DHA-15 (7/96)

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of

[redacted]

DECISION

MDV-40/18587

P R E L I M I N A R Y   R E C I T A L S

Pursuant to a petition filed September 25, 1997, under s.49.45(5), Wis. Stats., to review a decision by the Milwaukee County Dept. of Human Services to deny Medical Assistance (MA) nursing home services, a hearing was held on December 8, 1997, at Milwaukee, Wisconsin.

The issue for determination is whether the county agency correctly denied MA nursing home payment due to divestment. More specifically, the issues are (1) whether the agency correctly treated repair costs to a property in which the petitioner retains a life estate interest as divestments, and (2) whether the agency correctly cumulated monthly cash divestments when computing the MA penalty period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST: Petitioner:

[redacted]

Department of Health and Family Services
Bureau of Health Care Financing
1 W. Wilson St., Room 230
P.O. Box 309
Madison, WI 53707-0309
By: Ms. Pat Quezaire, ES Supr.
Milwaukee County Dept. of Human Services
1220 W. Vliet Street
Milwaukee, WI 53205

EXAMINER: Nancy Gagnon, Attorney
Division of Hearings and Appeals

F I N D I N G S O F F A C T

1. Petitioner (SSN: [redacted] CARES No. [redacted] is a resident of a nursing home in Milwaukee County.

2. On August 11, 1997, an MA application was filed on the petitioner's behalf. The county agency issued written notice of MA nursing home coverage denial on September 17, 1997 (MA "card services" were granted). The denial period ends on July 31, 1998. See Exhibit 1.

3. The agency's denial was based on its determination that the petitioner had (1) divested $52,074.30 by paying for repairs to the residence at [redacted], Wisconsin, and (2) divested $30,997 in cash to his children.

4. The petitioner and his wife, [redacted], deeded a remainder interest in their home at [redacted] to their four children on October 15, 1991. The parents retained a life tenancy in the property. The deed did not relieve the petitioner of the responsibility to pay property taxes and keep the property in good repair. See Exhibit 2A. However, the petitioner did not keep the property up.

The petitioner and [redacted] entered the nursing home in January, 1996; [redacted] died prior to August, 1997. Upon inspecting the residence after the petitioner's nursing home admission, his children determined that extensive repairs were needed to be make the property habitable for [redacted]'s return, rental to another party, or sale.

5. Between August, 1996, and August, 1997, the petitioner spent $52,074.30 on repairs to the home at [redacted]. The repairs included roof replacement, replacement of all of the 1940's windows (which had dry rot), tuckpointing, re-grading of a portion of the property to remedy water leaking into the basement, plumbing replacement, and the razing and reconstruction of a garage. None of the money was used to expand the square footage of the house or to add new amenities to it.

6. The residence at [redacted] is currently up for rent or sale.

7. The petitioner and his wife made monthly cash transfers to their children from January 25, 1996, through August 1, 1997. They never transferred more than $3,334.00 in any month. See Exhibit 2C. The petitioner's children claim to have paid unspecified amounts of his property taxes and heating bills from these cash transfers, with the balance of the case transfers being made without receipt of anything of value in return.

More specifically, the petitioner made 12 monthly cash transfers of $2,975 from January through December, 1996. As explained below, these transfers rendered him ineligible for institutional MA services from January through October, 1996. The petitioner and his wife also transferred $30,997 in cash from March through August, 1997.

D I S C U S S I O N

An MA recipient may not have nonexempt assets in excess of $2,000. The recipient also may not give away nonexempt assets in an effort to become eligible for MA; such an act is a prohibited divestment. In general, a person (or his spouse, or a person acting on his behalf) who transfers a nonexempt asset to another person for less than its fair market value and for the purpose of qualifying for MA is found ineligible. MA Handbook, Appendix 14.1.0; sec. 49.453(2)(a), Wis. Stats. Only divestments occurring within 36 months before, or with respect to trusts, 60 months before, the first date the individual is both institutionalized and an MA applicant, are a bar to eligibility. Ibid., (1)(f). If such a transfer occurs, the individual is ineligible for MA for nursing home services for a number of months determined by totalling the value of all assets transferred during the look-back period and dividing that amount by the average monthly cost to a private patient of nursing facility services at the time of the MA application. Ibid., (3)(b). The ineligibility period begins with the month of the first divesting transfer of assets. Ibid., (3)(a).

I. REPAIRS TO THE PROPERTY IN WHICH THE PETITIONER RETAINED A LIFE ESTATE INTEREST.

The county agency found that divestment occurred with respect to (1) payments made to repair the property in which the petitioner retained a life estate interest and (2) transfers of cash. There is no dispute that the petitioner spent $52,074.30 on repairs to the life estate property within 36 months of his MA application. Possession of a life estate interest does not affect a person's receipt of MA institutional services. Sec. HFS 103.06(6), Wis. Adm. Code. Further, a life tenant has a duty to make ordinary, reasonable, and necessary repairs to preserve the property. In re Matthews' Estate, 210 Wis. 109, 245 N.W. 122 (1932). The petitioner did so here. Because the petitioner received value (repairs to a property he was obligated to maintain) in exchange for the $52,074.30 paid out, these payments are not disqualifying divestments. Sec. HFS 103.065(4)(d)2a, Wis. Adm. Code.

II. MULTIPLE CASH TRANSFERS.

The cash transfers made between January 25, 1996, and August 1, 1997, are clearly divestments. The petitioner transferred those resources to his children without receipt of something of fair market value in return. (Although the children assert that they paid some of the petitioner's property taxes and heating bills, they produced no corroborating evidence, and therefore have not met their burden of proving that this was so).

The issue pertaining to these multiple cash transfers is how they are used to compute the divestment penalty period. The petitioner asserts that the penalty period is zero months because each month's divestment did not exceed $3,334. The agency correctly identified a 10 month penalty period running from January, 1996, through October, 1996, for the January through December, 1996, cash divestments. Because the petitioner does not seek MA certification for that period, that penalty period determination is not in issue here. The second penalty period calculation, based on the $30,997 transferred from March through August, 1997, is in dispute.

The controlling state statute and state code language direct the agency to determine the penalty period by "dividing the total uncompensated value of the transferred resources by the statewide average monthly cost to a private pay patient in an SNF at the time of application." Sec. HFS 103.065(5)(b), Wis. Adm. Code; see also s.49.455(3)(b), Wis. Stats. This language does not direct the agency to test monthly divested amounts against the $3,334 SNF monthly cost; rather it calls for division of the total transferred resources by $3,334.

The Department's policy instruction here also calls for a cumulation of multiple, consecutive divestments, unless they are adequately spaced out over time:

14.5.2 After 10-1-93 The penalty period begins with the month of divestment and extends for the number of months that result from dividing the divested amount (14.2.7) by the average nursing home cost to a private pay patient ($3,334).

Round all fractions downward. For example, 8.6=8 months, .7=0 months.

...

14.6.2 After 10-1-93 For multiple divestments beginning 10-1-93:

1. Add together all the divested amounts of <u>transfers in the lookback period</u> or any time thereafter that are connected in any of the following ways:

   a. Transfers that occur in the same month.
   b. Transfers that occur in both months of a period of any 2 consecutive months.
   c. Transfers with a penalty period (14.5.0) that extends into a month in which there is another transfer.

   ...

2. Calculate the penalty period (14.5.0).

...

If there are transfers in the lookback period which are not connected in any of the ways described above, treat them as separate and calculate a separate penalty period (14.5.0) for each.

(last paragraph emphasis added)

<u>MA Handbook</u>, Appendix 14.5.0 and 14.6.2 (7-1-97). Petitioner urges that the statutory and code language be ignored, and that the examiner only look to the italicized portion of the policy handbook here. However, it is clear that the pattern of divesting cash in consecutive months fits the policy instructions at 1b and c above.

Using the policy methodology, the $30,997 divestment occurring between March and August, 1997, creates a nine month penalty period ($30,997 divided by $3,334 equals 9). The nine month penalty begins in the first month of that divestment, March, 1997; it ends on November 30, 1997.

CONCLUSIONS OF LAW

1. The petitioner's payments for repairs to the property in which he holds a life estate interest were not a divestment.

2. Transfers of $30,997 in cash by the petitioner and his wife from March through August, 1997, create an MA penalty period of nine months ending on November 30, 1997. Because the transfers occurred in consecutive months, the

agency correctly added them together before dividing the divestment by the SNF rate to determine the penalty period.

NOW, THEREFORE, it is

O R D E R E D

That the petition herein be remanded to the county agency with instructions to change the petitioner's MA penalty period so that it expires on November 30, 1997, rather than July 31, 1998. This action shall be taken within 10 days of the date of this Decision; in all other respects the petition is dismissed.

REQUEST FOR A REHEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to 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 must explain what mistake the examiner 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.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in § 227.49 of the state statutes. 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 filed 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). The appeal must be served on the Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in § 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 16th day of December, 1997.

cc: Milwaukee Co. - 9378
Susan Wood, DHFS
[redacted]

Nancy Gagnon

Nancy Gagnon, Attorney
DIVISION OF HEARINGS AND APPEALS
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