



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

AMENDED
DECISION

MRA-11/86988

PRELIMINARY RECITALS

Pursuant to a petition filed September 6, 2007, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Columbia County Dept. of Social Services in regards to Medical Assistance (MA), a hearing was held on October 10, 2007, at Portage, Wisconsin. A final Decision was issued on October 15, 2007, granting the petitioner's request for an income reallocation to the community spouse. This Amended Decision is issued by the Division of Hearings & Appeals upon its own motion to amend, clarify and correct the provisions of the ORDER to be implemented by the county agency, and replaces the final Decision of October 15, 2007, in its entirety.

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

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

Jeffrey P. Clark, Attorney
Lathrop & Clark, L.L.P.
P O Box 128
Poynette, WI 53955

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: Kelly Krueger, ESS
Columbia County Health & Human Services Department
2652 Murphy Rd
PO Box 136
Portage, WI 53901

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxxxxx) is an institutionalized resident of Columbia County. He receives MA. His wife, (petitioner's spouse), lives in the community.
2. On July 26, 2007, the county agency determined that the petitioner's gross monthly income is \$1,043.90; his community spouse's gross monthly income is \$6,967.89; and that, after allowable deductions for personal needs (\$45) and "other deductions" (\$150.61), that the petitioner's monthly patient liability, effective July, 2007, was \$848.29 and \$0 would be allocated to his community spouse because her gross monthly income exceeded the maximum monthly income allowance of \$2,281.67. See, Exhibit #2.
3. Also on July 26, 2007, the agency issued a second Notice stating that the same calculations were applicable in August & September, 2007.
4. On September 6, 2007, the petitioner filed an appeal with the Division of Hearings & Appeals requesting that all of the petitioner's available monthly income be allocated to his community spouse because she needed it to meet her necessary and basic maintenance needs.
5. The community spouse's monthly necessary and basic maintenance expenses are \$8,566.97. See, petitioner's wife's list of expenses for details, at Exhibits #6 & #7. Her gross monthly income is \$7,267.69. See, Exhibit #6.

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 § 49.455 direct the Department to establish an income allowance for the community spouse of an institutionalized person. That allowance set by the county, is \$2,281.67. See, MA Handbook, Appendix § 5.10.6. 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 determined by the county. Any income of the institutionalized spouse that is not allocated to the community spouse or the personal needs allowance must be paid to the nursing home as the person's cost of care share.

An administrative law judge (ALJ) can grant an exception to this limit on income diversion. 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). 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.

I have reviewed the expenses for petitioner's wife. The community spouse has produced an extensive and detailed monthly budget. While the credit card expenses are much, much more than in a typical household, she still is required to pay the minimum monthly amounts or risk collection actions. In fact, she has an obligation to at least 17 credit cards, totaling \$31,210.87, with estimated minimum payments on these accounts totaling \$980.34. See, Exhibit #7, p. 3. She has a modest home with a monthly first mortgage of

\$930.22 and a second mortgage payment of \$309.48. Her car payment is \$594.10 per month on a 2003 Envoy with 140,000 miles accrued. Her gasoline expense is high at \$350 per month, but she explained that her home office is in Racine, and she has to commute there from Portage when she must be in-office. All together, her expenses total \$4,818.72. I cannot, however, consider the premiums on life insurance policies held on her life (\$42), and her son's life (\$30), as basic and necessary maintenance expenses. These monthly expenses are excluded. I also note that I would normally not allow the expense listed for a satellite television service, as it is not necessary for basic needs where free broadcast television is available, but the community spouse testified that she lives in a river valley about 40 miles from the nearest broadcasting area and cannot receive broadcast television, so to have television she must use a satellite dish. I note that all other expenses listed are reasonable, basic and necessary. I conclude that her allowable expenses actually total \$4,746.72.

I turn now to a further analysis of her income stream. The community spouse has a good job generating a substantial income stream. Her gross pay is approximately \$7,267.69 per month. From this, she produced a list of deductions totaling \$3,820.25 resulting in net pay of \$3,447.44 per month. I have also reviewed these asserted deductions from income. The list includes otherwise unremarkable deductions for federal income taxes, state income taxes, Social Security taxes, Medicare taxes, dental insurance, accidental death and dismemberment insurance, life insurance, a medical flex account deduction, and a medical insurance premium. These are all reasonable and basic expenses that in fact reduce her income available for her maintenance. The only truly unusual sum is the listed \$1,006.44 per month paid to her 401K program to repay a loan with a balance of \$34,471.11. The community spouse testified that the household had lived far above its means in the past, and she asserted that this was because her husband was, in essence, a spendthrift. She further explained that she borrowed \$50,000 two years ago from her 401K plan to pay off other now extinguished debts, and she still owes this balance on that loan.

In short, the petitioner has allowable monthly expenses that total \$8,566.97 (\$3,820.25 payroll deductions + \$4,746.72 allowed household expenses), and her gross monthly income is \$7,267.69. She is running a monthly budgetary shortfall of \$1,299.28. Her financial picture is clearly under duress.

I conclude that the community spouse's minimum monthly maintenance needs allowance is to be increased to a total of \$8,566.97 per month. The result is that petitioner will have no cost of care liability, retroactive to the first month of cost of care liability. This Decision contemplates that the allocation will be time limited to 3 calendar years, with the anticipation that the community spouse will reduce the debts during this period. At the end of 3 years, the agency is to review the allocation under the then prevailing law. If the petitioner and his community spouse are again aggrieved at that future date, she may request a *new* hearing at that time.

CONCLUSIONS OF LAW

That the petitioner's wife minimum monthly maintenance needs allowance is to be increased to a total of \$8,566.97 per month, effective March 1, 2007, and continuing through May, 2010, in order for her to avoid financial duress.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the county agency with instructions to: increase the community spouse's minimum monthly maintenance needs allowance from \$2,281.67 per month to a total of \$8,566.97 per month, effective March 1, 2007; refund to the community spouse any overpayments of patient liability made by the petitioner retroactive to March 1, 2007, arising as a consequence of this decision; and apply this allowance (MMMNA) level through May, 2010, after which it shall be subject to review and re-determination by the county agency under standard Department policy then-prevailing. The actions shall be completed within 10 days of the date of this Decision.

REQUEST FOR A REHEARING

This is a final administrative 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. Your request must explain what mistake the Administrative Law Judge 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.

To ask for a rehearing, 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 for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing 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 this decision. The process for appeals to the Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of
Madison, Wisconsin, this 29th day of
October, 2007

/s/Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
1115/KDD