DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-70/74428

PRELIMINARY RECITALS

Pursuant to a petition filed January 11, 2006, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Winnebago County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on March 21, 2006, at Oshkosh, Wisconsin. A hearing set for February 13, 2006, was rescheduled at the petitioner's request. The record was held open 20 days at the petitioner's request.

The issue for determination is if the petitioner is ineligible for Institutional MA due to a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
(petitioner)

Represented by:
Attorney Roy E. Hegard
107 Church Avenue
P O Box 617
Oshkosh, WI 54903-0617

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Barb Pommerening, ESS
Winnebago County Dept Of Human Services
220 Washington Ave.
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ADMINISTRATIVE LAW JUDGE:
Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxxxxx) is a resident of Winnebago County.

2. The petitioner entered a nursing home in 1996. At that time, she had liquidated some of her assets and a trust was established that had a corpus of $400,000.

3. In January, 2002, some of the petitioner's assets were gifted to the her children. However, the petitioner still retained legal title to three properties: the land upon which there is a business located at (redacted) in Oshkosh with a fair market value of about $235,000 in 2004; the petitioner's former home located at (redacted) in Oshkosh with a fair market value of about $160,000 in 2004; and a cottage in Neillsville with a fair market value of about $34,000 in 2004.

4. On June 30, 2004, (redacted), who was the petitioner's daughter and attorney-in-fact, signed a Quit Claim Deed on behalf of the petitioner for each of the three properties described in Finding #3. The properties were divided among family members.

5. (redacted) applied for MA for the petitioner on June 14, 2005. (redacted) contacted the county agency on July 8, 2005, and requested that the application be withdrawn because she had been informed that the petitioner would be ineligible due to the property transfers.

6. (redacted) reapplied for MA on August 30, 2005. On August 31, 2005, the county agency issued a negative notice stating that the institutional MA was denied due to divestments. The penalty period would be from June 30, 2004 through October 31, 2010. She was found eligible for card services as of August 1, 2005.

7. The county agency kept sending CARES notices to the petitioner stating she was eligible for MA long term (institutional) care. The last CARES notice like that was dated December 5, 2005, and it indicated that the petitioner was eligible in January, 2006. The county agency finally clarified that the CARES notices were incorrect.

8. The petitioner was 78 years old in 2004. In May, 2005, the Winnebago County Circuit Court reviewed an Annual Protective Placement Review (Exhibit #9). It listed a number of diagnoses including, but not limited to hemiplegia, aphasia, cerebral ischemia, coronary atherosclerosis, congestive heart failure, and COPD.

9. The Winnebago County Circuit Court Annual Protective Placement Review also indicated that the petitioner needed assistance with her activities of daily living and was non-ambulatory. She was able to self-propel the wheelchair, make her needs known through short phrases signs and gestures, become involved with activities at the nursing home, go outdoors, and leave the nursing home to go on visits to the family. Her condition was relatively stable.

DISCUSSION

At first blush, it would appear that the request for a hearing was untimely. A hearing officer can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely. An appeal of a negative action by an agency concerning MA must be filed within 45 days of the date of the action. See sections 49.45(5) and 49.21(1), Wis. Stats.; Income Maintenance Manual, II-G-3.4.0. A negative action can be the denial of an application, a request for service or the reduction or termination of an ongoing case. The petitioner's appeal was filed 133 days after the date of the county agency's negative notice dated August 31, 2005. However, the petitioner kept getting CARES notices stating that she was eligible for MA long term care; the last one, issued on December 5, 2005, pertained to January, 2006. Based on these continued CARES notices, I find that the request for hearing was timely and that jurisdiction exists for considering the merits of the case.

A person seeking medical assistance is ineligible if his assets exceed the MA program's limit. To prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by passing their assets to potential heirs, MA law prevents a recipient from reaching this limit by divesting assets. A divestment is a transfer of assets for less than fair market value. Wis. Stat. Sec. 49.453(2)(a); *Medicaid Eligibility Handbook*, § 4.7.2. A divestment occurs when an applicant, or a person acting on the applicant's behalf, transfers assets for less than their fair market value on or after the

lookback date. §49.453(2)(a), Stats.; *Medicaid Eligibility Handbook*, § 4.7.2. The lookback date is generally 36 months, but is 60 months if an irrevocable trust is involved. §49.453(1)(f), Stats; see also *Medicaid Eligibility Handbook*, § 4.7.3. The lookback date for an institutionalized person begins on the first day that the person is both institutionalized and applies for medical assistance. §49.453(1)(f)1., Wis. Adm. Code. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The period of ineligibility is specified in Wis. Stat. Sec. 49.453(3) to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. See the *Medicaid Eligibility Handbook*, 4.7.5. The period of ineligibility begins on the date of the divestment.

A divestment that occurred in the lookback period or any time after does not affect eligibility if any of the following exceptions that could be applicable to this case exist:

> 1. The person who divested shows that the divestment wasn't made with the intent of receiving MA.
>
> The person must present evidence that shows the specific purpose and reason for making the transfer. Verbal assurances that s/he was not trying to become financially eligible for Medicaid are not sufficient. S/he must show that s/he expected private health insurance or other resources would cover his/her institutional expenses. Take into consideration statements from physicians, insurance agents, insurance documents, and bank records that confirm the person's statements...
>
> 3. The ownership of the property is returned to the person in the fiscal group who originally disposed of it...
>
> 6. The agency determines that denial of eligibility would work undue hardship on the person. "Undue hardship" is a serious impairment to the institutionalized person's immediate health.
>
> The ESS must verbally inform the person of this undue hardship provision if the ESS has determined the per-son has divested. The undue hardship notice must be included on all manual MA institution denials and closures due to divestment.

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the county, like the denial of MA due to a divestment of assets was improper given the facts of the case. See, 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists. While oral testimony concerning the intent of the applicant is important, great weight must be afforded by the actions taken by the applicant given the overall circumstance at the time. Thus, the most commonly heard explanation that the transfer of assets was done for probate purposes must be well documented and be evident in light of all of the facts.

The petitioner presents a number of arguments. There is an underlying issue as to when the transfers took place. Per the Quit Claim Deeds executed in June, 2004, the transfers of all three properties occurred on June 30th. The argument that the properties where transferred in 2002 is incorrect. The properties were still titled in the petitioner's name until the Quit Claim deeds were executed. Until that time, the petitioner retained the right to sell, transfer, or dispose of the property (which she did in June, 2004) the legal right to the money obtained from sale of the properties, and the legal ability to make the money available for support and maintenance. See the *Medicaid Eligibility Handbook*, § 4.5.2 and 20 C.F.R. §416.1201(a). Thus, the transfer of the property occurred in June, 2004.

The first argument is that there was no intent to transfer the properties for the purpose of obtaining eligibility. The argument is that if the family wanted to have the assets divested, it would have been done

so in 1996 when the petitioner first went to the nursing home. However, that assumes that life is static and there is not change in the petitioner's circumstances. The petitioner's situation in 1996 is not the same as it was in 2002 or 2004.

In this case, when I determine the petitioner's intent, I must not only consider her actions or statements but also the actions and statements of (redacted), who was her attorney in fact. A divestment can still exist even if someone other than the individual does the transfer of the nonexempt asset. Such a person could be, for example, a guardian or attorney in fact. See §49.453(2)(a), Stats.; *Medicaid Eligibility Handbook*, § 4.7.2. The petitioner's representatives argued that the petitioner has been near death ever since 1996 and so she was not expected to live much longer. Further, she had a trust fund with about $400,000 in 1996, which had been reduced to about $250,000 in 2002. It was expected that the trust fund would last until 2008. Thus, her short life expectancy combined with ample resources proves that the transfer of the three properties was not to gain MA eligibility. Finally, the three properties should have been transferred in 2002 as part of the estate planning for the petitioner.

Given that by 2006 the petitioner had to apply for MA due to the spending of all of her resources, it is obvious that any prediction of available funds until 2008 was not accurate. Given the obvious attention given to the petitioner's trust funds, it should have become clear by June, 2004 that the trust fund would be depleted by 2006. Thus, it should have been expected that the petitioner would have no financial resources to rely on as of that time. As for the petitioner's life expectancy, I would agree that it would be unrealistic to rely on the life expectancy table in the *Medicaid Eligibility Handbook*, § 8.1.10, that the petitioner as a 78 year old woman would be expected to live to the age of 89. However, the picture presented in the Winnebago County Circuit Court Annual Protective Placement Review (Finding #9) does not quite match the bleak testimony at the hearing. Done in May, 2005, it shows that the petitioner needed assistance with her activities of daily living and was non-ambulatory. However, she also was able to self-propel the wheelchair, make her needs known through short phrases signs and gestures, become involved with activities at the nursing home, go outdoors, and leave the nursing home to go on visits to the family. This is not a woman who was at death's door. I can find no evidence that her status was any different in 2004. In fact, the social worker at the nursing home testified at the hearing that her condition was relatively stable. Finally, I heard much oral testimony concerning estate planning but little documentation. Thus, based on the above, I find that the petitioner was unable to rebut the county agency's case on the issue of intent.

The next argument is that the denial of eligibility would work undue hardship on the petitioner. As seen above, an undue hardship may be present when "the agency determines that denial of eligibility would ... [create] a serious impairment to the institutionalized person's immediate health. There is no dispute that the petitioner requires skilled nursing care. However, decisions from this office have looked at more than the petitioner's physical frailty in making "undue hardship" determinations. ALJ's have also looked at the totality of the circumstances surrounding the divestment, to determine if the hardship was of the petitioner's (or her agent's) own making. When the hardship was of the petitioner's own making, ALJ's have found that an undue hardship exception to the transfer penalty period is not appropriate. See Decisions MDV-18/54689 and MDV-13/56245.

The other consideration here is the status of the asset. In a "theft by POA" case, the stolen asset has been dissipated, significantly reduced in value, or rendered hopelessly inaccessible by the thief. This is consistent with thievery. In those cases, it is relevant to the undue hardship argument that an asset cannot by recovered. In the instant case, the asset's whereabouts are known, unchanging, and within the county's borders. Similarly the total value of all three properties is well into six figures. There has to be leverage to force the asset's return to the applicant, or incentive to seek its recovery. Ignoring the existence of large assets that are available is not consistent with the spirit of the divestment exceptions. The hoped-for result in such scenarios is that the children who benefited from the divestment will be

compelled to return the divested asset, which in turn will provide the patient with the ability to pay for her care.

The final argument is that even if there was a disqualifying divestment, the county agency calculated the disqualification period incorrectly. The provision cited is in the WI Admin Code, §HFS 103.065(5), which states in part:

> **(5)** DETERMINING THE PERIOD OF INELIGIBILITY. An institutionalized individual who has made a prohibited divestment under this section resulting in ineligibility or whose spouse has made a divestment under this section resulting in ineligibility on or after July 1, 1990, as determined by the agency, without a condition under sub. (4) (d) existing, shall be ineligible for MA as defined in this section for, beginning with the month of divestment, the lesser of:
>
> (a) Thirty months; or
>
> (b) The number of months obtained by dividing the total uncompensated value of the transferred resources by the statewide average monthly cost to a private pay patient in an SNF at the time of application.

However, the question of the calculation is also addressed in WI Stats § 49.453(3), which states in part:

> **3) Period of ineligibility.**
> (a) The period of ineligibility under this subsection begins on the first day of the first month beginning on or after the look-back date during or after which assets have been transferred for less than fair market value and that does not occur in any other periods of ineligibility under this subsection.
>
> (b) The department shall determine the number of months of ineligibility as follows:
>
> 1. The department shall determine the total, cumulative uncompensated value of all assets transferred by the covered individual or his or her spouse on or after the look-back date.
>
> 2. The department shall determine the average monthly cost to a private patient of nursing facility services in the state at the time that the covered individual applied for medical assistance.
> 3. The number of months of ineligibility equals the number determined by dividing the amount determined under subd. 1. by the amount determined under subd. 2.

Administrative rules are promulgated to implement statutes. In the event of a conflict between a statutory provision and an agency administrative code provision, the statutory provision is controlling. The petitioner's representatives did not challenge the county agency's arithmetic, only its application of the law. Thus, I find that the county agency's calculations are correct.

CONCLUSIONS OF LAW

1. The petitioner, through her attorney-in-fact divested properties in June 2004, in order to become eligible for MA.
2. The petitioner is ineligible for institutional MA through October 31, 2010.

NOW, THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found 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 no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 18th day of
April, 2006

/sJoseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
825/JAN