



FH  
[REDACTED]

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

In the Matter of

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

DECISION  
[REDACTED]

**PRELIMINARY RECITALS**

Pursuant to a petition filed November 18, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the [REDACTED] Health and Human Services in regard to Medical Assistance, a hearing was held on March 03, 2015, at Richland Center, Wisconsin.

The issue for determination is whether the agency erred in its denial of MA, and whether the CSRA and income allowance should be altered by the fair hearing process.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

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

Petitioner's Representative:

Attorney Patricia McKinney-Lins  
401 Charmany Dr, Ste 310  
Madison, WI 53719

Respondent:

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

By: Brianna Turk

[REDACTED] Health and Human Services  
221 W Seminary St.  
PO Box 673  
[REDACTED]

**ADMINISTRATIVE LAW JUDGE:**

John P. Tedesco  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of [REDACTED].
2. Petitioner entered a nursing home on February 21, 2014.

- [REDACTED]
3. Petitioner applied for nursing home MA in August 2014. Among the claimed assets was, and still is, a life insurance policy for petitioner with a cash value exceeding \$20,000. The dividends from the policy are reinvested.
  4. The application was denied due to excess assets.
  5. Petitioner appealed to the DHA for a fair hearing to reallocate assets and income from the institutional spouse to the community spouse.

### DISCUSSION

Under the normal MA eligibility rules, a person is not eligible for MA unless they are first in poverty. If these rules applied to situations, such as petitioner's, where one spouse is in a nursing home and the other in the community, the community spouse would be forced into poverty before the spouse in the nursing home would be eligible for MA. This is because married couples have a legal claim to the income and assets of one another.

To avoid forcing community spouses into poverty, persons, such as petitioner, who are residents of a nursing home and still have a spouse living in the community may apply for MA under special rules known as "Spousal Impoverishment" rules. These rules are designed to allow the community spouse to keep a certain portion of the married couple's assets and income. See, Wis. Stat. § 49.455; Wis. Admin. Code DHS § 103.075; *Medicaid Eligibility Handbook* ["MEH"] Chapter 18.

The amount of assets a community spouse is allowed to keep is called the Community Spouse Resource Allowance ["CSRA"] {also sometimes called the Community Spouse Asset Share ["CSAS"]}. The CSRA can be invested by the community spouse to generate income, which the community spouse can then use for living expenses. If the amount of income generated by the CSRA, combined with any other income the community spouse receives, does not rise to the level of a certain minimum monthly amount, an increase in the CSRA may be requested by way of the Fair Hearing process. The purpose of increasing the CSRA is to give the community spouse a greater amount of assets to invest, thereby generating a greater amount of income, which can then be used by the community spouse for living expenses. In this case, petitioner has requested that the CSRA be increased by the Fair Hearing process. See, Wis. Stat. §§ 49.455(6)(b)(3) & (8)(d).

During the hearing, it became apparent that some of the assets petitioner sought to reallocate were not typical interest-generating investments such as a mutual fund or stock brokerage account. Among the assets is a life insurance policy in the name of petitioner with a cash value of over \$20,000. Dividends from this policy are reinvested. I raised the issue at hearing as to whether petitioner considered this an income-generating asset or whether the law requires that reallocated assets indeed be income-generating. Petitioner did not believe that investments must be income-generating in order to be reallocated. I noted my belief that the law stated otherwise and encourage petitioner's counsel to research the issue and follow-up or take any appropriate action based on her findings. I have heard nothing from petitioner.

As an Administrative Law Judge ["ALJ"], I am bound to follow Final Decisions of the Secretary of the State of Wisconsin Department of Health Services ["DHS"]<sup>1</sup>. Final Decisions are made subsequent to Proposed Decisions issued by the Division of Hearings and Appeals ["DHA"]. See, Wis. Stat. §§ 227.46 & 227.47 Wis. Admin. Code § HA 3.09(9).

Specifically, Final Decisions of the DHS Secretary state that only resources that generate income can be added to the CSRA by the fair hearing process. Put another way, any assets of the nursing home resident

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<sup>1</sup> Prior to July 1, 2008 DHS was part of the Wisconsin Department of Health and Family Services ["DHFS"]. DHFS no longer exists.

and the community spouse that do not generate income cannot be used to increase the CSRA. The MA asset limit is \$2,000. Wis. Stat. § 49.47(4)(b)3g.e; Wis. Admin. Code § DHS 103.04(2). Thus, if the nursing home resident and the community spouse have in excess of \$2,000 in assets that do not generate income, no increase in the CSRA can be made because the nursing home resident is not otherwise eligible for MA. This is because, even if the CSRA were increased so as to include all resources that do generate income, the nursing home resident would still not be eligible for MA because the \$2,000 MA asset limit would be exceeded by the non-income-generating assets. DHA Case No. MRA-5/35807 (Wis. Div. Hearings & Appeals December 7, 1998) (DHFS Final Decision subsequent to DHA Proposed Decision); and, DHA Case No. MRA-70/15380 (Wis. Div. Hearings & Appeals August 19, 1997) (DHFS Final Decision subsequent to DHA Proposed Decision).

In this a case there is a life insurance policy that pays dividends that are reinvested into the policies.

The DHS Secretary has held in two Final Decisions that an increase in the value of a life insurance policy due to the payment and reinvestment of dividends is not the same as the generation of income. DHA Case No. MRA-22/48084 (Wis. Div. Hearings & Appeals July 24, 2001) (DHFS Final Decision subsequent to DHA Proposed Decision); and, DHA Case No. MRA-68/48394 (Wis. Div. Hearings & Appeals July 19, 2001) (DHFS Final Decision subsequent to DHA Proposed Decision)<sup>2</sup>. Consistent with this, the DHS Secretary has also held that life insurance policies may be reallocated when they pay dividends directly in cash, the dividends are not reinvested, and a check is sent to petitioner or petitioner's spouse on a yearly basis. DHA Case No. MRA-59/49531 (Wis. Div. Hearings & Appeals October 19, 2001) (DHFS Final Decision subsequent to DHA Proposed Decision).

However, DHS Secretary Final Decision MRA-68/48394 (cited above) was appealed to Circuit Court. In September 2002 the Circuit Court issued a *Decision* and an *Order for Remand* reversing the DHS Secretary's Final Decision and remanding the matter back to the DHS Secretary. *Hollingshead v. DHFS*, No. 2001-CV-000298 (Wis. Cir. Ct. Waupaca County September 19, 2002). Following the Circuit Court remand the DHS Secretary issued another Final Decision in Case No. MRA-68/48394. That second Final Decision set forth the history of the case, including the fact that petitioner and her husband owned a whole life insurance policy with a cash surrender value in excess of \$2,000.00 and that it had not been established that the life insurance policy generated any income, and then granted petitioner's request to increase the CSRA to include all assets of petitioner and her husband (including the life insurance policy). Thus, in Case No. MRA-68/48394 non-income producing assets were not a bar to increasing the CSRA. In fact, an asset (a whole life insurance policy) that had not been shown to produce income was used to increase the CSRA.

Furthermore, without explanation, the DHS Secretary has determined that life insurance policies may be reallocated when "the income-producing nature of the assets [is] demonstrated by the facts of record . . ." DHA Case No. MRA-14/48121 (Wis. Div. Hearings & Appeals September 2001) (*Rehearing Decision On Remand* subsequent to a DHFS Secretary Decision)<sup>3</sup>. Moreover, at least one DHA ALJ has issued a recent Decision reallocating a life insurance policy that paid dividends which were automatically reinvested in the policy. DHA Case No. MRA-5/108927 (Wis. Div. Hearings & Appeals February 12, 2010). In contrast to

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<sup>2</sup> DHA Case No. MRA-68/48394 has a long history. DHA issued a *Proposed Decision* on June 12, 2001. By a Final *Decision* issued July 19, 2001 the DHS Secretary adopted that June 12<sup>th</sup> *Proposed Decision*. On August 17, 2001 petitioner appealed the DHS Secretary's July 19<sup>th</sup> Final *Decision* to Circuit Court. The Circuit Court remanded the matter for further proceedings. *Hollingshead v. DHFS*, No. 2001-CV-000298 (Wis. Cir. Ct. Waupaca County September 19, 2002). A *Proposed Decision On Remand From Circuit Court* was issued by DHA on March 26, 2003. Lastly, over 2 years later, a second Final *Decision* was issued by the DHS Secretary on May 11, 2005. That second Final *Decision* amended the March 26, 2003 *Proposed Decision On Remand From Circuit Court*.

<sup>3</sup> In DHA Case No. MRA-14/48121 the DHS Secretary simply issued the following Order: "That the petition for review is remanded to the Administrative Law Judge for a decision on petitioner's request to increase the CSRA, treating the assets at issue as income-producing assets."

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this, another ALJ has issued a recent Decision refusing to reallocate life insurance policies citing DHA Case No. MRA-68/48394 and stating that Case No. MRA-68/48394 "specifically found that a life insurance policy producing dividends that are reinvested does not [generate income] and thus could not be assigned to the spouse." DHA Case No. MRA-32/104866 (Wis. Div. Hearings & Appeals August 28, 2009).

In a more recent Final Decision the DHS Secretary has clarified all of the above and has reaffirmed that an increase in the value of a life insurance policy due to the payment and reinvestment of dividends is not the same as the generation of income. DHA Case No. MRA-70/110322 (Wis. Div. Hearings & Appeals July 27, 2010) (DHS Final Decision subsequent to DHA Proposed Decision).<sup>4</sup> As already noted above, as an ALJ I am bound to follow Final Decisions of the DHS Secretary. Therefore, it must be concluded that the life insurance policies at issue here do not generate income and, consequently, cannot be reallocated.

The cash value of the life insurance policies at issue here is in excess of \$2,000. Thus petitioner would not be eligible for MA even if all assets that do generate income were reallocated (because he would still be over the \$2,000 MA asset limit). Therefore, no increase in the CSRA or income can be made because petitioner is not otherwise eligible for MA.

### **CONCLUSIONS OF LAW**

For the reasons discussed above, petitioner's request to increase the CSRA or income allowance by the fair hearing process is not ripe for decision and must be denied.

**THEREFORE, it is** **ORDERED**

That this appeal 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

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<sup>4</sup> See also, DHA Case No. MRA-11/110436 (Wis. Div. Hearings & Appeals August 25, 2010) (DHS Final Decision subsequent to DHA Proposed Decision), currently under appeal to Circuit Court as *Lydia Gaydos v. Department of Health Services*, No. 10-CV-5058 (Wis. Cir. Ct. Columbia County). In that case the DHS Secretary reaffirmed that life insurance policies that have not been shown to generate income cannot be reallocated.

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 Madison,  
Wisconsin, this 12th day of March, 2015

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\sJohn P. Tedesco  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on March 12, 2015.

Richland County Health and Human Services  
Division of Health Care Access and Accountability  
Attorney Patricia McKinney-Lins