State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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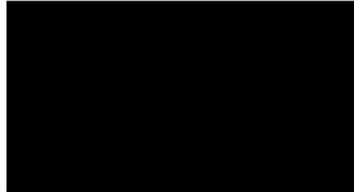
March 23, 2023



Stephanie Sisk
Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

RE:
Case No. FCP - 203910

Dear Parties:

Enclosed is a copy of the Final Decision in the above-referenced matter.

Sincerely,

Emily Zilliox
Legal Associate

c: Moraine Lakes Consortium - email
Office of Family Care Expansion - email
Health Care Access and Accountability - email
Attorney Matthew Hayes - email

STATE OF WISCONSIN
DEPARTMENT OF HEALTH SERVICES

In the Matter of

DECISION

Case No: FCP-203910

The attached proposed decision of the Administrative Law Judge dated February 23, 2022, is hereby adopted as the final decision of the Department.

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, Madison, WI 53705-5400 **and** to those identified in the proposed 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, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of the decision** or 30 days after the denial of a timely rehearing request (if you request one).

The process for Circuit Court appeals is in Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

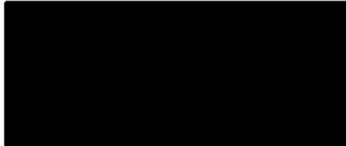
Given under my hand at the City of Madison, Wisconsin, this 23rd day of March, 2023.

Kirsten L. Johnson Secretary
Department of Health Services

FH
3224088338

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



PROPOSED DECISION
Case #: FCP - 203910

PRELIMINARY RECITALS

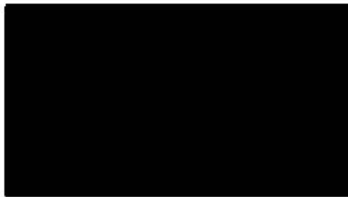
Pursuant to a petition filed on December 13, 2021, under Wis. Admin. Code § DHS 10.55, to review a decision by the Waukesha County Health and Human Services regarding Medical Assistance (MA), specifically the Family Care Program (FCP) a hearing was held on January 18, 2022, by telephone.

The issues for determination are whether 1) whether petitioner divested assets and 2) whether petitioner's Family Care enrollment can begin earlier than November 11, 2021.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney Matthew V. Hayes
Legal Action of Wisconsin
633 West Wisconsin Avenue
Suite 2000
Milwaukee, WI 53203

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: Stephanie Sisk
Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

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

2. On July 7, 2021 petitioner had a Long Term Care Functional Screen performed which found her functionally eligible for MA.

3. On October 6, 2021 petitioner filed a MA application with the agency.

4. On October 6, 2021 the petitioner signed a Family Care enrollment form.

5. On October 22, 2021 the agency issued a notice of decision to petitioner advising that petitioner was eligible for MA effective October 1, 2021 if she met a deductible and was ineligible for Community Waivers because she had divested and was ineligible for benefits from October 6, 2021-December 21, 2021.

6. The agency determined there was a divestment related to a Caregiver Agreement that petitioner signed on November 1, 2017 wherein she agreed to pay her daughters $500 monthly for personal services. Those payments were made monthly thereafter, for a total of $23,500. The Agreement was not notarized.

7. On November 5, 2021, petitioner filed an Undue Hardship waiver request, which was granted on November 11, 2021. Petitioner's enrollment date for the FCP was then set as November 11, 2021.

8. On November 15, 2021 the agency issued a notice of decision to petitioner advising that she was enrolled in the FCP effective November 11, 2021.

DISCUSSION

Family Care is a MA waiver program that provides long-term care services to frail elderly individuals, individuals who have physical disabilities, and individuals who have intellectual disabilities. See Wis. Stat. §46.286; *see also* Wis. Admin. Code, Chapter DHS 10. Family Care is designed to deliver benefits through a managed care system.

To be eligible for Family Care, a person must apply for benefits and meet the program's financial, non-financial, and functional criteria. Wis. Stat. §46.286(1); Wis. Admin. Code §§DHS 10.32(1)(d) and (e). However, a person who meets all of the program's eligibility criteria is not entitled to receive benefits until he is enrolled in a managed care organization (MCO). See Wis. Stat. §46.286 ("A person is eligible for, but not necessarily entitled to, the family care benefit if [the person satisfies all eligibility criteria]"), Wis. Admin. Code §DHS 10.36(1), and Wis. Admin. Code §DHS 10.41(1). In other words, an individual cannot begin to actually receive Family Care benefits until s/he is enrolled in a managed care organization and s/he cannot be enrolled in a managed care organization until s/he is found eligible through the application process. Thus, the longer the application process takes, the later an individual's benefit start date will be.

Over the past several years, the Department of Health Services has issued final decisions ordering that individuals be awarded backdated enrollment into an MCO where agency negligence or error resulted in delayed enrollment. See e.g., *In re* [redacted], DHA Case No.16-7655 (Wis. Div. Hearings & Appeals March 21, 2016) (DHS) and *In re* [redacted] DHA Case No. 17-3457 (Wis. Div. Hearings & Appeals Sept. 15, 2016) (DHS). Prior to those final decisions, the Division of Hearings and Appeals

routinely held that the relevant legal authorities did not allow for backdated enrollment into the FCP under any circumstances. Following the issuance of those final decisions, the Division of Hearings and Appeals endeavored to apply the reasoning articulated by the Department and allowed for backdated enrollment under limited circumstances. However, the Department thereafter issued a final decision in which the Secretary clarified that she considers any remedy involving backdated enrollment to be equitable in nature. See In *re* [redacted], DHA Case No. FCP-192893 (Wis. Div. Hearings & Appeals Nov. 5, 2019) (DHS). It is well-established that administrative law judges (ALJs) do not have the authority to order equitable remedies; however, the Secretary has invited ALJs to recommend an "appropriate remedy" for her consideration in the form of a proposed decision in cases where agency error has adversely affected an individual. *Id.*

Here, it is undisputed that petitioner signed a Family Care enrollment form on October 6, 2021 when she filed her MA application. It was also undisputed that she was financially and functionally eligible as of October 1, 2021. The application was denied due to divestment and a penalty period was created. The petitioner then filed for an undue hardship waiver on November 5, 2021 which was approved on November 11, 2021. The agency representative testified at hearing that the FCP enrollment date could only be set on November 11 (and per that Family Care enrollment form) because that was when her MA eligibility was established by the granting of the undue hardship waiver and that date cannot be backdated.

Petitioner's first argument is that the agency erred in determining a divestment which then caused the delay in getting her enrolled earlier than November 11. She seeks an enrollment date of November 1. Her counsel argues that the agency erred in using the total payments petitioner made to her daughters for personal services over 5 years to require a notarized agreement. The Caregiver Agreement (made when services started on November 1, 2017) was for $500/month, which was paid monthly, for a total of $23,500. The agreement was not notarized, however. The agency considered the $23,500 divested because the agreement was not notarized per statutory language as follows:

> CARE OR PERSONAL SERVICES. For the purposes of sub. (2), whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to a relative as payment for care or personal services that the relative provides to the covered individual, the covered individual or his or her spouse transfers assets for less than fair market value unless the care or services directly benefit the covered individual, the amount of the payment does not exceed reasonable compensation for the care or services that the relative performs and, if the amount of the payment exceeds 10 percent of the community spouse resource allowance limit specified in s. 49.455 (6) (b) 1., the agreement to pay the relative is specified in a notarized written agreement that exists at the time that the relative performs the care or services.

Wis. Stat. §49.453(5).

The *MA Handbook* provides:

> Payments (or transfer of ownership of something of value) by an institutionalized person to a relative for services provided to the institutionalized person is an allowed divestment and doesn't result in a penalty period if either:

- The amount is **less** than 10 percent of the maximum Community Spouse asset share (CSAS) and meets both of the following:
- The services directly benefited the institutionalized person.
- The payment did not exceed reasonable compensation for the services provided.
- The amount is **greater** than 10 percent of the maximum Community Spouse asset share and meets all of the following:

- The services directly benefited the institutionalized person.
- The payment did not exceed reasonable compensation for the services provided.
- The institutionalized person and the relative providing the service have a written, notarized agreement that meets all of the following:
- Specifies the service being provided to the institutionalized person
- Specifies the amount to be paid to the relative providing the services
- Was notarized at the time the relative began to provide the services

Medicaid Eligibility Handbook, §17.2.6.13, available online at http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm#t=policy_files%2F17%2F17.2.htm.

The Supreme Court of Wisconsin has held that statutory language must be interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663 (2004). Furthermore, statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. *Id.* And, of course, this tribunal "is not at liberty to disregard the plain, clear words of the statute." *Id.*

These standards apply to the interpretation of Wis. Stat. §49.453(5). The petitioner argues that the language in the statute and MA Handbook could be read to indicate that the notarization requirement only applies to **one** payment larger than 10 percent of the community spouse resource allowance limit. However, the terms 'assets' and 'payments' are used both singularly and in the plural. The language does not refer to small monthly payments, which may or may not eventually meet the 10 percent requirement. Petitioner further argues that such monthly payments would only meet such a requirement depending on arbitrary factors related to an individual's health care needs which would be impossible to predict when an agreement for providing care services is made. Indeed, the monthly payments were considered reasonable amounts by the agency at hearing. There was no hint here of any sleight of hand to transfer assets for less than fair market value, except that the agreement was not notarized. It would seem that the point of the notarization is generally to provide some assurance that such an agreement is not being backdated. If one were to accept petitioner's argument (that small monthly payments bypass the notarization requirement), that would result in effectively negating the notarization requirement, since almost all care agreements are on a periodic or as-needed basis. Thus, the petitioner's reading of the statute would require this tribunal to ignore the words of the statute. Petitioner's counsel further argues that to require petitioner to have predicted how long she would need long-term care services back in 2017, "in order to get an otherwise acceptable agreement notarized for an unknown reason, is unreasonable and is a violation of her procedural due process rights under the 14th Amendment." However, petitioner's quarrel is with the language of the statute. And this tribunal has no authority to re-write (or to ignore) the statute.

I find that the law and policy require that the agreement had to be notarized. If the agency wishes to exercise equitable power or clarify its policy to parse out such a situation of monthly payments, this Decision is being issued as a Proposed Decision for the Secretary to decide. I add that hearing examiners lack the authority to reach constitutional defenses. "Due process" is a legal term of art arising under color of the United States Constitution. It is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on constitutional *or* equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis. 1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

Although there is a finding of divestment, the agency granted an undue hardship waiver, which waived the entire divestment penalty period. See Wis. Stat.§49.453(8)(a)2 and *MEH* §22.4.4.1. Per policy, undue hardship occurs if denial or termination of an applicant's MA eligibility for coverage of long-term care

services would deprive the person of medical care, which then endangers the person's health or life, food, clothing, shelter, or other necessities of life. See *MEH* §22.4.1. Also per policy, her eligibility begins on the enrollment date provided to the IM agency by the ADRC. See *MEH* §22.4.4.1 and Operations Memo #17-21, available online at https://www.dhs.wisconsin.gov/dms/memos/ops/17-21.pdf. In this case it was on November 11. Again, I, as an administrative law judge, have no equitable powers to change that to November 1, 2021.

CONCLUSIONS OF LAW

1. Petitioner divested assets as her Caregiver Agreement was not notarized.
2. Petitioner's enrollment date in the FCP cannot be backdated to November 1, 2021.

THEREFORE, it is **ORDERED**

That, if this Proposed Decision is adopted as Final by the Department Secretary, the matter is dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. §227.46(2).

Given under my hand at the City of Milwaukee,
Wisconsin, this 23rd day of February, 2022

Kelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals