STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

Coalition of Wisconsin Aging Groups
5900 Monona Dr., Ste. 400
Madison, WI 53716-3554

DECISION

MRA-22/17389

The proposed decision of the hearing examiner dated December 10, 1998 is amended as follows, and as amended is issued as the final order of the Department.

The Discussion section on pages 4 and 5 are deleted and replaced by:

provision allows the hearing examiner only to look at the income of the community spouse in determining a resource reallocation, not the income of both spouses. The amendment to sec. 49.455(8)(d), Wis. Stats., which requires the examiner to assume that the income of the institutionalized spouse in available to the community spouse, is an invalid contravention of the federal law.

I disagree with petitioner's argument. In doing so, I draw support from the decision in Cleary v. Waldman, 959 F. Supp. 222 (D.N.J. 1997). After a careful and detailed analysis of the federal law, the court stated:

> Based simply on the language and structure of the MCCA I conclude that the "community spouse's income" as used in subsection (e)(2)(C) includes any community spouse monthly income allowance available to her pursuant to the provisions of subsection (d). This furthers MCCA's purpose of ensuring that the community spouse receives a minimum amount of income well above the poverty level. To accomplish this it is not necessary to create an endowment which not only provides the needed income but also creates a fund which can be passed on to the community spouse's heirs. This would subvert the other purpose of MCCA which is to require couples to bear a reasonable amount of the costs of institutionalized care and thus preserve Medicaid resources.

Cleary v. Waldman, 959 F. Supp. at 232.

In addition to its analysis of "the language and structure of the MCCA", the court also reviewed the legislative history of the federal law. It concluded that the history tended "to support either defendants position that the income first rule is required by the statute or perhaps the position of the responsible administrative agencies that the states have discretion to apply either the income first or resource first rule." 959 F. Supp. at 233.

The court's ultimate conclusion, which I adopt as the position of this Department, is that the "income first method is at least a permissible application of the statute." 959 F. Supp. at 234.

Petitioner also argues that the personal needs allowance should be $664 rather than $40 when determining the amount of income the institutionalized spouse must first make available under sec. 49.455(8)(d), Stats. That section, however, cross-references (4)(a), which in turn refers to sec. 49.45(7)(a). That section allows only a $40 needs allowance. While it is true that the Handbook, App. 23.6.0 implements the federal requirement for a higher personal needs allowance for community waivers individuals, that requirement applies only in calculating post-eligibility cost of care. Since federal law does not provide for use of a

personal needs allowance in the eligibility determination, the state statute controls for that purpose. Therefore, the personal needs allowance is $40.

The Conclusions of Law section is deleted and replaced by:

1. According to federal law, in determining whether a community spouse needs to have an asset allowance increased to bring his income up to the minimum monthly maintenance needs allowance, the income of the institutionalized spouse may be utilized.

2. The Wisconsin spousal impoverishment statute concerning the increasing of the asset allowance at a fair hearing is consistent with the federal law.

3. Petitioner's personal needs allowance is $40.

The Ordered section is deleted and replaced by:

ORDERED

That the petition for review is dismissed.

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 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 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 6th day of
April, 1998.

Richard Lorang, Deputy Secretary
Department of Health and Family Services

DHA-15 (7/96)

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of

PROPOSED
DECISION

[redacted]

MRA-22/#17389

PRELIMINARY RECITALS

Pursuant to a petition filed July 25, 1997, under sec. 49.45(5), Wis. Stats., to review a decision by the Grant County Dept. of Social Services to deny Medical Assistance (MA) Waiver eligibility, a hearing was held on September 29, 1997, at Lancaster, Wisconsin. A decision dismissing the appeal was issued on October 8, 1997. A rehearing was granted on November 12, 1997.

The issue for determination is whether income from an institutionalized spouse may by counted when a community spouse requests an increase in the spousal impoverishment asset allowance.

There appeared at that time and place the following persons:

PARTIES IN INTEREST: Petitioner:

[redacted]

By: [redacted]

Also by: [redacted]

Wisconsin Department of Health and Family Services
Bureau of Health Care Financing
1 W. Wilson St., Room 230
P.O. Box 309
Madison, WI 53707-0309
By: Ann White, ESS
Grant County Dept. of Social Services
Orchard Manor South, Rt. 2, Box 111
Lancaster, WI 53813

EXAMINER: Brian C. Schneider, Attorney
Department of Health & Social Services

FINDINGS OF FACT

1. Petitioner (SSN [redacted] CARES No. [redacted] is a resident of Grant County.

2. Petitioner is non-financially eligible for the MA Community Waiver program. She lives with her husband.

3. On June 27, 1997, petitioner applied for the MA Waiver services. The county denied the application on July 14 with a finding that assets were over the MA limit determined under spousal impoverishment rules.

4. Petitioner and her husband have non-exempt assets totalling $108,846, the majority in a checking account and a certificate of deposit. Interest from the assets equals $417.73 per month.

5. Not counting the interest income, petitioner has income of $1,143 per month. [redacted]s income is $724 per month, again not counting the interest. Total household income, excluding interest, is $1,867.

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 or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. Sec. 49.455(1), Wis. Stats.

The MCAA established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is the amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. Sec. 49.455(4)(a), Stats.

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 then are compared to the "asset allowance" to determine eligibility.

The current asset allowance for this couple is one-half of their non-exempt assets, or approximately $54,400. MA Handbook, App. 23.4.2, which is based upon sec. 49.455(6)(b), Stats. $2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

As an exception to this general rule, assets above the allowance may be retained as determined through the fair hearing process, if income-producing assets exceeding the asset limit are necessary to raise the community spouse's monthly income to the minimum monthly needs allowance. The minimum monthly maintenance needs allowance is currently defined as the lesser of $1,975.50, or $1,768 plus excess shelter costs. MA Handbook, Appendix 23.6.0. Since excess shelter costs cannot be added if the community spouse resides with the MA Waiver applicant, the allowance for Mr. [redacted] is $1,768. Id.; this provision is based upon sec. 49.455(4)(c), Stats.

Sec. 49.455(6)(b)3, Stats. explains this process, and subsection (8)(d) provides as follows:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). *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 (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, except for an amount equal to the sum of the personal needs allowance under sub. (4)(a)1. and any family allowances under sub. (4)(a)3. paid by the institutionalized spouse and the amount incurred as expenses for medical or remedial care for the institutionalized spouse under sub. (4)(a)4., available to the community spouse as a community spouse monthly income allowance under sub. (4)(b).*

Italics Added. Based upon the above, a hearing examiner can override the mandated asset allowance by determining that assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant a hearing examiner the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the spousal impoverishment asset limit.

The issue raised within the rehearing is the meaning of "community spouse monthly income" in subs. (8)(d) above.

When sec. 49.455 originally appeared in the 1989-90 statutes, only the first part of subsection (8)(d) existed. The italicized part was added to the subsection at a later date. The first part of the subsection is a virtual restatement of the federal statute, specifically 42 U.S.C. 1396r-5(e)(2)(C), which still exists in its original form, without amendment. Petitioner argues that the federal code

provision allows the hearing examiner only to look at the income of the community spouse in determining a resource reallocation, not the income of both spouses. The amendment to sec. 49.455(8)(d), Wis. Stats., which requires the examiner to assume that the income of the institutionalized spouse is available to the community spouse, is an invalid contravention of the federal law. I agree.

Throughout 42 U.S.C. 1396r-5, community spouse income and institutionalized spouse income are defined and described separately. Subs. (b)(1) specifically states that no income of the community spouse shall be deemed to the institutionalized spouse. No subsection of the statute defines community spouse income to include the income of the institutionalized spouse.

The only provision in the federal statute which requires the institutionalized spouse to make her income available to the community spouse is found at subs. (d)(1), which states:

> *After an institutionalized spouse is determined or redetermined to be eligible for medical assistance,* in determining the amount of the 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....
>
> (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....

Italics added. In other words, if the institutionalized spouse is to receive a deduction from cost of care to increase the community spouse's income allowance, she actually must give the money to the community spouse. If she keeps the money, she must use it for cost of care. Virtually identical language is found in the state statute, at 49.455(4)(a)2.

The federal law allows the hearing examiner to raise the asset allowance when income from assets is not sufficient to raise the income of the community spouse to the minimum monthly maintenance needs allowance. There is nothing in the federal law which requires or allows the state agency to consider or utilize the institutionalized spouse's income at that stage of the eligibility process. Only the state statute requires the examiner to consider the institutionalized spouse's income, but since the state statute contravenes the federal statute, I must conclude that the federal law controls.

As noted in my letter granting the rehearing, the policy of this office always has been to add the incomes of the spouses together before considering the income from assets. This office utilized such a policy even before the amendment to sec. 49.455(8)(d), Wis. Stats. I have reviewed decisions from the beginning of the spousal impoverishment rule, and my best guess for why this office's policy was developed was because the earliest petitioners presented their cases in that fashion. The earliest cases typically involved situations where the total of the income of the community spouse, the institutionalized spouse, and the income from assets did not rise above the minimum monthly maintenance needs allowance. Because this office got into the habit of reviewing appeals in that manner, it

became the course of conduct. I could find no case where the analysis argued by this petitioner was addressed.

The minimum monthly maintenance needs allowance for this couple is $1,768. The community spouse's income is $724 per month. Income from the couple's assets adds another $417.73, meaning that, even with all assets being allocated to the community spouse, Mr. [redacted] income still is not up the minimum needs allowance. I will order that the couple's asset allowance be increased to $108,846. Petitioner's assets, therefore, are within the MA eligibility limits. Her cost of care share should be determined from there, with Mr. [redacted]s income being $724 per month from social security and his pension, plus $417.73 from his assets.

Because of this decision, I will not address petitioner's second argument, that petitioner's personal needs allowance should be $664 rather than $40 when determining the community spouse income allowance under sec. 49.455(4)(a), Wis. Stats. I note only that the statute specifically refers to sec. 49.45(7)(a), Wis. Stats., which allows only a $40 personal needs allowance.

C O N C L U S I O N S O F L A W

1. According to federal law, in determining whether a community spouse needs to have an asset allowance increased to bring his income up to the minimum monthly maintenance needs allowance, the income of the institutionalized spouse cannot be utilized.

2. The Wisconsin Spousal Impoverishment statute concerning the increasing of the asset allowance at fair hearing is in contravention to the federal law.

3. The asset allowance of petitioner's husband must be increased to include all of the couple's nonexempt assets to maximize his income within the minimum monthly maintenance needs allowance.

NOW, THEREFORE, it is

O R D E R E D

That the matter be remanded to the county with instructions to increase the asset allowance of petitioner's husband to $108,846, and to redetermine petitioner's eligibility based upon the new allowance.

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.

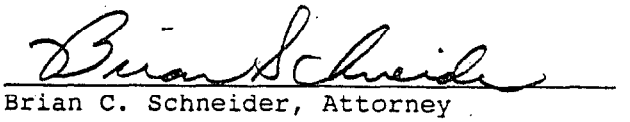
If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P. 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 and Family Services for final decision-making.

The process relating to Proposed Decisions is described in sec. 227.46(2), Wis. Stats.

Given under my hand at the City of Madison, Wisconsin, this 10th day of December, 1997.



Brian C. Schneider, Attorney
Division of Hearings and Appeals
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