



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

In the Matter of

[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

**DECISION**  
Case #: MDV - 193440

**PRELIMINARY RECITALS**

Pursuant to a petition filed April 15, 2019, under Wis. Stat., §49.45(5), to review a decision by the Crawford County Dept. of Human Services to discontinue Medical Assistance (MA), a hearing was held on June 5, 2019, by telephone.

The issue for determination is whether a divestment occurred, and if so, did the county agency correctly seek to close petitioner’s nursing home MA.

**PARTIES IN INTEREST:**

Petitioner:

[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

Petitioner's Representative:

[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

Respondent:

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

By: [Redacted]  
Crawford County Dept. of Human Services  
225 N Beaumont Rd., Suite 326  
Prairie du Chien, WI 53821

**ADMINISTRATIVE LAW JUDGE:**

Brian C. Schneider  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [Redacted]) is a resident of Crawford County.
2. In 2013 petitioner and her husband sold their farm to their son via two land contracts totaling \$264,400. The contracts extended 30 years, well past the grantors’ life expectancies, and initially

had no provisions preventing sales of the contracts. The land contracts were canceled upon the grantors' deaths.

3. Petitioner and her husband became eligible for nursing home MA effective April 1, 2015 (petitioner's husband died in 2016 and his eligibility is not at issue here). Prior to the application their attorney met with a Crawford County economic support specialist, who recommended that the land contracts be revised to include provisions prohibiting the sale of the land contracts. That was done in February, 2015.
4. The county worker then classified the land contracts as unavailable assets and made both spouses eligible for nursing home MA beginning April 1, 2015. The worker either did not consider that the actions might be divestment or did so and declined to impose a divestment penalty.
5. During an annual review in March, 2019, the current worker questioned whether the amended contracts created a divestment because the amendment made the contracts unavailable to the grantors. She checked with the state agency, which confirmed the divestment. By a notice dated April 1, 2019, the agency informed petitioner that nursing home MA was denied for the period April 1, 2019 through August 31, 2021 (approximately 29 months) because \$254,023.29 was divested.

### 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 (\$252.95 in 2015, \$286.15 in 2019). MA Handbook, App. 17.5.2.

The primary issue raised at hearing was whether a divestment occurred. Petitioner argued that in the MA Handbook effective in April, 2015, the provisions concerning promissory notes did not mention land contracts when talking about divestment. The Handbook, App. 17.12.2, effective that date said that a promissory note that went beyond the grantor's life expectancy, and which canceled the note upon the death of the grantor, was a divestment. The provision did not mention land contracts, but just notes, loans, and mortgages. The current Handbook provision, effective June 10, 2016, now mentions a note, loan, mortgage, or land contract. Petitioner thus argues that in 2015 a land contract was not considered the same as a promissory note, and thus the divestment provisions do not apply to these land contracts because they were created prior to June 10, 2016.

I disagree with petitioner's argument. It is evident that the exclusion of the words "land contract" from Appendix 17.12.2 in 2015 was not intended to exclude land contracts from the divestment rules. The simple fact is that these land contracts clearly met the general definition of divestment as it existed after 2009. They went far beyond grantor's life expectancy and were canceled at the death of the surviving grantor. The exclusion of the words "land contract" in the former version of Appendix 17.12.2 appears to be an oversight, not a policy statement. The transfers still met the general definition of divestment.

Furthermore, the county does not allege that the creation of the land contracts was the divestment. It argues that the action to prohibit the sale of the contracts was the divestment. Appendix 17.12.2 does not address that action. I believe that both the creation of the land contracts for a period far beyond life expectancy with cancellation upon the grantor's death is a divestment, but so too was the amendment to

prohibit the contracts' sale. It is the second action that the county focused on, and that one clearly meets the definition of divestment by acting to avoid the right to receive assets (the value of the land contracts). See Handbook, App. 17.2.1, no. 2.

All that said, I nevertheless conclude that the action at issue here – the denial of nursing home MA for petitioner beginning April 1, 2019 – was erroneous. Petitioner amended the land contract to make it unavailable in February, 2015. She applied for and was granted nursing home MA effective April 1, 2015. The penalty period for a divestment starts when the person applies for MA and meets all eligibility requirements but for the divestment. See Wis. Stat., §49.453(3)(a)2; MA Handbook, App. 17.5.2.

This case is unusual in that all the events occurred due to an initial worker error. As testified by [REDACTED], as petitioner's attorney she met with the then-county worker to discuss the matter. It was the worker's suggestion that she amend the land contracts to prohibit their sale. The worker clearly was thinking about the question of the assets' availability, but the worker failed to consider the potential for divestment (or perhaps the worker mistakenly thought the action was not a divestment). Nevertheless, when petitioner applied for MA in March or April, 2015, she was eligible for MA but for the divestment. Any divestment penalty thus would have, should have, run beginning April 1, 2015. April 1, 2019 is a full 48 months after the penalty period should have begun, and thus it is well beyond the date that the penalty period would have ended (even if calculated using a higher divestment amount and lower daily rate in 2015).

Petitioner was made eligible for MA *incorrectly* beginning April, 2015, and remained ineligible for MA incorrectly thereafter. There is nothing in the law that allows the agency to later create a new ineligibility period because the former worker erred. The problem for the Department is that petitioner's incorrect MA eligibility almost certainly cannot be recovered because it was not the result of a failure to report assets or otherwise misstate facts in the MA application. See Wis. Stat., §49.497(1). Petitioner essentially was overpaid MA for the period April 1, 2015 through sometime near the end of 2017, but the agency's remedy for that error is not to close her MA and start the penalty period now. I therefore conclude that although petitioner divested her farm property in 2015, the agency cannot close her nursing home MA now in 2019 after the overlooked penalty period expired.

### CONCLUSIONS OF LAW

1. Petitioner divested property in 2015 by extinguishing her access to two land contracts.
2. Petitioner was made eligible for MA following the divestment by the worker error of failing to impose the required divestment penalty when petitioner applied for MA in 2015.
3. The agency cannot now begin the penalty period that was overlooked when she applied in 2015.

**THEREFORE, it is**

**ORDERED**

That the matter be remanded to the county with instructions to reinstate petitioner's nursing home MA effective April 1, 2019, and to not impose now the proposed divestment penalty that should have been imposed from 2015 through 2017. The county shall take the action within 10 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, 5<sup>th</sup> 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.

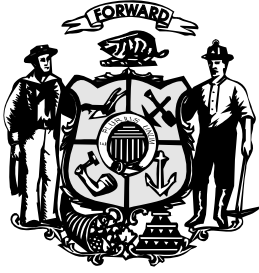
### **APPEAL TO COURT**

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 11th day of June, 2019

\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 June 11, 2019.

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

