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Opinion No. 08-31

Notice to Bureau of TennCare re: Medicaid/Medicare Benefits Due to Separation Asset Division

Judges in Davidson County have noted an increase in the number of divorce complaints in cases where one spouse suffers from a disability affecting his/her abilities. The complaints generally are in the nature of "Petitions for Legal Separation and Division of Assets." They are frequently filed with reference to Tenn. Code Ann. §36-4-102, and ask for only a legal separation and for court approval to transfer assets out of the disabled spouse's name and into the non-disabled spouse's name. The express purpose for filing said petitions appears to be attainment of Medicaid eligibility for the disabled spouse. In each case, these complaints fail to set forth any grounds for legal separation, although they reference Tenn. Code Ann. §36-4-102. In none of these cases is any notice being given to the Bureau of TennCare for the State of Tennessee. The filing of such complaints raises the following questions:

QUESTIONS

1. In any case seeking a divorce or legal separation in which the disabled spouse has a conservator and is receiving either Medicare[1]/Medicaid benefits, is notice to the Bureau of TennCare required as a prerequisite to granting relief?

2. In cases seeking a divorce or legal separation involving a disabled spouse but where court filings lack information as to whether or not the disabled spouse is receiving TennCare benefits, is notice to the Bureau of TennCare a prerequisite to the maintenance of such complaints?

3. When notice has been provided to TennCare but plaintiff fails to enumerate grounds for divorce or separation pursuant to Tenn. Code Ann. §36-4-102, is there a basis for granting relief under this statute?

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[1] The federal government funds the Medicare program and administers it through the United States Department of Health and Human Services. *Michigan Ass'n of Homes and Services for Aging, Inc. v. Shalala*, 127 F.3d 496, 497 (6th Cir. 1997). Thus, the State has no role in determining eligibility for Medicare benefits.

OPINIONS

1. No. In cases seeking a divorce or legal separation there is no statutory requirement of notice to the Bureau of TennCare as a prerequisite to granting relief to the disabled spouse already receiving TennCare benefits.

2. No. In any case seeking a divorce or legal separation there is no statutory requirement of notice to the Bureau of TennCare as a prerequisite to the maintenance of such complaints when information is lacking about whether or not the disabled spouse is receiving TennCare benefits.

3. While courts are given broad discretion in granting relief in divorce/separation matters, Tenn. Code Ann. §36-4-102 requires that a complaint requesting an order granting legal separation must set forth grounds for such relief pursuant to Tenn. Code Ann. §36-4-101. Further, if the other party objects to legal separation, the party seeking such relief must establish grounds under Tenn. Code Ann. §36-4-101.

ANALYSIS

Medicaid, enacted in 1965 as Title XIX of the Social Security Act, 42 U.S.C. § 1396, *et seq*., is a cooperative federal-state program that was established to enable the states to provide medical services to those who cannot afford such services. For states that participate in the program, the federal government provides partial funding and establishes mandatory and optional categories of eligibility and services covered. The Medicaid laws set various limits on an individual's income and resources for purposes of eligibility.

1. There is no state or federal statutory or regulatory requirement of notice to TennCare when a disabled person already receiving TennCare/Medicaid benefits is a party in a case of divorce or legal separation. While Tenn. Code Ann. §71-5-116 requires notice to TennCare before any probate matter may be closed, no similar provision has been enacted regarding divorce or separation. Additionally, a married disabled person who has applied for TennCare/Medicaid and been determined to be eligible has already met the income and resources limitations of the TennCare/Medicaid program. If that person were eligible for TennCare/Medicaid while married, then his/her eligibility determination should have been made based on marital income and resources.

2. There is no statutory requirement of notice to TennCare in any case seeking a divorce or legal separation when the court filings do not disclose whether or not the disabled spouse is receiving TennCare benefits. The statutes, both federal and state, governing Medicaid contain no requirement for notice in such a circumstance.

Transfers of assets in the overall context of Medicaid eligibility are not, in and of themselves, problematic as they are contemplated by Medicaid statutes. Medicaid statutes permit Medicaid participants and their spouses to file an action in a court of law to request court-

ordered support for the community spouse[2] or to request court-ordered transfers of assets for the benefit of the community spouse. 42 U.S.C. § 1396r-5. In 1988, Congress enacted the Medicaid spousal impoverishment provisions as part of the Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396r-5 (MCCA). The objective of the MCCA was to protect married couples when one spouse is institutionalized in a nursing home, so that the spouse who continues to reside in the community is not impoverished and has sufficient income and resources to live independently. *See* H.R.Rep. No. 100-105(II), 100th Cong., 2d Sess. at 65 (1988), *reprinted in* 1988 U.S.C.C.A.N. 857, 888. The MCCA attempted to strike a balance between preventing impoverishment of the community spouse by excluding minimum amounts of resources and income for that spouse from eligibility considerations, and preventing a financially solvent institutionalized spouse from receiving Medicaid benefits by ensuring that income was not completely transferred to the community spouse. *Chambers v. Ohio Dept. of Human Services,* 145 F.3d 793, 798 (6th Cir. 1998).

MCCA permits two methods of obtaining support for the community spouse. In the first, the determination is made by the state agency at application. The institutionalized spouse applies for Medicaid benefits, and the state performs a resource assessment and calculation of the community spouse resource allowance, which represents the amount of resources allocated to the community spouse. *Chambers*, 145 F.3d at 799. At this point, the local agency determines whether the institutionalized spouse has countable resources attributed to him or her in excess of $1,500; if so, the agency notifies the couple of its calculation and determination that the institutionalized spouse is ineligible for Medicaid until the institutionalized spouse's resources are “spent down” to $1,500. *Id.*

In the second, either spouse may ask a court to enter an order[3] specifying the monthly income required for the support of the community spouse:

> If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

42 U.S.C. § 1396r-5 (d)(5). Similarly, the same two methods are also available pursuant to MCCA for transferring assets from the institutionalized spouse to the community spouse:

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[2] Medicaid refers to the spouse who does not meet the criteria for nursing home level of care as the “community spouse” and the spouse who does meet the criteria for nursing home level of care as the “institutionalized spouse.” 42 U.S.C. § 1396r-5 (h). Accordingly, these terms will be used accordingly in this opinion.

[3] This opinion does not address the type or types of actions persons may or may not bring in Tennessee to obtain asset transfer or monthly income.

> If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1971 [42 U.S.C. §1396p[4]] of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1)).

42 U.S.C. § 1396r-5 (f)(3). Tenn. Code Ann. §71-5-121 specifies the method to be used by the courts in making asset transfers.

The Tennessee Court of Appeals examined the asset transfer statute in *Blumberg v. Tennessee Dept. of Human Services*, 2000 WL 1586454, 1 (Tenn.Ct.App. 2000). Frederic Blumberg filed a petition against his wife in the Sumner County Circuit Court, seeking all his wife's marital assets and an increase in his minimum monthly maintenance needs allowance. *Id*. The Sumner County Circuit Court issued an order requiring Mrs. Blumberg to pay as support for the benefit of Mr. Blumberg all of her monthly income. *Id*. Subsequently, on his wife's behalf, Mr. Blumberg applied for Medicaid benefits administered by the Tennessee Department of Human Services ("DHS"), for which she was approved. *Id*. Shortly thereafter, Blumberg received notice from DHS that his request for an income allocation, previously granted by the circuit court, was denied. *Id*. Thereafter, Blumberg requested an administrative hearing appealing the denial. *Id*. The administrative hearing also denied the income allocation. *Id*. Blumberg appealed this denial to the Chancery Court, which affirmed the denial after finding that the support order was not validly adjudicated because of lack of notice to DHS. *Id*. The Chancery Court found that Blumberg misrepresented Medicaid provisions to the Circuit Court when he claimed that the allocation of Mrs. Blumberg's entire monthly income would not affect her eligibility for benefits. *Id*. Furthermore, the Chancery Court found that the Circuit Court's order of spousal support was not validly adjudicated because DHS had not received notice of the proceedings, thus precluding them from an opportunity to be heard. *Id*.

On appeal, the Court of Appeals found that the statute permitted either spouse to choose either method of transferring assets in order to obtain support. *Id*. at *3. "[T]he statute itself does not preclude either side from making the choice they prefer." *Id*. The Court went on to state that "the legislature . . . provided two absolute alternative methods of setting a spouse's allowance and we are bound to recognize both procedures. Thus, DHS was without the authority to ignore the Circuit Court Order of spousal support." *Id*.

The Court of Appeals also discussed the issue of notice to DHS and held that no notice was required. "The present state of the Act does not require spouses to give notice in actions of this nature." *Id*. In *Blumberg*, the Chancery Court found that the Circuit Court's Order was not binding because of a lack of notice. *Id*. Though the Court of Appeals felt notice would be an excellent policy, it pointed out that no authority existed for such a requirement. *Id*. "Although it would be good policy to give notice and DHS would prefer such a rule, no authority exists stating notice as a requirement. It would not be proper in this case to hold Blumberg responsible for a rule of law that does not exist." *Id*.

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[4] 42 U.S.C. § 1396p(c) prohibits transfers of assets and describes the penalty for transferring assets.

Therefore, there exists at present no law requiring notification to TennCare when spouses in private actions seek to modify the distribution of assets between themselves.[5] *But see M.E.F. v. A.B.F.*, 393 N.J.Super. 543, 925 A.2d 12, 18-19 (N.J.Super 2007) (The New Jersey Court appears to take the position that court orders regarding support and asset transfers only apply when the orders occurred prior to a positive determination of Medicaid eligibility.)

3. The courts are given broad discretion in granting relief in divorce/separation matters. Tenn. Code Ann. §36-4-102 specifically requires the complaint to set forth grounds for legal separation. "Such complaint *shall* set forth the grounds for legal separation in substantially the language of § 36-4-101 . . ." Tenn. Code Ann. §36-4-102(a) (Emphasis added). Thus, if a case were to arise in which no grounds had been set out in any pleadings or in any proceeding before the court, the court would not have authority to grant a separation. The statute goes on to state that the court "shall declare the parties legally separated" unless a party specifically objects to the separation. *Id*.

> The other party may deny the existence of grounds for divorce but, unless the other party specifically objects to the granting of an order of legal separation, the court shall declare the parties to be legally separated.
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> (b) If the other party specifically objects to legal separation, the court may, after a hearing, grant an order of legal separation, notwithstanding such objections if grounds are established pursuant to § 36-4-101.

Id. Nevertheless, "in determining whether an absolute divorce or legal separation should be awarded, '[t]he court, of course, gravely considers the desires of the party wronged, but the court reserves the right to determine for itself what is best for that party.'" *Martin v. Martin*, 155 S.W.3d 126, 130 (Tenn.Ct.App., 2004) *quoting Lingner v. Lingner,* 165 Tenn. 525, 56 S.W.2d 749, 752 (1933). Moreover, in reviewing a trial court's determination regarding the award of absolute divorce or separation the Court of Appeals "will not interfere with the exercise of that discretion by the trial court unless it was abused." *Id. quoting Bennett v. Bennett,* 40 Tenn.App. 416, 292 S.W.2d 202, 205 (1954). Even though the courts are given broad discretion in divorce/separation cases, the statute nevertheless requires "grounds [be] established pursuant to §36-4-101."

The Court of Appeals reiterated the *Lingner* analysis concerning legal separations in *Asher v. Asher*, 2001 WL 490745 (Tenn.Ct.App. 2001). Ms. Asher filed for legal separation under Tenn. Code Ann. § 36-4-102 and her husband counterclaimed for divorce. The trial court granted the wife a divorce under Tenn. Code Ann. § 36-4-119, and Ms. Asher appealed, arguing the trial court erred because she requested only a legal separation. The Court of Appeals rejected Ms. Asher's argument, declaring the language of Tenn. Code Ann. § 36-4-119 vests broad

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[5] Both the state and federal Medicaid statutes prohibit fraud on the part of any person. 18 U.S.C. § §1035, 1347 and 42 U.S.C. § 1320a; Tenn. Code Ann. §§ 71-4-116 and 71-4-1113. TennCare actively investigates fraud and prosecutes same.

discretion in the trial court regarding the type and extent of relief granted. The Court stated, "While we acknowledge that Ms. Asher prayed for legal separation only in her complaint, the Chancery Court was not restricted by her request." *Id.* at *2-3. *See also*, *McCray v. McCray*, 1997 WL 772140, *2 (Tenn.Ct.App. 1997). (Court upheld trial court's refusal to grant an absolute divorce under Tenn. Code Ann. 36-4-102(b) as within the trial court's discretion.)

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