

income toward the cost of his nursing home care, and an increase in the Medicaid payment to the nursing home for that care.

In November, 1989, the petitioner, through his attorney, requested that the Department recalculate his Medicaid budget to allow his wife a greater spousal allocation based on her high living expenses. In March, 1990, the Department notified the petitioner of an increase in the "patient share" of his nursing home expenses based on recent increases in his and his wife's incomes. However, the Department refused to consider the petitioner's claim of his wife's "exceptional circumstances" in determining the spousal allocation component of the petitioner's patient-share determination. The Department has also refused to make any changes effective prior to November 1, 1989, when it first reviewed the petitioner's case.

ORDER

1) The matter should be remanded to the Department to consider the petitioner's claim of exceptional circumstances regarding his wife's "spousal allocation".

2) The Department's determination shall be made retroactive to October 1, 1989, the effective date of the federal statutory amendments.

REASONS

As noted above, this case raises two primary issues. First is whether the Department can "phase-in" certain

federal statutory amendments that became effective on October 1, 1989. This issue is also raised in Fair Hearing No. 9900, which was recently decided by the Board. It appears that the petitioner in the instant matter had his "scheduled case review" by the Department in October, 1989. Thus, the Department did not implement the federal statutory changes regarding the spousal-needs allocation in the petitioner's case until November 1, 1989.

For the reasons expressed in Fair Hearing No. 9900, which is incorporated by reference herein, the Department's decision in this matter regarding the amount of the petitioner's spousal-needs allocation shall be retroactive to October 1, 1989, the effective date of the federal statutory changes.

Unlike Fair Hearing No. 9900, however, the instant matter raises the additional issue of how the Department (or, indeed, if the Department) must consider the "exceptional circumstances" of a community spouse in determining the patient share payments of a long-term-care Medicaid recipient. The Department maintains that exceptional circumstances of a community spouse can be considered--but only by a hearing officer after a fair hearing on this question.

Understanding this issue requires the truly tortuous task of deciphering the statute in question. 42 U.S.C. § 1396r-5 provides, in pertinent part (and with emphasis added):

(d) PROTECTING INCOME FOR COMMUNITY SPOUSE.--

(1) ALLOWANCES TO BE OFFSET FROM INCOME OF INSTITUTIONALIZED SPOUSE.--After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

. . .

(B) A community spouse monthly income allowance (as defined in paragraph (2), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

. . .

(2) COMMUNITY SPOUSE MONTHLY INCOME ALLOWANCE DEFINED.-
-In this section (except as provided in paragraph (5), the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e), the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) ESTABLISHMENT OF MINIMUM MONTHLY MAINTENANCE NEEDS ALLOWANCE.--

(A) IN GENERAL.--Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with sections 652 and 673(2) of the Omnibus Budget Reconciliation Act of 1981) for a family unit of 2 member; plus

(ii) an excess shelter allowance (as defined in paragraph (4))

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) APPLICABLE PERCENT.--For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of--

- (i) September 30, 1989, is 122 percent,
- (ii) July 1, 1991, is 133 percent, and
- (iii) July 1, 1992, is 150 percent.

(C) CAP ON MINIMUM MONTHLY MAINTENANCE NEEDS ALLOWANCE.--The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed \$1,500 (subject to adjustment under subsections (e) and (g)).

(4) EXCESS SHELTER ALLOWANCE DEFINED.-- In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of--

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 5(e) of the Food Stamp Act of 1977) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

. . .

(e) NOTICE AND FAIR HEARING.--

(1) NOTICE.--Upon--

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B)), of the amount of any family allowances (described in subsection (d)(1)(C)), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f), and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) FAIR HEARING.--

(A) IN GENERAL.--If either the institutionalized spouse is dissatisfied with a determination of--

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B));

(iii) the computation of the spousal share of resources under subsection (c)(1);

(iv) the attribution of resources under subsection (c)(2); or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2));

such spouse is entitled to a fair hearing described in section 1902(a)(3)¹ with respect to such determination if an application for benefits under this title has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) REVISION OF MINIMUM MONTHLY MAINTENANCE NEEDS ALLOWANCE.--If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly

maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A), an amount adequate to provide such additional income as is necessary.

. . .

Putting aside the questions of notice (it does not appear that the Department is providing any notice to either recipients or its own caseworkers of the provisions of 1396r-5(e)(2)(B), supra), the preliminary issue raised by the above sections is whether the Department can (or must) consider the "exceptional circumstances" of a community spouse or whether this consideration can only be made by a hearing officer after a request for hearing by the recipient or the community spouse. The Department takes the positions that under the above statute it "does not have the option to grant. . . a higher spousal allocation upon a showing of exceptional circumstances", that only the hearing officers of the Board have this authority, and that the Department is "prepared to allow (petitioner) an opportunity to try to make such a showing". The Department does not specify whether it feels the hearing officer's decision is final and binding, or whether it is a recommendation subject to adoption (or rejection or modification) by the Board pursuant to 3 V.S.A. A 3091(d). (More about this problem later.)

To date (the hearing officer not having been informed to the contrary by the parties) federal regulations

implementing the above statutory provisions have been neither proposed nor promulgated. In the interim, the federal agency (The Health Care Finance Agency, [H.C.F.A.] of the Department of Health and Human Services [H.H.S.]) has issued "Implementing Instructions" (Transmittal No. 39, October, 1989) to the states. In Section 3710.1 of these instructions appears the following "definition":

Exceptional Circumstances Resulting in Extreme² Financial Duress.--Pending publication of regulations, a reasonable definition is: Circumstances other than those taken into account in establishing maintenance standards for spouses. An example is incurment by community spouses for expenses for medical, remedial and other support services which contribute to the ability of such spouses to maintain themselves in the community and in amounts that they could not be expected to pay from amounts already recognized for maintenance and/or amounts held in resources.

Section 3714.2 of the H.C.F.A. instructions refers to "hearing and appeals"³ and provides that spousal maintenance allowances can be based "on amounts deemed necessary by hearing officers to avoid extreme financial duress". (emphasis added.)

Notwithstanding the above, however, Section 3713 of the instructions include the following "methods" by which states can "calculate maintenance needs allowances":

Unless alternative methods described in subsection C. apply, use the following methods to calculate maintenance needs allowances.

A. Spousal Monthly Income Allowance.--Unless a spousal support order requires support in a greater amount, or a hearings officer has determined that a greater amount is needed because of exceptional circumstances resulting in extreme financial duress, deduct from community spouse's gross monthly income which is otherwise available the following amounts up

to the maximum amount allowed:

* A standard maintenance amount.

* Excess shelter allowances for couples' principal residences when the following expenses exceed 30% of the standard maintenance amount. Except as noted below, excess shelter is calculated on actual expenses for--

- rent;
- mortgage (including interest and principal);
- taxes and insurance;
- any maintenance charge for a condominium or cooperative; and
- an amount for utilities, provided they are not part of the maintenance charge computed above.

. . .

(C) Alternative Methods for Computing Monthly Income Allowances for Spouses and other Family Members.--In lieu of the methods described above, you may use:

* standards equal to the greatest amounts which may be deducted under the formula outlines in subsection A. and B. above, or

* standard maintenance amounts greater than the amount computed in A. and B. and in the case of community spouses, an additional amount for excess shelter costs described in subsection A. provides the total maintenance need standard for community spouses does not exceed the maximum.

(D) Option to Estimate Income of Institutionalized Spouses, Spousal and Family Monthly Income Allowances and Incurred Medical and Remedial Care Expenses.--Subject to periodic reconciliations of actual income, maintenance allowances and medical and remedial expenses, you may project any one or more of the following for a prospective period not to exceed six months:

* income institutionalized spouses expect to receive;

* spousal monthly income allowances based on standards, or shelter expenses spouses expect to incur, and income community spouses expect to receive;

- * monthly income allowances for other family members based on income family members expect to receive; and

- * medical and remedial care expenses expected to be incurred in the next six months based on a relationship to expenses incurred in the immediately preceding six months.

Projection is based on no more than six month periods. However, adjustments must be made sooner when there are significant changes in specific projected amounts. You must establish in your operating instructions and criteria for determining when significant changes occur. See §§ 3701.2 and 3701.3 for more detailed discussion of projections and reconciliations.

Under § 3713D, above, it appears that states do have the "option" in the initial evaluation process to consider "medical and remedial care expenses" in calculating the maintenance needs allowances of community spouses. This is the same language used in § 3710.1 (supra) to define "exceptional circumstances resulting in extreme financial duress" that hearing officers are empowered to determine pursuant to §§ 3713 A and 3714.2. (see supra).

The dilemma for the Department in this state is that if it does not elect the "option" of H.C.F.A. instruction § 3713 D, there is no existing mechanism under state law for the Board's hearing officers to determine "exceptional circumstances" as an initial matter of Medicaid benefit calculations. 3 V.S.A. § 3090(b) states: "The duties of the Board shall be to act as a fair hearing board on appeals brought pursuant to section 3091 of this title "(emphasis added). Neither the board nor its hearing officers are

empowered by § 3091 to make initial eligibility determinations. Yet, this is precisely what the Department is asking the hearing officers to do in these cases.

Even if this hearing officer's analysis of H.C.F.A. instruction § 3713 D is incorrect (i.e., states do not have an "option" not to use a hearing officer to determine "exceptional circumstances") it would have to be concluded that such an interpretation of the federal statute by the agency produces an incongruous and illegal result. An "appeal" of an agency decision regarding the amount of benefits for Medicaid (or any other program) is one of statutory and constitutional right. What happens to the right of appeal when the administrative appeals process is used to make initial benefit-level determinations?

In Vermont, 3 V.S.A. § 3091(a) provides that a person aggrieved by an "action" of the Department is entitled to a fair hearing before the Human Services Board. Under the Department's interpretation of the federal statute in question the only "action" by the Department regarding consideration of a spouse's "exceptional circumstances" would be the decision of the board's hearing officer--with or without consideration by the Board itself. Where would the "appeal" of this "action" lie? Clearly, the intent and purposes of § 3091 would be frustrated in this scenario.

The same problem flaws the Department's (and, apparently H.C.F.A.'s) interpretation of § 1396r-5

generally. A process that, in effect, precludes appeals-- because the appeals tribunal is charged with making the initial determination--is in conflict with the general appeal provisions in the Medicaid statutes (42 U.S.C. § 1396a (a)(3)) and is probably unconstitutional.⁴ In light of this patently incongruous result, 42 U.S.C. § 1396r-5(d) can only be interpreted as requiring state agencies to consider the standards pertaining to "exceptional circumstances" contained in § 1396r-5(e)(2)(B) (supra), but not limiting consideration of these standards to a "hearing" situation. By law and constitutional right, initial determinations and appeals hearings are separate processes. The statute cannot be read to obliterate this distinction.

Thus, as a matter of federal and state law, and constitutional due process, the petitioner's case is remanded to the Department to itself consider the petitioner's claim of "exceptional circumstances" in the determination of the petitioner's wife's monthly spousal income allowance. In making this determination, the Department shall consider whether "significant financial duress" will occur without a higher spousal needs allowance.

As noted above, for the reasons set forth in Fair Hearing No. 9900, the Department shall also be required to determine the petitioner's spousal income allowance retroactive to October 1, 1989, the effective date of 42 U.S.C. § 1396r-5.⁵

FOOTNOTES

¹Section 1902(a)(3), as referred to in the cited portion of the statute, refers to the general requirement for fair hearings contained in 42 U.S.C. § 1396 a (a)(3) for "any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness".

²It is curious (and troubling) that H.C.F.A. in this instruction would change the wording of the federal statute from "significant financial duress" (see § 1396r-5(e)(2)(B), supra) to "extreme financial duress".

³42 C.F.R. § 431 Subpart E is referred to in the H.C.F.A. instruction. This is the general regulatory provision regarding Medicaid appeals. See footnote 1, supra.

⁴The hearing officer is not aware of any other aspect of an initial benefit determination under any other federal or state program that is assigned to a hearing officer or to the fair hearing process.

⁵Any decision by the Department would, of course, be appealable by the petitioner pursuant to 3 V.S.A. § 3091(a).

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