



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MLL/145339

PRELIMINARY RECITALS

Pursuant to a petition filed November 16, 2012, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Wisconsin Department of Health Services – Division of Health Care Access and Accountability, by the Estate & Casualty Recovery Section, in regards to the denial of hardship waivers under Medical Assistance, a telephone hearing was held on December 19, 2012, at Madison, Wisconsin. At the request of the Department, the record was held open for 15 days for the submission of additional information.

The issue for determination is whether the Department correctly denied requests by the petitioners two adult daughters for hardship waivers from estate recovery against the estate of the petitioner.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Represented By:

[REDACTED]

Respondent:

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

By: Kathleen Emmerton, Chief
Estate & Casualty Recovery Section
Division of Health Care Access And Accountability
1 West Wilson Street
P.O. Box 309
Madison, WI 53701-0309

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren, Assistant Administrator
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED] is a resident of Milwaukee County. She was living at home and receiving I Respect, I Self-Direct (IRIS) MA Waivers services during the period of at least January 1, 2011, through March 31, 2012, totaling \$50,427.75 in costs. See, Exhibit #1, attachment A, at p. 4. She had also been eligible for Elderly Blind and Disabled MA during several preceding years.
2. On March 31, 2012, the petitioner died.
3. On July 20, 2012, the Department filed a claim against the estate of the petitioner in Milwaukee County Probate Case No. 2-12PR000801, asserting a claim for payment from the estate of the amount of \$50,427.75. The potential heirs in the probate estate were copied on the claim.
4. On August 1, 2012, the petitioner's two adult daughters, [REDACTED] [REDACTED] and [REDACTED] [REDACTED] initiated requests for a hardship waiver from the Department seeking to avoid the recovery against the petitioner's estate due to asserted hardship.
5. On August 17, 2012, and again on September 21, 2012, the Department requested additional information from the two adult children seeking more information about the use of the petitioner's homestead for business purposes by the two adult children, including federal tax returns for 2010 and 2011. The adult children provided the information requested asserting that the petitioner's primary asset, her former homestead, was necessary for them use as a part of their business.
6. On October 21, 2012, the Department issued letter Notices to the petitioner's estate and the two adult children informing them that the Department had denied the hardship waivers sought because a review of the request and the tax returns revealed that the decedent's home is not used as a part of any business in any ongoing manner by the two adult children, or from which they derive their livelihood.
7. On November 16, 2012, [REDACTED] and [REDACTED] filed an appeal on the behalf of their deceased mother's estate seeking a review from the Division of Hearings & Appeals of the denial of the hardship waivers they each sought.
8. At all times between January 1, 2011, and March 31, 2012, [REDACTED] and [REDACTED] provide cares under contract to the IRIS Program for Ms. [REDACTED] as in-home caregivers, and they were paid for the services hours for which they claimed payment.
9. At no time since March 31, 2012, have [REDACTED] or [REDACTED] provided paid cares to any other individual in the petitioner's residence or outside of that residence, or using the petitioner's former residence as a base of business operations to care for any other individual outside of that home.

DISCUSSION

Wisconsin law requires the department to file a claim against the estate of those who received medical assistance. Wis. Stat. § 49.496(3). However, the Department cannot obtain this lien if the decedent has a disabled child Wis. Stat. § 49.496(3)(c)1. If the Department cannot obtain a lien because of a child's disability, the probate court must assign it a lien against any home that is part of the estate. Wis. Stat. § 49.496(3)(c)1. If the estate closes through a sworn statement under Wis. Stat. § 865.16, rather than through regular probate proceedings, the personal representative must agree to such a lien. Wis. Stat. § 49.496(3)(c)2. The Department may not enforce this lien as long as the disabled child survives. Wis. Stat. § 49.496(3)(d)2.

In addition to the rules discussed above, the Department may waive a lien against the estate if it would cause undue hardship to an heir or beneficiary. Wis. Stat. § 49.496(6m). Under Wis. Admin. Code, § DHS 108.02(12), it must waive a lien against the estate if the heir or beneficiary (1) would become eligible for public benefits without the waiver; (2) required the decedent's real property to keep from losing a business that used the property; or (3) is receiving general relief, relief to needy Indian persons, or veteran's benefits based upon need. The Department must notify the person handling the estate of the availability of the hardship waiver and that person in turn must notify potential heirs who would qualify for the waiver. Wis. Admin. Code, § DHS 108.02(12)(c)2. A person seeking a hardship waiver must mail her claim to the Department within 45 days. That claim must (1) state her relationship to the decedent and document that relationship and (2) indicate for which of the three categories she is seeking the waiver.

The Department notified Gregory Brown, the attorney handling the estate of [REDACTED] of the right to file a hardship claim. Thereafter, Ms. [REDACTED] and Ms. [REDACTED] file such hardship claims asserting that the real property was necessary to keep from losing their business, or part of their business.

The petitioner, by her adult daughters, established only that they formerly were IRIS Program contracted and paid caregivers providing cares to Ms. [REDACTED] in her residence prior to her demise on March 31, 2012. They have not provided cares to any other person since that date, let alone cares in the [REDACTED] residence, or using the residence as an office or base of operations for such a business. In short, the occupation ended with Ms. [REDACTED]'s demise. This circumstance clearly does not meet the business diminishment hardship waiver for either adult daughter.

Ms. [REDACTED] and Ms. [REDACTED] further assert that neither they, nor Ms. [REDACTED] were advised or informed that IRIS paid for services would be subject to estate recovery. The Department has provided Exhibit #4, which clearly establishes on multiple occasions since 2007, with the most recent being October 21, 2010, that Ms. [REDACTED] signed Elderly, Blind & Disabled Medicaid application documents indicating, among other responsibilities, that estate recovery may result from obtaining public assistance for medical care reimbursement from Wisconsin Medicaid. IRIS is a form of Wisconsin Medicaid, known in the parlance as a MA Waivers program. I am satisfied that the petitioner and her adult children were aware that estate recovery for amounts expended by Medicaid and IRIS on her behalf were recoverable in the future from her estate. In addition, in 2011 alone, \$35,000 of the ultimate MA claim at issue here was paid to these two adult children as compensation for their services. The 2012 payments (i.e., for services rendered through March 31, 2012) to the two caregivers are not provided, as not then available when DHS requested tax records.

Finally, the petitioner, by her daughters, assert that the denial of these hardship waivers is unfair, and they request equitable relief. It is the longstanding rule of Wisconsin caselaw that the Division's administrative law judges do not possess the powers of a court of equity. Rather, the authority of an administrative law judge is limited to the "four corners" of the applicable statute. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977).

Under the law, the Department has correctly denied both hardship waivers sought here by the petitioner's estate for her two adult daughters. The Department's actions must be sustained on these facts. Nor would I find this recovery effort to be unfair in any event. The petitioner received expensive personal cares paid for by a Medicaid Program, during her later life. These cares were provided by her adult children as paid contract employees of the IRIS Program. In essence, the value of the cost of these services was extracted from the petitioner's estate while she was receiving cares, resulting in the reduction of the ultimate estate after her demise. The petitioner, and her adult children, chose at that time to contract for payment for the services the children were providing. On the other hand, they could have chosen to provide the same services for no payment and received the full value of the estate at a later time after the petitioner's demise; or to not have provided the services at all with the same potential result. Here, I cannot "unring the bell". I need not extend the argument further to discuss the further alternate possibility of nursing home care and higher costs for the period of time in question, resulting in a higher recovery. The family members involved made estate planning and patient care decisions in 2011-12, and the instant estate recovery action is one of the consequences of the decisions then made.

CONCLUSIONS OF LAW

The petitioner, and her two adult children, are not eligible for a hardship waiver from the Estate Recovery Program because her representatives did not establish that the former homestead residence is necessary and used for a part of the adult children's business, and/or establishing that any family member was a member of one of the categories for which the waiver is allowed.

THEREFORE, it is

ORDERED

The petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted. The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 7th day of January, 2013

\sKenneth D. Duren, Assistant Administrator
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 January 7, 2013.

Division of Health Care Access And Accountability