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

In the Matter of

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

DECISION
Case #: MLL - 175471

PRELIMINARY RECITALS

Pursuant to a petition filed on July 11, 2016, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability regarding Medical Assistance (MA), a hearing was held on August 10, 2016, by telephone.

The issue for determination is whether the Division correctly denied the petitioner’s request for a hardship waiver from the estate recovery program.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

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

Respondent:

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

By: [REDACTED]
Division of Health Care Access and Accountability
PO Box 309
Madison, WI 53701-0309

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES #) is a resident of Eau Claire County.

2. The petitioner's mother, [REDACTED], died on August 20, 2015.
3. The Department filed a claim against [REDACTED]'s estate on January 28, 2016, to recover \$187,869.09 in medical assistance she received from August 20, 2014, through August 20, 2015.
4. The petitioner's income is below the amount that requires him to file a federal tax return.
5. The petitioner is not on FoodShare because he eats food he grows in a garden on his mother's property. Without access to a garden, he would need FoodShare to have adequate food.

DISCUSSION

The department must file a claim against the estate of those who received medical assistance. Wis. Stat. § 49.496(3). It may waive a lien against the estate if it would cause undue hardship to an heir or beneficiary. Wis. Stat. § 49.496(6m). Under Wis. Admin. Code, § DHS 108.02(12)(b)2, it must waive a lien against the estate if the heir or beneficiary (a) would become eligible for public benefits without the waiver; (b) required the decedent's real property to keep from losing a business that used the property; or (c) is receiving general relief, relief to needy Indian persons, or veteran's benefits based upon need. The Department must notify the person handling the estate of the availability of the hardship waiver and that person in turn must notify potential heirs who would qualify for the waiver. Wis. Admin. Code, § DHS 108.02(12)(c)2. A person seeking a hardship waiver must mail his claim to the Department within 45 days. Wis. Admin. Code, § DHS 108.02(12)(d)1. That claim must (1) state his relationship to the decedent and document that relationship and (2) indicate for which of the three categories he is seeking the waiver. *Id.*

The petitioner's mother died after receiving \$187,869.09 in medical assistance benefits. He opposes the department's request to make a claim against her estate because he contends that he requires her property to generate income and to grow food that keeps him out of the FoodShare program.

He cuts brush and wood alongside her house and then sells it to supplement his income. To qualify for a hardship exemption for a business, he must show that he uses her property as part of his business and that if the department recovered her medical assistance payments from her estate it would affect the property and cause him to lose his "means of livelihood." Wis. Admin. Code, § DHS 108.02(12)(b)2.b. He does not meet this criterion because he has not shown that cutting and selling this wood generates enough income for it to be considered a livelihood. A livelihood is a "means of support or subsistence." <http://www.merriam-webster.com/dictionary/livelihood>. The petitioner testified that he earned \$2,285 working for a local township and another \$600 or \$700 mowing lawns. He did not know how much he made selling brush and wood. But I assume it was even less than he made mowing lawns because he could provide an estimate of the amount he made mowing lawns but not of the amount he made gathering brush and wood. Without evidence that the proceeds from cutting brush and wood contributed significantly to his support or subsistence, he has not demonstrated that he would lose his livelihood without the source of this income.

Although the petitioner's income is well below the amount that would allow him to obtain FoodShare, he does not participate in the program. He testified credibly that the reason he does not obtain FoodShare is because he and his siblings grow a large garden on their mother's property that feeds them throughout the year. Growing a garden large enough to support three people requires enough land to do so. Her property includes 10 acres of land. The petitioner could not grow a garden large enough to support himself if he were just renting an apartment. I am aware that, given his income, nothing prevents him from obtaining FoodShare even if he continues to grow his garden. But this has been true for a long time and he has not obtained FoodShare before. Although his past decision not to accept FoodShare does not provide absolute proof that he will not accept the benefit in the future, it does provide credible evidence that he won't. He

must prove that he is entitled to the hardship waiver, but his burden is not absolute proof but rather the preponderance of the evidence, a fairly low burden requiring only that it is more likely than not that he qualifies. For him, it means that he must prove that it is more likely than not that he would receive FoodShare if the department filed a lien against his mother’s estate that would allow it to end his use of her property. He has met that burden. Because he has met this burden, the department may not file a claim against his mother’s estate.

CONCLUSIONS OF LAW

The department may not file a lien against the estate of the petitioner’s mother because he would become eligible for FoodShare without the use of her property.

THEREFORE, it is ORDERED

That this matter is remanded to the department with instructions that within 10 days of the date of this decision it certify that it has ended its efforts to place a lien against the estate of the petitioner’s mother.

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, **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 29th day of August, 2016

\s _____
Michael D. O'Brien
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 August 29, 2016.

Division of Health Care Access and Accountability
Attorney [REDACTED]