



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Redact
Redact Redact
Redact

DECISION

MDV/162108

PRELIMINARY RECITALS

Pursuant to a petition filed November 19, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Fond du Lac County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on January 6, 2015, by telephone. At the petitioner's request, the record was held open for 10 days for submission of property tax and financial documents; those items were received.

The issues for determination are whether (1) the Department correctly determined that the petitioner was subject to a divestment penalty, and (2) the Department correctly denied a hardship waiver request.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Redact
Redact Redact
Redact

Respondent:

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

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

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # Redact) is a resident of Fond du Lac County.

2. The petitioner transferred her real property (lot and mobile home) at [Redact] [Redact] [Redact], to [Redact] R. [Redact] [Redact] in June 2000. [Redact] is the petitioner's son, and [Redact] holds her power of attorney. The petitioner retained a life estate interest in the property at the time of transfer.
3. The petitioner began participating in a Medicaid Community Waiver program in 2006, and then entered an MA-paid nursing home in 2010. Correspondence issued to the petitioner in October 2006 advised that if the [Redact] property were sold, a portion of the proceeds would be a counted asset for MA purposes. *See*, Exhibit 2.
4. At the annual case review on July 27, 2007, the topic of life estate sale proceeds was discussed. *See*, Exhibit 4.
5. The [Redact] property was sold to an unrelated third party on September 28, 2012. The sale was not reported to the Department.
6. In September 2014, the Department discovered that the [Redact] property had been sold for \$45,000. The petitioner kept none of the proceeds. Because the petitioner was age 79 at the time, the Department used a factor of 0.45357 to compute a life estate value of \$20,410.65 at the time of sale.
7. On October 7, 2014, the Department issued a *Negative Notice* to the petitioner, advising that she had divested \$20,410.65 from the sale proceeds. This dollar amount resulted in an 83-day divestment penalty period, running from November 1, 2014 through January 22, 2015. An undue hardship waiver request was enclosed with the *Notice*. *See*, Exhibit 7.
8. An undue hardship waiver request is to be filed within 20 days of receiving the divestment negative notice. The petitioner filed an undue hardship waiver request on November 19, 2014. This was beyond the 20 day limit. The request was accompanied by letters from the petitioner's nursing home. Those letters explained that the petitioner has dementia and needs assistance with all activities of daily living. They also stated that if the hardship waiver was not granted, the facility would have to discharge this patient. However, neither letter identified a date of involuntary discharge.
9. The undue hardship waiver request was denied by a written notice dated December 8, 2014. The reason given was failure to supply a letter from the facility identifying the date of projected involuntary discharge. *See*, Exhibit 12.
10. Prior to the divestment, [Redact] [Redact] paid property tax bills of the petitioner's, totaling \$5,491.77. These payments were not gifts to the petitioner.
11. [Redact] R. [Redact] [Redact] currently have \$9,000 remaining from the sale proceeds.

DISCUSSION

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

I. DIVESTMENT

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 2008, and within 60 months before an application/review for institutional MA, or while on these programs, 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 and community waivers services; 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, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>; 42 U.S.C. § 1396p(c).

In this case, the agency maintains that the petitioner divested \$20,410.65 on September 28, 2012. Before that date the petitioner owned a life estate interest worth \$20,410.65. The property sale price and the petitioner's age at the time of sale are not disputed. When a property is sold and the life estate extinguished, the cashed-out value of that life estate becomes an available asset to the MA participant. *MEH*, §§ 16.7.10, 16.8.1.6. If the petitioner had collected the \$20,410 to which she was entitled in 2012, she would have been ineligible for MA for several months, due to excess assets. However, she did not take the cash, and instead gave it to [Redact R Redact Redact]. That was a divestment.

The petitioner argues that the divestment amount should be reduced by liabilities paid for by [Redact Redact] after creation of the life estate. Specifically, [Redact] paid the petitioner's property tax bill on the [Redact] property from 2006 through 2011, and allegedly paid for repairs to the property. Property taxes generally remain the responsibility of the life tenant, so [Redact]'s payment of the tax bills was a benefit to the petitioner. *MEH*, § 16.8.1.6. The petitioner had insufficient liquid assets with which to pay these bills prior to the property's sale. Documentation of the tax bills and their payment by [Redact] was supplied post-hearing. I will treat these property tax payments as items that were reimbursed from the sale proceeds, and therefore a non-divested portion of the proceeds. This will reduce the divestment penalty period. The other submitted bills were not sufficiently persuasive to further reduce the divestment amount determination; it is not clear that they were exclusively the responsibility of the life estate holder.

This reduction in the penalty can occur because it is a reduction in the determination of the divestment amount. This is different than a partial refund of divestment, which is no longer allowed. *MEH*, § 17.5.5.2. The policy bars credit for a partial return of funds after the divestment has occurred. The case before me concerns reimbursement, on the divestment date, for legal liabilities that [Redact] covered for the petitioner *before* the divestment date. The property taxes paid by [Redact] from 2006 through mid-2012 total \$5,491.77. Thus, the divestment amount should be reduced by \$5,491.77, leaving a final divestment amount of **\$14,918.23**.

II. UNDUE HARDSHIP WAIVER

The petitioner also seeks an undue hardship waiver, which would allow the MA program to pay for coverage gap created by the \$14,918.23 divestment. The Department's policy language is as follows:

17.17.1 Introduction

A divestment penalty period must be waived when the imposition of the penalty period deprives the individual of:

- Medical care such that the individual's health or life would be endangered; **or**
- Food, clothing, shelter, or other necessities of life.

...

17.17.4.2 Untimely Request- Received Later Than 20 days After Notification Is Mailed

A request may be submitted later than 20 days after the local agency mails out the Divestment Penalty and Undue Hardship Notice ([F-10187](#)), (for example, when there is a

change in circumstances), but if approved, the waiver effective date will not be earlier than the date of the request. ...

17.17.5 Required Documentation

The applicant (or his/her representative) must submit the following verification of hardship:

1. A statement signed by the individual (or his/her representative) which describes whether the assets are recoverable, and if so, the attempts that were made to recover the divested assets, **and**
2. Proof that an undue hardship would exist if the penalty period is applied (as follows).
 - If the *member is currently institutionalized*, s/he must submit a copy of the notification sent from the LTC facility which states both the date of involuntary discharge and alternative placement location or other proof that if the hardship waiver is not granted, the individual will be deprived of medical care such that the individual's health or life would be endangered; or deprived of food, clothing, shelter, or other necessities of life. ...

If the applicant/member fails to submit the required verification within 10 days after the request is mailed, deny the undue hardship waiver request and notify the individual with the Undue Hardship Decision Notice (F-10188). Extend the deadline to submit the required documentation for up to ten days when the individual communicates a need for additional time or assistance in obtaining it.

MEH, § 17.17. See also, Wis. Stat. § 49.453(8)(b).

The agency correctly denied the undue hardship waiver on the technical ground that the facility's letter did not identify a projected involuntary discharge date.

In addition to this technical reason, there is a practical one. The petitioner's two children should have the ability to cover her care costs during the divestment penalty period, based on the amount that was divested to them. **Redact** received the proceeds the sale of the \$45,000 property in 2012. If the petitioner's POA had timely reported this sale to the agency in 2012, the agency would have imposed a period of ineligibility before **Redact** spent part of the proceeds; however, no timely report was made. If he dissipated a substantial chunk of the sale proceeds, is the publicly-funded program now supposed to bail him out? In any event, he has at least \$9,000 that could be applied to the petitioner's cost of care. The petitioner also has a daughter, **R.Redact**. According to the POA, **Redact** agitated to be cashed-out of her half of the *potential* inheritance in March 2011. Inexplicably, **Redact** gave in to this demand and paid her \$24,000 (half of an estimated value of the property at the time of \$48,000) out of his own funds. He took out a home equity loan on his own residence to fund the majority of this payment. See, Exhibit 8. A significant problem for **Redact** is that, when an institutionalized MA recipient retains a life estate in the property, half of the potential inheritance is many thousands of dollars less than the \$24,000 he gave to **Redact**. He made a very bad deal. **Redact** has been asked by the POA to pay \$10,000 to her mother's cost of care, and has declined, per a submitted email. However, **Redact** does not declare that she has dissipated the funds she received as an inappropriate advance payment against her mother's life estate interest. Although I cannot compel her payment toward her mother's care, it would certainly seem to be appropriate under the circumstances that she pay before the taxpayers are asked to cover institutional costs.

CONCLUSIONS OF LAW

1. The petitioner divested \$14,918.23 in September 2012, by giving away the sale proceeds of her life estate interest.
2. The Department correctly denied the petitioner's undue hardship waiver request.

THEREFORE, it is

ORDERED

That the petition is *remanded* to the county agency with instructions to redetermine the petitioner's divestment penalty period by amending the divestment amount downward to \$14,918.23. 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 10th day of February, 2015

\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 February 10, 2015.

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