



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION ON REHEARING
Case #: FCP - 181279

PRELIMINARY RECITALS

Pursuant to a petition filed on May 15, 2017, under Wis. Admin. Code § DHS 10.55, to review a decision by the Jefferson County Workforce Development Center regarding Medical Assistance (MA), a rehearing was held on June October 17, 2017, by telephone.

A prior hearing was held on June 21, 2017, by telephone. During that first hearing Petitioner offered exhibits which were marked and received as Exhibits P1 and P2. The record was held open after the first hearing to allow Petitioner to submit tax forms filed on behalf of [redacted] and a copy of Petitioner's durable power of attorney. Those documents were marked and received respectively as Exhibits P3 and P4. During the June 21, 2017 hearing and while the record was held open following that hearing, Respondent's Exhibits R1 through R31 were marked and received.

On August 14, 2017, Petitioner submitted a request for rehearing and a large number of unmarked attachments. At the time of the October 17, 2017 rehearing, that entire submission was marked and received as Exhibit P5. In addition, Respondent's Exhibit R32 was marked and received at the rehearing.

As stated by the undersigned administrative law judge during the introduction of the rehearing, the following decision is based on the testimony and exhibits submitted during both the initial hearing and the rehearing in this matter.

The issue for determination is whether the agency correctly terminated Petitioner's Community Waivers / Medical Assistance eligibility as of June 1, 2017 based on a finding that two rental properties she owns constitute available assets and that their value exceeds the applicable \$2,000 program asset limit.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: [REDACTED]
 Jefferson County Workforce Development Center
 874 Collins Rd
 Jefferson, WI 53549

ADMINISTRATIVE LAW JUDGE:
 Teresa A. Perez
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a widowed, unmarried resident of Jefferson County.
2. Petitioner has resided in an assisted living facility since October 3, 2016. Ex. R1 and Testimony of [REDACTED]
3. In or around 1973, Petitioner and her deceased spouse purchased property located at [REDACTED] and [REDACTED] in [REDACTED]. Both properties are single family homes and typically have been leased on an annual basis. Petitioner has always used these properties exclusively to generate rental income. In at least 2006, 2007, 2008, 2014, 2015, and 2016, each of these properties generated gross rental income of between approximately \$8,000-\$12,000. Prior to 2016, Petitioner reported that rental income to the IRS on her individual income tax return and an attached Schedule E. Ex. P5 and Testimony of [REDACTED]
4. Petitioner and her spouse at one point owned a total of six rental properties. Prior to the decline in her health, Petitioner participated in caring for the rental properties. Testimony of [REDACTED]
5. The property at [REDACTED] and [REDACTED] [REDACTED] has a current value of \$614,500. The gross rent generated from these two properties is currently \$1,750. Testimony of [REDACTED], Ex. R1, p. 5.
6. In November 2016, [REDACTED] was established. Petitioner and her two adult sons ([REDACTED] and [REDACTED]) are partners of [REDACTED]. Petitioner owns a 99.4% share and each of her sons owns a .3% share. Ex. R19, Ex. P3, Testimony of [REDACTED]
7. In December 2016, the property at [REDACTED] and [REDACTED] [REDACTED] was deeded to [REDACTED] [REDACTED]. Ex. R19 and Testimony of [REDACTED]
8. As of the date of the rehearing in this matter, Petitioner’s gross monthly income included: approximately \$656 from a military pension; approximately \$1,586 in Social Security benefits; and 99.4% of the \$1,750 rental income received from the properties owned by [REDACTED] [REDACTED]. Ex. R30, Ex. R31, Testimony of [REDACTED], Ex. P3--Brother’s Land 2016 IRS Form 8825, and Ex. P5—Petitioner’s 2016 IRS Form 1040.
9. Petitioner’s Durable Power of Attorney was activated following the issuance of a written confirmation by [REDACTED] dated July 29, 2016 which stated that Petitioner has irreversible and progressive dementia and is no longer fit to manage her finances. Ex. R29.
10. On February 10, 2017, Petitioner filed an application for “Elderly, Blind, Disabled” Medicaid and requested enrollment into the Family Care Program. Ex. R1 and Ex. R2.

11. The county agency approved Petitioner's application for Medicaid and enrolled Petitioner into the Family Care Program on March 23, 2017. Testimony of Agency Representative, [REDACTED]
12. The county agency was subsequently notified by a staff member from the Department of Health Services' CARES and Policy Call Center that the real property at [REDACTED] and [REDACTED] did not constitute "business property" under Medicaid policy, that those properties did not have a rate of return of at least 6%, and that the full value of those properties must therefore be counted in determining Petitioner's available assets. Ex. R3, p. 2, Ex. R32, p. 1 and Testimony of [REDACTED]
13. On May 1, 2017, the agency notified Petitioner that she was not eligible for Community Waivers/Medicaid because her assets exceeded the program asset limit. Ex. R8.
14. On May 12, 2017, Petitioner filed an appeal. Ex. P1.

DISCUSSION

Family Care is a Medical Assistance (MA) home and community based long term care waiver program designed as an alternative to Institutional MA. Family Care is authorized in the Wisconsin State Statutes at §46.286, is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10, and is administered by the Department of Health Services. Like Institutional MA, Family Care has an asset limit of \$2,000 for a one-person household. Wis. Stat. §46.286(1)(b)2m.a. and §49.47(4)(b)3g.e.; Wis. Admin. Code §DHS 10.34(2). Only non-exempt, available assets are counted towards the asset limit. Wis. Admin. Code §DHS 103.06(1)(a); *Medicaid Eligibility Handbook (MEH)* §16.1.

The central issue in this case is whether the value of the non-home real property at [REDACTED] and [REDACTED] must be counted in determining whether Petitioner owns assets in excess of the \$2,000 program limit.

Non-homestead real property is typically considered a countable asset. Wis. Admin. Code §DHS 103.06(5)(a); *Medicaid Eligibility Handbook (MEH)* §16.9. However, there are exceptions. Department policy provides that, "In EBD cases, all real and non-real business property is exempt if the business is currently operating for the self-support of the EBD individual. There is no profitability test." *MEH* §15.6.3.1. Department policy provides the following additional detail regarding the type of property and the circumstances under which certain types of property may be excluded:

1. **Real property** that is listed for sale with a realtor at a price consistent with its fair market value.
2. **Property excluded regardless of value or rate of return.** *Property used in a trade or business is in this category* (see [Section 15.6.3.1 Business Assets](#)). The property may be excluded as used in a trade or business when the applicant/member is actively involved in the business operation on a day to day basis. The information reported on the Schedule E, Supplemental Income and Loss, should be checked to determine whether the individual is actively engaged in the business. If the income is listed as Non-Passive Income, the individual is actively engaged in the business.

When determining if a trade or business exists in an LLC or other questionable situations workers should consider:

- Does the [IRS](#) regard this as a trade or business?
- Does the individual have documents to support the claim of trade or business such as licenses, permits, registration, etc.?
- Is the individual a member of a business or trade association?

3. **Property excluded up to \$6,000, regardless of rate of return.** *This category includes non-business property used to produce goods or services essential to self-support. Any portion of the property's equity value in excess of \$6,000 is not excluded.*

Non-business property essential to self-support can be real or personal property. It produces goods or services essential to self-support when it is used, for example, to grow produce or livestock solely for personal consumption, or to perform activities essential to the production of food solely for home consumption. . .

[Example omitted.]

4. **Property excluded up to \$6,000 if it is nonbusiness property that produces a net annual income (either cash or in-kind income) of at least 6 percent.** *Nonbusiness income producing property is land or non-liquid property which provides rental or other income but is not used as a part of a trade or business. Nonbusiness income producing property includes, but is not limited to, the following:*

- Structures producing rental income
- Land producing rent or other land use fees (non-liquid notes or mortgages, royalties for timber rights, mineral exploration, etc.)

Example 2: James is applying for EBD Medicaid. He lives in a CBRF and is renting out his home which has an equity value of \$20,000. He does not intend to return to the home. The income from the rent exceeds 6 percent of the equity value of the home, so \$6,000.00 of the equity value is exempt. The remaining \$14,000.00 is a counted asset

Example 3: Joan is applying for EBD Medicaid. She lives in her home but also owns a lake cottage in northern Wisconsin. She rents the cottage during the summer months. The income from the rent does not equal 6 percent of the equity value of the cottage. The entire equity value of the cottage is a countable asset.

If the excluded portion produces less than a 6 percent return due to circumstances beyond the person's control (e.g., crop failure, illness), and there is reasonable expectation that it will again produce at least a 6 percent return, continue to consider the first \$6,000 in equity as excluded.

MEH §16.9.

The agency representative who appeared at the June 21, 2017 hearing testified that the county agency terminated Petitioner's eligibility based on instructions from the Department's CARES and Policy Call

Center. At the hearing and the rehearing, the agency presented copies of e-mails it received from the Call Center which set forth those instructions as well as the Department's reasoning. Those Department instructions read, in relevant part, as follows: "the business is not her 'bread and butter'. It is a countable asset that was 'rebranded' with a business name to provide some insignificant income to try and make the asset unavailable" (Ex. R32, p. 1) and ". . . the property does not qualify as a business for EBD Medicaid. The property is not generating at least 6% of the net equity value, so the full \$614,500 will be counted as an available asset." (Ex. R3, p. 2). The Department's e-mail appears to rely on the policy regarding when and how to count non-business income producing assets found in *MEH* §16.9, Para 4.

Petitioner's attorney countered, in part, that because the property is held in a multi-member LLC, because the IRS and Wisconsin Department of Revenue require multi-member LLCs to file business tax returns, and because Petitioner did in fact file a business tax return (i.e., IRS Form 1065), the property in the LLC is business property. He further argued that both *MEH* §15.6.2, a section of Medicaid policy regarding how to identify a business when determining whether or not an individual's income is derived from self-employment activities, and the Social Security Administration's Program Operations Manual System (POMS), contain instructions on how to identify a business and that adherence to those instructions directs a finding that the rental properties at issue here constitute both a business and business properties. (The POMS is used by SSA workers to process claims for programs administered by the SSA). I am not persuaded by Petitioner's argument in this regard. While the establishment of an LLC and the nature of a recipient's tax filing can be probative as to whether a business exists, such factors are not dispositive.

No provision in either the *Medicaid Eligibility Handbook* or the POMS explicitly addresses the particular questions presented by this case; namely, the circumstances under which rental property may constitute a business and the circumstances under which rental property may constitute "property used in trade or business". Further, neither state Medicaid law nor regulation offers a definition of business. However, Department policy regarding self-employment income provides the following definition: "Business means an occupation, work, or trade in which a person is engaged as a means of livelihood." See *MEH* §15.6.1.2.

Based on the evidence in the initial hearing record, it appeared that the rental property was leased for only 31 days and generated only \$1,750 in gross rent in all of 2016 and significantly less in net rent. Largely because of that minimal income, my decision following the initial hearing in this matter found that Petitioner had not offered sufficient evidence to establish that the rental property was a means of livelihood or a bona-fide business. I thus upheld the agency's decision to count the full value of the rental properties. At rehearing, Petitioner's attorney presented additional documentation; specifically, Petitioner's 2016 individual tax return as well as tax returns from several prior years. In addition, Petitioner's son offered more detailed testimony regarding the nature of the properties and the extent to which they have been and continue to be let to tenants for the purpose of generating an additional stream of income. The additional documentation submitted, as indicated in Finding of Fact #3, shows that the income earned was not insignificant. However, additional analysis is required to determine whether the rental properties at issue, even if properly categorized as business property, may be excluded.

While the Department Call Center apparently concluded that the rental property at issue is not business property for purposes of Medicaid eligibility, at hearing and rehearing, the local agency representative advanced a different argument for counting the value of the rental properties at issue. Specifically, the agency representative observed that *MEH* §16.9 Para. 2 only exempts the value of business assets when a recipient is "actively involved" in the daily business operations and contended that Petitioner does not satisfy that criterion.

Petitioner's attorney did not dispute that active involvement is a criterion that must be met to take advantage of the business property exemption. Rather, he contended that Petitioner is, in fact, actively

involved in the day to day operations of the rental properties. To support that contention during the initial hearing, Petitioner's son, who is also her appointed agent under an activated Durable Power of Attorney, answered affirmatively to a series of largely leading questions from the attorney indicating that he, his brother, and Petitioner all participate in various aspects of tending to the rental properties (i.e., collecting rent, determining rent, paying bills, making repairs, dealing with leases, etc.). When, during the initial hearing, asked to describe the nature of his mother's involvement, he indicated that he and his brother let her know what needs to be done and that she helps make decisions. At rehearing, he testified that she knows exactly what is going on.

The agency representative pointed out at rehearing that Petitioner has a Durable Power of Attorney which has been and remains activated. (Ex. R.11 and R.29) The terms of that document specify that, to trigger activation, a determination must be made by a licensed physician that Petitioner is unable to manage her business and personal affairs resulting from a physical and/or mental disability. (Ex. R.11) As stated in Finding of Fact #9, a physician confirmed in a letter dated July 29, 2016, that Petitioner has progressive and irreversible dementia and that she does not have the ability to direct her financial affairs. (Ex. R29) Despite that strong evidence regarding Petitioner's mental status, Petitioner's son testified that he did not know whether his mother had progressive dementia because he is not a doctor and Petitioner's attorney suggested through questioning that, despite the information included in the physician's letter, a urinary tract infection was in fact the cause of Petitioner's apparently impaired cognition at the time the durable power of attorney was activated and that her condition has since improved. No medical evidence was offered to support that theory and the durable power of attorney remains activated. And, Petitioner did not appear at either the hearing or rehearing.

The testimony of Petitioner's son regarding Petitioner's mental status and her involvement in the operations of the business is not persuasive particularly in light of the activated durable power of attorney which notes a diagnosis of dementia and Petitioner's conspicuous absence from the proceedings in this matter. Moreover, the attorney's suggestions that: (1) Petitioner's inability to handle her financial affairs resulted from a urinary tract infection rather than, as confirmed in writing by her physician, irreversible and progressive dementia, and (2) Petitioner's status has improved since the power of attorney was activated strain credulity and are, frankly, troubling in light of his failure to offer supporting medical evidence.

For the reasons set forth above, I find that a preponderance of the evidence in the record established that Petitioner is not actively involved in the operation of the rental property. The agency therefore properly concluded that the rental properties constitute available assets.

Finally, I note that the Department advised the local agency to submit a prior fair hearing decision to support the Department's position that the rental properties must be counted. See DHA Case No. MRA-145118 (Div. of Hearings & Appeals February 1, 2013) (DHS). The petitioner in that matter requested and was granted a rehearing. Both the hearing and the rehearing resulted in decisions favorable to the Department. See *Id.* and DHA Case No. MRA-145118 (Div. of Hearings & Appeals May 2, 2013) (DHS). The petitioner in that matter then filed a petition for review by the Kenosha County circuit court. See *Crow v. Wis. Dep't of Health Serv's*, No. 13-CV-0877 (Wis. Cir. Ct. Kenosha County Jan. 10, 2014). As correctly observed by the attorney in the instant matter, the circuit court reversed the fair hearing decision. The hearing and rehearing decisions in DHA Case No. MRA-145118 thus have neither precedential nor persuasive value here and I did not rely on them. Further, I did not assign any persuasive value to the circuit court decision largely because it did not address the question of active involvement.

CONCLUSIONS OF LAW

The agency correctly determined that Petitioner is not eligible for Medicaid / Community Waivers and thus not eligible for Family Care as of June 1, 2017 because the value of her available assets exceeds the program limit.

THEREFORE, it is

ORDERED

Petitioner's appeal is dismissed.

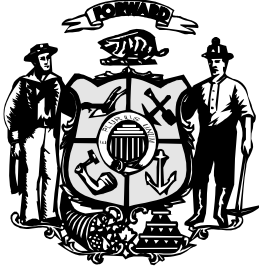
APPEAL TO COURT

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 22nd day of January, 2018

\s _____
Teresa A. Perez
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 January 22, 2018.

Jefferson Cty Workforce Developmt Ctr
Office of Family Care Expansion
Health Care Access and Accountability
Attorney [REDACTED]