



FH  
[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**DECISION**  
Case MDV-177535

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**PRELIMINARY RECITALS**

Pursuant to a petition filed on October 25, 2016, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services regarding Medical Assistance (MA), a hearing was held on January 18, 2017, at Waukesha, Wisconsin.

The issue for determination is whether the Waukesha County Health and Human Services (the agency) correctly determined that the Petitioner divested \$62,797.80 from 2011 through 2015.

NOTE: The record was held open to give the agency an opportunity to submit a spreadsheet finalizing its divestment determination and to give Petitioner's attorney an opportunity to respond. The finalized spreadsheet has been marked as Respondent's Exhibit 8. [REDACTED]'s response has been marked as Petitioner's Exhibit 10.

There appeared at that time and place the following persons:

**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]  
Waukesha County Health and Human Services  
514 Riverview Avenue  
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:  
Mayumi M. Ishii  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a 93 year-old resident of Waukesha County.
2. On November 19, 2010, the Petitioner appointed her grandson, [REDACTED], to be her power of attorney. (Exhibit R7)
3. In 2011, the Petitioner lived with her husband, but her daughter [REDACTED], who is also [REDACTED]'s mother, provided assistance to them both. In November 2011, Petitioner's husband passed away, and [REDACTED] began spending the night with Petitioner. Eventually, Petitioner purchased a condo, where she lived with [REDACTED]. (Testimony of [REDACTED])
4. In September 2013, [REDACTED] passed away. (Testimony of [REDACTED])
5. In October 2013, [REDACTED] moved the Petitioner to Wisconsin and placed her in an assisted living facility. Petitioner has been institutionalized since that time. (Testimony of [REDACTED]; Exhibit P3)
6. In September 2014, the Petitioner was diagnosed with Stage 4 terminal breast cancer and moved to hospice. She was not expected to live more than six months. (Testimony of [REDACTED]; Exhibit P10; stipulation of the parties)
7. The Petitioner privately paid for institutional care through October 2015. (Testimony of [REDACTED]; Exhibits P5 and P7)
8. The Petitioner submitted an application for Nursing Home Long Term Care Medicaid on November 24, 2015. The Petitioner requested a back date to October 10, 2015. (Stipulation of Parties)
9. The Petitioner's initial application for benefits was denied, and the Petitioner reapplied for Nursing Home Long Term Care Medicaid in February 2016. (Stipulation of Parties; DHA file MGE-174343)
10. In April 2016, the agency again denied Petitioner's application. Petitioner filed a request for fair hearing in May 2016, and in September 2016, DHA issued a decision finding that the agency incorrectly denied the application and remanded the matter back to the agency to continue processing the Petitioner's application. (DHA file MGE-174343)
11. On October 12, 2016, the agency issued a notice to the Petitioner indicating that it had determined that she divested \$179,980.66 and that she would be ineligible for Medicaid for the period of February 1, 2016 through December 25, 2017. (Exhibit P1)
12. The Petitioner filed an appeal of the divestment determination, that was received by the Division of Hearings and Appeals on October 25, 2016. (Exhibit P1)
13. The Petitioner filed a request for an undue hardship waiver, but on November 3, 2016, the agency denied the request. (Exhibit P2)
14. The Petitioner filed an appeal of the denial of undue hardship, that was received by the Division of Hearings and Appeals on November 17, 2016. (Exhibit P2)
15. Also on November 17, 2016, the agency sent the Petitioner a revised decision, indicating that it had determined she divested \$179,980.66 and that she would be ineligible for Medicaid for the period of November 1, 2015 through September 24, 2017. (Exhibit R4)

16. On November 30, 2016, Petitioner's nursing home filed a request for an undue hardship waiver on the Petitioner's behalf. (Exhibit R5)
17. On December 21, 2016, the agency sent the Petitioner another notice that it was again denying the request for an undue hardship waiver. (Exhibit R6)

### DISCUSSION

A divestment occurs when the applicant disposes of an asset/resource for less than fair market value. *See* the administrative rule concerning divestments that occurred after August 9, 1989, under Wis. Admin. Code §DHS 103.065 (4), which states, "An institutionalized individual or someone acting on behalf of that individual who disposes of resources at less than fair market value ... shall be determined to have divested. A divestment results in ineligibility for MA for the institutionalized individual..." *Wis. Admin. Code §DHS 103.065 (4)(a); See Also Wis. Stats. §49.453(2); 42 U.S.C. §1396P(c)(1)(A) and (B)*

The "Look Back" period for transfers/divestments made after February 8, 2006 is 60 months. *Wis. Stats. §49.453(1)(f); 42 U.S.C. §1396P(c)(1)(B)*

However, when a satisfactory showing is made to the State agency that the assets were transferred for a purpose other than to qualify for medical assistance, the transfer is not considered a divestment. *42 U.S.C. §1396P(c)(2)(C)(ii); See also MEH §17.4*

The divested asset at issue is cash from Petitioner's bank accounts. On the date of hearing, the parties agreed that the determination that Petitioner divested \$179,980.66 was incorrect. Exhibit R8 indicates that the agency's most current determination is that the Petitioner divested \$62,797.80.

Looking at Exhibit R8, it appears that the alleged divestment was comprised of over 100 transfers that were mostly in smaller amounts, given as gifts to her daughter, grandchildren, and great grandchildren, the spouses of those individuals between January 2011 and October 2015, with the exception of certain payments made in 2014 and 2015 to Petitioner's beautician. Given the volume of transfers, they will not be addressed individually, since the evidence supports a finding that the transfers were not made with the intent to make the Petitioner Medicaid eligible. Though, I will note that the agency's initial suspicion regarding the transfers was not necessarily unreasonable, given the frequency of the transfers.

Given the lower dollar amount of most of the transfers, some of which were as small as \$42.00, it is questionable whether the gifts/payments were made with the intent to become Medicaid eligible. Indeed, there is no large dollar "smoking gun" transfer.

With regard to the period of January 2011 to October 2013, Petitioner's grandson testified credibly that the expectation was that his mother would be caring for the Petitioner, who was then between the ages of 88 and 90 years old, until the Petitioner's death. (By November 2011, it was determined that the Petitioner had probably had a stroke which was causing dementia.) Indeed, it is undisputed that the Petitioner lived in a condominium with her daughter, before the daughter's unexpected death. Based upon the foregoing, it is unlikely any transfers made during that time were made with the intention of making the Petitioner Medicaid eligible. Thus, the transfers between January 2011 to October 2013 were not divestments.

Petitioner's grandson further testified that after his mother died unexpectedly in September 2013, he handled the Petitioner's finances, expecting that that the Petitioner would have enough money to cover her long term care expenses until her death. Indeed, in September 2014, the Petitioner, who was then 91, was diagnosed with terminal stage 4 cancer and given six months to live.

Even looking at the SSA life expectancy tables, at age 90 in 2013, the Petitioner's life expectancy was less than five years. <https://www.ssa.gov/OACT/STATS/table4c6.html> When one also takes into account her history of stroke and subsequent diagnosis of terminal cancer, it was reasonable for Petitioner to believe she would be dead, and not in need of further resources in six months.

The Petitioner ended up privately paying for her institutional care from October 2013 through October 2015. All of this would again seem to indicate that the transfers made between October 2013 and October 2015, were not made with the purpose of making the Petitioner Medicaid eligible.

It should be noted that, the Medicaid Eligibility Handbook acknowledges that the exceptions listed in §17.4 are "not intended to be all inclusive when describing divestments which are permissible because the transfer was made without the intent to qualify for Medicaid. Other situations will arise and in those instances, the person's 'intent' must be evaluated on a case-by-case basis to determine whether or not a divestment occurred. The fact that a person does not meet the criteria for a specific exception does not create a presumption that the person cannot show that the transfer was made for a purpose other than qualification for Medicaid..." *MEH §17.4*

The preponderance of the credible evidence establishes that the 100+ transfers of cash gifts to Petitioner's now deceased daughter, grandchildren and great grandchildren, and the payments to her beautician were not made with the intent to make the Petitioner Medicaid eligible, and thus, were not divestments.

### **CONCLUSIONS OF LAW**

The agency incorrectly determined that the Petitioner divested \$62,797.80 in cash between January 1, 2011 and October 31, 2015.

**THEREFORE, it is**

**ORDERED**

That within 10 days, the agency remove the divestment penalty and re-determine the Petitioner's eligibility for Nursing Home Long Term Care Medicaid, effective November 1, 2015.

### **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, 5005 University Avenue, Suite 201, 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**

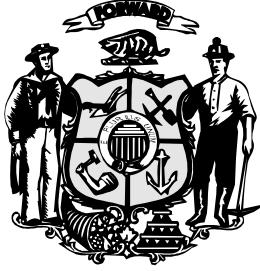
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision 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 Milwaukee,  
Wisconsin, this 9th day of February, 2017

\s \_\_\_\_\_  
Mayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin \DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: [DHAmail@wisconsin.gov](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on February 9, 2017.

Waukesha County Health and Human Services  
Division of Health Care Access and Accountability

