



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/162998

PRELIMINARY RECITALS

Pursuant to a petition filed December 31, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Burnett County Department of Social Services in regard to Medical Assistance, a hearing was held on February 10, 2015, at Siren, Wisconsin.

The issue for determination is whether the agency correctly determined the divestment, and whether the undue hardship request was denied correctly.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Michelle Brown

Burnett County Department of Social Services
7410 County Road K, #280
Siren, WI 54872

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Burnett County.
2. In June 2014, petitioner moved to a continuing care center due injuries suffered from a fall.

3. On July 7, 2014, petitioner applied for MA-Nursing Home Long-Term Care. This application included disclosures relating to the transfer of 7 parcels of land in 2010 to her nephew [REDACTED], the person representing petitioner in this appeal as POA, and his wife.
4. The agency determined this transfer to be a divestment and calculated a 21 month divestment penalty. Notice of this penalty was mailed to petitioner on 10/23/14. That notice included notice of fair hearing appeal rights and a 45-day deadline for the request for a fair hearing in medical assistance cases.
5. Petitioner filed an undue hardship waiver request on November 12, 2014.
6. The agency worker suggested that [REDACTED] return some of the divested assets to cover the bills. [REDACTED] states that he and his wife refused and for that reason the assets are not recoverable (see ex. #1).
7. On 11/25/14 the Department sent notice of the denial of the hardship waiver request. The basis for the denial was that the property transfers could be reversed and the divested assets recovered.
8. Petitioner filed a Request for Hearing form with DHA on January 2, 2015 indicating the appealed issue as "denial of medical assistance."

DISCUSSION

First of all, the request for hearing was filed on January 2, 2015. An administrative law judge (ALJ) or hearing officer can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely. An appeal of a negative action by a county agency concerning Medical Assistance (MA) must be filed within 45 days of the date of the action. Sections 49.45(5) and 49.50(8), Wis. Stats.; Income Maintenance Manual, II-G-3.4.0. This would be an untimely request for appeal from the notice of divestment penalty dated 10/23/14 as such an appeal would have needed to have been filed within 45 days of that date. But, neither petitioner nor [REDACTED], the POA, filed a timely request for hearing from the penalty notice so I have no jurisdiction to consider it including the related issue of intent at the time of the transfer. The divestment must stand as a valid determination.

The only negative action that could have formed the basis for an appeal was the denial of the undue hardship waiver. 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.

In order to request an undue hardship waiver, an 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 member is applying for Community Waivers COP, FamilyCare, IRIS "Include, Respect, I Self-Direct" - A Medicaid waiver program. , PACE or Partnership, s/he must submit an estimate of the cost of the LTC services needed to meet his/her medical and remedial needs (as determined by the waivers case manager) and an estimate of costs for food, shelter, clothing and other necessities of life.

MEH § 17.17.5 (emphasis added).

The recoverability of the assets is the reason the denial is correct. [REDACTED] and his wife are the people to whom the properties worth more than \$160,000 were transferred for less than market value. [REDACTED] is also the person arguing that the divestment penalty creates a hardship and health risk for petitioner. I fully understand that he and his wife would prefer not to transfer the multiple properties back to petitioner. And it is that refusal that creates the hardship. If the [REDACTED] were willing to liquidate some of the transferred properties, then the nursing home bills could be paid. [REDACTED] explained that his wife is not willing to transfer the properties back to petitioner because she maintains that the transfer was not a divestment. As discussed above, the divestment determination has been made and will stand. The transfer was a divestment. It is understandable that [REDACTED] would prefer that public benefits pay for the bills. Then he and his wife get to keep the properties and the associated value and his aunt also gets the care he and his wife would like her to have.

But, it does not seem reasonable to actually allow that to occur. The agency sought justification as to whether the transfers could be reversed so that petitioner could pay the bills. Of course [REDACTED] and his wife *can* return one or two of the properties *already determined to be an unlawful divestment*. The nursing home bills could then be paid. But [REDACTED] and his wife have refused to do it and, thus, [REDACTED] has asserted that the assets are not recoverable. I note that [REDACTED], as petitioner's power of attorney, has a legal duty to act in the best interests of petitioner. His judgment should not be clouded by the value of the assets he would like to retain. It seems far more inconsistent with MA policy to allow [REDACTED] to keep the valuable properties while concurrently arguing that petitioner is destitute and at risk and needs public assistance to pay the nursing home bills for which she (with [REDACTED]'s help) contracted.

CONCLUSIONS OF LAW

1. The appeal of the divestment determination was untimely; the agency's determination that the property transfers were improper divestments, and its determination of the 21 month divestment penalty must stand.
2. The agency did not err in denying the undue hardship request.

THEREFORE, it is

ORDERED

That this 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 11th day of March, 2015

\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 March 11, 2015.

Burnett County Department of Social Services
Division of Health Care Access and Accountability