



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/170877

PRELIMINARY RECITALS

Pursuant to a petition filed December 17, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Barron County Department of Human Services in regard to Medical Assistance, a hearing was held on January 13, 2016, at Barron, Wisconsin.

The issue for determination is whether the county agency correctly determined how long the petitioner is ineligible for medical assistance because of a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]
Barron County Department of Human Services
Courthouse Room 338
330 E Lasalle Ave
Barron, WI 54812

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Barron County.

2. The petitioner applied for medical assistance on November 5, 2015, and requested eligibility retroactive to September 1, 2015. She entered the nursing home on June 9, 2015.
3. On July 31, 2011, the petitioner sold her homestead property to her grandson for \$40,000 and retained a life estate. When sold, the property's assessed value was \$137,200 and the petitioner was 88 years old. She received \$37,504.44 after closing costs of \$2,495.56.
4. The petitioner divided the proceeds from the sale of her house between her two daughters, giving one \$20,000 and the other \$17,504.44.
5. The petitioner gave her daughters another \$2,720.50 in 2011, Of this \$2,500 was used to pay the VA for care provided to the petitioner.
6. The petitioner paid her daughters a total of \$6,625 in 2012. She also bought a van for her granddaughter for \$500 that year.
7. The petitioner paid her daughters a total of \$7,150 in 2013. She also contributed \$5,000 for her grandson's chemotherapy that year.
8. The petitioner paid her daughters a total of \$7,860 in 2014.
9. The petitioner paid her daughters a total of \$3,600 in 2015. On June 13, 2015, she paid \$1,000 so one of her grandsons could repair his car's head gasket.
10. The petitioner did not have personal services contracts in place with any of her relatives before she paid them.
11. The petitioner sold the her house and property to her grandson because he agreed to keep it whole as a nature preserve and not divide it or allow it to be used as a sand mine for fracking. That grandson's late father had done much of the work to preserve the property.

DISCUSSION

A person cannot receive medical assistance if her assets exceed \$2,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat. §§ 49.46(1) and 49.47(4). She cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf "disposes of resources at less than fair market value" within the "look back date." The look back date is five years before the latter of when she was considered institutionalized and when she applied for medical assistance. Wis. Stat. § 49.453(1)(f); *Medicaid Eligibility Handbook*, § 17.5.3. If someone improperly divests her assets, she is ineligible for institutional medical assistance for the number of days obtained by dividing the amount given away by the statewide average daily cost to a private pay patient in a nursing home when she applied; this is currently \$252.95. Wis. Admin. Code, § DHS 103.065(5)(b). *Medicaid Eligibility Handbook*, § 17.5.2.

The petitioner is a 93-year-old woman who entered a nursing home on June 9, 2015. She applied for medical assistance on November 5, 2015, and requested eligibility retroactive to September 1, 2015. The county agency denied her application because it contends that she has made a series of divestments since 2011 that total \$124,321.39.

The largest alleged divestment involves the sale of her house and other property to her grandson in 2011 for \$40,000 plus a life estate in the property. The house was worth \$137,200 at the time. The value of the life estate is the property's fair market value multiplied by the figure found in the table at *Medicaid Eligibility Handbook*, § 39.1. Multiplying the property's \$137,200 fair market value by .30859, the figure for someone 88 years old, the petitioner's age when she sold the property, gives \$42,338.59. The total value the petitioner received from the house was this amount plus the \$40,000 she sold it for, or \$82,338.59. The agency determined that the sale of the house led to a \$54,861.45 divestment; it arrived at this figure by subtracting the \$82,338.59 value she received from the sale from the \$137,200 value of the house.

After selling the house, she gave the \$37,504.44 she received after closing costs to her two daughters. Later that year, she gave her daughters \$2,720.50; they used \$2,500 of this to pay her VA bill. The agency considers \$37,504.44 and the \$220.50 they received after paying the VA to be divestments. From 2012 through 2015, she gave her daughters another \$25,235, which the agency also considers a divestment. The remaining portions of the alleged divestment are \$500 she gave her granddaughter in 2012 to buy a used van, \$5,000 she contributed in 2013 toward one of her grandson's chemotherapy, and \$1,000 she gave another grandson on June 13, 2015, to repair his car. The petitioner contends that making her ineligible because of a divestment would impose a hardship on her.

A divestment does not bar eligibility if the petitioner proves one of the following by the preponderance of the credible evidence:

- a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;
- b. The resource was transferred exclusively for some purpose other than to become eligible for MA;
- c. The ownership of the divested property was returned to the individual who originally disposed of it; or
- d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, "undue hardship" means that a serious impairment to the institutionalized individual's immediate health status exists.

Wis. Admin. Code, § DHS 103.065(4)(d)2.

Those testifying on the petitioner's behalf did not show that a divestment finding would seriously and immediately impair her health. She undoubtedly requires nursing home care, but nursing homes cannot immediately evict those who are behind on payments. And even if she did not stay in her current nursing home, she will be provided care that meets her needs. Allowing a hardship under these circumstances would undermine the entire principle behind making those who divest assets ineligible because there are few situations in which giving assets away does not affect one's ability to pay for nursing home care. If hardship is allowed in this situation, one could merely give her assets to her relatives, the relatives would then dissipate them, and the state is left paying for the person's care. This is exactly the situation that the divestment rules are designed to prevent. Because the petitioner has not shown that denying a hardship waiver will seriously and immediately impair her health, she is ineligible for a hardship waiver. To obtain a waiver from the divestment sanctions, she must qualify under one of the other exemptions.

The evidence established that her mind is sound but that she has had the physical problems that come with age. Although legally blind because of macular degeneration since 1996, she had continued to live alone. In June 2011, at age 88, she fell and broke her hip. She spent three months in a care center and then returned home. Her property was more than just a place for her to live. Her son had dug out four large ponds with a grant from the [REDACTED] to create a wildlife sanctuary. She planned to pass the property on to him, but he died from lymphoma. To ensure that the property remained a sanctuary and was not divided or leased out to a frac sand operation, she sold it to her grandson for \$1,000 an acre, or \$40,000, assuming he would maintain it. The petitioner's evidence is convincing, and I find that she sold this property for less than she could get on the open market because after all the work her family put into it she wished to ensure that it was maintained in its present state rather than because the sale at a reduced cost would eventually allow her to become eligible for medical assistance. Therefore, the \$54,861.45 that the agency contends was divested in the sale of her house does not affect her eligibility.

The petitioner contends that money she gave her daughters was for care they provided to her so that she could remain in her home. I do not doubt that a legally blind woman in her late 80s and early 90s who has had a broken hip requires care. Nor do I doubt that her daughters provided care to her. They struck me as compassionate daughters whose primary interest was in their mother's welfare rather than in grabbing her money before the state did. But the medical assistance program has specific rules concerning situations where a relative seeks payment for services to a potential medical assistance recipient. If the total payment for services to relatives exceeds 10% of the maximum community spouse asset share, "the institutionalized person must have a written, notarized agreement with the relative. The agreement must:

- a. Specify the service and the amount to be paid, **and**
- b. Exist at the time the service is provided."

Medicaid Eligibility Handbook, § 17.8.

The highest possible community spouse asset share is \$119,220. *Medicaid Eligibility Handbook*, § 18.4.3. This policy affects the petitioner because she gave her daughters more than \$11,922, which is 10% of the maximum community spouse asset share, for their services. Because there was no notarized agreement in place when the services were provided, the \$62,959.94 their mother gave them is a divestment.

The petitioner received nothing in return for the \$1,500 that she gave two of her grandchildren to buy a van and repair a car. I find no exception for this money, so it too is a divestment.

The remaining money she gave away was the \$5,000 she gave to her grandchild in 2013 for chemotherapy. While she did not receive anything in return for this, I find that it does not affect her eligibility because it was not given away to become eligible for medical assistance. Indeed it hard to imagine any grandparent who had recently lost a child to cancer and who had some extra money not doing what she could to help a grandchild fight cancer. At that point, although she had health problems, she clearly intended to remain in her home as long as possible. When she did enter the nursing home two years later, it because she suffered a stroke rather than because of the normal gradual degeneration associated with aging. In 2013, she was 90 years old and no doubt realized that at some point she would not be able to care for herself, but I find no evidence that her future eligibility for institutional medical assistance played any role in helping her grandson pay for his cancer treatment.

Based upon this, I find that the petitioner's divestment must be reduced by \$59,861.45 to \$64,459.94. Dividing this by the \$252.95 daily nursing home cost means that the agency must reduce her period of ineligibility to 254 days.

CONCLUSIONS OF LAW

1. The petitioner did not divest her assets when she sold her house or gave money to her grandson who required chemotherapy because she did not make those transactions to become eligible for medical assistance.
2. The money the petitioner gave to her daughters for her care is a divestment because she did not have a notarized agreement in place when she gave them the money
3. The money the petitioner gave her grandchildren for automobile expenses is a divestment because she did not receive anything of value in return for the money.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it reduce the number of days that the petitioner is ineligible for institutional medical assistance to 254. The period of ineligibility shall begin on October 1, 2015, as the agency previously determined.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 15th day of February, 2016

\sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 15, 2016.

Barron County Department of Human Services
Division of Health Care Access and Accountability