



FH  
[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MDV/159803

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 11, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Calumet County Department of Human Services in regard to Medical Assistance, a hearing was held on October 29, 2014, at Chilton, Wisconsin.

The issue for determination is whether the agency erred in its calculation of a divestment and related divestment penalty.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Jodi Kautzer

Calumet County Department of Human Services  
206 Court Street  
Chilton, WI 53014-1198

**ADMINISTRATIVE LAW JUDGE:**

John P. Tedesco  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Calumet County.
2. Petitioner had given cash gifts at times in the past:

- \$2,500 in 2002
  - \$5,000 in 2003
  - \$5,000 in 2004
  - \$2,500 in 2005
3. Petitioner did not gift any money in 2008, 2009, or 2010 as she did not have liquid assets available.
  4. Petitioner then sold the family home.
  5. Petitioner gave cash gifts to her family and paid for certain items and expenses for her family in 2011, 2012, 2013, and 2014. These included \$25,000 cash gifts in August 2011, \$5,000 for Christmas gifts in 2011 and 2012, and 2013. *See ex. #1* document entitled “Major Expenditures of Money.”
  6. Petitioner applied for Family Care on 6/17/14 to begin on 7/1/14.
  7. Petitioner disclosed that she had given gifts to others in the last five years.
  8. By notice dated 7/22/14, the agency informed petitioner that she would be subject to a divestment penalty due to a \$42,650 divestment. She would become eligible for MA on 12/24/14.
  9. Petitioner appealed.

### DISCUSSION

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. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code §DHS 103.065(4)(a); MA Handbook, Appendix 17.2.1. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as “MA card services” in the parlance). The penalty period is the number of days determined by dividing the value of property divested by the average daily nursing home cost to a private pay patient (\$243.49 in 2013). MA Handbook, App. 17.5.2.2.

There is no question that petitioner gifted the money to her children and family, so the issue is whether the gifts met an exception to the rule. Specifically, it is argued that petitioner did not intend to give the money with the intent of receiving MA. Under the law divestment is not a barrier to eligibility if the property was transferred “exclusively for some purpose other than to become eligible for MA.” Wis. Admin. Code, §DHS 103.065(4)(d)2.b. The MA Handbook, App. 17.4, provides guidelines for determining whether a transfer was for reasons other than MA eligibility. Any of these could be a basis for such a finding:

1. The person made financial arrangements for potential long term care that would cover a five-year period.
2. There was no expectation of long term care being needed for the next five years, given the person’s age and health.
3. The person had a pattern of similar gifts in the past.
4. The transfer is to a dependent relative living with the person.

The agency must deal with each transfer on a case-by-case basis; there may be a finding of no intent even if the circumstances do not meet the above four situations precisely.

The petitioner argues that the applicable exception is number 3 above which is set forth in greater detail in section 17.4 of the Medicaid Eligibility Handbook:

- *If an individual had a pattern of charitable gifting, or gifting to family members (i.e. birthdays, graduations, weddings, etc.) prior to the look-back period, similar transfers during the look-back period would not be considered to have been given with the intent to divest as long as the total yearly gifts did not exceed 15% of the individual's or couple's annual gross income. This exception is not limited to gifts made on traditional gift-giving occasions and does not preclude a pattern of giving to assist family members with educational or vocational goals,...*

\* \* \*

*This list is not intended to be all inclusive when describing divestments which are permissible because the transfer was made without the intent to qualify for Medicaid. Other situations will arise and in those instances, the person's "intent" must be evaluated on a case-by-case basis to determine whether or not a divestment occurred. The fact that a person does not meet the criteria for a specific exception does not create a presumption that the person cannot show that the transfer was made for a purpose other than qualification for Medicaid. For example, a person may be able to show that a transfer to a dependent relative not living at home was made for a purpose other than qualifying for Medicaid.*

Clearly petitioner did have a pattern of similar gifts. She had given substantial sums in the past to her family. I am persuaded on this record that her large gifts after the sale of her home were based on generosity rather than an attempt to qualify for MA. That said, I have no basis to allow for a gifting in years when no gifts were actually given. Petitioner made substantial gifts which are at issue here in 2011, 2012, and 2013. Her income in those years would have allowed gifting as follows without running afoul of the divestment rules:

- 2011 - \$2,171.24
- 2012 - \$2,245.27
- 2013 - \$2,274.40

I find it reasonable to allow this gifting on the basis that petitioner's gifts appear to be based on her coming into a sum of liquid assets which was unusual and awaited for some time, rather than her attempt to manipulate the system. But, I find no basis to allow for any sum of gifting in 2009, 2010, or 2014 as there were no gifts actually given in those years and I do not believe I have any basis or authority to prorate gifts given in other years. I recognize that the agency argues that the entire sum must be disallowed in each year because it exceeded the 15% rule. I also understand that the agency was instructed as to this from the Department. But, neither the Department's communication to the agency, nor the agency representative, cited any more authority than the section of the MEH quoted above. I do not read the section as being so clear or determinative as the agency would have me believe. I believe this conclusion is in keeping with the spirit and intent of the law and policy guidance.

### **CONCLUSIONS OF LAW**

A portion of the gifts given by petitioner in 2011-2013 are allowable.

**THEREFORE, it is**

**ORDERED**

That the matter is remanded to the agency with instruction to recalculate the divestment amount and penalty period consistent with the allowance of the gifting of 15% of income in 2011-2013. This action shall be completed within 10 days.

**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 3rd day of November, 2014

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\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 November 3, 2014.

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