



**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of



**DECISION**  
Case #: MDV - 199054

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**PRELIMINARY RECITALS**

Pursuant to a petition filed on June 8, 2020, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Outagamie County Department of Human Services regarding Medical Assistance (MA), a hearing was held on June 25, 2020, by telephone.

The issue for determination is whether the agency correctly determined that the Petitioner divested \$38,295.22 and correctly imposed a divestment penalty period of 133 days from April 21, 2020 – August 31, 2020.

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:   
Outagamie County Department of Human Services  
320 S Walnut St  
Appleton, WI 54911-5985

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Outagamie County.
2. In 2005, the Petitioner and her husband transferred the family home into the [REDACTED] Estate Trust. The Petitioner retained a life estate interest in the home.
3. The 2019 tax parcel information from Outagamie County estimated the fair market value of the home to be \$129,700.
4. On November 25, 2019, the home was sold through a licensed realtor to a third party for \$126,500. The home was initially listed by the realtor at \$132,900. A letter from realtor stated that she had not known about a necessary garage roof repair of \$3000 and other needed repairs in determining the initial listing price. Petitioner paid closing costs at the time of the sale that included prorated 2019 property taxes of \$1889.86 and additional closing costs.
5. On April 21, 2020, the agency received a MA application for the Petitioner. On April 23, 2020, the agency requested information regarding the [REDACTED] Estate Trust with a due date of May 21, 2020.
6. On May 15, 2020, the agency received a copy of the Trust document and a settlement statement for the home. On May 19, 2020, the agency received additional information that the proceeds from the sale of the home were put into the real estate trust.
7. The Petitioner received \$31,512.46 from the sale of the property after all closing costs were paid, including property taxes, realtor fees and other required closing costs. The Petitioner deposited \$28,500 in her bank account in November 2019. She retained \$3,012.46 which she paid to her son for services he provided to her between September 2015 – November 2019.
8. On May 22, 2020, the agency issued a notice of decision to the Petitioner informing her that the agency determined she divested funds of \$38,295.22 and imposed a divestment penalty period of 133 days from April 21, 2020 – August 31, 2020.
9. On June 8, 2020, an appeal was filed on behalf of the Petitioner with the Division of Hearings and Appeals.

## DISCUSSION

The Petitioner presents three issues regarding the county's determination that a divestment occurred and the calculation of the amount of that divestment.

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).

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, § 17.5.2.2.

There can be divestment if a life estate interest is terminated and the life estate holder is not paid for the value of the life estate. MEH 17.10.1. The MEH instructs that the divested amount is to be determined by multiplying the fair market value (FMV) of the property at the time the life estate was terminated by the number from the Life Estate and Remainder Interest table in Section MEH 39.1 that corresponds to the age of the life estate holder at the time the life estate was terminated. *Id.* The MEH notes that property tax assessments can be used to determine a property's FMV *if* both the local agency and applicant or member agree that it accurately represents the price it would sell for on the open market in that geographic area. *Id.* If both parties do not agree, statements from one or more realtors could be sufficient. *Id.*

A divestment can be cured if all divested assets are returned to the MA applicant. See Wis. Stats., § 49.453(8)(a) and MEH 17.4.

The county asserts that the FMV of the home was \$129,700 based on the property tax assessment. Based on this value and the multiplier in MEH 39.1, the county calculated the divested amount as \$38,295.22. The county asserts that this full amount is used as the divestment event though the Petitioner received \$28,500 from the sale because a partial repayment of the divested amount is not sufficient to cure a divestment. The county further asserts that closing costs are not an allowable expense in the determination or calculation of a divestment in this situation.

The Petitioner disagrees that there was a divestment in this case. The Petitioner asserts that she did not sell her property for less than FMV. The Petitioner notes that the estimated FMV of \$129,700 in the property tax assessment did not reflect necessary repairs to the property. The Petitioner further argues that the county should have deducted the closing costs paid by the Petitioner in determining whether there was a divestment. Finally, the Petitioner asserts that the county should have considered the fact that the Petitioner's son provided services to the Petitioner.

As to the home's FMV, the county presented the tax records which show estimated FMV to be \$129,700. The taxing district's estimated FMV is done for purposes of tax assessment and it does not consider a variety of detailed factors that an open market has on a property's value. The Wisconsin Court of Appeals has adopted the IRS definition of FMV to mean the price that property will bring when it is offered for sale by a person who desires but is not obligated to sell and is bought by a person who is willing but not obligated to buy. *First Wisconsin Nat'l Bank v. Wilson*, 121 Wis. 2d 505, 360 N.W.2d 548 (Ct. App. 1984).

Therefore, I find that the recent arm's length sale of the property is a better indicator of FMV than the estimated FMV of the property assessment. The parties to the sale considered the condition of the property and the needed repairs in coming to a sale price. That price was not significantly below the listing price and there is evidence that it was reasonable given the repairs that were needed. I concur with the Petitioner that the sale of the home for \$126,500 does not constitute a divestment.

The Petitioner further contends that the county should have considered the closing costs that she was required to pay on the property at the time of the sale which included taxes, insurance, title fees and realtor fees. The county contends that MEH 17.10 does not make any provision to allow for deduction of those costs in determining whether there was a divestment or the amount of a divestment. The Petitioner produced two previous DHA decisions (DHA Case Nos. 183502 and 177944) that concluded closing costs should be deducted in a divestment determination. I concur with those decisions. There is nothing specific in the law or in the MEH about how the county should treat the payment of required and reasonable closing costs in determining whether there is a divestment. There is no basis for finding in law or in policy that payment of required taxes, insurance, and title fees as well as reasonable realtor fees constitute a divestment of funds for purpose of becoming MA eligible.

Therefore, I conclude that there was no divestment related to the sale of the property.

There is an additional issue concerning whether the Petitioner's payment to her son of \$3,012.46 was a divestment. I do not find that the county agency made a specific determination regarding this issue. Therefore, I am remanding this case back to the agency to re-determine the Petitioner's MA eligibility based on my finding that there was no divestment related to the sale of the home. If the county makes any further divestment determination, it must provide notice and appeal rights to the Petitioner.

### CONCLUSIONS OF LAW

The county did not correctly determine that there was a divestment of funds by the Petitioner related to the sale of a home in which she had a life estate interest and did not correctly impose a divestment penalty period.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the agency to take all administrative steps necessary to re-determine the Petitioner's MA eligibility in accordance with the finding herein that there was no divestment related to the sale of the Petitioner's home. These actions must be completed within 10 days of the date 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 5<sup>th</sup> 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.

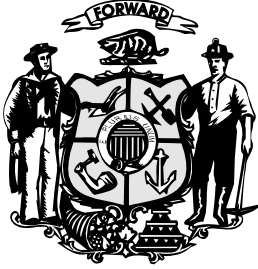
### **APPEAL TO COURT**

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 25th day of August, 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 August 25, 2020.

Outagamie County Department of Human Services  
Division of Health Care Access and Accountability

