FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o [redacted]

DECISION
Case #: MDV - 198612

PRELIMINARY RECITALS

Pursuant to a petition filed on April 13, 2020, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Iowa County Department of Social Services regarding Medical Assistance (MA), a hearing was held on May 6, 2020, by telephone.

The issue for determination is whether the agency correctly determined that petitioner was subject to an MA divestment penalty.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]
c/o [redacted]

Petitioner's Representative:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: [redacted]
Iowa County Department of Social Services
303 W Chapel Street, Ste 2300
Dodgeville, WI 53533

ADMINISTRATIVE LAW JUDGE:
Jason M. Grace
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Sauk County.

2. On February 24, 2020, petitioner submitted an application for nursing home long-term MA. The petitioner's application disclosed what was estimated to be 725 charitable donations during the prior 5 years totaling $52,425.26. Also disclosed was an arrangement with petitioner's son wherein petitioner and her husband were allowed to live rent free in a home on their son's farm and keep the income generated by the farm in exchange for paying the upkeep of the farm and tuition for their son's wife to attend the University of Wisconsin. It was asserted that between January 2015 and December 2018, the arrangement netted the petitioner and her husband free rent ($750/month x 48 months= $36,000.00), income from subletting a portion of the farm to [redacted] ($8,050.00 per year x 4 years = $32,200.00), income from subletting a portion of the farm to the USDA ($6,250.00 per year x 4 years = $25,000.00), and income from subletting a second house on the farm ($450 per month x 55 months = $24,750.00.00), that totaled a value of $117,950.00. The arrangement was claimed to have netted the son an estimated value of $113,576.00, comprised of payments for upkeep of the farm involving insurance payments ($900 per year x 4=$3,600.00), property tax payments ($3,500 per year x 4 years =$14,000.00), and farm maintenance (totaling an estimated $20,700.00), along with tuition payments ($75,276.00) for his wife's education.

3. The charitable donations set forth in Finding of Fact 2 is broken down to $6,705.38 from February through December 2015, $9,467.63 in 2016, $13,293.29 in 2017, $12,213.96 in 2018, and $10,325.00 in 2019.

4. By letter dated April 7, 2020, the agency notified petitioner that she was eligible for nursing home long-term care MA as of February 1, 2020. It further informed her that a divestment penalty period of 577 days (February 1, 2020 – August 30, 2021) was being imposed based on divestments of $165,961.26.

5. The agency found a total divestment of $165,961.26 based on the payments made by petitioner and her husband to their son for insurance, maintenance, and property taxes for the farm ($38,300.00); tuition payments to their daughter-in-law ($75,276.00); and, the 725 charitable donations disclosed in the MA application ($52,385.26) .

6. Tax documents for petitioner indicates she filed a joint return with her husband in 2015, 2016, and 2019. In 2015, petitioner and her husband received income of $16,624.00 and social security benefits of $18,477.00. In 2016, she had income of $18,872.00 and social security benefits of $18,478.00. In 2019, she received an IRA distribution of $44,248.00, pension and/or annuities of $50,000.00, social security of $19,416.00, and income of $4,961.00. The filings submitted each tax year reflected income generated from a farm that petitioner and her husband lived on.

7. Petitioner and her husband made charitable donations totaling $8,518.00 in 2014.

8. On April 13, 2020, an appeal was filed on behalf of the petitioner with the Division of Hearings and Appeals.

DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat., §49.453(2)(a); Wis. Admin. Code, §DHS 103.065(4)(a); MA Handbook, Appendix 17.2.1. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is the number of days determined by dividing the value of property divested by the average daily nursing home cost to a private pay patient ($287.29 in 2020). MA Handbook, App. 17.5.2.

An exception to the divestment penalty is found in the Wisconsin Administrative Code, §DHS 103.065(4)(d)2.b: "It is shown to the satisfaction of the department that one of the following occurred:… b. The resource was transferred exclusively for some purpose other than to become eligible for MA." The MA Handbook notes the exception in §17.4:

> A divestment that occurred in the look-back period or any time after does not affect eligibility if any of the following exceptions apply:
>
> 1. The person who divested shows that the divestment was not made with the intent of receiving Medicaid.
>
>   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. Verbal assurances that he or she was not trying to become financially eligible for Medicaid are not sufficient. Take into consideration statements from physicians, insurance agents, insurance documents, and bank records that confirm the person's statements. Any of the following circumstances are sufficient to establish that the applicant/member transferred resources without an intent to qualify for Medicaid.
>
>   • The applicant/member had made arrangements to provide for his or her long term care needs by having sufficient financial resources and/or long term care insurance to pay for long term care services for at least a five-year period at the time of the transfer….
>
>   • Taking into consideration the individual's health and age at the time of the transfer, there was no expectation of long-term care services being needed for the next five years. For example, someone who was gainfully employed and 50 years old at the time of the divestment is not expected to have set aside sufficient resources for five years of longterm care, or
>
>   • If an individual or couple had a pattern of charitable gifting or gifting to family members (i.e., birthdays, graduations, weddings, etc.) prior to the look-back period, similar transfers during the look-back period would not be considered to have been given with the intent to divest as long as the total yearly gifts did not exceed 15 percent of the individual's or couple's annual gross income….
>
>   • Resources spent on the current support of dependent relatives living with the individual are not considered to be divestments….
>
>   This list is not intended to be all inclusive when describing divestments which are permissible because the transfer was made without the intent to qualify for Medicaid. Other situations will arise and in those instances, the person's "intent" must be evaluated on a case-by-case basis to determine whether or not a divestment occurred. The fact that a person does not meet the criteria for a specific exception does not create a presumption that the person cannot show that the transfer was made for a purpose other than qualification for Medicaid. For example, a person may be able to show that a transfer to a dependent

relative not living at home was made for a purpose other than qualifying for Medicaid.

Petitioner argued that no divestment occurred as the transfers of income here were done without an intent to qualify for MA. There are three divestments at issue--- money paid to petitioner's son associated with the upkeep of a farm (insurance, taxes, and maintenance), payments for the daughter-in-law's tuition, and the approximate 725 charitable donations made between 2015 and 2019.

Farm Upkeep and Tuition Payments

The evidence presented at the hearing on petitioner's behalf was comprised of exhibits and an affidavit and testimony of petitioner's son, [redacted]. Per [redacted], in 2012 an arrangement was made wherein his parents agreed to give him their farm. However, the parents were concerned about their financial well-being so it was agreed that the parents would be allowed to live in one of the two houses on the farm rent free and keep all income generated by farm that they needed. Income that was not needed, was to be provided to their son. There was no signed written agreement memorializing the terms of the agreement or the intent of the parties.

Per counsel, the arrangement regarding the farm netted petitioner and her husband a net value from 2015 through 2018 of $117,950.00,[1] comprised of free rent ($36,000), income from subletting the farm to the USDA and [redacted] ($57,200), and income from subletting a second house on the farm ($24,750). It was further argued the arrangement netted the son a total value of $113,576 between 2015 and 2018, comprised of the payment of the farm's property taxes, insurance, and maintenance (totaling $38,300), and tuition payments for his wife ($75,276). It was argued the arrangement was an equitable and fair trade that amounted to a cash for cash exchange. It was argued that the petitioner's transfer of money to their son should not amount to a divestment as it was done for reasons other than to qualify for MA.

In finding the arrangement to be a divestment, the department believed it to be most akin to an agreement for care or services requiring a notarized agreement per MA Handbook, 17.8. Absent a notarized agreement, the transfer was treated as a divestment. I agree with counsel, that the arrangement involving payments associated with the farm does not fall within that provision.

Ultimately, the petitioner has the burden to show that a particular transfer was done for an exclusive purpose other than to qualify for MA. See Wis. Adm. Code, §DHS 103.065(4)(d)2.b and MA Handbook §17.4. The arrangement between the son and his parents was not reduced to writing and the only evidence as to the parent's intent or purpose in paying for the upkeep of the farm and their daughter-in-law's tuition was the son's testimony and affidavit.

From 2015 through 2018, the parents were living rent free on the farm and received the income generated by the farm. That income was reported by the parents in their tax filings in 2015, 2016, and 2019. The parents did not file taxes in 2017 or 2018. The reasonable estimate of the value of free housing was $36,000 ($750 x 48 months). It is reasonable to conclude the parents would pay for the upkeep of the farm given they were receiving most of the benefits associated with the farm, which was housing and income. The payments for the property taxes, insurance, and maintenance (indicated in the MA application to be $38,300) of the farm were not a divestment as they were made for an exclusive purpose other than to qualify for MA.

As to the tuition payments, petitioner has not met her burden to show the payments were made for an exclusive purpose other than to qualify for MA. The payment of the tuition could not have been

[1] At the hearing, counsel revised the amount of the income received by petitioner from the three sublets (USDA, [redacted], and second home) associated with the farm. This decision references the original amounts disclosed in the MA application as the amounts are not ultimately dispositive.

envisioned back in 2012 when the arrangement about the farm was made as the son was not married at that time. There was no written agreement to demonstrate petitioner's motive or purpose in paying the tuition. While the parent's conveyance of the farm to their son in 2012 is outside the look-back period and therefore not subject to a divestment, it is informative as to parent's motive. The transfer has the hallmarks of estate planning and it is logical they would have been contemplated considerations such the potential need for future long term care. Per the son's affidavit, his parents transitioned to assisted living in December of 2018 due to health issues. The record contains scant evidence as to petitioner's health in the years proceeding that transition other than that she was an organist for her church in 2015 and 2016. Such is not sufficient to prove the intent surrounding the tuition payments.

I also reject the argument that the arrangement here was a straight cash for cash exchange. The son's testimony regarding the 2012 agreement was that the parents would be entitled to free rent and the income generated from the farm because they gave him the farm. As the parents were already entitled to the income from the farm under that "agreement," the son did not provide cash or equivalent value to his parents for the tuition payments made in 2016 and 2017. It was not shown by preponderance of the evidence that the tuition payments totaling $75,276 were made for an exclusive purpose other than to qualify for MA and those payments were not cured or repaid. As such, it is a divestment subject to a penalty.

Charitable Gifting

Finally, petitioner's application disclosed 725 charitable donations made during the look-back period totaling $52,425.26. The department excluded the first two donations in January 2015 totaling $40 as they were outside the look-back period but found the remaining $52,385.26 to be a divestment.

Counsel argued the donations were not a divestment as they were made for a purpose other than to qualify for MA as petitioner and her husband had a pattern of charitable donations. To demonstrate that pattern, the son's affidavit pointed to donations totaling $8,518.00 in 2014.

Pursuant to MA Handbook, 17.4.1:

> … If an individual or couple had a pattern of charitable gifting or gifting to family members (i.e., birthdays, graduations, weddings, etc.) prior to the look-back period, similar transfers during the look-back period would not be considered to have been given with the intent to divest as long as the total yearly gifts did not exceed 15 percent of the individual's or couple's annual gross income. If the yearly gifted amount exceeds 15 percent of the individual's or couple's annual gross income, and/or there is a gap in the years the gifts occurred, the total amounts gifted for the years in the look-back period shall be considered divestment. This exception is not limited to gifts made on traditional gift-giving occasions and does not preclude a pattern of giving to assist family members with educational or vocational goals …

The department found the donations exceeded 15% of petitioner and her husband's gross income which was determined to be comprised of their social security benefits totaling $19,730.40 per year. As such, the donations were viewed as a divestment by the department.

Per tax documents submitted on petitioner's behalf for 2015, 2016, and 2019, income was not limited to social security benefits. In 2015, petitioner and her husband received income of $16,624.00 and social security benefits of $18,477.00, for a total of $35,101.00. In 2016, income was $18,872.00 and social security benefits was $18,478.00, for a total of $37,350.00. And in 2019, there was an IRA distribution of $44,248.00, pension and/or annuities of $50,000.00, social security of $19,416.00, and other income of

$4,961.00, for a total of $118,625.00. Petitioner and her husband did not file taxes in 2017 or 2018. Counsel argued that petitioner and her husband had an estimated income in those two years of $18,500.00 in social security benefits and $20,487.50 from income associated with the farm, totaling $38,987.50 per year.

Considering income generated from the farm that consisted of subletting to the USDA ($6,250 per year), [redacted] ($8,050 per year), and tenants for the second house (approximately $8,000 per year), the $20,487.50 estimate of income in addition to social security benefits in 2017 and 2018 seems reasonable. The exact amount of social security benefits for those years was not disclosed but the estimate of $18,500.00 seems reasonable. Using petitioner's income calculations, the donation cap of 15% would be 5,265.15 in 2015 ($34,101.00 x .15), $5,602.50 in 2016 ($37,350.00 x 15), $5,848.13 in each of 2017 and 2018 ($38,987.50 x .15), and $17,793.66 in 2019 ($118,625.00 x .15). The $52,385.26 in charitable donations was broken down to $6,705.38 from February through December 2015, $9,467.63 in 2016, $13,293.29 in 2017, $12,213.96 in 2018, and $10,325.00 in 2019.

In 2015, 2016, 2017 and 2018, petitioner's charitable donations exceeded 15% of her and her husband's income. Of note, the MA Handbook directs that if the that total charitable donation/gifting for the year exceeds 15% of the gross income, the " … total amounts gifted for the years in the look-back period shall be considered divestment. MA Handbook, 17.4. Thus, the divestment is the entire amount of the gifting for the year, not just the amount that exceeds 15% of the income. As a result, all charitable donations for 2015 through 2018 are subject to divestment, amounting to $41,680.26. As the 2019 charitable donations ($10,325.00) did not exceed 15% of total income for the year and the record demonstrates a similar pattern of charitable gifting, I find that the 2019 donations are not subject to divestment.

In summary, the petitioner's payments to her son associated with taxes, insurance, and maintenance for the farm between 2015 and 2018 were not a divestment as they were made for purposes other than to qualify for MA. The payments for the daughters-in-law tuition is a divestment as petitioner failed to demonstrate it was made for a purpose other than to qualify for MA. The charitable donations from 2015 through 2018 are a divestment as the yearly amount exceeds 15% of petitioner's gross income. The charitable donations in 2019 are not a divestment as it was demonstrated there was a pattern of charitable gifting and the amount did not exceed 15 % of petitioner's total income for the year.

CONCLUSIONS OF LAW

1. The petitioner's payments to her son associated with the taxes, insurance, and maintenance for the farm between 2015 and 2018 (reported in the MA application to amount to $38,300.00) were not a divestment.

2. The payment of the daughter-in-law's tuition of $75,276.00 was a divestment.

3. Petitioner's 2015 through 2018 charitable donations totaling $41,680.26 amount to a divestment.

4. Petitioner's 2019 charitable donations of $10,325.00 is not subject to divestment as it was part of pattern of charitable gifting and the amount does not exceed 15% of the petitioner's yearly gross income.

THEREFORE, it is **ORDERED**

That this matter is remanded to the agency to amend the total divestment to $116,956.26 and the penalty for long-term care services to 407 days ($116,956.26 divided by $287.29). The agency shall take all administrative steps to complete this task within 5 days 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 24th day of June, 2020

\s
Jason M. Grace
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 June 24, 2020.

Iowa County Department of Social Services
Division of Health Care Access and Accountability
[redacted]