



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted case name]

DECISION

MDV/161655

PRELIMINARY RECITALS

Pursuant to a petition filed October 30, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to Medical Assistance (MA) – related benefits, a hearing was held on December 16, 2014, at Green Bay, Wisconsin.

The issue for determination is whether the Department correctly imposed an 82-day divestment penalty period on the petitioner’s case for transfer of cash to her children.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted petitioner name]

Respondent:

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

By: Ashley Johnson, ES Spec.
Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Brown County.

2. The petitioner filed an assistance application with the Department in November 2014. She sought coverage for her assisted living (CBRF) charges through an MA-based Home and Community Waiver program. Assistance was requested to begin three months (the maximum) prior to the month of application.
3. The agency determined that the petitioner was eligible for “card services,” but imposed an 82-day divestment penalty period from the date of the application. The arithmetic of that computation is not in dispute, and the penalty period ended on December 14, 2014.
4. The basis for penalty period imposition was that the petitioner had an excess asset, which she divested. The problematic asset was \$20,000 in cash that the petitioner paid out in equal shares to her four children in July 2013.
5. Prior to a 2013 hospitalization, the petitioner lived independently in the community. She was hospitalized as of March 2013. Upon discharge in April 2013, her physician determined that the petitioner could not continue to live independently. The petitioner then lived in the home of her daughter [Redact] from April into mid-July 2013. [Redact] supplied care above the level of room and board. There was no written personal services contract or lease between [Redact] and her mother.
6. On July 11, 2013, the petitioner cashed in a certificate of deposit that she owned. Within a few days, she gifted \$5,000 cash to each of her four non-dependent, adult children. Later in July 2013, she entered a CBRF costing \$3,200.00 monthly. The petitioner, now age 71, has an income stream that is slightly under \$2,000 monthly. She does not have long-term care insurance. There was not an expectation of the petitioner’s imminent death at the time of CBRF admission.

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), Wis. Stats.; *MA Eligibility Handbook*, (MEH), 17.2.1. A divestment or divestments made after December 31, 2008, and within 60 months before an application/review for institutional MA/Community Waiver programs/Family Care, may cause ineligibility for that type of benefit. Sec. 49.453(1)(f), Stats.; *MEH*, 17.5. 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 days determined by dividing the value of property divested by the average daily cost of nursing facility services. *MEH*, 17.5.2, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>.

In this case, the agency maintains that the petitioner divested \$20,000 in July 2013. There is no dispute that the petitioner transferred \$20,000 to her children in July 2013. She got nothing in return from three of the four children. Those three transfers were clearly impermissible divestments. The lame assertion that they were atypical, early Christmas gifts was not believable or persuasive.

The petitioner received three months of services from her daughter [Redact], but no personal services contract was created. The Department’s current policy instruction on this topic calls for scrutiny of payments to relatives for services made within three years of the MA-related application:

17.8.1 Divesting by Paying Relatives Introduction

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 (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.

If there is no community spouse, use 10% of the highest possible CSAS in [18.4.3 Calculate the CSA](#). [i.e., 10% of \$50,000.00]

MEH, § 17.8.1. See also, Wis. Stat. § 49.453(5). I conclude that the daughter's provision of care, room and board to her mother was a service that directly benefited the institutionalized person. Because the \$5,000 transfer to **Redact** did not exceed the 10 percent (\$5,000) standard, a written, notarized agreement between them is not needed to avoid a divestment penalty.

The *MEH* provides further instruction for a relative's provision of room and board:

17.8.2 Room & Board

If an institutionalized person has made room & board payments to a relative, **disregard** them if:

1. The payments do not exceed fair market value of the room & board, **and**
2. Are for periods when the institutionalized person was receiving the room & board.

If the room & board is paid after the person has been institutionalized, treat the payment as divestment unless:

1. The payment is only for the month immediately preceding the month s/he entered the institution, **or**
2. S/he provides a written lease that existed during the time s/he was receiving room & board from the relative.

MEH, § 17. 8.2.

No detailed evidence or documentation was proffered into the record as to the petitioner's room and board costs while living with **Redact**, or the number and type of service hours provided for April-June 2013. In the absence of such evidence, I will assume that the monthly food ("board") cost was the same as a Food Stamps monthly allotment for one person -- \$189.00. For a rent equivalent, I viewed the realtor's association website for one bedroom rentals in Brown County, Wisconsin. See, (viewed in December 2014) http://www.realtor.com/apartments/Brown-County_WI . The one bedroom apartments shown in

Green Bay rent for \$475 - \$575 monthly. I therefore assigned a monthly rental equivalent cost in this case of \$500. Thus, a rational room and board charge would be \$689 (\$189 + \$500).

The daughter also performed some unspecified number of personal care hours, because the petitioner's physician declared that petitioner could not independently perform her activities of daily living (ADLs). This is a vague description. I take official notice that an entry level personal care aide in Brown County is paid, on average, \$9.35 hourly. See, wage information online at <http://worknet.wisconsin.gov>. The daughter testified that the petitioner has congestive heart failure, diabetes, and joint replacements, and has trouble walking. With these ailments, it seems likely that the petitioner needed help with the ADLs of bathing, lower body dressing, mobility, transfers, and accompaniment to medical appointments. The other Medicaid ADLs recognized in state code are grooming, eating, toileting/incontinence care, medication assistance, and skin care. The Medicaid program has also developed time allocations for each ADL task. The daily time allocations are 30 minutes for bathing, 20 minutes for dressing/undressing, 20 minutes for in-home mobility, and 30 minutes for transfers; 60 minutes weekly should also be added for physical help needs at medical appointments (not driving time). Applied to this case, the petitioner required 100 minutes/1.75 hours of care daily plus 4 hours monthly for the appointments, or \$528.28 monthly (56.5 hours x \$9.35).

The daughter did vaguely testify to spending large amounts of time caring for her mother in her home, but also noted that she is raising four children and assists with a family business. This suggests that provision of full-time care was not feasible, even if it was justified by the petitioner's diagnoses.

Adding the together the room, board, and personal care services charges, the total justifiable charge to the petitioner was \$1,217.28 monthly for three months, for a total of \$3,651.84.

CONCLUSIONS OF LAW

1. The petitioner divested \$16,348.16 (\$20,000 - \$3,651.84) in July 2013, which was before her MA/Community Waivers application date.
2. The Department shall revise its 82-day divestment penalty period downward, based on a divested amount of \$16,348.16.

THEREFORE, it is

ORDERED

That the petition is *remanded* to the Department with instructions to recalculate the petitioner's divestment penalty period length by using a \$16,348.16 divestment amount. 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 19th day of December, 2014

Nancy 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 December 19, 2014.

Brown County Human Services
Division of Health Care Access and Accountability