

**OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

Pernie Dupree,)
)
Petitioner,)
) Docket No.
v.) _____
) Agency Reference No.
Department of Human Resources,) _____
Division of Family and Children Services,)
)
Respondent.)

Memorandum of Law

Pernie Dupree entered a nursing home on September 11, 2009. She applied for Medicaid on November 1, 2010. Medicaid was denied and a request for a fair hearing was filed. Following a decision entered by Administrative Law Judge Ana Kennedy, dated June 30, 2010, Mrs. Dupree's Medicaid eligibility was approved. On February 1, 2011, Medicaid issued a notice finding "Based on our records we have determined that you are eligible." Said letter indicated that eligibility began in November 2010 and that it "will continue ... unless there is a change in your situation." (Emphasis added).

At the first annual review, during the review process, eligibility was administratively denied by notice dated February 29, 2012 due to failure to provide documentation. A new application was filed on May 25, 2012 in reliance on Section 2060-2 of the ABD Manual. That section provides: "An application was previously correctly denied due to failure to provide required verification. A/R wants to reapply in a subsequent month. Although the application date of the first application is protected, have the A/R sign another application for the subsequent month(s) unless there is good cause for not initially providing the verification." (Emphasis added). As noted above, the first application was filed on November 1, 2010.¹

Mrs. Dupree was discharged from the nursing home at the end of August, 2013. Since then, she has lived with her daughter. Since September 11, 2009, Mrs. Dupree has been separated and has not lived with her husband.

During the annual review, the Department deemed Mr. Dupree's (the Community Spouse) resources to Pernie Dupree (the Institutionalized Spouse). Because Mrs. Dupree was continuously institutionalized during the relevant period, Mr. and Mrs. Dupree contend the Department's analysis violates both 42 U.S.C. § 1396r-5(c)(4) and the rules which terminate deeming after institutionalization occurs.

¹ Technically 42 U.S.C. § 1396a(a)(34) folds the May 2012 application back into February.

Specific Termination of Spousal Deeming Following Initial Determination.

As part of the Medicare Catastrophic Coverage Act of 1988, Congress enacted certain protections for Community Spouses to prevent their impoverishment. 42 U.S.C. § 1396r-5(c)(4) provides: "During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse."

The Supreme Court of the United States paraphrased subsection (c)(4) in *Wisconsin v. Blumer*, 534 U.S. 473, 483 n.4 (2002), where it said "Once the institutionalized spouse is determined to be eligible, no resources *gained by* the community spouse shall be deemed available to the institutionalized spouse."

In *Hughes v. McCarthy*, 734 F.3d 473, 2013 U.S. App. LEXIS 21701, *5 (6th Cir. 2013), citing *Blumer*, the Sixth Circuit found: "'after the month in which an institutionalized spouse is determined to be eligible for benefits . . . , no resources of the community spouse shall be deemed available to the institutionalized spouse.'" *See also Morenz v. Wilson-Coker*, 415 F.3d 230, at note 1 (2nd Cir. 2005); *Geston v. Olson*, 857 F.Supp. 2d 863, 875 (N. D. 2012).

In *Morris v. Oklahoma Dep't of Human Services*, 685 F.3d 925 (10th Cir. 2012), the Court made it clear that § 1396r-5(c)(4) relates to the initial determination of eligibility. There, in the context of addressing how the agency would deal with resources which were "newly received" by the institutionalized spouse, the Court said:

once an agency affirmatively determines that an institutionalized spouse is eligible for benefits, at which point "separate treatment of resources" begins. § 1396r-5(c)(4). "[A]fter the month in which an institutionalized spouse is determined to be eligible for benefits . . . no resource of the community spouse shall be deemed available to the institutionalized spouse." *Id.* Following a determination that one spouse is eligible, the couple appears to have some period of time to transfer any excess resources held in the institutionalized spouse's name into the community spouse's name. Section 1396r-5(f)(1) facilitates this transition by providing that, "[a]s soon as practicable after the date of the initial determination of eligibility" the couple may transfer title to resources so that the community spouse holds the full amount of the CSRA in her name.

Morris, at 937 (emphasis added).

Specifically, the *Morris* Court gave the "same meaning" to the phrases "initial determination of eligibility" in § 1396r-5(f)(1) and the phrase "determined to be eligible" in § 1396r-5(c)(4).

In *Houghton v. Sellers*, 382 F.3d 1162 (6th Cir. 2004), the Sixth Circuit specifically addressed the issue of redeterminations. There, the State attempted to re-classify certain assets held by the Community Spouse (in that case, retirement accounts) and then use that re-classification during annual re-determinations. The Court held:

We again begin our analysis with the text of the MCCA. *Barnhart*, 534 U.S. at 450. Section 1396r-5(c)(4) plainly states that, after the initial one-month eligibility period, "no resources of the community spouse shall be deemed available to the institutionalized spouse." As we have noted, neither the MCCA nor the Medicaid Act explicitly addresses whether retirement accounts are "income" or "resources." Nevertheless, for several reasons, we do not interpret this lack of clarity as permitting a state to reclassify assets a couple possessed at the time the state made its initial eligibility determination.

When Congress stated in § 1396r-5(c)(4) that "no resources of the community spouse shall be deemed available to the institutionalized spouse," it did not limit this prohibition to include only those resources "allocated" to either spouse at the time of the initial eligibility determination; nor did Congress **[**30]** limit such transfers to only those resources used to calculate the initial CSRA. The text provides no indication that Congress intended to protect only those assets a state initially classified as resources while leaving up for grabs assets which existed at the time the initial eligibility determination was made, but which a state later chooses to include in the definition of resources. Rather, it appears Congress intended that, at the time one spouse is institutionalized, all of the couple's existing assets should be classified as income or resources, and any resources of a community spouse not included in that initial classification are protected from future reclassification.

Our interpretation is buttressed by reading § 1396r-5(c)(4) in the context of § 1396r-5(c), which delineates the "Rules for treatment of resources" under the MCCA. Parts (1) and (2) of § 1396r-5(c) discuss the "Computation of spousal share at time of institutionalization" and "Attribution of resources at time of initial eligibility determination," respectively. §§ 1396r-5(c)(1)-(2). Part (2) clearly states that when the initial eligibility determination is made, "all the resources held by either the institutionalized **[**31]** spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse." *Id.* (c)(2)(A). Parts (1) and (2) are broad, requiring inclusion of all of the community spouse's resources. The remaining parts of § 1396r-5(c) provide exceptions and limitations. Part (3) addresses certain cases where an institutionalized spouse should be eligible for Medicaid even if assets exceed the statutory eligibility cap. *Id.* (c)(3). Part (4) addresses the "Separate treatment of resources after eligibility for benefits [is] established" and sets out the rule that "during the continuous period in which an institutionalized spouse is in an institution . . . no resources of the community spouse shall be deemed available to the institutionalized spouse." *Id.* (c)(4). Part (5) defines "resources." A plain reading of § 1396r-5 suggests Congress intended that

resources be pooled in the initial eligibility determination, but analyzed separately after eligibility was established. (Emphasis added).

The Court went on, examining the legislative history, finding that “The attribution of resources into spousal shares, and the subsequent imposition of limits on the community spouse’s [**32] shares, would occur only once, at the time of initial application.” (Emphasis added). Thus, “§ 1396r-5(c)(4), ... shields resources belonging to the community spouse from annual re-evaluation.”

The legislative history further states, in H.R. Rep. No. 100-105, 100th Cong., 1st Sess., at 71, *reprinted in* 1988 U.S.C.C.A.N. 857, 894, that “if while the care of the institutionalized spouse is being paid for by Medicaid, the community spouse’s resources grow to exceed the \$48,000 initial limit, *the State would not be authorized to require the community spouse to apply any excess toward the cost of care of the institutionalized spouse*” (emphasis supplied).

Finally, in a letter from Ronald Preston, HCFA (now CMS) Associate Regional Administrator, to Attorney Brian Barreira, dated April 5, 2000 (attached), CMS took the position that “after the month in which an institutionalized spouse is determined eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse. That is, the community spouse can do whatever he or she wants to with them.”

General Rules on Termination of Spousal Deeming.

The Georgia Medicaid Manual indicates that deeming ceases when certain events occur. Specifically, when one spouse (or child) enters LA-D, deeming of income ceases for the LA-D A/R the month of admission. Spousal impoverishment resource rules apply the month of admission. If the community spouse is an A/R under a non LA-D COA, deeming of income and resources ceases for the community spouse the month following the month of admission. Georgia Medicaid Manual § 2502-2.

Further, a marital relationship ceases the month following the month of separation of spouses,² regardless of whether or not either or both is Medicaid eligible. The admission of one or both spouses into LA-D is considered separation. Georgia Medicaid Manual § 2501-1.

Georgia is an “SSI State,” meaning that Georgia follows the SSI rules in determining Medicaid eligibility. In that regard 42 C.F.R. § 416.1163 provides:

(f) We have special rules to determine how to deem your spouse's income to you when there is a change in your situation.... (5) You become subject to the \$30 Federal benefit rate. If you become a resident of a medical care facility and the \$30 Federal benefit rate applies, we do not deem your ineligible spouse's income to you to determine your eligibility for SSI benefits

² This is consistent with 42 C.F. R. § 416.1830(a).

beginning with the first month for which the \$30 Federal benefit rate applies. In determining your benefit amount beginning with the first month for which the \$30 Federal benefit rate applies, we use only your own countable income in a prior month, excluding any income deemed to you in that month from your ineligible spouse.

Further, POMS SI 01320.450 provides: "If an ineligible spouse and eligible spouse separate, or their marriage ends in divorce, the ineligible spouse's income is no longer deemed to determine eligibility effective with the month after the month of separation or divorce. Deemed income in the budget month continues to affect payment if deeming applied in the budget month."

Mrs. Dupree's Medicaid eligibility should have continued because spousal deeming terminated upon separation and 42 U.S.C. § 1396r-5(c)(4) prohibits consideration of the community spouse's resources following the initial determination of eligibility.

This _____ day of _____, 20_____.

David L. McGuffey
Attorney for Petitioner
P.O. Box 2023
Dalton, Georgia 30722
(706) 428-0888
david@mcguffey.net

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DEPARTMENT OF HEALTH & HUMAN SERVICES

HEALTH CARE FINANCING
ADMINISTRATION

Division of Medicaid and State Operations

Region 1
JFK Federal Building
Government Center
Boston, MA 02203

April 5, 2000

Brian E. Barreira, Attorney-At-Law
225 Water Street
Suite 212
Plymouth, Massachusetts 02360

Dear Mr. Barreira:

This is in reply to your letter concerning transfer of assets by community spouses. You advised us that it is the position of the Division of Medical Assistance (DMA) that the post-eligibility transfer made by community spouses causes Medicaid disqualification. Thus, you requested that we notify DMA of its need to come into compliance with Federal law.

Under the transfer of assets provisions in §1917(e) of the Social Security Act (the Act), transfers between spouses are exempt from any transfer penalty. Under the spousal impoverishment provisions of §1924 of the Act, once eligibility is determined, the resources of the community spouse are no longer considered available to the institutionalized spouse. Thus, after the month in which an institutionalized spouse is determined eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse. That is, the community spouse can do whatever he or she wants to with them.

We will be writing a letter to Mark F. Reynolds, Acting Commissioner, DMA, advising him that State policy needs to be revised to be consistent with Federal requirements. We appreciate your interest in the Medicaid program and for bringing this matter to our attention.

Please contact Allen Bryan if you have any questions. He can be reached at (617) 565-1246.

Sincerely yours,

Ronald Preston
Associate Regional Administrator