STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MGE/156623

The attached proposed decision of the hearing examiner dated June 2, 2014, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed April 04, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Douglas County Department of Human Services in regard to Medical Assistance, a hearing was held on May 12, 2014, at Superior, Wisconsin.

The issue for determination is whether the county agency correctly determined the amount of assets the petitioner divested.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Petitioner's Representative:

Attorney Steven J. Ledin
1109 Tower Avenue
Superior, WI 54880

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Tom Ostrander
Douglas County Department of Human Services
1316 North 14Th Street
Suite 400
Superior, WI 54880

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES #[redacted]) is a resident of Douglas County.
2. The petitioner applied for institutional medical assistance on January 27, 2014. She was found ineligible because her assets were over the program's limit and a notice of decision was sent on February 20, 2014.
3. The petitioner gave $23,284.95 to her daughter in January 2014. The county agency did not calculate a divestment period after her January application because it determined that she was over the program's asset limit.
4. The petitioner's daughter returned all of the $23,284.95 to her mother by March 26, 2014.
5. The petitioner reapplied for medical assistance on March 27, 2014.
6. The petitioner gave her daughter $5,000 on March 27, 2014.
7. The county agency determined that the petitioner divested $28,284.95 and was ineligible for medical assistance for 116 days, or until June 25, 2014.

DISCUSSION

I note initially that the petitioner filed requests for hearing on the same date both to challenge that she was found ineligible for medical assistance on February 20, 2014 and that the county agency determined on April 1, 2014 that she divested more than $5000. The issues are interconnected and the arguments at hearing focused only on the divestment issue and will be decided on that matter. Therefore, I decide both appeals with the following discussion. Other than this paragraph of discussion, this decision is identical to MDV/156624.

A person cannot receive institutional medical assistance if her assets exceed $2,000. *See* Wis. Stat. §§ 49.46(1) and 49.47(4). A person cannot reach this limit by divesting assets. This occurs if she or someone acting on her behalf "disposes of resources at less than fair market value" within five years of her "look-back date," which is the first date on which she is both institutionalized and has applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f) and (2)(a). If the person 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 when she applied. Wis. Admin. Code, § DHS 103.065(5)(b). Beginning 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 $243.49 *Medicaid Eligibility Handbook*, § 17.5.2.2. The period of ineligibility for institutional medical assistance applicants begins on the date the person applied for benefits and "[m]eets all other Medicaid non-financial and financial eligibility requirements." *Medicaid Eligibility Handbook*, § 17.5.2. The statute providing the basis for this policy states that the period of ineligibility begins

> the first day of a month beginning on or after the look-back date during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance and would otherwise be receiving institutional level care described in sub. (2)(a) 1. to 3. based on an approved application for the care but for the application of the penalty period, whichever is later, and that does not occur during any other period of ineligibility under this subsection.

Wis. Stat. § 49.453(3)(a)2.

Workers are instructed in *Medicaid Eligibility Handbook,* § 17.6 to take the following action if there is more than one divestment in order to effectuate Wis. Stat. §49.453(3)(b)1. which calls for determining the total, cumulative value of the transferred assets:

1. Add together all the divested amounts of transfers in the look back period or any time thereafter that are connected in any of the following ways:
    a. Transfers that occur in the same month.
    b. Transfers that occur in both months of a period of any two consecutive months.
    c. Transfers with a penalty period (17.5 Penalty Period) that extends into a month in which there is another transfer.
    d. Transfers with a penalty period (17.5 Penalty Period) that extends into the month immediately preceding a month in which there is another transfer.
2. Calculate the penalty period (17.5 Penalty Period)).

A divestment does not bar eligibility if the "ownership of the divested property was returned to the individual who originally disposed of it." Wis. Admin. Code, § 103.065(4)(d)2.c. This provision had allowed an applicant to reduce her divestment penalty period if a portion of the money she gave away was returned to her. For example, if a nursing home resident gave away $24,349 but received all except $2,434.90 back, the divestment penalty, based upon $243.49 per day, would be 10 rather than 100 days. That has changed. Presumably because this policy created opportunity to manipulate eligibility the Wisconsin legislature last year amended Wis. Stat. § 49.453(8)(a)1. to strictly conform to the controlling federal statute at 42 USC 1396p(c)(2)(C)iii. It now reads:

> To make a satisfactory showing to the state under 42 USC 1396p(c)(2)(C) and adjust the ineligibility period under sub. (3), the individual shall demonstrate that all of the assets transferred for less than fair market value, or cash equal to the value of the assets transferred for less than fair market, have been returned to him or her.

2013 Wisconsin Act 20, § 1064.

The Department's policy interpreting these laws states:

> When the entire divested resource or equivalent value is returned to the individual, the entire penalty period is nullified. You must then re-evaluate the individual's Medicaid eligibility for LTC services retroactively, back to the beginning date of the previously imposed penalty period. The individual can then be certified for Medicaid LTC services if s/he met all other eligibility requirements during this retroactive adjustment period. The refunded resources will be counted as available assets beginning with the month in which they were returned.

Medicaid Eligibility Handbook, § 17.5.5.1.

The petitioner first applied for medical assistance on January 27, 2014. That month, she gave a total of $23,284.95 to her daughter. The county agency found that she was ineligible, but did not determine a divestment penalty period because, according to its position letter, her assets exceeded the program's limit and therefore she was not otherwise eligible. By March 26, 2014, her daughter gave all of the money back to her. On March 27, 2014, the petitioner reapplied and gave her daughter $5,000 without receiving anything in return. The county added the two amounts together and then did not give her credit for any of the returned money because it was not a refund of the aggregated amount. The petitioner contends that she cured the original divestment by returning the money and then incurred a new divestment of $5,000. She contends that only this second divestment should affect her eligibility. I agree with petitioner.

The county agency used *Medicaid Eligibility Handbook,* § 17.6 to add the divestments together and on § 17.5.5.1 to deny a cure of the divestment because it was not fully repaid. However, § 17.6 on its face does not require combining the amounts divested because they did not occur in the same or consecutive months nor was a penalty period assigned for the first divestment. When the first divested amount of $23,284.95 was returned only a single divestment amount of $5,000 remained when the county acted on petitioner's March 27, 2014 application. Therefore, I find that in these circumstances the county agency should have calculated a penalty period based only on the $5,000 transfer.

I am not naïve to the possibility that the Legislature's intent in closing this eligibility loophole will be met by new attempts by future applicants to thwart it. My decision today is a reasonable meshing of §§ 49.453(3)(b)1 and 49.453(8)(a)1. but I recognize that in the face of Medicaid planning by future applicants a refined analysis may be needed to continue to effectuate legislative intent.

The petitioner divested $5,000 on March 27, 2014, the same date that she reapplied for benefits. Other than that divestment, she met all of the program's financial and non-financial eligibility requirements on that date. The amount of her divestment divided by the $243.49 daily nursing home cost causes a 20 day penalty period starting on March 27, 2014 and running through April 15, 2014.

CONCLUSIONS OF LAW

1. The money the petitioner gave her daughter through January 2014 does not count toward the petitioner's divestment penalty period because she recovered the entire amount before divesting any other assets.
2. The petitioner divested $5,000 and is ineligible for medical assistance for 20 days as a result that divestment.

THEREFORE, it is **ORDERED**

This decision is adopted as a final decision by the department, this matter is remanded to the county agency with instructions that within ten days of the date of this decision it reduce the petitioner's medical assistance divestment penalty period to 20 days and find her eligible for institutional medical assistance as of April 16, 2014.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison, Wisconsin, this 27 day of August, 2014.

Kevin E. Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services

FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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PROPOSED DECISION

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ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
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FINDINGS OF FACT

1. The petitioner (CARES #[redacted]) is a resident of Douglas County.

2. The petitioner applied for institutional medical assistance on January 24, 2014. She was found ineligible because her assets were over the program's limit.

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7. The county agency determined that the petitioner divested $28,284.95 and was ineligible for medical assistance for 116 days, or until June 25, 2014.

DISCUSSION

A person cannot receive institutional medical assistance if her assets exceed $2,000. *See* Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets. This occurs if she or someone acting on her behalf "disposes of resources at less than fair market value" within five years of her "look-back date," which is the first date on which she is both institutionalized and has applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f) and (2)(a). 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 when she applied. Wis. Admin. Code, § DHS 103.065(5)(b). Beginning 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 $243.49 *Medicaid Eligibility Handbook*, § 17.5.2.2. The period of ineligibility for institutional medical assistance applicants begins on the date the person applied for benefits and "[m]eets all other Medicaid non-financial and financial eligibility requirements." *Medicaid Eligibility Handbook*, § 17.5.2. The statute providing the basis for this policy states that the period of ineligibility begins

> the first day of a month beginning on or after the look-back date during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance and would otherwise be receiving institutional level care described in sub. (2) (a) 1. to 3. based on an approved application for the care but for the application of the penalty period, whichever is later, and that does not occur during any other period of ineligibility under this subsection.

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2. Calculate the penalty period (17.5 Penalty Period)).

A divestment does not bar eligibility if the "ownership of the divested property was returned to the individual who originally disposed of it." Wis. Admin. Code, § 103.065(4)(d)2.c. This provision had allowed an applicant to reduce her divestment penalty period if a portion of the money she gave away was returned to her. For example, if a nursing home resident gave away $24,349 but received all except $2,434.90 back, the divestment penalty, based upon $243.49 per day, would be 10 rather than 100 days. That has changed. Federal law now allows agencies to adjust the penalty period only if "all assets transferred for less than fair market value have been returned to the individual." 42 USC 1396p(c)(2)(C)iii. Last year, the Wisconsin legislature amended Wis. Stat. 49.453(8)(a)1. so that it conforms with the federal statute. It now reads: read:

> To make a satisfactory showing to the state under 42 USC 1396p(c)(2)(C) and adjust the ineligibility period under sub. (3), the individual shall demonstrate that all of the assets transferred for less than fair market value, or cash equal to the value of the assets transferred for less than fair market, have been returned to him or her.

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The petitioner first applied for medical assistance on January 24, 2014. That month, she gave a total of $23,284.95 to her daughter. The county agency found that she was ineligible, but did not determine a divestment penalty period because, according to its position letter, her assets exceeded the program's limit. By March 26, 2014, her daughter gave all of the money back to her. On March 27, 2014, the petitioner reapplied and gave her daughter $5,000 without receiving anything in return. The county agency, relying on *Medicaid Eligibility Handbook,* § 17.6, added the two divestments together and determined that the petitioner divested $28,284.95. It did not give her credit for any of the of the returned money. The petitioner contends that she cured the original divestment by returning the money and then incurred a new divestment of $5,000. She contends that only this second divestment should affect her eligibility.

The petitioner disposed of assets twice within her look-back date. She clearly sought to get around the new divestment rules by completely paying off one divestment and then immediately incurring a second one. However, because she used the recovered funds to pay the nursing home and other debts, once she recovered the first divestment, she was in exactly the same financial position she would have been if she had not incurred it in the first place. The primary purpose of divestment statutes had always appeared to be to put a person who gives away her assets in the same position for medical assistance eligibility as she would have been if she had not given them away. Under this logic, because the petitioner has $5,000 less to spend on her own care than she would have if she had not given anything away, her divestment penalty period would be based upon only the second divestment. But this logic does not seem to provide the basis for the new federal and state statues. Unlike the earlier statutes, the new ones do not appear to provide a remedy proportional to the harm done to the medical assistance program. Thus, the mere fact that the divestment penalty period is not proportional to the net amount divested does not by itself mean that the agency determined that period incorrectly.

To sort all of this out, it necessary to consider the interplay of the various statutes and rules. The petitioner's argument implies that it is significant that she reapplied after completely recovering her first divestment. I do not find anything in the statutes that specifically creates this exception. Statutory references to the application date are only relevant as to when the divestment begins. The look-back period referred to in those statutes goes back five years from the date the person is both institutionalized and applies for medical assistance. In the petitioner's matter, this would be five years from January 25, 2014. Nothing in the sections pertaining to the look-back date indicates that the penalty is calculated differently if there is more than one application. Workers must still go back five years from the original look-back date and base the period on the total amount given away.

But the statutes do not irrefutably support the county agency's position. Its argument relied solely upon *Medicaid Eligibility Handbook,* § 17.6, which instructs workers on how to combine various divestments when determining ineligibility, and § 17.5.5.1, which instructs them that an entire divestment must be returned before the period of ineligibility is reduced. Section 17.6 is derived from Wis. Stat. § 49.453(3)(b)1, which requires that when determining how long a person is ineligible, the "department shall determine the total, cumulative uncompensated value of all assets transferred by the covered individual or his or her spouse on or after the look-back date." The petitioner's daughter completely compensated the petitioner for the first divestment by returning the entire amount. As a result, when the department reviewed the second application and determined how long the petitioner was ineligible, the total, cumulative, *uncompensated* value of all assets transferred by her on or after her look-back date was $5,000, the amount of the second divestment.

Still, § 49.453(3)(b)1 does not provide the final word because it must be harmonized with the new provision in Wis. Stat. § 49.453(8)(a)1. This is difficult. Read alone, § 49.453(3)(b)1 appears to hold that any partial recovery of a divestment should reduce the period of ineligibility. But § 49.453(8)(a)1 specifically prohibits reducing the period unless the entire amount is repaid. Nothing in either section refers to the other, and § 49.453(8)(a)1 did not implicitly repeal § 49.453(3)(b)1 because that statute still provides the primary basis for calculating the total amount divested. Because § 49.453(3)(b)1 still is in the statute books and remains valid, *Medicaid Eligibility Handbook,* § 17.6, the policy that interprets the statute, must be carried out in a manner consistent with the dictates of the statute. The policy is not consistent with the statute when it counts divestments for which the applicant has already been fully compensated. Because § 49.453(8)(a)1 does not allow an applicant to partially cure a divestment, in order for § 49.453(3)(b)1's requirement that agency's consider the total, cumulative, uncompensated value of the assets given away to continue to have meaning, a divestment that has already been fully recovered must be considered a separate divestment and not countable when determining the penalty period.

This interpretation can lead to some manipulation of the process, as occurred here. But combining fully recovered divestments with those that have not been recovered can lead to absurd results in which the penalty period is completely out of proportion to the applicant's actions. For example, parents often lend their children money and then eventually get paid back. Each of these loans could considered a divestment because the application received nothing in return. If the applicant made several such loans over the course of five years—or a few large ones, and the child could and did repay all except the last, the divestment amount would be the total amount of every dollar lent rather than just the final loan. If over the course of five years the child repaid $30,000 in loans but had a $2,000 loan outstanding that she could not repay, the penalty period would be 123 days rather than eight.

This interpretation is not inconsistent with § 49.453(8)(a)1 because that section refers "adjust[ing] the ineligibility period." This implies that there is a period to adjust. Likewise, the Department's policy found in *Medicaid Eligibility Handbook,* § 17.5.5.1, In this case, no decision was made on the period of ineligibility until the second application was filed. By then, the original divestment could not be adjusted because it no longer existed. The department's policy interpreting § 49.453(8)(a)1 instructs workers that if

the entire divestment has been returned, the worker "must then re-evaluate the individual's Medicaid eligibility for LTC services retroactively, back to the beginning date of the previously imposed penalty period." This indicates that the department also determined that this policy should apply where there is a penalty period to adjust. This does not mean that the department can no longer assess a cumulative penalty for overlapping divestments periods. Nor does it mean that it must give partial credit for a partially recovered divestment. Rather, it means that to reconcile §§ 49.453(3)(b)1 and49.453(8)(a)1 in a manner that acknowledges the dictates of both without leading to an absurd result, any divestment that has been completely recovered before another divestment occurs cannot be considered when determining the penalty period.

The petitioner divested $5,000 on March 27, 2014, the same date that she reapplied for benefits. Other than that divestment, she also met all of the program's financial and non-financial eligibility requirements on that date. The amount of her divestment divided by the $243.49 daily nursing home cost, which makes her ineligible for 20 days from March 27, 2014, or until April 16, 2014.

CONCLUSIONS OF LAW

1. The money the petitioner gave her daughter through January 2014 does not count toward the petitioner's divestment penalty period because she recovered the entire amount before divesting any other assets.
2. The petitioner divested $5,000 and is ineligible for medical assistance for 20 days as a result that divestment.

THEREFORE, it is **ORDERED**

That if this decision is adopted as a final decision by the department, this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it reduce the petitioner's medical assistance divestment penalty period to 20 days and find her eligible for institutional medical assistance as of April 16, 2014.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH. If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as 'PARTIES IN INTEREST.'

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 23 day of June, 2014

Michael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals