



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/149083

PRELIMINARY RECITALS

Pursuant to a petition filed April 27, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Washington County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on May 21, 2013, at West Bend, Wisconsin. Please note that the case classification was changed to MDV (from MGE) to properly reflect the case type.

The issue for determination is whether the agency correctly terminated petitioner's MA from December 1, 2012 through March 31, 2013 due to divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Ken Benedum

Washington County Department of Social Services
333 E. Washington Street
Suite 3100
West Bend, WI 53095

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Washington County.
2. Petitioner was receiving MA (Institutional) since July 9, 2012.

3. In January, 2013 the agency was notified that petitioner's daughter and power of attorney (POA) had transferred money (\$26,074.84) in petitioner's joint account, shared with his community spouse, to an account in her name.
4. On January 29, 2013 the agency issued a negative notice to petitioner stating that his MA was terminated from December 10, 2012 through April 10, 2013 due to divestment.
5. On April 27, 2013 the agency revised that January negative notice to correct the divestment period and issued a new negative notice stating that "due to divestment of assets in December 2012 of \$26,074.84" the divestment penalty period of 121 days would run from December 1, 2012 to March 31, 2013.
6. Petitioner's daughter/POA provided verification that at least some, if not all, of the alleged divested assets were used to pay for her parents' expenses.

DISCUSSION

A divestment is a transfer of assets for less than fair market value. Wis. Stat., §49.453(2)(a); see also *Medicaid Eligibility Handbook (MEH)*, §17.2.1, available online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. A divestment made within 60 months after petitioner's institutionalization and MA eligibility for nursing home MA may cause ineligibility for that type of Wisconsin MA. Wis. Stat. §49.453(1)(f); *MEH*, 17.3. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in Wis. Stat. §49.453(3), to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (currently, \$6,554). *MEH*, §17.5.

Petitioner's daughter/POA did not dispute the occurrence of the divestment or the calculations for it. Rather, she is asking this ALJ to consider her unintentional error in transferring the monies from her parents' account to her own. Petitioner's daughter/POA described that petitioner, her father, had two Roth CDs in his name only valued at \$12,430.86 and \$5250.39 for a total of \$17681.25. She described that she was told by the county agency to cash in those CDs and have the cash placed into an account in her mother's name only so that petitioner could remain MA eligible. The daughter/POA and her mother then went to the bank in October to cash in the CDs, but were told that to avoid a penalty for doing so, they would have to get a statement from the nursing home/institution and petitioner's primary care provider (PCP) regarding petitioner's need for long term institutional care. The daughter/POA received the necessary paperwork from the PCP and delivered it to the institution for them to complete their end of the bargain. The daughter/POA described that paperwork being lost at the facility thereafter until late November. Apparently she relied on the nursing home/institution providing the paperwork to the bank to get the CDs cashed in. On December 9, 2012 petitioner's mother passed away. On December 10, 2012 the daughter/POA opened a checking account in her name and transferred \$9495.13 out of her parent's joint account and into her account. On December 19, 2012 the money from the CDs (\$16,579.71) was deposited into the joint checking account. That same day, the daughter/POA transferred that money out of their account into hers. The total divestment then totals \$26,074.84. She testified that she thought in doing so she would keep her father under the asset limit for MA and keep him eligible, and that she used those funds to pay for funeral expenses for her mother, as well as other expenses for her parents. She also testified that but for the late deposit of the CD money, due to the nursing home/institution's misplacement of the paperwork, and the untimely death of her mother, that none of the transfers would have occurred.

(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.

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the agency, 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. While oral testimony concerning the intent of the applicant is important, great weight must be afforded by the actions taken by the applicant given the overall circumstances at the time. A divestment can still exist even if someone does the transfer of the nonexempt asset other than the individual. Such a person could be, for example, a power of attorney.

In this case, the petitioner was represented at the hearing by his daughter/POA. She presented some evidence of the use of the transferred funds which showed that she paid for her mother's funeral, hospital, ambulance and living expenses, as well as payment for the nursing home's fees for petitioner. Her testimony was that all of that money was used for her parents' expenses. The accounting of *all* of those funds was not made available, but it appears from the evidence that was presented that at least a large part, including her mother's funeral expense, was paid out for petitioner and his community spouse. As such she was acting on their behalf, and the funds were utilized to pay for her parents' expenses. They were in effect "returned" to the parents and thus not a divestment under the statutory section cited above. I am therefore remanding the matter to the agency in order for them to determine the extent of that return and if any divestment in fact resulted.

The daughter/POA also argued that petitioner should be granted eligibility for Institutional MA due to a "hardship waiver." Undue hardship exceptions are made for divestment issues. *MEH*, §17.17.

A divestment penalty period must be waived when the imposition of the penalty period deprives the individual of:

- Medical care such that the individual's health or life would be endangered; or
- Food, clothing, shelter, or other necessities of life.

MEH, §17.17.1.

In order to request an undue hardship waiver, an applicant or his/her representative must submit the following verification of hardship:

1. A statement signed by the individual (or his/her representative) which describes whether the assets are recoverable, and if so, the attempts that were made to recover the divested assets, and
2. Proof that an undue hardship would exist if the penalty period is applied (as follows).

- If the member is currently institutionalized, s/he must submit a copy of the notification sent from the LTC facility which states both the date of involuntary discharge and alternative placement location or other proof that if the hardship waiver is not granted, the individual will be deprived of medical care such that the individual's health or life would be endangered; or deprived of food, clothing, shelter, or other necessities of life.

- If the member is applying for Community Waivers COP, FamilyCare, IRIS "Include, Respect, I Self-Direct" - A Medicaid waiver program. , PACE or Partnership, s/he must submit an estimate of the cost of the LTC services needed to meet his/her medical and remedial needs (as determined by the waivers case manager) and an estimate of costs for food, shelter, clothing and other necessities of life.

MEH § 17.17.5.

If the request for an undue hardship waiver is denied, the individual has the right to appeal the decision through a written request to the Division of Hearings & Appeals. The individual has 45 days from the date of the notice issuance to file the appeal. These same hearing rights are also applicable to the facility in which the individual resides, as long as the facility has the institutionalized individual's written permission to represent him/her in the appeal process. MEH § 17.17.8.

At this point, there has been no filing of a hardship request with the agency or denial of same, and thus that matter is not ripe for me to determine. Should the remand result in a finding of divestment again, the POA may request it at that time.

CONCLUSIONS OF LAW

1. The agency incorrectly terminated petitioner's MA from December 1, 2012 through March 31, 2013 due to divestment.
2. The ownership of some, if not all, of the alleged divested property was returned to the individual who originally disposed of it.

THEREFORE, it is

ORDERED

The matter be remanded to the agency (1) to review the accounting of the transferred monies from petitioner's account to his daughter's account, (2) to determine what amount of funds were utilized to pay for her parents' expenses, (3) to determine what amount, if any, was not 'returned' to her parents by paying for their expenses, and (4) redetermine if any divestment occurred. The agency shall issue a notice of decision regarding this redetermination. Because this redetermination may likely require verification from the daughter regarding all of the expenditures (invoices, checking account statements, etc.) and additional time for doing so, these actions shall be taken within thirty (30) days of the date of this decision.

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 Milwaukee,
Wisconsin, this 9th day of July, 2013

\sKelly Cochran
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoef, Acting Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on July 9, 2013.

Washington County Department of Social Services
Division of Health Care Access and Accountability