



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

In the Matter of



DECISION

MDV/145638

PRELIMINARY RECITALS

Pursuant to a petition filed November 30, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Marinette County Department of Human Services in regard to Medical Assistance, a telephone hearing was held on January 30, 2013, at Marinette, Wisconsin.

The issue for determination is whether the divested property was returned to petitioner by executed and notarized Quit Claim deeds in June 2012 even though those deeds were not recorded until much later.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney William Lucius
312 Silver St
Hurley, WI 54534

Respondent:

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

By: Jill Messner

Marinette County Department of Human Services
Wisconsin Job Center Suite B
1605 University Drive
Marinette, WI 54143

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # ) is a resident of Marinette County.
2. Petitioner applied for long term care medical assistance.

3. Petitioner provided the Department with a recorded deed reflecting a conveyance of real property to her children in 2011.
4. Petitioner also provided a series of deeds reflecting the conveyance of the property interests back to petitioner in June 2012. These deeds were not recorded. They were notarized on the same dates as signed by the respective children.
5. The Department determined that the divestment was not cured because the conveyances back to the children were invalid because they were not recorded.
6. Petitioner filed a timely appeal.

DISCUSSION

A divestment occurs when an institutionalized individual, his spouse, or another person acting on his behalf, transfers assets for less than fair market value, on or after the individual's "look -back date." Wis. Stat. § 49.453(2)(a). "Fair market value" is an estimate of the prevailing price an asset would have had if it had been sold on the open market at the time it was transferred. Medicaid Eligibility Handbook (MEH) § 17.2.1. The "look-back date" is defined as 36 months before, or with respect to trusts, 60 months before, the first date the individual is both institutionalized and an MA applicant. MEH § 17.3.

If such a transfer occurs, the individual is ineligible for MA for nursing home services for a number of months determined by totaling the value of all assets transferred during the look-back period and dividing that amount by the average monthly cost to a private patient of nursing facility services at the time of the MA application. MEH § 17.5. The ineligibility period begins with the month of the first divesting transfer of assets.

A parallel divestment definition is found at Wis. Admin. Code § HFS 103.065(4), and states in the parts relevant here, as follows:

(4) DIVESTMENT. (a) *Divestment resulting in ineligibility*. An institutionalized individual or someone acting on behalf of that individual who disposes of resources at less than fair market value within 30 months . . . immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. . . (Emphasis added).

A divestment is not a bar to MA eligibility where:

(d) *Circumstances under which divestment is not a barrier to eligibility*. An institutionalized individual who has been determined to have made a prohibited divestment under this section shall be found ineligible for MA as defined under s. DHS 101.03 (95) unless:

1. The transfer of property occurred as the result of a division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments; or
2. It is shown to the satisfaction of the department that one of the following occurred:
 - 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. Adm. Code § DHS 103.065(4)(d) (emphasis added).

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the county, such as the denial of MA due to a divestment of assets was improper given the facts of the case. See 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists.

In this case, the core question is whether the quit claim deeds from the children required recording in order to be valid. Stated another way, were the deeds effective to transfer the property back to petitioner as of the date they were signed by each child and notarized?

The Department supported its contention that recording is necessary for a valid transfer by citing a telephone call to their call center in which the person at the call center confirmed that recording is essential. The Department representative also explained that a “legal analyst with the State agrees the property is not actually transferred back to the original owner until the deeds are recorded. Following the hearing, the Department representative faxed a copy of Wis. Stat. § 706.08 which described the effect of not recording a deed. The representative specifically cited subsections (5) and (7) in support of her argument. But, these subsections only define the validity of a recorded or nonrecorded deed as against other claimed interests. The subsections do not state that recording is required for a conveyance to be effective under the law.

Petitioner argues that Wis Stats. § 706.02 sets forth the formal requirements that make a deed valid, and that recording of the deed is not set forth as one of the requirements. Petitioner also cites *State v. Barkdoll*, 99 Wis.2d 163 (1980):

The recording statutes define what unrecorded instruments are ineffective as to what classifications of persons. Sec. 706.08, Stats., a race-notice recording statute, provides that an unrecorded conveyance is void as against any subsequent purchaser of the real estate in good faith and for a valuable consideration whose conveyance is first recorded.[4] Thus the statute protects a prior unrecorded interest unless a claimant records his or her interest first and is a purchaser in good faith and for a valuable consideration. Unless a claimant meets these statutory requirements, the recording act provides no protection to the claimant as against a prior unrecorded interest.

In that excerpt, it is clear that the Supreme Court also contemplates a valid conveyance even in the case of an unrecorded deed. It may indeed be imprudent and foolish to not record. But, it does not make the conveyance ineffective.

There may be many reasons why the Department wishes conveyances to be recorded in divestment situations. The Department is undoubtedly concerned about manipulation of the MA system and the inability to accurately track conveyances, or dates thereof, without recording. The Department has the authority to issue rules or policies that could make such requirements part of the MA program. But, at this point, I cannot find that the return conveyance is invalid.

CONCLUSIONS OF LAW

The Department and its county agent erred in the determination that the June 2012 deeds returning the property from her children back to petitioner were invalid and ineffective.

THEREFORE, it is

ORDERED

That this matter is remanded to the Department and its county agent with instructions to redetermine eligibility for LTC-MA based on the conclusion that the quit claim deeds of June 2012 (see exhibit #3) are valid and effective as of the dates they each were signed and notarized. This shall be completed within 10 days.

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 March, 2013

\sJohn P. Tedesco
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 March 7, 2013.

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Division of Health Care Access and Accountability
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