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[REDACTED]

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

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In the Matter of



**DECISION**  
Case #: MDV - 209376

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**PRELIMINARY RECITALS**

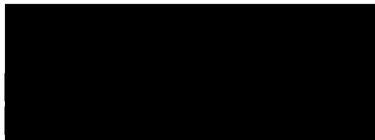
Pursuant to a petition filed on July 13, 2023, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Barron County Department of Human Services regarding Medical Assistance (MA), a hearing was held on September 20, 2023, by telephone.

The issues for determination are (1) whether the agency correctly denied petitioner's request to backdate her enrollment to January 1, 2023, and (2) whether the agency correctly determined that the petitioner divested assets causing a 745 day penalty period of ineligibility for MA.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:



Respondent:

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

By: Nicole Daul

Barron County Department of Human Services  
Courthouse Room 338  
335 E Monroe Ave  
Barron, WI 54812

**ADMINISTRATIVE LAW JUDGE:**

Peter McCombs  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Chippewa County. She presently resides at [REDACTED], located in [REDACTED], Wisconsin.
2. On or about January 10, 2023, the petitioner and her husband submitted an Asset Assessment request. The agency established an asset limit for the couple, as petitioner had been admitted to a nursing facility in October of 2022.
3. In May of 2023, a Medicaid Application was received by the agency. The application was denied on June 21, 2023, due to assets exceeding program limits. The denial also included, in error, a divestment penalty period of 745 days.
4. The agency determined that divestments occurred 2022, consisting of the sale of petitioner's real property (\$190,200.00) and cash gifts to heirs (\$40,000). In reviewing this matter, the agency found that there was an error in the valuation of the real property, but since that error benefited the petitioner, the valuation was not corrected nor was the divestment period corrected.
5. The petitioner appealed the MA denial on July 13, 2023.
6. The agency subsequently completed a review of the matter and found that the pervious Asset Assessment value and date were changed during the May 18, 2023 MA application processing. On June 12, 2023, the asset assessment date was incorrectly updated to May 2023, the date of the ADRC Functional Screening, instead of retaining the assessment date of October 2022, which was the date of the original nursing home admission date.
7. The agency corrected the Asset Assessment to the higher value assigned using the October 2022 date. The agency review also determined that the valuation of the countable assets for the May 1, 2023 determination were calculated incorrectly. The corrected determination of July 28, 2023, found that the petitioner and her husband remained over the asset limit, with counted assets of \$168,554.58 (vs the couple's asset limit of \$124, 565.33).
8. The agency concedes that the divestment penalty should not have been calculated or imposed because the petitioner's assets exceeded the asset limit as of May 2023. Despite this, since the system error caused the imposition of the divestment penalty, the agency is honoring the May 1, 2023 penalty period start date.

## DISCUSSION

### **1. Whether the agency correctly denied petitioner's request to backdate her enrollment to January 1, 2023.**

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. *Medicaid Eligibility Handbook*, § 18.4.1. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to an "asset allowance" to determine eligibility. Exhibit R-6, *Medicaid Eligibility Handbook*, § 18.4.3, which is based upon Wis. Stat., §49.455(6)(b). \$2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy, resulting in an eligibility limit. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

### **2.8.1 Begin Dates Introduction**

Medicaid eligibility begins the first day of the month in which the valid application is submitted and all program requirements are met with the following exceptions. Those begin dates are the date a valid application is submitted, all program requirements are met, and: ...

5. Institutionalized – His or her entry into the nursing home or hospital.

### **2.8.2 Backdated Eligibility**

Medicaid eligibility can be backdated up to three months prior to the month of application.

The backdated eligibility should not go back further than the first of the month, three months prior to the application month. The member may be certified for any backdate month in which he or she would have been eligible had he or she applied in that month.

A backdate request can be made at any time except when the member is already enrolled and backdating the member's eligibility would result in a deductible for the backdated period.

If a member has incurred a bill from a Medicaid-certified provider during a backdate period, instruct the member to contact the provider to inform them to bill Medicaid. The member may be eligible to receive a refund, up to the amount already paid to the provider.

*Medicaid Eligibility Handbook*, §§ 2.8.1 and 2.8.2.

The petitioner's representatives argued that they believed that the Asset Assessment request submitted in January of 2023, was the MA application. In fact, the proper MA application was not filed until May of 2023. While I can understand that this process can be confusing, especially here where the agency has conceded to several errors, the plain language of the relevant MA policy only allows for backdating for a period of three months preceding the month of application. I have no authority to subvert this language, or to make a ruling based upon grounds of fairness or equity. MA policy is very specific with regard to backdating, and I find no error by the agency in authorizing a backdate to February 1, 2023, which is three months preceding the month of application.

## **2. Whether the agency correctly determined that the petitioner divested assets causing a 745 day penalty period of ineligibility for MA**

“Divestment” is the transfer of income, non-exempt assets, and/or homestead realty belonging to an institutionalized person (or his spouse) or both, for less than market value, by the person, spouse, someone else with legal authority to act for the institutionalized person (or spouse), or any person acting at the direction or request of the institutionalize person (or spouse) like a relative, friend, volunteer, or authorized representative. See, *Medicaid Eligibility Handbook*, § 17.1. The lookback period for divestments, including multiple divestments, is 60 months. See, *Medicaid Eligibility Handbook*, § 17.2.2.1.

The petitioner does not contest that two cash gifts totaling \$40,000.00 constituted divestments, but there is an issue regarding the 2022 sale of petitioner's real property. The agency learned after the petitioner's appeal was filed that there may be a life estate involved, as well.

The Department's written policy identifies allowable divestments, in pertinent part, as follows:

### **17.2.6 Allowed Divestments**

A divestment must be checked against all types of allowed divestments described in this section before checking it against those that are disallowable as described in 17.2.7 DIVESTMENTS THAT ARE NOT ALLOWED AND RESULT IN A PENALTY PERIOD.

There is no penalty period for allowed divestments.

This section does not include a comprehensive list of all allowed divestments. The member or applicant's intent must be evaluated to determine whether it is an allowed divestment.

Prior to determining whether a transfer is an allowed divestment or not, the transfer must be evaluated as a divestment based on the following:

- 17.2.1 EXEMPTION OR DISREGARDED STATUS OF INCOME AND ASSETS
- 17.2.2 DATE OF TRANSFER
- 17.2.3 TRANSFERS THAT ARE NOT DIVESTMENT
- 17.2.4 DETERMINING FAIR MARKET VALUE
- 17.2.5 VERIFICATION

### **17.2.6.8 Transfer of Homestead Property**

The transfer of homestead property by an institutionalized person or their spouse for less than FMV is an allowed divestment and doesn't result in a penalty period when the transfer is to:

- The institutionalized person's spouse.
- The institutionalized person's child if at least one of the following criteria is met:
  - The child is under the age of 21.
  - The child is blind or permanently and totally disabled.
  - The child resided in the institutionalized person's home for at least two years immediately before the institutionalized person moved to a medical institution, and provided care that allowed the institutionalized person to reside at home rather than in the institution for the entire two years immediately before the institutionalized person moved to a medical institution. The child's provision of care must be verified by a notarized statement from the institutionalized person's physician or someone else who has personal knowledge of the circumstances. A notarized statement from the child is not sufficient. The homestead transfer does not have to take place after the provision of care in order to be an allowed divestment.
- The institutionalized person's sibling if both of the following criteria are met:
  - The sibling resided in the institutionalized person's home for at least one year immediately before the institutionalized person moved to a medical institution.
  - The sibling has a verified equity or ownership interest in the home. The equity or ownership interest must be verified by documentation such as a

copy of the deed or land contract. The sibling's name on the document is not sole proof, so other documentation such as canceled checks and receipts may be needed.

*Medicaid Eligibility Handbook*, §§ 17.2.6 and 17.2.6.8.

#### **17.2.7.10 Life Estate – Transferring the Property for Less Than FMV**

The transfer of property originally owned by a life estate holder to a remainder person without receiving FMV is an unallowable divestment and results in a penalty period.

The divested amount is the FMV of the property at the time of the transfer minus the life estate value. To determine the life estate value, multiply the FMV of the property by the number from the [39.1 LIFE ESTATE AND REMAINDER INTEREST](#) table corresponding to the age of the life estate holder at the time the property was transferred.

**Example 6:** Marion, age 83, gave her home to her son John, retaining a life estate. The FMV of the house at the time of the transfer was \$87,000. Two years later, Marion applied for Long Term Care Medicaid. Since the transfer of her home occurred in the look back period, it is an unallowable divestment and results in a penalty period. The worker must determine the divestment amount and penalty period. The divestment amount is the FMV of the house at the time of transfer, minus the life estate value.

To determine the life estate value, multiply \$87,000 by .38642 (the number from [39.1 LIFE ESTATE AND REMAINDER INTEREST](#) table that corresponds to Marion's age, 83, at the time of transfer).

Marion is the life estate holder. John is the remainder person.

The divested amount is  $\$87,000 - \$33,618.54 = \$53,381.46$ .

*Medicaid Eligibility Handbook*, § 17.2.7.10.

At hearing, the agency representative noted that the entire issue of the existence of a life estate may be moot, however, if the property at issue is an operating business concern:

#### **16.9.1 Introduction to Property Essential to Self-Support**

Certain assets deemed to be essential to an individual's means of self-support are excluded. These assets fall into three main categories:

- Property used in an established trade or business, which is excluded regardless of its value or rate of return if the business is currently operating for the self-support of the individual or their spouse, or there is a reasonable expectation it will resume operating within the next 12 months (see [SECTION 15.6.3.1 BUSINESS ASSETS](#))
- Nonbusiness property used to produce goods or services essential to self-support, which is excluded up to \$6,000
- Nonbusiness income-producing property, which is excluded up to \$6,000 if it produces at least a six percent rate of return

#### **16.9.2 Business Property Excluded Regardless of Value Rate of Return**

This category includes:

- Property used in a trade or business, if the individual is actively involved in the business operation on a day-to-day basis
- Government-issued permits (such as commercial fishing permits)

- Personal property used by an individual as an employee for work or required by an employer for work

Note: Rental property is not considered business property unless the property owner is in the business of renting and managing properties. If a person simply owns a piece of property and is renting it to produce passive income, they are not considered to be the owner of a trade or business.

The information reported on the Schedule E, Supplemental Income and Loss (if applicable), should be checked to determine whether the individual is actively engaged in the business. If the income is listed as Non-Passive Income, the individual is actively engaged in the business.

When determining if a trade or business exists in an LLC or other questionable situations, the agency should consider:

- Does the IRS regard this as a trade or business?
- Does the individual have documents to support the claim of trade or business such as licenses, permits, registration, etc.?
- Is the individual a member of a business or trade association?

*Medicaid Eligibility Handbook*, §§ 16.9.1 and 16.9.2.

As the issues concerning the life estate status and the business property status have not yet been fully vetted by the agency, I will remand this matter to the agency to investigate these issues further.

### CONCLUSIONS OF LAW

1. The respondent may commence petitioner's eligibility for institutional MA as of February 1, 2023.
2. The respondent has not completed its investigation into the asset status and potential divestment of petitioner specific to the transfer of petitioner's homestead real property.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the respondent to investigate the petitioner's and/or her spouse's life estate in the homestead property and whether the homestead property would constitute an excluded asset pursuant to *Medicaid Eligibility Handbook*, §§ 16.9.1. Written notice shall be issued to petitioner confirming the respondent's compliance with this Order. All actions required by this Order shall be completed within 10 days following issuance 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

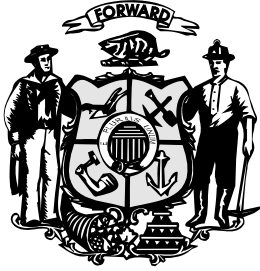
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision 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 27th day of October, 2023



\s \_\_\_\_\_  
Peter McCombs  
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 October 27, 2023.

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