



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

[REDACTED]
c/o Attorney Mark Rogers
Angermeier & Rogers, LLP, Law Offices
312 East Wisconsin Ave Suite 210
Milwaukee, WI 53202-4305

MDV/130600

PRELIMINARY RECITALS

Pursuant to a petition filed February 28, 2011, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on April 04, 2011, at Waukesha, Wisconsin.

The issues for determination are (1) whether petitioner divested her assets prior to her application for MA; if so, (2) what the divestment amount is, and (3) the date when the penalty period begins.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
c/o Attorney Mark Rogers
Angermeier & Rogers, LLP, Law Offices
312 East Wisconsin Ave Suite 210
Milwaukee, WI 53202-4305

Petitioner's Representative:

Attorney Mark J. Rogers
312 East Wisconsin Ave Suite 210
Milwaukee, WI 53202-4305

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Linda Zellmer, ESS
Cindy Sommers, ESS
Josie Lamonte, ESS
Waukesha County Health and Human Services
500 Riverview Avenue
Waukesha, WI 53188

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*Family Care
Date of
Decision*

ADMINISTRATIVE LAW JUDGE:
Marina Croft
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. On October 22, 2010, petitioner submitted an application for MA.
3. On November 17, 2010, petitioner applied for the Family Care program.
4. On January 14, 2011, the agency sent a written notice of negative action to the petitioner informing that she was not eligible for any MA due to divestment. The agency determined that petitioner had divested \$242,972.15, which resulted in a penalty period of 1189 days. The agency also determined that the penalty period began as of the date of the family care request which was November 17, 2010.
5. On February 28, 2011, petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

A divestment occurs when an institutionalized individual, his spouse, or another person acting on his behalf, transfers assets for less than fair market value, on or after the individual's "look-back date." Wis. Stat. § 49.453(2)(a). "Fair market value" is an estimate of the prevailing price an asset would have had if it had been sold on the open market at the time it was transferred. Medicaid Eligibility Handbook (MEH) § 17.2.1. The "look-back date" is defined as 36 months before, or with respect to trusts, 60 months before, the first date the individual is both institutionalized and an MA applicant. MEH § 17.3.

If such a transfer occurs, the individual is ineligible for MA for nursing home services for a number of months determined by totaling the value of all assets transferred during the look-back period and dividing that amount by the average monthly cost to a private patient of nursing facility services at the time of the MA application. MEH § 17.5. The ineligibility period begins with the month of the first divesting transfer of assets.

A parallel divestment definition is found at Wis. Admin. Code § DHS 103.065(4), and states in the parts relevant here, as follows:

(4) DIVESTMENT. (a) *Divestment resulting in ineligibility.* An institutionalized individual or someone acting on behalf of that individual who disposes of resources at less than fair market value within 30 months . . . immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. . . (Emphasis added).

A divestment is not a bar to MA eligibility where:

(d) *Circumstances under which divestment is not a barrier to eligibility.* An institutionalized individual who has been determined to have made a prohibited divestment under this section shall be found ineligible for MA as defined under s. DHS 101.03 (95) unless:

1. The transfer of property occurred as the result of a division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments; or
2. It is shown to the satisfaction of the department that one of the following occurred:
 - a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;
 - b. The resource was transferred exclusively for some purpose other than to become eligible for MA;
 - c. The ownership of the divested property was returned to the individual who originally disposed of it; or

- d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, "undue hardship" means that a serious impairment to the institutionalized individual's immediate health status exists.

Wis. Adm. Code § DHS 103.065(4)(d).

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the county, such as 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 circumstances at the time. A divestment can still exist even if someone does the transfer of the nonexempt asset other than the individual. Such a person could be, for example, a guardian or attorney in fact.

In this case, the negative action was the agency's determination that petitioner had divested \$242,972.15, which resulted in a penalty period of 1189 days. The agency representative explained that petitioner had transferred the following amounts:

- \$210,000 on 9/29/10
- \$4,000 on 1/13/10
- \$3,000 on 7/30/10
- \$16,000 on 12/28/10
- \$10,000 on 1/21/10

In response, petitioner's representative acknowledged that petitioner had divested \$210,800¹. However, he also argued that the remaining amounts should not be considered as divestments because they were used for petitioner's vacation (\$3,000) and/or were family gifts made without the intent to qualify for MA (\$30,000²). Petitioner's representative submitted a statement showing that petitioner had a pattern of giving about \$17,000 year to family members.

Upon review of this information, I do find that petitioner's vacation expenses should not be included in the divestment amount. However, MA policy indicates that if an individual had a pattern of gifting to family members prior to the look-back period, similar transfers during the look-back period would not be considered to have been given with the intent to divest *as long as the total yearly gifts did not exceed 15% of the individual's annual gross income*. MEH § 17.4. The agency representative indicated that petitioner has an annual income of \$14,380.80 and that 15% of that income would be \$2,157.12. This, in turn, means that the family gifts do not meet the requirements for this exception. Therefore, I must conclude that petitioner divested \$240,800.

The last issue for determination is when the divestment period may begin. The agency representative testified that the divestment period was set to begin on November 17, 2010, the date when petitioner applied for the Family Care program. At the hearing, petitioner's representative alleged that the penalty period should begin on October 22, 2010, the date when petitioner completed the MA application.

¹ The original amount listed by the agency was \$210,000, but petitioner's representative revised this amount to \$210,800 during the hearing.

² While petitioner referenced a \$40,000 amount, I believed this to be a typographical error based upon the calculations.

The MA handbook has the following applicable guidelines to determine the penalty period begin date.

17.5.3 Penalty Period Begin Date For Applicants

For divestments that occurred on or after January 1, 2009, the penalty period for an applicant for Institutional LTC Medicaid begins on the day the applicant:

- Is institutionalized and
- Has applied for Medicaid and
- Is otherwise eligible for Medicaid

17.5.3.2 Divestments That Occurred On or After January 1, 2009

For divestments that occurred on or after January 1, 2009, the penalty period for an applicant for a HCBW program or FC begins on the date:

- The person applied for a HCBW/FC program and
- Meets the appropriate level of care and functional screen criteria and
- Meets all other Medicaid non-financial and financial eligibility requirements, regardless of whether or not the waiver funding is actually available

As petitioner is a Family Care applicant, the penalty period will begin on November 17, 2010.

CONCLUSIONS OF LAW

1. Petitioner divested whether petitioner divested her assets prior to her application for MA.
2. The amount of the divestment is \$240,800.
3. The date when the penalty period begins on November 17, 2010.

THEREFORE, it is

ORDERED

That the matter be remanded to the agency with instructions: (1) to redetermine the penalty period based upon a divestment amount of \$240,800; and (2) to issue a notice to petitioner regarding same. These actions must be taken within 10 days from the date of this decision.

In all other aspects, the matter is hereby dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge 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.

To ask for a rehearing, 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 for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be 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 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Department of Health Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53

Given under my hand at the City of Milwaukee,
Wisconsin, this 23rd day of May, 2011

/sMarina Croft
Administrative Law Judge
Division of Hearings and Appeals

c:

[REDACTED]