



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
c/o Atty. John F. Koenig
6041 Monona Drive, Suite 100
Monona, WI 53716

DECISION

MRA/143512

PRELIMINARY RECITALS

Pursuant to a petition filed August 29, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Dane County Department of Human Services in regard to Partnership Waiver eligibility, a hearing was held on October 2, 2012, at Madison, Wisconsin.

The issue for determination is whether this household's CSAS shall be increased to in turn increase the community spouse's income, pursuant to "spousal impoverishment" rules at Wis. Stat. §49.455.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
c/o Atty John F Koenig
6041 Monona Drive Suite 100
Monona, WI 53716

Respondent:

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

By: Eric Demel, ES Spec.

Dane County Department of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED] is a resident of Dane County. His wife, [REDACTED] resides in the community. The petitioner seeks long-term care services through the Elderly/Blind/Disabled Partnership Waiver program.
2. An EBD Partnership Waiver application was filed on the petitioner's behalf on August 9, 2012. The application sought retroactive Partnership coverage from May 1, 2012, forward. An asset assessment was completed, and the agency determined that the couple's combined assets of \$112,518.96 exceeded their \$63,254.82 Community Spouse Asset Share (CSAS) at all times relevant hereto. The agency issued written notice of denial on August 27, 2012; the basis for denial was excess assets.
3. The petitioner's community spouse has gross monthly income, not including investment income referenced in Finding #5, of \$1,474.00 monthly (Social Security).
4. The petitioner has gross monthly income, not including investment income referenced in Finding #5, of \$644.50 in Social Security. If the couple's assets drop below their CSAS, the agency would subtract a \$45 statutory needs allowance, a \$77.50 Medicare premium, and a \$108 health care premium from the petitioner's income, before allocating the remainder to the community spouse.
5. In July, 2012, the petitioner and his wife owned the following non-exempt assets: \$88,515.83 in E. Jones account I, \$25,629.92 in E. Jones account II, \$9,771.94 in interest-bearing checking, and \$827.18 in savings, for total of \$124,744.87. All of these items generate income. The assets totaled \$195,146 in May, 2012, and went down thereafter.
6. The petitioner's husband's monthly income of \$1,474 is well under the Minimum Monthly Maintenance Needs Allowance (MMMNA) of \$2,521.67. See, *MEH*, § 18.6.2. The petitioner seeks to have the CSAS increased to an amount that will allow retention of the assets listed in Finding #5. The assets in Finding #5 generate income of \$359.48 monthly.

DISCUSSION

The issue presented in this case is whether the petitioner is Partnership Waiver eligible, per spousal impoverishment rules, where the household's assets exceed the special asset limit, and the community spouse has income that falls below the Minimum Monthly Maintenance Needs Allowance (MMMNA, or "income allowance," or Community Spouse Income Allocation in the policy manual).

"Spousal impoverishment" rules were created with passage of the federal Medicare Catastrophic Coverage Act of 1988 (MCCA), which included extensive changes in state Medicaid (MA) eligibility determinations in cases involving married persons. These rules also apply to the EBD Partnership Waiver, which is an MA Waiver program. *MEH*, §18.2.3. In spousal impoverishment cases, the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. Wis. Stat. §49.455(1). Generally, no income of a community spouse is considered to be available for use by the other spouse during any month in which that other spouse is institutionalized. Wis. Stat. § 49.455(3).

The MCCA created *asset* eligibility limits for spousal impoverishment households that are more generous than those for a non-spousal impoverishment household (*e.g.*, \$2,000 for a single person). The MCCA also established a MMMNA/*income* allowance for the community spouse at a specified percentage of the federal poverty line. This income allowance is the amount of monthly income deemed necessary for the community spouse to live on. A community spouse may prove through the fair hearing process that he/she

has financial need above the MMMNA based upon exceptional circumstances resulting in financial duress. Wis. Stat. § 49.455. In the instant case, the petitioner's husband is not arguing that he needs more than the MMMNA.

Establishing the Asset Limit in a Spousal Impoverishment Case

When initially determining whether an institutionalized spouse is MA eligible, county agencies review the combined assets of the institutionalized spouse and the community spouse. *MA Eligibility Handbook (MEH)*, 18.4.1, online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the CSAS plus \$2,000 (*i.e.*, an asset limit) to determine eligibility.

MEH, 18.4.1 – 18.4.6, explains the asset eligibility determination process: First, a CSAS is calculated as follows: **(1)** If the couple's total countable assets are \$227,280 or more, the CSAS is \$113,640; **(2)** If the couple's total countable assets are less than \$227,280 but greater than \$100,000, the CSAS is 1/2 of the total countable assets of the couple; and **(3)** if the total countable assets of the couple are \$100,000 or less, the CSAS is \$50,000. Wis. Stat. § 49.455(6)(b)3.

Second, \$2,000 (the MA asset limit for the institutionalized individual) is then added to the CSAS to determine the total asset allowance for the couple. Generally, if the couple's assets are at or below the determined asset allowance, the institutionalized spouse is eligible for MA. If the assets exceed the asset allowance calculated for the couple, the institutionalized spouse is not MA eligible.

In this case, the petitioner's exhibit shows that the couple's non-exempt assets at the time of application were \$112,518.96. Based upon an asset assessment, the amount of assets the couple would be allowed to retain would be \$63,254.82. Therefore, per the assessment, the petitioner and her community spouse exceeded the relevant asset limit.

As an exception to the general rule, the CSAS may be increased through the fair hearing process if the assets generate income on a monthly basis and are necessary to raise the community spouse's income to the MMMNA. Wis. Stat. § 49.455(8)(d), Wis. Admin. Code § DHS 103.075(8)(c).

The petitioner asserts the couple should be able to retain assets above the \$63,254.82 asset limit in order to generate income to meet the community spouse's living expenses. They ask this administrative law judge to find that all of these assets are necessary to generate a monthly income which meet the community spouse's needs.

The pertinent state statute, Wis. Stat. § 49.455(6),(8), allows an administrative law judge (ALJ) to increase the CSAS/resource allowance under limited circumstances:

(6) PERMITTING TRANSFER OF RESOURCES TO COMMUNITY SPOUSE.

...

(b) The community spouse resource allowance equals the amount by which the amount of resources otherwise available to the community spouse is exceeded by the greatest of the following: . . .

3. The amount established in a fair hearing under sub. (8)(d).

...

(8) FAIR HEARING. ...

(d) 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) . .

Based upon the above, an administrative law judge (ALJ) is allowed to modify the CSAS by determining assets in excess of the limit are necessary to generate needed income for the community spouse. The above provision has been interpreted to allow an ALJ to determine an applicant eligible for Waiver benefits even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the asset allowance. See MED-62/94792, MED-36/93977.

As an aside, the couple's assets include two annuities, which are not in pay-out phase, and which are accumulating in value at 3.77 percent annually. See, Exhibit 2. I have treated these assets as assets that are generating income, because they are increasing in value, and that value can be withdrawn when needed. It is common sense that the couple will draw down the lower-producing assets first (*e.g.*, savings earning 0.10 percent). Putting common sense aside, I also note the directive in a circuit court decision, *Richard Anderson v. Department of Health Services*, Case No. 11-CV-3921 (Dane County Circuit Court, Branch 3, March 9, 2012), by Judge Albert. That decision held that a life insurance policy that can be redeemed in the future for cash should be included as an income-producing asset in the current exercise (increasing the CSAS). Further and rather extraordinarily, the court enjoined "the Department, along with the Division of Hearings and Appeals, from refusing to allow an institutionalized spouse to transfer an asset to the community spouse under Wis. Stat. § 49.455(8)(d) or Wis. Stat. § 49.455(6) on the basis that the asset does not currently produce income."

In this case, when the institutionalized petitioner's countable income is added to the community spouse's non-investment income, the combined sum is below the MMMNA. The petitioner has supplied a chart and account verification showing that the accounts generate interest earnings that total \$359.48 monthly. When the \$359.48 investment income is added to their other joint income, the total is only \$2,041.00, which is well below the \$2,521.67 MMMNA. Although the investment income would have been slightly higher in the months prior to July, 2012, the total income (based on the Exhibit 2 rate of return) was still below \$2,521.67 for May and June 2012.

CONCLUSIONS OF LAW

1. The CSAS for this household shall be increased to \$122,745.00, in order to increase the community spouse's income to a level approaching the \$2,521.67 MMMNA.

THEREFORE, it is

ORDERED

That the petition herein be remanded to the county agency with instructions to increase the Community Spouse Asset Share to **\$122,745.00** for the petitioner's household, effective May 1, 2012. The county agency shall take this action 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 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).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on 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.

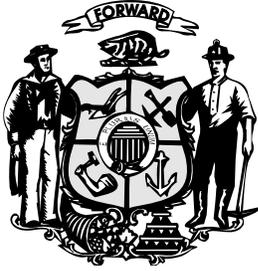
The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 4th day of October, 2012

Nancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals

c:





State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on October 4, 2012.

Dane County Department of Human Services
Division of Health Care Access and Accountability