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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: MLL - 216316

PRELIMINARY RECITALS

Pursuant to a petition filed on December 12, 2024, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Medicaid Services regarding Medical Assistance (MA), a hearing was held on February 5, 2025, by telephone.

The issue for determination is whether the agency correctly denied the petitioner's request for a hardship waiver of estate recovery.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Robert A. Kennedy
Kennedy Law Office
209 East Madison Street
Crandon, WI 54520-1416

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: Rebecca Heaney
Division of Medicaid Services
PO Box 309
Madison, WI 53701-0309

ADMINISTRATIVE LAW JUDGE:

Kate J. Schilling
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner is a resident of Forest County. Her mother, a former Medicaid recipient, passed away on March 7, 2024.

2. On June 18, 2024, the Department received a Transfer by Affidavit form submitted by the petitioner relating to her mother's estate. The sole asset listed on the form was the decedent's home valued at \$49,114.71. The home is subject to a mortgage which is currently being paid by the petitioner.
3. On July 26, 2024, the Department sent out a claim for Medicaid estate recovery of \$126,163.79 from the petitioner's mother's estate. This notice included information on how to request a hardship waiver and provided a deadline of September 9, 2024.
4. On September 6, 2024, the Department received a written request for a hardship waiver from the petitioner's attorney based on the petitioner living with her mom and providing care for at least two years which delayed having to place her in a nursing home. A hardship waiver was requested; however, the request did not specify which hardship waiver criteria the petitioner was claiming to meet.
5. On September 16, 2024, the Department sent forms to the petitioner's attorney regarding each of the three hardship criteria and asked her to fill out the appropriate form for the hardship she was claiming.
6. On November 1, 2024, the Department received a hardship waiver form completed by the petitioner which indicated that she used her mother's real property for her livelihood (trade or business).
7. On November 14, 2024, the Department issued a denial notice indicating that the petitioner did not meet the criteria for the hardship waiver.
8. On December 16, 2024, the petitioner filed a timely appeal with the Division of Hearings and Appeals.

DISCUSSION

The Department must file claims against the estates of recipients to recover the costs of certain Medicaid services or other aid. See Wis. Stat. §§ 46.27(7g), 49.496, 49.849 (which includes aid under 49.682(2)(2)(a) or (am)); and see Wis. Admin. Code §DHS 108.02(10). All property in the estate is subject to such a claim. See Wis. Stat. §§49.496(3)(aj)1 and 49.849(2)(a). The Department is required to promulgate rules establishing the criteria for granting a waiver from such a claim based on hardship. Wis. Stats. §§49.496(6m) and 49.682(6). To that end, Wis. Admin. Code §DHS 108.02(12)(b) provides:

(b)Hardship waiver criteria

1. A beneficiary or heir of a decedent may apply to the department for a waiver of an estate claim filed by the department. The department shall review an application for a waiver under this subsection and shall determine whether the applicant meets the criterion under subd. 2.a, b, or c. If the department determines the criterion under subd. 2.a, b, or c is met, the department shall waive its claim as to that applicant.
2. Any of the following situations constitutes an undue hardship on the waiver applicant:

- a. The waiver applicant would become or remain eligible for supplemental security income (SSI), food stamps under 7 USC 2011 to 2029, aid to families with dependent children (AFDC), or medical assistance if the department pursued its claim;
- b. **A decedent's real property is used as part of the waiver applicant's business, which may be a working farm, and recovery by the department would affect the property and would result in the waiver applicant losing his or her means of livelihood; or**
- c. The waiver applicant is receiving general relief, relief to needy Indian persons (RNIP) or veterans benefits based on need under s. 45.40(1m), Stats.

(Emphasis added.) Wis. Admin. Code § DHS 108.02(12)(b)

As noted above, a beneficiary or heir may apply for a waiver of an estate claim on grounds of hardship related to one of the three listed criteria above. Wis. Admin. Code § DHS 108.02(12)(b)1. The code requires that the waiver applicant submit an application for the hardship waiver as well as documentation to support the request. The petitioner submitted a copy of her income taxes along with the hardship waiver request form.

In the request for a hardship waiver, the petitioner's counsel raised the fact that the petitioner was a caregiver child for her parents prior to their passing. The petitioner testified that she moved in with her parents in 2009 to help provide care for her father, who was ill and subsequently passed away in 2010. In 2011, the petitioner's mother became very sick and needed a leg amputation. Initially one leg was amputated, then later the second leg was amputated as well. Towards the end of her mother's life, she was diagnosed with cancer. The petitioner was her mother's primary caregiver and was only able to work out of the home part-time due to her caregiving responsibilities.

During the hearing, the Department's representative provided a more thorough explanation of the three criteria for the hardship waiver. At that point, the petitioner agreed that she did not own a business that was tied to her mother's home or real property. Rather, her concern was more related to the fact that she had lived in her parents' home since 2009, and that selling the home now to repay estate recovery would leave her and her children without a home after 16 years of living with her parents and providing care to them.

There are two different provisions in the Medicaid Eligibility Handbook (MA Handbook) related to a caregiver child. The first one relates to a *divestment* exception where a parent can transfer their home to a caregiver child who has lived with and provided care to a parent for at least 2 years prior to the parent moving into a medical institution, such as a nursing home. *MA Handbook* § 17.2.6.8. However, this provision is not relevant to this case as it pertains to Medicaid divestment determinations, the transfer of money or property for less than fair market value, which is not at issue in this case. This provision is also not applicable after the Medicaid recipient passes away.

The second provision relating to a caregiver child in the MA Handbook is relevant to estate recovery and this case.

DHS will take a lien in full or partial settlement of an estate claim against the portion of an estate that is a home if:

- 1. A child, of any age of the deceased member:
 - a) Resides in the member's home, **and**

- b) That child resided in that home for at least 24 months before the member entered the nursing home, hospital, or received HCBW services, **and**
- c) That child provided care that delayed the member's move to the nursing home, hospital, or his or her receipt of HCBW services.

MA Handbook § 22.1.5.5. In the case of a caretaker child who lived in the home and provided care to a parent for at least two years, the estate recovery program will take a lien when real property is part of the estate. The lien amount would then be collected upon the death of the caretaker child or when the home is transferred, whichever comes first. *MA Handbook* § 22.1.5.5. Qualifying as a caretaker child is a separate issue from the hardship waiver exemption which was at issue in this appeal. Thus, the Department will need to make a separate determination as to whether the petitioner qualifies as a caretaker child under this provision.

The petitioner testified that neither she nor her adult sister have disabilities. The petitioner did not request consideration for a hardship waiver based on receipt or eligibility for SSI, Medicaid, or other need-based benefits, and there was no testimony at the hearing relating to this. As such, I find that the Department correctly denied the petitioner's request for a hardship waiver exception as she does not meet the criteria.

While it is clear to me that the petitioner lovingly provided care to her parents for many years, I do not have equitable powers and cannot deviate from the administrative code and the statutes. "An agency or board created by the legislature has only those powers which are expressly or impliedly conferred on it by statute. Such statutes are generally strictly construed to preclude the exercise of power which is not expressly granted. [citation omitted]" *Browne v. Milwaukee Board of School Directors*, 83 Wis.2d 316, 333, 265 N.W.2d 559 (1978).) Thus, as an administrative law judge, I do not have authority to render a decision on the basis of fairness or equity.

CONCLUSIONS OF LAW

The Department correctly denied the Petitioner's request for a hardship waiver as she does not meet the criteria listed in Wis. Admin. Code § DHS 108.02.

THEREFORE, it is

ORDERED

That the petitioner's appeal is hereby dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

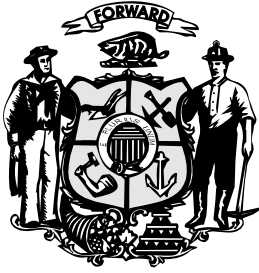
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 6th day of March, 2025

\s

Kate J. Schilling
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 6, 2025.

Division of Medicaid Services
Attorney Robert Kennedy