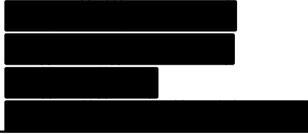




STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MDV/159680

PRELIMINARY RECITALS

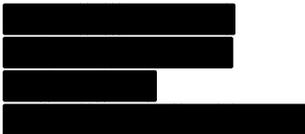
Pursuant to a petition filed August 8, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Pierce County Department of Human Services in regard to Medical Assistance, a hearing was held on September 17, 2014, at Ellsworth, Wisconsin.

The issue for determination is whether the county agency correctly determined that the petitioner was ineligible for medical assistance because he did not recover all of the assets he divested.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: Carol Hilsgen

Pierce County Department of Human Services
412 West Kinne Street
PO Box 670
Ellsworth, WI 54011

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

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

2. The petitioner applied for institutional medical assistance on June 30, 2014. The county agency determined on July 30, 2014, that he could not become eligible until a divestment period ran from March 1, 2014, to September 13, 2014.
3. The petitioner gave his family members a total of \$48,000 in December 2013. He later said it was for help they provided to him and his wife.
4. The petitioner had no notarized agreement with family members before they provided these services.
5. The petitioner's family returned \$31,900 of the money in February 2014 and \$4,300 on May 16, 2014.
6. The petitioner's family does not know how much work each did for him. They divided equally among themselves the \$11,800 remaining after they had returned the rest of the money he gave them.

DISCUSSION

A divestment occurs when someone seeking medical assistance gives away resources without receiving something of equal value in return. One cannot meet the program's \$2,000 asset limit by divesting his assets. But one who divests assets can later meet the limit and become eligible if he recovers his entire divestment. The petitioner gave four of his family members a total of \$48,000 for help they claim they gave him and his wife. They returned \$31,900 and later another \$4,300, but kept \$11,800, which they divided equally. The issue is whether, after considering the work they said they did, they returned the entire divestment.

The legal authority for the \$2,000 asset limit is found in Wis. Stat. §§ 49.46(1) and 49.47(4). A divestment occurs if he or someone acting on his behalf "disposes of resources at less than fair market value" within five years of the later of when they were institutionalized and applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). If he improperly divests his assets, he 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 at the time he applied. Wis. Adm. Code, § DHS 103.065(5)(b). Beginning on 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.

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. Until recently, this provision had allowed an applicant to reduce his divestment penalty period if only a portion of the money he gave away was returned to him. For example, if he 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 to conform with the federal statute. 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.

Because the petitioner gave his family \$48,000 and only received \$36,200 back, the county agency determined that his divestment period must be based upon the entire \$48,000 and found him ineligible for 197 days. Those applying for medical assistance can receive benefits retroactive to the first day of the month three months before the month of the application. Wis. Admin. Code, § DHS 103.08(1). The petitioner applied in June 2014, and the agency determined that he was ineligible from March 1, 2014, to September 13, 2104. He contends that the total amount of the divestment must be reduced by \$11,800 to compensate four of his family members for the work they did for him and his wife. Doing this, he argues, reduces the uncompensated amount he gave them to \$36,200. It is this amount, he argues, that he divested in December 2013 and this amount that he has entirely cured since then.

I agree with the principle that if something received in return for the transferred resources reduces the portion of those resources that were given away without compensation, the divestment is reduced by that amount, and the amount that must be returned to cure the divestment is the reduced amount. This means that if the petitioner can show that his family was entitled to receive \$11,800 for the work they performed, he divested \$36,200 rather than \$48,000 and cured the entire amount as of May 2014. If the amount they were entitled to was anything less than \$11,800, then the divestment was only partially cured, and the period he is ineligible is based upon the entire amount originally divested.

When reviewing a potential divestment, work performed for a relative can offset money given by that relative because a divestment does not bar eligibility if the individual intended to dispose of the resource for "other valuable consideration." Wis. Admin. Code, § 103.065(4)(d)2.a. But it can be difficult to accurately verify how much work a person does for a family member, which means that any allowance given for work can be abused. To reduce this abuse, the Department's policy requires that any work must be done for the direct benefit for the recipient, the payment must not exceed the local market rate, and the total payment to a relative must not exceed an amount currently set at \$11,724 unless the recipient and the family member have a written, notarized agreement in place when the work is performed:

It is divestment when an institutionalized person transfers resources to a relative in payment for care or services the relative provided to him/her. A relative is anyone related to the institutionalized person by blood, marriage, or adoption.

Count all the payments for care and services which the institutionalized person made to the relative in the last 36 months. The form of payment includes cash, property, or anything of value transferred to the relative. It is not divestment if all of the following conditions exist:

1. The services directly benefited the institutionalized person.
2. The payment did not exceed reasonable compensation for the services provided.
"Reasonable compensation" is the prevailing local market rate for the service at the time the service is provided.

3. If the amount of total payment exceeds 10% of the community spouse asset share [currently \$117,240] (See 18.4.3 Calculate the CSA), the institutionalized person must have a written, notarized agreement with the relative. The agreement must:
 - a. Specify the service and the amount to be paid, **and**
 - b. Exist at the time the service is provided.

[Examples omitted]

Medicaid Eligibility Handbook, §17.8.1.

The \$11,800 claimed for compensation exceeds the \$11,724 point where a written agreement becomes necessary, but the petitioner contends that this is allowable because this limit applies to each individual who performed services. Because the petitioner divided his money equally among four family members, each now has received less than 10% of the community spouse asset share.

Allowing separate limits for each individual can allow recipients to transfer substantial amounts without accountability to relatives, which undermines the of the policy—and the divestment statute. But as pointed out in *DHA Decision No. MDV/156359*, each reference in the policy to the person receiving the money is singular, and nothing in the policy instructs the agency to combine the amounts a person gives to all of her relatives. Thus the policy states, “It is divestment when an institutionalized person transfers resources to a *relative* in payment for care or services the *relative* provided to him/her.” It also states, “Count all the payments for care and services which the institutionalized person made to the *relative* in the last 36 months.” And finally, it states, “If the amount of total payment exceeds 10% of the community spouse asset share (See 18.4.3 Calculate the CSA), the institutionalized person must have a written, notarized agreement with the *relative*.”

Because the limit applies to each of the four family members who received money from the petitioner, each must prove that he did work worth at least the \$2,950 he received. If any of the members of the family cannot prove that his services were worth this amount, the amount by which the value of the services fall short of \$2,950 is a divestment that has not been cured. As mentioned, under the current rules, the entire amount divested, including any amount cured, determines the penalty period.

The petitioner’s evidence concerning what work his relatives did consisted of one-page handwritten note indicating what work was done. It is sketchy at best, likely because it is an after-the-fact attempt to justify giving his money away before medical costs ate it all up; there is no convincing evidence that when the family members were performing the tasks, they expected to be paid for them. It does not indicate which of the family members did the work or when he did it. *Exhibit 1*. It lists the following general tasks: grocery and supply shopping three hours a week, meals two hours a day, shoveling and ice removal three hours a week from January through May, basic housekeeping five hours a week, deep cleaning one hour a week, laundry four hours a week, yard work four hours a week from June through December, and general assistance (including providing financial help) 10 hours a month. It also listed the following special tasks: wash and re-stain the deck for 10 hours, repair the roof for 32 hours, house maintenance inside and out (including duct work) for 16 hours, replace flooring for 40 hours, clean and repair the garage for 50 hours, clean out the basement for 30 hours, and install a new dishwasher for two hours. If each individual did a quarter of this work, they would be entitled to the compensation they received because the hourly rate comes to \$6.31, which is below both the prevailing wage for these services and the minimum wage.

But there is no way to tell who did what work. This means that there is no way to determine whether any particular member of family did work worth the \$2,950 he received. The petitioner must prove by the preponderance of the credible evidence that he is eligible; because he is ineligible if he divested money, he must prove that each of the four family members performed services whose total value was worth at least \$2,950. Because there is no way to determine whether each family member did work worth this

much, the petitioner divested resources that he has not recovered. Because he has not recovered a portion of this divestment, his penalty period must be based on the entire amount he divested.

Left to determine is how much he divested. Although he cannot prove what work any particular member of his family did, together they did at least some work. Still, even if I ignore that there is little evidence that they expected to be paid while performing the work, I cannot give him any credit for it because, as has just been pointed out, I cannot determine how much work any particular family member did. Without this information, any figure is speculation. For example, it is theoretically possible that one person did all of the work. If so, any money the others received would be a divestment because they did nothing to receive it. And the money the family member doing the work received would also be a divestment because it exceeds 10% of the community spouse asset share. Other divisions of labor would cause varying amounts of divestment depending upon how much below \$2,950 any particular family member's work was worth. In the end, determining how much credit to give for the work the petitioner's family did for him is similar to determining the amount of an overpayment in a FoodShare or medical assistance matter where the worker does not include a worksheet with her calculations. Even where there appears to be some overpayment, the agency's entire claim is rejected because there is no way to determine the correct figure, or even some minimum figure. *See, e.g., FOP/131249 and MOP/149881.* Because there is no way to determine what reduction the petitioner is entitled to from the \$48,000 he initially gave his family, the entire amount must be counted as a divestment. Therefore, the agency correctly found him ineligible for medical assistance from March 1, 2014 through September 13, 2014.

CONCLUSIONS OF LAW

1. The petitioner has not recovered all of the assets he divested in December 2013.
2. The county agency correctly based the period the petitioner was ineligible for medical assistance on the entire amount he divested in December 2013.
3. The county agency correctly determined that the petitioner divested \$48,000 and a result was ineligible for medical assistance from March 1, 2014, through September 13, 2014.

THEREFORE, it is

ORDERED

The petitioner's appeal 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 10th day of October, 2014

\sMichael D. O'Brien
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 October 10, 2014.

Pierce County Department of Human Services
Division of Health Care Access and Accountability
Attorney Jennifer O'Neill