



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MDV/143690

PRELIMINARY RECITALS

Pursuant to a petition filed September 07, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Eau Claire County Department of Human Services in regard to Medical Assistance, a hearing was held on October 24, 2012, at Eau Claire, Wisconsin.

The issue for determination is whether the petitioner divested assets when she transferred her property to four limited liability corporations in which she continued to control the property.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Petitioner's Representative:

Attorney William S. Milne
3624 Oakwood Hills Pkwy
Eau Claire, WI 54702

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Sheila Morden (Brief by Keith Zehms, Corp. Counsel)
Eau Claire County Department of Human Services
721 Oxford Avenue
PO Box 840
Eau Claire, WI 54702-0840

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) resided in a nursing home in Eau Claire County from May 1, 2010, until she died on November 6, 2012.

2. When the petitioner entered the nursing home she owned her home and 23 acres of surrounding land. She divided the surrounding land into three separate parcels that she deeded to her children. She retained a fourth parcel, which consisted of her home.
3. The petitioner's children returned the land to her on April 19, 2012, to avoid a divestment. The next day she applied for medical assistance.
4. On May 10, 2012, the petitioner created four separate limited liability corporations and transferred one of the parcels of property as a capital contribution into each. In exchange she received a 100% interest in each LLC. The transfer agreement passed the parcels to her children upon her death. The total value of all four parcels was \$195,800. The three parcels consisting of land were each leased to her children for \$100 a month. The parcel containing her house was leased to her children for \$250.
5. The petitioner was found eligible retroactive to April 1, 2012, on May 16, 2012
6. On August 24, 2012, the Department notified the petitioner that she was ineligible for medical assistance from April 20, 2012, until April 16, 2016, because of a divestment that occurred when she transferred her property to the LLCs..

DISCUSSION

A person cannot receive institutional medical assistance if her assets exceed \$2,000. *See* Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf "disposes of resources at less than fair market value" within five years of the later of when they were institutionalized or applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). If the person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private pay patient in a nursing home at the time he applied. Wis. Admin. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The daily amount is currently \$215.48 *Medicaid Eligibility Handbook*, § 17.5.2.2.

A divestment does not bar eligibility under the following circumstances found in Wis. Admin. Code, § 103.065(4)(d)2:

- 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.

The petitioner resided in a nursing home in from May 1, 2010, until she died on November 6, 2012. When she entered the nursing home she owned her home and 23 acres of surrounding land. She divided the surrounding land into three separate parcels, which she deeded to her children, and retained a fourth parcel, which consisted of her home. Her children, realizing that this would make her ineligible for medical assistance because of a divestment, returned the land to her on April 19, 2012. The next day she applied for medical assistance. On May 10, 2012, she created four separate limited liability corporations and transferred one of the parcels of property as a capital contribution into each. In exchange she received a 100% interest in each LLC. The transfer agreement passed the parcels to her children upon her death.

The total value of all four parcels was \$195,800. The three parcels consisting of land were each leased to her children for \$100 a month. The parcel containing her house was leased to her children for \$250.

On May 16, 2012, the agency found her eligible for medical assistance retroactive to April 1, 2012. However, the Department filed a lien against her homestead property to recover any medical assistance. The petitioner challenged this lien. After reviewing the matter, Eau Claire County Corporation Counsel Keith Zehms determined that the Department could not file a lien because this was not homestead property. He did, however, indicate that he believed that transferring the property to the LLCs constituted a divestment. The Division of Hearings and Appeals dismissed the action for a lien in *DHA Decision No. MLL-142099* and the county agency brought the present action to discontinue the petitioner's medical assistance because of a divestment.

The petitioner's attorney relies *Medicaid Eligibility Handbook*, § 17.2.2, which states:

"Transfer" is the act of changing the legal title or other right of ownership to another person. Converting an asset from one form to another is not divestment. For example, buying a race horse for \$12,000 and keeping the race horse is not divestment.

He argues that there is no divestment because the petitioner merely converted the property from one form to another and she could take it out of the business and regain it for her personal use at any time. Although he does not state it in his brief, the underlying assumption is that the property is now an exempt business asset. See *Medicaid Eligibility Handbook*, § 15.6.3.1. If this is not the underlying assumption, it would remain an available asset, which would make the petitioner ineligible for medical assistance and negate all of the legal maneuvers. The agency relies upon *DHA Final Decision No. MDV-67/42212*, which holds that the petitioner divested assets because she had exclusive control over them and gave them to an LLC in which she no longer had exclusive control.

DHA Final Decision No. MDV-67/42212 does not apply because the petitioner retained total control over her assets. But neither does *Medicaid Eligibility Handbook*, § 15.6.3.1. To be exempt, business assets must be used in a business that is "for the self-support of the [elderly, blind, or disabled] individual." *Id.* These LLCs were not set up until after the petitioner entered the nursing home. Once there, medical assistance regulations limited the income she is allowed to keep for herself and still receive medical assistance to \$45 per month. Wis. Stat. § 49.45(7)(a). Because she was already in the nursing home and could only keep \$45 per month, she did not set up the businesses that generate \$550 per month for her self-support. Rather, she was attempting to preserve her estate for her children by using public rather than her own funds to pay for her healthcare. The funds are available assets that count toward her medical assistance asset limit. As such, she was ineligible for the benefits.

It is unclear whether the petitioner's benefits continued after the agency alleged that there was a divestment because the Division of Hearings and Appeals' notices are silent on the issue and it was not raised at the hearing or in the briefs. If the agency did end the benefits, the petitioner is not entitled to them now because she was ineligible for them. The agency of course cannot bring an overpayment action against her because she is deceased; even if she were still alive it could not recover any benefits provided before she was notified of the alleged divestment because she did not receive the benefits as a result of omitting or misstating any relevant information to the agency. See Wis. Stat. § 49.497(1). Regardless, because the assets remained solely hers at the time of her death, a point that forms the basis of her attorney's argument that there was no divestment, the Department can bring an action against her estate to recover any funds it expended for her medical assistance benefits, whether she should have received the benefits or not. See Wis. Stat. § 49.496(3).

CONCLUSIONS OF LAW

1. The petitioner did not divest assets when she transferred her property to four separate LLCs.

2. The assets in the LLCs remained available to the petitioner and countable when determining her medical assistance eligibility.
3. The petitioner was ineligible for medical assistance because her available assets exceeded the program's limit.

THEREFORE, it is

ORDERED

The petitioner's appeal is 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 served and 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, 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 Madison,
Wisconsin, this 23rd day of November, 2012

\sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals