FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MDV/140118

PRELIMINARY RECITALS

Pursuant to a petition filed April 04, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance (MA), a hearing was held on June 27, 2012, at Milwaukee, Wisconsin. The coding of this case was changed administratively post-hearing to accurately reflect the case type; previously it was coded as "FCP", but was changed to "MDV" to reflect the divestment type case that it is.

The issue for determination is whether the county properly imposed a divestment sanction.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Tina Anderson
Milwaukee Enrollment Services
1220 W Vliet St

Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted] is a resident of Milwaukee County.

2. An application for nursing home MA was filed on petitioner's and her husband's behalf on March 15, 2012 requesting coverage to begin on March 28, 2012.

3. On March 6, 2012, petitioner's husband endorsed a check paid out to the order of "cash" in the amount of $100,000. This was withdrawn from his account on the same date.

4. On March 5, 2012 petitioner endorsed a check paid out to the order of "cash" in the amount of $17,000. This was withdrawn from her account on the same date.

5. The county determined that the two withdrawals were divestments that resulted in a 542 day period of nursing home MA ineligibility beginning March 26, 2012.

6. On April 26, 2012 the agency issued a notice of decision stating that the MA application was denied due to the divestment penalty.

DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code §DHS 103.065(4)(a); MA Handbook, §17.2.1 (available online at http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm.) Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (currently $6,554). MA Handbook, §17.5.

The whereabouts of the monies withdrawn are unknown. Petitioner's daughter claimed at hearing that the $100,000 was spent gambling, and was allowed time to provide some proof of that but was unable. She also claimed that the $17,000 was spent on a big family party in December. Again, there was no corroborating proof of that.

However, both arguments are mentioned in the MA Handbook. Specifically, "Divestment" is the transfer of income, non-exempt assets, and homestead, which belong to an institutionalized person or his/her spouse or both. See §17.2.1. At best, I might be able to consider the extravagant party as a gift; however, gifts of that size are not an exempt asset:

> If an individual had a pattern of charitable gifting, or gifting to family members (i.e. birthdays, graduations, weddings, etc.) 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 or couple's annual gross income. This exception is not limited to gifts made on traditional gift-giving occasions and does not preclude a pattern of giving to assist family members with educational or vocational goals.

Handbook, §17.4. Per the application's information, petitioner's gross annual income would be approximately $31,524. A gift of $17,000 is far above 15% of that annual income. Further, "Nonexempt assets" are those that are counted in SSI-related asset tests. See Handbook,§17.2.3. Of the assets counted in SSI-related tests, gifts are included if they are over $30. See Handbook, §16.7.22.

With respect to the gambling, the MA Handbook states that gambling losses at a casino, racetrack or in some other type of regulated gambling is not divestment. It is divestment if the member makes personal bets with friends or relatives or has losses from unregulated gambling. See §17.16. Petitioner's daughter

claimed that he spent the money at Potawatomi, and so was given the opportunity to show that the money was spent there. No such evidence was provided.

Finally, with regard to the hardship claim, one can be granted only if medical care will be endangered or if the person has received a notice of intent to discharge from a facility. See Handbook, §17.17.1-.5. Petitioner had not yet received a decision on her request for hardship for her parents by the time of the hearing. However, she had not received a discharge notice yet, either. If the agency denies the hardship request, petitioner can again appeal to the Division of Hearings & Appeals. See Handbook, §17.17.8.

Based on the preponderance of the evidence, I uphold the agency's imposition of the divestment penalty. However, I note that the divestment penalty start date began per the agency's notice on March 26. The period should have begun March 28, 2012 which is the date the petitioner requested MA coverage and was institutionalized. See Handbook, §17.5.3.2. Further, the policy appears to apportion the penalty equally when both spouses are institutionalized. Handbook, §17.14. Therefore, the penalty period for both is 271 days. However, if one spouse dies the remainder of his/her penalty period is added to the other spouse's penalty period. That would make the period of ineligibility be from March 28, 2012 to December 24, 2012. I will remand to the agency to correct that information only.

CONCLUSIONS OF LAW

1. The county properly imposed a divestment sanction.
2. The divestment period runs from March 28, 2012 to December 24, 2012.

THEREFORE, it is ORDERED

That the matter is remanded to the agency to take the administrative steps to correct the divestment period consistent with Conclusion of Law #2. This action shall be taken within 10 days of the date of this Order. In all other respects, the petition for review 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 with the appropriate court 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. After filing the appeal with the appropriate court, it must be served on 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. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

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 13th day of July, 2012

/sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

c: [redacted]