DHA-15 (R10/97)

STATE OF WISCONSIN

In the Matter of

(petitioner)

DECISION

MED-40/46891

The proposed decision of the hearing examiner dated March 14, 2001 is hereby amended on pages 3-6 as follows and as such is adopted as the final order of the Department.

Page 3: Delete the 2nd paragraph under *The Correct Asset Assessment Date* heading as follows:

The Correct Asset Assessment Date

~~The MA Handbook directs that the assessment of the couple's assets is to occur based upon the assets they "…possess at the time the institutionalized person applies for MA." At Appendix, 23.2.2 (Note: Underlining for emphasis is in the Handbook version, not added by examiner here.)~~

Page 4: Delete the portions of the first two paragraphs after WI Admin Code § HFS 101.03(15) as follows:

~~The Handbook also notes that once the institutionalized spouse is determined eligible, the assets of the community spouse are unavailable. MA Handbook, App. 23.2.2.~~

~~I have reviewed the MA statutes, rules and policy statements carefully. I must conclude that the policy provision stated above is in conflict with the Code provisions. The Handbook appears to direct the assessment to be done as of the date the application is filed.~~ The Code~~, however,~~ allows a person to be tested for eligibility retroactively for three calendar months prior to the application filing date; and the Code's spousal impoverishment provision specifically uses permissive language about the asset test being performed for the month for which eligibility is being determined.

Pages 5 and 6: Modify the Conclusions of Law and Ordered sections as follows:

CONCLUSIONS OF LAW

~~1) The MA Handbook, at Appendix, 23.2.2 directing that the spousal impoverishment assessment of the couple's assets is to occur based upon the assets they …possess at the time the institutionalized person applies for MA.", is in conflict with WI Admin Code §§ HFS 103.075(5)(b), the Handbook provision must yield.~~

1) The agency erred in performing the spousal impoverishment asset assessment as of the date of application filing; the petitioner is entitled to be assessed as of the first day of the first retroactive backdate month for which eligibility was sought.

2) The agency erred in counting the annuity income paid to the community spouse as an asset of the petitioner; it is income available to at least the community spouse; this part of the matter must be remanded for further processing.

3) The county agency incorrectly counted $3,000 in funds in the petitioner's M & I Bank, Checking Account # (redacted) as available assets when the petitioner had specifically identified that bank, sum, account number, and location as a burial expense set aside for a community spouse under spousal impoverishment rules, under WI Admin Code § HFS 103.075(5)(b)2d.

NOW, THEREFORE, it is **ORDERED**

That the matter is remanded to the county agency with instructions to: (1) rescind the denial of the petitioner's application for Institutional-MA; (2) review and re-determine her eligibility for MA by spousal impoverishment assessment using a July 1, 2000, date for the assessment, and excluding *as assets* the $3,000 set aside in the M& I Bank Account No. 23009137 and the annuity income received by the community spouse. IT IS FURTHER ORDERED, that if the petitioner is otherwise eligible for MA, then the agency is to determine the petitioner's cost of care contribution. These actions shall be completed within 10 days of the date of this decision. ~~the Secretary's Final Decision in this matter, ***if and only if***, this Proposed Decision is adopted therein by the Secretary.~~

REQUEST FOR A REHEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Department of Health and Family Services. P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in the proposed decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 23rd day of April, 2001.

/s

Thomas E. Alt, Deputy Secretary
Department of Health and Family Services

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

PROPOSED
DECISION

MED-40/46891

PRELIMINARY RECITALS

Pursuant to a petition filed November 20, 2000, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Milwaukee County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on March 14, 2001, at Milwaukee, Wisconsin. Hearings set for January 16, 2001, and February 7, 2001, were rescheduled at the petitioner's request.

The issue for determination is whether the county agency correctly denied the petitioner's application due to assets in excess of program limits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:	Represented by:
(petitioner)	Attorney Margaret Hickey 312 E Wisconsin Ave Suite 306 Milwaukee, WI 53202-4305

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Pat Quezaire, ESS I
Addie Robertson, ESS
Milwaukee County Dept Of Human Services
1220 W. Vliet St, 3rd Floor
Milwaukee, WI 53205

EXAMINER:
Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is an institutionalized resident of Milwaukee County; she was first institutionalized on May 13, 2000. Her husband, (petitioner's spouse), resides at the home they formerly shared.

2. The petitioner applied for Institutional – MA on October 2, 2000, seeking a resource allocation and back-dated MA retroactive to July 1, 2000. See, Exhibit #4.

3. On November 13, 2000, the county agency issued a Notice of Decision to the petitioner informing her that it had determined that the total combined countable assets of the couple as of November 11, 2000, was $339,900.32; that the maximum total of countable assets her community spouse can have is $84,120; and that (petitioner)(petitioner's spouse) can have a maximum of $86,120 in assets and still qualify for MA. See, Exhibit #1.

4. Subsequently on November 13, 2000, the county agency performed an asset test on the petitioner's application and determined that she had an interest in liquid assets of $92,629.66, and that this exceeded the asset limit applicable to her of $86,120 by $6,509.66. See, Exhibit #2.

5. On November 16, 2000, the petitioner's attorney contacted the county agency and informed them that she believed a computational error was made in totaling countable assets because the petitioner had indicated that $3,000 (in checking account #23009137) was a burial set-aside to be deducted from assets; that certain payments from annuities should be treated as income in the month of receipt and not assets, and therefore this income should be deducted from the asset total; and that if these two resources were disregarded for the asset test, then the petitioner would be under the asset limit set for the petitioner for Institutional-MA at $86,120. She attached a copy of a table demonstrating her estimate of the petitioner's assets on or about the date of institutionalization and on the date for which eligibility was first sought, i.e., July 1, 2000.

6. Thereafter the agency representatives indicated that they disagreed with the petitioner's interpretation of MA law, and did not take these actions.

7. The petitioner filed an appeal with the Division of Hearings & Appeals on November 20, 2000.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home, and has a "community spouse" who is not institutionalized (or eligible for MA Waiver services). WI Stat § 49.455(1).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 23.4.0. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets are compared to the "asset allowance" to determine eligibility.

The then current asset allowance for a couple in mid-2000, as here, with $168,240 or more in total non-exempt assets, was $84,120. See, MA Handbook, App. 23.4.2(05-01-00); see also, WI Stat § 49.455(6)(b). $2,000 (the MA asset limit for the institutionalized) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy, i.e., here, $86,120. If the couple's assets are at or below the determined asset limit, the "institutionalized" person is eligible for MA. If the assets exceed the above amount, as a general rule the applying spouse is not MA eligible.

The agency counted resources as of the date of application that the petitioner urges are not-countable, i.e., a burial set-aside sum held in an otherwise available checking account, and annuity income. In addition, the petitioner asserts that the appropriate date of the asset test is the first date of eligibility sought, i.e., as of July 1, 2000. I turn now to consideration of each of these three points.

The Correct Asset Assessment Date

The county agency used the asset values as of the application date of October 2, 2000, as provided *in* the application. Attorney Hickey asserts that the assessment date is the first date of eligibility sought under the application, i.e., the back-dated July 1, 2000 eligibility sought, under the general beginning date of eligibility rule in the Code. See, WI Admin Code § HFS 103.08(1). She also indicated that the information provided in the application was a snapshot of the petitioner's assets as of July 1, 2000.

The MA Handbook directs that the assessment of the couple's assets is to occur based upon the assets they "…possess at the time the institutionalized person applies for MA." At Appendix, 23.2.2 (Note: Underlining for emphasis is in the Handbook version, not added by examiner here.)

The "spousal impoverishment resource treatment provision" states the following:

> (b) Notwithstanding ch. 766, in determining the resources of an institutionalized spouse *at the time of application for medical assistance*, the amount of resources considered to be available to the institutionalized spouse equals the value of all of the resources held by either or both spouses minus the greatest of the amounts determined under subs. (6)(b) 1. to 4.

WI Stat § 49.455(5)(b). (Italics added by examiner for emphasis.)

The Code provides the following concerning the prevention of spousal impoverishment, and states in part:

> (b) Eligibility determination. 1. Initial determination. The agency shall consider the total countable assets of the institutionalized spouse and his or her community spouse in determining initial MA eligibility for the institutionalized spouse.
>
> 2. Total countable assets. ***The agency shall count all available assets belonging to either spouse in the month for which eligibility is being determined*** except for the following:
>
> a. Homestead property;
>
> b. One vehicle, regardless of value;
>
> c. Household and personal effects, regardless of value;
>
> d. Burial assets and funds set aside for the purpose of meeting burial expenses, regardless of value. This includes burial trusts, burial funds, burial plots, burial insurance and other property or funds expressly set aside for burial expenses;
>
> e. Any other assets that would otherwise be excluded for purposes of SSI-related MA eligibility deterrmination as provided under s. HFS 103.06.
>
> 3. Asset limit. The agency shall compare the value of the couple's assets to the amount obtained by adding the SSI-related one person asset limit under s. 49.47(4)(b)3g., Stats., to the community spouse resource allowance under s. 49.455(6)(b), Stats. If the couple's available assets are equal to or less than the asset limit, the institutionalized spouse is asset eligible for MA.

WI Admin Code §§ HFS 103.075(5)(b) & (c). (Bold italics added for emphasis.) The Code also provides, as follows:

> 'Application for medical assistance' means the process of completing and signing a department-approved application form by which action a person indicates to the agency authorized to accept the application a desire to receive MA.

WI Admin Code § HFS 101.03(15).

The Handbook also notes that once the institutionalized spouse is determined eligible, the assets of the community spouse are unavailable. MA Handbook, App. 23.2.2.

I have reviewed the MA statutes, rules and policy statements carefully. I must conclude that the policy provision stated above is in conflict with the Code provisions. The Handbook appears to direct the assessment to be done as of the date the application is filed. The Code, however, allows a person to be tested for eligibility retroactively for three calendar months prior to the application filing date; and the Code's spousal impoverishment provision specifically uses permissive language about the asset test being performed for the month for which eligibility is being determined.

I must conclude that an applicant who can decide whether to apply for back-dated eligibility in the 3 calendar months preceding the application filing date, having done so, is properly subject to the asset assessment in the first month of potential eligibility, at a minimum. If found eligible, the assessing ends. If not, then the assessment must be performed sequentially for each of the other two back-date months, and up to the application filing date, if the applicant is asserting eligibility for each of these periods. If the institutionalized applicant is found eligible as a consequence of any of these tests, then the community spouse's assets are no longer available to the institutionalized spouse, and the sequential assessments can end.

Treatment of Annuity Payments

The MA Handbook fails to specifically address the counting of annuity payments as *income*. See, App. 15.0.0, et. seq. (07-01-00). The Handbook, at Appendix 11.6.4, does discuss the treatment of annuities as *assets*, providing as follows:

> An annuity is a written contract under which, in return for payment of a premium or premiums, an individual will receive a series of payments at regular intervals for a specified time period.
>
> The annuitant is the person entitled to the payments. A purchaser can name himself/herself or another person as the annuitant. The purchaser may also name a beneficiary to receive annuity payments after the annuitant's death.

The Handbook provides that an annuity become unavailable as an asset on the date the "settlement option" is made final. Here, the settlement options apparently occurred on dates unknown prior to July 1, 2000, because the petitioner's husband testified, and her attorney stated, that the community spouse was receiving the annuity payments as of July 1, 2000. See, Exhibit #3; see also, MA Handbook, at App. 11.6.4.2.

The petitioner is correct. The annuity payments at issue are income, not countable assets. However, the Department's Secretary has recently issued a Final Decision in DHA Case No. MED-66/47172 (Wis. Div. Hearings & Appeals March 14, 2001)(DHFS), that indicates that while annuity income to the community spouse is considered available only to him under WI Stat § 49.455(3)(b)1a, and cannot be deemed to the institutionalized spouse to determine her MA eligibility, it may be considered available to the community spouse in the post-eligibility calculation of the amount of the institutionalized spouse's income that must

be applied to her costs of institutional care under WI Stat. § 49.455(4). I am bound by the Secretary's determination in that case. See, attached copy.

The Secretary's Final Decision in MED-66/47172 indicates that while the annuity income stream is not an asset to the institutionalized petitioner, it *may* be considered income to the institutionalized person if he or she has made the annuity payments *available* to the community spouse by the annuity device; and the amount of the institutionalized person's income made available to the community spouse that exceeds the community spouse's monthly income allowance, becomes part of the institutionalized person's cost of care contribution.

Treatment of Burial Set-Asides

The burial asset policy under spousal impoverishment guidelines is as follows:

> 3. Anything set aside for burial. This includes all burial trusts, burial funds, burial plots and burial insurance.
>
> This differs from SSI-related burial policies for noninstitutionalized persons and institutionalized persons without a community spouse (11.4.0).

MA Handbook, App. 23.4.0(01-01-01).

However, the Code provision, cited above, clearly allows a wider array of set asides in the spousal impoverishment setting, i.e., "funds expressly set aside for burial expenses", and "regardless of value". WI Admin Code § HFS 103.075(5)(b)2d.

The narrower Handbook provision is in conflict, here, with the specific Code provision, and it must yield.

I must conclude that the petitioner has met the test on this point. The mere express declaration in writing by her attorney to the county agency that $3,000 of such funds in the account specified is earmarked for burial expenses meets this broad test. The agency must exclude this asset as exempt.

CONCLUSIONS OF LAW

2) The MA Handbook, at Appendix, 23.2.2 directing that the spousal impoverishment assessment of the couple's assets is to occur based upon the assets they …possess at the time the institutionalized person applies for MA.", is in conflict with WI Admin Code §§ HFS 103.075(5)(b); the Handbook provision must yield.

3) The agency erred in performing the spousal impoverishment asset assessment as of the date of application filing; the petitioner is entitled to be assessed as of the first day of the first retroactive backdate month for which eligibility was sought.

4) The agency erred in counting the annuity income paid to the community spouse as an asset of the petitioner; it is income available to at least the community spouse; this part of the matter must be remanded for further processing.

5) The county agency incorrectly counted $3,000 in funds in the petitioner's M & I Bank, Checking Account # (redacted) as available assets when the petitioner had specifically identified that bank, sum, account number, and location as a burial expense set aside for a community spouse under spousal impoverishment rules, under WI Admin Code § HFS 103.075(5)(b)2d.

NOW, THEREFORE, it is **ORDERED**

That the matter is remanded to the county agency with instructions to: (1) rescind the denial of the petitioner's application for Institutional-MA; (2) review and re-determine her eligibility for MA by spousal impoverishment assessment using a July 1, 2000, date for the assessment, and excluding *as assets* the $3,000 set aside in the M& I Bank Account No. (redacted) and the annuity income received by the community spouse. IT IS FURTHER ORDERED, that if the petitioner is otherwise eligible for MA, then the agency is to determine the petitioner's cost of care contribution. These actions shall be completed within 10 days of the date of the Secretary's Final Decision in this matter, ***if and only if***, this Proposed Decision is adopted therein by the Secretary.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P. O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15 day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health & Family Services for final decision-making. The process relating to Proposed Decisions is described in WI Stat. § 227.46(2).

Given under my hand at the City of Madison, Wisconsin, this 29th day of March, 2001.

/s

Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
326/KDD