



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
[Redacted]
c/o [Redacted]
[Redacted]
[Redacted]

DECISION

MDV/157143

PRELIMINARY RECITALS

Pursuant to a petition filed April 25, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Grant County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on June 26, 2014, by telephone. A hearing set for June 11, 2014, was rescheduled at the petitioner's request. With the parties' consent, the hearing record was extended for receipt of additional exhibits; those items were received and entered into the record.

The issues for determination are (1) whether the county agency correctly determined the applicable asset limit for this spousal impoverishment case, and (2) whether the petitioner divested assets that render him ineligible for Institutional MA coverage for a period of time.

There appeared at that time 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, Room 651
Madison, Wisconsin 53703

By: Katie Grinnell, ES Spec.
Grant County Department of Social Services
Hwys 35 and 61 South
P.O. Box 447
Lancaster, WI 53813

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Grant County.
2. The petitioner entered a nursing home on September 4, 2013, and has remained there through the hearing date.
3. The petitioner's wife, who remains in the community, created an irrevocable family trust on September 13, 2013. The trust provided that trust assets/income could be paid to the beneficiaries only in the trustee's discretion. On September 20, 2013, the wife loaned \$327,706.98 (the couple's non-real estate assets) to the trust. In return the trust was supposed to pay \$27,350.35 monthly to the wife for twelve months. The interest rate on the loan was 0.28% annually.
4. In 2011, the petitioner and his wife sold their family farm to their son on a land contract, at a sale price of \$240,000. The son paid \$20,000 down, with the remainder to be paid to the couple over 15 years in monthly payments of \$1,739.75, and an interest rate of 5.00% annually. On September 20, 2013, the petitioner and his wife assigned their interest in the land contract to their son, meaning that he would then be making monthly payments on the contract to himself.
5. The petitioner applied for Long-Term Care/Institutional MA on October 17, 2013, requesting backdating to September 4, 2013. The agency denied that application on November 11, 2013, due to excess assets in a trust. As part of that process, the agency determined that the applicable asset limit was \$117,920.00 (+\$2,000). The petitioner appealed.
6. A fair hearing was conducted, with Administrative Law Judge Schneider of this office presiding. He concluded that the trust assets are not available to the petitioner and his wife. The judge questioned whether the note was valid if the petitioner did not sign the note. If it is valid, the judge wondered whether the petitioner has a full interest in the monthly \$27,350 payments. Finally, he wondered if the land contract assignment was a divestment. He remanded the matter to the county agency for a further determination. DHA Decision No. 154182 (Wis. Div. of Hearings & Appeals February 28, 2014)(DHS).
7. On March 13, 2014, the agency issued written notice of denial to the petitioner. The basis for denial was excess assets. The agency determined that the trust promissory note was valid. It also determined that the trust promissory note payments (\$27,350.35 monthly) were assets.

The assets that the agency compared against a \$52,000 asset limit totaled \$92,979.03 and were the following: \$27,350.35 monthly trust payment, petitioner's IRA of \$29,432.54, Clare Bank account #...40 of \$10,253.54, Clare Bank account #...57 of \$8,450.53, and an American Bank account #...10 of \$17,491.87. None of these assets are within the trust.
8. As part of its March 2014 redetermination, the agency concluded that the couple's assets, excluding the unavailable trust assets, totaled \$92,979.03 in September 2013. That asset figure in the "asset snapshot" means that the applicable asset limit must be \$52,000 for the couple.
9. The testimony of petitioner's spouse, [REDACTED], was not credible as to her activities and intentions in September 2013. She initially could not recall signing her Marital Property Agreement. Only after prompting by the second of her two attorneys was she able to recall signing the Agreement.

DISCUSSION

“Spousal impoverishment” rules were created with passage of the federal Medicare Catastrophic Coverage Act of 1988 (MCCA), which included extensive changes in state Medicaid (MA) eligibility determinations in cases involving married persons. In spousal impoverishment cases, the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. Wis. Stat. §49.455(1).

I. ASSET LIMIT.

The MCCA created asset eligibility limits for spousal impoverishment households that are more generous than those for a non-spousal impoverishment household (*e.g.*, \$2,000 for a single person). When initially determining whether an institutionalized spouse is MA eligible, county agencies review the combined assets of the institutionalized spouse and the community spouse. *MA Eligibility Handbook (MEH)*, 18.4.1, online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the Community Spouse Asset Share (CSAS) plus \$2,000 (*i.e.*, an asset limit) to determine eligibility.

MEH, 18.4.1 – 18.4.6, explains the asset eligibility determination process: First, a CSAS is calculated as follows: **(1)** If the couple's total countable assets are \$234,480 or more, the CSAS is \$117,240; **(2)** If the couple's total countable assets are less than \$234,480 but greater than \$100,000, the CSAS is 1/2 of the total countable assets of the couple; and **(3)** if the total countable assets of the couple are \$100,000 or less, the CSAS is \$50,000. Wis. Stat. § 49.455(6)(b)3.

Second, \$2,000 (the MA asset limit for the institutionalized individual) is then added to the CSAS to determine the total asset allowance for the couple. Generally, if the couple's assets are at or below the determined asset allowance, the institutionalized spouse is eligible for MA. If the assets exceed the asset allowance calculated for the couple, the institutionalized spouse is not MA eligible.

The first salient issue over which the parties disagree is the applicable asset limit for this “spousal impoverishment” case. The petitioner argues that the correct asset limit is \$119,240, because the petitioner and his wife had assets totaling more than \$234,480 on September 4, 2013, the date of nursing home admission. Those assets included, but were not limited to, the \$194,684 owed on the land contract and the \$93,130 in the [REDACTED] [REDACTED] joint checking account. The county argues that the lower \$52,000 limit should be used because the couple had assets totaling \$92,979 as of September 20, 2013. In arriving at this number, the agency was not counting assets that were transferred to the trust on September 20, 2013, including the \$93,130 [REDACTED] funds and \$234,576 in CDs titled in the spouse’s name.

The petitioner is correct that the asset limit should have been based on the assets available to the couple on the date of nursing home admission. This is the requirement in state statute:

(5) RULES FOR TREATMENT OF RESOURCES; INELIGIBILITY.

(a)

1. The department shall determine the total value of the ownership interest of the institutionalized spouse plus the ownership interest of the community spouse in resources as

of the beginning of the first continuous period of institutionalization beginning after September 29, 1989. The spousal share of resources equals one-half of that total value.

Wis. Stat. § 49.455(a)1. *See*, in accord, *MEH*, § 18.4.2. Thus, the CSAS for this case is \$117,240; after the petitioner's \$2,000 asset limit is added in, the couple's asset limit is \$119,240.

II. TRANSFERS AFTER 9/4/13.

Divestment is the transfer of income or non-exempt assets of a person or his spouse, by that person or his spouse, to another person for less than fair market value. Wis. Stat. § 49.453(2)(a); *MEH*, § 17.2.1. Divestments that occurred within 60 months of an Institutional MA application are a barrier to eligibility. *Id.*, § 17.3.

The petitioner and his wife committed a disqualifying divestment on September 20, 2013, when they essentially forgave the \$194,684.56 amount owed by their son on his land contract with them. The document assigning their interest over to the son is not in this hearing record, so I am accepting Judge Schneider's characterization of this transaction. I note that petitioner's attorney submitted an undated (!) but notarized document drafted by Attorney [REDACTED] that purports to transfer the petitioner's interest in the land contract to his wife. *See*, Exhibit K. This does not get him off of the divestment hook, because even if only the wife erased the son's land contract liability, the divesting transfer by the wife to the son is still a disqualifying divestment. In any event no reliance is placed on Exhibit K, as its provenance appears questionable.

Another divestment questioned by the county agency was the transfer of the \$93,130.84 [REDACTED] joint account into the trust on September 20, 2013. *See*, Exhibit J. However, this transfer is not disqualifying. The \$93,130 [REDACTED] transfer into the trust was added to the wife's \$234,576 transfer into the trust of CDs titled solely in her name. These transfers into an irrevocable trust would have been disqualifying divestments by the spouse but for the fact that she took back as "fair market value received," a promissory note that repays the combined amount (\$93,130 plus \$234,576) to her in a year, with interest. Section 17.12.2 of the *MEH* explicitly declares that such promissory notes are not a disqualifying divestment.

Petitioner's counsel also included as an exhibit a Power of Attorney document for the petitioner, dated October 8, 2013, which is after all of the transfers that matter here. *See*, Exhibit B. The importance of this document is unclear to me. A Marital Property Agreement was also submitted, but such agreements are not relevant to an MA asset or divestment determination. *MEH*, §15.1.1; 20 C.F.R. §416.1202(a), cross-referenced from 42 C.F.R. § 435.601(a),(b). Finally, the petitioner argued that the county agency was limited in its remanded review to only those eligibility elements explicitly raised in Judge Schneider's decision. That position is rejected. The agency cannot certify a person for MA unless all eligibility criteria have been met.

CONCLUSIONS OF LAW

1. The petitioner's CSAS, determined as of the date of his nursing home admission, is \$117,240.
2. The couple's available assets have fallen below the CSAS by the date of the instant hearing, if not earlier.
3. The petitioner or his community spouse divested \$194,684.56 in September 2013.

THEREFORE, it is

ORDERED

That the petition is *remanded* to the county agency with instructions to determine (1) when the petitioner's available assets fell under \$119,240, and (2) the duration of the petitioner's divestment penalty period, based on a divested amount of \$194,684.56 in September 2013. This action shall be taken within 10 days of the date of this Decision. In all other respects, the petition is dismissed.

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, Wisconsin 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 (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 8th day of
August, 2014

\sNancy J. Gagnon
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 August 8, 2014.

Grant County Department of Social Services
Division of Health Care Access and Accountability
Attorney W [REDACTED] [REDACTED]