



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-66/71952

PRELIMINARY RECITALS

Pursuant to a petition filed August 31, 2005, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Washington County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on October 6, 2005, at West Bend, Wisconsin. The hearing record was held open to December 15, 2005, for submissions by the parties.

The issues for determination are whether (1) the county agency correctly determined that the petitioner was over the asset limit (CSAS & \$2,000) at the time of her June, 2005, application, and (2) the county agency correctly determined that the petitioner is currently ineligible for Institutional MA due to asset divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

Atty. Reg P. Wydeven
PO Box 860
120 E Fourth St.
Kaukauna, WI 54130-0860

Respondent:

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Joanne Faber, ES Supr.
Washington County Dept. of Social Services
333 E. Washington Street
Suite 3100
West Bend, WI 53095

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is an institutionalized resident of Washington County. Her husband resides in the community.

CSAS

2. The petitioner entered the nursing home for a continuous stay on August 18, 2004. She requested an asset assessment and applied for Institutional MA with a community spouse, from the county agency in June, 2005. The agency completed its asset assessment on July 18, 2005. The agency determined that the couple had combined assets totaling \$144,984.98 at the time of initial institutionalization. This number resulted in the determination that the couple's Community Spouse Asset Share (CSAS) was \$72,492.49. See Exhibit 1, Calculation. In initially calculating the couple's assets, the agency incorrectly (1) omitted a \$4,662.01 checking account belonging to (redacted), and (2) listed a certificate of deposit of (petitioner) at \$6,053.00, rather than the correct amount of \$4,689.45. At hearing, the agency corrected the couple's total asset amount to \$148,283.31, with a resulting CSAS of \$74,141.65.
3. On July 19, 2005, the county agency issued written notice to the petitioner advising that the couple's countable total assets for MA purposes were \$144,984.98, and that the CSAS for their case was \$72,492.49.
4. The assets owned by the couple on May 24, 2005, were certificates of deposit (CDs) belonging to (redacted) that totaled \$80,757.24, (redacted) \$5,465.23 checking account, and (petitioner) \$943.66 checking account. These assets put the couple at least \$11,000 over the CSAS.
5. (redacted) loaned \$28,000 to (redacted) on May 25, 2005. See Exhibit 3, Promissory Note and verification. This reduced the couple's (petitioner and (redacted)) assets to \$59,166.03, which is below the CSAS, on May 25, 2005.

DIVESTMENT

6. On July 19, 2005, the agency also issued a negative notice advising the petitioner that her MA application was also failing because she had divested \$158,443.42 since January 6, 2004.
7. On November 4, 2004, (redacted) gifted his Met Life life insurance policy, with a cash value of \$12,850.37, to his daughter. On the same date, he also gifted his Prudential life insurance policy, with a cash value of \$4,359.91, to his daughter.
8. (petitioner) transferred \$33,739.37 from her Marshall & Ilsley money market account on 1-6-04 to her children. She also transferred, for no consideration, the following Marshall & Ilsley CDs to her children as they came due:

4-5-03 \$ 3,132.25

4-5-03 \$ 3,071.10

2-24-04 \$20,043.30

3-1-04 \$13,352.75

3-2-04 \$53,718.95

9-15-04 \$ 4,689.45

In addition, the petitioner transferred \$5,000 from her checking account on May 31, 2005, to one of her children, and another \$5,000 from her checking account on June 16, 2005, to one of her children. The total of the amounts identified in Findings #7 and #8 is \$158,443.42. See Exhibit 2.

9. The petitioner transferred \$44,000 to her children and their spouses without consideration in January, 2003. Both the agency and the petitioner made this assertion in their post-hearing comments.
10. The petitioner's son, (redacted), returned \$116,192.75 of the amount divested from the January, 2004, through June, 2005, period, by paying the petitioner's Cedar Bay charges from January, 2004, through September 23, 2005.

DISCUSSION

I. THE PETITIONER HAS A "SPOUSAL NON-IMPOVERISHMENT" CASE; SHE DID NOT EXCEED THE ASSET LIMIT (CSAS PLUS \$2,000) AT THE TIME OF HER JUNE, 2005 MA APPLICATION.

A "spousal impoverishment" case (which would more aptly be called a spousal non-impoverishment case) differs from an institutional MA case for a single person in several respects. This case status is available to a married couple with one person in an institution, and the other spouse living in the community. In this type of case, the institutionalized person is allowed to be MA eligible even though the couple has combined assets that vastly exceed the standard \$2,000 asset limit allowed for a single institutionalized person. The aspect of case eligibility that is significant here is that the county agency is required to develop a Community Spouse Asset Share (CSAS) figure for each case. The agency did so here, and correctly determined that the couple had combined assets of \$148,283.31 at the time of the petitioner's nursing home entry on August 18, 2004. *MA Eligibility Handbook*, 5.10.4.1, viewable online at <http://www.emhandbooks.wi.gov/meh/>. This resulted in a CSAS of \$74,141.65 (half of the countable assets). *Id.*, 5.10.4.2. The agency then adds \$2,000 to the CSAS to come up with a combined asset limit for the couple. Because the agency believed that the couple owned combined assets of \$87,166 at the time of the June, 2005, application, it denied the petitioner's Institutional MA application in July, 2005, for excess assets.

At hearing, the petitioner's attorney-in-fact testified that a \$28,000 loan was made from the couple's assets on May 25, 2005. Satisfactory documentation of the existence of the loan, and the immediate diminution of the couple's assets, was proffered at hearing. See Exhibit 3. Therefore, I agree that the couple's assets fell below the \$76,141.65 asset limit at the time of MA application.

II. THE PETITIONER DIVESTED ASSETS TO HER CHILDREN DURING THE "LOOKBACK" PERIOD; HOWEVER, SOME FUNDS WERE RETURNED TO HER IN THE FORM OF PAYMENTS TO THE FACILITY IN WHICH SHE RESIDES.

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; *Medicaid Eligibility Handbook (MEH)*, 4.7.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause

ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; *MEH*, 4.7.3. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical 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, \$5,096). *MEH*, 4.7.5. In July, 2005, the agency calculated a disqualification period of 31 months, based on a divestment amount of \$158,443.42.

At hearing, the petitioner’s son proffered testimony and documentation in support of an argument that the recipients of the divested amounts have made payments on the petitioner’s behalf for nursing home care, and that these payments have satisfied enough of the divestment total to create current eligibility for the petitioner. The hearing record was held open for the county agency to review new documentation, and to determine if this changed the agency’s position. Generally, such a record hold results in an improvement, from the applicant’s perspective, in the agency’s position. However, in this case, the agency post-hearing review (received November 3) resulted in a larger divestment amount of \$229,822.61, with a resulting longer divestment penalty period. The petitioner’s post-hearing comment period was extended to December 15, 2005, and her comments and supporting documentation were received on December 7, 2005.

In this case, multiple and sometimes consecutive divesting transfers occurred from at least January, 2003, through October, 2003, and again from January, 2004, through June, 2005. “Multiple divestments” are two or more separate divestments made within a 36-month period before the MA application date or the date of entering an institution, or at any time thereafter. More specifically, the *MEH* characterizes a multiple divestment as follows:

Multiple divestments are two or more separate divestments made within a 36-month period before the MA application date or the date of entering an institution or at any time thereafter.

For multiple divestments:

1. Add together all the divested amounts of transfers in the lookback period or any time thereafter that are connected in any of the following ways:
 - a. Transfers that occur in the same month.
 - b. Transfers that occur in both months of a period of any two consecutive months.
 - c. Transfers with a penalty period (4.7.5) that extends into a month in which there is another transfer.
 - d. Transfers with a penalty period (4.7.5) that extends into the month immediately preceding a month in which there is another transfer.
2. Calculate the penalty period (4.7.5).
...

If there are transfers in the lookback period which are not connected in any of the ways described above, treat them as separate and calculate a separate penalty period (4.7.5) for each.

See *MEH*, 4.7.6.

Post-hearing, the county agency has reviewed the material proffered by the petitioner at hearing, some of which was not taken as hearing exhibits. If I confine myself to the documents submitted as hearing exhibits, the petitioner had a continuous multiple divestment period that ran from January, 2003 through October, 2003 (the January \$44,000 and April \$6,203.45 divestments). The next documented divestment in the *hearing record* begins in January, 2004, and continues through the divestment on June 16, 2005 (January - \$33,739.37, February - \$20,043.30, March 1 - \$13,352.75, March 2 - \$53,718.95, September 15 - \$4,689.45, November 4 insurance - \$12,850.37, November 4 insurance - \$4,359.91, May 31, 2005 - \$5,000, June 16, 2005 - \$5,000). This creates a total divested amount of \$152,754.41 for the January, 2004, through June, 2005, period. A \$152,754.41 divestment currently results in a 29 month divestment penalty period, beginning in January, 2004.

In its post-hearing commentary, the county agency identified new divestment amounts that are not reflected in my Findings. For the most part, these new amounts do not match the “spreadsheet” information supplied by the petitioner in her post-hearing comments. Because I do not have the supporting documentation in the hearing record regarding these new amounts, I cannot make Findings with respect to them. Unfortunately for all concerned, the most appropriate remedy appears to be to remand this case to the agency with instructions to issue a new negative notice regarding the divested amount. The new divestment calculation shall start with the premise that the petitioner divested, *at a minimum*, the divestment amounts identified in Findings #7, #8, and #9 above. The divested amounts for which I have not made a Finding of Fact, are the following taken from the agency’s post-hearing commentary:

12/02 \$ 1,250.00
11/03 \$ 2,500.00 Ozaukee Bank withdrawal
12/03 \$ 1,250.00 Ozaukee Bank withdrawal
12/03 \$ 1,250.00 Ozaukee Bank withdrawal
12/03 \$ 4,750.00 Ozaukee Bank withdrawal
12/03 \$ 27,500.00 Associated Bank transfer to(redacted)
11/04 \$ 5,689.72 life insurance policy cash value
05/05 \$ 3,495.00 Ozaukee Bank withdrawal

With respect to all of the actual and alleged divestment amounts, the petitioner argues that her children have made sufficient payments towards her nursing home expenses for a satisfaction of the penalty period no later than July, 2005. Specifically, in her post-hearing submission, she argues that as of June, 2005, her son (redacted) used \$82,308.60 from the amounts divested to him to pay against the petitioner’s institutional charges at Cedar Bay East nursing home. This satisfaction amount would reduce the penalty period by 16 months. *Id.*, 4.7.5; Wis. Admin. Code §HFS 103.065(4)(d)2c.

The petitioner has proved that her son, (redacted), returned \$116,192.75 of the amount divested from the January, 2004, through June, 2005, period, by paying the petitioner's Cedar Bay charges from January, 2004, through September 23, 2005. See Exhibit 5, plus the testimony of (redacted). This \$116,192.75 amount must be treated as a return of the divested amount, and will reduce the divestment penalty period here.

It is not possible for me to issue a more definitive decision at this time, as the agency may find that divestments occurred in 2003 that will link the two multiple divestment periods into one long multiple divestment period. If this decision is made, the son's payments for the petitioner's needs in 2003 would also be pertinent to the question of how much money was returned to the petitioner.

CONCLUSIONS OF LAW

1. The petitioner and her husband no longer had assets in excess of their CSAS plus \$2,000 limit by the time of the petitioner's June, 2005, "spousal impoverishment" Institutional MA application. Thus, denial of the petitioner's application on that basis proved to be incorrect.
2. At a minimum, the petitioner performed a multiple divestment with a total value of \$50,203.45 beginning in January, 2003. The petitioner also performed another multiple divestment beginning in January, 2004, totaling \$152,754.41.
3. From January, 2004, through September 23, 2005, the petitioner's son has returned \$116,192.75 of the amount divested in or after January, 2004; said amount must be used to reduce the length of the petitioner's divestment penalty period.

NOW, THEREFORE, it is

ORDERED

That the petition herein be remanded to the county agency with instructions to:

- (1) redetermine the amount of the petitioner's total divestment during the lookback period with the divestment amount being least \$152,754.41 from January, 2004 – June, 2005,
- (2) determine the amount of the divestment that was returned to the petitioner by her children in the form of payment for charges, with the minimum amount of such a return being the \$116,192.75 returned from January, 2004, through September 23, 2005, and
- (3) issue a negative notice to the petitioner within 10 days of the date of this Decision, advising her of the determinations in (1) and (2) above.

Nothing in this Decision shall be construed as preventing the agency from concluding that a multiple, continuous divestment occurred from January, 2003, forward. The petitioner shall be given leave to file a new fair hearing request within the statutory 45-day time frame if the result in the negative notice is not satisfactory to her.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, 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 must explain what mistake the examiner 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.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can 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 thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 25th day of
January, 2006

/s/Nancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
214/NJG MDVmult