



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

In the Matter of

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

DECISION

MDV/157839

PRELIMINARY RECITALS

Pursuant to a petition filed May 21, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Florence County Department of Human Services in regard to Medical Assistance (MA), a hearing was held on July 15, 2014, by telephone. The hearing record was held open for 10 days for a submission by the petitioner; the submission was received.

The issue for determination is whether the petitioner divested assets that resulted in a penalty period for Institutional MA.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Sharon Johnson, ES worker
Florence County Department of Human Services
501 Lake Ave.
PO Box 170
Florence, WI 54121-0170

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Florence County.

2. The petitioner entered a hospital on April 27, 2014, and then transferred to a nursing home on May 6, 2014.
3. As of May 1, 2014, the petitioner's assets consisted of a checking account and a savings account. The checking account had a balance of \$1,179 in late April 2014, and is not a barrier to eligibility. The savings account, with a balance of \$9,724.07, was closed out on May 5, 2014, with the proceeds taken by the petitioner's eventual guardian, [REDACTED].
4. The petitioner applied for Institutional/Long-Term Care MA on May 13, 2014. After receiving verification, the agency issued written notice of denial on May 15, 2014. The basis for denial was divestment of \$36,025.07 (\$26,300 plus \$9,725.07 savings transfer). This amount resulted in ineligibility for nursing home costs from May 5, 2014 through September 29, 2014. *See*, Exhibit 9. The agency later revised the end date of the penalty period to September 24, 2014.
5. The petitioner will not be able to return to the independent living in the community, and does not intend to attempt such a return. She divested her mobile home to [REDACTED] and her husband on February 21, 2013. The petitioner received no payment in return for this transfer. In calculating the divestment amount, the agency used a property tax valuation of \$26,300 for the home. The fair market value of the property in 2014 is \$15,883.
6. The petitioner filed a request for an undue hardship waiver on May 22, 2014. All necessary supporting documentation was not attached. The agency denied that request on June 9, 2014. *See*, Exhibit 14.
7. Ms. [REDACTED] created an irrevocable burial trust with [REDACTED] for the petitioner, in the amount of \$9,155.78, on May 22, 2014. *See*, Exhibit 15. [REDACTED] became the petitioner's guardian on June 9, 2014.

DISCUSSION

The non-exempt asset limit for a single person applying for/receiving Institutional MA or Family Care is \$2,000. A person cannot give their assets away to get under the asset limit.

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; *MEH*, 17.2.1, at <http://www.emhandbooks.wi.gov/meh-ebd/>. A divestment or divestments made within 60 months before an application for nursing home or FC MA may cause ineligibility for that type of Wisconsin MA. Sec. 49.453(1)(f), Stats.; *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 sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average cost of nursing facility services (currently, \$243.49 per day). *MA Handbook*, 17.5.

In this case, the agency maintains that the petitioner divested \$36,025.07 by transferring her \$26,300 real property in February 2013 without receiving fair market value compensation in return. The agency also counted the \$9,725.07 savings account transfer to Ms. [REDACTED] as a divestment. Regarding the real property, the agency relied upon the best available information to determine value, which was the property tax assessment. Post-hearing, the petitioner provided better documentation of current value, in the form of a realtor's appraisal, based on comparable sales and an evaluation of the mobile home's poor condition. Based on the best evidence (which the agency did not have when it made its decision), I found that the property had a value of \$15,883. The agency will be instructed to decrease the amount of the divestment in accord with that Finding. The petitioner's other argument regarding the property transfer, which was that Ms. [REDACTED] had helped through the years and deserved compensation, is rejected. This argument is often made in divestment cases. Without a contemporaneous written services contract between the parties, this argument goes nowhere.

Ms. [REDACTED] also removed \$9,725.07 from the petitioner's savings account on May 5, 2014. She deposited \$9,155.78 (not the full \$9,725.07) into an irrevocable burial trust for the petitioner on May 22, 2014. [REDACTED] became the petitioner's guardian on June 9, 2014. Even if I could count the action taken by [REDACTED] on May 22 as a partial divestment cure, current Department policy does not allow for removal of that amount under a "divestment refund" theory:

17.5.5 Recalculation of Penalty Periods

17.5.5.1 Full Refund

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. ...

17.5.5.2 No Reduction for Partial Refund

As of November 11, 2013, individuals who are currently serving a divestment penalty may no longer reduce this penalty period by receiving a partial refund of a previously transferred resource.

MEH, § 17.5.5.

II. HARDSHIP WAIVER REQUEST.

The petitioner's current representative also requested a hardship waiver. The statutory provision relevant to this request is as follows:

(8) INAPPLICABILITY.

(a) Subsections (2) and (3) do not apply to transfers of assets if any of the following applies:

1. The assets are exempt under 42 USC 1396p (c) (2) (A), (B), or (C).
2. The department determines under the process under par. (b) that application of this section would work an undue hardship.

(b) *The department shall establish a hardship waiver process that includes all of the following:*

1. The department determines that undue hardship exists if the application of subs. (2) and (3) would deprive the individual of medical care to the extent that the individual's health or life would be endangered, or would deprive the individual of food, clothing, shelter, or other necessities of life.

2. A facility in which an institutionalized individual who has transferred assets resides is permitted to file an application for undue hardship on behalf of the individual with the consent of the individual or the individual's authorized representative.

3. The department may, during the pendency of an undue hardship determination, pay the full payment rate under s. 49.45 (6m) for nursing facility services for up to 30 days for the individual who transferred assets, to hold a bed in the facility in which the individual resides.

[emphasis added]

Wis. Stat. § 49.453(8). See also, the less expansive Wis. Admin. Code § DHS 103.065(4)(d)2d; *MEH*, § 17.17.

It is not appropriate to grant a hardship waiver here. The petitioner's physician has declared that she requires custodial care due to dementia. It is not clear that she requires 24/7 skilled nursing care. The divested home property has not vaporized. It could be sold, with the proceeds used to pay the petitioner's care. Accordingly, the waiver request will not be granted.

CONCLUSIONS OF LAW

1. The petitioner divested \$25,608.07 within five years of, or after, her Institutional MA application.
2. An MA hardship waiver is not granted for the duration of the divestment penalty period here.

THEREFORE, it is

ORDERED

That the petition is remanded to the county agency with instructions to revise the petitioner's divestment penalty period downward to reflect a \$25,608.07 divestment (\$15,883 + \$9,725.07). 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 12th 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 12, 2014.

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