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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MDV/132474

PRELIMINARY RECITALS

Pursuant to a petition filed May 10, 2011, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Marathon County Department of Social Services in regard to Medical Assistance (MA)/Family Care (FC), a hearing was held on June 29, 2011, at Wausau, Wisconsin.

The issue for determination is whether the agency correctly imposed a divestment penalty on the petitioner's Long-Term/Institutional MA/Family Care (FC) case.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Julie Jamroz, ES Spec.
Marathon County Department of Social Services
400 E. Thomas Street
Wausau, WI 54403

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted] is a resident of Wisconsin.

2. An application for FC was filed on the petitioner's behalf on April 14, 2011. On May 9, 2011, the agency issued written notice to the petitioner advising that her application for MA/Family

Care benefits was denied until after a 123-day divestment penalty period expired (August 16, 2011). Exhibit 1-A.

3. The agency's basis for imposing a penalty period was that the petitioner allegedly divested $25,200 to her son, [redacted] via cash payments during the "lookback period." The petitioner does not deny that she has paid $25,200 to [redacted]s during the lookback period.

4. The petitioner, age 88, has diagnoses of chronic congestive heart failure, arthritis, and dementia. Her mobility is poor: she ambulates within her living space with a walker, but still falls frequently. Outside of her living space, she requires physical assistance for ambulation and transfers. She requires daily personal care and housekeeping services. From September 20, 2010, to the date of application, [redacted] has provided this care to the petitioner in his home, where she resides. He has billed her $20 an hour/$3,600 monthly for these services, and the $25,200 represents the total payment for these services through the application date. There is no dispute that the services provided have benefited the petitioner.

5. There is no dispute that Mr. [redacted] compensation did not exceed reasonable compensation for the services provided.

6. The $25,200 compensation exceeded 10 percent of the community spouse asset share standard. The standard is $109,560. The petitioner's actuarially computed life expectancy at the time of transfer was 5.4 years. *MEH*, 39.8.

DISCUSSION

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; *MEH*, 17.2.1, at http://www.emhandbooks.wi.gov/meh-ebd/. A divestment or divestments made within 60 months before an application for nursing home or FC MA may cause ineligibility for that type of Wisconsin MA. Sec. 49.453(1)(f), Stats.; *MEH*, 17.3. MA divestment rules apply to FC cases. 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, $6,554). *MA Handbook*, 17.5.

In this case, the agency maintains that the petitioner divested $25,200 by paying this amount to her son, without a contemporaneous *notarized* written agreement, for care provided within 36 months of application. The agency is following the state policy declaration below:

> **17.8.1 Divesting by Paying Relatives Introduction**
> It is divestment when an institutionalized person transfers resources to a relative in payment for care or services the relative provided to him/her. A relative is anyone related to the institutionalized person by blood, marriage, or adoption.
>
> Count all the payments for care and services which the institutionalized person made to the relative in the last 36 months. The form of payment includes cash, property, or anything of value transferred to the relative. It is not divestment if all of the following conditions exist:
>
> 1. The services directly benefited the institutionalized person.
> 2. The payment did not exceed reasonable compensation for the services provided.
>
> "Reasonable compensation" is the prevailing local market rate for the service at the time the service is provided.

3. If the amount of total payment exceeds 10% of the community spouse asset share (See 18.4.3 Calculate the CSA), the institutionalized person must have a written, notarized agreement with the relative. The agreement must:

    a. Specify the service and the amount to be paid, **and**
    b. Exist at the time the service is provided.

MEH, 17.8.1.

The facts of this case are not in dispute. The petitioner received personal care services from her son since September, 2010 – *i.e.*, services that "directly benefited the institutionalized person." The payment to the son for these services "did not exceed reasonable compensation for the services provided." However, because the $25,200 total payment exceeded 10% of the Medicaid community spouse asset share ($10,956), the agency followed the policy directive that the payment be considered a divestment due to the lack of a written, *notarized*, contemporaneous service agreement between the petitioner and her son. A written agreement was in place; the flaw was that it was not notarized.

The petitioner acknowledges that the contemporaneous written service agreement was not notarized. She requests a conclusion that a disqualifying divestment did not occur, as she and her son acted in good faith. The petitioner obtained a sample personal services contract from an Aging and Disability Resource Center in the spring of 2010. The petitioner's POA took the model contract to a private attorney on September 2, 2010, and he advised that it was suitable. He did not advise the POA that signatures on the contract would have to be notarized. Thus, the petitioner and her son signed the contract, without notarization. The son reported his 2010 payments under the contract on a 1099 form for 2010.

Unfortunately for the petitioner, I have no discretion in this matter, because the *MEH* is completely in conformance with the following MA divestment statute:

> **(5) Care or personal services.** For the purposes of sub. (2), *whenever a covered individual* or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, *transfers assets to a relative as payment for care* or personal services that the relative provides to the covered individual, *the covered individual or his or her spouse transfers assets for less than fair market value unless the care or services directly benefit the covered individual*, the amount of the payment does not exceed reasonable compensation for the care or services that the relative performs *and, if the amount of the payment exceeds 10% of the community spouse resource allowance limit specified in s. 49.455 (6)_(b) 1., the agreement to pay the relative is specified in a notarized written agreement that exists at the time that the relative performs the care or services.*
> (*emphasis added*)

Wis. Stat. §49.453(5). Based on the statutory language, the county agency's action was correct. If the *statute* did not specify that notarization was required, I would have ruled in the petitioner's favor. I cannot ignore the statutory requirement.

The petitioner argues that *MEH* §17.4 ("Exceptions") applies, asserting that the petitioner's son [redacted] should be considered a dependent. It was not argued that the petitioner claimed [redacted] as a dependent on her tax return. There is also no evidence in that record that [redacted] requires care. Thus, that argument fails.

CONCLUSIONS OF LAW

1. The petitioner's son, [redacted] performed care services from September, 2010, forward that directly benefited an "institutionalized person."
2. The petitioner's $25,200 payment to her son did not exceed reasonable compensation for the services provided.
3. Because the care payment exceeded the community spouse resource allowance limit, and because there was no contemporaneous *notarized* written agreement for payment for the care services, the agency correctly treated the $25,200 care payment as a divestment.

THEREFORE, it is **ORDERED**

That the petition 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 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).

Appeals to Circuit Court should name the Department of Health Services as the respondent. After filing the appeal with the appropriate court, it 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 651, 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 24th day of August, 2011

/sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals

[redacted]