



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/161299

PRELIMINARY RECITALS

Pursuant to a petition filed October 17, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance (MA), a telephonic hearing was held on December 18, 2014. The record was held open 10 days to allow petitioner's attorney time to submit additional documents, which were received.

The issue for determination is whether the agency correctly terminated petitioner's Family Care Program (FCP) MA eligibility effective October 3, 2014 due to excess assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney John V. Kitzke
101 Falls Road
Suite 602
Grafton, WI 53024

Respondent:

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

By: Karen Pearson, ESS
Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County.

2. Petitioner was found eligible for FCP effective September 1, 2012.
3. In September 2014 petitioner had a review due for FCP.
4. On September 11, 2014 the agency requested verification of assets of petitioner's wife due to a change in policy. See Exhibit 6. The asset verification was received and the agency conducted an asset assessment.
5. On October 9, 2014 the agency issued a notice of decision to petitioner stating that he was no longer enrolled in the FCP due to excess assets. See Exhibit 11; see also Exhibit 12.

DISCUSSION

MA is supposed to pay for "health care services for qualified persons whose financial resources are inadequate to provide for their health care needs." Wis. Admin. Code, §DHS 101.01. Generally, a person cannot be eligible if her assets exceed \$2,000 or, if married, her and her spouse's combined assets exceeded \$3,000. Wis. Admin. Code, §DHS 103.06(1)(a); Wis. Stat. §§49.46(1) and 49.47(4). In some cases, when one spouse went into a nursing home and the other remained in the community, this asset limit often created a hardship on the community spouse because he would have to pay for his spouse's nursing home care until their assets were almost entirely depleted. In response, the state and federal governments enacted laws that increased the asset limit for couples in this situation. These rules allow the institutionalized spouse to allocate assets to the community spouse. The amount of assets that a couple can hold and allocate are not unlimited. In general, after considering the \$2,000 asset limit for an individual, a couple is eligible if their combined assets do not exceed \$52,000. If their assets are between \$100,000 and \$234,480, the institutionalized spouse can assign half of the assets to the community spouse. But their combined assets, including the \$2,000 individual limit, cannot exceed \$119,240. Wis. Stat. §49.455(6)(b); *Medicaid Eligibility Handbook (MEH)*, §18.4.3. If the assets do exceed this amount, the institutionalized spouse is ineligible for full medical assistance benefits until the assets are spent down to this level.

MA rules require recipients to verify various things, including assets. Wis. Admin. Code, §DHS 102.03(3). Because spousal impoverishment eligibility depends upon the assets of both spouses, both spouses are expected to sign the application and verify assets. Occasionally, a belligerent community spouse would refuse to cooperate and sign the application. In order to protect an institutionalized spouse, who may have had no control over the other spouse's behavior, the Department allowed institutionalized spouses in this situation to have their eligibility determined without regard to their spouse's assets. *MEH*, §2.5.2. (Release 09-04). However, what was meant to be a rare occurrence began happening more frequently as recipients took advantage of this loophole and their spouses simply refused to sign the application. This undermined the legislature's intent by allowing an institutionalized person whose household held over \$52,000 in assets to become eligible immediately. In this case, the petitioner was found eligible for FCP in 2012 under these "old rules" as his spouse refused to participate.

The Department changed its policy on November 11, 2013 so that if the community spouse refused to sign an application or verify assets, or would not provide this information during the renewal, the agency had to deny the application. *MEH*, §2.5.3. The Department declared in *BEPS/DFS Operations Memo 13-38* that this "means that 'Just say no' is no longer a viable strategy for shielding assets." The authority for the agency's action is found in Wis. Stat. §49.455(5)(e), which states: "The department may deny to the institutionalized spouse eligibility for Medical Assistance if, when requested by the department, the institutionalized spouse and the community spouse do not provide the total value of their assets and information on income and resources to the extent required under federal Medicaid law or sign the application for Medical Assistance."

The petitioner was an ongoing institutional MA client at the time the new rule was in effect for his review in September 2014. When the agency redetermined the couple's assets under the new rule, the agency

found their assets totaled \$345,452.58, which made the community spouse asset share (CSAS) limited to \$117,240. See Exhibit 12. The agency thus found the petitioner over the asset limit.

Petitioner did not argue the amount of the assets determined. Rather, he argues that the authorizing statute does not allow such a change (the redetermination of assets) at renewal. The change in policy was meant to correct a flaw in the previous rule. This made the statute that provided the basis for the new rule a remedial statute. Under *Steffen v. Little*, 2 Wis.2d 350 (1957), remedial statutes are applied retroactively. Further, there is no evidence to suggest that the agency was without authority to request the asset information for the couple at renewal, or that such reviews/renewals are not a requirement for MA to determine if it should continue or discontinue eligibility. Accordingly, I find that the agency acted correctly here.

The petitioner also argues that because he signed an Assignment of Rights to Support from Community Spouse, that the agency should not be able to ‘look at’ his community spouse’s assets. The petitioner cites 42 U.S. Code § 1396r-5(c)(3) which provides “The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where (A) the institutionalized spouse has assigned to the State any rights to support from the community spouse”. This document was signed on December 15, 2014. See Exhibit 19. This is about 2 months after the denial for MA, even if the petitioner seeks to make it retroactive to the date of his institutionalization. Accordingly, this is a new fact or change made by the petitioner after the agency made its decision. My role is to determine if the agency made its decision correctly at the time it made it. Petitioner may reapply and see if this newly created document would benefit him going forward.

Finally, petitioner argues that the denial would create a hardship. According to the testimony, the denial would be a hardship to the community spouse in about 3 years because by that time her long term care insurance, which pays her rent, would be exhausted. According to the *MEH*, “[t]he institutionalized person will not be denied MA if the IM Agency determines that the ineligibility caused by excess assets creates undue hardship for him/her. Undue hardship means an immediate, serious impairment to the institutionalized person's health.” *MEH*, §18.4.5. I do not find petitioner’s argument meets the intent of the policy here.

Based on the foregoing, I must find that the agency correctly terminated petitioner’s MA due to excess assets.

CONCLUSIONS OF LAW

The agency correctly terminated petitioner’s Family Care Program (FCP) MA eligibility effective October 3, 2014 due to excess assets.

THEREFORE, it is

ORDERED

The petition for review herein is dismissed.

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, 5005 University Avenue, Suite 201, 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, Wisconsin 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 (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 Milwaukee,
Wisconsin, this 3rd day of February, 2015

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on February 3, 2015.

Waukesha County Health and Human Services
Office of Family Care Expansion
Attorney John Kitzke