

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. 17,039  
 )  
Appeal of )

INTRODUCTION

The petitioner, a nursing home resident and a recipient of Medicaid, appeals a determination by the Department of PATH regarding the amount of his "patient share", i.e., the amount from his monthly income that he must contribute toward his nursing home costs. His wife, who lives in the community, joins in the appeal asking that the Board raise the minimum monthly maintenance allowance for her as the "community spouse" and that more of the income of her husband (the "institutionalized spouse") be allocated to the community spouse to increase her monthly income.

FINDINGS OF FACT

The following facts are not in dispute and are taken from the parties' memoranda:

1. The petitioner was admitted to a nursing home in August 2000. The nursing home is located some distance from the family house where the petitioner's wife still lives. In

order to visit with the petitioner his wife drives 912 miles per month.

2. The petitioner's wife first contacted the Department regarding his eligibility for Medicaid in October 2000. At that time the couple's resources, excluding their home and some rental property they own, were about \$134,000. The resource limit for a community spouse is \$84,120 (see infra).

3. Over the next several months the petitioner's wife spent over \$104,000 of their assets. About \$15,000 was spent for the petitioner's nursing care, about \$44,000 on home improvements and furnishings, \$7,000 on improvements to the rental property, and the remainder to pay off loans, taxes, and other expenses.

4. The petitioner was found eligible for Medicaid beginning April 1, 2001. However, the Department determined that \$2,203.14 out of the petitioner's monthly income of \$2,537.15 constituted the petitioner's "patient share" of his nursing home costs (with Medicaid paying the rest). The Department only allowed the following deductions from the petitioner's income: \$46.66 for his "personal needs allowance" (which is set by regulation and is not in dispute in this matter), \$79.17 for a health insurance premium (also not in dispute), and \$207 for his wife's "spousal allowance".

It is this latter figure that is the subject of the parties' dispute in this matter.

5. The Department determined the wife's spousal allowance by reducing the minimum Standard (Spousal) Income Allocation, set by regulation at \$1,452 (see infra), by her monthly income (over and above the petitioner's income) of \$1,199.82.

6. The Department does not dispute that the petitioner's wife has monthly expenses of \$2,005.50. \$448 of this amount is for a home equity loan and her property taxes and insurance. \$284 is for her expenses in visiting and phoning the petitioner at the nursing home. The remainder appears to be for usual and customary living expenses, including utility expenses.

7. The petitioner maintains that the Department has violated federal statutes in the calculation of his wife's spousal share and that, as a result, her spousal share should be increased by \$363.00. The petitioner's wife also claims that the costs she incurs in visiting her husband constitute "exceptional circumstances" justifying an increase in the amount of her monthly needs allowance.

ORDER

The Department's decision regarding the calculation of the petitioner's spousal share is modified. Based on federal statute, the amount of the petitioner's spousal share should be increased by \$363.00. The petitioner's wife's request to increase her monthly maintenance needs allowance based on exceptional circumstances is denied.

REASONS

Once an individual is determined to be eligible for long-term care Medicaid, the regulations allow the institutionalized spouse to pay over amounts of his or her income to the community spouse if it is needed to reach a certain monthly maintenance minimum. If the spouses feel that the resource or monthly income allocation is inadequate, the federal statute sets up a unique process which requires that the fair hearing Board, not the Department, make the initial finding as to whether the spousal allocation should be revised and/or whether the monthly maintenance amount should be increased.

Using the word "complicated" to describe the statutes and regulations regarding spousal allocations is a perverse understatement. However, the Board has dealt exhaustively

with many of the same issues presented by this case in Fair Hearing No. 12,673, decided in 1994. The following analysis is taken directly from pages 6-12 of the Board's decision in that case.

The federal authorizing statute, 42 U.S.C. § 1396r-5(e), provides as follows:

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community 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) of this section);

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

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

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section); such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter 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) of this section, an amount adequate to provide such additional income as is necessary.

Under the federal statute, the minimum monthly needs allowance is defined and established as follows:

(d) Protecting income for community spouse

. . .

(2) Community spouse monthly income allowance defined

In this section...the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e) of this section, 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 9847 and 9902(2) of this title) for a family unit of 2 members; 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 . . .

(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 \$1,500.00 (subject to adjustment under subsections (e) and (g) of this section).<sup>1</sup>

(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 2014(e) of Title 7) 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.

This rather lengthy section can be summarized as requiring a case by case determination in which a standardized figure based on poverty indexes is added to an individualized figure based on the community spouse's actual shelter expenses to obtain a figure which is then

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<sup>1</sup>Subsection (e) refers to revision of the amount through the fair hearing process. Subsection (g) requires that amounts to be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers for the calendar year involved. According to the Department's procedures manual that figure is now set at a maximum of \$1,815.50\*. (\*Note: This amount is now \$2,175.00.)

reduced by the monthly amounts already coming into the household. The Department's regulations, inexplicably, use a slightly different methodology:

Allocation to Community Spouse

A Standard Community Spouse Allocation (see Procedures Manual) may be deducted from a long-term care spouse's income for the needs of a spouse who is living in the community. In no case shall an allocation be made to a community spouse whose countable resources exceed the Community Spouse Resource Allocation Maximum (see Procedures Manual) or a higher amount set by a Fair Hearing or court order in accordance with policy in the Special Requirements for Applicants/Recipients Living in Long-Term Care section. This standard deduction is reduced by the gross income, if any, of the community spouse. The long-term care spouse is not required to make the full (or any) allocation to his/her spouse.

. . .

A higher amount, up to the Maximum Community Spouse Allocation as specified in Title XIX of the Social Security Act, as amended (unless a higher amount has been set by a Fair Hearing or court order), may be deducted for the needs of a community spouse upon documentation of a greater need. The higher amount is determined by adding a Maintenance Income Standard to any Excess Shelter Allowance (see Procedures). The Excess Shelter Allowance is equal to the amount by which actual shelter expenses exceed the Shelter Standard; the Shelter Standard is equal to 30 percent of the Maintenance Income Standard (which is equal to 150 percent of the federal Poverty Guideline for two). The community spouse, as well as the applicant/ recipient, has a right to request a Fair Hearing.

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This amount (i.e. the maintenance income standard plus the excess shelter allowance) is reduced by the gross income, if any, of the community spouse.

. . .

M413.21

No explanation was offered by the Department as to where it derives the authority to use its method number one, which is a standardized amount . . . since the statute requires that method number two be used in all cases. If the Department's regulation is to make any sense, it would mean interpreting the term "greater need" to mean anyone who would get a higher monthly maintenance figure if method number two were used. In that case, the . . . standardized figure would merely be a bonus to those who have no excess shelter expenses to add.

It must be concluded, therefore, that method number two, the "greater need" standard must be used in this case. . .

(End of citation.)

Since the Board's decision in Fair Hearing 12,673 neither the federal statutes nor the Department's regulations has been changed. To the hearing officer's knowledge the Department did not reverse or appeal the Board's decision in 12,673. In the instant matter the Department has offered no response whatsoever to the petitioner's argument that the method of computation decreed by the Board in Fair Hearing No. 12,673

should be employed here. Thus, it must again be concluded that to the extent that the Department's regulation, M413.21 (supra), still requires a showing of "greater need" before the consideration of any excess shelter allowance in determining a community spouse's monthly maintenance needs allowance, it impermissibly conflicts with the federal statute at § 1396r-5(d)(3) (supra).

In the instant case it does not appear that the Department contests the petitioner's calculation that his wife's excess shelter allowance, if counted in full, would be \$363.00. Thus, it must be concluded that under the federal statutes (supra) the petitioner's wife's initial monthly maintenance needs allowance should have been calculated as 150% of the federal poverty rate<sup>2</sup> plus the excess shelter allowance. Inasmuch as the Department's calculations did not include an excess shelter allowance, and insofar as the Department does not contest the petitioner's calculation of his wife's excess shelter allowance, its decision should be modified to allow the petitioner's wife an additional \$363 in her monthly maintenance needs allowance.

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<sup>3</sup> The applicable poverty rate was raised on April 1, 2001 from \$1,407 to \$1,452. It is not clear whether the Department has given the petitioner the benefit of the new rate.

As noted above, the petitioner's wife also requests that her spousal allocation be increased by an additional \$284.00 a month because of the expense she incurs in visiting and telephoning her husband in the nursing home. The federal provisions cited above, 42 § 1396r-5(e)(2)(B), require that any spousal allocation increase above the statutory limit awarded through a fair hearing be the result of a showing that the need is "due to exceptional circumstances resulting in significant financial duress". In Fair Hearing No. 12,673, and in other cases, the Board has considered the additional expense of visiting a spouse in a distant nursing home to constitute an exceptional circumstance within the meaning of the above statute.

In this case, however, although there is no dispute that the community spouse's expenses exceed her monthly income and spousal allotment, it cannot be found either that they are due to exceptional circumstances or that they will cause her significant financial duress. This is not to say that the community spouse's expenditures are frivolous or unreasonable, or not essential to her lifestyle. It must be concluded, however, that her current predicament, if it can be termed that, is largely of her own making.

The petitioner's wife admits that after her husband entered the nursing home, in order for him to become eligible for Medicaid she spent over \$104,000 of their assets, with more than \$50,000 being spent on home improvements and household furnishings. Although the petitioner's wife maintains that such expenditures were "necessary", there has been no allegation or showing that they were required to maintain her home in a habitable condition. Certainly, there is no penalty under the regulations for voluntarily converting countable excess resources to exempt items like home improvements and furniture in order to qualify for Medicaid. However, once a couple chooses to divest themselves of such a large portion of their assets in order to qualify for Medicaid in this manner, any claim of "exceptional circumstances" necessary to justify the further protection of their income must be subject to a high degree of scrutiny. It must be concluded that the petitioner's wife has not alleged any facts or circumstances that would approach such a showing.

Moreover, unlike in Fair Hearing No. 12,673, the petitioner's wife in this matter still has substantial cash assets (apparently about \$30,000) that she does not allege are necessary to maintain her monthly income. While the regulations allow a community spouse to keep at least \$84,120

in assets in addition to a home and its furnishings, it does not follow that such assets are immune from consideration in determining whether he or she has extraordinary needs justifying the further protection of their income. Although the petitioner's wife incurs a significant expense in visiting and phoning her husband at the nursing home, in light of her significant assets and recent expenditures on seemingly non-essential (though legally exempt) items, it cannot be concluded she has alleged or demonstrated the type and degree of "significant financial duress" contemplated by the regulations. For these reasons, the petitioner's wife's request to increase her monthly maintenance needs allowance should be denied.

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