



FH
[REDACTED]

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

In the Matter of

[REDACTED]

DECISION

MDV/144813

PRELIMINARY RECITALS

Pursuant to a petition filed October 26, 2012, 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, a hearing was held on December 11, 2012, at Fond du Lac, Wisconsin.

The issue for determination is whether the county agency correctly denied the petitioner's MA application due to divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Petitioner's Representative:

Attorney Karl Dovernik
P O Box 178
Wales, WI 53183

Respondent:

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

By: M. Aird, SSP

Fond Du Lac County Department of Social Services
87 Vincent Street
Fond Du Lac, WI 54935-4595

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Fond du Lac County.
2. The petitioner applied for MA in late May 2012. Verification of assets and \$195,000 worth of burial insurance policies was requested, and then received by the agency in July 2012. Although

the petitioner's assets came under the MA asset limit by June 1, 2012, the agency denied her application due to an alleged divestment. A negative notice was issued on July 27, 2012, identifying a \$205,000 divestment, with the divestment disqualification period ending January 7, 2015. See, Exhibit H.

3. On August 21, 2012, the agency corrected the petitioner's divestment amount (half was attributed to her spouse) to \$97,500, with the new divestment period identified as ending on August 27, 2013.
4. On August 31, 2012, the agency received an Undue Hardship Waiver Request for the petitioner. The agency granted the request and opened MA certification for the petitioner. The agency determined on September 19, 2012, that the hardship waiver had been erroneously granted due to lack of proof of involuntary discharge, and that the MA certification was incorrect. Notice was issued to the petitioner on September 19 that the hardship waiver request was denied, MA certification would end October 31, 2012, and that the divestment disqualification period would run until May 12, 2013. See, Exhibit Q.
5. The petitioner submitted a new hardship waiver request to the agency on October 22, 2012. The agency denied this request on November 28, 2012, due to untimely filing. The agency's current position is that the petitioner divested \$74,500.
6. Prior to but within five years of her MA application, the petitioner and her husband purchased life-insurance-funded burial contracts (LIFBC) for relatives that were irrevocably assigned to a third party, Unity Financial Funeral Trust (Trust). Each LIFBC specifies that unused funds are payable to the estate. The purchase cost \$195,000. In October 2011, the petitioner executed a *Statement of Funeral Goods and Services Selected* for each of 13 family members, with a designation that the Trust would pay for a casket and outer burial container for each of them, at a cost of \$15,000 per relative. The relatives were the petitioner's children and their spouses.

DISCUSSION

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

A divestment is a transfer of non-exempt 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 December 31, 2008, and within 60 months before an application/review for institutional MA or FC, may cause ineligibility for that type of Wisconsin MA/FC. Sec. 49.453(1)(f), Stats.; *MEH*, 17.3. The ineligibility is only for nursing home care; 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 months determined by dividing the value of property divested by the average monthly cost of nursing facility services. *MEH*, 17.5, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>.

In this case, the petitioner expended her assets on the purchase of LIFBCs, irrevocably assigned to the Trust. The agency looked askance at this purchase because it was not for something that would be used by the petitioner. *If* the LIFBCs for the children are not *exempt*, their purchase by definition becomes a divestment because petitioner purchased them for other people and received nothing in return. That is why the county agency determined that a divestment occurred here.

The petitioner argues that she has not divested because she is the titleholder of the LIFBCs, and that the LIFBCs are exempt because all of the funds therein were used to purchase "burial spaces." Exempt asset status for EBD MA is determined by using SSI standards. 42 C.F.R. § 435.845(b). The federal SSI rule exempts burial spaces and contains the following language:

§ 416.1231 Burial spaces and certain funds set aside for burial expenses.

(a) *Burial spaces* —(1) *General*. In determining the resources of an individual, the value of burial spaces for the individual, the individual's spouse or any member of the individual's immediate family will be excluded from resources.

(2) *Burial spaces defined*. For purposes of this section “burial spaces” include burial plots, gravesites, crypts, mausoleums, urns, niches and other customary and traditional repositories for the deceased's bodily remains provided such spaces are owned by the individual or are held for his or her use. Additionally, the term includes necessary and reasonable improvements or additions to or upon such burial spaces including, but not limited to, vaults, headstones, markers, plaques, or burial containers and arrangements for opening and closing the gravesite for burial of the deceased.

(3) *An agreement representing the purchase of a burial space*. The value of an agreement representing the purchase of a burial space, including any accumulated interest, will be excluded from resources. We do not consider a burial space “held for” an individual under an agreement unless the individual currently owns and is currently entitled to the use of the space under that agreement. For example, we will not consider a burial space “held for” an individual under an installment sales agreement or other similar device under which the individual does not currently own nor currently have the right to use the space, nor is the seller currently obligated to provide the space, until the purchase amount is paid in full.

20 C.F.R. § 416.1231(a)(1)-(3). Per the above definition, a burial space includes vaults and burial containers (e.g., caskets). This is consistent with the Wisconsin MA policy definition of burial spaces. See, *MEH*, §16.5.4. The STGS executed by the petitioner are for purchase of caskets and burial vaults, and so the “purchased” items are burial spaces. The purchases were paid in full, so the seller is obligated to provide the burial space items.

The remaining question here is whether the purchase of burial spaces for a large number of adult children and their spouses satisfies the rule’s requirement that the burial spaces be for the MA recipient, her spouse, or “any member of the individual’s immediate family.” The rule addresses this also:

(4) *Immediate family defined*. For purposes of this section *immediate family* means an individual's minor and adult children, including adopted children and step-children; an individual's brothers, sisters, parents, adoptive parents, and the spouses of those individuals. Neither dependency nor living-in-the-same-household will be a factor in determining whether a person is an immediate family member.

Id., § 416.1231(a)(4). See in accord, *MEH* §16.5.4. Thus, it was permissible to buy burial spaces for all of the petitioner’s adult children and their spouses, and those spaces are exempt assets. Accordingly, there is no divestment penalty to be served by the petitioner here.

As an aside to the agency’s curiosity, as evidenced by part of its email exchange with the Department’s Call Center, a question was raised as to what would happen to an LIFBC if the purchaser/depositor dies before the death of the child for whom services/burial space was purchased. Wisconsin statutes contain the following:

2. In the event of the death of the depositor before the death of the potential decedent, title to funds under par. (a) shall vest in the potential decedent, and the funds shall be used for the personal property and services to be furnished under the contract for the funeral of the potential decedent.

Wis. Stat. § 445.125 (1) (b)2.

CONCLUSIONS OF LAW

1. The petitioner's purchase of LIFBCs that in turn were totally used to purchase burial spaces for her children did not put the petitioner over the MA asset limit because such burial spaces are exempt assets for MA purposes.
2. The petitioner did not commit a disqualifying divestment by purchasing exempt assets (burial spaces), for which she and her husband remain the owners (through the Trust).

THEREFORE, it is

ORDERED

That the petition is *remanded* to the county agency with instructions to redetermine the petitioner's Long-term Care/Institutional MA eligibility from June 1, 2012, forward, in accord with the Conclusions of Law above. This action shall be taken within 10 days of the date of this Decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 18th day of January, 2013

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on January 18, 2013.

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Division of Health Care Access and Accountability
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