



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of
(petitioner)

PROPOSED
DECISION

MRA-13/84527

PRELIMINARY RECITALS

Pursuant to a petition filed May 3, 2007, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Dane County Dept. of Human Services in regard to the petitioner's community spouse income allocation, a hearing was held on May 23, 2007, at Madison, Wisconsin. At the request of the county agency, the record was held open for 10 days for the submission of an additional document; this document has been received.

The issue for determination is whether the petitioner's community spouse is eligible for an increase in his income allocation.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Respondent:

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: Jean Scott, ESS
Dane County Dept Of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxxx) is an institutionalized resident (Meriter Health Center) of Dane County. She was institutionalized in May, 2005. The cost of her care is paid by Institutional – MA, as of September, 2006, based upon a December 29, 2006, application. Her husband (petitioner's spouse) resides in a community based residential care facility, Meriter Terraces, and he has lived there since May, 2005. His cost of care has been paid privately by his income stream and the couple's assets.

2. In September, 2006, (petitioner's spouse) was receiving a Wisconsin Retirement System (WRS) monthly pension payment of \$1,751.49 and Social Security benefits of \$1,658; and the petitioner had her own gross monthly income from a Wisconsin Retirement System (WRS) pension and Social Security benefits, of \$4,564.37.
3. On January 1, 2007, (petitioner's spouse) Social Security benefit increased to \$1,797 per month, and the petitioner's gross monthly WRS & Social Security income increased to \$4,629.37.
4. As of May 1, 2007, (petitioner's spouse) WRS pension increased to \$1,858.63; and the petitioner's gross monthly income from WRS pension (\$2,664.86) and Social Security income (\$2,129.50) increased to a gross total of \$4,794.36.
5. Since the petitioner was certified for Institutional – MA in September, 2006, she has been required to pay all of her individual income, after the deduction of the \$45 personal needs allowance, to the Department as her patient liability for the cost of her care at Meriter Health Center; no income has been allocated to her community spouse in any month since September 1, 2006.
6. All food, housing and cares are provided to (petitioner's spouse) at Meriter Terraces. The cost of care is \$4,200 per month. He also pays \$350.30 per month for health insurance, and retains \$40 for personal needs. His total estimated monthly maintenance expenses are \$4,590.30, and his present income stream is \$3,655.63.
7. On May 3, 2007, the community spouse filed an appeal with the Division of Hearings & Appeals seeking an income allocation of \$934.67 to enable him to continue living in his current living situation.

DISCUSSION

Wis. Stat. § 49.455 is the Wisconsin codification of 42 U.S.C. § 13964-5 (MCCA). Among other things, the "spousal impoverishment" provisions at sec. 49.455 direct the Department to establish an income allowance for the community spouse of an institutionalized person. MA directs that the maximum community spouse income allocation (CSIA) is the lesser of \$2,488.50 or \$2,138.33 plus excess shelter expenses. See Medicaid Eligibility Handbook, Appendix 5.10.6

MA law and policy provides that the institutionalized person may divert some of his income to her community spouse rather than contributing it all to her cost of care. The amount of the diverted income, when combined with the spouse's income, cannot exceed the maximum allocation determined by the county. Any income of the institutionalized spouse that is not allocated to the community spouse or the personal needs allowance (and his own private health insurance premium allowance) must be paid to the nursing home as the institutionalized person's cost of care share. The cost of care share, also known in the parlance as his "patient liability" is used to reduce the cost paid by MA for the nursing home. The average amount paid for nursing home care in Wisconsin, i.e., the MA payment rate, in 2007 is \$5,584 per month.

An administrative law judge (ALJ) can grant an exception to this limit on the community spouse income allocation. The ALJ may increase the income allowance following a fair hearing. The ALJ does not have unfettered discretion in creating an exception to the maximum allocation ceiling, however. The relevant statutory provision states that the test for exception is as follows:

(c) If either spouse establishes at a fair hearing that, due to exceptional circumstances resulting in financial duress, the community spouse needs income above the level provided by the minimum monthly maintenance needs allowance determined under sub. (4)(c), the department shall determine an amount adequate to provide for the community spouse's needs and use that amount in place of the minimum monthly maintenance needs allowance in determining the community spouse monthly income allowance under sub. (4)(b).

Wis. Stat., § 49.455(8)(c), emphasis added. Thus an ALJ may augment the maximum allocation ceiling only by amounts needed to alleviate financial duress, to allow the community spouse to meet necessary and basic maintenance needs.

This case presents a novel situation, i.e., the community spouse here lives in a community based residential care facility (CBRF). See, Exhibit #9. Generally speaking, regular Long Term Care – MA (formerly called "Institutional

– MA”) does not cover CBRF residence cost of care. Here, the community spouse would essentially have part of his institutionalized spouse’s income diverted from paying for her skilled nursing facility care to his income stream to pay for part of the cost of his residency in the present CBRF via the diversion. To decide this case, I must first decide whether the husband is a bona fide “community spouse”, or himself an institutionalized spouse who happens to be private pay.

The Medicaid Eligibility Handbook § 5.10.2.1, defines a community spouse, as follows:

5.10.2.1 Community Spouse

A “community spouse” is:

1. Married to an institutionalized person and
2. Not living in a nursing home or other medical institution for 30 or more consecutive days.

As long as the community spouse is not an institutionalized person, his/her living arrangement can have no effect on his/her asset share (5.10.2.2) or income allocation (5.10.6).

Example: Joe is an institutionalized person living in a nursing home. His wife, Carla, is in prison. Carla is entitled to the community spouse asset share and to any allowable income which Joe chooses to allocate to her.

MEH likewise defines an institutionalized person as follows:

5.10.2.3 Institutionalized

“Institutionalized person” means someone who:

1. Participates in Community Waivers, or
2. Has resided in a medical institution for 30 or more consecutive days, or
3. Is likely to reside in a medical institution for 30 or more consecutive days, as attested to by the medical institution.

An exception to the 30 day period is that a resident of an IMD (5.8.1.1) is considered an institutionalized person until s/he is discharged. The 30 day period includes situations in which the person resides in more than 1 medical institution during 30 or more consecutive days.

If a person relocates from one institutional living arrangement to another, consider him/her to be in a continuous period of institutionalization, provided s/he does not live in a non-institutional living arrangement between the two periods of institutional living.

Example: Mr. Wunder's niece moved him from his community waiver placement in Bayfield County to an SNF nursing home in Eau Claire County. This is a continuous period of institutionalization. If he had gone to live with his niece for a while, and then gone to the Eau Claire nursing home, his arrival at the Eau Claire nursing home would have been considered a new period of institutionalization.

Medicaid Eligibility Handbook § 5.10.2.3.

The MEH defines an “institution” as follows:

For MA purposes, “institution” means medical institution. A medical institution can be, but is not limited to, skilled nursing facilities (SNF), intermediate care facilities (ICF), institutions for mental disease (IMD), and hospitals.

Medical institution means a facility that:

1. Is organized to provide medical care, including nursing and convalescent care,
2. Has the necessary professional personnel, equipment, and facilities to manage the medical, nursing, and other health needs of patients on a continuing basis in accordance with accepted standards,
3. Is authorized under State law to provide medical care, and,
4. Is staffed by professional personnel who are responsible to the institution for professional medical and nursing services.

Medicaid Eligibility Handbook, § 5.8.1.

Based upon a review of these policy definitions, I can only conclude that the petitioner is not living in a medical institution, and thus he is not an institutionalized person. Therefore, he can be considered a community spouse.

Reaching the conclusion that he is a community spouse, I conclude that he is under financial duress. He lacks sufficient income stream to meet his community-based living arrangement, which has been his only home since May, 2005. The modest income allocation sought is necessary for the community spouse to meet his necessary and basic maintenance needs. I conclude that \$934.67 of the petitioner's income is to be allocated to the community spouse, retroactive to September 1, 2006.

CONCLUSIONS OF LAW

That the petitioner's community spouse is eligible for a minimum monthly needs allowance of \$4,590.30 per month, meaning that income may be allocated from the petitioner in the amount of \$934.67 per month, retroactive to September 1, 2006.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the county agency with instructions to: set the community spouse's minimum monthly needs allowance at \$4,590.30, retroactive to September 1, 2006; allocate \$934.67 of the petitioner's income to the community spouse, retroactive to September 1, 2006; and continue this needs allowance and income allocation until May 1, 2008, at which time the agency should review the allocation. The actions setting this allowance and allocation shall be completed within 10 days of the date the Secretary adopts this Proposed Decision in a Final Decision, *if* so adopted.

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 Decision is described in WI Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 5th day of June, 2007.

/s

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



STATE OF WISCONSIN

In the Matter of

(petitioner)

DECISION

MRA-13/84527

The proposed decision of the hearing examiner dated June 5, 2007 is hereby adopted as the final order of the Department.

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 rehearing. You may also ask for a rehearing 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" in the proposed decision. 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 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 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Wisconsin Department of Health and Family Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, 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 Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 10th day of July, 2007.

/s

Reginald Bicha, Deputy Secretary
Department of Health and Family Services