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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o Attorney Megann Hendrix
3970 N. Oakland Avenue, Suite 401
Shorewood, WI 53211

DECISION
Case #: MGE - 217838

PRELIMINARY RECITALS

A petition was filed on April 10, 2025, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services regarding Medical Assistance (MA). The hearing was initially scheduled for May 22, 2025, but was rescheduled at the petitioner's request. A hearing was then held on June 3, 2025, by telephone.

The issue for determination is whether the agency correctly denied the petitioner's Medicaid application on April 7, 2025.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]
c/o Attorney Megann Hendrix
3970 N. Oakland Avenue, Suite 401
Shorewood, WI 53211

Petitioner's Representative:

Attorney Megann Hendrix
Sage Legal Group
3970 N. Oakland Avenue, #401
Shorewood, WI 53211

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: Kyra Oberg
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
Kate J. Schilling
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a 72 year old resident of Milwaukee County. He currently resides in a memory care unit licensed as a community-based residential facility (CBRF). He currently pays $8,580 per month for his care.

2. On August 21, 2024, the petitioner and his wife were divorced. The divorce judgment requires the petitioner to pay monthly spousal support payments to his former spouse. The payment started at $3,960 per month in September 2024; however, it was indexed for inflation and in January 2025, it increased to $4,059 per month.

3. The petitioner has monthly income of $3,441.40 from Social Security retirement, $601.82 from a pension, and $8,045.98 from an annuity. His total monthly income is $12,089.20.

4. On February 25, 2025, the petitioner's attorney faxed his application for long-term care Medicaid to the agency. A backdate of eligibility was not requested. The petitioner acknowledges making a divestment of $134,688.29 prior to applying for Medicaid.

5. On March 5, 2025, the agency requested verification of the petitioner's burial assets, pension income, and authority for the petitioner's son's signature on the Medicaid application. These verification items were submitted by the due date of March 31, 2025.

6. On March 10, 2025, the agency received the referral for community waivers and the functional screen level of care determination.

7. On March 12, 2025, the agency sent out a notice requesting verification of the petitioner's US Bank checking account, the value of his family trusts, the value of his Wispact Trust, and the amount of his pension/retirement. These verification items were submitted by the due date of March 31, 2025.

8. On March 20, 2025, the agency sent out a notice of denial of the SLMB+ Medicare Savings Program benefit due to being over the income limit.

9. On April 8, 2025, the agency sent out a denial notice stating that the petitioner was over the income and asset limit for Medicaid, and over the asset limit for community waivers.

10. On April 15, 2025, the agency sent out a notice to the petitioner that stated he would be eligible for Medicaid with a $41,082.18 deductible. This notice also states that he was over the income limit for both community waivers and SLMB+. According to this notice, the petitioner's income was $12,089.20 and his countable assets were $150.

DISCUSSION

Divestment is the act of transferring ownership of assets or income and receiving less than fair market value in return. Applicants or members seeking Medicaid-covered long-term care services are subject to a set of special rules about transferring assets and income. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat., §49.453(2)(a); Wis. Admin. Code, §DHS 103.065(4)(a); *Medicaid Eligibility Handbook* (MA Handbook) §§ 17.1 and 17.2. An applicant for Medicaid programs that has transferred assets and/or income during a five year "lookback" period is subject to having those transfers evaluated for compliance with the

divestment rules. Transfers of an applicant's assets and/or income by someone acting on behalf of the applicant are also subject to divestment rules.

The facts in this case are largely undisputed. The petitioner is a 72 year old man who resides in a memory care unit of a CBRF. He applied for long-term care Medicaid on February 25, 2025. The petitioner's adult son is his power of attorney for finances and signed the Medicaid application on his behalf. The petitioner and his attorney do not dispute that a divestment of $134,688.29 was made prior to applying for Medicaid. Rather, the issue in this case is when the divestment penalty should start running.

A divestment penalty will not start running until an applicant is otherwise eligible, both financially and functionally, for long-term care Medicaid.

> 17.3.3 Penalty Period Begin Date for Applicants
>
> The penalty period for an applicant begins on the date that meets all of the following:
>
> - The person applies for institutional Medicaid or requests one of the Community Waivers programs (Family Care, Family Care Partnership, PACE, or IRIS).
> - The person enters an institution or meets the appropriate LOC and functional screen criteria.
> - The person meets all other Medicaid nonfinancial and financial eligibility requirements.
>
> An enrollment date is not required for Community Waivers programs applicants to meet the criteria.
>
> Note: An applicant who divests excess assets during the application period, including any backdated months, is ineligible due to excess assets until the month that they divested the assets. The divestment penalty period as well as the potential eligibility for card services begins on the date of the divestment.

MA Handbook § 17.3.3. Here, the petitioner applied for Medicaid on February 25, 2025; however, his application was denied for being over the income limit. The petitioner has $3,441.40 in income from Social Security retirement, $601.82 from a private pension, and $8,045.98 from an annuity. This totals $12,089.20 in monthly income. However, the petitioner is required to pay a court-ordered support payment of $4,059 to his former spouse each month. This leaves his available monthly income at $8,030.20. Currently, the cost of his care at the CBRF is $8,550 per month. Due to his current living situation, he is seeking community waivers (FamilyCare) rather than Institutional Medicaid.

At the hearing, the petitioner's attorney argued that court-ordered support payments are disregarded from income for Medicaid eligibility. *MA Handbook* § 15.7.2.1.1. After disregarding the spousal support payments, the petitioner is left with monthly income of $8,030.20, which is less than his monthly cost of his care of $8,550 at the CBRF. Therefore, he should qualify for community waivers under the medically needy criteria.

The Medicaid Handbook disregards income used to make spousal or maintenance payments to a person outside of the household.

> 15.7.2.1 Support Payments

> Support payments are payments that a Medicaid member makes to another person outside the FTG for the purpose of supporting and maintaining that person. Support payments are either court-ordered (see Section 15.7.2.1.1 Court-Ordered or non-court-ordered (see Section 15.7.2.1.2 Non-court-Ordered).
> **Include the support payment amount as part of an institutionalized person's monthly need** (see Section 27.6 ILTC Monthly Need) **and cost of care** (see Section 27.7 ILTC Cost of Care Calculation).
>
> A person in the fiscal group who has legal responsibility for a person in a nursing home may be paying that person's patient liability. If so, deduct this amount from the group's income.
>
> 15.7.2.1.1 Court-Ordered
> **The income deduction for monthly court-ordered support expenses is the amount that the member is "obligated" to pay as stipulated in the court order.** Do not allow payments for arrearages and annual R & D expenses. * * *

(Emphasis added.) *MA Handbook* §§15.7.2.1 and 15.7.2.1.1. The agency representative argued at the hearing that the spousal support payment deduction only applied to Institutional Medicaid and not community waivers. However, the petitioner's attorney referenced the definition of an "institutionalized person" in the handbook which includes a person on community waivers.

> 27.4.1 Institutionalized Person
> "Institutionalized person" means someone who:
> 1. **Participates in Community Waivers**, or
> 2. Has resided in a medical institution for 30 or more consecutive days, or
> 3. Is likely to reside in a medical institution for 30 or more consecutive days, as attested to by the medical institution.

(Emphasis added.) *MA Handbook* § 27.4.1. Furthermore, the petitioner's attorney points out that the Medicaid Eligibility Handbook does not contain specific criteria for income eligibility with regard to community waivers alone. Indeed, the closest that the community waivers section of the handbook comes to mentioning income eligibility is in § 28.6 where it explains Groups A, B, and B+ eligibility and cost shares. There is one reference to special exempt income in this section.

> 28.6.3.3 Special Exempt Income
> Special exempt income (see Section 15.7.2 Special Exempt Income) must be deducted from income when calculating cost share.

MA Handbook § 28.6.3.3. Income used for supporting others is considered special exempt income. *MA Handbook* § 15.7.2. This particular section of the MA Handbook only refers to spousal support payments as being deducted from a cost share and not income eligibility overall. However, the MA Handbook is not the final authority on Medicaid law and policy.

Eligibility criteria for the FamilyCare program is covered in more detail in the Wis. Admin Code § DHS 10.

> **(2)** Individuals eligible for medical assistance
> **A person who is eligible for medical assistance under ch. 49, Stats., and chs. DHS 101 to 108 is financially eligible for the family care benefit.** Cost

> sharing requirements for the family care benefit for a medical assistance-eligible person are those that apply under ch. 49, Stats., and chs. DHS 101 to 108.

(Emphasis added.) Wis. Admin. Code § DHS 10.34(2); see also Wis. Stat. §46.286(1)(b). There are many references to eligibility for Institutional Medicaid in Chapter 49 of the Wisconsin statutes. Wis. Stats. §§ 49.453, 49.455, 49.47. Therefore, according to the administrative code, if a person would be financially eligible for Institutional Medicaid, they would be financially eligible for FamilyCare.

Additionally, there are several references in the FamilyCare statutes that specifically state that FamilyCare rules must be "substantially similar" to the rules for Institutional Medicaid. Wis. Stats. §§ 46.287(4), 46.287(5), 46.287(6). These statutory references are to treatment of trusts, divestment policies, and spousal impoverishment rules, which are covered in the MA Handbook in sections 16.6, 17, and 18, respectively. In all three of these instances, Institutional Medicaid and community waivers essentially share the same definitions and financial eligibility criteria. Section 27.5.3 of the MA Handbook pertains to Institutional Medicaid and is titled "divestments;" however, it just refers the reader to the MA Handbook § 17.1 which is the general, shared section on divestments. Likewise, section 28.3 of the MA Handbook pertains to community waivers and also refers to the MA Handbook § 17.1. In regards to spousal impoverishment provisions, both the Institutional Medicaid section and the community waivers section refer the reader back to the shared section on spousal impoverishment (section 18). See *MA Handbook* §27.5.2 referencing §18.6 and *MA Handbook* § 28.2 referencing §18.43.) Lastly, MA Handbook §16.6 lays out the rules for both revocable and irrevocable trusts, which would pertain to the counting of assets for both Institutional and community waivers Medicaid. However, I found no references to the counting of trusts as assets in either the section for Institutional Medicaid or community waivers.

The administrative code for FamilyCare also references the monthly need criteria for long-term care Medicaid that the petitioner's counsel referenced in the MA Handbook § 27.6.1.

> A non-MA-eligible person is financially eligible for the family care benefit if the projected cost of the person's care plan exceeds the person's maximum cost-sharing requirement.

Wis. Admin Code § DHS 10.34(3). This provision further explains how to calculate a person's maximum cost-sharing requirement.

> 5. Deduct from the amount calculated under subd. 4. all of the following:
>
> a. Subject to subd. 6., if the person is a family care spouse, the community spouse monthly income allowance under s. 49.455 (4) (b), Stats.
>
> **b. The amount of any payments the person is required to pay by court order.**
>
> c. If the person resides in a nursing home, community-based residential facility or adult family home, a personal maintenance allowance of $65.
>
> * * *

(Emphasis added.) Wis. Admin Code § DHS 10.34(3)(b)5. This provision in the administrative code is essentially the same as the one laid out in the MA Handbook §27.6.1, and both allow a court-ordered support order to be considered as part of the person's financial need.

The aforementioned FamilyCare administrative code provisions and statutory references corroborate the petitioner's arguments that the court-ordered spousal support order must be deducted from his income for purposes of calculating his eligibility for community waivers and his monthly cost share. The petitioner is then financially eligible for long-term care Medicaid based on need. The hearing record does not contain a copy of the petitioner's long-term care functional screen, which is needed to determine functional eligibility for FamilyCare. However, there are notations in the agency's summary of the case which state that the agency received notification that the petitioner met the nursing home level of care for community waivers on March 10, 2025. Therefore, I determine that the petitioner was both functionally and financially eligible for long-term care waivers as of March 10, 2025, and that his divestment penalty should start running as of that date.

CONCLUSIONS OF LAW

1. The petitioner's court-ordered support payments to his former spouse are disregarded from his income for eligibility purposes and his calculation of cost share.

2. The petitioner is eligible for community waivers as his monthly cost of care needs surpass his income.

3. The petitioner was both functionally and financially eligible for long-term care Medicaid as of March 10, 2025.

THEREFORE, it is **ORDERED**

That this case is Remanded to the agency with instructions to find the petitioner financially and functionally eligible for long-term care Medicaid as of March 10, 2025; therefore, his divestment penalty shall start to run as of this date. The agency shall do this within 7 days of the date of this decision, with written notice sent to the petitioner.

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 15th day of July, 2025

\s_____
Kate J. Schilling
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 July 15, 2025.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability
Attorney Megann Hendrix