COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3330

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CARYL J. KEIP, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WALTER F. KEIP (DECEASED),

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Dykman, Roggensack and Lundsten, JJ.

¶1 LUNDSTEN, J. Caryl Keip, individually and as the special administrator of her deceased husband's estate, appeals an order of the circuit court denying Keip's motion for costs and fees incurred during certain litigation

culminating in a decision by this court, finding that her individual retirement account (IRA) should not have been included by the Wisconsin Department of Health and Family Services as an asset in determining her husband's eligibility for medical assistance. The circuit court denied the request for costs and fees because it concluded that the Department's position in the litigation met the "substantially justified" standard in the Wisconsin Equal Access to Justice Act.[1] For the reasons that follow, we affirm.

I. Background

¶2 Because the underlying facts in this case were set forth in ***Keip v. DHFS***, 2000 WI App 13, 232 Wis. 2d 380, 606 N.W.2d 543, we set forth here only those facts relevant to Keip's motion for costs and fees.

¶3 After Caryl Keip retired from employment in 1996, she rolled her employee pension into an IRA. Keip's husband, Walter, was admitted to Waunakee Manor, a Medicare- and Medicaid-certified nursing home, in April of 1997. He remained there until December of 1997, when he passed away.

¶4 Keip began the medical assistance application process on behalf of her husband in June of 1997, six months before his death. After learning that the Department intended to count her IRA as an asset in determining her husband's eligibility, thus rendering him ineligible for medical assistance, Keip spent down half of her IRA so that her husband would become eligible. Keip's husband qualified for medical assistance in August of 1997, but the Department denied him benefits for the period prior to that month.

[1] WIS. STAT. § 814.245 (1997-98).

¶5 The Keips requested a "fair hearing" before the Division of Hearings and Appeals, challenging the denial of medical assistance prior to August 1997. *See* WIS. STAT. § 49.45(5) (1995-96).[2] Although the hearing examiner concluded that the community spouse's IRA should not be included as an asset in determining the institutionalized spouse's eligibility for medical assistance, the Department concluded in its final decision that, pursuant to the "spousal impoverishment provisions" (found in what has been termed the Medicare Catastrophic Coverage Act), the IRA should have been included.[3]

¶6 Keip appealed that decision to the circuit court, which upheld the administrative determination. Keip appealed the circuit court's decision and prevailed before this court. *See* ***Keip***, 2000 WI App 13 at ¶22.

¶7 Following remand, Keip moved the circuit court for costs and fees pursuant to the Wisconsin Equal Access to Justice Act. The circuit court denied that motion, concluding that the Department was "substantially justified" in asserting that a community spouse's IRA is an includable asset in determining the institutionalized spouse's eligibility for medical assistance. Keip now appeals that order.

II. Discussion

¶8 The sole issue on appeal is whether the circuit court properly determined that Keip was not entitled to fees and costs under the Wisconsin Equal

[2] All further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] The relevant provisions of the Medicare Catastrophic Coverage Act, as amended, are found at 42 U.S.C. § 1396r-5 (1994).

Access to Justice Act because the Department, though ultimately unsuccessful, pursued a theory that was "substantially justified."

Standard of Review and Applicable Principles of Law

¶9 The Wisconsin Equal Access to Justice Act provides, in relevant part, that upon a motion for costs the "court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position." WIS. STAT. § 814.245(3).[4] Subsection (1) of § 814.245 directs courts to look to federal case law interpreting substantially similar provisions under the federal Equal Access to Justice Act[5] when interpreting the Wisconsin Act.

¶10 "Substantially justified" means having a reasonable basis in both law and fact. WIS. STAT. § 814.245(2)(e); ***Sheely v. DHSS***, 150 Wis. 2d 320, 337, 442 N.W.2d 1 (1989). In order to satisfy its burden of showing that its position is "substantially justified," the government must demonstrate: "'(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.'" ***Sheely***, 150 Wis. 2d at 337 (quoting ***Phil Smidt & Son,***

[4] WISCONSIN STAT. § 814.245(3) provides in full:

> **(3)** Except as provided in s. 814.25, if an individual, a small nonprofit corporation or a small business is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 227.485(6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

[5] *See* 5 U.S.C. § 504 (1994).

Inc. v. NLRB*,* 810 F.2d 638, 642 (7th Cir. 1987)). "Substantially justified" does not mean justified to a high degree, but rather "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." ***Pierce v. Underwood***, 487 U.S. 552, 565 (1988). Losing a case does not raise the presumption that the agency's position was not substantially justified. Nor does advancing a "'novel but credible extension or interpretation of the law.'" ***Sheely***, 150 Wis. 2d at 338.

¶11 The parties do not dispute the facts. Furthermore, if there was a reasonable basis in law for the Department's position, then there necessarily was a reasonable connection between the facts and the theory advanced by the Department. Accordingly, the only part of the three-prong "substantially justified" test at issue here is the second prong: whether there was "a reasonable basis in law for the theory propounded." *See* ***id.*** at 337.

¶12 Keip acknowledges that the substantially justified analysis requires revisiting, but not relitigating, the merits of the underlying issue. Nevertheless, she uses much of her brief to reargue in detail the merits of her position and the weaknesses of the Department's specific legal analysis. Keip asserts that because the Department's specific legal analysis during the merits litigation was flawed, the Department could not have been "substantially justified."[6]

[6] This dispute matters because the Department's specific legal argument below was that the federal statutory scheme unambiguously supported inclusion of Keip's IRA when determining her husband's eligibility. This court in ***Keip*** rejected that argument, but found the Department's broader proposition (that the statutory scheme supported inclusion of the IRA) to be a reasonable reading of the statutes.

¶13 The United States Supreme Court's decision in ***Pierce*** convinces us that the legislature never intended that reviewing courts embark on a detailed analysis of the merits of each legal argument, proffered by a party during the underlying litigation, when the reviewing court determines the propriety of a trial court's decision granting or denying a fee request. In determining that the standard of review in these actions should be deferential rather than *de novo*, the Court noted that even where full knowledge of the factual setting could be acquired by the appellate court, that acquisition would

> often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

Pierce, 487 U.S. at 560. The Court went on to state that even if there is a merits appeal that occurs simultaneously with (or goes to the same panel that entertains) the appeal from the attorney fee award, the latter legal question is not precisely the same as that raised during the merits litigation. The question with respect to an award of costs is "not what the law now is, but what the Government was substantially justified in believing it to have been." ***Id.*** at 560-61.

¶14 We also observe that prong two of the three-prong substantially justified test is phrased as follows: whether there is a "reasonable basis in law for the theory propounded." ***Stern v. DHFS,*** 212 Wis. 2d 393, 398, 569 N.W.2d 79 (Ct. App. 1997) (citations omitted). This phrasing supports our conclusion that the question to be addressed here is whether there is a "reasonable basis in law" for the Department's theory that, pursuant to the "spousal impoverishment provisions" of the Medicare Catastrophic Coverage Act, the community spouse's IRA should be included as an asset in determining the institutionalized spouse's eligibility for

medical assistance, not whether the Department's specific legal arguments supporting its theory were substantially justified. This approach properly focuses on the underlying merits of the agency's position, rather than on the skill or strategy of the lawyer representing the agency.[7]

¶15 We turn now to the standard of review. Citing the ***Sheely*** decision, Keip asserts that this court should review the circuit court's decision *de novo*. The only specific portion of ***Sheely*** that Keip directs our attention to in this regard addresses a question of statutory interpretation. *See* ***Sheely***, 150 Wis. 2d at 328-29. Questions of statutory interpretation are reviewed *de novo*. However, we apply the erroneous exercise of discretion standard when reviewing a circuit court's "substantially justified" determination:

> The United States Supreme Court has held that under the [federal Equal Access to Justice Act] an appellate court must review a trial court's determination on whether a government agency's position was "substantially justified" as a question of an abuse of discretion. ***Pierce v. Underwood***, 108 S. Ct. 2541, 2547-2549 (1988).

Id. at 337. Accordingly, we will review the circuit court's decision for an erroneous exercise of discretion.

Application of the Standards to the Facts in this Case

¶16 Keip complains that the circuit court erroneously based its decision on the fact that the Department's position was supported by a single published

[7] We note that if Keip were held to the same standard she seeks to impose, her arguments below would be found wanting. As will be discussed later in this opinion, just as this court rejected the Department's argument that the statutes at issue unambiguously require inclusion of the IRA, the court also rejected Keip's argument that the statutes unambiguously require exclusion. *See* ***Keip v. DHFS***, 2000 WI App 13, ¶11, 232 Wis. 2d 380, 606 N.W.2d 543.

decision from a different jurisdiction. The case the Department relied on is ***Mistrick v. Division of Medical Assistance and Health Services***, 712 A.2d 188 (N.J. 1998). We agree with Keip that the Department's reliance on ***Mistrick*** does not, by itself, establish that the Department had a reasonable basis in law to support its position. *See* ***Pierce***, 487 U.S. at 563-65. However, the ***Mistrick*** decision and the legal reasoning contained in that decision support the circuit court's conclusion that the Department's position was substantially justified because the Department advanced the same legal reasoning as employed in ***Mistrick***.

¶17 Keip next argues that the Department's inclusion of her IRA in determining her husband's medical assistance eligibility is inconsistent with its own Medical Assistance Handbook and inconsistent with another Department decision on a related topic. The Department does not disagree that these were inconsistencies, but asserts that such inconsistencies are simply factors to consider. We agree. *See, e.g.,* ***Stern***, 212 Wis. 2d at 398-400 (that the Department's position was contrary to its handbook was one of many factors considered in deciding whether its position was substantially justified); ***Bracegirdle v. Dep't of Regulation & Licensing***, 159 Wis. 2d 402, 426-27, 464 N.W.2d 111 (Ct. App. 1990) (Department of Regulation and Licensing's change in position was one factor of many we considered in concluding the Department's position was not substantially justified). Accordingly, we will assume, without deciding, that these inconsistencies weigh against the Department, and we consider them along with other factors.

¶18 We turn our attention now to the theories advanced by the parties during the merits litigation. Both parties relied upon federal statutes relating to medical assistance benefits. Title XIX of the Social Security Act[8] was created to provide medical assistance to persons whose income is insufficient to meet their medical needs. ***Atkins v. Rivera***, 477 U.S. 154, 156 (1986). This is an optional cooperative program in which the federal government shares the costs for medical assistance with states that elect to participate. ***Id.*** at 156-57. Participating states may choose to provide medical benefits to the "medically needy." "Medically needy" refers to persons who meet the nonfinancial eligibility requirements for cash assistance under Aid to Families with Dependent Children[9] or Supplemental Security Income for the Aged, Blind, and Disabled (SSI),[10] but whose income or resources exceed the financial eligibility standards of those programs. ***Id.*** at 157.

¶19 States providing assistance to the medically needy must prescribe eligibility standards that are "reasonable" and "comparable for all groups." 42 U.S.C. § 1396a(a)(17) (1994). Every state plan must include a single standard to be employed in determining income and resource eligibility "which shall be no more restrictive than the methodology which would be employed under the [SSI] program." 42 U.S.C. § 1396a(a)(10)(C)(i); *see also* 42 U.S.C. § 1396a(r)(2)(A) (providing that the methodology for determining eligibility for categorically needy applicants may be less restrictive, but no more restrictive, than the methodology used to determine eligibility for SSI applicants). A methodology is "no more

[8] 42 U.S.C. § 1396 *et seq.* (1994).

[9] 42 U.S.C. § 601 *et seq.* (1994).

[10] 42 U.S.C. § 1381 *et seq.* (1994).

restrictive" if, in using the methodology, "additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance." 42 U.S.C. § 1396a(r)(2)(B).

¶20 During the merits litigation, Keip cited the SSI eligibility criteria and the "no more restrictive" language found in 42 U.S.C. § 1396a(a)(10)(C)(i) to argue that her IRA was not an includable asset in determining her husband's eligibility for medical assistance. More specifically, 20 C.F.R. § 416.1202(a) (1998), an SSI regulation, provides that a pension fund owned by a community spouse is not included as a resource in determining the institutionalized spouse's eligibility for SSI. Pension funds are defined to include funds held in an IRA. 20 C.F.R. § 416.1202(a).

¶21 The Department relied on the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act. The Act was designed to prevent the impoverishment of the community spouse when the institutionalized spouse enters a nursing home by allowing the community spouse to retain some assets and income. 42 U.S.C. § 1396r-5(c) and (d) (1994). Prior to the passage of the Act, when a married person was institutionalized, all of the couple's assets were regarded as available, often requiring the community spouse to "spend down" assets in order for the institutionalized spouse to qualify for medical assistance. Under the spousal impoverishment provisions of the Act, the community spouse is now allowed to retain a "community spouse resource allowance." 42 U.S.C. § 1396r-5(f)(1) and (2). Only the resources of the couple exceeding the community spouse resource allowance are considered in determining eligibility. 42 U.S.C. § 1396r-5(c)(2)(B).

¶22 The Act provides that the spousal impoverishment provisions supersede any other provision in that subchapter (including §§ 1396a(a)(17) and 1396a(f)) which is inconsistent with them. 42 U.S.C. § 1396r-5(a)(1). The Act further states that the spousal impoverishment provisions do not apply to the "methodology and standards for determining and evaluating income and resources" except as the section "specifically provides." 42 U.S.C. § 1396r-5(a)(3). Under that section of the Act relating to the rules for the treatment of "resources," the Act provides that "[i]n determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter," "all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse." 42 U.S.C. § 1396r-5(c)(2)(A).

¶23 "Resources" is defined by the Act as not including those resources excluded under subsection (a) or (d) of § 1382b of that title. 42 U.S.C. § 1396r-5(c)(5)(A). Neither subsection (a) nor (d) of § 1382b lists pensions or IRAs as an excluded asset. *See* 42 U.S.C. § 1382b(a), (d) (1994).

¶24 Accordingly, the Department argued that the spousal impoverishment provisions, by their very terms, supersede the SSI eligibility criteria cited by Keip. More specifically, because the Act states that all resources held by either the community spouse or the institutionalized spouse are to be considered for eligibility determinations, and because the term resource was not defined to exclude IRAs, Keip's IRA was an includable asset. This court has previously determined that this is a reasonable interpretation of the statutes at issue. "Reasonably well-informed persons could conclude from the cited provisions that the exclusions referred to in the spousal impoverishment law

replace any and all asset exclusions specified under SSI eligibility rules and regulations." ***Keip***, 2000 WI App 13 at ¶11.[11]

¶25 We have considered the Department's statutory argument and its reliance on the New Jersey Supreme Court's decision in ***Mistrick***. We also assume for argument sake that the Department took a position inconsistent with its own handbook and with a Department decision on a related topic. Finally, we consider that the federal statutes with respect to medical assistance and the spousal impoverishment provisions are lengthy, highly complex, and often convoluted. In light of all these factors, we cannot conclude that the circuit court erroneously exercised its discretion in deciding that the Department's theory was substantially justified.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[11] Keip argues on appeal that we concluded in our 1999 ***Keip*** decision that the Department's position was "not reasonable." This misconstrues the language in our decision. After concluding that both parties urged a "reasonable" interpretation of the statutes at issue, but that Keip's interpretation was "more reasonable," we stated only that an inference the Department asked this court to draw from certain statutory cross-references was not reasonable. We did not conclude that the Department's entire statutory construction argument was not reasonable. *See* ***Keip***, 2000 WI App 13 at ¶¶11, 15, 17.