



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

In the Matter of:

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/155403

PRELIMINARY RECITALS

Pursuant to a petition filed February 10, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Iowa County Department of Social Services [“County”] in regard to Medical Assistance [“MA”], a Hearing was held via telephone on March 25, 2014.

The issue for determination is whether petitioner’s transfer of her home to her son was a divestment.

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Julie A. Short
Attorney
Haskins Law LLC
3866 Johns Street
Madison, WI 53714

Respondent:

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

By: Nikki Biddick, ESS
Iowa County Department of Social Services
303 W Chapel Street, Ste 2300
Dodgeville, WI 53533-1450

OTHER PERSONS PRESENT:

[REDACTED], ESS
[REDACTED], Information and Assistance Specialist
[REDACTED], petitioner’s son

ADMINISTRATIVE LAW JUDGE:
 Sean P. Maloney
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]; 89 years old) is a resident of Iowa County, Wisconsin.
2. On November 21, 2013 petitioner transferred her home to her son via a *Warranty Deed* (it was recorded on December 5, 2013). Exhibit A.¹
3. During the week of November 4, 2013 petitioner requested MA Family Care ["FC"] and FC staff started a functional screen of petitioner.
4. On November 27, 2013 FC staff completed a functional screen of petitioner, entered petitioner's functional screen information the CARES system, and concluded that petitioner needed a nursing home level of care. Exhibits C & D; testimony of FC staff at about 16:30.
5. On December 9, 2013 petitioner moved into an assisted living facility (not a nursing home).
6. On December 23, 2013 petitioner applied for FC.
7. In January 2014 the County completed the financial eligibility process for FC for petitioner.
8. The County sent petitioner a *Negative Notice* dated January 30, 2014 denying her FC application due to the divestment of her home to her son; the County determined that petitioner divested \$105,356.00 and that the divestment penalty period would be 432 days. Exhibits C & D.

DISCUSSION

With certain exceptions not applicable here, if an individual or his or her spouse, or another person acting on behalf of the individual or his or her spouse, transfers assets for less than Fair Market Value ["FMV"] on or after the individual's look-back date (such transfers are commonly known as *divestment*), the individual is ineligible for FC for a specified time period. Wis. Stat. §§ 46.286(4), 49.453(2)(a) & (b) (2011-12); See also, Wis. Admin. Code §§ DHS 10.32(1)(i) (December 2013) & DHS 103.065(4)(a) (December 2008); *Medicaid Eligibility Handbook* ["MEH"] 17.2.1 et. seq. The divestment penalty period is the number of months obtained by dividing the total uncompensated value of the transferred assets by the statewide average monthly cost to a private pay patient in a nursing facility at the time of application. Wis. Stat. § 49.453(3)(b) (2011-12); Wis. Admin. Code § DHS 103.065(5)(b) (December 2008); MEH 17.5.2.

Petitioner does not deny that she transferred her home to her son for less than FMV on or after her look-back date. However, she argues that an exception to the divestment rule applies because her son was residing in her home for at least 2 years immediately before she became institutionalized and provided care to her which permitted her to reside at home rather than in the institution. She submitted a notarized *Statement of Physician* in support of her argument. Exhibit B.

There are several exceptions to the divestment rule. One of them is as follows: A divestment that occurred in the look-back period or any time after does not affect eligibility if the institutionalized person or his/her spouse divests homestead property to his/her child who was residing in the institutionalized

¹ Exhibits are those attached to the memorandum from petitioner's attorney dated March 21, 2014.

person's home for at least 2 years immediately before the person became institutionalized, and provided care to him/her which permitted him/her to reside at home rather than in the institution. This care must have been provided for the entire 2 years immediately before the person became institutionalized. MEH 17.4.7.b.; See also, Wis. Admin. Code § DHS 103.065(4)(b)4. (December 2008).

On December 9, 2013 petitioner moved into an assisted living facility² (not a nursing home). Petitioner later left the assisted living facility and became institutionalized. Therefore, for at least some period of time immediately before petitioner became institutionalized petitioner's son did not provide care to her which permitted her to reside at home rather than in the institution (because she was not residing at home, she was residing at the assistive living facility and receiving care there). As stated, for the above exception to apply the care must have been provided for the entire 2 years immediately before the person became institutionalized. Therefore, the above exception does not apply in petitioner's case.

Petitioner argues that the above exception does apply. She cites the following law defining what individuals, among others, are included in the definition of *institutionalized individual*:

“who would be eligible under the State plan under this subchapter if they were in a medical institution, with respect to whom there has been a determination that but for the provision of home or community-based services described in subsection (c), (d), or (e) of section [1396n](#) of this title they would require the level of care provided in a hospital, nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan, and who will receive home or community-based services pursuant to a waiver granted by the Secretary under subsection (c), (d), or (e) of section [1396n](#) of this title”

42 USC § 1396a(a)(10)(A)(ii)(VI); See also, Wis. Stat. §§ 46.286(4) & 49.453(1)(e) (2011-12); and, 42 USC § 1396p(h)(3).

Based on this petitioner argues that she was an *institutionalized individual* in November 2013 when the functional screen was completed (and FC staff concluded that petitioner needed a nursing home level of care). If petitioner is correct it follows that her son did provide care for the entire 2 years immediately before the petitioner became institutionalized and the above exception to the divestment rule would apply -- but petitioner is not correct.

Petitioner's argument is based on an incomplete reading of the law. The last part of the law cited by petitioner requires that the individual “will receive home or community-based services pursuant to a waiver granted by the Secretary . . .” Simply because a functional screen has been completed and it has been concluded that an individual needs a nursing home level of care does not mean that the individual will receive home or community-based services. There are other criteria, in addition to the functional screen, which must be satisfied before an individual will receive such services. With regard to FC this includes, among other things, financial criteria. Wis. Stat. § 46.286(1) (2011-12); Wis. Admin. Code § DHS 10.32 (December 2013). Thus, not all persons who complete a functional screen and are determined to need a nursing home level of care will receive home or community-based services.

The financial eligibility process for FC for petitioner was not completed until January 2014. Therefore, petitioner would not meet the definition of an *institutionalized individual* until, at the earliest, January 2014. This is because it could not be known until that time that petitioner will receive home or community-based services. It follows, as concluded above, that for at least some period of time immediately before petitioner became institutionalized petitioner's son did not provide care to her which

² All parties agree that being a resident of an assisted living facility does not, by itself, mean that a person is institutionalized.

permitted her to reside at home rather than in the institution (because she was not residing at home, she was residing at the assistive living facility and receiving care there).

Written state policy defines an *institutionalized person* to include a person who “[p]articipates in Community Waivers.” MEH 27.4.1. Petitioner argues that she was participating in Community Waivers when she had her functional screen in November 2013. This argument must fail, since, as pointed out above, not all persons who complete a functional screen and are determined to need a nursing home level of care will receive home or community-based services. Further, the plain meaning of the word “participates” requires that a person actually be receiving services -- not merely applying for services.

A second issue raised by petitioner is whether or not her FC benefits may be backdated to the date of her application in December 2013. In light of the finding that petitioner’s transfer of her home to her son was a divestment this issue is moot. However, it is noted that the Secretary of the Wisconsin Department of Health and Family Services [“DHFS”] (now the Wisconsin Department of Health Services [“DHS”]) has concluded in a Final Decision that FC benefits can not be retroactive. See, DHA Case No. FCP-40/55295 (Wis. Div. Hearings & Appeals Proposed Decision December 12, 2002; Final Decision April 15, 2002) (DHFS) {The date of this Final Decision probably should be April 15, **2003** (not 2002). Decision FCP-40/55295 was appealed to Circuit Court but was settled by way of stipulation without a decision being made on the merits. See, "Stipulation and Order For Dismissal", *Ione Kueck v. Wisconsin Department of Health and Family Services*, No. 03-CV-004416 (Wis. Cir. Ct. Milwaukee County October 6, 2003)}; See also, DHA Case No. FCP-32/72462 (Wis. Div. Hearings & Appeals Proposed Decision February 6, 2006; Final Decision March 14, 2006) (DHFS).

If she wishes petitioner may contact her local County agency and apply for a hardship waiver. There is no divestment, and no divestment ineligibility period, if the divestment ineligibility period would work an undue hardship. Wis. Stat. § 49.453(8)(a)2. (2012-13); See also, Wis. Admin. Code § DHS 103.065(4)(d)2.d. (December 2008); MEH 17.17.1. An *undue hardship* exists if the divestment ineligibility period would deprive the individual of medical care to the extent that the individual's health or life would be endangered, or would deprive the individual of food, clothing, shelter, or other necessities of life. Wis. Stat. § 49.453(8)(b)1. (2011-12). An undue hardship means that a serious impairment to the individual's immediate health status exists. Wis. Admin. Code § DHS 103.065(4)(d)2.d. (December 2008); See also, MEH 17.17.1.

CONCLUSIONS OF LAW

For the reason discussed above, petitioner’s transfer of her home to her son was a divestment.

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.

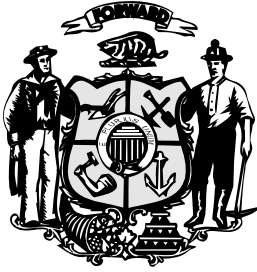
APPEAL TO COURT

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 30th day of April, 2014

\sSean P. Maloney
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 April 30, 2014.

Iowa County Department of Social Services
Division of Health Care Access and Accountability
Attorney Julie Short