pay for the costs.⁴² Two studies of spend down patterns for long-term care found that even more people exhaust their assets on home- and community-based services than do so for nursing home care.⁴³ Many people who receive Medicaid in nursing homes have already exhausted their assets to obtain community based care. Since community-based care is highly preferred over nursing home care, it is unlikely that people with large amounts of wealth would seek nursing home care before spending considerable resources on home- and community-based care.

The overwhelming majority of nursing home residents who spend down their assets to qualify for Medicaid are age sixty-five and older.⁴⁴ One commentator observed: "Impoverishment resulting from extended nursing home stays has, in effect, become

37. BEYOND 50.02, *supra* note 2, at 57.

38. See KASSNER & SHIREY, *supra* note 21, at ii.

39. BEYOND 50.02, *supra* note 2, at 58.

40. *Id.* at 88, 117 n.144.

41. *Id.* at 87, 117 n.141.

42. STATE COST CONTAINMENT, *supra* note 22, at CRS-14.

43. SPENDING DOWN, *supra* note 22, at 28.

44. *Id.* at 19.

a normal risk of aging.”⁴⁵ Another commentator remarked that “the vast majority” of elderly Americans “are at an appreciable risk of exhausting their life savings to cover an extended stay” in a nursing home.⁴⁶ Medicaid is “a substantial safety net” for middle class people who are impoverished by the high costs of long-term care.⁴⁷

B. After the Death of the Institutionalized Spouse, the Surviving Spouse is Likely to Have Decreased Income as well as Depleted Assets

Individuals who die while in nursing home care are significantly more likely to have experienced longer nursing home stays than those who are discharged alive.⁴⁸ Therefore, the economic situation of the surviving spouse is especially precarious after the death of a spouse who was institutionalized in a nursing home. The couple probably expended significant assets on nursing home care for the institutionalized spouse, and the surviving spouse’s income is likely to decrease dramatically after the institutionalized spouse’s death.

Women tend to live longer than men and are more likely to be the surviving spouse.⁴⁹ In 1999, thirty-two percent of women over age fifty-five were widowed compared to only nine percent of men of comparable age.⁵⁰ As women age, the likelihood that they will be widowed increases rapidly. Seventy-seven percent of women eighty-five years and older are widows.⁵¹ The average period of widowhood (*i.e.* the average number of years a woman lives past the death of her husband) is eleven years.⁵² After the death of her husband, a woman needs sufficient income and assets to sustain her for an average of eleven years.

45. *Catastrophic Costs*, *supra* note 13, at 183.

46. Rein, *supra* note 17, at 254.

47. SPENDING DOWN, *supra* note 22, at 29; STATE COST CONTAINMENT, *supra* note 22, at CRS-1.

48. *Catastrophic Costs*, *supra* note 13, at 196.

49. DENISE SMITH & HAVA TILLIPMAN, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS: THE OLDER POPULATION IN THE UNITED STATES: MARCH 1999 1 (2000), <http://www.census.gov/prod/2000pubs/p20-532.pdf> at P20-532. In 1999, the ratio of men to women age 55 and over was 81 men to 100 women. The male-female ratio drops steadily with age. For Americans age 85 and over, the male-female ratio was 49 men to 100 women. *Id.*

50. *Id.* at 3.

51. *Id.*

52. Rein, *supra* note 17, at 218.

The poorest segment of the elderly population is comprised of unmarried (or widowed) women, and the likelihood of impoverishment increases with age. In 1999, 13.4% of unmarried women over sixty-five years of age lived in poverty, as did 9.7% of unmarried men over sixty-five. In contrast, approximately five percent of married couple families sixty-five and over lived in poverty.⁵³ Women who are widowed are at a much higher risk of living in poverty.

Both older men and women living alone (most of whom are widowed) have significantly fewer assets than older married couples, likely reflecting the spending of those assets on medical care or long-term care for the spouse who died.⁵⁴ While married couple households over age sixty-five had a median net worth (excluding home equity) of \$47,741 in 1995, single men over age sixty-five had a median net worth of \$15,374, and single women over age sixty-five had a median net worth of \$11,100.⁵⁵ Thus, after the death of a spouse, the surviving spouse has few assets to finance his or her own medical and long-term care.

Moreover, after the death of an institutionalized husband, the wife's pension and Social Security benefits are likely to be inadequate to meet her needs. "[T]he average household income of married women falls sharply in the United States when their husbands die, even when income measures are adjusted for the reduced consumption needs of the now smaller household unit."⁵⁶

Fewer women than men receive an annuity or pension, and the average pension amount is significantly lower for women than for men. In 1995, 46.4% of men over age sixty-five received annuity and/or pension income averaging \$11,460, compared to only 26.4% of women over age 65 who received an annuity or pension, with an average pension of \$6,684.⁵⁷ While widows constituted the largest proportion of women over age fifty receiving annuities and/or pensions, "widows received the lowest mean and median

53. SMITH & TILLIPMAN, *supra* note 49, at 5.

54. See Cathleen D. Zick & Karen Holden, *An Assessment of the Wealth Holdings of Recent Widows*, 55 J. GERONTOLOGY: SOCIAL SCIENCES S90, S96 (2000) (discussing finances of the elderly population).

55. DAVERN & FISHER, *supra* note 31, at xvii tbl. 1.

56. Karen C. Holden & Cathleen Zick, *Insuring Against the Consequences of Widowhood in a Reformed Social Security System*, in FRAMING THE SOCIAL SECURITY DEBATE 157 (R. Douglas Arnold et al. eds., 1998).

57. KEN McDONNE ET AL., EMPLOYEE BENEFIT RESEARCH INSTITUTE, EBRI DATABOOK ON EMPLOYEE BENEFITS G3 (1997).

annuity and/or pension amounts of women of any marital status.”⁵⁸ Census Bureau data from 1990 to 1992 show that only fifty-nine percent of the widows of pensioners received any post-widowhood pension and post-widowhood pension income was seventy-one percent of the husband’s pre-widowhood pension income.⁵⁹ Also, since private pensions usually are not indexed to inflation, real pension income declines over time.⁶⁰

In addition, Census Bureau data show that Social Security benefits declined by almost forty percent from the pre- to post-widowhood period among women widowed during the early part of the 1990s.⁶¹ For a single-earner couple, during the lifetime of the working spouse, the retired worker receives a Social Security retired-worker benefit, and the nonworking spouse receives a benefit equal to fifty percent of that amount. After the death of the retired-worker spouse, the widow will be paid a benefit equal to the deceased worker’s benefit, which amounts to only two-thirds of the combined pre-widowhood benefit. For a two-earner couple in which the spouses have identical covered-earnings history, after the death of a spouse, the surviving spouse receives only her own retired-worker benefit without any additional payments to compensate for the loss of the deceased spouse’s benefits. For this two-earner couple, the post-widowhood Social Security income is only half of the pre-widowhood income.⁶²

In order for a widow to maintain the same standard of living as when both spouses were alive, she needs to receive eighty percent of the couple’s pre-widowhood income.⁶³ However, most widows do not receive eighty percent of the couple’s income, since both their pensions and Social Security incomes drop dramatically after the death of the spouse. As a result, “many married women face a significantly increased risk of poverty following the death of their husbands.”⁶⁴

III. MCCA INCLUDED A “RESOURCES FIRST” RULE, DESIGNED TO PROTECT THE COMMUNITY SPOUSE’S ASSETS, BUT SOME LOWER

58. *Id.*

59. Holden & Zick, *supra* note 56, at 166.

60. Rein, *supra* note 17, at 253.

61. Holden & Zick, *supra* note 56, at 165-66.

62. *Id.* at 159.

63. Karen C. Burke & Grayson M.P. McCouch, *The Impact of Social Security Reform on Women’s Economic Security*, 16 N.Y.L. SCH. J. HUM. RTS. 375, 384 (1999).

64. *Id.*

COURTS DISREGARDED ITS MANDATE

A. Congress's Intent in Enacting MCCA was to End Spousal Impoverishment

The legislative history of MCCA demonstrates that in 1988 Congress sought to redress the devastating financial impact of nursing home costs on the community spouse. The House Report states:

The leading cause of financial catastrophe among the elderly is the need for long-term care, especially the need for nursing home placement. The expense of nursing home care—which can range from \$2,000 to \$3,000 per month or more—has the potential for rapidly depleting the lifetime savings of all but the wealthiest The purpose of the Committee bill is to *end this pauperization* by assuring that the community spouse has a sufficient—but not excessive—amount of income and resources available to her while her spouse is in a nursing home at Medicaid expense. This will be of particular benefit to older women, who, in the current generation at risk of nursing home care, have often worked at home all their lives raising families and have limited income other than their husbands' pension checks.⁶⁵

The House Report noted that the inadequate maintenance levels for community spouses had forced community spouses to sue the institutionalized spouses for support, and that in some cases the “financial duress” of the low maintenance levels had resulted in “the premature institutionalization” of the spouse who had been residing in the community.⁶⁶ The Report continues:

The Committee bill would *end spousal impoverishment*. It revises the current Federal requirements relating to attribution of income, attribution of resources, transfer of resources, and post-eligibility application of income. These revisions are limited to the context of a couple with one spouse in an institution who applies for or receives Medicaid. The purpose of these revisions is to assure that the community spouse in these circumstances has income

65. H.R. REP. NO. 100-105(II), at 65 (1988) (emphasis added), *reprinted in* 1988 U.S.C.C.A.N. 857, 888.

66. H.R. REP. NO. 100-105(I), at 69 (emphasis added), *reprinted in* 1988 U.S.C.C.A.N. at 892.

and resources sufficient to live with independence and dignity.⁶⁷

The Senate expressed similar concern for the plight of spouses of nursing home residents and its intent to remedy spousal impoverishment. In discussing the conference report on MCCA, Senator Kerry was especially concerned about couples who had sought court orders of support for the community spouse through the divorce courts, utilizing the divorce process in order to protect the community spouse from impoverishment. Senator Kerry stated:

I am also very pleased that the conference report addresses the issue of spousal impoverishment and contains much needed protections against asset and income depletion. There is absolutely no reason why a couple married for 30 years must even consider getting a divorce to protect the wife's income and assets while the husband impoverishes himself to qualify for Medicaid funded nursing home care. This is immoral—this is not America—this is an abomination. And, this legislation will eliminate the need for its consideration.⁶⁸

The many statements of support in the Senate for MCCA's spousal impoverishment provisions included the statement of Senator Reid:

Spousal impoverishment is a very serious national problem. The term "spousal impoverishment" refers to the far too familiar situation affecting many, many older couples. It occurs when a spouse enters a nursing home, for example, and the couple must forfeit their entire savings to qualify for Medicaid coverage. This is a significant statement, Madam President. A person enters an extended care facility, a nursing home, and the couple must forfeit their entire savings to even qualify for Medicaid coverage. The act now before us *provides for protection for the non-institutionalized persons* whose spouse's nursing home costs are being paid for by Medicaid.⁶⁹

67. *Id.*

68. 135 CONG. REC. S7386, S7408-S7409 (daily ed. June 8, 1988) (statement of Sen. Kerry).

69. *Id.* at S7402 (statement of Sen. Reid) (emphasis added).

B. MCCA Provides for the Community Spouse to Retain Resources During the Initial Application Period if Her Income is Below a Minimum Level

MCCA sought to protect the community spouse by ensuring that she retained sufficient income and resources to avoid impoverishment. Prior to MCCA, the couple could own no more than \$2,000 in resources in order for the institutionalized spouse to receive Medicaid.⁷⁰ MCCA revised Medicaid law to permit the community spouse to retain a greater share of the couple's resources. Under MCCA, the community spouse is permitted to retain half of the couple's resources up to a specified limit, known as the Community Spouse Resource Allowance (CSRA), while the institutionalized spouse is required to spend down his or her share of the couple's assets to the \$2,000 amount.⁷¹ The exact amount of CSRA is set by the state, but must be within the minimum and maximum levels established by federal law and indexed with inflation.⁷² In 2001, the minimum CSRA was \$17,400 and the maximum CSRA was \$87,000.⁷³ More than half the states set their CSRA at the minimum level permitted by federal law.⁷⁴

An example will clarify how the CSRA works. Assume the state has chosen the minimum CSRA (for 2001) of \$17,400, and the husband is the institutionalized spouse. Our hypothetical couple is presumed to own \$50,000 in non-excluded resources (just above the average).⁷⁵ Since the couple's resources exceed the \$17,400 CSRA chosen by the state, \$25,000 will be attributed to each spouse. The husband will be entitled to Medicaid benefits (focusing on resources only) when his share of the resources is reduced to \$2,000. Thus, the couple must expend \$23,000 of the husband's designated resources on the nursing home care of the husband before he will be eligible for Medicaid.

MCCA also contained provisions to protect the income of the community spouse. The community spouse is allocated a Minimum Monthly Maintenance Needs Allowance ("MMMNA"), set by federal law at a minimum of 150% of the federal poverty

70. Rein, *supra* note 17, at 217.

71. 42 U.S.C. § 1396r-5(c), (d), and (f) (2002); 20 C.F.R. § 416.1205 (2002).

72. *Id.*

73. Blumer, 534 U.S. at ___, 122 S. Ct. at 968.

74. WILLIAM H. CROWN ET AL., AARP, AN ANALYSIS OF ASSET TESTING FOR NURSING HOME BENEFITS, at 45 (1994).

75. DAVERN & FISHER, *supra* note 31, at xvii tbl. I.

level for a family unit of two plus a possible excess shelter allowance (if the community spouse can establish the need for the allowance). The maximum MMMNA was set at \$1,500 in the original 1988 law.⁷⁶ For 2001, the maximum MMMNA was \$2,175 per month.⁷⁷ States set the actual MMMNA between the federal minimum and maximum amounts.⁷⁸ A majority of states set the MMMNA at the minimum amount permitted by federal law.⁷⁹

If the community spouse's income is insufficient to produce income equal to or exceeding the MMMNA, then the couple may request a fair hearing and seek to keep additional assets to generate additional income and bring the community spouse up to the basic income level of the MMMNA.⁸⁰ The revision of the CSRA to generate additional income is authorized by 42 U.S.C. § 1396r-5(e)(2)(C), which 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), an amount adequate to provide such a minimum monthly maintenance needs allowance.⁸¹

The *Blumer* case concerned whether the revision of CSRA pursuant to 42 U.S.C. § 1396r-5(e)(2)(C) is mandatory.⁸² Irene Blumer was institutionalized in a nursing home and sought Medicaid benefits to pay for her care.⁸³ Her husband, Burnett Blumer, resided in the community, and his income was twenty-five dollars below the minimum income level of the state MMMNA.⁸⁴ The Blumers contended that the state was required to revise the CSRA as set forth in 42 U.S.C. § 1396r-5(e)(2)(C) to permit Burnett to retain additional resources to generate the minimum income of the MMMNA.⁸⁵

76. 42 U.S.C. § 1396r-5(d)(3)(c), and (g) (2002).

77. *Blumer*, 534 U.S. at ___, 122 S. Ct. at 967.

78. 42 U.S.C. § 1396r-5(d)(3).

79. CROWN, *supra* note 74, at 46-49.

80. 42 U.S.C. § 1396r-5(e)(2).

81. 42 U.S.C. § 1396r-5(e)(2)(C).

82. *Blumer*, 534 U.S. at ___, 122 S. Ct. at 964.

83. *Id.* at ___, 122 S. Ct. at 970.

84. *Id.*

85. *Id.* at ___, 122 S. Ct. at 972-73.

The state of Wisconsin, supported by the federal agency, HHS, sought to utilize a different procedure to make up for the shortfall in Burnett's income.⁸⁶ The state's approach would allocate income from the institutionalized spouse to the community spouse, pursuant to 42 U.S.C. § 1396r-5(d), instead of permitting the community spouse to retain additional resources to generate the additional income. This approach is known as "income first," allocating income before increasing the CSRA. The Blumers' approach is known as "resources first," in which the CSRA is adjusted before allocating income from the institutionalized spouse to the community spouse.⁸⁷

The "resources first" approach permits couples to obtain Medicaid eligibility sooner, because they do not have to expend as much of their resources to qualify under the resource limit.⁸⁸ Under the "income first" method, the couple must expend more resources to qualify for Medicaid.⁸⁹

Importantly, after the death of the institutionalized spouse, the community spouse is much more likely to be impoverished when an "income first" method is utilized as compared to the "resources first" method. The "income first" rule forces the community spouse, most commonly the wife, to spend down the couple's assets and live on her husband's income during his lifetime. Yet, after the husband's death, his pension or Social Security income, or a significant portion of it, may no longer be available to her.⁹⁰ As a result, the "income first" rule greatly increases the risk that the community spouse will be impoverished after the death of the institutionalized spouse. In contrast, the "resources first" rule helps to reduce the pauperization of the community spouse, since it preserves assets for her support after the institutionalized spouse has died. Thus, the "resources first" rule is consistent with the purpose of MCCA, *i.e.* to protect the community spouse from impoverishment.

However, from the vantage point of the government, the "income first" approach is desirable, because it results in lower Medicaid expenditures. In the *Blumer* case, the federal government's brief projected that the additional annual cost of the

86. *Id.* at ___, 122 S. Ct. at 970.

87. *Id.* at ___, 122 S. Ct. at 969.

88. *Id.*

89. *Id.*

90. *See supra* Part II.B.

“resources first” method for Wisconsin was \$10 million.⁹¹ The state and federal government both contribute to the payment of Medicaid expenditures. Not surprisingly, given the predicted additional costs, a majority of states utilized the “income first” approach when the *Blumer* case went before the Supreme Court.⁹²

C. Some Lower Courts Ignored the Plain Language and Legislative History of MCCA in Upholding the “Income First” Approach

Medicaid applicants in numerous states challenged states’ use of the “income first” method. Applicants argued that the CSRA adjustment pursuant to 42 U.S.C. § 1396r-5(e) (2) (C) occurs during a fair hearing process that determines initial eligibility, while the attribution of income permitted by 42 U.S.C. § 1396r-5(d) is applicable only *after* the applicant is found eligible for Medicaid. The section pertaining to the attribution of income states:

Protecting income for community spouse. (1) Allowances to be offset from income of institutionalized spouse. *After an institutionalized spouse is determined or redetermined to be eligible for medical assistance*, in determining the amount of the spouse’s income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse’s monthly income the following amounts in the following order: (A) A personal needs allowance. . . . (B) A community spouse monthly income allowance. . . .⁹³

Therefore, applicants argued, according to the clear language of the statute, the attribution of income from the institutionalized spouse to the community spouse could not be utilized to deny initial eligibility and could only occur *after* the institutionalized spouse was found eligible for Medicaid. In other words, applicants contended that the “resources first” approach was mandated by the statute.

91. Brief for the United States as *Amicus Curiae* (on Petition for Writ of Certiorari) at 11, Wisconsin Dep’t. of Health & Family Servs. v. Blumer, 534 U.S. 473, 122 S. Ct. 962 (2002) (No. 00-952). The Blumers’ answering brief disputed the government’s estimate of the cost of the “resources first” method. The Blumers challenged the assumptions underlying the government’s calculations, and the Blumers asserted that the government’s estimates were greatly exaggerated. Respondent’s Brief In Opposition (on Petition for Writ of Certiorari) at 9-10, *Blumer* (No. 00-952).

92. Brief for the United States, *supra* note 91, at 11.

93. 42 U.S.C. § 1396r-5(d) (2002) (emphasis added).

Two federal courts of appeals and two state courts rejected the applicants' arguments in support of "resources first" and upheld the legality of the states' "income first" method.⁹⁴ The Court of Appeals for the Third Circuit reasoned that the "resources first" approach would render the allocation of income set forth in 42 U.S.C. § 1396r-5(d) "superfluous."⁹⁵ The Third Circuit's decision did not address the statute's scheme of requiring adjustment of resources prior to an eligibility determination and limiting the attribution of income in section (d) until *after* a finding of eligibility. By ignoring the timeframe set forth in the statute for adjusting resources pre-eligibility and attributing income post-eligibility, the Third Circuit was able to conclude that the "income first" method was permissible.⁹⁶ Moreover, the Third Circuit deferred to the opinion of the federal agency, HHS, contained merely in opinion letters and not in regulations, that "income first" was permitted by the Medicaid statute.⁹⁷ The court opined that this result comported with the purpose of MCCA "by preserving as many Medicaid resources as possible."⁹⁸ The court stated that MCCA was not intended to be a final solution to spousal impoverishment, disregarding the legislative history of MCCA that stated Congress' intent to end spousal impoverishment.⁹⁹

The Supreme Judicial Court of Massachusetts, the state's highest court, similarly concluded that "income first" was permitted by the Medicaid statute.¹⁰⁰ The Massachusetts court acknowledged that the attribution of income provision, set forth in 42 U.S.C. § 1396r-5(d), applied "after" eligibility was determined, but then stated that the "fair meaning" of the statute was that the attribution of income was not limited "only" to post-eligibility determinations.¹⁰¹ Thus, the court ignored the plain meaning of

94. *Cleary v. Waldman*, 167 F.3d 801, 808 (3d Cir.), *cert. denied*, 528 U.S. 870 (1999); *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 802 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998); *Thomas v. Comm'r of the Div. of Med. Assistance*, 682 N.E.2d 874, 879 (Mass. 1997); *Golf v. New York State Dep't of Soc. Serv.*, 697 N.E.2d 555, 662-63 (N.Y. 1998).

95. *Cleary*, 167 F.3d at 809.

96. *Id.* at 809-12.

97. *Id.* at 811-12.

98. *Id.* at 811.

99. *Compare id.* at 810, with H.R. REP. NO. 100-105(II), at 65, 69 (1988), *reprinted in* 1988 U.S.C.C.A.N. 857, 888, 893.

100. *Thomas*, 682 N.E.2d at 879.

101. *Id.* (quoting *Holbrook v. Randolph*, 374 Mass. 437, 440-41 (1978)). The Court of Appeals of New York similarly stated that the federal statute did not

the word “after” and disregarded the text limiting income attribution to the post-eligibility period.¹⁰² The Massachusetts court acknowledged that “the income deemed to the community spouse from the institutionalized spouse was not guaranteed on the death of the latter,” but concluded that permitting the community spouse to retain resources would “subvert” the “purpose of MCCA, which was to require couples to bear a reasonable amount of the cost of institutionalized care and thus preserve Medicaid resources.”¹⁰³

Like the Third Circuit, the Massachusetts court was more concerned with lowering Medicaid expenditures than with ending spousal impoverishment.¹⁰⁴ Neither court cited any passage of MCCA legislative history in support of their characterization of the purpose of MCCA.¹⁰⁵ The courts’ statements that the goal of the spousal impoverishment provisions of MCCA was to preserve Medicaid resources is factually incorrect; so, it is not surprising that the courts do not cite any passage of the MCCA legislative history in support of their claim.

Nevertheless, Congress did seek to dramatically reduce Medicaid expenditures when it passed the Omnibus Budget Reconciliation Act of 1993 (“OBRA 1993”).¹⁰⁶ In hearings before the Health and Environment Subcommittee of the United States House of Representatives’ Committee on Energy and Commerce, the chairman of the subcommittee, Congressman Waxman, made this objective clear. Congressman Waxman stated that the Clinton administration had requested that the Committee reduce federal Medicaid outlays by \$7.8 billion over the next five fiscal years, dwarfing the \$2.9 billion in cuts in 1981 under President Reagan.¹⁰⁷

specify whether an income transfer was to occur prior to an eligibility determination or post-eligibility, ignoring the word “after” in 42 U.S.C. § 1396r-5(d).

102. *Id.* The Court of Appeals for the Sixth Circuit relied upon *Thomas* in reaching the conclusion that a transfer of income may occur prior to an eligibility determination. *Chambers v. Ohio Dep’t of Human Serv.*, 145 F.3d 793, 802 (6th Cir., cert. denied, 525 U.S. 964 (1998)). The Court of Appeals of New York similarly stated that the federal statute did not specify whether an income transfer was to occur prior to an eligibility determination or post-eligibility, ignoring the word “after” in 42 U.S.C. § 1396r-5(d). *Golf v. New York State Dep’t of Soc. Serv.*, 697 N.E.2d 555, 562 (N.Y. 1998).

103. *Thomas*, 682 N.E.2d at 880-81.

104. *Id.*

105. See *Chambers*, 167 F.3d at 793; *Thomas*, 682 N.E. 2d at 880-81.

106. Pub. L. No. 103-66, 107 Stat. 312 (1993).

107. Ira S. Wiesner, *OBRA ‘93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 19 NOVA L. REV. 679, 683-84 n.18

To accomplish this goal, OBRA 1993 increased the number of months of ineligibility for transferring assets, placed restrictions on wealth sequestered in trust arrangements, and enhanced state recovery of Medicaid expenditures from deceased Medicaid recipients' estates.¹⁰⁸

Yet, OBRA 1993 made no changes to the procedures for revising the CSRA and attributing income, and therefore the 1993 law is irrelevant to the question of whether the "resources first" method is required by MCCA. The courts imputed the legislative history of OBRA 1993, specifically the objective of reducing Medicaid expenditures, to MCCA, but in fact, MCCA did not seek to diminish Medicaid spending. The courts' distortion of the legislative history and the clear terms of MCCA is best understood as judicial deference to governments seeking to expend less on low-income seniors and as judicial insensitivity to the plight of older Americans who require long-term care.

Three state courts, including the Court of Appeals of Wisconsin in the *Blumer* case, held that the "resources first" approach was mandated by MCCA.¹⁰⁹ All three decisions focused on the statutory language requiring a revision of the CSRA prior to a decision on eligibility and limiting the attribution of income until after a determination of eligibility.¹¹⁰ These decisions concluded that the unambiguous language of the statute mandates the "resources first" approach and does not permit the "income first" method.¹¹¹

The United States Supreme Court denied *certiorari* in two federal appellate cases which held that the "income first"

(1995).

108. *Id.* at 681. The long-term care industry lobbied for restrictions on Medicaid eligibility, alleging that wealthy elderly couples were using asset transfers and trusts to pass their wealth to their children without paying for long-term nursing home care. The true motive behind the long-term care industry's efforts was the desire to increase the sale of private long-term care insurance. Rein, *supra* note 17, at 261. As described *supra*, in Section I, most older Americans do not have significant resources to pass to their children, and indeed, the few who have such wealth utilize their resources to pay for home and community based long-term care services.

109. *Gruber v. Ohio Dep't of Human Serv.*, 647 N.E.2d 861, 868 (Ohio Ct. App. 1994); *Kinnach v. Ohio Dep't of Human Serv.*, 645 N.E.2d 825, 827 (Ohio Ct. App. 1994); *Wisconsin Dep't. of Health & Family Serv. v. Blumer*, 615 N.W.2d 647, 655 (Wis. 2000), *reversed*, 534 U.S. 473, 122 S. Ct. 962 (2002).

110. *See id.*

111. *See id.*

procedure is permissible.¹¹² Then the Supreme Court granted *certiorari* to review the decision of the Wisconsin Court of Appeals in *Blumer*, which had held that the language of the statute mandated the “resources first” approach.¹¹³

IV. IN *BLUMER*, THE SUPREME COURT FAILED TO UPHOLD THE CLEAR LANGUAGE AND LEGISLATIVE INTENT OF MCCA

The majority opinion in *Blumer*, constituting the views of six of the Justices, was written by Justice Ginsberg. The crux of the opinion is that the term “community spouse’s income” in 42 U.S.C. section 1396r-5(e)(2)(C) does not mean the income “actually possessed by” the community spouse.¹¹⁴ Instead, according to the majority opinion, the term “community spouse’s income” includes income that is possessed by the institutionalized spouse and attributed to the community spouse by the state.¹¹⁵ The Court did not even suggest that any specific language of MCCA or the legislative history of MCCA supported its dismissal of the plain meaning of the term “community spouse’s income.”¹¹⁶ Instead, the opinion listed two citations in support of its conclusion that the community spouse’s income includes the institutionalized spouse’s income. First, the Court cited a treatise on grammar for the proposition that a “possessor nominal does not necessarily possess (in the everyday, legalistic sense of the term) the entity denoted by the possessee.”¹¹⁷ The second citation is to a prior Supreme Court case which “question[ed the] characterization of a statutory term as unambiguous when its meaning has generated a division of opinion in the lower courts.”¹¹⁸ In essence the Court ruled that since some, but not all, lower courts had ignored the plain meaning of the text, the text must be ambiguous.

The Court acknowledged the argument that the statute requires the revision of the CSRA prior to a determination of

112. See *Cleary v. Waldman*, 167 F.3d 801, 808 (3rd Cir.), *cert. denied*, 528 U.S. 870 (1999); *Chambers v. Ohio Dep’t of Human Servs.*, 145 F.3d 793, 802 (6th Cir.), *cert denied*, 525 U.S. 964 (1998).

113. 534 U.S. at ___, 122 S. Ct. at 972.

114. *Id.* (emphasis in original).

115. *Id.* at ___, 122 S. Ct. at 974.

116. *Id.*

117. *Id.* at ___, 122 S. Ct. at 972 (citing J. TAYLOR, *POSSESSIVES IN ENGLISH: AN EXPLORATION IN COGNITIVE GRAMMAR 2* (1996)).

118. *Id.* (citing *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996)).

eligibility but permits the attribution of the institutionalized spouse's income to the community spouse only after a determination of eligibility.¹¹⁹ The Court responded by concluding that since the fair hearing would consider the post-eligibility situation of the couple, specifically whether the community spouse had a sufficient monthly income allowance to meet the MMMNA, therefore, the state could conduct the post-eligibility income attribution calculation prior to a determination of eligibility.¹²⁰ The only case law cited by the Court in support of permitting post-eligibility income attributions prior to a determination of eligibility was *Schweiker v. Gray Panthers*.¹²¹ The Court cited the case for the "background principle that 'it is proper to expect spouses to support each other'" and quoted legislative history from the establishment of the Medicaid program in 1965.¹²² Thus, the Court's decision completely disregarded not only the clear language of MCCA regarding pre- and post-eligibility determinations but also the legislative history of MCCA, which expressed Congressional intent to end spousal impoverishment.

Moreover, the Court's characterization of the legislative history of the original enactment of Medicaid is misleading. In 1965, "Medicaid was simply tacked on as an afterthought to the Medicare program," with virtually all debate focusing on the Medicare program.¹²³ There was hardly any attention paid in 1965 to Medicaid coverage of nursing home care,¹²⁴ and the Medicaid program was "part of a last-minute scramble to cobble together the Medicaid Act's provisions" based on existing legislation, "which involved little or no debate."¹²⁵ The 1965 Senate Report described Medicaid as an extension and improvement of the Kerr-Mills medical assistance for the aged program, authorized in 1960.¹²⁶ Kerr-Mills had provided "some institutionalized care" for the elderly, while the 1965 "improvements" required coverage for skilled nursing home services.¹²⁷ The 1965 Senate Report's

119. *Id.* at ___, 122 S. Ct. at 972-73.

120. *Id.* at ___, 122 S. Ct. at 973-74.

121. *Id.* at ___, 122 S. Ct. at 974 (citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 45 (1981)).

122. *Id.* (quoting S. REP. NO. 404, 89th Cong., 1st Sess., pt. 1, p. 78 (1965)).

123. Rein, *supra* note 17, at 257.

124. *Id.* at 258.

125. *Id.*

126. S. REP. NO. 404, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 1950, 2014.

127. *Id.* at 1951.

discussion of the obligation of spouses to support each other, cited by the *Blumer* court, did not contain any references to spouses residing in institutions, but rather applied to the entire Medicaid program.¹²⁸ There certainly was no discussion in 1965 of whether income attributions to the community spouse would occur pre- or post-eligibility, since the income attribution provision was added to Medicaid in 1988, when Congress explicitly sought “to protect at-home spouses from impoverishment.”¹²⁹

In sum, the Court ruled that the text of MCCA did not mean what the words said but rather its meaning was to be interpreted in accordance with the legislative history of a different statute than the one being implemented. After dismissing both the text and legislative history of MCCA, the Court readily concluded that HHS’s preliminary determination that MCCA permits “income first” was “not . . . unreasonable.”¹³⁰ The Court stated that HHS’s position, as embodied in proposed regulations that were not finalized, “warrants respectful consideration.”¹³¹

The Court noted that since MCCA gave states “large discretion” in setting the MMMNA and the CSRA, therefore the statute did not indicate that additional discretion with regard to “income first” was “inappropriate.”¹³² The Court’s reasoning is truly frightening. Many federal entitlement programs operate by giving states broad discretion with regard to some variables but requiring states to adhere to strict federal requirements in other matters. The High Court justified gutting the “resources first” provision of MCCA by noting that the statute deferred to state choice in other provisions of the statute.¹³³

Notably, the *Blumer* Court did not cite or rely on the case of *Chevron U.S.A. Inc. v. NRDC*, in which the Supreme Court had stated: “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹³⁴ Instead, the Court cited *United States v. Mead*,¹³⁵ *Thomas Jefferson University v. Shalala*,¹³⁶

128. *Id.* at 2018, cited by *Blumer*, 534 U.S. 473, ___, 122 S.Ct. 962, 974 (2002).

129. Rein, *supra* note 17, at 258.

130. *Blumer*, 534 U.S. at ___, 122 S. Ct. at 973.

131. *Id.* at ___, 122 S. Ct. at 976.

132. *Id.*

133. *Id.* at ___, 122 S. Ct. at 975.

134. 467 U.S. 837, 842-43 (1984).

135. 533 U.S. 218, 227-28 (2001).

136. 512 U.S. 504, 512 (1994).

and *Schweiker v. Gray Panthers*.¹³⁷ As noted *supra*,¹³⁸ *Gray Panthers* was decided before MCCA was passed, and therefore is of little relevance to the validity of the Secretary's interpretation of MCCA. In *Mead*, the Court held that the *Chevron* deference was not warranted and remanded the case for consideration, pursuant to *Skidmore v. Swift & Co.*,¹³⁹ of whether the agency's position was persuasive.¹⁴⁰ Yet, the *Blumer* majority did not state that the agency's position permitting "income first" was persuasive. The *Blumer* decision characterized the government's position as not "unreasonable" and not "inappropriate."¹⁴¹ A reasonableness standard is far more deferential to the agency than a persuasiveness standard, and thus the Court expanded upon prior precedent, granting the agency enormous power in interpreting legislation.

Blumer cites *Thomas Jefferson University* for the proposition of deferring to the Secretary's significant expertise in interpreting a complex and technical regulatory program.¹⁴² *Thomas Jefferson University* did not concern interpretation of statutory language but rather addressed the agency's interpretation of its own regulation, which the Court reviewed under the standard that the agency's interpretation would be upheld unless it was "plainly erroneous."¹⁴³ In *Blumer*, the Court extended the "not erroneous" or "not unreasonable" standard to the context of an agency's interpretation of Congressional mandates and intent.¹⁴⁴ Interestingly, *Thomas Jefferson University* was a five to four decision, in which the dissent written by Justice Thomas derided the majority for ignoring the "plain meaning" of the relevant regulation.¹⁴⁵

Similarly, the dissent in *Blumer*, written by Justice Stevens and joined by Justices Scalia and O'Connor, criticized the majority for ignoring the plain text of the statute. For instance, the dissent stated, "Rather than admitting that its reading strains the text of the MCCA, the Court engages in an analytical sleight of hand."¹⁴⁶ The dissent also pointed out that the majority's decision violated

137. *Blumer*, 534 U.S. at ___, 122 S. Ct. at 976.

138. *See supra*, notes 121-22 and accompanying text.

139. 323 U.S. 134, 140 (1944).

140. *Mead*, 533 U.S. at 234-39.

141. *Blumer*, 534 U.S. at ___, 122 S. Ct. at 973, 976.

142. *Id.* at ___, 122 S. Ct. at 976.

143. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512-13 (1994).

144. *Id.* at 525 (Steven, J., dissenting).

145. *Id.* at 518 (Thomas, J., dissenting). Justices Stevens, O'Connor, and Ginsburg joined the dissent. *See id.*

146. *Blumer*, 534 U.S. at ___, 122 S. Ct. at 978.

MCCA's requirement that, post-eligibility, income is defined as "available" only to the spouse whose name is on the check.¹⁴⁷ The dissent further noted that the majority expressed the opinion that the "income first" method is a better policy choice than the "resources first" method, and the dissent berated the majority for ignoring the policy choice made by Congress.¹⁴⁸

The majority stated that if states are required to expend greater funds on Medicaid for long-term care, due to the federal requirement to utilize the "resources first" method, then the states "would have little choice but to offset the greater expense of the resources-first method" by reducing expenditures on other recipients within the bounds of federal law.¹⁴⁹ The Court further suggested that applicants "whose assets exceed the formula resource allowance" are not worthy of the expenditure of these funds.¹⁵⁰

The Court's reasoning displays callous disregard for the impoverishment of older Americans, particularly older women, who lose a lifetime of savings when their spouses are beset by disabling impairments that require nursing home care. The Court demonstrated insensitivity to the plight of many older Americans who are on the edge of poverty and are pushed into the chasm of despair by the exorbitant costs of long-term care.

The Court did not provide any citations in support of its assumption that if states are forced to comply with the plain meaning of the statute they will "have little choice" but to penalize other Medicaid recipients, "by reducing the MMMNA or the standard CSRA."¹⁵¹ The Court fails to consider that states have many other means of reducing Medicaid expenditures, such as cutting nursing home reimbursement rates, reducing the supply of nursing home beds, expanding the role of managed care and capitated payments to long-term care providers, and utilizing tax incentives to encourage people to purchase long-term care insurance.¹⁵²

The Court's presumption that states will not spend additional dollars to prevent the pauperization of older Americans is self-

147. *Id.* at 959 (citing 42 U.S.C. § 1396r-5(b)(2)(A)(i)).

148. *Id.* at 979.

149. *Id.* at 976.

150. *Id.* at 976-77.

151. *Id.* at 976.

152. STATE COST CONTAINMENT, *supra* note 22, at CRS-15, CRS-19, CRS-22.

prophesying. Now that the Court has ruled that states are free to reduce their Medicaid expenditures by ignoring the requirement to calculate “resources-first,” the Court has encouraged states to minimize their Medicaid expenditures without worrying about the plain meaning of the Medicaid Act.

V. CONCLUSION

The legislative history of MCCA included the expression of outrage at the need for spouses to become divorced in order to protect the financial survival of the community spouse.¹⁵³ By eliminating the “resources first” rule from the Medicaid statute, the *Blumer* Court has increased the likelihood that couples will be forced to divorce in order for the community spouse to retain sufficient resources to provide a basic level of income to her after the death of her institutionalized husband.¹⁵⁴

In *Blumer*, the use of the “resources-first” approach would have meant an additional \$15,000 in resources to be kept by Mr. Blumer.¹⁵⁵ The additional economic assistance provided by a small increase in assets and income generated from those assets is essential to maintaining some measure of independence and dignity for the community spouse. The *Blumer* decision is a disturbing development for all but the wealthiest Americans. Middle class citizens whose economic survival is contingent upon the protections of the Medicaid statute are clearly at risk of pauperization under the Court’s damaging decision.

153. See *supra* pp. 14-18.

154. See William J. Browning, *Recent U.S. Supreme Court Decision Will Lead to More Divorces Among the Elderly*, PROBATE L.J. OF OHIO ___ (forthcoming 2002).

155. 534 U.S. at ___, 122 S. Ct. at 972.