



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: MDV - 206205

PRELIMINARY RECITALS

Pursuant to a petition filed on September 8, 2022, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Door County Department of Social Services regarding Medical Assistance (MA), a hearing was held on November 2, 2022, by telephone. The record was held open to allow petitioner's attorney time to submit a written closing summation; petitioner's submission was timely received on November 11, 2022.

The issues for determination are: (1) whether the agency correctly denied petitioner's request to backdate her enrollment to June 1, 2022, and (2) whether the agency correctly determined that the petitioner divested \$19,817.00 in assets causing a 64 day penalty period of ineligibility for MA.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney John Schober
Schober, Schober & Mitchell, S.C.
P. O. Box 510233
New Berlin, WI 53151-0233

Respondent:

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

By: Emily Luedtke

Door County Department of Social Services
Door County Government Center
421 Nebraska Street
Sturgeon Bay, WI 54235-0670

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a 78 year old resident of Door County who has resided at [REDACTED] since October 5, 2021.
2. On June 30, 2022, petitioner executed an MA-compliant Single Premium Individual Immediate Annuity application, and on that same date her spouse obtained and hand-delivered a cashier's check in the amount of \$103,550.04 to pay for said annuity. Exhibit A, Exhibit 9a, Testimony of [REDACTED].
3. On June 30, 2022, a Loan Agreement and Assignment was executed by petitioner's son, [REDACTED] and petitioner's husband, [REDACTED] irrevocably assigning to petitioner's son \$600,000 in assets in the process of being liquidated and consolidated to fund the loan. Exhibit P-2.
4. On June 30, 2022, petitioner's son, [REDACTED] (Maker) and petitioner's husband, [REDACTED] (Payee) prepared a Promissory Note in the amount of \$600,000 that [REDACTED] executed on June 30, 2022. Exhibit 9B.
5. The assignment of assets funding the \$600,000 loan identified at Finding of Fact no.3 was processed on July 11, 2022. Exhibit P-2C.
6. Petitioner submitted an institutional MA application on July 21, 2022, and identified asset transfers in the preceding 60 months consisting of gifting of two vehicles and cash gifts to pay petitioner's granddaughter's tuition. The cover letter, but not the application form, indicated petitioner's request that MA benefits be backdated to June 1, 2022. Exhibit R-1.
7. Based upon the application information, the agency identified unallowed divestments in the total amount of \$19,817.00. Testimony of Emily Luedtke.
8. Petitioner's request for backdated MA enrollment for June, 2022, was denied by the respondent due to "excess assets." Exhibit R-7.
9. On July 26, 2022, the respondent issued an About Your Benefits notice to petitioner, which identified the divestment by petitioner and imposed a penalty period of 64 days commencing July 21, 2022. Exhibit P-1.
10. On July 26, 2022, the respondent issued an Information about Community Spouse Asset Share Calculation that identified an incorrect countable assets total. Exhibit R-6 and Testimony of Emily Luedtke.

DISCUSSION

1. Whether the agency correctly denied petitioner's request to backdate her enrollment to June 1, 2022

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. *Medicaid Eligibility Handbook*, § 18.4.1. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to an "asset allowance" to determine eligibility. The asset allowance for this couple was \$137,400.00. Exhibit R-6, *Medicaid Eligibility Handbook*, § 18.4.3, which is based upon Wis. Stat., §49.455(6)(b). \$2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy, which resulting in an eligibility limit of \$139,400.00. If the couple's assets are at or below the

determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

2.8.1 Begin Dates Introduction

Medicaid eligibility begins the first day of the month in which the valid application is submitted and all program requirements are met with the following exceptions. Those begin dates are the date a valid application is submitted, all program requirements are met, and: ...

5. Institutionalized – His or her entry into the nursing home or hospital.

2.8.2 Backdated Eligibility

Medicaid eligibility can be backdated up to three months prior to the month of application.

The backdated eligibility should not go back further than the first of the month, three months prior to the application month. The member may be certified for any backdate month in which he or she would have been eligible had he or she applied in that month.

A backdate request can be made at any time except when the member is already enrolled and backdating the member's eligibility would result in a deductible for the backdated period.

If a member has incurred a bill from a Medicaid-certified provider during a backdate period, instruct the member to contact the provider to inform them to bill Medicaid. The member may be eligible to receive a refund, up to the amount already paid to the provider.

Medicaid Eligibility Handbook, §§ 2.8.1 and 2.8.2.

The petitioner's attorney argues that the petitioner's assets fell below the limit on June 30, 2022, which is the date that the assets of petitioner and her spouse were reduced by \$600,000.00 (when said assets were irrevocably assigned to petitioner's son via a loan agreement and assignment). Exhibit P-2. The agency's representative contends that the assignment of the \$600,000.00 was not complete on June 30, 2022, and as the funds remained in petitioner's accounts, her assets exceeding program limits status did not change until July of 2022. As such, petitioner would have been eligible for MA enrollment effective July 1, 2022. I note that the respondent initially commenced petitioner's MA enrollment on July 21, 2022, but at hearing Ms. Luedtke conceded that July 1, 2022 should have been the correct enrollment date.

MA policy addresses asset availability:

An asset is available when:

1. It can be sold, transferred, or disposed of by the owner or the owner's representative, and
2. The owner has a legal right to the money obtained from sale of the asset, and
3. The owner has the legal ability to make the money available for support and maintenance, and
4. The asset can be made available in less than 30 days.

Consider an asset as unavailable if **either**:

1. The member lacks the ability to provide legal access to the assets, and

2. No one else can access the assets, and
3. A process has been started to get legal access to the assets.

Or, when the owner or owner's representative documents that the asset will not be available for 30 days or more, and the process has been started to obtain the assets.

Use the criteria above to determine whether an asset was available in a backdate month unless an asset is deemed unavailable in the month of application because it will not be available for 30 or more days (considered unavailable in any or all backdate months).

Medicaid Eligibility Handbook, § 16.2.1.

Based upon the record before me, I am unable to conclude that the petitioner lacked a legal right to her identified assets on June 30, 2022, which would qualify her as eligible for MA as her assets would not exceed the asset limit of \$139,400.00. Petitioner's attorney, in a letter to the Division of Hearings and Appeals dated October 26, 2022, stated:

... Submitted with the application were copies of statements for [REDACTED] accounts ending in 8404 and 0535 showing that the assigned funds in the amounts of \$400,000 and \$200,000 respectively to fund the loan to [REDACTED] were processed on July 11, 2022. (See Petitioner's Exhibit C.) The \$400,000 check which cleared on July 11 consisted of funds consolidated in the account ending 8404 as of June 30, 2022 which were irrevocably assigned that date. The \$200,000 check which cleared on July 11 consisted of \$120,000 of bank funds irrevocably assigned on June 30, 2022 of which \$103,550.04 came from [REDACTED] IRA, liquidation of which had been requested on June 29, 2022, but not received until July 1, 2022. In addition the \$200,000 check included \$80,000 from [REDACTED] IRA, liquidation of which had also been requested on June 28, but not received until July 1, 2022.

Exhibit P-2.

While I appreciate that the petitioner was attempting to timely address her efforts to legally transfer her assets and establish her MA eligibility, she did not complete the process in its entirety prior to July of 2022. As such, I conclude that petitioner retained legal access to assets exceeding MA program limits as of June 30, 2022 and petitioner's institutional MA enrollment should properly commence on July 1, 2022.

2. Whether the agency correctly determined that the petitioner divested \$19,817.00 in assets causing a 64 day penalty period of ineligibility for MA

"Divestment" is the transfer of income, non-exempt assets, and/or homestead realty belonging to an institutionalized person (or his spouse) or both, for less than market value, by the person, spouse, someone else with legal authority to act for the institutionalized person (or spouse), or any person acting at the direction or request of the institutionalize person (or spouse) like a relative, friend, volunteer, or authorized representative. See, *Medicaid Eligibility Handbook*, § 17.1. The lookback period for divestments, including multiple divestments as here, is 60 months. See, *Medicaid Eligibility Handbook*, § 17.2.2.1.

The petitioner does not contest that two vehicles were gifted, nor that a gift was made to a granddaughter to cover her tuition costs. The amount of the determined divestment, \$19,817.00 is likewise not at issue. The petitioner's attorney argues, however, that no divestment actually occurred here, since those gifts qualified as specifically allowed divestments. Since petitioner had sufficient financial resources to pay for

long term care services for at least a five-year period at the time of the transfer, petitioner argues that these divestments are exempt.

The Department's written policy identifies allowable divestments, in pertinent part, as follows:

17.2.6 Allowed Divestments

A divestment must be checked against all types of allowed divestments described in this section before checking it against those that are disallowable as described in 17.2.7 DIVESTMENTS THAT ARE NOT ALLOWED AND RESULT IN A PENALTY PERIOD.

There is no penalty period for allowed divestments.

This section does not include a comprehensive list of all allowed divestments. The member or applicant's intent must be evaluated to determine whether it is an allowed divestment.

Prior to determining whether a transfer is an allowed divestment or not, the transfer must be evaluated as a divestment based on the following:

- 17.2.1 EXEMPTION OR DISREGARDED STATUS OF INCOME AND ASSETS
- 17.2.2 DATE OF TRANSFER
- 17.2.3 TRANSFERS THAT ARE NOT DIVESTMENT
- 17.2.4 DETERMINING FAIR MARKET VALUE
- 17.2.5 VERIFICATION

17.2.6.1 Sufficient Resources for Five Years of Long-Term Care

A transfer by an applicant or member who has sufficient financial resources or Long Term Care insurance for at least a five-year period at the time of the transfer is an allowed divestment and doesn't result in a penalty period.

For the average monthly nursing home cost of care in effect at the time of a divestment, see 39.4.3 INSTITUTIONAL COST OF CARE VALUES. This cost per month multiplied by 60 months provides the amount to compare to the income, assets, and insurance held by the individual at the time of the divestment.

Example 11: Lucius had a money market account that could pay for more than five years of Long Term Care services. At that time, Lucius gave a graduation present to his granddaughter worth \$25,000. Two years later, Lucius suffers a traumatic brain injury and is institutionalized. Because the cost of specialized nursing home care is significantly greater than a regular nursing home, Lucius must apply for institutional Medicaid after only two years. Because Lucius had enough money to pay for five years of care at a regular nursing home at the time he gave the gift to his granddaughter, the gift is an allowed divestment and doesn't result in a penalty period.

Example 12: Pierce had an investment portfolio with assets that could pay for more than five years of Long Term Care services. At that time, Pierce paid for his granddaughter to take a trip to Europe. Later, his investments plummeted in value due to the stock market, and he quickly spent his remaining assets on his care. Pierce then applied for Medicaid to

continue receiving his necessary Long Term Care services. Because Pierce had assets to pay for his long-term care for five years when he made the gift to his granddaughter, the gift is an allowed divestment and doesn't result in a penalty period even though gift was in Pierce's look back period.

Medicaid Eligibility Handbook, §§ 17.2.6 and 17.2.6.1.

The agency's representative testified that, in reviewing petitioner's divestments, she made two assumptions based upon her understanding of the MA Allowed Divestment policy language. First, as petitioner is married, she evaluated whether petitioner *and her spouse* had sufficient financial resources for at least a five-year period of long term care. Second, she concluded that, because the two examples cited in allowed divestment policy reference a hardship or adverse event, petitioner must also identify some adverse event in order for her divestments to be "allowed divestments."

The agency's implementation of MA policy is a question of interpretation of *Medicaid Eligibility Handbook* policy language. While it is not statutory construction, I find Wisconsin's statutory interpretation case law history to be informative here. The Wisconsin Supreme Court has stated that, "[s]tatutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The statutory language is "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. If this textual analysis "yields a plain, clear statutory meaning, then there is no ambiguity," and the statute should be applied according to that plain meaning. *Id.* Courts may not "disregard the plain, clear words of the statute." *Id.* (quoting *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)). Similarly, a court cannot "read into the statute words the legislature did not see fit to write." *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316.

I have reviewed the evidence presented and the *Medicaid Eligibility Handbook* language, and do not concur with the agency determination that these divestments fail to qualify under *Medicaid Eligibility Handbook* §17.2.6.1. I find the policy language to be simple and unambiguous. While I appreciate the agency's basis for its interpretation here, I ultimately agree with Attorney Schober's argument that there is no direction contained in the *Medicaid Eligibility Handbook* requiring that *both* spouses have sufficient financial resources to fund five years of long term care. While the agency's policy authors could have certainly included such direction if that was their intent, the policy language specifically references only the singular "applicant or member." Neither of the examples shed any light on this issue, either, despite the fact that both examples reference a grandparent making a gift to a granddaughter.

I also agree with Attorney Schober's argument that the agency's representative's imposition of a hardship or adverse event requirement is improper. While the examples included under *Medicaid Eligibility Handbook* §17.2.6.1 do reference unintended adverse events, the clear policy language in that section does not restrict "allowed divestments" in any such manner. As the policy itself states generally, [t]his section does not include a comprehensive list of all allowed divestments." *Medicaid Eligibility Handbook* §17.2.6.1. Because petitioner had sufficient financial resources to cover her long term care for at least a five-year period, I conclude that the identified gifts qualify as an allowed divestment.

CONCLUSIONS OF LAW

1. Petitioner's available assets exceeded MA program limits as of June 30, 2022.
2. The respondent incorrectly commenced petitioner's eligibility for institutional MA as of July 21, 2022; petitioner was eligible for institutional MA effective July 1, 2022.

3. The respondent incorrectly found that petitioner divested assets and applied a penalty period as a result, because petitioner's divestment was allowed under *Medicaid Eligibility Handbook* §17.2.6.1.

THEREFORE, it is

ORDERED

That this matter is remanded to the respondent to: (1) find that petitioner's assets did not exceed institutional MA program limits in July 2022; (2) correct petitioner's MA enrollment date to July 1, 2022; (3) affirm that the \$19,817.00 divestment is an allowed divestment under *Medicaid Eligibility Handbook* §17.2.6.1; and (4) rescind the 64-day divestment penalty period assessed. Written notice shall be issued to petitioner confirming the respondent's compliance with this Order. All actions required by this Order shall be completed within 10 days following issuance 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 North, 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

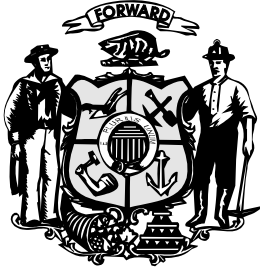
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision 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 Madison,
Wisconsin, this 2nd day of December, 2022



Peter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
4822 Madison Yards Way
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 December 2, 2022.

Door County Department of Social Services
Division of Health Care Access and Accountability
Attorney John Schober