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

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In the Matter of



DECISION

MRA/136156

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**PRELIMINARY RECITALS**

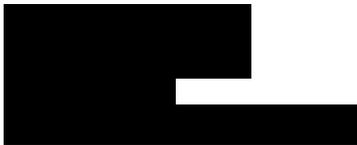
Pursuant to a petition filed October 20, 2011, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Waupaca County Department of Social Services in regard to Medical Assistance, a hearing was held on November 30, 2011, at Waupaca, Wisconsin.

The issue for determination is if there should be an increase in the community spouse income allocation.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:



Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Pam Kolb, ESS

Waupaca County Department of Social Services  
811 Harding Street  
Waupaca, WI 54981-2087

**ADMINISTRATIVE LAW JUDGE:**

Joseph A. Nowick  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Waupaca County.
1. An application for MA was filed on the petitioner's behalf in September, 2011 with backdating to July 1, 2011. On October 13, 2011, the county agency sent a written notice to the petitioner's

community spouse, [REDACTED] stating that her husband was found eligible for nursing home MA as of June 30, 2011.

2. The September 11<sup>th</sup> notice also stated that the petitioner's cost of care contribution each month would be \$2,255.71, starting with July 1, 2011. This was after the petitioner's \$45 personal allowance and a spousal income allocation of \$845 was subtracted from his income.
3. Petitioner's monthly income is \$3,145.70 in pension and Social Security payments. Ms. [REDACTED] monthly income is 1,894.01 in pension and Social Security payments. The income allocation of \$845 brought her income up to \$2,739.
4. Ms. [REDACTED] presented her expenses and debts at the hearing (See Exhibit #1). Based on those documents and estimates presented at the hearing, Ms. [REDACTED] is asserting that the amount of income needed to meet her necessary and basic maintenance needs is \$2,775.41 each month.

### 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. Wis. Stat., §49.455 is the Wisconsin codification of 42 U.S.C. s.13964-5 (MCCA).

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 WI Stats §§49.46 or 49.47, 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. The amount in 2006, the MMMNA is the *lesser* of \$2,739 per month, or \$2,451.67 plus the amount of shelter expenses incurred each month by the community spouse which exceed \$735.50, known as the "excess shelter allowance". Wis. Stat. §49.455(4)(b), *Medicaid Eligibility Handbook*, 5.10.6. Given the calculated excess shelter expenses, \$2,541 per month is the lesser amount. In this case, Sec. 49.455(4)(c), Wis. Stats., and sec. 49.455(4)(b), Wis. Stats., allows an increase in the monthly community spouse allotment by order of a fair hearing examiner or a court. See also *Medicaid Eligibility Handbook*, 5.10.6. In order to increase the allotment, the examiner must find exceptional circumstances resulting in financial duress. See sec. 49.455(8)(c), Stats.

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". See *Medicaid Eligibility Handbook*, 5.10.6. This corresponds to the statutory language that the new income amount is in lieu of the "minimum monthly maintenance needs". See §49.455(8)(c), Stats.; Wis. Admin. Code §HFS 103.075(8)(c). Because the community spouse is essentially asking state taxpayers to give the nursing home resident more financial support in the form of MA, I find that every expense is not automatically appropriate

for inclusion, even if it is not frivolous. As an example, by following this logic, I do not include any dues or donations to religious or charitable organizations as an allowable expense. The reason is the fundamental basis of the program, which does not allow for the use of income for something that is not a "maintenance" need.

(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. (6)(b), the hearing officer shall determine an amount adequate to provide for the community spouse's needs. In this paragraph, "exceptional circumstances resulting in financial duress" means situations that result in *the community spouse not being able to provide for his or her own necessary and basic maintenance needs*. The agency shall use the amount determined by the hearing officer in place of the minimum monthly maintenance needs allowance determined under sub. (6)(b). (*emphasis added*)

In *Tannler v. DHSS*, 211 Wis.2d 179 (1997), Chief Justice Shirley Abrahamson stated the following in a concurring opinion:

Although Congress requires divestment, it has recognized that elderly persons should not be forced into impoverishment in order to qualify an institutionalized spouse for medical assistance. Thus Congress has determined that spouses of those who need long-term care should not be driven by the government into poverty.

See *Tannler*, at 192. The goal is the prevention of poverty of the community spouse, not the ability to maintain a middle class lifestyle or any other lifestyle. It is this purpose that guides the determination in these cases. Using the above standards, I cannot find that there is an exceptional circumstance. However, for the sake of this discussion, I will still consider what expenses claimed by Ms. [REDACTED] are for "necessary and basic maintenance needs".

I will only address some of the items submitted in Exhibit #1. I can only include those expenses that might cause financial duress due to exceptional circumstances. I would reduce the entertainment amount of \$400 as that level is not a necessary and basic maintenance need. All I need to reduce that amount by is \$36.41 in order for the petitioner to be under the \$2,739 amount that she is already receiving. (I note that I could have reduced this amount even further.) Thus, I cannot increase the community spouse allowance.

### CONCLUSIONS OF LAW

1. The cost of expenses for the items that are basic and necessary may be a basis for allocating income to a community spouse above the Maximum Community Spouse Income Allocation.
2. Petitioner has not shown that an increase in the community spouse income allowance is necessary to avoid financial duress.

**NOW, THEREFORE, it is ORDERED**

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

**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 Wis. Stat. § 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 with the appropriate court 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).

Appeals to Circuit Court should name the Department of Health Services as the respondent. After filing the appeal with the appropriate court, it 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 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

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 Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,  
Wisconsin, this 14th day of December, 2011

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/s/ Joseph A. Nowick  
Administrative Law Judge  
Division of Hearings and Appeals

c:

