



FH  
[REDACTED]

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

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In the Matter of

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

DECISION

MGE/170367

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 24, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Barron County Department of Human Services in regard to Medical Assistance, a hearing was held on January 08, 2016, at Barron, Wisconsin.

The issue for determination is whether the county agency correctly determined the date the petitioner became eligible for medical assistance.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

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

Petitioner's Representative:

Attorney [REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: [REDACTED]

Barron County Department of Human Services  
Courthouse Room 338  
330 E Lasalle Ave  
Barron, WI 54812

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Barron County.

2. The petitioner applied for institutional medical assistance on September 8, 2015. The county agency determined on October 23, 2015, that he would be eligible for benefits on November 17, 2015. It determined that his house was an available asset until he listed it with a realtor in October 2015 and that he was ineligible for 38 days from October 1, 2015, through November 7, 2015, because money that was unaccounted for while he lived with his daughter was divested to her.
3. The petitioner's daughter [REDACTED] moved in with him some time before [REDACTED] 2011 because he could no longer care for himself. They then moved into her house in [REDACTED].
4. On [REDACTED] 11, 2011, shortly after moving in with his daughter, a couple unrelated to the petitioner has rented his house for \$800 per month. They have been in the house since then. His mortgage on the house is \$778 per month. He includes income from the property on his federal income tax return as a business expense.
5. The fair market value of the petitioner's home is \$76,400. He owed \$67,588.31 on it as of September 2015.
6. [REDACTED] quit her job in 2012 to provide continuous care to her father. He had developed severe dementia and became incontinent, first of the bladder and then of the bowel. In return for this care and her loss of income, they agreed to combine their income to meet their expenses.
7. Any money the petitioner gave [REDACTED] was not to become eligible for medical assistance.
8. The petitioner was hospitalized in August 2015. His family, expecting him to return home, purchased a transfer board and rented a wheelchair, but his doctor instructed them to place him in a nursing home so he could obtain proper rehabilitation.
9. The petitioner had several medical setbacks while in the nursing home and was unable to leave it.

### DISCUSSION

A person cannot receive institutional medical assistance if his "actually available" assets exceed \$2,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat. §§ 49.46(1) and 49.47(4). He cannot reach this limit by giving away his assets. Special rules apply when determining whether non-homestead real property is an asset. The petitioner applied for institutional medical assistance on September 8, 2015, and requests benefits retroactive to the first of that month. The agency determined he was ineligible in September because the house he used to live in but now rented out was an available asset. It then delayed his eligibility for 38 days to November 7, 2015, as a penalty for allegedly giving his daughter \$9,808.18 without receiving anything in return.

Giving away an asset is considered a divestment. This occurs if the petitioner or someone acting on his behalf "disposes of resources at less than fair market value" within the "look back date." The look back date is five years before the latter of when he was institutionalized and when he applied for medical assistance. Wis. Stat. § 49.453(1)(f); *Medicaid Eligibility Handbook*, § 17.5.3. If someone improperly divests his assets, he is ineligible for institutional medical assistance for the number of days obtained by dividing the amount given away by the statewide average daily cost to a private pay patient in a nursing home when he applied. This is currently \$252.95. Wis. Admin. Code, § DHS 103.065(5)(b). *Medicaid Eligibility Handbook*, § 17.5.2. A divestment does not bar eligibility if he shows to the "satisfaction of the department" that the "resource was transferred exclusively for some purpose other than to become eligible for MA." Wis. Admin. Code, § DHS 103.065(4)(d)2.d.

The petitioner's health has been failing for the last decade. His children began checking on him several years ago. When this was not enough, his daughter [REDACTED] moved in with him some time before [REDACTED] 2011. They soon realized that his house did not meet their needs. He then moved in with her and in [REDACTED] 2011 an unrelated couple began renting his house for \$800 a month. The next year his needs became so great that [REDACTED] quit her job to provide continuous care to him. He had dementia and then began wetting

and defecating himself. They combined their funds to meet their joint needs. This continued until he was hospitalized in August 2015. His family, expecting him to return home, purchased a transfer board and rented a wheelchair, but his doctor instructed them to place him in a nursing home so he could obtain proper rehabilitation. While there, he had several setbacks that ended any chance that he would return home.

It is during and just before the time [REDACTED] lived with the petitioner that the agency contends the divestment occurred. It determined how much he earned and then subtracted his monthly costs such as rent, utilities, prescriptions, telephone, television and internet, credit card payments, food, cigarettes, gas, tax preparation, and food; food cost were based on the maximum amount of FoodShare one could receive in a month. From this, it determined that the petitioner had divested \$9,808.18 since September 2010.

The department has enacted a policy regarding payments made for care given by a family member. That policy, found in the *Medicaid Eligibility Handbook*, §17.8.1., It states:

It is divestment when an institutionalized person transfers resources to a relative in payment for care or services the relative provided to him/her. A relative is anyone related to the institutionalized person by blood, marriage, or adoption.

Count all the payments for care and services which the institutionalized person made to the relative in the last 36 months. The form of payment includes cash, property, or anything of value transferred to the relative. It is not divestment if all of the following conditions exist:

1. The services directly benefited the institutionalized person.
2. The payment did not exceed reasonable compensation for the services provided. "Reasonable compensation" is the prevailing local market rate for the service at the time the service is provided.
3. If the amount of total payment exceeds 10% of the community spouse asset share (See 18.4.3 Calculate the CSA ), the institutionalized person must have a written, notarized agreement with the relative. The agreement must:
  - a. Specify the service and the amount to be paid, **and**
  - b. Exist at the time the service is provided.

[Examples omitted]

The petitioner signed an agreement with his daughter on September 29, 2015, allowing her to be reimbursed for the care she provided him. The agency correctly states that this agreement is invalid because it was entered into after she provided the services. But that does not mean that there is a disqualifying divestment. An agreement is necessary only if the payments exceed 10% of the community spouse asset share, which is currently \$119,220 and has been at least \$109,560.00 since January 2009. This means that the petitioner could pay [REDACTED] at least \$10,956 a year for her services without any written contract, assuming she did enough work and charged a reasonable rate. The evidence leaves no doubt that, at least since 2011, [REDACTED] provided at least two or three times this amount of services each year. Very little of the divestment is attributed to the time before [REDACTED] moved in—I cannot tell the exact amount—but there is no doubt that [REDACTED] also provided enough care during this period to justify this amount. Much of the alleged divestment occurred in the last year the petitioner lived with [REDACTED], but these figures do not account for payments made on the petitioner's behalf for the transfer board, wheelchair, and diapers. Based upon all of this, I find that no divestment occurred.

The second issue is whether the house the petitioner used to live in but is now rented was an available asset in September 2015. (The agency concedes that it was not available in October 2015 because he listed it with a realtor. *See Medicaid Eligibility Handbook*, § 16.9.) Both parties submitted various policies

to support their positions. The petitioner also submitted a circuit court decision and an earlier Division of Hearings and Appeals decision. Neither circuit court nor DHA decisions are binding, and, because circuit court decisions are unpublished, I am not sure it is proper to cite them. As for the policies, these are the Department's interpretation of the law; the law itself consists of statutes and administrative code provisions. In this matter, there is an administrative code provision directly on point that must be considered before moving onto policies and prior decisions.

The property in question is real property that is no longer homestead property because the petitioner does not live in it. Section DHS 103.06(5)(b) exempts non-homestead property if it produces a reasonable amount of income:

If the value of non-homestead property together with the value of the other assets exceeds the asset limit, the non-homestead property need not be counted as an asset if it produces a reasonable amount of income. In this paragraph, "reasonable amount of income" means a fair return considering the value and marketability of the property.

Nothing in this regulation requires—or even allows—the department to consider the amount of time the applicant or recipient devotes toward managing the property. The petitioner receives \$800 per month for property assessed at \$76,400. He does pay most of this as a mortgage, but this is an arm's-length transaction that has been going on for almost five years, which clearly distinguishes it from situations where a property is rented to a relative at a reduced rate for a short period just as the applicant seeks benefits. Given that the property is worth \$76,400, the amount of rent the petitioner receives for it is a fair return. Moreover, those who engage in commercial real estate do not do so just for the amount of rent they can get for it. Just as those buying stocks consider not only the stock's dividends but also its potential for appreciation, real estate holders consider both the property's rent and its potential to increase in the value. Based upon this, I find that the petitioner's property was exempt in September 2015.

With limited exceptions that do not apply here, medical assistance "eligibility begins the first day of the month in which the valid application is submitted and all program requirements are met..." *Medicaid Eligibility Handbook*, § 2.8.1. Because the only challenges to the petitioner's eligibility for the month he applied, September 2015, were the alleged divestment and the availability of property, he is eligible for medical assistance retroactive to September 1, 2015.

I note to the petitioner and his family that nothing in this decision allows him to pass any proceeds from the future sale of his house to them.

### **CONCLUSIONS OF LAW**

1. The petitioner did not divest any of his assets within five years of applying for medical assistance.
2. The petitioner's former home was not an available asset during September 2015 because he received a reasonable amount of income from it.
3. The petitioner has met all of the criteria to be eligible for institutional medical assistance since September 2015.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it take all steps necessary to provide institutional medical assistance benefits to the petitioner retroactive to September 1, 2015.

## 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 2nd day of March, 2016

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\sMichael 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 March 2, 2016.

Barron County Department of Human Services  
Division of Health Care Access and Accountability  
Attorney [REDACTED]