



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: MGE - 208281

PRELIMINARY RECITALS

Pursuant to a petition filed April 13, 2023, under Wis. Stat., §49.45(5), to review a decision by the Eau Claire County Dept. of Human Services to deny Medical Assistance (MA), a hearing was held on May 24, 2023, by telephone.

The issue for determination is whether a rental property was correctly counted as an asset in the determination of petitioner's MA eligibility.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Atty. Peter E. Grosskopf
Grosskopf Law Office LLC
1324 West Clairemont Avenue, Suite 10
Eau Claire, WI 54701

Respondent:

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

By: Megan Botteau
Eau Claire County Dept. of Human Services
PO Box 840
Eau Claire, WI 54702-0840

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Barron County. Eau Claire County DHS handles Barron County cases as part of the Great Rivers Income Maintenance Consortium.

2. On January 25, 2023, an application for long-term care MA was filed on petitioner's behalf. Because she has a community spouse, the spousal asset allocation was determined to be \$73,729.77, meaning that petitioner and her husband could have countable assets totaling \$75,729.77. [I note here that initially the numbers were different; after the appeal was filed the agency discovered errors in its calculations. I am noting only the corrected numbers in my findings.]
3. The couple's counted assets totaled \$147,459.55. As a result, the agency denied petitioner's application for MA because assets were over the limit, by a notice dated March 20, 2023.
4. A counted asset was a non-homestead property that the couple has owned since 1989. It is rented, with the most recent tenant living there since 2011. The couple files an annual Schedule E showing the income and expense of the rental property. In 2020 yearly rent from the property was \$6,000 with net income of \$2,917. In 2022 gross rent was \$7,200 and net income was \$4,314.
5. If the rental property were considered an exempt asset petitioner would be eligible for MA with assets less than \$75,729.77.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. Wis. Stat., §49.455(1).

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. MA Handbook, Appendix 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 \$73,729.77. MA Handbook, App. 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. 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.

I note that there is a mechanism to raise the asset allowance based upon assets bringing in income to increase the community spouse's monthly income. See Wis. Stat., §49.455(8)(d). That issue was not raised in this appeal. The only issue is whether the rental property should be considered to be exempt.

The Wisconsin Administrative Code, §DHS 103.06(5)(b) reads: "If the value of non-homestead property together with the value of the other assets exceeds the asset limit, the non-homestead property need not be counted as an asset if it produces a reasonable amount of income. In this paragraph, "reasonable amount of income" means a fair return considering the value and marketability of the property." The code also provides that work-related items are exempt. §DHS 103.06(12).

Federal law provides that property essential to the means of self support of an individual is excluded, with no limitation on property used in a trade or business. 42 USC §1382b(a)(3). The Social Security POMS Manual, §SI 1130-501 interprets that provision as follows: "Essential Property Excluded Regardless of

Value or Rate of Return.... 2. Trade or Business Property. Property essential to self support used in a trade or business is excluded from resources regardless of value or rate of return....” POMS then goes on to provide further guidance, including looking at Schedule C, Schedule SE, Schedule F, and Form 4562. Notably missing from that list is Schedule E.

With those state and federal provisions in the background, the Department has interpreted non-homestead property to be exempt in the MA Handbook, §16.9.2, “Business Property Excluded Regardless of Value Rate of Return:”

This category includes:

- Property used in a trade or business, if the individual is actively involved in the business operation on a day-to-day basis
- Government-issued permits (such as commercial fishing permits)
- Personal property used by an individual as an employee for work or required by an employer for work

Note: Rental property is not considered business property unless the property owner is in the business of renting and managing properties. If person simply owns a piece of property and is renting it to produce passive income, they are not considered to be the owner of a trade or business.

The information reported on the Schedule E, Supplemental Income and Loss (if applicable), 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.

I note also that the Handbook, §16.9.4, provides that nonbusiness income-producing property is excluded up to \$6,000 if it produces at least six percent rate of return. It does not appear that the property’s net income produces a rate of return of six percent of the property’s \$72,000 value.

The county agency here read §16.9.2 literally to conclude that the \$72,000 rental property cannot be considered to be exempt. It cannot be considered business property because the couple is not in the business of renting and managing properties. I admit to being puzzled by the final paragraph of §16.9.2, which says that Schedule E should be checked to determined if the income is listed as non-passive income, because Schedule E does not appear to have a question concerning non-passive income, at least on the forms provided in petitioner’s exhibits.

Petitioner points out that the Note in §16.9.2 is recent. She also points out that the Division of Hearings and Appeals has issued conflicting decisions, and that at least one Circuit Court found a similar rental property to be exempt. The first fair hearing decision by Judge Bursinger does not conflict with the Note in §16.9.2. Judge Bursinger concluded that the petitioner and his family were actively in the business of owning and renting several properties; the issue primary was whether the petitioner remained active in the business or whether he ceded active ownership to his children. The second fair hearing decision by Judge Perez from 2017, in circumstances virtually identical to the situation in this case, upheld the non-exemption of the rental property on the basis that the owner was not actively involved in the business of renting properties, and that decision was issued prior to the inclusion of the Note in §16.9.2. The decisions by Judges Bursinger and Perez do not conflict.

The Circuit Court decision, Crow v. Wisconsin DHS, was issued in 2014. It is a tenet of administrative law that a Circuit Court decision is not precedential over the statewide program, and it is evident that the Department’s reaction to the Crow decision was not to accept the court’s reasoning, but instead to

reiterate in §16.9.2 that a rental property is not exempt unless the owner is in the business of renting properties. Wis. Admin. Code §DHS 103.06(5)(b), cited above, does not define what a rental property's reasonable rate of return is, so it comes within the Department's authority to define reasonable rate of return. In the Handbook, §16.9.4, it defines a reasonable rate of return as six percent. If anything, it could be argued that limiting the exemption to \$6,000 conflicts with the code provision, but since the property here does not appear to meet the six percent threshold, the argument would be moot.

Just to be clear, there are two separate issues here. The first is whether the rental property here is business property. Using the Department's interpretation of the law, it is not. The second is whether, even if it is not business property, it could be exempt as producing a reasonable rate of income under §DHS 103.06(5)(b). It fails in that test also.

I conclude, therefore, that the county agency correctly denied the exemption to the \$72,000 rental property, leaving petitioner's assets above the MA limit and ineligible for long-term care MA.

CONCLUSIONS OF LAW

Petitioner's rental property is not an exempt asset for MA purposes because petitioner and her husband are not in the business of renting properties, and the property does not bring in a reasonable rate of income as the term is defined by the Department.

THEREFORE, it is

ORDERED

That the petition for review is hereby dismissed.

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

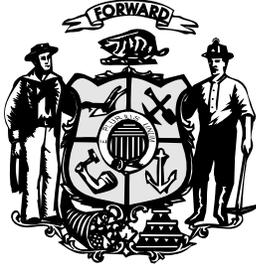
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision 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 30th day of May, 2023



\s _____
Brian C. Schneider
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 May 30, 2023.

Eau Claire County Department of Human Services
Division of Health Care Access and Accountability
Attorney Peter Grosskopf