DHA-15 (R10/97)

# STATE OF WISCONSIN
# Division of Hearings and Appeals

In the Matter of

(petitioner)
C/o Carol Wessels
Nelson, Irvings & Waeffler, S.C.
Wauwatosa, WI 53222

DECISION

MDV-45/86382

## PRELIMINARY RECITALS

Pursuant to a petition filed August 7, 2007, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Ozaukee County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on October 15, 2007, via telephone. The record was held open 15 days to allow petitioner's attorney time to submit a post-hearing brief. That brief was received in the time allowed.

The issues for determination are (1) whether the county agency correctly determined that the petitioner was ineligible for institutional MA for 37 months due to divestment and (2) whether the agency correctly calculated petitioner's patient liability.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
C/o Carol Wessels
Nelson, Irvings & Waeffler, S.C.
Wauwatosa, WI 53222

Represented by:

Carol J. Wessels
3077 N. Mayfair Rd., Suite 203
Wauwatosa, WI 53222

Respondent:

Wisconsin Department of Health and Family Services
1 West Wilson Street, Room 650
P.O. Box 7850
Madison, WI 53707-7850

By: Sandra Rabuck, ESS
Ozaukee County Dept Of Social Services
121 W. Main Street
PO Box 994
Port Washington, WI 53074-0994

Also present: (redacted), petitioner's daughter and POA; (redacted), petitioner's son-in-law

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxxxxx) is a resident of Milwaukee County.
2. On April 23, 2007 petitioner was admitted to a nursing home.
3. On May 10, 2007 petitioner applied for MA, requesting a one month backdate in MA coverage.
4. Petitioner co-owns her residence with her daughter. The fair market value (FMV) of the residence is $483,000. For these purposes, the FMV must be divided by two as there are two owners, and therefore petitioner's portion of the FMV is $241,500.
5. Petitioner also owns a commercial property with a fair market value of $128,100.
6. On March 10, 2005 petitioner applied life estates to both properties.
7. In determining petitioner's eligibility, the agency calculated the value of the life estates and found the petitioner ineligible for MA due to divestment.
8. On June 28, 2007 the county issued petitioner a negative notice denying the Institutional MA effective April 1, 2007 because it determined that petitioner divested the properties on March 10, 2005, thereby causing petitioner to be ineligible (penalty period) for 64 months, beginning in March 2005 and ending on June 30, 2010. Petitioner's case was opened for MA card services.
9. Since that June 2007 notice, the agency determined that it had incorrectly calculated the penalty period because it had used the full fair market value of the residence, when it should have been divided by two as it was co-owned with her daughter. Therefore, the penalty period was calculated as 37 months, beginning March 2005 through February 2008.
10. On July 3, 2007 the agency issued another notice of decision stating that effective June 2007 it calculated petitioner's income as $3158.34 and her patient liability as $2867.03.

## DISCUSSION

Medical Assistance (MA) rules prevent a person from reaching the program's asset limit by divesting or transferring income, non-exempt assets, and homestead property for less than their fair market value during the lookback period. The lookback period is generally 36 months, although longer periods exist for trusts. §49.453(1)(f), Wis. Stats.; see also, Medicaid Eligibility Handbook, §4.7.3. MA policy defines income as anything you receive in cash or in kind that you can use to meet your needs for food, clothing, and shelter. Nonexempt assets are those that are counted in SSI-related asset tests. Assets that aren't counted in these tests are called exempt assets. An available asset can be either exempt or nonexempt. Medicaid Eligibility Handbook, §4.7.3.2. The penalty period begins with the month of divestment and extends for the number of months that result from dividing the divested amount by the average nursing home cost to a private pay patient ($5,584).§HFS 103.065(5)(b), Wis. Adm. Code; §49.453(3), Wis. Stats.; see also, Medicaid Eligibility Handbook, §4.7.5.

### I. Residence

It was undisputed that petitioner transferred the remainder interest in the residential property to her daughter and reserved a life estate in the property for herself within 36 months of her application for institutional MA. The evidence and testimony admitted during the hearing demonstrate that petitioner's daughter did not pay anything in return for interest the home, and that the transfer was a gift. Thus, the issue is whether the transfer of petitioner's home to her daughter met an exception to the divestment rules.

Homestead property, usually an exempt asset, is given special consideration in the MA divestment policy Medicaid Eligibility Handbook, §4.7.2.31. One exception to the divestment rules exists if the institutionalized person or his spouse divests homestead property to:

> A minor or adult child of the institutionalized person. The child must have:
>
> - Been residing in the institutionalized 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. Get a notarized statement that the person was able to remain in his/her home because of the care provided by the child.
>
> **Note**: The statement must be from his/her physician or from someone else who has personal knowledge of his/her living circumstances. A notarized statement from the child does not satisfy these requirements.

Medicaid Eligibility Handbook, §4.7.4. Petitioner's daughter testified that she resided in the home for a least 2 years prior to her mother going into the nursing home. Specifically, they lived together in this property since 1992. She also testified that she had provided care for mother since at least 2003, and that those cares increased, in terms of function and number of hours, over the next four years until her mother was admitted to the nursing home. She administered medications, provided bathing needs, cooked, cleaned, toileted and diapered, assisted with walking and transfers, and handled her accounting. See also, Exhibit 5. Petitioner needed those cares due to a variety of medical conditions including spinal stenosis, dementia, depression, chronic eye infections, bowel and bladder issues and anxiety. An affidavit was submitted from petitioner's primary care physician stating that petitioner was able to remain in her home because of the care provided by petitioner's daughter. See Exhibit 6.

The overall testimony and documentation presented at hearing support a conclusion that: 1) petitioner's daughter resided with petitioner in the home for at least 2 years, 2) that petitioner's daughter provided care to petitioner that allowed her to reside in the home rather than in the institution, and 3) that the care was provided in the home for the entire 2 years immediately before petitioner became institutionalized. The criteria for the above-described exception to the divestment rules were met in this case.

II. Commercial Property

It was undisputed that petitioner transferred the remainder interest in the commercial property to her daughter and reserved a life estate in the property for herself within 36 months of her application for institutional MA. The evidence and testimony admitted during the hearing demonstrate that petitioner's daughter did not pay anything in return for interest the commercial property, and that the transfer was a gift. Thus, the issue is whether the transfer of the interest in the petitioner's commercial property to her daughter met an exception to the divestment rules.

As stated above, "divestment" involves the transfer of income, non-exempt assets, and homestead property. Medicaid Eligibility Handbook, §4.7.2.1. Petitioner argues that the transfer of the commercial property involves a "exempt asset" and therefore does not qualify as a divestment. "Non-exempt assets" are those that are counted in SSI-related asset tests. Assets that aren't counted in these tests are called exempt assets. Id., §7.4.2.3.

In elderly, blind, and disabled (EBD) MA cases, all real and nonreal business property is exempt if the business is currently operating for the self-support of the EBD individual. Id., §4.2.3.1.1; see §1.1.1.2 for further definition on EBD. In order to determine if the property is currently operating the petitioner

should furnish the documents needed to: (1) describe the business, its properties, and its assets; (2) show the number of years it has been operating; (3) identify any co-owners; and (4) show the estimated gross and net earnings for the current tax year. Id., §4.2.3.1.1.

Petitioner has furnished the Certificate of Termination of Joint Tenancy establishing the number of years of ownership, and that as of the time of the transfer in 2005, she was the sole owner. See Exhibit 7 (further marked therein as Exhibit G) and Exhibit 11. Petitioner's daughter testified that it has been operating as a rental property since 1983. Petitioner furnished her 2006 taxes, including the Schedule E showing the rents received. Exhibit 4. Other documents provided show that the at least one of the property's current tenants has run it as an auto shop. Exhibit 10. Petitioner's daughter testified that the tenant is still operating the business at the property, however the rent has been lowered to keep the tenant. And finally, there is the 2005 tax bill showing the FMV of the property as $128,100. See Exhibit 7 (further marked therein as Exhibit J). If the agency needs further information than what has been provided, it will need to request it from petitioner. However, based on the evidence presented to me, I must find that this is an exempt asset, not subject to the divestment rules, and the agency incorrectly subjected it to those rules.

III. Patient Liability

As discussed at hearing, the county's computer system issued another notice of decision on July 3, 2007 stating that effective June 2007 it calculated petitioner's income as $3158.34 and her patient liability as $2867.03, despite the previous notice stating that she was not eligible for institutional MA at all. However, the parties agreed that for expediency's sake, that it may be helpful to further narrow the patient liability issue (called the "cost share issue" at hearing) in the event petitioner was determined eligible as a result of this hearing. Having now found that petitioner did not divest as alleged by the county and that she is eligible for MA, the second part of the appeal addresses the appropriate calculation of petitioner's patient liability.

After an institutionalized person is determined eligible for MA, a county agency must calculate the amount of income the institutionalized person must contribute to defray the cost of care incurred by MA on his behalf on a monthly basis. See Id., §5.8.7. The amount to be paid by the institutionalized person is his "patient liability." The MEH states as follows:

> **COST OF CARE CALCULATION**
>
> After you have determined that an institutionalized person is eligible for MA, you must calculate his/her cost of care. Cost of care is the amount s/he will pay each month to partially offset the cost of his/her MA services. It is called the patient liability amount when applied to a nursing home resident, and cost share when applied to a community waivers client, Pace/ Partnership, or Family Care client.
>
> Calculate the cost of care in the following way:
>
> 1. For a MA client in a nursing home who does not have a community spouse, subtract the following from the person's monthly income:
>
> a. $65 and ½ earned income disregard (4.1.3.6).
> b. Monthly cost for health insurance (5.8.6.3).
> c. Support payments (4.1.3.2.1).
> d. Personal needs allowance (8.1.5.1).
> e. Home maintenance costs, if applicable (4.1.3.1).

> f. Expenses for establishing and maintaining a court-ordered guardianship or protective placement, including court-ordered attorney and/or guardian fees (4.1.3.2.3).

Medicaid Eligibility Handbook, §5.8.7.

In this instance the agency asserts that as of June 2007 petitioner's income was $3158.34 and that her cost of care would have been $2867.03. Ultimately, the dispute centers on how to calculate the petitioner's income from the commercial property's rental proceeds. Petitioner requests that certain expenses be deducted from her monthly rental income. Specifically, she requests that monthly mortgage interest payments, maintenance costs, upkeep costs, property management fees, and professional fees (attorney fees and tax preparation fees) be deducted. There was no dispute that the petitioner does not report the rental income as self-employment income to the Internal Revenue Service ( IRS ). In such case, the Medicaid Eligibility Handbook §4.1.5.3, provides, in relevant part, for the treatment of rental income as follows:

> If s/he does not report it as self-employment income, add "net rent" to any other unearned income on the appropriate worksheet. Determine "net rent" as follows:
>
> 1. When the owner is not an occupant, "net rent" is the rent payment received minus the interest portion of the mortgage payment, and other verifiable operational costs. Operational costs include ordinary and necessary expenses such as insurance, taxes, advertising for tenants, and repairs. Repairs include such expenses as repainting, fixing gutters or floors, plastering, and replacing broken windows.
>
> Capital expenditures are not deductible from gross rent. A capital expenditure is an expense for an addition or increase in the value of the property. It would include improvements such as finishing a basement, adding a room, putting up a fence, putting in new plumbing, wiring or cabinets, paving a driveway.
>
> If an institutionalized person has excess operational costs above the monthly rental income, carry the excess costs over into later months until they are offset completely by rental income. But do the carryover only until the end of the year in which the expenses were incurred.

See also Wis. Adm. Code §HFS 103.07(2)(e)1. The agency conceded at hearing that the property taxes and building insurance would be appropriate deductions. The agency further agreed that maintenance costs, properly verified as operational costs, would be allowable deductions and would include snow removal and lot maintenance. I agree that these costs should be deducted from her income as well.

The remaining expenses left to be determined are attorney fees, tax preparation fees, property management fees and the mortgage interest on the loans taken out to pay a number of expenses incurred to make repairs and remodels associated with the commercial property. Because the Medicaid Eligibility Handbook and the Wisconsin Administrative Code do not provide much further guidance on these issues, I examined the Supplemental Security Income (SSI) Program Operations Manual (POMS), available online at https://s044a90.ssa.gov/apps10/poms.nsf/partlist!OpenView. At §00830.505 A.1, net rental income is defined as gross rent minus ordinary and necessary expenses. Ordinary and necessary expenses are defined as are "those necessary for the production or collection of rental income" and include interest on debts, State and local taxes on real and personal property and on motor fuel, general sales taxes, and expenses of managing or maintaining property. Id. (emphasis added). Based on this information, I am finding that property management fees are deductible expenses.

The POMS further lists deductible expenses at subsection A.11, as interest and escrow portions of a mortgage payment (at the point the payment is made to the mortgage holder), real estate insurance, repairs (i.e., minor correction to an existing structure), property taxes, lawn care, snow removal, advertising for tenants; and utilities. The county's representative argued that the mortgage interest could not be deducted because the loans were taken out on expenses that had been paid for in years previous. However, the POMS here clearly allows a mortgage interest payment as a deductible expense. As such, I am finding it deductible here. However, it was not verified at hearing whether the expenses that the mortgages cover were themselves deductible. For example, mortgage #1 (as it was termed at hearing) was to cover a roof repair. I cannot tell from the evidence whether those expenses were verifiable operational expenses as it looks like the service was performed twice. Also, petitioner's daughter said the "remodel in 2002" was another of the expenses under mortgage #1; I cannot tell if that was an operational expense or a capital expenditure. The petitioner will need verify those expenses in order for the county to recalculate the deduction. Additionally there was the question of the fact that the petitioner would have excess operational costs above her monthly rental income. The Handbook directs the county to carry the excess costs over into later months until they are offset completely by rental income, but to do the carryover "only until the end of the year in which the expenses were incurred." The county argued that since the expenses were incurred in years past, they could not be carried over. However, again relying on the POMS for guidance, interest of a mortgage payment - at the point the payment is made to the mortgage holder – is a deductible expense. Since the mortgage interest payment is ongoing to the mortgage holder regardless of the underlying expense it covers, it should be carried over as such.

Finally, we are left with attorney fees and tax preparation fees. Neither of these expenses were verified at hearing, however, as a general category I look at the definition cited above for an "ordinary operational expense." The POMS states such an expense is one that is "necessary for the production or collection of rental income." I find that tax preparation fees would be an ordinary expense associated with being able to rent a property and should be deducted. I do not find that the attorney fees, as argued at hearing, are deductible. Petitioner argued that the attorney fees were related to "all of these issues"; essentially, those necessary to show that the commercial property was an eligible asset for MA purposes. I cannot agree that these fees are necessary for the production or collection of rental income.

Based on the foregoing, I am remanding this matter to the county for redetermination. As some expenses still need verification, I am building in time for the recalculation so that the petitioner can verify her expenses.

## CONCLUSIONS OF LAW

1. The county agency incorrectly determined that the petitioner was ineligible for institutional MA for 37 months due to divestment.

2. The agency incorrectly calculated petitioner's patient liability.

**NOW, THEREFORE, it is ORDERED**

That the matter is remanded to the county agency with instructions to rescind the action denying the petitioner's application for MA retroactive to April 1, 2007; review and re-determine the petitioner's eligibility for MA retroactive to April 1, 2007, consistent with the Discussion, above; and issue written notice regarding same. As certain verifications made be needed to complete the determination, the county shall request in writing the necessary verifications within 10 days of the date of this decision and provide the petitioner 10 days thereafter to respond. The county shall then make its determination within 10 days of the receipt of said verifications. In all other respects, the petition for review herein is dismissed.

**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 Wisconsin Statutes § 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 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).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Wisconsin Department of Health and Family Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, 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 appeals to the Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee, Wisconsin, this 19th day of November, 2007

/sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals
111/KLC