



FH  
[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

In the Matter of

[REDACTED]

DECISION

MDV/149517

**PRELIMINARY RECITALS**

Pursuant to a petition filed May 16, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Sheboygan County Department of Human Services in regard to Medical Assistance, a hearing was held on July 12, 2013, at Sheboygan, Wisconsin.

The issue for determination is whether the Sheboygan County Department of Human Services correctly determined that Petitioner divested assets and is therefore, ineligible for Institution Long Term Care Medicaid.

The record was held open to give the parties time to submit additional exhibits. Petitioner's representative submitted a spreadsheet that has been marked as Exhibit 4 and copies of checks from a title company that have been marked as Exhibit 5. The agency submitted an authorization for Petitioner's daughter to represent him, case comments and a Medicaid Divestment Penalty and Undue Hardship Notice sent to Petitioner's wife, who is the case head, on July 1, 2013. The case comments were previously marked as Exhibit 2. The Medicaid Divestment Penalty and Undue Hardship Notice has been marked as Exhibit 6.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

Respondent:

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

By: Amy Wieland

Sheboygan County Department of Human Services  
3620 Wilgus Ave  
Sheboygan, WI 53081

ADMINISTRATIVE LAW JUDGE:  
Mayumi M. Ishii  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Sheboygan County.
2. On April 2, 2013, The Department of Workforce Development, Division of Economic Support (the Division) sent Petitioner a notice of negative action indicating that his application for Institutional Medicaid had been denied effective February 1, 2013 until April 23, 2014, due to a divestment of \$92,979.90 - \$22,219.40 in cash from a savings account and \$70,760.50 in income. (Exhibit 1, pg. 3; Exhibit 3, pg. 2.)
3. Petitioner's daughter filed a request for fair hearing on Petitioner's behalf that was received on May 16, 2013. (Exhibit 3)

### DISCUSSION

A person cannot receive institutional medical assistance if his assets exceed \$2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4); *Medicaid Eligibility Handbook (MEH)* §39.4.1. Generally, a person cannot reach this limit by divesting assets. Wis. Adm. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(2).

"Divestment" is defined as, "the transfer of income, non-exempt assets and homestead property..., which belong to an institutionalized person, his/her spouse or both...for less than fair market value of the income or asset." Id.; *MEH* §17.2.1 "Transfer" is defined as, "the act of changing the legal title or other right of ownership to another person." *MEH* §17.2.2 "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. *MEH* §17.2.1. Other types of divestment include taking an action to avoid receiving income or making certain types of investments in life estates, mortgages, loans, promissory notes or annuities. *MEH* §17.2.1

In determining whether a divestment occurred, the Division must examine financial records during a "look back period" from the institutionalized person's date of application or review, or the Medicaid recipient's date of entry into the institution. *MEH* §17.3.1 For divestments occurring after January 1, 2009, the look back period is 60 months. *MEH* §17.3.3; See also Wis. Adm. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f)(2m).

If there was a divestment during the look back period, or any time thereafter, the institutionalized person must be determined ineligible for Institution Long Term Care Medicaid, unless the divestment falls under a specific exception. *MEH* §17.5.1. For divestments occurring after January 1, 2009, the divestment penalties are calculated as follows:

#### 17.5.1 Penalty Period Introduction

...For divestments on or after January 1, 2009, the divestment penalties are calculated in days, using the average daily nursing home cost to a private pay patient. The average daily rate is computed by multiplying the average monthly rate by 12 and dividing by 365. ( $\$6,554 \times 12 = 78,648$  divided 365 = 215.48)

**Example 2:** Jeff applied for FC on February 5, 2010. In January 2009 Jeff transferred \$18,500 in cash to his son. At the time of application Jeff is otherwise eligible for FC.  $\$18,500$  divided by 215.48 = 85.86 days. Jeff is ineligible for 85 days.

See Also Wis. Admin. Code, § DHS 103.065(5) and Wis. Stats. §49.453(3)

During the penalty period Medicaid will not pay the institutionalized person's daily care rate in the nursing home. This penalty applies only to 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). Id.

In the case at hand, the Division asserts that there was a divestment of cash assets from a savings account and a divestment of income.

In a Fair Hearing such as this, the petitioner has the burden to prove that a denial action taken by the agency, 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 Estate of Gonwa ex rel Gonwa v. Wisconsin Dept. of Health and Family Services*, 265 Wis.2d 913, 668 N.W.2d 122, 2003 WI App. 152

### Cash Assets

With regard to the cash assets, the Division asserts that there were ten cash withdrawals between February 23, 2009 and December 21, 2012, totaling \$22,219.40, for which it did not receive adequate explanations.

Petitioner's daughter represented him at the hearing and claimed that Petitioner was using the money for living expenses and as such, fell into an exception to the divestment rules.

The exceptions to divestment are explained in MEH §17.4:

#### **17.4 Exceptions**

A divestment that occurred in the look back period or any time after does not affect eligibility if any of the following exceptions apply:

1. The person who divested shows that the divestment wasn't made with the intent of receiving Medicaid.
2. The community spouse divested assets that were part of the community spouse asset share.
3. The ownership of the property is returned to the person in the fiscal group who originally disposed of it.
4. Division of property as part of a divorce or separation action, and loss of property due to foreclosure or repossession aren't divestment.
5. The person intended to dispose of the asset either at fair market value or other valuable consideration.
6. The agency determines that denial of eligibility would result in undue hardship for the person.
7. The institutionalized person or his/her spouse divests homestead property to his/her:
  - a. Spouse
  - b. Child who meets at least 1 of the following conditions/situations:

Under 21 years of age OR

Blind OR

Permanently Totally Disabled OR

Been residing in the institutionalized person's home for at least 2 years immediately before the person became institutionalized and provide care to

him/her which permitted him/her to reside at home rather than in the institution. This must be proven by a notarized statement from a physician or someone else who has personal knowledge of the situation. A statement from a child does not satisfy this requirement.

c. Sibling who:

Was residing in the institutionalized person's home for at least 1 year immediately before the date the person became institutionalized AND has a verified equity interest in the home.

8. The institutionalized person or his/her community spouse divests a non-homestead asset or assets to:
  - a. A spouse
  - b. A child of any age of either spouse who is either blind or permanently and totally disabled or both.

Petitioner's daughter did not clearly articulate which exception to divestment she was applying, but it is presumed that she was asserting that her father did not act with the intention of reducing his assets so that he would be eligible for Medicaid, because he was merely spending the money to meet his living expenses. However, the spreadsheet submitted by Petitioner's daughter breaking down his living expenses does not prove where the money went.

First, the spreadsheet is not the same as a receipt or contract from whomever was allegedly providing lawn service or snow removal services to Petitioner. Second, it is odd Petitioner's daughter could not find any type of paper document to prove Petitioner was paying for such services, such as a contract, receipt or notarized letter from the person providing the service. Third, it is odd that the spreadsheet did not include things such as property tax payments or utilities.

Fourth, in some cases, Petitioner's income exceeded the expenses listed and so they do not explain the cash withdrawals. For example, in February 2009, there was a withdrawal of \$4,506.76, but in 2009, Petitioner's income from his pension, his social security and his wife's social security exceeded the expenses listed by Petitioner's daughter/family in the spread sheet.

Fifth, the amounts estimated for the services or gifts given do not necessarily make sense or are unreasonable. For example, \$540 a month for groceries for one to two people seems excessive or \$620 for "holiday celebrations" in February, May or July seems strange since they are not necessarily huge holiday months or in some months Petitioner's income was only \$1,063.73, but the spread sheet provided by Petitioner's daughter still lists the \$620 "holiday celebrations" and gifts of \$125 to each of Petitioner's five children.

Petitioner's daughter also claimed that her father liked to use cash for his transactions, but it is undisputed that Petitioner has a checking account that he used regularly and it seems peculiar that he would not have used a check to pay the person who provided lawn care or snow removal services, especially when the services cost \$157.50 to \$315 per month. It also seems peculiar that he would not have used a check, if he was paying for his son's wedding expenses as claimed.

Based upon the foregoing, Petitioner has not met his burden to prove the agency improperly determined a divestment occurred with regard to the unaccounted cash withdrawals.

Income

The rules governing the divestment of income are explained, in part, in MEH §17.9:

**17.9 Income Divestment**

Income received by an institutionalized person and transferred in the month of receipt is considered divestment.

**Example 1:** Mr. M. resides in nursing home. He receives a pension check of \$3,000 a month. Mr. M. immediately signs the check over to his son. This is a divestment.

Unless there is reason to believe otherwise, assume that ordinary household income was legitimately spent on the normal costs of living.

However, there may be divestment if the person transferred amounts of regularly scheduled income which s/he ordinarily would have received. Such a transfer usually takes the form of a transfer of the right to receive income.

When you find the institutionalized person has transferred income or the right to receive income, calculate a penalty period based on the total amount of income transferred.

**Example 2:** Donald transfers his rights to his \$325,000 pension to his daughter. The divested amount is \$325,000, not the \$4,500 the daughter expects to receive each month from the pension.

*Emphasis added*

Given the presumption that income is used for living expenses, given Petitioner's relatively modest income from his pension and Social Security and given a lack of evidence to the contrary, there is no reason believe Petitioner was using his income for anything other than normal living expenses.

Based upon the findings above, the agency will have to re-determine Petitioner's divestment penalty period.

Undue Hardship

At the hearing Petitioner's daughter asked about an undue hardship waiver, stating that she had not seen the most recent notice, since it was sent to her mother.

A divestment penalty period must be waived when the imposition of the penalty period deprives the individual of:

- Medical care such that the individual's health or life would be endangered; or
- Food, clothing, shelter, or other necessities of life.

*MEH § 17.17.1*

In order to request an undue hardship waiver, an applicant or his/her representative must submit complete an Undue Hardship Waiver Request form (F-10193) *in addition to* the following verification of hardship:

1. A statement signed by the individual (or his/her representative) which describes whether the assets are recoverable, and if so, the attempts that were made to recover the divested assets, and

2. Proof that an undue hardship would exist if the penalty period is applied (as follows).

•If the member is currently institutionalized, s/he must submit a copy of the notification sent from the LTC facility which states both the date of involuntary discharge and alternative placement location or other proof that if the hardship waiver is not granted, the individual will be deprived of medical care such that the individual's health or life would be endangered; or deprived of food, clothing, shelter, or other necessities of life.

•If the member is applying for Community Waivers COP, FamilyCare,, IRIS "Include, Respect, I Self-Direct" - A Medicaid waiver program. , PACE or Partnership, s/he must submit an estimate of the cost of the LTC services needed to meet his/her medical and remedial needs (as determined by the waivers case manager) and an estimate of costs for food, shelter, clothing and other necessities of life.

*MEH § 17.17.2*

If a valid request for an undue hardship waiver is received by the local agency within 20 days after the local agency mails out the Divestment Penalty and Undue Hardship Notice **and** the waiver is approved, the effective date of the waiver will be the initial date of the penalty period. *MEH § 17.17.4.1* If the request for an undue hardship waiver is untimely, meaning later than 20 days after the notice is mailed, and the waiver is approved, the waiver effective date will not be earlier than the date of the request. *MEH § 17.17.4.2*

If the request for an undue hardship waiver is denied, the individual has the right to appeal the decision through a written request to the Division of Hearings & Appeals. The individual has 45 days from the date of the notice issuance to file the appeal. These same hearing rights are also applicable to the facility in which the individual resides, as long as the facility has the institutionalized individual's written permission to represent him/her in the appeal process. *MEH § 17.17.8*

As discussed above, the agency will have to issue a new notice to Petitioner. If Petitioner wishes to receive an undue hardship waiver, he must follow the procedures discussed above and provide all of the necessary information.

### **CONCLUSIONS OF LAW**

1. The agency correctly determined Petitioner divested assets from his savings account.
2. The agency did not correctly determine that Petitioner divested income.

**THEREFORE, it is**

### **ORDERED**

That the agency re-determine Petitioner's penalty period based upon the divested cash from his savings account. The agency shall send Petitioner, in care of his representative, a new notice and Undue Hardship Waiver Request form, advising Petitioner of the new penalty period. The agency shall take all administrative steps necessary to complete these tasks within ten days of this decision.

### **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 Milwaukee,  
Wisconsin, this 26th day of July, 2013.

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\sMayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals