SUPREME COURT OF THE UNITED STATES

No. 00–952

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, PETITIONER
v. IRENE BLUMER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT IV

[February 20, 2002]

JUSTICE STEVENS, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join, dissenting.

The Medicare Catastrophic Coverage Act of 1988 (MCCA), 42 U. S. C. §1396r–5 *et seq*. (1994 ed. and Supp. V), provides important protections for married couples who need financial assistance when one spouse is institutionalized in a nursing home. Eligibility for financial assistance in paying nursing home costs is limited by a ceiling on the couple's resources and a ceiling on their income. The MCCA responded to pre-1988 eligibility rules that often required both spouses to deplete their combined resources before an institutionalized spouse became eligible for benefits. In order to prevent the "pauperization" of the spouse who remains at home (the "community spouse"), the 1988 Act gives couples two important rights that are implicated by this case. H. R. Rep. No. 100–105, pt. 2, pp. 66–67 (1987). The first is a *preeligibility* right of the spouse who remains at home (the "community spouse") to retain a defined share of their joint resources, called the "community spouse resource allowance" (CSRA).[1] The

[1] A portion of the couple's assets is allocated to the community spouse pursuant to a formula found in 42 U. S. C. §1396r–5(C)(1)(A) (1994 ed). This allocated amount, the CSRA, is reserved for the benefit of the

second is a *posteligibility* right of the institutionalized spouse to use a defined share of her income for purposes other than paying for the cost of her care.

The two statutory rights involved in this case are designed, in part, to assure that the community spouse's income may be maintained at a minimum level—the "minimum monthly maintenance needs allowance" (MMMNA).[2] To safeguard these rights and this minimum level of subsistence for the community spouse, the statute provides for a "fair hearing," at which a couple seeking medical assistance for an institutionalized spouse may challenge several calculations that are used to determine eligibility for Medicaid. 42 U. S. C. §1396r–5(e)(2) (1994 ed.). The determination of the CSRA is one such calculation that may be challenged. §1396r–5(e)(2)(A)(v).

During this pre-eligibility hearing, if the institutionalized spouse has income-producing resources and the community spouse's income is below the MMMNA, the provision in issue in this case, §1396r–5(e)(2)(C), is applicable. By its terms, it allows the institutionalized spouse to transfer sufficient resources to the community spouse to provide him with an income equal to the MMMNA. Since only those resources that remain with the institutionalized spouse are counted for eligibility purposes, §1396r–5(e)(2)(C) enables some institutionalized spouses who would otherwise be ineligible to qualify for financial assistance.

The text of §1396r–5(e)(2)(C) is straightforward. As its

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community spouse and is not considered in establishing assistance eligibility for the institutionalized spouse. §1396r–5(c)(2).

[2] Section 1396r–5(d)(3) sets the boundaries of the MMMNA. Although this provision grants States some flexibility in setting the MMMNA, it must be set no lower than 150% of the poverty level for a family of two. In 2001, States could set the MMMNA between $1,406.25 and $2,175 per month. Wisconsin established its MMMNA at $1,935.

caption indicates, it deals only with the "[r]evision of community spouse resource allowance" and it is applicable when an eligibility determination is made. It provides:

> "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."

Thus, under the plain language of the statute, if the CSRA that has been calculated in accordance with §1396r–5(c)(1)(A) is insufficient to raise the community spouse's income to the MMMNA level, there "shall be substituted" a new CSRA that will produce sufficient income. §1396r–5(e)(2)(C).

With respect to income, the sole provision in the federal statute that authorizes a transfer of income from the institutionalized spouse to the community spouse applies only *after* the eligibility determination has been made. §1396r–5(d)(1). It authorizes the institutionalized spouse to use some of her income to take care of her own needs, to provide support for the community spouse when his income is below the MMMNA, and to help other family members before paying for her care. But as the text of the provision expressly states, it only applies "[a]fter an institutionalized spouse is determined or redetermined to be eligible for medical assistance."[3]

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[3] 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

Wisconsin has passed a statute that prohibits the resource transfer authorized by §1396r–5(e)(2)(C) unless the institutionalized spouse first transfers any available income to the community spouse.[4] Unless this prohibition is authorized by federal law, it is plainly invalid because it qualifies the federal right created by §1396r–5(e)(2)(C).

There are two possible bases for arguing that the Wisconsin statute is consistent with §1396r–(e)(2)(C): first, that despite the express limitation in §1396r–5(d) to deductions authorized "[a]fter an institutionalized spouse is determined or redetermined to be eligible," Congress really meant "before or after"; and second, that when Congress used the term "community spouse's income" in §1396r–5(e)(2)(C), it really meant "community spouse's income plus any deduction from the institutionalized spouse's income that may in the future be made available

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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 (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

"(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

"(C) A family allowance, for each family member. . . ." §1396r–5(d)(1).

[4] Wis Stat. §49.455(8)(d) (1993–1994) provides in part:

"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 . . . ."

to him." As is clear, both of these arguments require altering the plain text of the statute.

Rather than admitting that its reading strains the text of the MCCA, the Court engages in an analytical sleight of hand: It conceives of the transfer of income that is commanded by the Wisconsin statute as a condition of eligibility, not as a *required* transfer, but only as a *prediction* of things to come. *Ante*, at 16 ("In short, if the §1396r–5(e)(2)(C) hearing is properly comprehended as a pre-eligibility projection of the couple's posteligibility situation, as we think it is, we do not count it unreasonable for a state to include in its estimation of the 'community spouse's income' in that posteligibility period an income transfer that will then occur"). The Court's temporal manipulation of the §1396r–5(e)(2)(C) hearing is innovative; but it is wrong for at least three reasons.

First, in speculating that Wisconsin does not actually require a preeligibility transfer, but only predicts a future income transfer, the Court neglects to consider the text of the State statute in issue. In holding that Wisconsin's "income-first" approach is permissible, the Court states: "The *theoretical* incorporation of the CSMIA [Community Spouse Monthly Income Allowance] into the community spouse's future income at that hearing has no effect on the pre-eligibility allocation of income between the spouses. *The CSMIA becomes part of the community spouse's income only when it is in fact transferred to that spouse, §1396r–5(d)(1), which may not occur until '[a]fter [the] institutionalized spouse is determined . . . to be eligible.*' §1396r–5(d)(1)." *Ante*, at 16–17 (emphasis added). The Court's own statement, which replaces the statutory phrase "*made available to*" from §1396r–5(d)(1)(B) with the phrase "transferred to," exposes precisely why the Wisconsin statute is in conflict with the MCCA. As the text of the Wisconsin statute makes clear, there is nothing "theoretical" about the income transfer that it requires:

"[T]he department may not [substitute an increased CSRA] unless the institutionalized spouse *makes available* to the community spouse the maximum monthly income allowance permitted." Wisc. Stat. §49.455(8)(d) (1993–1994) (emphasis added). The state statute requires that an institutionalized spouse "make available" income to the community spouse. In other words, Wisconsin requires a pre-eligibility transfer of income from the institutionalized spouse to the community spouse. Because 42 U. S. C. §1396r–5(d)(1) permits the income transfer to take place only after eligibility has been established, the Wisconsin statue is in conflict with the plain language of the MCCA.[5]

Second, although the MCCA permits an institutionalized spouse to transfer income to the community spouse after eligibility has been established, it by no means requires that she do so.[6] Thus, by requiring the CSMIA transfer, and therefore not increasing the CSRA to meet the community spouse's income needs, the Wisconsin

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[5] The Court asserts in response that the dissent fails to consider that the Wisconsin statute only requires the institutionalized spouse to make available that which she is "permit[ed]" to make available pursuant to subsection (4)(b). *Ante*, at 16, n. 10. But subsection (4)(b), which is substantially identical to §1396r–5(d)(1), describes the amount of income that can be made available posteligibility, whereas subsection (8)(d) of the Wisconsin statute requires that it be made available as a condition of eligibility. In overlooking the difference between the permissive character of the federal provision and the mandatory character of the Wisconsin statute, the Court's response continues to ignore the text of the Wisconsin statute.

[6] Counsel for the Wisconsin Department of Health and Family Services conceded at oral argument that the income transfer is not required. Tr. of Oral Arg. 14 ("It doesn't explicitly require the transfer"). The Court itself waffles between describing the income transfer as something that has the "potential" to occur, *ante*, at 13, and something that "will . . . occur," a*nte*, at 16. Nevertheless, the Court's analysis of the 42 U. S. C. §1396r–5(e)(2)(C) hearing clearly contemplates a mandatory posteligibility transfer.

statute mandates an income transfer that Congress left optional. Furthermore, if the Wisconsin statute could be interpreted to require only a prediction, rather than a mandatory preeligibility transfer, there are several plausible reasons why such a "prediction" may not ultimately come to fruition. For example, the institutionalized spouse might choose not to contribute to the support of the community spouse. Alternatively, the institutionalized spouse's income could fluctuate over time and may not in a given month be sufficient to augment the community spouse's monthly income. Finally, a hearing examiner's finding of ineligibility—based on a fictional prediction that a posteligibility transfer of income would occur—might (as it did in this case) actually prevent the posteligibility transfer from occurring.[7] If any of these events occurs, a primary purpose of the statute—ensuring the financial security of the community spouse—will have been undermined. Thus, either the Wisconsin statute mandates the income transfer, in which case it contradicts the MCCA, or it diminishes the §1396r–5(e)(2)(C) hearing into a thought experiment that is inconsistent with the purpose of the statute.

Third, an important posteligibility provision of the statute, which expresses the "name-on-the-check" policy of the MCCA, also exposes why the Wisconsin statute is in conflict with the federal one. Section 1396r–5(b)(2)(A)(i) states: "[Posteligibility,] if payment of income is made

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[7] Under the hearing examiner's ruling in this case, the predicted posteligibility transfer of income could not occur because he found her ineligible for assistance. It is ironic, to say the least, that the predicate for the so-called "income first" approach is a hypothetical transfer of income that is actually precluded by the application of that approach. The effect of the Wisconsin statute in this case is to preclude the reallocation of resources that (a) is expressly authorized by §1396r–5(e)(2)(C) of the statute, (b) would establish her eligibility, and (c) make it possible for the posteligibility transfer to take place.

solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse." By mandating an income transfer from the institutionalized spouse to the community spouse, the Wisconsin statute effectively treats the institutionalized spouse's income as that of the community spouse, and, therefore, violates the prohibition of §1396r–5(b)(2)(A)(i).

As a final matter, the Court pays "respectful consideration" to an opinion letter and policy memoranda in which the Secretary of Health and Human Services "'in the spirit of Federalism'" has allowed the States to use either an income-first or a resources first approach. *Ante*, at 20. The weight that should be accorded to such a document depends "'upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *United States* v. *Mead Corp.*, 533 U. S. 218, 228 (2001). The Secretary has taken inconsistent positions on this issue over time, see App. to Pet. for Cert. 78a–90a, and the current opinion letter offers no analysis of the potentially conflicting provisions in the federal and state statutes. It is devoid of any "'power to persuade.'"

The Court concludes its opinion with an explanation of why the income-first rule may represent a better policy choice than the resource-first rule. It is not, however, a policy choice that Congress made. Indeed, the fact that the text of the federal statute expressly authorizes the resource-first approach without mentioning the income-first rule commanded by the Wisconsin statute, at the very least, identifies a congressional preference for the former.

This statute is not ambiguous. The resource adjustment authorized by §1396r–5(e)(2)(C) is not conditioned on any prior or predicted transfer of income. The state statute imposing that condition is therefore invalid. Because I

agree with the analysis of the statute in the opinion of the Wisconsin Court of Appeals, I would affirm its judgment. I therefore respectfully dissent.