



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
c/o [REDACTED] & Atty Peter Walsh
20975 Swenson Drive Suite 400
Waukesha, WI 53186

DECISION
Case #: MDV - [REDACTED]

PRELIMINARY RECITALS

Pursuant to a petition filed on September 16, 2019, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Ozaukee County Department of Social Services regarding Medical Assistance (MA), a hearing was held on November 21, 2019, at Waukesha, Wisconsin. The record was held open post-hearing for the parties to present additional evidence and closing arguments. The record was closed on December 16, 2019 after the parties submitted the additional documentation.

The issue for determination is whether the Petitioner divested assets because she sold real property for less than fair market value.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
c/o [REDACTED] & Atty Peter Walsh
20975 Swenson Drive Suite 400
Waukesha, WI 53186

Petitioner's Representative:

Attorney Peter J. Walsh
Von Briesen & Roper, S.C.
20975 Swenson Drive
Suite 400
Waukesha, WI 53186

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: Jennifer Lee
Ozaukee County Department of Social Services
121 W. Main Street
PO Box 994
Port Washington, WI 53074-0994

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. Petitioner owned a multi-family residential property at 105 S Maple St., Port Washington. It is a 4-unit residential rental property. One unit was used as a residence by the Petitioner and/or her son. One other unit was rented. Two of the units were vacant and not able to be rented due to poor interior condition of the property. The Petitioner and her family owned the property for 40 years. The rental income was a primary source of income for the Petitioner and her husband for many years.
3. In 2016, the Petitioner moved to an assisted living facility due to poor health. Her son, [REDACTED] became her power of attorney. In March 2017, the Petitioner moved to a skilled nursing facility.
4. In 2017, Mr. [REDACTED] secured a mortgage on the property to obtain funds for the Petitioner's long-term care costs. During 2017-2018, Mr. [REDACTED] withdrew approximately \$133,000 to cover the Petitioner's long-term care costs. Petitioner's total medical and long-term care costs for 2017-2018 were approximately \$208,809.
5. On July 27, 2018, a Warranty Deed was executed between the Petitioner and her son [REDACTED] for the Maple St. property. Exhibit E. Mr. [REDACTED] purchased the property from the Petitioner for \$170,000. The maximum amount of mortgage he was able to secure for the property was \$90,000. He used his savings for the remainder of the purchase price. The net sales proceeds from the purchase of \$32,966.06 was used to pay the Petitioner's long-term care expenses.
6. On September 7, 2018, a MA application was submitted on behalf of the Petitioner. The sale of the Petitioner's home was not reported. Exhibit J.
7. On February 27, 2019, the agency issued a Notice of Proof Needed to the Petitioner's POA requesting bank statements and checks from October 2018 to the present. The agency also requested information about large deposits made into the accounts. In addition, the agency requested verification of account closures and spend-down of any assets that were liquidated within the last 5 years. The agency further requested a copy of the realtor fair market value assessment and closing statement and verification of where the sale proceeds were deposited and spent. The due date for the information was March 11, 2019. Exhibit A.
8. On March 21, 2019, the agency received an Evaluation Form completed by Port Washington State Bank showing estimated fair market value of the Petitioner's real property on Maple Ave as of June 6, 2018 at \$225,000. The evaluation was done based on an exterior inspection, comparable sales and tax assessment. Exhibit E. The agency also received the 2017 tax assessment bill for the property showing an estimated fair market value of \$236,500. Exhibit E.
9. On June 7, 2019, another MA application was submitted with a 3 month backdate request.
10. On June 11, 2019, the agency issued a Notice of Proof Needed to the Petitioner's POA requesting bank statements from March 2019 to the present. The agency further requested the closing statement for the real property and verification of any other funds that were transferred or given to the Petitioner's son [REDACTED] and whether any of those funds would be recovered. The due date for the verification was July 8, 2019. Exhibit B. On June 27, 2019, the agency received bank statements and an email from [REDACTED]'s attorney who indicated that she is waiting for copies of receipts from Mr. [REDACTED] regarding repairs to the property.
11. On July 22, 2019, the agency issued a Notice of Proof Needed to the Petitioner's POA requesting information about the sale of the Petitioner's property. The due date for the verification was July

- 31, 2019. Exhibit D. On July 29, 2019, the agency received verification that included property tax bill, realtor assessment, email from [REDACTED]'s attorney.
12. On August 1, 2019, the agency issued a notice of decision to the Petitioner's POA informing her that she was approved for Institutional MA effective June 1, 2019 with no monthly premium. It further informed her that the agency had determined there was a divestment of assets in the amount of \$55,000 and was imposing a divestment penalty period of 192 days from June 1, 2019 – December 9, 2019. It also informed her that she was not enrolled in MA for the period of March 1, 2019 – May 31, 2019 due to assets exceeding the asset limit. Exhibit E.
 13. On September 16, 2019, the Petitioner filed an appeal with the Division of Hearings and Appeals.
 14. On October 2, 21, and 24, 2019, the agency received additional receipts of maintenance costs for the property and other fees that the Petitioner claimed to reduce the amount of the divestment. Exhibits F and G.
 15. On November 8, 2019, the agency reduced the divestment calculation to \$21,276.06 based on documentation provided by the Petitioner's son regarding expenses incurred in improving the property, costs saved by the Petitioner for not hiring a realtor and negative income from unrentable units. The divestment penalty was amended to 74 days from June 1, 2019 – August 13, 2019. See Exhibit H.

DISCUSSION

A person cannot receive institutional medical assistance if her assets exceed \$2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf “disposes of resources at less than fair market value” within five years of the later of when she was institutionalized and applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f).

If a person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private-pay patient in a nursing home at the time she applied. Wis. Adm. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The daily amount is currently \$287.29 Medicaid Eligibility Handbook, § 17.5.2.2.

The agency contends that the property at Maple St. had a fair market value of \$225,000. This is based on the evaluation done for the Port Washington State Bank. The agency notes that this is less than the fair market value of \$236,500 on the property tax assessment. The property was sold to the Petitioner's son for \$170,000. The agency initially determined there was a divestment of \$55,000 but reduced the divestment to \$21,276.06 after deducting costs the Petitioner saved by selling the property privately and without a realtor, negative income from uninhabitable rental unit, and the costs of improvements and repairs made to the property.

The Petitioner makes the following arguments in support of its position that the agency has not correctly determined there is a divestment in this case:

1. The Petitioner's son purchased the property at fair market value. The agency did not correctly consider anticipated expenses Mr. [REDACTED] will need to make on the property in determining fair market value and did not correctly consider Mr. [REDACTED]'s attorney's fees and costs.
2. The sale was done exclusively for purposes other than to make the Petitioner eligible for MA and is not, therefore, a divestment.
3. The property was an exempt business asset and the sale is not, therefore, a divestment.

The Petitioner argues that the sale of the Petitioner's property to her son was for purposes other than to make the Petitioner eligible for MA and is not, therefore, a divestment under MEH 17.4. The Petitioner argues that her son paid fair market value for the property. The Petitioner asserts that the Evaluation used by the agency to determine the fair market value is not a qualified appraisal and the person who performed the evaluation, Mr. [REDACTED], is not an appraiser. Mr. [REDACTED] testified at the hearing that he did not inspect the interior of the property or consider the fact that the rental units were not being rented at the time of his evaluation. He relied on comparable sales of rental properties and the exterior condition of the property in his estimate of fair market value. He also stated that he did not consider the expense necessary to return the units to a rentable condition in his estimate or the rental history of the property. He testified at the hearing that all these factors would make a difference in his estimate. He further testified that if these factors had been considered, \$170,000 would be in the range of estimated fair market value for the property. The Petitioner provided the receipts for the expenses that her son incurred in repairing and improving the property and costs yet to be incurred for additional repairs that are necessary to put the property to its highest and best use.

The Petitioner further argues that the evidence demonstrates the money she received from the sale of the property was used to provide for her long-term care expenses in 2017 and 2018. She submitted copies of her 2017 and 2018 tax returns to show reported medical expenses totaling \$208,809. The Petitioner's son testified that he took out a mortgage for the Petitioner on the property and withdrew \$133,000 from the mortgage in 2017 and 2018 to pay for her medical expenses. The Petitioner argues that her son's use of substantially all of the value of the property to pay her long-term care expenses demonstrates that the property was not sold with the intention of qualifying the Petitioner for MA.

The agency argues that Mr. [REDACTED] waited a year and 8 months to start the process of selling the property. If the Petitioner had sold the home at the time she entered an assisted living facility, additional costs to maintain the property would not have been incurred. Further, the agency argues that the wear and tear on the property would not have been as extensive if the property had been sold when she moved to the assisted living facility. The county argues that Mr. [REDACTED] purchased the property at less than fair market value and gained an ongoing income-producing rental property.

I concur with the Petitioner that there is sufficient evidence to demonstrate that the sale of the Petitioner's property to her son was not done with the intent to qualify her for MA and is not, therefore, a divestment. The Petitioner's son paid a substantial amount for the property and used the equity value and proceeds from the sale to pay for the Petitioner's long-term care costs. The evidence further demonstrates that he paid fair market value for the property when one considers the costs of repairs and improvements that have been incurred and the costs that are yet to be incurred well as the fact that units were not rentable at the time of purchase. All these factors would be important in determining fair market value and the evidence demonstrates that none of these factors were considered in the property tax assessment's estimate of fair market value or in Mr. [REDACTED]'s estimate.

Because I find that there is no divestment because the sale of the Petitioner's property was not done with the intent to qualify the Petitioner for MA and the sale was for fair market value, I am not addressing additional arguments presented by the Petitioner.

CONCLUSIONS OF LAW

The sale of the Petitioner's home was not a divestment.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to re-determine the Petitioner's MA eligibility in accordance with the finding of this decision that the sale of the Petitioner's home was not a divestment. The agency shall issue a new notice of decision to the Petitioner with new appeal rights. These actions shall be completed within 10 days of the date of this decision.

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, 4822 Madison Yards Way 5th Floor, 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 Milwaukee,
Wisconsin, this 9th day of January, 2020

\s_____
Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 9, 2020.

Ozaukee County Department of Social Services
Division of Health Care Access and Accountability
Attorney Peter Walsh