



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

In the Matter of

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

DECISION

MDV/149121

PRELIMINARY RECITALS

Pursuant to a petition filed May 01, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Jefferson County Department of Human Services in regard to Medical Assistance, a hearing was held on June 04, 2013, at Jefferson, Wisconsin.

The issue for determination is whether the divestment of assets by the petitioner to her spouse was prohibited under divestment rules.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Julie Ihlenfeld

Jefferson County Department of Human Services
Workforce Development Center
874 Collins Rd.
Jefferson, WI 53549

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Jefferson County.
2. Petitioner is married to her husband, [REDACTED].

3. Petitioner entered a nursing home. Around that time, petitioner transferred non-homestead assets exceeding \$200,000 to her husband.
4. Petitioner applied for state MA-Institutional.
5. Petitioner's husband refused to sign the MA application instead writing "Just say no."
6. The county agency processed the MA application and considered the transfer of assets a prohibited divestment that resulted in ineligibility for MA-Institutional for a period exceeding two years.
7. Petitioner appealed.

DISCUSSION

In this case, the community spouse has chosen to not sign the MA application. This is part of a strategy commonly called spousal refusal. Under this elder law strategy, an institutionalized spouse transfers assets to the community spouse. The institutionalized spouse then applies for MA but the community spouse refuses to sign the application or provide asset information. The county did not argue the validity of this strategy and I do not address it here.

In situations as described, the so-called "spousal refusal," county agencies are directed to "**test the institutionalized person's eligibility as if s/he were unmarried.**" See *Medicaid Eligibility Handbook* § 2.5.3. A DHS Operations Memo (No. 07-66) also clarifies that:

if a community spouse refuses to sign or otherwise cooperate in providing information necessary to process an application under spousal impoverishment provisions, determine the institutionalized spouse's eligibility using non-spousal impoverishment rules.

These rules create a fictional scenario for the purposes of determining MA eligibility. That is, the institutionalized spouse is legally married, but the Department pretends that the person is not for the eligibility determination.

The added wrinkle in this case which raises the specific issue for my determination relates to the \$200,000+ in assets that were transferred to the community spouse. The county agency considers this a prohibited divestment under the divestment rules which would result in a penalty period of ineligibility for MA of more than two years. The county considers this a prohibited divestment because it believes that the exception to this rule claimed by the petitioner does not apply.

Under the divestment rules, when an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services during a penalty period. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. § 49.453(2)(a); Wis. Admin. Code § DHS 103.065(4)(a); *Medicaid Eligibility Handbook* § 17.2.1. 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). *Medicaid Eligibility Handbook* § 17.5. An exception to this rule requiring a penalty is in the case of non-homestead assets **transferred to a spouse**. See *Medicaid Eligibility Handbook* § 17.4(8). Petitioner argues that this exception should apply as the couple is legally married and the assets were, in fact, non-homestead assets transferred from one spouse to the other.

The county argues that if the institutionalized spouse is to be considered unmarried for spousal impoverishment reasons under the program rules, then the characterization as "unmarried" should also

apply to the divestment analysis making the petitioner ineligible for the exception of the transfer of non-homestead assets **to a spouse**.

The county's argument prevails here. While on the surface, it may seem that petitioner is correct that consideration of the petitioner as unmarried should only apply to an initial eligibility question and not to a separate divestment analysis, the *Handbook* and Operations Memo clearly state that "eligibility" is to be determined as if the petitioner were unmarried and using non-spousal impoverishment rules. The critical thing to recognize is that **the divestment analysis is indeed part of the eligibility analysis** as the period of eligibility for MA for the institutionalized spouse can only be determined after the divestment analysis. The two cannot be discretely applied. The question of a person's eligibility of course includes *whether* the person is entitled to benefits under program rules. But, as essential as *whether* the person is entitled is the determination of *when* the person is entitled to benefits under program rules. Both must questions must be answered as part of a determination of eligibility. The divestment analysis is critical to defining when a person is entitled to receive benefits in institutional MA cases. When one conducts the divestment analysis under the *Handbook* direction to "test the institutionalized person's eligibility as if s/he were unmarried" the divestment fails because it does not fit within the exception allowing divestment to a spouse. The divestment is therefore prohibited and subject to penalty.

CONCLUSIONS OF LAW

The county did not err in considering the divested assets a prohibited divestment.

THEREFORE, it is

ORDERED

That this 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 24th day of July, 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 July 24, 2013.

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