
In the Matter of the Appeal of
██████████
from a determination by the New York City
Department of Social Services

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**DECISION
AFTER
FAIR
HEARING**

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on January 8, 2013, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

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For the Social Services Agency

Regina Simpson, Fair Hearing Representative
Jeremy Knapp, Esq., HRA OLA

ISSUE

Was the Agency's determination, dated September 20, 2012, that the Appellant must apply Net Available Monthly Income (NAMI) in the amount of \$4,661.55 toward the cost of his institutional care for the period of November 1, 2011, through December 31, 2011, correct?

Was the Agency's determination, dated September 20, 2012, that the Appellant must apply Net Available Monthly Income (NAMI) in the amount of \$4,711.25 toward the cost of his institutional care for the period commencing January 1, 2012, correct?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

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1. On October 12, 2011, the Appellant entered the [REDACTED] (“nursing home”), where he still resides.
2. On November 17, 2011, the Appellant’s wife executed a Declaration Of The Legally Responsible Relative and spousal refusal thereby refusing to make her income and/or resources available for the cost of necessary medical care and services for Appellant.
3. On February 28, 2012, an application for Institutional Services Medical Assistance ("Medicaid") was submitted to the Agency on behalf of the Appellant, requesting a “pickup date” of November 1, 2011.
4. On September 20, 2012, the Agency determined to accept the Appellant's application for Institutional Services Medical Assistance, for the period of November 1, 2011, until December 31, 2011, subject to the application of Net Available Monthly Income ("NAMI") in the amount of \$4,661.55, and for the period commencing January 1, 2012 subject to the application of Net Available Monthly Income ("NAMI") in the amount of \$4,711.25. The Agency computed the Appellant's NAMI as follows:

For period commencing November 1, 2011:

Appellant's Social Security Benefits	\$ 2,490.50
“Other” Income	\$ 2,356.15
 Total Gross Income	 \$ 4,846.65
 <u>Less:</u>	
Personal Needs Allowance - \$ 50.00	
Medicare Parts B&D - \$ 135.10	
Total deductions	- \$ 185.10
<hr/> Net Available Monthly Income	<hr/> \$ 4,661.55

For period commencing January 1, 2012:

Appellant's Social Security Benefits	\$ 2,543.60
“Other” Income	\$ 2,356.15
 Total Gross Income	 \$ 4,899.75
 <u>Less:</u>	
Personal Needs Allowance - \$ 50.00	
Medicare Parts B&D - \$ 138.50	
Total deductions	- \$ 188.50
<hr/> Net Available Monthly Income	<hr/> \$4,711.25

5. On October 4, 2012, this fair hearing was requested.

APPLICABLE LAW

Section 360-1.4(c) of the Regulations defines Chronic Care budgeting as a procedure used for individuals who are in "Permanent Absence" status. For such individuals, Chronic Care budgeting begins as of the first day of the calendar month following the month in which the individual is determined to be in permanent absence status.

Under Section 360-1.4(k) of the Regulations, Permanent Absence status means an individual is not expected to return home. Unless overcome by adequate medical evidence, it will be presumed that an individual will not return home if:

- (1) a person enters a skilled nursing or intermediate care facility;
- (2) a person is initially admitted to acute care and is then transferred to an alternative level of care, pending placement in a residential health care facility (RHCF); or
- (3) a person having no community spouse remains in an acute care hospital for more than six calendar months.

Section 366-c of the Social Services Law provides in part:

Treatment of income and resources of institutionalized persons.

- (1) Notwithstanding any other provision of law to the contrary, in determining the eligibility for medical assistance of a person defined as an institutionalized spouse, the income and resources of such person and the person's community spouse shall be treated as provided in this section.
- (2)
 - (a) For purposes of this section an "institutionalized spouse" is a person in a medical institution or nursing facility (i) who is expected to remain in such facility or institution for at least thirty consecutive days, or is receiving care, services and supplies pursuant to a waiver pursuant to subsection (c) of section nineteen hundred fifteen of the federal social security act; and (ii) who is married to a person who is not in a medical institution or nursing facility or is not receiving services pursuant to a waiver pursuant to subsection (c) of section nineteen hundred fifteen of the federal social security act.
 - (b) For purposes of this section, a "community spouse" is a person who is the spouse of an "institutionalized spouse".

- (g) For purposes of this section, "community spouse monthly income allowance" is the amount by which the minimum monthly maintenance needs allowance for the community spouse exceeds the monthly income otherwise available to the community spouse unless a greater amount is established pursuant to a fair hearing under this section or pursuant to court order for the support of the community spouse.
- (h) For purposes of this section, "minimum monthly maintenance needs allowance" is an amount equal to one-twelfth of the applicable percentage of the federal income official poverty line for a family of two, plus an excess shelter allowance, provided however, such amount shall not be less than one thousand five hundred dollars per month, nor exceed one thousand five hundred dollars (as adjusted in the discretion of the commissioner for changes in the federal consumer price index for calendar years after nineteen hundred eighty-nine) per month.

- (3) Unless established by a preponderance of the evidence to the contrary, the following presumptions shall apply in determining the availability of income to an institutionalized spouse in determining eligibility for medical assistance.
 - (a) During any month in which an institutionalized spouse is in the institution or facility, no income of the community spouse shall be considered available to the institutionalized spouse except as provided in this subdivision; and
 - (b) Income solely in the name of the institutionalized spouse or the community spouse shall be considered available only to that spouse; and
 - (c) Income in the names of the institutionalized spouse and the community spouse shall be considered available one-half to each spouse.

- (4) In determining the amount of income to be applied toward the cost of medical care, services and supplies of the institutionalized spouse, after the institutionalized spouse has been determined eligible for medical assistance, the following items shall be deducted from the monthly income of the institutionalized spouse in the following order:
 - (a) a personal needs allowance;
 - (b) a community spouse monthly income allowance;

- (c) a family allowance for each family member;
- (d) any expenses incurred for medical care, services or supplies and remedial care for the institutionalized spouse.

- (8) (a) If, after a determination on an application for medical assistance has been made, either spouse is dissatisfied with the determination of the community spouse monthly allowance, the amount of monthly income otherwise available to the community spouse, the computation of the spousal share of resources, the attribution of resources or the determination of the community spouse's resource allocation, the spouse may request a fair hearing to dispute such determination. Such hearing shall be held within thirty days of the request therefor.
- (b) If either spouse establishes that the community spouse needs income above the level established by the social services district as the minimum monthly maintenance needs allowance, based upon exceptional circumstances which result in significant financial distress (as defined by the commissioner in regulations), the department shall substitute an amount adequate to provide additional necessary income from the income otherwise available to the institutionalized spouse.

Section 360-4.10 of the Regulations provide in part:

- (a) Definitions. Notwithstanding any regulations to the contrary, when used in this section, unless the context clearly requires otherwise:
 - (1) Applicable percent of the annual federal poverty level means one hundred twenty-two percent as of September 30, 1989, one hundred thirty-three percent as of July 1, 1991, and one hundred fifty percent on and after July 1, 1992.
 - (2) Community spouse means a person who is the spouse of an institutionalized person and who is residing in the community.
 - (3) Community spouse monthly income allowance means the amount by which the community spouse's minimum monthly maintenance needs allowance, as defined in paragraph (8) of this subdivision, exceeds the community spouse's otherwise available monthly income, or such greater amount as may be established by fair hearing decision or court order for the support of the community spouse.
 - (7) Institutionalized spouse means a married person: who is in a medical institution or nursing facility and is likely to remain there for at least thirty consecutive days or is receiving home and community-based services provided pursuant to a waiver under

Section 1915(c) of the federal Social Security Act and is likely to receive such services for at least thirty consecutive days; and whose spouse is not in a medical institution or nursing facility, and is not likely to receive such home and community-based services for thirty consecutive days.

- (8) Minimum monthly maintenance needs allowance means an amount equal to one thousand five hundred dollars, to be increased annually by the same percentage as the percentage increase in the federal consumer price index.
 - (9) Resources do not include those disregarded or exempt under sections 360-4.4(d), 360-4.6(b), and 360-4.7(a) of this Subpart.
 - (10) Significant financial distress means exceptional expenses which the community spouse cannot be expected to meet from the monthly maintenance needs allowance or from amounts held in resources. Such expenses may be of a recurring nature or may represent major one-time costs, and may include but are not limited to: recurring or extraordinary non-covered medical expenses; amounts to preserve, maintain or make major repairs on the homestead; and amounts necessary to preserve an income-producing asset.
- (b) Treatment of income.
- (1) At any time after the commencement of a continuous period of institutionalization, an assessment of the amount of the community spouse monthly income allowance and/or family allowance may be requested in accordance with subdivision (c) of this section.
 - (2) Unless rebutted by a preponderance of the evidence, for purposes of determining MA eligibility the following presumptions will apply with respect to the availability of income to an institutionalized spouse.
 - (i) No income of the community spouse will be considered available to the institutionalized spouse except as provided for in this section.
 - (ii) Income solely in the name of the institutionalized spouse or the community spouse will be considered available only to that spouse.
 - (iii) Income in the names of the institutionalized spouse and the community spouse shall be considered available one-half to each spouse.
 - (iv) Income in the names of the institutionalized spouse or the community spouse, or both, and also in the name of another person or persons, will be considered available to each spouse in proportion to the spouse's interest or, if in the names of both spouses and no

share is specified, one-half of the joint interest will be considered available to each spouse.

- (v) Income from a trust will be considered available to each spouse in accordance with the provisions of the trust instrument, or, in the absence of a specific trust provision allocating income, in accordance with the provisions of subparagraphs (ii) through (iv) of this paragraph.
 - (vi) Income in which there is no instrument establishing ownership will be considered to be available one-half to each spouse.
- (3) The eligibility of an institutionalized spouse for MA for the first month or partial month of institutionalization will be determined by comparing his/her net available income, computed in accordance with section 360-4.6(a)(1) and (2) of this Part, and any income actually contributed by the community spouse, to the appropriate MA or PA income standard for one person. Thereafter, the institutionalized spouse's eligibility for MA and liability for the cost of care will be determined in accordance with this section and with sections 360-1.4(c) and 360-4.9 of this Part until the month following the month in which he/she ceases to be an institutionalized spouse.
- (4) In determining the amount of the institutionalized spouse's income to be applied toward the cost of medical care, services and supplies in accordance with section 360-4.9(b) of this Part, the following items will be deducted from the otherwise available monthly income of the institutionalized spouse in the following order:
- (i) a personal needs allowance;
 - (ii) a community spouse monthly income allowance, but only to the extent that the income is made available to or for the benefit of the community spouse;
 - (iii) a family allowance for each family member; and
 - (iv) any expenses incurred for medical care, services, supplies or remedial care for the institutionalized spouse not subject to payment under this Title or by a third party.
- (5) The community spouse will be requested to contribute 25 percent of his/her income in excess of the minimum monthly maintenance needs allowance and any family allowances toward the cost of necessary care or assistance for the institutionalized spouse. An institutionalized spouse will

not be denied MA because the community spouse refuses or fails to make such income available. However, nothing contained in this paragraph prohibits a social services district from enforcing the provisions of the Social Services Law which require financial contributions from legally responsible relatives, or recovering from the community spouse the cost of any MA provided to the institutionalized spouse.

- (6) If either spouse establishes that the community spouse needs income above the level established by the social services district as the minimum monthly maintenance needs allowance, based upon exceptional circumstances which result in significant financial distress as defined in paragraph 360-4.10(a)(10) of this section, the department must substitute an amount adequate to provide additional necessary income from the income available to the institutionalized spouse.

Section 101 of the Social Services Law provides that the spouse or parent of a recipient of Public Assistance or care, or a person liable to become in need thereof, shall, if of sufficient ability, be responsible for the support of such person.

Regulations at 18 NYCRR 360-1.4(h) defines a legally responsible relative as a person who is legally responsible for the support and care of one or more relatives. For Medical Assistance purposes, a legally responsible relative is:

- (1) a spouse of a Medical Assistance applicant or recipient; or
- (2) a parent of a child under the age of 21. A parent is not financially liable for a certified blind or certified disabled child expected to be living separately from the parental household for 30 days or more, even if the child returns to the parental household for periodic visits.

Regulations at 18 NYCRR 360-4.3(f)(1)(i) provide that, where a legally responsible relative is living with a Medical Assistance applicant/recipient, a portion of the legally responsible relative's income, if he/she is of sufficient financial ability, will be considered available to the Medical Assistance applicant/recipient. (see also 18 NYCRR section 360-4.10 regarding the obligation of a community spouse towards an institutionalized spouse). The applicant/recipient will not be denied Medical Assistance if the legally responsible relative refuses or fails to contribute toward the applicant's/recipient's medical support. However, the furnishing of Medical Assistance will create an implied contract with the legally responsible relative and the cost of any Medical Assistance provided may be recovered from such relative by the social services district pursuant to Sections 101 and 366(3)(1) of the Social Services Law.

Regulation 360-1.2 states that all departmental regulations relating to public assistance and care apply to Medical Assistance except those that are inconsistent with the laws and regulations governing the Medical Assistance program found at:

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- (a) Title 11 of Article 5 of the Social Services Law; and
- (b) Part 360 and Parts 500 through 541 of this Title.

Pursuant to Section 352.17 of Title 18 NYCRR, the amount of earned income used to determine the public assistance grant will be based on monthly earnings. To project monthly income, the social services district must average the most recent four weeks of earned income, or if there has been a change expected to last at least 30 days, use the new information regarding the amount of pay and the frequency of pay.

Section 360-2.3(c)(2) of the regulations provides that the applicant must submit with his/her application documentation of all wages received by all employed family members who are included in the application and by all legally responsible relatives living with the applicant. Acceptable forms of documentation are pay envelopes, wage stubs, or an employer's statement of wages. If the applicant's income varies, the documentation must show all wages earned in the past four weeks. If the applicant cannot supply such documentation, the social services district can accept other forms of information which it determines will verify the wages earned. All other income also must be documented and a determination made as to its availability. The social services district must record the type of information used to verify other available income.

Section 360-4.3(a)(1) of the regulations provides in part that all earned and unearned income received during the month will be considered.

Pursuant to Administrative Directive 91 ADM-33, districts must determine entitlement to the CSMIA without regard to the amount of resources owned by the community spouse, other than to determine the amount of income generated from the resources. A community spouse who refuses to make his or her resources which exceed the maximum CSRA available to the cost of care of the institutionalized spouse must be allowed the appropriate CSMIA.

The Medicaid Reference Guide at page 396 advises in relevant part that a community spouse who refuses to make his or her resources (in excess of the community spouse resource allowance) available to the cost of care for the institutionalized spouse is allowed the appropriate community spouse monthly income allowance. If the community spouse refuses to provide information concerning his/her resources, the community spouse is not entitled to a monthly income allowance, because the amount of income generated by the resources is not known.

Section 358-3.1(g)(1) of the Regulations provides:

If you are an institutionalized spouse or a community spouse, as defined in section 360-4.10 of this Title, and a determination has been made on an application for medical assistance for the institutionalized spouse, you have a right to a fair hearing to challenge the amount of the community spouse monthly income allowance.

Section 358-5.9(a) of the Regulations provides that at a fair hearing concerning the denial of an application for or the adequacy of public assistance, medical assistance, HEAP, SNAP

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benefits or services, the appellant must establish that the agency's denial of assistance or benefits was not correct or that the appellant is eligible for a greater amount of assistance or benefits.

DISCUSSION

The record established that on October 12, 2011, the Appellant entered the [REDACTED] [REDACTED] (“nursing home”), where he still resides, and that on November 17, 2011, the Appellant’s wife executed a Declaration Of The Legally Responsible Relative and spousal refusal thereby refusing to make her income and/or resources available for the cost of necessary medical care and services for Appellant. The record further establishes that on February 28, 2012, an application for Institutional Services Medical Assistance ("Medicaid") was submitted to the Agency on behalf of the Appellant, requesting a “pickup date” of November 1, 2011, and that on September 20, 2012, the Agency determined to accept the Appellant's application for Institutional Services Medical Assistance, subject to the application of Net Available Monthly Income ("NAMI") in the amount of \$4,661.55 toward the cost of his institutional care for the period commencing November 1, 2011, through December 31, 2011, and subject to the application of Net Available Monthly Income ("NAMI") in the amount of \$4,711.25 toward the cost of his institutional care for the period commencing January 1, 2012. It is noted that the Agency’s determination included an attached “Budget Calculation” detailing how the Agency calculated the Appellant’s NAMI. Finally, the record establishes that this hearing was requested to review the NAMI calculations.

At this hearing Appellant’s representative contended that the Agency had inaccurately calculated the Appellant’s NAMI as the Agency’s Budget Calculation for the Appellant failed to determine any Community Spouse Monthly Income Allowance for the Appellant’s community spouse. At this hearing, the Agency argued that it correctly calculated the Appellant’s NAMI without the CSMIA due to the spousal refusal executed by the Appellant’s spouse and her failure to make her excess resources available toward the cost of institutionalized care for the Appellant.

At this hearing, the Appellant’s Representative argued that the failure by the Agency to determine the CSMIA for the Appellant’s spouse violated the Agency’s own guidelines, as well as Administrative Directive 91 ADM 33. The Agency, pursuant to its Memorandum Of Law In Opposition To Appellant’s Memorandum, responded:

“Although Appellant’s counsel correctly cites the language of 91 ADM-33, which provides that ‘a community spouse who refuses to make his or her resources which exceed the maximum CSRA available to the institutionalized spouse, is entitled to a (Community Spouse Entitlement to Monthly Income Allowance)’, the Agency’s position in this matter is that when a community spouse refuses to make resources available, he or she is not entitled to contribution from her institutionalized spouse’s income.”

The Agency also cites Administrative Directive 89 ADM-47, which indicates that if a community spouse refuses to make her assets above the Community Spouse Resource Allowable available to pay for the care of her institutionalized spouse, “the community spouse shall not be entitled to a community spouse monthly income allowance.”

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Administrative Directive 91 ADM-33(III)(B), in pertinent part, provides for the following:

89 ADM-47 (Section V.A.2.b.) also advises social services districts that when a community spouse refuses to make his or her resources which exceed the maximum CSRA available to the institutionalized spouse, the community spouse is not entitled to a CSMIA.

However, the Division of Legal Affairs has clarified that Section 1924 of the Act does not require that the resources of a community spouse be at or below the maximum CSRA in order to be entitled to the CSMIA.

Therefore, a community spouse who refuses to make his or her resources which exceed the maximum CSRA available to the institutionalized spouse, is still entitled to a CSMIA.

91 ADM-33(IV)(B), in pertinent part, provides for the following:

A community spouse who refuses to make his or her resources which exceed the maximum CSRA available to the cost of care of the institutionalized spouse must be allowed the appropriate CSMIA effective July 1, 1991.

The New York State Medicaid Reference Guide, at page 396, provides in pertinent part:

A community spouse who refuses to make his or her resources (in excess of the community spouse resource allowance) available to the cost of care for the institutionalized spouse is allowed the appropriate community spouse monthly income allowance.

The Agency's determination not to calculate a CSMIA based on the execution of a spousal refusal cannot be sustained.

The remaining question is the proper amount of the CSMIA. Appellant's representative has contended in submissions that the financial information contained in the Medicaid application cover letter should be used, in order to calculate the CSMIA. However, even presuming the Agency's receipt of all appropriate supporting financial verification, the Agency has apparently never evaluated any of the financial documentation needed in order to calculate the CSMIA.

DECISION AND ORDER

The Agency's determination, dated September 20, 2012, that the Appellant must apply Net Available Monthly Income (NAMI) in the amount of \$4,661.55 toward the cost of his institutional care for the period of November 1, 2011, through December 31, 2011, was not correct and is reversed.

The Agency's determination, dated September 20, 2012, that the Appellant must apply Net Available Monthly Income (NAMI) in the amount of \$4,711.25 toward the cost of his institutional care for the period commencing January 1, 2012, was not correct and is reversed.

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1. The Agency is directed to investigate and redetermine the amount(s) of Appellant's and his wife's available income and resources, and the amount(s) incurred for health insurance, during the months from November 1, 2011, through the present.
2. The Agency is directed to calculate Appellant's community spouse's monthly income allowance and to recalculate Appellant's Medicaid entitlement including net available monthly income (NAMI) retroactive to November 1, 2011.
3. The Agency is further directed to notify Appellant, his representative and his wife of its new determinations including copies of its calculations.

Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant and his representative promptly in writing as to what documentation is needed. If such information is required, the Appellant must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
03/01/2013

NEW YORK STATE DEPARTMENT
OF HEALTH

By



Commissioner's Designee