



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
c/o [Redacted]
[Redacted]
[Redacted]

DECISION
Case #: MDV - 196288

PRELIMINARY RECITALS

Pursuant to a petition filed October 16, 2019, under Wis. Stat., §49.45(5), to review a decision by Dodge County Human Services to deny Medical Assistance (MA), a hearing was held on November 26, 2019, by telephone.

The issue for determination is whether selling property for non-negotiable promissory notes is a divestment.

PARTIES IN INTEREST:

Petitioner:

Petitioner's Representative:

[Redacted]
c/o [Redacted]
[Redacted]
[Redacted]

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

Respondent:

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

By: [Redacted]
Dodge County Human Services
199 Cty Rd DF
Juneau, WI 53039

ADMINISTRATIVE LAW JUDGE:
Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Dodge County.

2. Petitioner applied for long-term care MA as an assisted living resident on July 23, 2019. Eventually, on September 6, 2019, the county agency denied long-term care MA with a finding that assets had been divested, leading to a 737 day penalty period.
3. Petitioner acknowledges 111 days of the penalty period based on \$32,000 of gifts. He disputes the other 626 days.
4. On August 30, 2019 petitioner's wife sold the couple's former homestead property in two parcels. The parcel including the home was sold to a son and daughter-in-law for \$120,000. The adjoining land was sold to three grandsons for \$60,000. Both parcels were sold pursuant to promissory notes. The notes called for equal monthly payments for ten years (\$925.58 for the home property, \$462.79 for the land parcel) at interest rates of 1.77%. The sale prices of the parcels were within fair market value, and the 10 year repayment is within the seller's life expectancy. The notes do not specifically prohibit cancellation upon the seller's death. The notes allowed for written modifications, but they specifically are non-saleable, non-transferrable, and non-assignable.
5. The county agency concluded that the sales were divestments because the notes did not meet Department policy as being transactions for fair market value.

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 or long-term home health services (a person eligible for community based long term care is considered "institutionalized" under these provisions). 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 (currently \$287.29). MA Handbook, App. 17.5.2.

The MA Handbook, App. 17.12.2 provides:

The purchase of a promissory note, loan, land contract, or mortgage, on or after January 1, 2009, is a divestment unless such note, loan, land contract, or mortgage meets all of the following criteria:

- Has a repayment term that is actuarially sound (paid out in the person's life expectancy)....
- Provides for payments to be made in equal amounts during the term of the loan with no deferral or balloon payments made.
- Does not allow cancellation of the promissory note, loan, land contract, or mortgage upon the death of the lender. Under Wisconsin law, the outstanding loan balance on these types of contracts is not automatically canceled upon the death of the lender. Cancellation of the loan balance can only occur if the contract contains specific language to this effect. If a promissory note, loan, land contract, or mortgage contains language to cancel the balance upon the death of the lender, the promissory note, loan, land contract, or mortgage can be amended to remove this language and avoid a divestment penalty.

If all of the criteria above are not met, the purchase of the promissory note, land contract, loan, or mortgage is a divestment. The divested amount is the value of the outstanding balance due on the promissory note, loan, land contract, or mortgage as of the date of application for Medicaid LTC services.

If all of the criteria above are met, the purchase of the promissory note, land contract, loan, or mortgage is not a divestment. This applies even if the promissory note, land contract, loan, or mortgage cannot be sold because it is not negotiable, assignable, enforceable, or otherwise marketable.

It is not disputed that the notes are actuarially sound. The county based its determination on the second and third prongs. The notes did not state the terms of the repayment or include the amortization schedules, so the county could not ascertain whether the payments were in equal amounts. However, following the hearing petitioner provided the schedules, and they provide for equal payments for the full ten years.

With regard to the third prong, the Handbook states clearly that the note must affirmatively allow cancellation at death. As noted, loan balances are not canceled at death under Wisconsin law, and thus there must be language allowing cancellation. That is not the case here, so the notes pass that prong.

Since the promissory notes pass all three prongs, they are not a divestment. They also are not countable assets because they are non-negotiable. The entire monthly payments are considered income to petitioner's wife, which could affect petitioner's cost of care determination once he is eligible. See DMS Operations Memo 17-34, dated July 21, 2017, page 3; even the principal portions of the monthly payments are considered income based upon Supplemental Security Income (SSI) policy.

Two other possible issues were mentioned. First, it was suggested that there might be a problem because the notes are amendable. That would not affect possible divestment; it could affect availability. However, I can find nothing in the Handbook saying that the potential for amending the notes affects eligibility. Second, it was suggested that it could be divestment because the community spouse transferred the property within five years under Handbook, App. 17.4. However, that provision discusses divestment of a homestead within five years. Here I am finding that the sales are not divestments.

CONCLUSIONS OF LAW

1. The sales of petitioner's former home property by his wife in exchange for promissory notes are not divestments because the notes passed all three prongs of the MA Handbook, Appendix 17.12.2 test.
2. The monthly payments on the notes are income in their entirety.

THEREFORE, it is

ORDERED

That the matter be remanded to the county with instructions to remove the divestment penalty imposed for the sales of property via promissory notes and to re-determine petitioner's MA eligibility based upon the promissory notes being unavailable assets with no divestment penalty (the other portion of the divestment penalty remains effective). The county shall do so 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, 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.

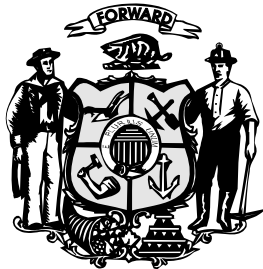
APPEAL TO COURT

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 4th day of December, 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 December 4, 2019.

Dodge County Human Services
Division of Health Care Access and Accountability

