



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MRA-13/19339

PRELIMINARY RECITALS

A final administrative decision was issued in this matter on April 6, 1998. This decision was upheld on appeal to circuit court, but reversed by the Court of Appeals in a decision dated December 23, 1999. By order dated May 17, 2000, the circuit court in Dane County remanded the matter to the Department of Health and Family Services with instructions to proceed in a manner consistent with the decision of the Court of Appeals.

The administrative decision had concluded that the Dane County Department of Human Services had properly processed and denied Mr. [REDACTED] application for Medical Assistance (MA) by including an Individual Retirement Account (IRA) as a countable asset for the purpose of determining MA financial eligibility under "spousal impoverishment" provisions. The decision also concluded that income received by [REDACTED] from her IRA was countable for purposes of MA eligibility.

The Court of Appeals, in its decision, reversed the conclusion that [REDACTED]'s IRA was a countable asset for MA, finding it to be an excludable resource. The Court did not disturb the rest of the final administrative decision.

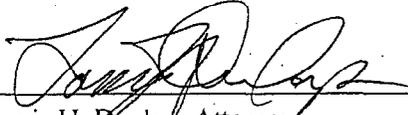
The decision of the Court of Appeals and its Order are appended hereto.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the Dane County Department of Human Services with instructions to redetermine [REDACTED] eligibility for Medical Assistance pursuant to the application filed on August 13, 1997 without counting Mrs. [REDACTED] IRA as an available resource, and if he is found eligible, appropriately certify him for Medical Assistance pursuant to that application.

Given under my hand at the City of
Madison, Wisconsin, this 21st
day of June, 2000.



Louis H. Dunlap, Attorney
Division of Hearings and Appeals

cc: petitioner
Atty. Sara Buscher
Atty. Mitchell Hagopian
Bruce Olsen, DOJ
Dane Co. DHS (w/attachment)
Shelley Malofsky, DHFS



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

██████████ (deceased) & ██████████
c/o Sara Buscher, Atty. and CPA
6409 Odana Rd., Ste. A
Madison, WI 53719

DECISION

MRA-13/19339

The proposed decision of the hearing examiner dated February 13, 1998 is amended as follows, and as amended is issued as the final order of the Department.

In the Discussion section – (I) IRA//ASSET, the last paragraph on page 3 through the end of section (I) on page 4 is deleted and replaced by:

The hearing examiner failed to consider spousal impoverishment requirements. Provisions of the law governing spousal impoverishment supersede any inconsistent provision of Title 19. 42 U.S.C. 1396r-5(a)(3). The examiner's failure to recognize that the deceased institutionalized spouse applied for medical assistance under the protections offered by the spousal impoverishment portion of the law caused him to erroneously rely on inapplicable provisions.

Citing 42 U.S.C. 1396r-5(a)(3), petitioner argues that "the spousal impoverishment protection provisions do not apply to 'the determination of what constitutes income or resources' or to 'the methodology and standards for determining and evaluating income or resources.'" However, petitioner conveniently ignores the language preceding the quoted provisions where it is stated that the spousal impoverishment protection provisions are inapplicable "[e]xcept as this section specifically provides...."

The section specifically provides in 5(c)(1) and (2) that all resources owned by either or both spouses are considered available to the institutionalized spouse in determining eligibility. Excluded resources are restricted to those expressly cross-referenced in 5(c)(5). Neither the cross-referenced provisions of 42 USC 1382b nor 20 CFR 416.1210, which essentially paraphrases the cross-referenced statute, contain any reference to pension funds as an excluded resource.

Petitioner relies on 20 CFR 416.1202, which concerns deeming of resources under SSI generally and states that "[i]n addition to the exclusion listed in 416.1210, pension funds which the ineligible spouse may have are also excluded." There is no evidence, however, that Congress intended to supplement the resource exclusion list in this manner regarding spousal impoverishment cases.

The County therefore correctly counted Mrs. ██████████ IRA as an asset in determining Mr. ██████████ MA eligibility.

In the Discussion section – (II) IRA INCOME, the last sentence of the first paragraph is deleted.

(However, merely because an asset is not countable does not mean that income from that asset also is not countable.) (page 4)

The last paragraph of this section (first paragraph on page 5) is changed as follows:

Therefore, income from [REDACTED]'s IRA is countable income for MA spousal impoverishment purposes. ~~even though [REDACTED]'s IRA is not counted as an asset in determining the MA eligibility of [REDACTED].~~ However, any portion of a payment to [REDACTED] from her IRA that is a return of principal is not income for MA spousal impoverishment purposes. see (IV), below.

In the Discussion section – (IV) RETURN OF PRINCIPAL AMOUNT INVESTED, the last four (4) paragraphs on page 6 are deleted and replaced by:

Annuity payments, including payments from pension funds, are unearned income. 20 CFR 416.1121(a). The regulation draws no distinction between principal and interest portions of those payments. The fact that tax law draws such a distinction is not relevant here. The fact that 20 CFR 416.1123(b)(3) permits expenses to be deducted from certain forms of unearned income is irrelevant since principal is not an expense.

The monthly annuity payments received by Mrs. [REDACTED] are to be counted as unearned income in their entirety for spousal impoverishment purposes.

In the Conclusions of Law section, the portions indicated are deleted as follows:

- I. The County was ~~not~~ correct to count [REDACTED]'s IRA as an asset in determining the MA eligibility of Walter F. Keip; and,
- II. ~~income from [REDACTED]'s IRA is countable income for MA spousal impoverishment purposes even though [REDACTED]'s IRA is not counted as an asset in determining the MA eligibility of Walter F. Keip;~~
- IV. ~~portions of monthly payments received by [REDACTED] that are a return of the principal amount invested are not income for MA spousal impoverishment purposes;~~

In the Ordered section, the order is deleted and replaced by:

that this matter be REMANDED to the County and that, within ten days of the date of this Decision the County calculate (or recalculate) the MA benefits, if any, to which [REDACTED] is entitled under spousal impoverishment rules, not counting as income increases in the value of [REDACTED]'s unsold assets. In all other respects, it is ordered that the petition for review herein be and the same is hereby 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



STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of

PROPOSED
DECISION

[REDACTED] (deceased) & [REDACTED]
c/o Sara Buscher
Attorney & C.P.A.
6409 Odana Road, Suite A
Madison, WI 53719

MRA -13/19339

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition filed October 29, 1997 under 42 C.F.R. § 431.200 et. seq. (1996), Wis. Stats. §§ 49.45(5), 49.21(1) & 49.455(8)(a)2. (1995-96), Wis. Admin. Code §§ HFS 103.075(8)(a)2. & 104.01(5) (January 1997), and Wis. Admin. Code § HSS 225.01 (February 1995), to review decisions by the Dane County Department of Human Services (County) concerning Medical Assistance (MA) for [REDACTED] a Fair Hearing was held on November 21, 1997 in Madison, Wisconsin.

At petitioners' request, the record in this matter was held open until December 5, 1997.

The issues for determination are:

(I) whether the County was correct to count [REDACTED]'s Individual Retirement Account (IRA) as an asset in determining the MA eligibility of Walter F. Keip;

(II) whether income from [REDACTED]'s IRA is countable income for MA spousal impoverishment purposes;

(III) whether undistributed income from [REDACTED]'s IRA, such as undistributed dividends, is countable income for MA spousal impoverishment purposes;

(IV) whether portions of monthly payments received by [REDACTED]'s that are a return of the principal amount invested are income for MA spousal impoverishment purposes.

(V) whether increases in the value of [REDACTED]'s assets are income for MA spousal impoverishment purposes; and,

(VI) whether the Division of Hearings and Appeals (DHA) has the power to grant equitable relief.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED] (deceased) and [REDACTED]
c/o Sara Buscher
Attorney & C.P.A.
6409 Odana Road
Suite A
Madison, Wisconsin 53719

BY: Sara Buscher
Attorney & C.P.A.
6409 Odana Road
Suite A
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Wisconsin Department of Health & Family Services
Bureau of Welfare Initiatives
1 West Wilson Street
Room 350
P.O. Box 7851
Madison, Wisconsin 53707-7851

BY: Kathy Keller, ESS Supervisor
Joanie Kanter, ESS
Dane County Department of Human Services
1819 Aberg Avenue
Suite D
Madison, Wisconsin 53704

OTHER APPEARANCES:

Mr. A.J. Hancock, insurance broker (petitioner's witness)

EXAMINER:

Sean P. Maloney, Hearing Examiner
Division of Hearings and Appeals

F I N D I N G S O F F A C T

1. Petitioner [REDACTED] (SSN: [REDACTED]; CARES No. [REDACTED]; DOB: May 5, 1927) was, at the time of his death on December 5, 1997, a resident of Waunakee Manor Nursing Home in Dane County, Wisconsin. Exhibit CK-10.
2. Petitioner [REDACTED] (SSN: [REDACTED]) is the widow of [REDACTED] and is a resident of Dane County, Wisconsin. Exhibit CK-10.
3. On August 13, 1997 [REDACTED] filed an MA application with the County. Exhibits DC-6, DC-7.1, Dane-3, Dane-4 & Dane-7.

Walter F. Keip was not present at the November 21, 1997 Fair Hearing. Walter F. Keip passed away on December 5, 1997.

4. By a manual *Negative Notice*, dated September 23, 1997, and also by a computer generated *Notice of Decision*, dated September 25, 1997, the County denied [REDACTED]'s August 13th MA Application because "countable assets exceed limits". Exhibits DC-6, DC-7.1, Dane-3 & Dane-4.

5. In making the determination to deny [REDACTED]'s August 13th MA Application because "countable assets exceed limits" the County counted [REDACTED]'s Individual Retirement Account (IRA) as an asset. Exhibits DC-2, DC-5, DC-6, DC-10, Dane-2, Dane-3, Dane-6 & Dane-7.

6. [REDACTED] has income, primarily dividends, from her IRA which is not distributed to her. Exhibits CK-7 & Dane-7.

7. [REDACTED] owns assets, such as annuities, which make periodic payments that required an initial expense of principal to obtain.

8. [REDACTED] owns assets, such as stocks, that increase in value. Exhibits C-6, CK-7, CK-8, CK-9, DC-2, DC-5, Dane-2, Dane-6 & Dane-7.

D I S C U S S I O N

The methodology to be employed by the Wisconsin MA program in determining income and asset eligibility for the aged, blind, and disabled can be no more restrictive than the methodology used in the federal Supplemental Security Income (SSI) program. see, 42 U.S.C. §§ 1396a(a)(10)(A)(ii), 1396a(r)(2)(A)(i), 1396d(a), & 1396a(r)(2)(B); see also, 42 U.S.C. § 1396a(a)(10)(C)(i)(III); Wis. Admin. Code §§ HFS 101.03(169), 101.03(170) & 103.03(1)(c)1. (January 1997); *General Electric Company v. Gilbert*, 429 U.S. 125, 141 (1976); *Mistrick v. Div. of Med. Assist.*, 690 A.2d 651, 652-653, 299 N.J. Super. 76 (N.J. Super. A.D. 1997); *Final Decision* MED-37/65251 (August 21, 1992; Deputy Secretary Richard W. Lorang) amending and adopting *Proposed Rehearing Decision* MED-37/65251 (October 15, 1991; Hearing Examiner Jay C. Gitchel).

Methodologies include, but are not limited to, definitions of income and assets, exclusions or disregards of income and assets, deeming of income from spouses and parents, treatment of regular and periodic income, and ownership of income and assets. Federal Health Care Financing Administration (HFCA), *Medicare and Medicaid Guide*, § 3625 (March 20, 1997); *Mistrick v. Div. of Med. Assist.*, 690 A.2d 651, 653-654, 299 N.J. Super. 76 (N.J. Super. A.D. 1997).

(I) IRA//ASSET

On August 13, 1997 [REDACTED] filed an MA application with the County. By a manual *Negative Notice*, dated September 23, 1997, and also by a computer generated *Notice of Decision*, dated September 25, 1997, the County denied [REDACTED]'s August 13th MA Application because "countable assets exceed limits". In making the determination to deny [REDACTED]'s August 13th MA Application because "countable assets exceed limits" the County counted [REDACTED]'s Individual Retirement Account (IRA) as an asset.

The methodology used in the federal SSI program requires that pension funds which the ineligible spouse of an applicant may have are to be excluded as an asset. *Pension funds* are defined as funds held in individual retirement accounts (IRA),

as described by the Internal Revenue Code, or in work-related pension plans (including such plans for self-employed individuals, sometimes referred to as Keogh plans). 20 C.F.R. § 416.1202(a) (1997); see also, *Mistrick*, 690 A.2d at 654. Thus, as the Court in *Mistrick* stated, the issue before me is "an essentially simple and straightforward one." *Mistrick*, 690 A.2d at 652. Federal law, controlling in this matter, requires that an IRA not be counted as an asset.

Therefore, the County was not correct to count [REDACTED]'s IRA as an asset in determining the MA eligibility of Walter F. Keip.

This result is not consistent with the law and policy of the State of Wisconsin. see, Wis. Admin. Code §§ 103.06 & 103.075(5)(b)2.e. (January 1997); MA Handbook, Appendix 11.6.21 & 23.4.0.5.; but see, Wis. Stats. § 49.45(34) (1995-96). In this matter, however, federal law must be followed. U.S. Constitution, Article VI, Clause 2; *Mistrick*, 690 A.2d at 652-654.

Petitioners make other arguments. Petitioners' other arguments are based on due process and equal protection. It is not necessary to address those other arguments.

(II) IRA INCOME

Petitioners argue that, for MA spousal impoverishment purposes, income from [REDACTED]'s IRA is not countable income because federal law requires that [REDACTED]'s IRA not be counted as an asset. In essence, petitioners argue that if an asset is not countable, then income from the asset should also not be countable. However, merely because an asset is not countable does not mean that income from that asset also is not countable.

Assets and income are always treated separately for MA purposes. 20 C.F.R. §§ 416.1100 et. seq. & 416.1201 et. seq. (1997); Wis. Stats. §§ 49.455(4) & (5) (1995-96); Wis. Adm. Code §§ 103.06, 103.07, 103.075(5) & 103.075(6) (January 1997); MA Handbook, Appendix 11.0.0 et. seq. & 15.0.0 et. seq. The federal regulation directing that IRA's not be counted as assets is in the section of the regulations dealing with assets and is clearly not applicable to income. 20 C.F.R. § 416.1202(a) (1997). Moreover, there is no federal regulation directing that income from IRA's not be counted as income for MA purposes. 20 C.F.R. § 416.1100 et. seq. (1997). Additionally, other laws dealing with income for MA purposes have no directive that income from IRA's not be counted as income for MA purposes. Wis. Stats. §§ 49.455(4) (1995-96); Wis. Admin. Code §§ 103.07 & 103.075(6) (January 1997); MA Handbook, Appendix 15.0.0 et. seq.

Income is anything received in cash or in kind that can be used to meet needs for food, clothing, and shelter. In-kind income is not cash, but is actually food, clothing, or shelter, or something that can be used to get one of those. 20 C.F.R. §§ 416.1102 & 416.1103(intro.). Furthermore, unearned income is a type of income. 20 C.F.R. § 416.1120 (1997). Annuities, pensions and other periodic payments are expressly defined to be unearned income. 20 C.F.R. § 416.1121(a) (1997). Dividends and interest are returns on capital investments (such as stocks, bonds, or savings accounts) and are also expressly defined to be unearned income. 20 C.F.R. § 416.1121(c) (1997). Clearly, income from an IRA fits this definition of income and is, therefore, countable income for MA purposes.

Therefore, income from [REDACTED]'s IRA is countable income for MA spousal impoverishment purposes even though [REDACTED]'s IRA is not counted as an asset in determining the MA eligibility of [REDACTED]. However, any portion of a payment to [REDACTED] from her IRA that is a return of principal is not income for MA spousal impoverishment purposes. see (IV), below.

(III) UNDISTRIBUTED IRA INCOME

[REDACTED] has income, primarily dividends, from her IRA which is not distributed to her.

Petitioners argue that undistributed income from [REDACTED]'s IRA, such as undistributed dividends, is not countable income for MA spousal impoverishment purposes. The only arguably applicable authority petitioners cite for this proposition is the Federal Register: "Amounts distributed from a pension fund to a pensioner will count as income to the pensioner that can be deemed to a spouse or child." Volume 52 Federal Register No. 155, page 29840 (August 12, 1987).² Petitioners' argument must fail.

First, the Federal Register is not law (although it may be useful to interpret law if the law is ambiguous).

Second, even if the Federal Register were law, the above quote does not support the proposition advanced by petitioners. The above quote states only that distributions are income - it does not state that undistributed income is not countable income.

Third, the above quote was made in the context of a discussion relating to the new federal regulation directing that pension funds (including IRA's) held by ineligible spouses be excluded from assets for MA purposes. see, 20 C.F.R. § 416.1202(a) (1997). Thus, the above quote was made not to introduce a new rule or practice concerning income, but rather, on the contrary, it was made to clarify that the new regulation relating to assets was not intended to change the way pension funds are treated with respect to income.

Fourth, the law concerning income is clear and unambiguous. Annuities, pensions and other periodic payments are expressly defined to be unearned income. 20 C.F.R. § 416.1121(a) (1997). Dividends and interest are returns on capital investments (such as stocks, bonds, or savings accounts) and are also expressly defined to be unearned income. 20 C.F.R. § 416.1121(c) (1997). All of these are considered unearned income, whether they are received in cash or in kind. 20 C.F.R. § 416.1120 (1997). Finally, unearned income is counted, for MA purposes, at the earlier of the following points: When it is received or when it is credited to an account or set aside for use. 20 C.F.R. § 416.1123(a) (1997). Clearly, undistributed income (such as undistributed dividends) fits this

² Petitioners also cite the MA Handbook, Appendix: "Capital Gains. Income from selling securities and other property." MA Handbook, Appendix 22.4.1 (underline and bold in original). This section of the MA Handbook applies to farming and self-employment, not income in general. MA Handbook, Appendix 22.0.0 et. seq. Moreover, it is policy, not law. Finally, even as policy, it defines only capital gains, and not income.

definition of income and is, therefore, countable income for MA spousal impoverishment purposes.³

Finally, petitioners argue that the policy behind the federal regulation directing that pension funds (including IRA's) held by ineligible spouses be excluded from assets for MA purposes would be thwarted unless [REDACTED] undistributed IRA income is not countable income for MA spousal impoverishment purposes. Petitioners argue that the purpose of the federal regulation, in the case of a spouse of retirement age, is to allow the spouse to keep assets invested in the stock market for inflation protection and future expenses.

As stated above, the law concerning income is clear and unambiguous. If the language of a law is clear and unambiguous, then reference to extrinsic aids is unnecessary. *Appointment of Interpreter in State v. Lee*, 184 Wis.2d 860, 867 n. 2, 517 N.W.2d 144 (1994); see also, *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, 951 F.2d 757 (7th Cir. 1991), *Meiers v. Wang*, 192 Wis.2d 115, 128, 531 N.W.2d 54 (1995). Thus, reference to policy considerations in this matter is unnecessary.

Therefore, undistributed income from [REDACTED]'s IRA, such as undistributed dividends, is countable income for MA spousal impoverishment purposes.

(IV) RETURN OF PRINCIPAL AMOUNT INVESTED

[REDACTED] owns assets, such as annuities, which make periodic payments that required an initial expense of principal to obtain. Petitioners argue that portions of monthly payments received by [REDACTED] that are a return of the principal amount invested are not income for MA spousal impoverishment purposes.

Annuity payments, to the extent they are income, must be unearned income. 20 C.F.R. § 416.1120 (1997).

Only part of an unearned income payment is counted as *income* for MA purposes if part of the payment is for an expense incurred in getting the payment. 20 C.F.R. § 416.1123(b)(3) (1997). Clearly, then, the portion of a payment that is simply a return of the principal amount originally invested is not income for MA purposes.

In the case of annuities, for instance, each payment consist of a principal portion and an income portion. The principal portion is found by multiplying the payment by a percentage known as the *exclusion ration*. Exhibits AJ-1, AJ-3 & AJ-4; Transcript of November 21, 1997 Fair Hearing, pages 10 & 13-14. Only the income portion should be counted as income for MA spousal impoverishment purposes.

Therefore, portions of monthly payments received by [REDACTED] that are a return of the principal amount invested are not income for MA spousal impoverishment purposes.

³ Of course, income must be available or it cannot be counted for MA purposes. Available is defined in the MA Handbook, Appendix. MA Handbook, Appendix 15.1.0. Petitioners have not argued that the undistributed income from Caryl J. Keip's IRA is not available.

(V) INCREASES IN THE VALUE OF AN ASSET

owns assets, such as stocks, that increase in value. Petitioners argue that increases in the value of s assets are not income for MA spousal impoverishment purposes.

The definition of *income* is anything received in cash or in kind that can be used to meet needs for food, clothing, and shelter. 20 C.F.R. §§ 416.1102 & 416.1103(intro.). If the increase in value of an asset is income it must be unearned income. 20 C.F.R. § 416.1120 (1997). Unearned income, however, is only counted, for MA purposes, at the earlier of the following points: When it is received or when it is credited to an account or set aside for use. 20 C.F.R. § 416.1123(a) (1997).

An increase in the value of an asset is not *received* by the owner unless the asset is sold. Likewise, an increase in the value of an asset is not *credited* to an account or set aside for use unless the asset is sold. Thus, the increase in the value of an asset, such as stocks, is not *income* for MA purposes unless the asset is sold.

Dividends and interest, however, are returns on capital investments (such as stocks, bonds, or savings accounts) and are income for MA purposes. 20 C.F.R. § 416.1121(c) (1997). The difference is that dividends and interest are *received* -- they are credited to an account so that they can be used.

Therefore, increases in the value of s assets are not income for MA spousal impoverishment purposes.

(VI) EQUITABLE RELIEF

Petitioners make several equitable arguments. Petitioners argue, for instance, that it is inequitable to include any of s annuity payments as income for MA spousal impoverishment purposes in light of the fact that the annuities were purchased only because the County failed to disregard s IRA as an asset (as required by federal regulation).

DHA does not have the power to grant equitable relief. As a DHA Hearing Examiner I must apply the law as it is written.⁴ Thus, I cannot reach the merits of petitioners' equitable arguments.

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

(I) The County was not correct to count [REDACTED]'s IRA as an asset in determining the MA eligibility of [REDACTED]; and,

(II) income from [REDACTED]'s IRA is countable income for MA spousal impoverishment purposes even though [REDACTED]'s IRA is not counted as an asset in determining the MA eligibility of [REDACTED];

(III) undistributed income from [REDACTED]'s IRA, such as undistributed dividends, is countable income for MA spousal impoverishment purposes;

(IV) portions of monthly payments received by [REDACTED] that are a return of the principal amount invested are not income for MA spousal impoverishment purposes;

(V) increases in the value of [REDACTED]'s assets are not income for MA spousal impoverishment purposes; and,

(VI) DHA does not have the power to grant equitable relief.

NOW, THEREFORE, it is

O R D E R E D

that this matter be REMANDED to the County and that, with ten days of the date of the Final Decision in this matter (this Decision is not the Final Decision), the County: [A] make an eligibility decision on [REDACTED]'s August 13, 1997 MA application without counting [REDACTED]'s IRA as an asset; and, [B]

⁴ *Final Decision A-40/44630*; Timothy F. Cullen, Secretary, December 30, 1987; adopting *Proposed Decision A-40/44630*; Hearing Examiner James J. Shampo, October 19, 1987; "An administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates. [citation omitted]" *Oneida County v. Converse*, 180 Wis.2d 120, 125, 508 N.W.2d 416 (1993). "No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds." *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448 (1944); see also, *Neis v. Education Board of Randolph School*, 128 Wis.2d 309, 314, 381 N.W.2d 614 (Ct. App. 1985). "As a general matter, an administrative agency has only those powers as are expressly conferred or necessarily implied from the statutory provisions under which it operates [citation omitted]". *Brown County v. DHSS Department*, 103 Wis.2d 37, 43, 307 N.W.2d 247 (1981). "An agency or board created by the legislature has only those powers which are expressly or impliedly conferred on it by statute. Such statutes are generally strictly construed to preclude the exercise of power which is not expressly granted. [citation omitted]" *Browne v. Milwaukee Board of School Directors*, 83 Wis.2d 316, 333, 265 N.W.2d 559 (1978).

calculate (or recalculate) the MA benefits, if any, to which [REDACTED] is entitled under spousal impoverishment rules, retroactive to the date of his first MA eligibility during 1997, counting as income neither portions of monthly payments received by [REDACTED] that are a return of the principle amount invested nor increases in the value of [REDACTED]'s assets; and, [C] issue all MA benefits (including retroactive benefits) to which [REDACTED] is otherwise entitled under spousal impoverishment rules and which have not already been issued. In all other respects, it is ordered that the petition for review herein be and the same is hereby dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

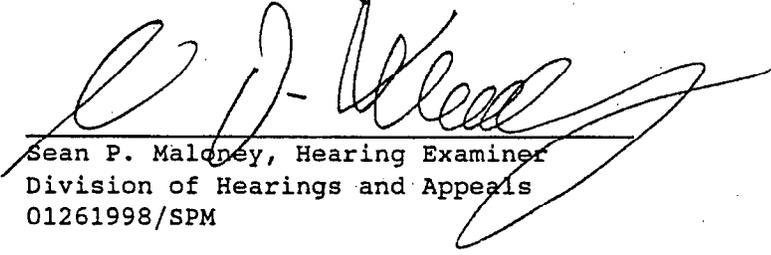
This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

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, Wisconsin 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 Wis. Stats. § 227.46(2) (1995-96).

Given under my hand at the City of
Madison, Wisconsin, this 13th
day of February, 1998.


Sean P. Maloney, Hearing Examiner
Division of Hearings and Appeals
01261998/SPM