



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Redact

DECISION

MDV/161978

PRELIMINARY RECITALS

Pursuant to a petition filed November 13, 2014, under Wis. Stat., §49.45(5), to review a decision by the Fond du Lac County Dept. of Social Services to deny Medical Assistance (MA), a hearing was held on January 22, 2015, by telephone. A hearing set for December 17, 2014 was rescheduled at the petitioner's request.

The issue for determination is whether the appeal of a divestment determination was untimely.

PARTIES IN INTEREST:

Petitioner:

Redact

Respondent:

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

By: Redact
Fond du Lac County Dept. of Social Services
50 N. Portland St
Fond du Lac, WI 54935

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # Redact) was a resident of Fond du Lac County. She died on July 24, 2014.
2. An application for nursing home MA was filed on petitioner's behalf on December 3, 2013. The county denied the application in January after concluding that petitioner was ineligible for 556 days due to a divestment. Petitioner did not appeal.

3. A new application was filed on May 15, 2014. By a notice dated July 8, 2014, the county denied the application based upon a divestment. The notice stated that the divestment period was 526 days and that petitioner would be ineligible until May 12, 2015. The notice informed petitioner that if she disagreed with the decision she could appeal to the Division of Hearings and Appeals within 45 days of the decision.
4. On July 23 petitioner filed an undue hardship waiver request. The county made petitioner eligible for MA effective that date.
5. On August 6, 2014, the county denied the undue hardship waiver request because petitioner died on July 24, 2014, and thus the criterion for undue hardship that the person be facing eviction from the nursing facility no longer was met. The notice was sent to petitioner's authorized representative and informed her that an appeal could be filed within 45 days of the decision.

### 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. Admin. 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 2014). MA Handbook, App. 17.5. 2.2.

Wis. Admin. Code, §DHS 103.065(4)(d)2.d provides that a divestment penalty can be avoided if there would be an undue hardship, and defines "undue hardship" to mean "that a serious impairment to the institutionalized individual's immediate health status exists."

An appeal of a negative action concerning MA must be filed within 45 days of the action. Wis. Stat. §49.45(5)(a); Wis. Admin. Code, §HA 3.05(3). Language concerning the right to appeal and the time limit is included on all department notices. An MA appeal must be made in writing; it cannot be made orally unless it is then reduced to writing. Wis. Admin. Code, §HA 3.05(2)(a). The date of filing is the date the written appeal is received by the agency or the postmark date, whichever is earlier. Wis. Admin. Code, §HA 3.05(3)(c). If an appeal is untimely the Division of Hearings and Appeals lacks jurisdiction to consider the petitioner's position on the merits.

Petitioner's representatives testified that the divestment penalty was imposed incorrectly because the property was not transferred for MA purposes. They did not address the undue hardship denial.

I must conclude that I do not have jurisdiction over either issue. This appeal was filed untimely whether the issue is the imposition of the divestment penalty in the first place, or whether it is the denial of the undue hardship waiver. The divestment penalty was imposed by a notice dated July 8, 2014, and the waiver was denied by a notice dated August 6. It is evident that petitioner's representatives received the notices because there are case notes describing contacts between petitioner's representatives and county personnel. Nothing in the case notes suggests that the representatives asserted that they were appealing the determinations until October 29, but that date was more than 120 days after the divestment denial and more than 90 days after the hardship waiver denial. The appeal was filed on November 13, an additional two weeks later. When I asked petitioner's representative why she waited so long to appeal, she discussed waiting until a bank account was spent down. That occurred in April, 2014, so the response was not on point.

Because the appeal was filed more than 45 days after each denial, I must dismiss the appeal. The Division of Hearings and Appeals does not have jurisdiction over the merits of the appeal.

**CONCLUSIONS OF LAW**

Petitioner's appeal of a denial of MA due to a finding that a disqualifying divestment occurred was untimely.

**THEREFORE, it is ORDERED**

That the petition for review herein be and the same is hereby 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 27th day of January, 2015

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\sBrian C. Schneider  
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 January 27, 2015.

Fond Du Lac County Department of Social Services  
Division of Health Care Access and Accountability