



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

Pewaukee, WI 53072

MED-36/91877

PRELIMINARY RECITALS

Pursuant to a petition filed March 10, 2008, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Manitowoc County Dept. of Human Services in regards to the denial of Medical Assistance (MA), a hearing was held on April 22, 2008, at Manitowoc, Wisconsin. At the request of the parties, the record was held open for 20 days for the county agency to submit an argument, and 20 additional days for the petitioner to submit a reply argument.

The issue for determination is whether the county agency correctly denied the petitioner's application for Elderly, Blind & Disabled MA due to assets in excess of program limits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Pewaukee, WI 53072

Represented By:

John V. Kitzke, Attorney
Kitzke & Associates, S.C.
W62 N588 Washington Avenue
Cedarburg, WI 53012

Respondent:

Wisconsin Department of Health and Family Services
1 West Wilson Street, Room 650
P.O. Box 7850
Madison, WI 53707-7850

By: Steve Rollins, Corporation Counsel
c/o Manitowoc County Dept Of Human Services
3733 Dewey Street
Manitowoc, WI 54221-1177

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is an institutionalized resident of Manitowoc County. She was admitted to Shady Lane Nursing Home on August 29, 2007. She requested assistance from the Medical Assistance (MA) Program on January, 3, 2008. The agency pended the request for verification of a trust instrument.

2. On January 9, 2008, the county agency received a PHYSICIAN'S LENGTH OF STAY STATEMENT dated January 9, 2008, from Dr. T. Maatman. Dr. Maatman stated that the petitioner was admitted to her present facility, Shady Lane, on August 29, 2007; she is stable and her medical diagnosis is "CVA" (cerebrovascular accident); and he check-marked the statement that provided that the "Patient cannot realistically expect to return home." See, Exhibit #5.
3. On February 6, 2008, the agency received a copy of the [REDACTED] FAMILY TRUST. The TRUST provides by its terms that it is revocable; and the TRUST res included the petitioner's homestead realty.
4. On February 25, 2008, the county agency issued a Notice of Decision to the petitioner informing her that her application for Elderly Blind & Disabled MA was denied due to assets in excess of program limits. The agency determined that her countable assets included the homestead realty valued at \$64,490, \$232.10 in a checking account, \$703.95 in other assets, and \$25 in a savings account, i.e., a total of \$65,451.05.
5. The petitioner filed an appeal with the Division of Hearings & Appeals on March 10, 2008, contesting the denial of her application and asserting that the value of the homestead realty was exempt and not countable for MA purpose.
6. The petitioner has an intent to return to live in her home; and the county agency representatives admitted during the hearing that this was the petitioner's intent.

DISCUSSION

The MA asset limit for an individual is \$2,000. Wis. Stat. § 49.47(4)(b)3m. If countable and available assets are above that limit, the person is not eligible for MA.

The county agency counted the petitioner's former homestead as an available and countable asset. If counted, she is in excess of the program's limits. If not, she is eligible. The fact that the homestead is the res of a revocable trust has no bearing on the ultimate decision. That is a legal distinction without difference in this case. It is established in Wisconsin case law that even realty in a revocable trust may remain exempt from counting for MA purposes if it meet an exemption provision, like the homestead exemption. See, *Estate of Ferguson v. Wisconsin Department of Health & Social Services*, 211 Wis. 732, at p. 739 (Ct. App. 1997). And see, Wis. Stat. § 49.47(4)(b). This asset is available from the revocable trust at any time the petitioner would choose to list it for sale or sell it. The question is whether it must count against the asset limit.

Wis. Stat. § 49.47(4)(b) provides for the so-called "homestead exemption" to countable assets in the MA asset test, in the parts relevant here, as follows:

(b) Eligibility exists if the applicant's property does not exceed the following:

(1) A home and the land used and operated in connection therewith or in lieu thereof a mobile home if the home or mobile home is used as the person's or his or her family's place of abode.

Wis. Stat. § 49.47(4)(b)(1).

The Department has further interpreted, by duly promulgated rule, whether a home is used as the person's (or family's) place of abode, in the parts relevant here, as follows:

HFS 103.06 Assets. (1) SPECIAL SITUATIONS OF INSTITUTIONALIZED PERSONS.

(a) In determining the eligibility of an institutionalized person, only the assets actually available to that person shall be considered.

(b) The homestead property of an institutionalized person is not counted as an asset if:

1. The institutionalized person's home is currently occupied by the institutionalized person's spouse or a dependent relative. In this subdivision, "dependent relative" means a son, daughter, grandson, granddaughter, stepson, stepdaughter, in-law, mother, father, stepmother, stepfather, grandmother, grandfather, aunt, uncle, sister, brother, stepbrother, stepsister, halfsister, halfbrother, niece, nephew or cousin who is financially, medically or otherwise dependent on the institutionalized person;

2. The institutionalized person intends to return to the home and the anticipated absence from the home, as verified by a physician, is less than 12 months; or

3. The anticipated absence of the institutionalized person from the home is for more than 12 months but there is a realistic expectation, as verified by a physician, that the person will return to the home. That expectation shall include a determination of the availability of home health care services which would enable the recipient to live at home.

(c) If none of the conditions under par. (b) is met, the property is no longer the principal residence and becomes non-homestead property.

Wis. Admin. Code § HFS 106.03(1).

The Department also interpreted the above-quoted statute, and the rule, in its written policy, as follows:

16.8.1.3 Exempt Home Property

Although home property is an exempt asset under the conditions described in this subsection, there are limits on divesting home property (See 17.2.3.1 Homestead Property).

Non-Institutionalized Person. For a person who is not residing in an institution, the home is exempt as long as the person resides in it, or intends to return to it. There is no time limit for an intended return. The home remains exempt even if the person rents out part of it while s/he continues to reside there.

Institutionalized Person. When a person resides in an institution, the home is exempt if one of the following conditions is met:

1. His/her spouse or dependent relative resides in the home. The dependency of the relative may be of any kind, such as financial or medical. The relative may be father, mother, daughter, son, grandson, granddaughter, in-laws, stepmother, stepfather, stepson, stepdaughter, grandmother, grandfather, aunt, uncle, sister, brother, stepbrother, stepsister, half-sister, half-brother, niece, nephew, or cousin.
2. The institutionalized person expresses his/her intent to return to the home. If s/he is able to form an intent but unable to express it, determine his/her intent through other available evidence. Other evidence includes:
 - a. His/her written statements.

- b. His/her oral statements made before incapacitation. Accept reports of these statements made by family members.
- c. Accept reports of his/her intent made by an authorized representative (IMM, Ch. I, Part A, 18.3.0). If there is no evidence s/he disagrees with the statement, accept the authorized representative's statement.

If s/he appears unable to form an intent but has not been judged incompetent by a court, accept a family member's statement as evidence of his/her intent.

If s/he has been judged incompetent, accept the intent statement of his/her guardian. Use the guardian's intent statement even if it differs from the member's.

If neither condition #1 nor #2 is met, the property is no longer the principal residence and becomes non-home property.

Medicaid Eligibility Handbook, § 16.8.1.3 (April 30, 2008).

A home is any property in which an individual has an ownership interest and which serves as the individual's principal place of residence. This property includes the shelter in which an individual resides, the land on which the shelter is located, and related outbuildings. See 20 C.F.R. § 416.1212(a); see also, § HSS 101.03(75) Wis. Admin. Code. A home, regardless of its value, is not counted as an asset for MA eligibility purposes. 20 C.F.R. § 416.1212(b); see also Wis. Stat. § 49.47(4)(b)1. If an individual moves out of his or her home without the intent to return, the home is no longer an exempt asset based on its being the individual's principal place of residence. 20 C.F.R. § 416.1212(c). When a person resides in an institution, the home is an exempt asset if the institutionalized person expresses his or her intent to return to the home. *Medicaid Eligibility Handbook*, § 16.8.1.3.

The petitioner's attorney argued that she has expressed her intent to return to live in her home. The preponderance of the evidence in this record is that the petitioner has stated that it is her intent to return to live in her home, and the county witnesses admitted that she had so indicated this was her intent. No more is required. It has been well-established since at least 1992 that federal regulations and the *Handbook* require only an expression of intent, and are thus controlling. See, Wis. Admin. Code § HFS 103.06(1)(b)3; § 20 C.F.R. 416.1212(c); *Medicaid Eligibility Handbook*, § 16.8.1.3; see also, Final Decision, DHA Case No. MED-37/65251 (Wis. Div. Hearings Appeals August 21, 1992)(DHSS), by Deputy Secretary Richard W. Lorang. See also, final Decisions in MED-49/33331 (ALJ Schneider, December 22, 1998); MED-41/95962 (ALJ Maloney, July 24, 1996); MED-40/41973 (ALJ Nowick, December , 1999); all concurring in a similar result on the same issue.

Thus, the petitioner's home is an exempt asset for purposes of MA eligibility and the County was not correct to count her home as an asset. Nothing in this Decision prevents the county agency from acting to issue a notice of lien, if appropriate, under MA laws.

CONCLUSIONS OF LAW

The county agency was incorrectly counted the petitioner's home as an asset for purposes of MA; it is at present exempt.

NOW, THEREFORE, it is

ORDERED

That the county agency re-determine the petitioner's eligibility for MA without counting her home as an asset within 10 days of the date of this Order, with written Notice.

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 Wisconsin Statutes § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

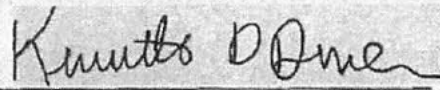
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Wisconsin Department of Health and Family 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 650, P.O. Box 7850, Madison, WI 53707-7850.

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 Wisconsin Statutes §§ 227.52 and 227.53.

THIS IS A CERTIFIED COPY OF THE
FINDINGS AND DECISION MADE IN THIS
MATTER AND FILED IN THE DIVISION OF
HEARINGS AND APPEALS IN THE CITY
OF MADISON, WISCONSIN.

Given under my hand at the City of
Madison, Wisconsin, this 4th day
of June, 2008.



Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
63/KDD

cc: Suzanne Bach, DHFS-Bureau Of Health Care Eligibility - email
Rita Cairns, DHFS - email
Angela Dombrowski, DHFS/DHCAA Director - email
Vicki Jessup, Department Of Health & Family Services - email
Ruth Wichlacz, Manitowoc County Dept Of Social Services - email