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

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DEPT OF CHILDREN & FAMILIES

PETITIONER,  
Vs.

APPEAL NO. 09F-07534

FLORIDA DEPARTMENT OF  
CHILDREN AND FAMILIES  
CIRCUIT: 04 Duval  
UNIT: 88374

CASE NO. 1316824039

RESPONDENT.  
\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened telephonically before the undersigned hearing officer on December 30, 2009, at 10:04 a.m. The petitioner was not present. He was represented by his daughter, The Department was represented by Ella Swain, ACCESS economic self-sufficiency specialist II.

The hearing record was held open for seven days, until close of business on January 6, 2010, for the submission of additional evidence. No evidence was received from either party and the record was closed.

**ISSUE**

The petitioner is seeking an increase in the community spousal allowance under Institutional Care Program (ICP) Medicaid. The petitioner holds the burden of proof.

**FINDINGS OF FACT**

1. The petitioner (age 74, resident of a nursing facility in Jacksonville, Florida) was approved for ICP Medicaid in October 2009. His wife (also age 74) continues to reside in the family home; she will be referred to as the community spouse.

2. During the application process, the Department determined that the petitioner's income exceeded income eligibility limits. He was required to establish an Irrevocable Medicaid Income Trust. The trust was established and funded as required by Department policy.

3. During the ICP budgeting process, the Department determined that the petitioner could keep \$35 of his income for personal needs, \$1,767.01 of his income was allocated for the community spouse; the petitioner's remaining monthly income of \$994.93 was considered the patient responsibility (the monthly amount the petitioner is obligated to pay the nursing facility). ICP Medicaid pays all nursing charges above the \$994.93 patient responsibility.

4. The petitioner's family requested a hearing on October 29, 2009. They would like to increase the amount of the petitioner's income allocated to the community spouse.

5. The petitioner's gross monthly income consists of \$421 Veterans Administration (VA) benefits, \$735 Social Security (SSA) and \$1794 pension. The community spouse has income consisting of \$759 monthly SSA. The community spouse has a monthly mortgage obligation of \$845.93 (this includes property tax and

homeowner's insurance). For unknown reasons, homeowner's insurance was listed again separately as \$88.08 monthly. The Department determined the community spousal allowance as follows: \$547, which is 30% of the \$1822 Minimum Monthly Maintenance Income Allowance (MMMIA), was subtracted from the shelter cost of \$1251.01 (845.93 mortgage, \$88.08 home owner's insurance and \$317 standard utility allowance). The balance of \$704.01 was the excess shelter. The MMMIA of \$1822 was added to the excess shelter of \$704.01 to arrive at \$2226.01 allowable shelter deduction. The community spouse's income of \$759 was subtracted from the allowable shelter deduction; the resulting figure, \$1767.01, is the community spousal allowance.

6. The petitioner's daughter stipulated that the income figures for both parents are correct. She disagrees with the inclusion of gross income figures in the budget calculations. As net income is the amount actually received by the family, she would like the net figures to be used in the budget. She would also like more of the community spouse's expenses to be included in the budget calculations. The Department deducts only for shelter and utility expenses. The community spouse also incurs the following monthly expenses:

Car Payment	245.93
Car Insurance	123.00
Lawn Service	80.00
Pool Service	150.00
Groceries	350.00
Medicine	45.00
Life Insurance	166.00
Credit Cards	230.00
Tithe	90.00

The family would like these expenses to be included in the calculation of spousal allowance.

### CONCLUSIONS OF LAW

Federal Regulations at 20 C.F.R. Sec. 416.1123 in part states:

How we count unearned income...

(a) When we count unearned income. We count unearned income at the earliest of the following points: when you receive it or when it is credited to your account or set aside for your use. We determine your unearned income for each month. We describe exceptions to the rule on how we count unearned income in paragraphs (d), (e) and (f) of this section.

(b) Amount considered as income. We may include more or less of your unearned income than you actually receive.

(1) We include more than you actually receive where another benefit payment (such as a social security insurance benefit)...

Florida Administrative Code 65A-1.713, SSI-Related Medicaid Income

Eligibility Criteria, states in part:

(1)(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 subsection 65A-1.702(15), F.A.C. ...

(4) Income Budgeting Methodologies. To determine eligibility SSI budgeting methodologies are applied except where expressly prohibited by 42 U.S.C. § 1396 (2000 Ed., Sup. IV) (incorporated by reference), or another less restrictive option is elected by the state under 42 U.S.C. § 1396a(r)(2) (2000 Ed., Sup. IV) (incorporated by reference). When averaging income, all income from the most recent consecutive four weeks shall be used if it is representative of future earnings. A longer period of past time may be used if necessary to provide a more accurate indication of anticipated fluctuations in future income.

(a) For MEDS-AD Demonstration Waiver, Protected Medicaid, Medically Needy, Qualified Working Disabled Individual, QMB, SLMB, QI1, and to compute the community spouse income allocation for spouses of ICP

individuals, the following less restrictive methodology for determining gross monthly income is followed:

1. When income is received monthly or more often than once per month the monthly income from that source shall be computed by first determining the weekly income amount and then multiplying that amount by 4. A five-week month shall not be treated any differently than a four-week month.
2. When unearned income is received less often than monthly the total amount will be prorated over the period it is intended to cover. If prorating income adversely affects the client it will be counted in the month received and not prorated.
3. When earned income is received less often than monthly, the department counts the total amount in the month received and does not prorate.

(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 regulations cited above explains that the Department must use gross income during the eligibility computations, both for the institutionalized spouse and for the community spouse.

Florida Administrative Code 65A-1.712 includes the provision for either spouse to appeal the post-eligibility amount of the income allowance through the fair hearing process and states:

(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... (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.

Florida Administrative Code 65A-1.716 Income and Resource Criteria subsection

(5) states in relevant 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:  $MMMIA \times 30\% = \text{Excess Shelter Expense Standard}$ . This standard changes July 1 of each year.

4. Food Stamp Standard Utility Allowance...

5. Cap of Community Spouse Income Allowance. The MMMIA plus excess shelter allowance cannot exceed the maximum amount allowed under 42 U.S.C. § 1396r-5. This standard changes January 1 of each year.

The above authorities set forth the Minimum Monthly Maintenance Income Allowance (MMMIA) for the community spouse.

The Department's Integrated Policy Manual, passage 2640.0117 states in relevant part:

Patient Responsibility Computation (MSSI)

The following policy applies to ICP, institutionalized MEDS ...:

After the individual is determined eligible, the amount of monthly income to be applied to the cost of care (patient responsibility) is computed as follows:

Step 1 - Deduct the personal needs allowance and one half of the gross therapeutic wages up to the maximum of \$111 if applicable, for adults in ICF/DDs. Refer to 2640.0118 for information regarding the personal needs allowance.

Step 2 - Deduct the community spouse income allowance, family member allowance, or the dependent's allowance, if applicable. ...

...

Step 4 - Deduct uncovered medical expenses as discussed in passages 2640.0125.01 through 2640.0125.04.

The balance is the amount of the patient responsibility.

The Department's Integrated Policy Manual, passage 2640.0119.01 in part states:

Community Spouse Income Allowance (MSSI)

The following policy applies to the ICP, institutionalized MEDS, institutionalized Hospice, Long Term Care Diversion, PACE, and the Assisted Living Waiver Programs. When an institutionalized individual has a community spouse whose gross income is less than the state's minimum monthly maintenance income allowance (MMMIA) plus the CS excess shelter expense costs, a portion of the individual's income may be allocated to meet the needs of his community spouse.

The Department's Integrated Policy Manual, passage 2640.0119.02 in part states:

Community Spouse's Monthly Income Allowance (MSSI)

A community spouse's monthly income allowance depends on the amount of monthly income available to the community spouse and the amount of excess shelter costs the community spouse must pay.

The actual community spouse monthly income allowance is equal to how much the state's MMMIA plus the community spouse's excess shelter costs exceed the community spouse's income.

Note: The community spouse income allowance is included as income to the community spouse during the hearing process when determining if the community spouse qualifies for an increase in the community spouse resource allowance.

The Department's Integrated Policy Manual, passage 2640.0119.03 in part states:

Formula for Community Spouse Income Allowance (MSSI)

The following is the formula used to determine the community spouse's income allowance:

(State's MMMIA + community spouse's excess shelter costs) - (the community spouse's total gross income) = (the community spouse's income allowance.)

The community spouse's income allowance is the total amount that can be allotted to the community spouse from the institutionalized individual.

The state's MMMIA plus CS excess shelter cost cannot exceed the state's cap on CS income allowance (see Appendix A-9).

The institutionalized individual's personal needs allowance and deduction for therapeutic wages is deducted prior to deducting the community spouse's income allowance.



The Department's Integrated Policy Manual, passage 2640.0119.04 in part states:

Determining Community Spouse's Excess Shelter Costs (MSSI)

The following steps are used to determine the community spouse's excess shelter costs:

- Step 1 - Obtain verification of the community spouse's monthly assistance group expenses if questionable. Allowed expenses are limited to rent or mortgage payment (including principal and interest), taxes, insurance (homeowners or renters), maintenance charges if a condominium and mandatory homeowner's association fees. Do not include expenses paid by someone other than the community spouse. Add all of these expenses.
- Step 2 - To the total obtained above, add the current food stamp standard utility disregard (refer to Appendix A-3.1) if the community spouse pays utility bills. Allowed utilities are limited to water, sewage, gas, and electric.
- Step 3 - To determine what portion of the total shelter costs is excess, subtract 30% of the state's income allowance, from the total costs. The difference is the community spouse's excess shelter costs.

The Department's Integrated Policy Manual, 165-22, Appendix A-9 establishes the Minimum Monthly Maintenance Income Allowance (MMMIA) of \$1,822 effective July 2009. The appendix also establishes the excess shelter standard at \$547 and the Maximum Community Spouse Income Allowance (MMMIA plus excess shelter costs) at \$2,739. This same reference at Appendix A-3.1 sets forth the standard utility allowance effective October 1, 2009 at \$317.

The petitioner's family believes the community spousal income allowance is not enough to cover the expenses of his wife; they would like an increase in the spousal allowance. The controlling authorities explain that the community spouse allowance may be adjusted by the hearing officer if the petitioner provides proof of exceptional circumstances resulting in significant inadequacy of the allowance to meet the needs of

the community spouse. Examples of exceptional circumstances include medical and support services beyond the control of the community spouse that impacts her ability to remain independent and live in the community.

The community spouse's monthly income includes her SSA income of \$759.70 plus her spousal allowance of \$1767.01; total monthly income of \$2526.71 Her basic allowable expenses as presented total mortgage of \$845.93 (this includes homeowner's Insurance and property tax), food allowance of \$350 and a standard utility allowance of \$317. Her basic allowable monthly expenses total \$1512.93; the expenses do not exceed her \$2526.01 monthly income. No provision could be found in the controlling legal authorities to allow deductions for car payments, car insurance, life insurance premiums, credits cards, third party medical premiums, lawn service, pool service, or tithe. Therefore, the undersigned must conclude that absent exceptional circumstances, as defined by the controlling legal authorities, the community spouse is not eligible for any further income diversion from the petitioner.

It is noted that the Department is deducting twice for the community spouse's homeowner's insurance (it is included the mortgage expense and therefore should not be allowed again as a separate expense when calculating the spouse's allowable shelter deduction).

### **DECISION**

The appeal is denied.

**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 1<sup>st</sup> day of February, 2010,  
in Tallahassee, Florida.



Leslie Green  
Hearing Officer  
Building 5, Room 255  
1317 Winewood Boulevard  
Tallahassee, FL 32399-0700  
850-488-1429

Copies Furnished To: