DHA-15 (R10/97)
THIS DECISION WAS ADOPTED AS FINAL ON 7-24-01

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

PROPOSED
DECISION

MED-36/47216

PRELIMINARY RECITALS

Pursuant to a petition filed December 19, 2000, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Manitowoc County Dept. of Human Services in regard to the discontinuance of Medical Assistance (MA), a hearing was held on February 28, 2001, at Manitowoc, Wisconsin. A hearing set for January 22, 2001, was rescheduled at the petitioner's request.

The issue for determination is whether the county agency correctly denied the petitioner's application for MA due to excess income and determined her spenddown deductible.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

(petitioner)

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: Connie Hendries, ESS I
Chris Shaw, ESS
Manitowoc County Dept Of Human Services
926 S. 8th Street
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EXAMINER:
Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a disabled resident of Manitowoc County; she was receiving MA in December, 2000. She lives with her husband, [redacted]. [redacted] is a Community Options Program (COP) Waiver recipient.

2. At the annual cost-of-living-adjustment conversion on December 2, 2000, the county agency implemented a policy change that affected the petitioner's eligibility for MA; prior to this change, (petitioner's spouse) and (petitioner) were treated as separate fiscal test groups. After the change, they were treated as a single fiscal test group in computing the wife's eligibility for SSI-Related MA.

3. (petitioner's spouse) receives gross unearned income of $1,079 per month (after a $50 deduction for Medicare Part B premium payment); of this sum, his personal allowance is $803.97; his cost of care contribution is $0; "other deductions" allowed - $78; and the amount allocated to his spouse is $275.03.

4. (petitioner) receives gross unearned income (in her name only) of $441 (after a $50 deduction for Medicare Part B premium payment).

5. On December 6, 2000, the county agency issued a Notice of Decision to the petitioner informing her that her SSI-Related MA would be discontinued, effective January 1, 2001, due to income in excess of MA program limits, and that she could be eligible only by meeting a spenddown deductible of $5,449.98 (6 mos. X $908.33 = $5,449.98). The agency computed the petitioner's eligibility as shown on Exhibit #4, p.5; the Fiscal Test Group of 2 persons was determined to have gross unearned income of $1,520; and eligible only for the $20 disregard, leaving net income of $1,500. This meant that (petitioner) was determined to be $908.33 in excess of the income limit of $591.67 per month.

6. The petitioner filed an appeal with the Division of Hearings & Appeals on December 19, 2000; benefits have been continued pending the hearing decision.

DISCUSSION

The agency determined that the Department's policy regarding the treatment of household income for the community spouse of a Waiver recipient had changed. As a result of this change, the waivered spouse's income was included in the petitioner's household income for her application for MA, i.e., the eligibility budget was determined using a fiscal test group (FTG) of 2 persons. This limit, for an SSI-Related Medical Assistance applicant, is $591.67. (The income limit for the waivers individual in a FTG of 1 person, is $1,590 per month.)

The MA Handbook reflects the policy change as follows:

> When a community waivers person and his/her community spouse are both applying for MA, they are one case, but separate AGs. Enter them in CARES on the same application. Only one of the spouse's signature is needed on the application.
>
> Both spouses are in the non-waiver spouse's fiscal test group (FTG). Since the waiver spouse is in the FTG, disregard any income that may have been allocated by the waiver spouse to the community spouse.
>
> The waivers spouse is a FTG of 1. CARES creates the separate FTG's and AG's.

MA Handbook, App. 25.12.0 (01-01-01).

I would also note that a separate policy states that when a married couple applies for MA waivers eligibility, the asset limit is $2,000 *each*, and the income limit (for individuals in "Group B", as (petitioner's spouse) is here) is $1,590 *per individual*. See, MA Handbook, App. 25.9.2. This means that if *each* applies for a community waiver program, they are then tested in separate fiscal test groups again. See, MA Handbook, App. 25.3.0. This is of note, here, because the petitioner asserts that she too is disabled, so there may be the potential here for waiver eligibility, depending on her circumstances.

The petitioner could point to no specific law, rule or policy that contravenes this policy change. Rather, she asserts that the policy as applied to her here, is unfair. She notes that her medical expenses exceed $900 per month, and without MA coverage, she will not be able to afford these costs and meet her living expenses. She agreed to consent to contact by the administrative law judge with the Department's policy experts concerning the genesis of this policy change. I have done so. Department policy expert Jeff Ulanski confirms that the policy change was intended to be applied in the circumstances present here. He noted that the MA program had treated such couples as two separate fiscal test groups for approximately ten years, but that a recent review of federal and state regulations revealed that there was no basis for doing so, and that the State had accordingly been out of compliance with MA laws in doing so in the past.

However, Wisconsin's so-called "spousal impoverishment" statute specifically provides that a married "waiver" recipient is considered an "institutionalized spouse". See, WI Stat § 49.455(1)(d). In practical terms, he is deemed to be outside of the home even though he is *actually* still living there as a community waivers recipient. None of his income is to be considered available to his spouse in a month when he is "institutionalized". See, WI Stat § 49.455(3)(b). This law also provides that, subject to exceptions not presented here:

> (a) Income paid solely in the name of one spouse is considered to be available only to that spouse.
>
> (b) Income paid in the names of both spouses is considered to be available one-half to each spouse.

WI Stat §§ 49.455(3)(b)1a & b.

The proffered policy change, as applied here, renders the income allocation performed on the husband's income stream superfluous and meaningless. The income allotted to the community spouse under that calculus is not *really* used as her income for her own MA eligibility application. It also renders meaningless the personal needs allocation calculation performed on the husband's waivers eligibility budget. He is not treated as *really* needing the personal needs allowance; rather, the new policy concludes that this money is actually available to meet the needs of *both* household members for purposes of the community spouse's application for Regular MA. Justifying this by simply providing that the community spouse's income does not count against the waivers applicant as income is insufficient. The institutionalized spouse's income is not available to the community spouse either, except as allotted under WI Stat § 49.455(4). Any other interpretation of the law as it pertains to the community spouse's separate application for MA renders the protections provided by the law meaningless. See, WI Stat § 49.455(3)(a).

This policy change runs afoul of the spousal impoverishment directive in the treatment of each spouse's available income stream. The statute intended to protect the community spouse from impoverishment by providing for her maintenance. It is applicable to both spouses vis à vis applications for MA under WI Stat §§ 49.46-.47. The statute directs that the institutionalized spouse's income paid in his name not be attributed to the community spouse, and vice versa. To turn this around and say that when the community spouse is applying for MA that the waivers/institutionalized spouse's income *is* available to her, defeats one of the purposes of the spousal impoverishment protections.

I conclude that the provision contained in MA Handbook, App. 25.12.0, is contrary to the provisions of WI Stat § 49.455(3)(a) & (b), and it must yield. The matter will be remanded to the county agency for further processing, as directed below.

CONCLUSIONS OF LAW

1) The Department's policy as contained in the MA Handbook, at App. 25.12.0, is contrary to WI Stat §§ 49.455(3)(a) &(b), and therefore it is void.

2) The county agency incorrectly determined the petitioner's MA eligibility on December 6, 2000, as a consequence of the voided policy described in Conclusion #1.

3) The denial action must be rescinded, and the petitioner's eligibility must be reviewed and re-determined counting only income paid to her in her name or allocated to her under spousal impoverishment rules pursuant to WI Stat § 49.455.

NOW, THEREFORE, it is **ORDERED**

That the matter is remanded to the county agency within instructions to: (a) rescind the denial of the petitioner's MA application and the spenddown deductible determination, retroactive to January 1, 2001; (b) review and re-determine her MA eligibility as a separate Fiscal Test Group of 1, using only the petitioner's individual unearned income paid to her directly in her name, plus one-half of any income payable jointly to her and her husband, plus the amount of her husband's income allocated to her as a community spouse; (c) with written notice. These actions shall be completed within 10 days of the issuance of a Final Decision by the Secretary, *if and only if*, this Proposed Decision is adopted by the Secretary of the Department of Health & Family Services as a Final Decision.

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, WI 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 & Family Services for final decision-making.

The process relating to Proposed Decision is described in WI Stat § 227.46(2).

Given under my hand at the City of Madison, Wisconsin, this 4th day of April, 2001.

/s

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