

STATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILIES  
OFFICE OF APPEAL HEARINGS



APPEAL NO. 10F-05088

PETITIONER,

Vs.

CASE NO. 1318303702

FLORIDA DEPARTMENT OF  
CHILDREN AND FAMILIES  
CIRCUIT: 04 Duval  
UNIT: 88368

FILED  
April 1, 2011  
OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN AND FAMILIES

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, the undersigned convened an administrative hearing telephonically in the above-referenced matter on February 21, 2011 at 9:15 am.

**APPEARANCES**

For the Petitioner: [REDACTED] stepdaughter.

For the Respondent: Gloria Jackson, ACCESS supervisor.

### **STATEMENT OF ISSUE**

1. Whether the denial of Institutional Care Program (ICP) Medicaid for the months of August 2009 through October 2009 was correct.
2. Whether the amount of the petitioner's income allocated to the community spouse was correct.

### **PRELIMINARY STATEMENT**

By notice dated October 6, 2009, the respondent informed the petitioner that his application of ICP Medicaid was denied. Subsequently, the application was reactivated and by Notice dated January 19, 2010, the respondent informed the petitioner that he was approved for ICP Medicaid effective November 2009; he remained ineligible for the months of August 2009 through October 2009.

On January 23, 2010, the petitioner timely requested a hearing to challenge denial of ICP Medicaid for the months of August 2009 through October 2009. The request for hearing was forwarded to the Office of Appeals Hearings on August 25, 2010. The appeal was scheduled for hearing October 12, 2010, December 21, 2010 and February 16, 2011; on each occasion, a continuance was granted at the petitioner's request. The hearing was conducted on February 21, 2011.

The petitioner was not present; [REDACTED] was present as his representative and witness. Present as a witness for the respondent was Euzera Foster, economic self sufficiency specialist. The respondent submitted documents which were entered into

evidence as Respondent's Composite Exhibit 1. The record was held open for seven days for the submission of additional evidence. Evidence was received from both parties and entered into evidence as Respondent's Composite Exhibit 2 and Petitioner's Composite Exhibit 1.

### **FINDINGS OF FACT**

The petitioner (age 89) was admitted into a nursing home on July 11, 2009 due to Parkinson's related dementia. His wife (age 91) continued to live in the family home until her death in February 2011.

An application for ICP Medicaid was submitted to the Department on August 21, 2009. A telephone interview was conducted with the petitioner's stepdaughter on September 9, 2009. On September 10, 2009, the Department issued a written request for verification of additional information: level of care, identification, funeral plan, savings certificate, bank account balances, face value and cash value of all life insurances policies and pension income. The information was due on September 19, 2009. Subsequently the petitioner requested a deadline extension which was granted for approximately another 10 days, new due date September 29, 2009.

On September 28, 2009, the Department received verification of the petitioner's monthly income; it consists of General Electric pension \$905.13, Met Life pension \$127.08, civil service annuity from his first wife \$631, and Social Security \$1447, \$3110.21 total monthly income. The ICP income limit for an individual is \$2022. By notice also dated September 28, 2009, the Department informed the petitioner that he

would need to establish and fund qualified income trust (QIT) with all income above \$2022 to qualify for ICP Medicaid. The QIT verification was due on October 5, 2009. The Department denied the petitioner's application on October 6, 2009 for failure to verify bank account balances, face and cash values of life insurances policies, pension income and establishment and funding of a QIT.

The petitioner continued to submit additional verification to the Department after the application was denied. On November 16, 2009, the Department reactivated the application; all the needed verification had been received except verification that a QIT was properly funded. On November 18, 2009, the Department sent the petitioner a written request for verification of QIT funding. The information was due on November 30, 2009; it was submitted to the Department the first week in December 2009. The verification documents that a QIT was opened on October 9, 2009 with a \$400 deposit. In November 2009, additional deposits were made into the QIT until the balance exceeded \$1088 (\$3110 income -\$ 2022 income limit), the monthly deposit amount required to reduce the petitioner's monthly income to less than the \$2022 ICP income limit for an individual. The petitioner was approved for ICP Medicaid effective November 2009. ICP coverage was denied for the months of August 2009, September 2009 and December 2009 because the petitioner's income exceeded program limitations.

The fact that the QIT was not properly funded prior to November 2009 is not disputed. The petitioner's stepdaughter believes that there were mitigating circumstances which should be taken into consideration. The petitioner was unable to

assist with the application process due to his dementia; his only biological child lives in Alaska and refused to provide assistance. The current representative, the petitioner's stepdaughter, assumed responsibility for providing the information needed to determine his eligibility for ICP Medicaid. She was unaware of all the petitioner's income sources. It took her several weeks to determine the sources of the income; it took additional time to secure the Power of Attorney (POA) required to obtain documentation of the income. The problem was compounded by misinformation from an attorney she consulted during the application process; the attorney instructed her to fund the QIT monthly with \$400.

The petitioner is also seeking to increase the amount of his income the community spouse is allowed to keep. It is his position that she requires all the income to pay household expenses.

The Department determines the community spousal allowance by a budgeting procedure that considers shelter and utility expenses as well as the community spouse's income. The community spouse's income consists of \$1063 monthly Social Security. Her monthly shelter and utility expenses were \$414.23 mortgage, \$83 home owner's insurance, \$114.41 property taxes and utility bills of approximately \$600. The Department included the standard utility allowance of \$317 in its budget calculation. Total shelter costs considered by the Department were 928.64. The Minimum Monthly Maintenance Income Allowance (MMMIA) was \$1822 effective July 2009, and is based on a federal law.

Thirty percent of the MMMIA (30% x 1822) or \$547 was deducted from the community spouse's shelter costs of \$928.64 to determine an excess shelter cost of \$381.64. The excess shelter amount was then added to the MMMIA,  $\$381.67 + \$1822 = \$2203.64$  to determine the amount of income the community spouse requires to cover shelter and utility expenses. From this figure, the community spouse's own income is deducted to determine how much of the petitioner's income is needed to meet the shelter and utility expenses,  $\$2033.64 - \$1063 = \$1140.64$ ; this amount is the spousal allowance.

In addition to the aforementioned shelter expenses, the community spouse incurs prescription expenses in excess of \$200 monthly; she owes \$14,000 in credit card debt (pays infrequently). In addition, she recently purchased a new wheelchair and walker for \$250 each.

The community spouse died in February 2011; it is the petitioner's position that his income is still needed in the community to "run" the house until it can be sold.

### **CONCLUSIONS OF LAW**

The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Fla. Stat § 409.285. This order is the final administrative decision of the Department of Children and Families under § 409.285, Fla. Stat.

This proceeding is a de novo proceeding pursuant to Fla. Admin. Code

§ 65-2.056.

In accordance with Fla. Admin. Code § 65-2.060 (1), the burden of proof was assigned to the petitioner.

Fla. Admin. Code 65A-1.713, SSI-Related Medicaid Income Eligibility Criteria, in part states:

SSI-Related Medicaid Income Eligibility Criteria.

(1) Income limits. An individual's income must be within limits established by federal or state law and the Medicaid State Plan. The income limits are as follows:

(d) For ICP, gross income cannot exceed 300 percent of the SSI federal benefit rate after consideration of allowable deductions set forth in subsection 65A-1.713(2), F.A.C. Individuals with income over this limit may qualify for institutional care services by establishing an income trust which meets criteria set forth in paragraph 65A-1.702(15), F.A.C. ... (2) Included and Excluded Income. For all SSI-related coverage groups the department follows the SSI policy specified in 20 C.F.R. 416.1100 (2007) (incorporated by reference) et seq., including exclusionary policies regarding Veterans Administration benefits such as VA Aid and Attendance, unreimbursed Medical Expenses, and reduced VA Improved pensions, to determine what counts as income and what is excluded as income with the following exceptions: ... (d) Income placed into a qualified income trust is not considered when determining if an individual meets the income standard for ICP, institutional Hospice program or HCBS... (b) For institutional care, hospice, and HCBS waiver programs the department applies the following methodology in determining eligibility:

1. To determine if the individual meets the income eligibility standard the client's total gross income, excluding income placed in qualified income trusts, is counted in the month received. The total gross income must be less than the institutional care income standard for the individual to be eligible for that month.

The Department's ACCESS Florida Program Policy Manual 165-22, Appendix A-9 sets forth the ICP income limit for an individual at \$2022 effective March 2009.

The Department's ACCESS Florida Program Policy Manual, 165-22, Section 1840.0110 in part states:

#### Income Trusts (MSSI)

The following policy applies only to the Institutionalized Care Program (ICP), institutionalized MEDS-AD, institutionalized Hospice, Home and Community Based Services (HCBS) and PACE. It does NOT apply to Community Hospice.

To qualify, an individual's gross income cannot exceed 300 percent of the SSI federal benefit rate (refer to Appendix A-8 for the current income standard). If an individual has income above the ICP income limit, they may become eligible for institutional care or HCBS if they set up and fund a qualified income trust. A trust is considered a qualified income trust if:

1. it is established on or after 10/01/93 for the benefit of the individual;
2. it is irrevocable;
3. it is composed only of the individual's income (Social Security, pensions, or other income sources); and
4. the trust stipulates the state will receive the balance in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on their behalf.

The eligibility specialist must forward all income trusts to their Region or Circuit Program Office for review and submission to the District Legal Counsel (DLC) for a decision on whether the trust meets the criteria to be a qualified income trust. Refer to Appendix A-22.1, "Guidance for Reviewing Income Trusts," for instructions on processing income trust cases.

The individual (or their legally authorized representative) must deposit sufficient income into the income trust account in the month in which the income is received to reduce their countable income (the income outside the trust) to within the program income standard. The individual must make the deposit each month that eligibility is requested....

The above cited authorities explain that an applicant's gross income must not exceed program limitations to qualify for ICP Medicaid. Individuals who have income in excess of program limitations may qualify for ICP Medicaid by establishing and funding a QIT. The above authority explains further that income placed into a QIT is not considered when determining if an individual meets the income standard for ICP. \$2022 is the ICP income limit for an individual.

The uncontested evidence establishes that the petitioner's gross monthly income is \$3110; this exceeds the applicable \$2022 income limit for an individual. In order to qualify for ICP Medicaid, the petitioner must deposit the \$1088 (\$3110 - \$2022) excess income into a QIT each month. The petitioner applied for ICP Medicaid in August 2009. The QIT was established in October 2009; November 2009 was the first month it was properly funded. It is the petitioner's position that a non-cooperative relative, lack of knowledge and subsequently lack of legal authority to access the petitioner's income, in addition to misinformation given by an attorney were all mitigating circumstances which delayed properly funding the QIT. The undersigned carefully reviewed the authorities, but could find no exceptions for the reasons put forth by the petitioner. The undersigned concludes that the Department correctly denied ICP Medicaid for the months of August 2009, September 2009 and October 2009.

**The spousal allowance issue will now be addressed**

It is the petitioner's position that his community spouse should be allowed to keep his income to pay household expenses.

Florida Administrative Code 65A-1.712, *SSI-Related Medicaid Resource*

*Eligibility Criteria*, states in part:

4) Spousal Impoverishment. The Department follows 42 U.S.C. § 1396r-5 for resource allocation and income attribution and protection when an institutionalized individual, including a hospice recipient residing in a nursing facility, has a community spouse. Spousal impoverishment policies are not applied to individuals applying for, or receiving, HCBS waiver services, except for individuals in the Long-Term Care Community Diversion Program, the Assisted Living Facility waiver or the Cystic Fibrosis waiver.

(a) When an institutionalized applicant has a community spouse all countable resources owned solely or jointly by the husband and wife are considered in determining eligibility.

(b) At the time of application only those countable resources which exceed the community spouse's resource allowance are considered available to the institutionalized spouse.

(c) The community spouse resource allowance is equal to the maximum resource allocation standard allowed under 42 U.S.C. § 1396r-5 or any court-ordered support, whichever is larger.

(d) After the institutionalized spouse is determined eligible, the Department allows deductions from the eligible spouse's income for the community spouse and other family members according to 42 U.S.C. § 1396r-5 and paragraph 65A-1.716(4)(c), F.A.C.

(e) If either spouse can verify that the community spouse resource allowance provides income that does not raise the community spouse's income to the State's minimum monthly maintenance income allowance (MMMIA), the resource allowance may be revised through the fair hearing process to an amount adequate to provide such additional income as determined by the hearing officer. Effective November 1, 2007 the hearing officers must consider all of the community spouse's income and all of the institutionalized spouse's income that could be made available to a community spouse. The hearing officers will base the revised community spouse resource allowance on the amount necessary to purchase a single premium lifetime annuity that would generate a monthly payment that would bring the spouse's income up to the MMMIA (adjusted to include any excess shelter costs). The community spouse does not have to actually purchase the annuity. The community spouse will have the opportunity to present convincing evidence to the hearing officer that a single premium lifetime annuity is not a viable method of protecting the necessary resources for the community spouse's income to be raised to the State's MMMIA. If the community spouse requests that the revised allowance not be based on the earnings of a single premium lifetime annuity, the community spouse must offer an alternative method for the hearing officer's consideration that will provide for protecting the minimum amount of assets required to raise the community spouse's income to the State's MMMIA during their lifetime.

(f) Either spouse may appeal the post-eligibility amount of the income allowance through the fair hearing process and the allowance may be adjusted by the hearing officer if the couple presents proof that exceptional circumstances resulting in significant inadequacy of the

allowance to meet their needs exist. Exceptional circumstances that result in extreme financial duress include circumstances other than those taken into account in establishing maintenance standards for spouses. An example is when a community spouse incurs unavoidable expenses for medical, remedial and other support services which impact the community spouse's ability to maintain themselves in the community and in amounts that they could not be expected to be paid from amounts already recognized for maintenance and/or amounts held in resources. Effective November 1, 2007, the hearing officers must consider all of the community spouse's income and all of the institutionalized spouse's income that could be made available to a community spouse. If the expense causing exceptional circumstances is a temporary expense, the increased income allowance must be adjusted to remove the expenses when no longer needed.

(g) The institutionalized spouse shall not be determined ineligible based on a community spouse's resources if all of the following conditions are found to exist:

1. The institutionalized individual is not eligible for Medicaid institutional services because of the community spouse's resources and the community spouse refuses to use the resources for the institutionalized spouse; and
2. The institutional spouse assigns to the State any rights to support from the community spouse by submitting the Assignment of Rights to Support, Form CF-ES 2504, PDF 10/2005 (incorporated by reference), signed by the institutionalized spouse or their representative; and
3. The institutionalized spouse would be eligible if only those resources to which they have access were counted; and
4. The institutionalized spouse has no other means to pay for the nursing home care.

Florida Administrative Code 65A-1.7141, SSI-Related Medicaid Post-Eligibility

Treatment of Income, states in part:

After an individual satisfies all non-financial and financial eligibility criteria for Hospice, institutional care services or Assisted Living waiver (ALW/HCBS), the department determines the amount of the individual's

patient responsibility. This process is called "post eligibility treatment of income".

(1) For Hospice and institutional care services, the following deductions are applied to the individual's income to determine patient responsibility:

(a) Individuals residing in medical institutions shall have \$35 of their monthly income protected for their personal need allowance...

(d) The department applies the formula and policies in 42 U.S.C. section 1396r-5 to compute the community spouse income allowance after the institutionalized spouse is determined eligible for institutional care benefits. The standards used are found in subsection 65A-1.716(5), F.A.C. The current standard Food Stamp utility allowance is used to determine the community spouse's excess utility expenses...

(f) For ICP or institutionalized Hospice, income is protected for the month of admission and discharge, if the individual's income for that month is obligated to directly pay for their cost of food or shelter outside of the facility.

(g) Effective January 1, 2004, the department allows a deduction for the actual amount of health insurance premiums, deductibles, coinsurance charges and medical expenses, not subject to payment by a third party, incurred by a Medicaid recipient for programs involving post eligibility calculation of a patient responsibility, as authorized by the Medicaid State Plan and in accordance with 42 CFR 435.725.

Florida Administrative Code 65A-1.716, Income and Resource Criteria, states in part:

(c) Spousal Impoverishment Standards...

2. State's Minimum Monthly Maintenance Income Allowance (MMMIA).  
The minimum monthly income allowance the department recognizes for a community spouse is equal to 150 percent of the federal poverty level for a family of two.

3. Excess Shelter Expense Standard. The community spouse's shelter expenses must exceed 30 percent of the MMMIA to be considered excess shelter expenses to be included in the maximum income allowance:  $MMIA \times 30\% = \text{Excess Shelter Expense Standard}$ . This standard changes July 1 of each year.

The above cited authorities set forth the rules and budgeting methodology for determining how much income the institutional spouse must pay the nursing facility as well as the spousal allowance in the ICP Medicaid Program. The petitioner would like all of his income to go to the community spouse (or their estate subsequent to her death in February 2011) to pay the household expenses until their home is sold. The Department's budgeting methodology, as outlined in the Findings of Facts and in Respondent's Exhibit 1, correctly reflects the budgeting methodology set forth in the above authorities in calculating the spousal allowance. However, Florida Administrative Code permits possible adjustment to this methodology and the resulting spousal allowance, if proof is presented of exceptional circumstances that result in financial duress and impact the spouse's ability to remain in the community. The petitioner put forth large utility and prescription expenses in addition to a medical equipment purchase of \$500 and credit card debit as reasons for increasing the spousal allowance.

The community spouse has her own monthly income of \$1063 plus \$1140.64 of the petitioner's income; \$2,203.64 total monthly income available to the community spouse. Her basic allowable expenses total \$928.64; this total includes mortgage, property taxes, homeowner's insurance and a standard utility allowance. Were the asserted average actual monthly utility expense of \$600 included in the budget, the spousal income of \$2203.64 exceeds the adjusted shelter and utility expenses of

\$1211.64. After careful review, the undersigned cannot find that any additional funds should be diverted to the community spouse or the estate.

**DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is denied. The Department's actions are affirmed.

**NOTICE OF RIGHT TO APPEAL**

This decision is final and binding on the part of the department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2011,

in Tallahassee, Florida.

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Copies Furnished To: [REDACTED], Petitioner

FINAL ORDER (Cont.)

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ACCESS Circuit 4 - Gayle Bellock, OMC

