



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
Case #: MRA - 195793

PRELIMINARY RECITALS

Pursuant to a petition filed on September 13, 2019, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Green Lake County Department of Human Services regarding Medical Assistance (MA), a hearing was held on October 30, 2019, by telephone.

The issue for determination is whether the petitioner is ineligible for medical assistance because of a divestment.

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]

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

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) was a resident of Green Lake County.

2. Petitioner's marital residence was placed into a trust on November 13, 1993. The marital residence was removed from the trust on November 17, 2018 and deeded to petitioner's wife as her individual property.
3. The petitioner received medical assistance through MA-Nursing Home Long Term Care. He was institutionalized after September of 2017.
4. Petitioner's wife was institutionalized on October 23, 2018, but did not receive medical assistance for her long term care
5. Petitioner's wife sold the real property on January 11, 2019, and the proceeds were placed into a money market account. The proceeds were used to pay for petitioner's wife's long term care costs.
6. Petitioner' wife died in April, 2019.
7. When the petitioner's wife died, \$90,979.84¹ passed to their son via two payable-on-death money market accounts. The petitioner did not make a claim under Wis. Stat. §861.08 to recover any of these proceeds.
8. Petitioner died on October 28, 2019.
9. The department seeks to end the petitioner's MA-Waiver benefits because it considers his failure to make a claim for the assets passed to his son a divestment.

DISCUSSION

A person cannot receive institutional medical assistance if his "actually available" assets exceed \$2,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat. § Wis. Stat. § 49.47(4)(b)3g.e. He cannot reach this limit by giving away his assets. Doing so is considered a divestment, which occurs if he or someone acting on his behalf "transfers assets for less than fair market value" within the "look back date." Wis. Stat. § 49.453(2)(a).

The Medicaid Eligibility Handbook provides for certain exemptions from divestment. Program policy instructs:

2. The *community spouse* divested assets that were part of the community spouse asset share **and** this transfer occurred more than five years after the institutionalized spouse was determined eligible. If it is more than five years after the institutionalized person is determined eligible, the community spouse can divest assets.

Example 1: When Ralph went into a nursing home and applied for Medicaid, Edith's community spouse asset share was \$42,000. Six years after Ralph became eligible, Edith gave \$30,000 of the community spouse asset share to a favorite nephew. This divestment did not affect Ralph's eligibility. Edith is allowed to divest all or any part of the community spouse asset share, as long as it is more than five years after Ralph was determined eligible. If Edith applies for long-term care services within five years though, the gift to her nephew may be considered divestment when determining her eligibility.

¹ The Corporation Counsel's August 1, 2019 Memorandum (Exhibit R-G) references the amount of \$90,895.60, but the County's September 25, 2019 notice (Exhibit R-I) references a divestment of \$90, 979.84).

Example 2: When Ralph went into the nursing home and applied for Medicaid, Edith's community spouse asset share was \$42,000. One year after Ralph became eligible, Edith gave \$30,000 to a favorite nephew. This divestment will result in a divestment penalty period for Ralph because it occurred within the first five years of his eligibility.

The transfer of *homestead* property to the community spouse and then to another person is treated as a divestment depending on when the transfers occur. If the institutionalized person transfers the homestead to the community spouse, and then the community spouse transfers it to someone else within five years of the institutionalized person becoming eligible for long-term care Medicaid, this would be considered a divestment, and it would affect the institutionalized person's eligibility. However, if five years have passed since the institutionalized person became eligible for long-term care Medicaid, the community spouse can transfer the homestead property without affecting the institutionalized person's eligibility.

Example 3: When Ralph applied for Institutional Medicaid, he and Edith owned a home together. After Ralph became eligible, he signed his 1/2 share of the home over to Edith. After five years have passed, Edith can transfer the part of the homestead Ralph gave her without Ralph's eligibility being affected.

Note: While these examples show that in some circumstances the community spouse's divestments occurring more than five years after the determination do not affect the institutionalized person's eligibility, they may affect the community spouse's eligibility if he or she later enters an institution and applies for Medicaid.

Medicaid Eligibility Handbook, § 17.4. (emphasis added)

If someone improperly divests his assets, he is ineligible for institutional medical assistance for the number of days obtained by dividing the amount given away by the statewide average daily cost to a private pay patient in a nursing home when he applied; this was \$286.15 when the petitioner's case was reviewed. Wis. Admin. Code, § DHS 103.065(5)(b). *Medicaid Eligibility Handbook*, § 17.5.2. The department seeks to end the benefits the petitioner receives through a medical assistance waiver because it contends that he divested assets when he did not make a claim against \$90,979.84 that passed upon his wife's death to their son through a payable-on-death account. The respondent cited Wisconsin case law in support of its position here:

In a marital property scheme, title is not synonymous with ownership and proof that title to an asset is in one spouse or the other will not rebut the basic presumption. Title functions principally to establish management and control rights.

Exhibit R-G, citing *Matter of Estate of Lloyd*, Wis.2d 240, 255, 170 (Ct. App. 1992).

The department has long held that a spouse divests assets if he refuses "to take action to claim the statutorily required portion of a deceased spouse's ... estate." *Medicaid Eligibility Handbook*, § 17.2.1. A widower is generally entitled to one-half of each of the marital assets in his spouse's estate even if he is not included in her will. Wis. Stat. § 861.02. The Wisconsin Supreme Court upheld a divestment finding where the widow did not make a claim against her husband's estate in *Tannler v. DHSS*, 211 Wis. 2d 179,

564 N.W.2d 735 (1997). These provisions only apply if “[t]here is certainty that a legal claim action will be successful” and the “agency Corporation Counsel makes this determination.” *Medicaid Eligibility Handbook*, § 17.2.1.

The petitioner and his wife placed their marital residence in trust on November 13, 1993. The marital property was removed from the trust on November 17, 2018, and deeded to petitioner’s wife as her individual property. That marital property was sold on January 11, 2019, and the proceeds from the sale were placed into money market accounts (account nos. [REDACTED] and [REDACTED]). The money market accounts were payable on death (POD) to petitioner’s son [REDACTED] [REDACTED]. The home sale proceeds were used to pay for institutional care for Mrs. [REDACTED] until her death. When petitioner’s wife passed away in April of 2019, and [REDACTED] [REDACTED] received the funds on the POD accounts. The department, relying on a statement from its corporation counsel, contends that he could have made a successful claim for the assets.

I agree with the department. Even if there is no estate, a surviving spouse retains an undivided one-half interest in each item of marital property. Wis. Stat. § 861.01(1). Petitioner could have enforced this right by making a claim in court within six months of his wife’s death. Wis. Stat. § 861.08. Because he did not make such a claim and because the petitioner has not established that it was unlikely that he would not have prevailed, he did divest the amount he is entitled to. But under marital property law, it would appear that he was only entitled to one-half of the \$90,979.84 in the accounts. Therefore, I will reduce the divestment to \$45,489.92. At \$286.15 per day, his period of ineligibility is 158 days.

CONCLUSIONS OF LAW

The petitioner divested one-half the value of the bank account that he did not make a claim against when his wife died.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it reduce the amount of the petitioner’s divestment to \$45,489.92 and his period of ineligibility to 158 days.

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.

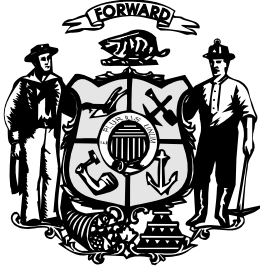
APPEAL TO COURT

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 6th day of January, 2020

\s _____
Peter McCombs
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 6, 2020.

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

