



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION

Case #: MDV - 199858

PRELIMINARY RECITALS

Pursuant to a petition filed on September 4, 2020, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Green Lake County Department of Human Services regarding Medical Assistance (MA), a hearing was held on October 6, 2020, by telephone. The record was held open post hearing for the parties to submit additional evidence. Additional evidence was supplied by the parties and the record closed on October 21, 2020.

The issue for determination is whether the agency correctly determined the Petitioner divested \$68,434.37 of assets to become eligible for MA.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

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

By: [REDACTED]

Green Lake County Department of Human Services
Human Services Ctr
571 County Road A
Green Lake, WI 54941

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waushara County.
2. Petitioner owned property located on [REDACTED] in the Town of [REDACTED], Green Lake County. Petitioner's daughter [REDACTED] [REDACTED] and [REDACTED]'s children resided at the home with the Petitioner until the Petitioner went to the hospital in November 2017, then to a nursing home on December 5, 2017 and then to an assisted living facility on March 5, 2018. Petitioner's daughter and her children continued to reside at the home.
3. [REDACTED] [REDACTED] is the boyfriend of [REDACTED] [REDACTED].
4. On February 4, 2018, a "Purchase Agreement" was executed by the Petitioner and [REDACTED] [REDACTED] stating as follows: "In lieu of payment for material and services rendered from [REDACTED] [REDACTED] in the sum of \$40,534.37, [REDACTED] [REDACTED] agrees to sign over all equity at the time of sale of W7136 [REDACTED], Dalton, Wis 53926. [REDACTED] [REDACTED] Agrees to a purchase price to cover the first mortgage and the home equity loan. Once the purchase has been completed [REDACTED] [REDACTED] agrees to seek no further payment for services rendered."
5. On March 4, 2018, [REDACTED] [REDACTED] signed a Notice of Intention to file Claim for Lien in the amount of \$40,534.37 for the Petitioner's property based on his construction, home repair and home remodeling services.
6. [REDACTED] [REDACTED] prepared and submitted invoices and receipts to the Petitioner between 2015 – 2018 for various home repair, construction and remodeling services including garage door opener and installation, kitchen faucet and installation, ceiling fan and installation, landscaping, snowplowing, yard maintenance, drywall mud and tape, framing materials, spray texture basement, painting, installation of kitchen cabinets, kitchen flooring and kitchen countertops, carpeting, installation of carpeting, doors and installation of doors, baseboard and trim, door tracks, barn board wall and shelves, install lighting fixture and outlets, installation of appliances, toilets and faucets, installation of deck. Total for all invoices was \$42,034.37.
7. On March 25, 2018, the Petitioner applied for MA benefits. The application asked whether the Petitioner would return to her home. The agency was advised that the Petitioner would not return to her home, that her home would be put up for sale, and relatives planned to purchase the home. It was reported that relatives had done extensive work on the home and would be performing additional work on it. The value of the work and supplies to be done on the home was reported as \$40,534.37. It was reported that the Petitioner had a first mortgage on the home and a home equity loan. On April 20, 2018, the agency received a statement from the Petitioner's physician that she was not expected to return home in the next 6 months.
8. The Petitioner executed a listing contract for the home on April 26, 2018. The listed price for the property was \$190,000.
9. A comparative market analysis completed on the Petitioner's home on March 3, 2018 concluded it had an estimated fair market value of \$179,900.
10. On February 4, 2019, the Petitioner executed a listing contract for the property. The listed price of the home was \$229,900.
11. On August 19, 2019, the Petitioner executed a listing contract for the property. The listed price of the home was \$229,900.
12. The assessed value of the home per Green Lake County is \$222,400.
13. On June 1, 2019, a Residential Offer to Purchase the property was executed by [REDACTED] [REDACTED] and [REDACTED] [REDACTED] to purchase the Petitioner's home for \$146,000. The offer included a provision for the seller to give the buyer a \$4000 credit for closing costs and prepaids. It further notes that work

and materials for [REDACTED] [REDACTED] totaling \$40,500 will be satisfied with the sale of the house and property.

14. On July 14, 2020, the sale of the home occurred. The home was sold by the Petitioner to [REDACTED] [REDACTED] for a total sale price of \$194,500. The first mortgage of \$107,830.37 was paid and the 2nd mortgage of \$30,141.30 was paid from the sale proceeds. A check was written from the sale proceeds to [REDACTED] [REDACTED] for the work he performed on the home in the amount of \$40,534.37.
15. On August 25, 2020, the agency issued a notice of decision to the Petitioner informing her that the agency determined she had divested assets of \$68,434.37. This was based on the difference between assessed value of the home of \$222,400 and the purchase price of \$194,500 (27,900) and the \$40,534.37 credit given to [REDACTED] [REDACTED]. As a result, the agency imposed a divestment penalty period of 238 days from October 1, 2020 – May 26, 2021. The agency determined that the Petitioner is eligible for MA card services for the period of October 1, 2020 – March 31, 2020 with a deductible of \$5,817.78. The agency notice further informs the Petitioner that she may need to reapply for community waivers after the divestment penalty period ends.

DISCUSSION

The agency's bases for finding divestment includes two transactions. The first issue is whether the credit given to Mr. [REDACTED] at the time of the sale of the home for his repairs and construction on the home was a divestment. The second issue is whether the sale of the home for \$194,500 is a divestment based on the assessed value of the home at \$222,400.

There is an additional issue regarding when any divestment penalty period is to begin. The agency asserts that they have been advised that a divestment penalty period cannot be applied while an MA pandemic policy is in effect. I have been unable to find any specific policy adopted by the State related to the start date of divestment penalty periods during the pandemic. The most recent update to the Medicaid Eligibility Handbook dated November 23, 2020 does not contain anything about a pandemic policy that relates to divestment penalty periods. Without being able to find and review the specific policy, I can only order that the agency follow the policies in place regarding the imposition of divestment penalty periods at MEH 17.5 and any policy that has been adopted by DHS specific to divestment penalty periods during the pandemic.

A person cannot receive institutional medical assistance if her assets exceed \$2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf "disposes of resources at less than fair market value" within five years of the later of when she was institutionalized and applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). The Petitioner in this case was first admitted to a nursing home on December 5, 2017 and applied for MA on March 25, 2018. The "look-back" period goes back to March 25, 2013.

If a person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private-pay patient in a nursing home at the time she applied. Wis. Adm. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The daily amount is currently \$287.29 Medicaid Eligibility Handbook (MEH), § 17.5.2.2.

A "divestment" is defined in the MEH, in pertinent part, as follows:

17.2.1 Divestment

"Divestment" is the transfer of income, non-exempt assets, and homestead property which belong to an institutionalized person or his or her spouse or both:

1. For less than the fair market value of the income or asset by:
 - a. An institutionalized person, or
 - b. His or her spouse, or
 - c. A person, including a court or an administrative body, with legal authority to act in place of or on behalf of the institutionalized person or the person's spouse, or
 - d. A person, including a court or an administrative body, acting at the direction or upon the request of the institutionalized person or the person's spouse. This includes relatives, friends, volunteers, and authorized representatives.

2. It is also divestment if a person takes an action to avoid receiving income or assets he or she is entitled to. Actions which would cause income or assets not to be received include:
 - a. Irrevocably waiving pension income.
 - b. Disclaiming an inheritance.
 - c. Not accepting or accessing injury settlements.
 - d. Diverting tort settlements into a trust or similar device.
 - e. Refusing to take legal action to obtain a court-ordered payment that is not being paid, such as child support or alimony.
 - f. Refusing to take action to claim the statutorily required portion of a deceased spouse's or parent's estate.

...

Count the action as a divestment only if both of the following are true:

- The value of the abandoned portion is clearly identified.
- There is certainty that a legal claim action will be successful. The IM worker must ask the agency's Corporation Counsel to make this determination.

The MEH defines "fair market value" as "an estimate of the prevailing price an asset would have had if it had been sold on the open market at the time it was transferred." MEH 17.2.6.

The MEH also defines "value received" as follows:

The amount of money or value of any property or services received in return for the person's property. The value received may be in any of the following forms:

1. Cash.
2. Other assets as listed in Chapter 16 Assets.
3. Discharge of a debt.
4. Prepayment of a bona fide and irrevocable contract such as a mortgage, shelter lease, loan, or prepayment of taxes.
5. Services which shall be assigned a valuation equal to the cost of purchase on the open market. Assume that services and accommodations provided to each other by family members or other relatives were free of charge unless there exists a written contract (made prior to the date of transfer) for payment (see Section 17.8 Divesting by Paying Relatives).

MEH, § 17.2.9.

A divestment that occurred in the look-back period or any time after does not affect eligibility if there is a showing that the divestment was not made with the intent of receiving Medicaid or if the person disposed of an asset at fair market value or for other valuable consideration. MEH, § 17.4. The person must present evidence that shows the specific purpose and reason for making the transfer and establish that the resource was transferred for a purpose other than to qualify for Medicaid. *Id.* Verbal assurances that he or she was not trying to become financially eligible for Medicaid are not sufficient. *Id.* The agency is to consider statements from physicians, insurance agents, insurance documents, and bank records that confirm the person's statements. *Id.*

A. Transfer of funds to [REDACTED] [REDACTED]

The county agency argues that the check written to Mr. [REDACTED] at the time of the sale for his repairs and work on the property are a divestment because he did not file a lien against the property for the work. The Petitioner asserts that there was a written agreement executed on February 4, 2018 by the Petitioner and Mr. [REDACTED] and a notice of intent to file a lien was also prepared. The Petitioner asserts that she was never informed by the county agency that it was necessary to file a lien.

The Petitioner's daughter produced invoices and receipts for the prior work performed by [REDACTED] [REDACTED] in the amount of \$40,534.37. The agreement executed between Mr. [REDACTED] and the Petitioner regarding the work he did and that he would be paid for the work at the time of the sale was provided as evidence.

I conclude there is no basis for finding that the transfer of funds to Mr. [REDACTED] for the labor, materials and repairs he did to the property is a divestment. A divestment can include an action that avoids the receipt of income that the Petitioner is entitled to receive. Though Mr. [REDACTED] did not file a lien against the property for the work he performed, he and the Petitioner executed an agreement whereby they agreed on the amount of repairs and work he had performed. Mr. [REDACTED] kept all invoices and receipts for the work that was done. The transfer of funds to Mr. [REDACTED] at the time of the sale discharged the Petitioner's debt to him. The Petitioner received valuable consideration in this transaction. There is also no indication that this transfer was made for any purpose other than to discharge the debt and no specific indication that it was made with the intent to ensure the Petitioner was eligible for MA.

I note the agency's assertion that the Petitioner could have sold her home earlier and avoided incurring the expenses of repairs and maintenance. It is clear from the evidence that the work that was done added value to the home. The contract list price for the home in 2018 was \$190,000 and a market analysis done on the property valued it at \$179,900. In 2019, the list price was \$229,900. This supports the Petitioner's argument that she received valuable consideration from Mr. [REDACTED] for the work he performed.

B. Sale of the home for \$194,500

The agency also found a divestment of \$27,900 based on the sale of the home at \$194,500 which is less than the assessed value of the home of \$222,400 and less than the contract list price in 2019. The Petitioner argues that the assessed value and the contract list price do not take into consideration the repairs that are still needed on the property. She asserts that the realtor listed the home at the "top of the range." She produced quotes for work that the Petitioner's daughter and Mr. [REDACTED] anticipate doing in the near future as well as photographs of the items to be repaired or replaced. She argues that the \$194,500 purchase price was fair market value if those anticipated expenses are correctly considered.

The Petitioner produced quotes in support of her position that many original items on the 22-year-old home need to be replaced including a furnace (quote for \$4300), roof (quote for \$2804.17), windows (quote for \$6906.20), doors (quote for \$9038).

I understand the Petitioner's assertion that repairs that the home needs could impact the purchase price. However, she has not produced sufficient documentation to demonstrate that the needed repairs were not considered in the assessed value of the home or in the listing price of \$229,900. The letter from a realtor indicating that it is common to negotiate a sale price based on anticipated repairs is not from the same realtor that prepared the contract listing. The Petitioner's assertion that the anticipated repairs were not considered in his list price and that he listed the home at the "top of the range" are not supported by any evidence.

As noted in the MEH definitions, fair market value is an estimate of the prevailing price that a home would get on an open market. In this case, the sale of the Petitioner's home was not an arm's length transaction. It was a sale to her daughter. Under these circumstances, I find the contract listing price and the assessed value to be better indicators of the fair market value of the home than the sale price. Therefore, I conclude the agency correctly determined there was a divestment in the amount of \$27,400.

CONCLUSIONS OF LAW

1. The transfer of funds to [REDACTED] [REDACTED] in the amount of \$40,534.37 is not a divestment.
2. The sale of the Petitioner's home to her daughter for less than fair market value is a divestment in the amount of \$27,400.
3. The divestment penalty period should be imposed in accordance with MEH 17.5 and any policy adopted by DHS that relates to divestment penalty periods during the pandemic.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to revise the divestment penalty and divestment penalty period to reflect a divestment of \$27,400. The agency is to revise and apply the divestment penalty in accordance with the MEH § 17.5 as updated on November 23, 2020 and any other policies that have been adopted by DHS related to the pandemic. These actions shall be completed within 10 days of the date of this decision. If the divestment penalty period is not to be imposed at this time due to specific policies, the agency must provide notice to the Petitioner when the divestment penalty period is determined and imposed.

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, 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 Milwaukee,
Wisconsin, this 4th day of December, 2020

\s _____
Debra Bursinger
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 December 4, 2020.

Green Lake County Department of Human Services
Division of Health Care Access and Accountability