



FH
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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of:



DECISION

MDV/133314

PRELIMINARY RECITALS

Pursuant a petition filed on or about June 16, 2011, under Wis. Stat. § 49.45(5) (2009-10), to review a decision by the County of Marathon Social Services Department ["County"] in regard to divestment under the Medical Assistance ["MA"] program, a Hearing was held via telephone on August 29, 2011. At petitioner's request a Hearing scheduled for July 14, 2011 was rescheduled.

The issue for determination is whether or not petitioner divested assets.

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:



Represented by:

[REDACTED], petitioner's son &
Power of Attorney ["POA"]



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

BY: Sherri Seubert, ES Lead Worker
Julie Jamroz, ESS
County of Marathon Social Services Department
400 East Thomas Street
Wausau, Wisconsin 54403-6498

OTHER PERSON PRESENT:

[REDACTED] petitioner's daughter
[REDACTED] petitioner's youngest daughter
[REDACTED] petitioner's eldest daughter

ADMINISTRATIVE LAW JUDGE:
Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]; age 100 years) is a resident of Marathon, County, Wisconsin.
2. On October 13, 2009 petitioner suffered a stroke; during the time period November 2009 to May 2011 petitioner lived with her children and her children provided care and personal services to her on a 24 hours/day 7 days/week basis.
3. Pursuant to a written agreement petitioner paid \$50.00/day to her children for the care and personal services provided to her by her children during this time period; the written agreement was not notarized; the \$50/day was used by petitioner's children to cover necessary living expenses for petitioner such as ramps for enter/exit to homes, revamping bathroom (walk-in shower; raised toilets, grab bars), food (special meals and ensure), clothing, wipes, depends, panty liners, batteries for hearing aids, increased utility costs (heat set to 75-78 degrees all day in addition to portable heater in petitioner's room), transportation, and respite care; the intent of the written agreement between petitioner and her children was to keep petitioner out of a nursing home.
4. The care and services petitioner received from her children during the time period November 2009 to May 2011 directly benefited petitioner.
5. The amount of the payment petitioner made to her children for the care and services she received from them during the time period November 2009 to May 2011 did not exceed reasonable compensation for the care and services performed.
6. The amount of the payments petitioner made to her children for care and services during the time period November 2009 to May 2011 exceeded 10% of the Community Spouse Resource Allowance ["CSRA"] limit specified in section 49.455(6)(b)1. of the Wisconsin Statutes.
7. On May 24, 2011 petitioner applied for MA; the County determined that the amount petitioner paid to her children for care and services during the time period November 2009 to May 2011 was a divestment due solely to the fact that the written agreement providing for the payments was not notarized.
8. In 2009 petitioner gave a total of \$5,000.00 to 5 of her children (\$500.00 to each child and their spouse) as a Christmas gift; the County determined that this was a \$5,000.00 divestment.

DISCUSSION

With certain exceptions, if an individual, or another person acting on behalf of the individual, transfers assets for less than Fair Market Value ["FMV"] on or after the individual's look-back date (such transfers are commonly known as "divestment"), the individual is ineligible for Institutional MA for a specified time

period. Wis. Stat. § 49.453(2)(a) (2009-10); See also, Wis. Admin. Code § DHS 103.065(4)(a) (December 2008); *Medicaid Eligibility Handbook* ["MEH"] 17.2.1 et. seq.

Petitioner disputes the County's determination that the amount she paid to her children for care and services was a divestment. She also disputes the County's determination that the \$5,000.00 in 2009 Christmas gifts was a divestment. Petitioner does not dispute that the County's determination that the \$23,712.21 she transferred to her son in April 2011 was a divestment.

(I) PAYMENTS TO RELATIVES FOR CARE AND SERVICES

In situations where an individual, or another person acting on behalf of the individual, transfers assets to a relative as payment for care or personal services that the relative provides to the individual, the transfer is for less than FMV unless: (1) the care or services directly benefit the individual; (2) the amount of the payment does not exceed reasonable compensation for the care or services the relative performs, and, (3) if the amount of the payments exceeded 10% of the Community Spouse Resource Allowance ["CSRA"] limit specified in section 49.455(6)(b)1. of the Wisconsin Statutes the agreement to pay the relative is specified in notarized written agreement that existed at the time the relative performed the care or services. Wis. Stat. § 49.453(5) (2009-10); MEH 17.8.1.

In this case the County acknowledges that the sole reason that it determined that the payments petitioner made to her children for care and services were divestment is because the written agreement was not notarized. Petitioner does not deny that the agreement was not notarized. Both the relevant Wisconsin Statute and written Wisconsin State Policy require that the written agreement be notarized. Wis. Stat. § 49.453(5) (2009-10); MEH 17.8.1.3. Therefore, the County was correct when it determined that the payments petitioner made to her children for care and services during the time period November 2009 to May 2011 were divestment.

Nevertheless, it appears that petitioner may not be subject to a divestment penalty period for the payments she made to her children for care and services during the time period November 2009 to May 2011. The divestment penalty period is the number of months obtained by dividing the total uncompensated value of the transferred assets by the statewide average monthly cost to a private pay patient in a Skilled Nursing Facility ["SNF"] at the time of application. Wis. Stat. § 49.453(3)(b) (2009-10); Wis. Admin. Code § DHS 103.065(5)(b) (December 2008); MEH 17.5.2. The "total uncompensated value of the transferred assets" is the divested amount and the divested amount is the net market value of the transferred assets minus the value received. MEH 17.5.2.1. In this case the County acknowledges that the compensation the children received from petitioner was reasonable for the care and services performed. Thus, it appears that the divested amount may be zero since the market value of the transferred assets minus the value received appears to be zero. The County will determine the divestment penalty period for this divestment. Petitioner may request another Hearing if she disagrees with the County's determination of the divestment penalty period for this divestment.

(II) 2009 CHRISTMAS GIFTS

"If an individual had a pattern of charitable gifting, or gifting to family members (i.e. birthdays, graduations, weddings, etc.) prior to the look-back period, similar transfers during the look-back period would not be considered to have been given with the intent to divest as long as the total yearly gifts did not exceed 15% of the individual's or couple's annual gross income. This exception is not limited to gifts made on traditional gift-giving occasions and does not preclude a pattern of giving to assist family members with educational or vocational goals." MEH 17.4.1; See also, Wis. Admin. Code § DHS 103.065(4)(d)2.b. (December 2008).

Petitioner argues that the \$5,000.00 she gave as Christmas gifts in 2009 was not a divestment because she had made similar gifts in the past. However, petitioner acknowledges that in the past she usually gave only \$100.00 for Christmas gifts but gave more in 2009 because she thought she was going to pass away. Petitioner's reason for giving more in 2009 is understandable. However, she did not have a pattern of giving \$500.00 Christmas gifts. Therefore, the \$5000.00 in Christmas gifts she gave in 2009 was correctly determined by the County to be a divestment.

CONCLUSIONS OF LAW

For the reasons discussed above, petitioner divested assets.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby 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 4th day of October, 2011

/sSean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals

c: [REDACTED]