

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1411

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**ESTATE OF RAYMOND TOMCZYK,
ROSEMARY WALKER, ADMINISTRATOR,**

PETITIONER-RESPONDENT,

V.

**WISCONSIN DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Wood County:
EDWARD F. ZAPPEN, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. The Wisconsin Department of Health and Family Services (DHFS) appeals from an order awarding costs and attorney fees to the Estate of Raymond Tomczyk following the latter's successful petition for review of a DHFS decision which had denied Tomczyk nursing home benefits under the

spousal impoverishment provisions of the Wisconsin Medical Assistance Program. DHFS does not challenge the circuit court's decision on the merits, or Tomczyk's entitlement to costs and fees, but claims that the amount of the award was improperly calculated using a cost of living adjustment from the year 1981. We agree, based upon our recent decision in *Stern v. DHFS*, No. 98-1493, *slip op.* (Oct. 21, 1998, ordered published Nov. 11, 1998) (*Stern II*). In light of *Stern II*, we reverse and remand for recalculation of the cost of living adjustment from the year 1985.

The circuit court reversed the hearing examiner's denial of benefits on October 22, 1997, finding that DHFS's interpretation and application of the applicable MA provisions to Tomczyk were clearly contrary to the plain meaning of the rules and without a rational basis. Tomczyk's estate then moved to recover the costs incurred during the litigation pursuant to § 814.245(3), STATS. That section, which is part of the Wisconsin Equal Access to Justice Act (WEAJA), provides:

If an individual ... is the prevailing party ... 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.

A primary purpose of the WEAJA "is to encourage challenges to agency action and to provide a disincentive to agencies to prolong the litigation process." *Stern v. DHFS*, 212 Wis.2d 393, 404, 569 N.W.2d 79, 84 (Ct. App. 1997) (*Stern I*) (internal citation omitted). To further that objective, attorney fees are recoverable under the statute at the prevailing market rate, except that:

Attorney or agent fees may not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.

Section 814.245(5)(a)(2), STATS.

Tomczyk's estate sought \$2,515.03 in attorney fees based upon 18.91 hours of work by Attorney Daniel Hayes of the Elder Law Center at the rate of \$133 per hour. The rate of \$133 per hour was calculated based on the increased cost of living since 1981. DHFS challenged the use of 1981 as the starting date for calculating the cost of living increase, arguing that the WEAJA did not even take effect until November 20, 1985. *See* 1985 Wis. Act 52. The circuit court approved the fee request based upon language found in *Stern I*, and DHFS appeals.

The issue before us in *Stern I* was whether or not the termination of Stern's benefits had been "substantially justified," so as to preclude an award of attorney fees altogether. We decided it was not. In the context of remanding for the trial court to award costs, we noted that courts applying the WEAJA "may use cost of living increases since 1981" just as courts applying the federal EAJA would do, because "awarding higher, fully compensatory fees would better serve [the] statutory purposes [of encouraging challenges to agency action] than lesser awards." *Stern I*, 212 Wis.2d at 402-404, 569 N.W.2d at 84. This was the statement relied upon by the trial court and respondents.

After the trial court issued its order in this case, however, we heard a second appeal in the *Stern* litigation, and for the first time squarely addressed the question of the proper date from which to compute the cost of living adjustment. In *Stern II*, we expressly determined that cost of living increases under the

WEAJA should be calculated from the date of its own enactment, not that of the federal EAJA. *Stern II*, slip op. at 5. We are satisfied that *Stern II* controls the outcome of this appeal. The trial court must therefore recalculate the cost of living increase from November of 1985, and we remand to allow it to do so.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.