COURT OF APPEALS DECISION DATED AND FILED

July 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1424

Cir. Ct. No. 2009CV411

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

EMMETT BERGER,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF HEALTH SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed.*

Before Vergeront, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Emmett Berger appeals an order affirming a decision by the Department of Health Services (DHS) denying Berger Medicaid benefits. Berger contends that DHS's interpretation of the relevant statutes and administrative rules is unreasonable. We disagree, and affirm.

Background

¶2 Berger entered a nursing home in February 2008. La Crosse County determined that Berger was eligible for medical assistance to help pay the costs of the nursing home.[1] *See* WIS. STAT. § 49.47(4)(b) and (c) (2009-10)[2]; WIS. ADMIN. CODE § DHS 103.04(2) and (4) (May 2011).[3] The county also determined that Berger qualified for spousal impoverishment protection, allowing Berger to allocate a portion of his income to his spouse in determining the amount of Berger's income that was required to be applied to pay the costs of his care. *See* WIS. STAT. § 49.455(4) and WIS. ADMIN. CODE § DHS 103.075.

¶3 In June 2008, Berger's condition improved and he transferred to a community-based residential treatment facility. The county determined that Berger no longer qualified for institutional Medicaid based on his transfer to a community setting, and thus reassessed his eligibility for a different Medicaid subprogram. *See* Medicaid Eligibility Handbook, §§ 24 to 38 (Feb. 1, 2008).[4] The county determined that Berger did not meet the income criteria for any of the Medicaid subprograms, including Family Care.[5] R-15:3. WIS. STAT. § 46.286;

[1] Medical assistance is one of three Medicaid programs in Wisconsin; Medicaid is a federal/state program. ***Estate of Hagenstein ex rel. Klemmer v. DHFS***, 2006 WI App 90, ¶3 n.3, 292 Wis. 2d 697, 715 N.W.2d 645.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] All references to the Wisconsin Administrative Code are to the May 2011 version.

[4] The Medicaid Eligibility Handbook is a policy handbook created by DHS pursuant to WIS. STAT. § 49.45(34). ***Estate of Hagenstein***, ¶5 n.5. It is designed to assist state and local agencies, such as the county in this case, in implementing the Medicaid program. ***Id.***

[5] Part of the county's determination was that, based on the reduced costs of Berger's care in the community setting as opposed to the nursing home, Berger did not have sufficient qualifying medical expenses to reduce his income below the required level.

WIS. ADMIN. CODE § DHS 10.32; *see* Medicaid Eligibility Handbook § 29. The county also determined that the spousal impoverishment protection statute no longer applied to the Bergers. Berger requested a hearing to review the county's decision. *See* WIS. STAT. § 49.45(5).

¶4 An administrative law judge (ALJ) of the Division of Hearings and Appeals issued a proposed decision finding that the spousal impoverishment protection continues to apply when a medical assistance recipient moves from institutional care to a community setting. The ALJ determined that the recipient's income is to be reduced by the amount allocated to the recipient's spouse before determining the recipient's income for purposes of assessing eligibility for a Medicaid subprogram. DHS, however, rejected the ALJ's proposed decision and issued a final decision upholding the county's determination that Berger is ineligible for Medicaid benefits or spousal impoverishment protection. Berger sought review in the circuit court, which affirmed DHS's decision. Berger appeals.

Standard of Review

¶5 On an appeal involving the decision of an administrative agency, we review the decision of the agency, not the circuit court. *See* ***Estate of Hagenstein ex rel. Klemmer v. DHFS***, 2006 WI App 90, ¶19, 292 Wis. 2d 697, 715 N.W.2d 645. When we review an agency's statutory interpretation, we accord the agency's decision one of three levels of deference: great weight, due weight, or no deference. *See* ***id.***, ¶20. Great weight deference is appropriate where: (1) the legislature has charged the agency with the duty of administering the statute; (2) the agency's interpretation is long standing; (3) the agency's interpretation is based on its specialized knowledge or expertise; and (4) the agency's

interpretation provides consistency and uniformity in applying the statute. ***Id.*** When we accord an agency decision great weight, we uphold the decision if it is reasonable and not contrary to the intent of the statute, even if another interpretation is more reasonable. ***Hillhaven Corp. v. DHFS***, 2000 WI App 20, ¶12 n.6, 232 Wis. 2d 400, 606 N.W.2d 572.

¶6 We accord due weight deference when an agency decision does not meet all of the criteria for great weight deference, or is very nearly one of first impression. ***Estate of Hagenstein***, 292 Wis. 2d 697, ¶20. When we accord due weight deference, we uphold an interpretation so long as it is reasonable, unless another interpretation is more reasonable. ***Hillhaven***, 232 Wis. 2d 400, ¶12 n.6. De novo review is appropriate where the issue is clearly one of first impression, or where an agency's position on an issue has been so inconsistent that it provides no real guidance. ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 285, 548 N.W.2d 57 (1996).

¶7 When an agency's decision is based on the interpretation of its own rules or regulations, we accord the decision controlling deference. ***Hillhaven***, 232 Wis. 2d 400, ¶12 & n.6. This level of deference is similar to great weight deference; we defer to an agency's interpretation of its own rules and regulations if that interpretation is reasonable and consistent with the meaning or purpose of the rules and regulations. ***Id.*** Thus, "an administrative agency's interpretation of its own rules or regulations is controlling unless plainly erroneous or inconsistent with the language of the rule or regulation." ***Id.***, ¶12.

¶8 The parties dispute the level of deference we owe DHS's decision in this case. Berger contends that our review is de novo, because this case presents an issue of first impression: whether the spousal impoverishment protection continues to apply when the recipient moves from a nursing home to a community

based residential facility under the Medicaid Family Care subprogram. *See* WIS. STAT. § 49.455(4); WIS. ADMIN. CODE § DHS 10.32. He further contends that de novo review is appropriate because DHS does not have any particular expertise on the precise question of how the spousal impoverishment protection applies in the context of the Family Care subprogram. *See* ***Telemark Dev., Inc. v. DOR***, 218 Wis. 2d 809, 820-21, 581 N.W.2d 585 (Ct. App. 1998) (agency's broad expertise in area may not be sufficient to accord decision great weight deference, where agency has not previously addressed precise question presented). Finally, Berger contends de novo review is appropriate because DHS's interpretation of the spousal impoverishment statute is inconsistent with its position in the Medical Eligibility Handbook. He cites the Handbook's provisions providing that the spousal impoverishment protection applies to institutionalized persons and their spouses, and that when a person transfers from one institutionalized setting to another, it is considered one continuous period of institutionalization. *See* Medical Eligibility Handbook, §§ 18.1, 18.2.3. Berger argues that the Handbook expressly states that the spousal impoverishment protection applies in his situation.

¶9 DHS argues that its statutory interpretation is entitled to great weight deference. *See* ***Estate of Hagenstein***, 292 Wis. 2d 697, ¶20; ***Hillhaven***, 232 Wis. 2d 400, ¶12 & n.6. It points out that: (1) DHS has been charged by the legislature with the duty of administering the medical assistance statutes; (2) DHS has a long history of interpreting and applying the medical assistance statutes; (3) DHS has developed an expertise in interpreting and applying the medical assistance statutes; and (4) its interpretation will provide consistency in applying the statutes and rules. DHS also argues that, regardless of the level of deference applied to its statutory interpretation, its decision in this case turned on its

interpretation of its own rules, which we must accord controlling weight deference. *See* ***Hillhaven***, 232 Wis. 2d 400, ¶12 & n.6.

¶10 We agree with DHS that its decision in this case turned on its interpretation of its own rules and regulations, thus entitling it to controlling weight deference. *See* ***id.*** Applying that standard as explained below, we conclude that DHS's interpretation was reasonable and consistent with the language of its rules and regulations, and thus we have no basis to disturb it.

DHS's Decision

¶11 Berger contends that DHS's interpretation of the spousal impoverishment statute is unreasonable.[6] *See* ***Harnischfeger v. LIRC***, 196 Wis. 2d 650, 662, 539 N.W.2d 98 (1995) (agency interpretation is unreasonable if it directly contravenes the words of the statue, is contrary to legislative intent, or without a rational basis).

¶12 Berger contends first that DHS's interpretation of the spousal impoverishment statute, WIS. STAT. § 49.455(4)(a), is unreasonable because it directly contravenes the words of the statute. Section 49.455(4)(a) provides:

> After an institutionalized spouse is determined to be eligible for medical assistance, in determining the amount of that institutionalized spouse's income that must be applied monthly to payment for costs of care in the institution, [DHS] shall deduct the following amounts … from the institutionalized spouse's income:
>
> ….

[6] Berger did not address controlling weight deference in his initial brief, and declined to file a reply brief.

> 2. The community spouse monthly income allowance ….

Berger contends that the statute is unambiguous in stating that after the institutionalized spouse qualifies for medical assistance, DHS shall deduct from the calculation of income the community spouse monthly income allowance. Thus, Berger contends, after he was found eligible for medical assistance in the nursing home, DHS was required to apply the spousal impoverishment protection, regardless of his transfer to a community-based residential facility. He argues that nothing in the statute states that a new determination of eligibility must be made based on a transfer to a different facility.

¶13 Berger also contends that DHS's interpretation of the spousal impoverishment statute is unreasonable because it clearly contravenes legislative intent. He asserts that the purpose of the Family Care program is to allow individuals to choose community-based care over institutional settings. He points out that WIS. STAT. § 46.286(1)(b)2m. provides that a person is eligible for Family Care if that person is eligible for and accepts medical assistance, and asserts that is what happened here. He cites legislative history in support of his argument that drafters of the Family Care provisions intended the spousal impoverishment protection to apply to Family Care participants.

¶14 Finally, Berger argues that DHS's interpretation is unreasonable because it has no rational basis. He contends that WIS. ADMIN. CODE § DHS 10.34(2) provides that an individual who is eligible for medical assistance is also eligible for Family Care; WIS. ADMIN. CODE § DHS 10.35 states that the spousal impoverishment provision applies to all Family Care spouses; and WIS. ADMIN. CODE § DHS 103.075 provides that to allocate income to a community spouse, the institutionalized spouse need only be eligible for medical assistance. He contends

that while WIS. ADMIN. CODE § DHS 10.32(4) states that Family Care eligibility is reassessed when a change in circumstances occurs, a move from one facility to another should not be viewed as such a change. Berger also points to the Medicaid Eligibility Handbook, §§ 18.4.6.2.1. and 18.2.3., as providing that an institutionalized spouse's move directly from one institution to another does not require a reassessment of eligibility for the spousal impoverishment protection.

¶15 DHS responds that Berger's interpretation is based on an isolated reading of WIS. STAT. § 49.455(4)(a), rather than viewing it in the context of the medical assistance statutes as a whole, and with corresponding administrative rules. It points to its rules requiring it to reassess a participant's eligibility for medical assistance at least once a year, and when any change occurs that might affect the recipient's eligibility. *See* WIS. ADMIN. CODE §§ DHS 10.32(4) and 102.04(3). It also points to the Medicaid Eligibility Handbook, § 28.8.1., which provides that a county is to complete an eligibility worksheet when an institutionalized person is discharged to a community-based program.

¶16 DHS then points to the language of WIS. STAT. § 49.455(4)(a), which states that the spousal impoverishment protection provision applies after the institutionalized spouse is determined eligible for medical assistance. Here, DHS asserts, its rules provided that it was to reassess Berger's eligibility for medical assistance upon his transfer to the community-based residential facility and, having determined that Berger was not eligible for any subprogram, the statute, by its terms, did not apply. It argues that its interpretation is not contrary to legislative intent of allowing individuals to choose community care over nursing home care, pointing out that the spousal impoverishment protection would apply to Berger in the community setting if he qualified for Family Care. It also contends that its interpretation has a rational basis, as it followed its rules in

reassessing Berger's eligibility and determining that, based on Berger's income level and the reduced costs of the community-based residential facility, Berger did not qualify for any Medicaid subprogram.

¶17 We observe that a threshold issue as to whether DHS properly determined that Berger is not entitled to the spousal impoverishment protection is whether DHS properly interpreted its rules as requiring it to reassess Berger's eligibility for medical assistance upon his transfer to a different facility. That is, all of Berger's arguments are premised on his assertion that he remained eligible for medical assistance when he transferred from the nursing home to the community based residential facility, and that DHS erred in reassessing his eligibility at that point. We conclude that DHS's interpretation of its rules as requiring it to reassess a recipient's eligibility for medical assistance upon a move from a nursing home to a community-based residential facility is a reasonable interpretation of its rules.

¶18 WISCONSIN ADMIN. CODE § DHS 102.04(3) provides:

> A recipient's eligibility shall be redetermined:
>
> (a) When information previously obtained by the agency concerning anticipated changes in the individual's situation indicates the need for redetermination;
>
> (b) Promptly after a report is obtained which indicates a change in the individual's circumstances that may affect eligibility;
>
> ….
>
> (e) At any time the agency has a reasonable basis for believing that a recipient is no longer eligible for [medical assistance].

We conclude that DHS's interpretation of this rule as authorizing it to reassess Berger's eligibility for medical assistance upon his transfer from a nursing home

to a community-based residential facility is not plainly erroneous. A change in facility, with lower medical costs, may provide a reasonable basis for believing the recipient no longer qualifies for medical assistance. *See* WIS. STAT. § 49.47(4)(b) and (c); and WIS. ADMIN. CODE § DHS 103.04(2) and (4).

¶19 DHS also points out that once Berger moved into a residential facility, which does not qualify as a "medical institution," he no longer qualified for institutional Medicaid, and thus the county assessed whether he was eligible for any other Medicaid subprogram.[7] *See* Medicaid Eligibility Handbook, § 27.1.1. (defining "medical institution" for purposes of Medicaid eligibility). As DHS points out, Berger does not challenge the county's determination that, after his transfer to the community-based residential facility and absent the community spouse allocation, his income was above the threshold to qualify for any other Medicaid subprogram. Because we have no basis to disturb DHS's interpretation of its rules and regulations as allowing it to reassess Berger's eligibility for medical assistance based on his transfer to a different facility, and Berger has not set forth an argument that he qualified for medical assistance upon reassessment, we affirm.

By the Court.—Order affirmed.

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[7] In his statement of facts, Berger asserts that the county should have assessed his eligibility for Family Care under "Group A" rather than "Group C" because he remained eligible for institutional Medicaid upon his transfer from the nursing home to the community-based treatment facility. Berger does not provide any record or legal citations to support this assertion, does not explain why he believes he remained eligible for institutional Medicaid after the transfer, and does not address this issue in his argument section. DHS, in its statement of facts, asserts that while Berger remained an "institutionalized person" in the community-based residential facility, the residential facility is not a "medical institution" for purposes of institutional Medicaid eligibility. *See* Medicaid Eligibility Handbook § 27.1.1. Berger has not filed a reply brief addressing this issue.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.