



FH  
[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MDV/146543

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**PRELIMINARY RECITALS**

Pursuant to a petition filed January 10, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the St. Croix County Department of Human Services in regard to Medical Assistance, a hearing was held on February 21, 2013, at New Richmond, Wisconsin.

The issue for determination is whether the petitioner divested her assets when \$12,000 from the sale of her home was given to her husband's children pursuant to a premarital agreement.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Jen Feyereisen

St. Croix County Department of Human Services  
1445 N. Fourth Street  
New Richmond, WI 54017-1063

**ADMINISTRATIVE LAW JUDGE:**

Michael D. O'Brien  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of St. Croix County.
2. The petitioner entered into a marital property agreement with her husband on April 26, 1991. That agreement required that if he died before the sale of their house, \$12,000 from the sale

would go to his children. (The petitioner and her husband both have children from a prior marriage.)

3. The petitioner's husband died on July 27, 1991.
4. The petitioner received a net amount of \$72,000 after selling her house on April 26, 2010.
5. The petitioner entered an assisted living facility in April 2010 and moved to a nursing home in January 2011.
6. The petitioner gave away \$72,000 of her assets to her children and stepchildren. Her children returned the money they received, but her stepchildren have retained \$10,350.
7. The petitioner did not enter into the marital property agreement that required her to give proceeds from the sale of her house to her husband's children in order to become eligible for medical assistance.
8. The petitioner applied for medical assistance on November 16, 2012, requesting benefits retroactive to August 1, 2012.
9. The agency determined that the petitioner divested \$10,350 and found her ineligible for 48 days from August 1, 2012, through September 17, 2012.

### DISCUSSION

A person is ineligible for institutional medical assistance if her available assets exceed \$2,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat. § 49.47(4)(b)3g. Generally, a person cannot reach this limit by divesting assets. A divestment occurs if an institutionalized person or someone acting on her behalf "disposes of resources at less than fair market value" within the "look back date," which is the later of when she was considered institutionalized and when she applied for medical assistance. The look back date for assets other than trusts had been three years but is being phased into five years by adding one month to its length each month after January 1, 2012. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). Thus, as indicated in the *Medicaid Eligibility Handbook*, § 17.3.3. the following look back dates apply:

From January 1, 2009 to January 1, 2014 the look back period for non-trust divestments is:

- 36 months until 1/1/12
- 37-59 months between 1/1/12- 12/31/13
- Effective 1/1/14, 60 months

If the person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private-pay patient in a nursing home at the time she applied. Wis. Admin. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The daily amount is currently \$215.48 *Medicaid Eligibility Handbook*, § 17.5.2.2.

A divestment does not bar eligibility under the following circumstances found in Wis. Admin. Code, § 103.065(4)(d)2:

- 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.

The petitioner married [REDACTED] about 30 years ago. Both had children from an earlier marriage, and they entered into a marital property agreement that kept much of their property separate. This agreement was amended on April 26, 1991, which was a few months before [REDACTED] died, to require that if their house were sold after he died his children would receive \$12,000 from the proceeds of the sale. The petitioner moved into an assisted living facility in April 2010 after developing dementia. Later that month, she sold her house, netting \$72,000. She entered a nursing home in January 2011. On November 16, 2012, she applied for medical assistance, requesting benefits retroactive to August 1, 2012. She initially gave away all of the proceeds from the sale of her house. However, when the agency explained that this was a divestment that would leave her ineligible, all but \$10,350 kept by [REDACTED]'s children pursuant to the marital settlement agreement was returned. (It is unclear why this amount was less than \$12,000.) The agency determined that this was a divestment and found her ineligible for 48 days from August 1, 2012, through September 17, 2012.

The Wisconsin Marital Property Act allows persons to enter into marital property agreements that divide their property between them. Wis. Stat. § 766.58. However, this act generally does not apply to medical assistance divestment matters because the federal definition of *resource* applies. Wis. Admin. Code, § DHS 103.065. The federal definition counts the assets of both spouses when determining the eligibility of either. *See*, 42 USC 1382b. This means that for there not to be a divestment, the petitioner must show that the disposal of the \$10,350 meets one of the exceptions to the divestment rule found in Wis. Admin. Code, § 103.065(4)(d)2.

The petitioner did not receive anything in return for the \$10,350, it has not been returned to her, and she has not shown that a divestment finding would create a hardship. This means that she must show that it was disposed of for a reason other than to become eligible for medical assistance. To determine this, one must look at the circumstances that existed when she entered into the marital property agreement that led to the money going to [REDACTED]'s children. Looking that far back is necessary because when the money was actually transferred to [REDACTED]'s children, she no longer had any legal recourse to prevent the transfer. When the document was drafted, the person who would most likely need institutional medical assistance was [REDACTED], who was sick and near the end of his life. The petitioner was 61 and presumably healthy. Because the provision that caused the money to pass to his children could not take place until after he died, it was not drafted to allow him to become eligible for medical assistance. If that had been his goal, he would have taken steps to reduce his assets while he was alive. Nor is there any evidence that the document was drafted to help the petitioner become eligible for medical assistance. If that had been her goal, she could have accomplished it through a trust or other planning device that took effect after [REDACTED]'s death. Rather, it appears that the document was meant to do what these documents are often meant to do when two people, both with children and both on the back half of life, marry: assure that some of the assets each brings into the marriage can eventually be passed onto his or her own children. Based upon this, I find that the money was not transferred to become eligible for medical assistance and thus is not a disqualifying divestment.

### **CONCLUSIONS OF LAW**

The \$10,350 the children of the petitioner's late husband received pursuant to a marital settlement agreement is not a divestment that disqualifies the petitioner from medical assistance because the transfer was not done to make her eligible for medical assistance.

**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 redetermine the petitioner's eligibility for medical assistance. When doing so, it shall not consider the \$10,350 she gave to her children to be a disqualifying divestment.

**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 27th day of March, 2013

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\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 March 27, 2013.

St. Croix County Department of Human Services  
Division of Health Care Access and Accountability