



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-67/60174

PRELIMINARY RECITALS

Pursuant to a petition filed October 10, 2003, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Waukesha County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on November 25, 2003, at Waukesha, Wisconsin.

The issue for determination is whether the agency correctly denied the petitioner's MA application for institutional MA services, pursuant to a divestment of assets theory.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

John Dobroski, Atty.
735 West Wisconsin Avenue
Ste 800
Milwaukee, WI 53233

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Ann Oven, ESS
Waukesha County Health & Human Services
500 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Peter D. Kafkas
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Waukesha County.
2. Petitioner had a life estate in her home. Petitioner's health deteriorated. Petitioner was admitted to a nursing home.
3. Petitioner applied for institutional MA.
4. The county agency denied petitioner's application for institutional MA on the basis that petitioner had transferred petitioner's life estate to petitioner's children when petitioner entered the nursing home.
5. Petitioner did not execute any document transferring her life estate in her home to any third party.

DISCUSSION

A single person cannot be eligible for institutional/nursing home MA if she has nonexempt assets exceeding \$2,000. To prevent a person from simply giving away her assets when the specter of nursing home costs appears, the MA program has developed policies to limit eligibility in the event of such giveaways, or prohibited "divestments."

A divestment is a transfer of assets for less than fair market value. Wis. Stat. Sec. 49.453(2)(a); MA Handbook, Appendix 14.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for institutional MA may cause ineligibility for that type of MA. Wis. Stat. Sec. 49.453(1)(f); MA Handbook, App. 14.3.0. The relevant 36 or 60 month period is called the "look-back period." 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 Wis. Stat. Sec. 49.453(3) to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services, (being raised to \$4,827.00 beginning February 1, 2004). MA Handbook, Appendix 14.5.0; BWI Operations Memo 04-02.

It was undisputed that petitioner had a life estate in her home. It was also undisputed that the original transfer of the life estate occurred many years ago and that any divestment period relating to the underlying, original, transfer would have expired long before the months at issue in this case. Furthermore, it was undisputed that the original transfer creating the life estate was not within the "look-back period."

But the county agency's argument is that when petitioner recently went into the nursing home she transferred the remaining life estate to her children. The testimony was that petitioner did not sign any additional deed or other transferring documents – the agency is merely relying on petitioner's action of going into the nursing home as an act of "transferring" the remaining life estate.

Petitioner's counsel is convincing in his argument that no transfer occurred when petitioner went into the nursing home. If petitioner's health improves, petitioner still has the life estate and can move back into the home. The administrative law judge could not find any persuasive authority that a person's action in merely moving out of a home results in a loss or transfer of a life estate.

And a "life estate or remainder interest in homestead or non-homestead property is an unavailable asset." MA Handbook, App. 11.8.1.5. So petitioner has not "transferred" or "divested" property during the look-back period and petitioner's remaining life estate is "unavailable" for MA purposes.

As a side note, under certain circumstances a life estate holder may be responsible for taxes and maintenance of a property. The county agency has not demonstrated that petitioner divested funds during periods that petitioner paid funds to maintain the property or for property taxes. See, *id.*

CONCLUSIONS OF LAW

The county agency acted incorrectly in determining that petitioner transferred (and divested herself of) her life estate in her home when she went into a nursing home.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the county agency with instructions to take the administrative steps necessary to: re-determine petitioner's eligibility for institutional MA retroactive to the time petitioner entered the nursing home. For purposes of the re-determination, the county agency shall not consider petitioner to have divested herself of her life estate in her home. Nor shall the county agency consider funds petitioner used for maintenance and taxes for the home to be divestments. The administrative steps shall be done within ten (10) days of the date of this decision. In all other respects, the hearing request is dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, 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 must explain what mistake the examiner 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.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can 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 thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Milwaukee, Wisconsin, this 3rd day of
February, 2004

/sPeter D. Kafkas
Administrative Law Judge
Division of Hearings and Appeals
319/PDK