



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

MRA-70/#21384

PRELIMINARY RECITALS

Pursuant to a petition filed February 18, 1998 under §49.45(5), Wis. Stats., to review a decision by the Winnebago County Dept. of Social Services regarding Medical Assistance (MA), a hearing was held on March 11, 1998 at Oshkosh, Wisconsin.

The issue for determination is whether petitioner's spouse is a "community spouse" under Spousal Impoverishment rules although she is an MA Waiver recipient.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Petitioner's Representative:

David Fendt, Benefit Specialist
Winnebago County DSS
P.O. Box 2646
Oshkosh, WI 54903-2646

Wisconsin Dept. of Health and Family Services
Bureau of Health Care Financing
1 West Wilson Street, Room 230
P.O. Box 309
Madison, WI 53701-0309

By: Barb Luchinski, ESS
Winnebago County Dept. of Social Services
P.O. Box 2646
Oshkosh, WI 54903-2646

EXAMINER:

Brian C. Schneider, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN [REDACTED] CARES [REDACTED]) is a resident of Winnebago County.
2. Until December, 1997, petitioner and his wife [REDACTED] both resided in the community and received MA under an MA Waiver program. Petitioner entered a nursing home on December 31, 1997.

3. The county thereafter redetermined MA eligibility. It found that petitioner had a cost of care liability in the nursing home, and that only \$142.67 of his income could be used by [REDACTED] for upkeep of the couple's home.
4. Petitioner's income is \$522 per month social security. The county deducted a \$40 personal needs allowance and the \$142.67 home maintenance allowance to conclude that petitioner's monthly cost of care was \$339.33. [REDACTED]'s income is \$284 social security. Although she is considered to be institutionalized as an MA waiver recipient, her monthly expenses are approximately \$650.

DISCUSSION

Because MA waiver recipients have more liberal deductions from income in determining eligibility, petitioner and his wife were able to keep all of their income and still be eligible when both were waiver recipients. When petitioner entered the nursing home, the county attributed his income solely to him and [REDACTED]'s income solely to her. With fewer deductions for a person in a nursing home, suddenly the income available to [REDACTED] decreased, and she testified that she cannot afford to stay in the home with only \$426 income each month.

The primary issue in this case is whether [REDACTED] may be considered a "community spouse" under Spousal Impoverishment rules although she is considered "institutionalized" under MA waiver rules. The answer is important because if she is a community spouse, petitioner's entire income can be allocated to her to allow her to remain in the home. See the MA Handbook, Appendix 23.6.0. According to Department policy described in the Handbook, she cannot be a community spouse for Spousal Impoverishment purposes. The Handbook, at App. 23.2.1, defines "community spouse" as a person married to an institutionalized person and not an institutionalized person herself. An "institutionalized person" is someone who is in a nursing home or participates in community waivers. Id., App. 23.2.3. Therefore, since [REDACTED] is considered institutionalized, she cannot be a community spouse. She thus is not entitled to Spousal Impoverishment benefits.

Both the Wisconsin Statute and the United States Code read differently, with a distinction that must be read closely. Sec. 49.455(1)(d), Wis. Stats., reads as follows:

"Institutionalized spouse" means either an individual who is in a medical institution or nursing facility and is married to an individual who is not in a medical institution or nursing facility or an individual who receives services under a waiver under 42 U.S.C. § 1396n (c) or (d) and is married to an individual who is not in a medical institution or nursing facility and does not receive services under a waiver under 42 U.S.C. § 1396n (c) or (d).

Read carefully, the statute describes two identifying characteristics for an individual to be considered an institutionalized spouse for Spousal Impoverishment purposes, either (1) an individual who is in an institution and who is married to an individual who is not in an institution, or (2) an individual who receives MA waiver services and who is married to an individual who is not in an institution and does not receive MA waiver services.

[REDACTED] is not an institutionalized spouse under that two-part definition. Under the second part of the definition, she receives waiver services and her spouse is in a nursing facility. Petitioner, on the other hand, falls under the first part of the definition. He is in a nursing facility, and his spouse is not in an institution or nursing facility. [REDACTED] would meet the definition of "community spouse" under sec. 49.455(1)(a), as she is an individual married to an institutionalized spouse.

The federal statute reads similarly to the state statute. 42 U.S.C. 1396r-5(h)(1) defines "institutionalized spouse" as an individual who is in a medical institution or nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) [the MA waiver section], and who is married to a spouse who is not in an institution or nursing facility. Again, [redacted] does not meet that definition because she is a waiver participant married to a person in a nursing facility, but petitioner meets it because his spouse is not in a medical institution or nursing facility.

Most importantly, this same issue was decided almost six years ago. In Final Decision No. MRA-17/71495, dated September 4, 1992, the Department's Deputy Secretary adopted a proposed decision which concluded that when a man was in a nursing facility, his wife could be considered a community spouse even though she was an MA waiver recipient. The hearing examiner in that case analyzed the Wisconsin Statute in the same way as I interpret it. Unfortunately, the Department did not change its MA Handbook after that decision was made.

I conclude that petitioner is an "institutionalized spouse" as defined for Spousal Impoverishment purposes under sec. 49.455, Wis. Stats., and that his wife is a community spouse for the same purposes. The matter will be remanded to the county with instructions to recalculate petitioner's cost of care liability under Spousal Impoverishment rules.

CONCLUSIONS OF LAW

Because petitioner resides in a nursing facility, and his wife does not, the couple falls within the scope of Spousal Impoverishment, despite her receipt of MA waiver services.

NOW, THEREFORE, it is

ORDERED

That the matter be remanded to the county with instructions to redetermine petitioner's cost of care liability under the Spousal Impoverishment policy.

REQUEST FOR A NEW HEARING

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 in this decision 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 sec. 227.49 of the state statutes. 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 Wisconsin 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 this 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 30th day
of March, 1998.



Brian C. Schneider, Attorney
Division of Hearings and Appeals
0320/bcs

cc: Winnebago Co.
David Fendt, Benefit Specialist
Susan Wood, DHFS