STATE OF WISCONSIN
DEPARTMENT OF HEALTH SERVICES

In the Matter of

[redacted]

DECISION

Case No: CMGE-208717

The attached proposed decision of the Administrative Law Judge dated September 20, 2024, is hereby adopted as the final order of the Department.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison, Wisconsin, this 21st day of November, 2024.

Kirsten Johnson

Kirsten L. Johnson, Secretary
Department of Health Services

FH
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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

PROPOSED DECISION

Case #: CMGE - 208717

PRELIMINARY RECITALS

Pursuant to a petition filed May 16, 2023, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1) to review a decision by the St. Croix County Health & Human Services in regard to EBD Medicaid General Eligibility, a hearing was held by telephone on Tuesday, June 27, 2023, originating from Madison, Wisconsin. A decision on the merits was issued on July 20, 2023. On August 18, 2023, the petitioner's attorney filed a motion for legal fees incurred during the representation, pursuant to Wis. Stats., §227.485 and Wis. Admin. Code, §HA 3.11. The county agency filed no response or objection to the cost motion.

The issue for determination is whether the petitioner is entitled to reimbursement of $3,000.00 in attorney fees.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Represented by:

Attorney Benjamin S. Wright
Wright Elder Law
PO Box 375
New Richmond, WI 54017

Respondent:

St. Croix County Health & Human Services
1752 Dorset Lane
New Richmond, WI 54017-1063

By:

ADMINISTRATIVE LAW JUDGE:
Jason M. Grace
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #[redacted]) is a resident of St. Croix County who earned less than $150,000 in each of the last three years.

2. On February 27, 2023, the petitioner applied for Institutional MA. At that time, she was living at a nursing home. Her husband remained living in the community.

3. By notice dated April 18, 2023, information was provided to the petitioner about her Community Spouse Asset Share Calculation. It reflected that she had total combined assets as of April 17, 2023, of $192,509.70. It further indicated the maximum total countable assets for her community spouse was $96,254.85. Finally, it indicated in order to meet Medicaid asset eligibility, her and her spouse together can have $98,254.85 in assets.

4. Included in the countable asset determination were two revocable Individual Retirement Annuities owned by the petitioner's husband. Those two annuities totaled $35,104.49. The Individual Retirement Annuities were certified as traditional IRAs by American Equity. They were funded by a transfer in 2005 from a prior traditional IRA account of the husband.

5. On or about April 13, 2023, the county agency in processing the petitioner's MA application reached out to DHS CARES Problem Resolution for assistance in how to treat the two Individual Retirement Annuities of the community spouse. The county agency was informed to treat them as countable assets.

6. On or about April 20, 2023, petitioner's attorney informed the county agency of a prior decision issued in DHA Case No. 135337 wherein it was found that the IRAs owned by the community spouse were exempt assets. The county agency was further informed that in that case there were two conflicting MEH provisions: one saying a revocable annuity is an available asset and the other that the community spouse's IRAs must be disregarded. It was further indicated that the ALJ concluded that "the fact that the funds are in an IRA trumps the fact that they are also in revocable annuities." Counsel indicated to the county agency that as per the finding in DHA Case No. 135337, the two Individual Retirement Annuities of the community spouse in the petitioner's case should be exempt under MEH §18.4.1.

7. In DHA Case No. 135337, the ALJ issued a proposed decision, and the Secretary of the Department of Health Services adopted it in a final decision issued on March 12, 2012.

8. On or about April 21, 2023, the county agency reached out to DHS CARES Problem Resolution seeking guidance as to the applicability of the decision reached in DHA Case No. 135337 and whether the assets at issue in the petitioner's case would be exempt under MEH, § 18.4.1. The county agency was ultimately informed that the assets should be treated as countable annuities.

9. By notice dated May 18, 2023, the petitioner's MA application was denied on grounds her assets exceeded program limits. The agency determined that the petitioner had total countable assets of $105,525.44 and that the counted asset limit was $98,254.85. Included in the countable asset determination were the two revocable Individual Retirement Annuities owned by the petitioner's husband (the community spouse), totaling $35,104.49.

10. An administrative hearing was held on June 27, 2023 following the filing of an appeal by the petitioner. The ALJ issued a Decision in the matter on July 20, 2023. That Decision provided, in part, the following:

> The issue in this case is whether the two Individual Retirement Annuities are exempt assets under MA rules. There are competing provisions in the MA Eligibility Handbook (MEH) at issue here. Under MEH, 16.7.4.2, annuities are generally deemed to be an available asset. However, under MEH, 16.7.20, "work-related retirement benefit plans or individually-owned retirements accounts, such as IRAs or Keoghs, of an ineligible spouse in an EBD case [are exempt]." This policy is mirrored in MEH, 18.4.1 (spousal impoverishment).
>
> It appears the agency's position is that an Individual Retirement Annuity of the community spouse is treated as an available and countable asset under MEH, 16.7.4.2; while an Individual Retirement Account of the community spouse would be exempt under MEH, 16.7.20. A similar issue as involved here was addressed in two prior decisions issued by the Division of Hearings and Appeal. Both decisions were forwarded as exhibits by petitioner's counsel. ...
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> In DHA Case No. MRA-135337, the community spouse had two Individual Retirement Accounts that contained revocable annuities, one of which was labeled as an Individual Retirement Annuity. At issue in that case were similar policy provisions in the MEH as involved here. Of import to the ALJ was that it appeared the IRA annuities were created as part of the community-spouse's employment and had nothing to do with his wife's recent application for MA. The ALJ found that the fact the funds are in an IRA trumps the fact they are also revocable annuities. The ALJ issued a proposed decision finding the community spouse's IRA funds in the revocable annuities to be exempt assets in determining the petitioner's Institutional-MA eligibility. That decision was later adopted by the then Secretary of the Department of Health Services in a Final Decision issued on March 20, 2012.
>
> In DHA Case No. MRA-178406, the community spouse had an Individual Retirement Annuity purchased with funds from a prior retirement account. The ALJ noted the annuity was not created using available assets and was simply rolled over from an IRA into a different type of retirement account. The ALJ cited the decision in DHA Case No. MRA-135337 with approval, finding no flaws in the reasoning. In a decision issued on January 13, 2017, the ALJ found the Individual Retirement Annuity owned by the community spouse to be an exempt retirement account for purposes of the petitioner's application for Institutional-MA.
>
> While the prior decisions are not binding, I do find them persuasive. Like the prior cases, the Individual Retirement Annuities involved here were funded by proceeds from prior retirement accounts of the community spouse, not otherwise available assets. It was unrelated to petitioner's current MA application.
>
> Petitioner's counsel cited SSI rules in support of the argument that the community spouse's Individual Retirement Annuities at issue here should be treated as an exempt asset. Per the SSI Program Operations Manual System (POMS), annuities are listed as a possible retirement fund, as are individual retirement accounts. POMS, SI 01120.210 A.1. It was noted that the POMS indicate that "If an

> ineligible spouse … owns a retirement fund, we exclude it ….” POMS, SI 01120.210 E.4
>
> Counsel further cited the SSI rules that indicate “pension funds” of an ineligible spouse are excluded, and that term was further defined as:
>
> …. funds held in *individual retirement arrangements (IRAs), as described by the Internal Revenue Code*, or in work-related pension plans (including such plans for self-employed individuals, sometimes referred to as Keogh plans).
>
> POMS, SI 01330.120 A.1 (*emphasis* added). I performed a keyword search of the Internal Revenue Code and found no definition for “Individual Retirement Arrangements.” That term only appeared in an annotation, as was noted by counsel. However, counsel cited IRS Publication 590-A, pg. 7 (2022), which tends to indicate that Individual Retirement Arrangements encompass both Individual Retirement Accounts and Individual Retirement Annuities. The Individual Retirement Annuities at issue here were certified as Traditional IRAs. …
>
> Based on the record, I find that in this case the two Individual Retirement Annuities of the community spouse are exempt retirement accounts for purposes of petitioner’s eligibility for Institutional-MA.

11. On August 18, 2023, the petitioner’s attorney, Benjamin S Wright, sent an e-mail to the Division of Hearings and Appeals (DHA) that set forth the case number MGE-208717 and indicated, “Please accept the attached Petitioner’s Motion for Costs in this case under the Wisconsin Equal Access to Justice Act.” No motion or attachment was included with the e-mail. The DHA did not respond to the e-mail or otherwise notify Attorney Wright that his e-mail did not contain an attachment.

12. On August 25, 2023, Attorney Wright sent an e-mail to the DHA indicating that attached was an Affidavit of Financial Eligibility that supplemented the Motion for Costs filed the week prior. No affidavit or attachment was included with the e-mail. The DHA did not respond to the e-mail or otherwise notify Attorney Wright that his e-mail did not contain an attachment.

13. On October 4, 2023, Attorney Wright sent an e-mail to the DHA requesting a confirmation receipt and update on the status of his motion for costs.

14. On October 11, 2023, the DHA informed Attorney Wright by e-mail that it did not receive the attachment containing the cost motion.

15. Shortly thereafter on October 11, 2023, Attorney Wright sent an e-mail to the DHA that contained the Petitioner’s Motion for Costs, including an itemized Statement of Costs, and Affidavit of Financial Eligibility. The Statement of Costs sets forth 13.2 hours of attorney work at a rate of $244.68 per hour, reflecting a total of $3,229.78. The Motion for Cost requested attorney fees of $3,000.00, reflecting the flat fee amount charged to the petitioner.

DISCUSSION

Section 227.485(3), Wis. Stats., provides in pertinent part:

> In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the

> hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

"Substantially justified" means having a reasonable basis in law and fact. Wis. Stats. §227.485(2)(f). The Wisconsin Supreme Court, in considering the issue of "substantial justification" in Sheely v. Wisconsin Department of Health and Social Services, 442 N.W. 2d 1, 150 Wis. 2d 320 (1988), recited the following language from Phil Schmidt and Son v. NLRB, 810 F. 2d 638, 642 (7th Cir. 1987):

> To satisfy its burden the government must demonstrate 1) a reasonable basis in truth for the facts alleged; 2) a reasonable basis in fact for the theory propounded; and 3) a reasonable connection between the facts alleged and the legal theory advanced.

Sheely also cites the federal Equal Access to Justice Act decision in Pierce v. Underwood, 108 S.Ct. 2541 (1988). In that case, the United States Supreme Court discussed the concept of "substantial justification" as follows:

> We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main" - that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue... [cites omitted].

Pierce, 108 S.Ct. at 2550. This approach was followed in U.S. v. Paisley, 957 F.2d 1161 (4th Cir. 1992) and Johnson v. U.S. Dept. of Housing & Urban Dev., 939 F.2d 586 (8th Cir. 1991). Thus, the question is not whether the agency was actually correct but whether a reasonable person could think that the action by the agency was properly taken and correct, *i.e.,* whether a person could find at the time of the action, a reasonable basis in law for the theory propounded, a reasonable basis in truth for the facts alleged, and a reasonable connection between the two.

The first issue to be addressed is whether the motion for costs was timely filed. The timeframe for filing such a motion is within thirty days of service of the final decision. See Wis. Admin. Code, §HA 3.11(1). In this case, the final decision was issued July 20, 2023. On August 18, 2023, petitioner's attorney sent an e-mail to DHA that set forth the case number and clearly indicated that a motion for costs was being filed. While that motion was not attached to the e-mail as the attorney indicated, DHA did not inform the attorney of that fact. Moreover, on August 25, 2023, petitioner's attorney sent another e-mail to DHA that indicated an affidavit was attached supplementing the cost motion previously filed. DHA again did not inform the attorney that no cost motion had been filed. Under the circumstances set forth in this case, I find the e-mail sent by petitioner's attorney on August 18, 2023 serves as the date of filing of the motion for costs. Thus, it was timely filed.

The next issue to be addressed is the merits of the petitioner's motion for costs. In this case, the petitioner was the prevailing party and met financial eligibility rules under Wis. Stats. §227.485(7). The petitioner's attorney argued:

> The agency cannot show that its position had any basis in the applicable law. In this case, the agency's position was that a community spouse's Individual Retirement *Annuity* was a countable asset while an Individual Retirement *Account* was not. But, as explained in petitioner's brief, the agency cannot treat any assets as available that SSI regulations would not treat as available, and the SSI regulations clearly do not count a spouse's Individual

> Retirement Annuities. It is also worth noting that the agency took the same position in at least two prior fair hearing cases, both of which were decided against agency. It is for this purpose the Wisconsin Equal Access to Justice Act exists: to help petitioners correct an agency's repeated misinterpretation or misapplication of the law in a way that harms Wisconsinites.

Petitioner's Motion for Costs, pg. 2.

The two prior fair hearing decisions mentioned above in counsel's motion involved the same issue as addressed in the petitioner's case, dealt with a similar conflict in the Medicaid Eligibility Handbook, and the funding or creation of the Individual Retirement Annuities at issue were unrelated to the MA application. Of note is that in DHA Case No. MRA-135337, the final decision was issued by the then Secretary of the Department of Health Services following the adoption of a proposed decision of the ALJ. The reasoning in that decision was then followed in a subsequent decision issued by the DHA in DHA Case No. MRA-178406 approximately five years later. The county agency was notified by counsel of both of those decisions prior to the hearing. The Secretary's final decision in DHA Case No. MRA-135337 was cited by the county agency when it sought guidance from the Department's CARES Problem Resolution Team prior to the hearing. Thus, the Department was also apprised of the prior decision of the Secretary. Based upon the record before me, I agree with the petitioner that the Department was not substantially justified in its denial of the petitioner's MA application.

Turning to the fee request, Petitioner's attorney is requesting $3,000.00 in attorney's fees. Wis. Stat. § 227.485(5) states that the amount of an award of costs in these proceedings be determined using the criteria specified in Wis. Stat.§ 814.245(5), which provides:

> If the court awards costs under sub. (3), the costs shall include all of the following which are applicable:
>
> (a) The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the case and reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:
>
> *1.* No expert witness may be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency which is the losing party.
>
> *2.* Attorney or agent fees may not be awarded in excess of $ 150 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.
>
> (b) Any other allowable cost specified under s. 814.04 (2).

The Court of Appeals in *Stern v, DI-IFS,* 212 Wis.2d 393 at 404 (Ct. App. 1997) stated, "When cost of living increases are supported by the record, adjustment should be based on the 'All Items' component of the Consumer Price Index (CPI-AD)." Thus, if fees are awarded, it would be appropriate to adjust the statutorily mandated fee for inflation, since the history notes included with Wis. Stats. § 814.25 appear to indicate that the $150 fee was established in 2004.

Using the inflation calculator found at https:/www.bls.gov/data/inflation_calculator.htm the 2004 rate of $150/hour turns out to be $246.32 an hour, when adjusted for inflation at the time counsel began work in May 2023. The petitioner's attorney spent 13.2 hours on this case; and at the standard rate of

$246.32 per hour, that equals $3,251.42 in allowable attorney's fees. The amount sought by the petitioner in attorney fees is less than that amount as she was charged a flat fee of $3,000.00. The $3,000.00 in attorney fees being sought is reasonable.

Accordingly, the petitioner is entitled to $3,000.00 in attorney's fees under the law pursuant to her claim.

CONCLUSIONS OF LAW

1. The Department was not substantially justified in denying the petitioner's February 27, 2023 application for Institutional MA.

2. The petitioner is entitled to attorney fees of $3,000.00 as the prevailing party in this matter.

3. There are no special circumstances exist that would make the award for attorney costs unjust.

THEREFORE, it is **ORDERED**

That, if this Proposed Decision is adopted by the Secretary of the Department of Health Services as a final decision, it shall within 10 days of issuing that decision reimburse the petitioner $3,000.00 for legal costs she incurred in this matter.

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 for final decision-making.

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

Given under my hand at the City of Madison,
Wisconsin, this 20th day of September, 2024

Jason M. Grace
Administrative Law Judge
Division of Hearings and Appeals