



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

DECISION

MRA-28/#38771

PRELIMINARY RECITALS

Pursuant to a petition filed February 15, 1999, under Wis. Stat. §49.455(8), to review a decision by the Jefferson County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on March 19, 1999 at Jefferson, Wisconsin. At the request of the petitioner, the record was held open for 24 days (until April 12, 1999) for the submission of petitioner's additional information and a one-week response period for the county agency. The petitioner timely submitted a proposal from Flood's Remodeling for replacement of 12 windows in her home. This proposal for window replacements shall be marked as Exhibit 5, and received into the record. The county agency's response to Exhibit 5 shall be marked as Exhibit 6, and received into the record.

The issue for determination is whether the county agency correctly denied petitioner's request for an increase in the income allocation to the community spouse.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Representative:

[REDACTED], wife and guardian

[REDACTED]

Wisconsin Dept. of Health and Family Services
Bureau of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53701-0309

By: Attorney Philip Ristow, Jefferson County Corporation Counsel
JEFFERSON COUNTY DEPT OF HUMAN SERVICES
N3995 ANNEX ROAD
JEFFERSON WI 53549

EXAMINER:

Gary M. Wolkstein, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN [REDACTED], CARES [REDACTED]) has been residing in the group home, Abilities, Inc., in Jefferson County since January, 1998, as a result of his suffering a traumatic brain injury in a motor vehicle accident on March 2, 1996. His wife [REDACTED], resides in the community in their home at [REDACTED] Wisconsin. See Exhibit 1.
2. The petitioner has an ongoing institutional MA case. A periodic case review was performed on February 10, 1999. As a result of that review, the county agency told the petitioner that his MA certification would continue, but that \$490.84 of the petitioner's nursing home cost remains his cost of care responsibility (the balance is paid by MA).
3. The petitioner is an institutionalized person and has a spouse residing in the community. The petitioner, Mrs. [REDACTED], and their two minor children have gross monthly income of \$4,186.00 (Mrs. [REDACTED] earned income of \$2,326, Mr. [REDACTED] disability income of \$1,492, and the children's benefits of \$184 each). After subtraction of a \$65 personal allowance, a \$536.16 Dependent Allowance, and a \$400 Community Spouse Allocation from petitioner's gross income of \$1,492, the Department determined that he had \$490.84 available to contribute toward the cost of his nursing home care.
4. The current Maximum Community Spouse Income Allocation is \$2,044. After subtracting Mrs. [REDACTED] gross monthly income of \$2,326 from the maximum allocation, the Department determined that no additional amount of Mr. [REDACTED] income could be "allocated" to her. See Exhibit 2.
5. The petitioner's spouse has identified the following monthly living expenses:

Mortgage, property tax, heat	\$900.00
Telephone	26.00
Electricity	66.00
Food	340.00
Daycare	400.00
Clothing	275.00
Car payment	225.00
Gas (commutes to Madison job)	160.00
Income taxes	155.00
Minimum credit card payments	100.00
School lunches for two children	50.00
Car insurance	70.00

Family health insurance	54.00
Life insurance for petitioner and wife	52.00
Life insurance for both girls	80.00
Prescriptions (not paid by insurance)	57.00

TOTAL \$2,920.00

6. All of the expense amounts listed in Finding #5 are reasonable.
7. There are 12 windows on the petitioner's home that need replacement. The cost for replacement of these windows with high quality, energy-efficient windows with oak trim is \$4,200. See Exhibits 5 & 6.
8. In a prior May 15, 1997 decision of the petitioner's appeal of his cost of care liability (Decision MRA-28/1366), Hearing Examiner Gagnon ordered that due to exceptional circumstances, the petitioner's wife required an income allocation of \$400 (from her institutionalized spouse, the petitioner), in addition to her earned income, to avert financial duress. See Exhibit 3. The county agency implemented this order, and has continued this \$400 income allocation to the community spouse, Mrs. [REDACTED]

DISCUSSION

The federal Medicare Catastrophic Coverage Act of 1988 included extensive changes in State Medicaid eligibility determinations as they relate to spousal impoverishment where one spouse is a resident in a nursing home. The purpose of the new act was to protect a "community" spouse's assets and resources and designate how a spousal share would be computed. The Act also established a new minimum needs allowance for the community spouse at a specified percentage of the federal poverty line. Consequently the Wisconsin Legislature enacted sec. 49.455, Wis. Stats. in order to bring the Wisconsin Medicaid program into conformity with federal law. Section 49.455 specifically states that the department is to use the criteria of that statutory section in determining the eligibility for medical assistance under §§49.46 or 49.47, Wis. Stats. and the required contribution toward the care of an institutionalized spouse.

"Community spouse" refers to the person who is married to an institutionalized individual. See sec. 49.455(1), Wis. Stats. As a general rule, no income of a spouse is considered to be available for use by the other spouse during any month in which that other spouse is an institutionalized spouse. See sec. 49.455(3), Wis. Stats. However, after an institutionalized person is found eligible for medical assistance (MA), he or she may allocate income to the community spouse.

If the community spouse's monthly income is below a certain amount, the institutionalized spouse may allocate some of his or her income to bring the community spouse's income up to that amount. That amount is the lesser of \$2,044 or \$1,809.00 plus an excess shelter allowance. In this case, sec. 49.455(4)(c), Wis. Stats., the Medical Assistance Handbook, Appendix 23.6.0. (1-1-99 edition), and sec. 49.455(4)(b), Wis. Stats., allow an increase in the monthly community spouse allotment by order of a fair hearing examiner or a court. See also MA Handbook, Appendix 23.6.0. In order to increase the allotment, the examiner must find exceptional circumstances resulting in financial duress. See sec. 49.455(8)(c), Stats. In this case, the

income of the community spouse, Mrs. ██████ earned income alone exceeds \$2,044. The Department therefore refused to increase the income allocation from Mr. ██████ to Mrs. ██████ beyond the \$400 which was income allocated to the community spouse from the previous May 15, 1997 decision in MRA-28/1366. See Finding of Fact #8.

It is important to emphasize that even if income allocation is possible, not all expenses qualify. In order for a Hearing Officer to use expenses, they must meet "necessary and basic maintenance needs" MA Handbook, Appendix 23.6.0. "Income Allocation". This corresponds to the statutory language that the new income amount is in lieu of the "minimum monthly maintenance needs". Sec. 49.455(8)(c), Stats., (emphasis added.) Because the community spouse is essentially asking state taxpayers to give the nursing home or group home resident more welfare in the form of MA, I do not think that every expense is automatically appropriate for inclusion, even if it is not frivolous.

During the hearing, the petitioner stated that she had 12 windows on her house that needed replacement due to rotted wood in those windows. At the petitioner's request, the record was held open for the petitioner to submit an estimate of the expense to replace any necessary windows on her home. Flood's Remodeling submitted to the Division of Hearings and Appeals (DHA) an estimate for installing 12 energy-efficient, replacement windows with golden oak inside at a cost of \$4,200 (or \$350 per window). See Exhibit 5. The monthly cost of this window replacement over the time period of one year would be \$350 per month. However, Jefferson County Corporation Counsel objected to the \$4,200 cost of the window repair as not basic because of the extra costs of oak trim and energy-efficient windows, and contended that none of the cost of replacement should be approved as a home owner expense to the petitioner's wife. See Exhibit 6. This contention appears unreasonable as replacement of rotten windows is a necessary home expense in the upkeep of any keep. On the other hand, the golden oak trim may not be a basic and necessary expense of each of the windows. However, the county agency did not provide any evidence (for example, an estimate from a window contractor) to establish that there is an additional cost for oak trim in windows or to establish that the petitioner's window estimate was excessive or unreasonable.

Sec. 49.455, Wis. Stats., is the Wisconsin codification of 42 U.S.C. s.13964-5 (MCCA). Among other thing, the "spousal impoverishment" provisions at sec. 49.455 direct the Department to establish an income allowance for the community spouse of an institutionalized person. That allowance is currently set, for purposes of this discussion, at \$2,044. See MA Handbook, Appendix 23.6.0 (1-1-99). The institutionalized person may divert some of his income to his community spouse rather than contributing to his cost of care. The amount of the diverted income, when combined with the spouse's income, cannot exceed the maximum allocation.

A fair hearing officer can grant an exception to this limit on income diversion. The hearing officer 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).

An exceptional circumstance is present because Mrs. [REDACTED] incurs relatively high gas costs for commuting to her job in Madison, has day care costs, and the expense of replacing any rotten windows on her home. See sec. 49.455(8)(c), Wis. Stats.

Mrs. [REDACTED] contended that she cannot "get by" on the \$2,044 maximum (plus Dependent Allowance). However, the basic issue in this case is whether the county agency has correctly denied petitioner's request for additional community spousal income allocation, beyond that allocated as a result of her last hearing. During the March 19, 1999 hearing, the petitioner admitted that the total household income was \$4,186 (\$2,326 from her job at WPS; \$1,492 from the petitioner's insurance and disability income; and \$368 from disability payments to petitioner's two children). Also during the hearing, the petitioner contended that she had basic and necessary expenses of \$2,920. The county argued that life insurance was not basic and necessary, and should not be counted as an expense in the petitioner's monthly budget. See Finding of Fact #5. However, with a father who is institutionalized due to a severe brain injury, the life insurance on himself and his wife is necessary to the financial survival of the two young children (6 and 9 years of age) if Mr. or Mrs. [REDACTED] were to die. As to the children's life insurance policies, this decision is a much closer one. However, with the testimony of Mrs. [REDACTED] at the hearing, it appears reasonable that she might not have funds to meet the expenses if one of her children were to pass away. In any case, even if the total \$350 per month for window replacement were approved and the four life insurance policy payments, petitioner's total monthly expenses would be $\$2,920 + \$350 = \$3,270$.

The petitioner's total household income of \$4,186 minus \$490.84 (county's calculation of petitioner's cost of care contribution as of 2-10-99) = \$3,695.16 which is substantially more than even the highest possible petitioner monthly expense figure of \$3,270. In cases such as this one in which the petitioner has appealed the amount of the cost of care contribution, the burden of proof is upon the petitioner to establish his or her case that the community spouse's basic and necessary expenses can not be met with his or her current income. The petitioner has not met this burden. I conclude that Mrs. [REDACTED] has not met her burden of proof to establish a prima facie case demonstrating the need for an increase in the income allocation to the community spouse to avert financial duress.

CONCLUSIONS OF LAW

The county agency correctly denied petitioner's request for an increase in the income allocation to the community spouse.

NOW, THEREFORE, it is

ORDERED

That the petition herein be and the same is hereby dismissed.

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.

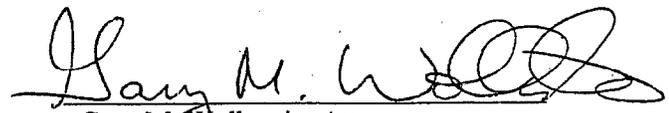
Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

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 26th day
of May, 1999.


Gary M. Wolkstein, Attorney
Division of Hearings and Appeals
5-24-99gmw

cc: Jefferson Co. DHS
Susan Wood, DHFS