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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION
Case #: MDV - 187317

PRELIMINARY RECITALS

Pursuant to a petition filed on April 17, 2018, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Winnebago County Department of Human Services regarding Medical Assistance (MA), a hearing was held on June 13, 2018, by telephone.

The issue for determination is whether the county agency correctly determined that the petitioner is ineligible for medical assistance due to a divestment.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Petitioner's Representative:

Attorney Jeanne E. Baivier
Reff, Baivier, Bermingham & Lim, S.C.
217 Ceape Ave
PO Box 1190
Oshkosh, WI 54903-1190

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: Janet Williams
Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

ADMINISTRATIVE LAW JUDGE:
Nicole Bjork
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Winnebago County.

2. In December 2005, the petitioner quit claimed her home to her three children, but retained a life estate. Petitioner signed a deferred payment loan agreement, making her jointly and severally liable, and she was obligated to pay her share of the mortgage and costs of any future sale.

3. On January 22, 2018, the petitioner applied for health care benefits but was denied for being over the asset limit.

4. On March 2, 2018, the petitioner's property was sold for $115,000. Proceeds were split among the children and the petitioner. After closing costs and paying her share of the remaining mortgage, the petitioner received $25,869.13 from the sale of the home.

5. On March 13, 2018, the petitioner reapplied for healthcare benefits.

6. The agency found that the petitioner should have received $37,101.30 from the sale of her home because she was a life estate holder and thus, the life estate value calculation applied. Petitioner was 87 years old at the time of the sale, which gave her the life estate value of .32262. Thus, the sale price $115,000 multiplied by the life estate value of .32262 equaled $37,101.30. Based on this calculation, the agency subtracted what the petitioner actually received, $25,869.13, from what she should have received based on their calculation, $37,101.30, and found that she divested the difference, $10,698.42.

7. On April 4, 2018, the agency sent a notice to the petitioner, denying her application for healthcare benefits due to the divestment detailed in Finding of Fact 6.

8. Because the petitioner was jointly and severally liable for the mortgage of the property, she was required to pay closing costs and her share of the remainder of the mortgage. Thus, the amount she actually received after paying such costs was $25,869.13.

DISCUSSION

A person cannot receive institutional medical assistance if her assets exceed $2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf "disposes of resources at less than fair market value" within five years of the later of when she was institutionalized and applied for medical assistance. Wis. Admin. Code, DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f).

If a person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private-pay patient in a nursing home at the time she applied. Wis. Adm. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The daily amount is currently $259.08. *Medicaid Eligibility Handbook*, § 17.5.2.2.

In this case, the petitioner quit claimed her home to her three children in 2005, but retained a life estate interest in the home. Further, she signed a deferred payment loan agreement that required her to pay her share of any mortgage or closing costs if her home sold in the future. The pertinent provisions of the Medicaid Eligibility Handbook state as follows:

> 17.10.1 Life Estates Introduction

> A life estate is created when a property holder transfers ownership of the property to someone else and retains the right to live on the property and the income from it. The new owner of the property is referred to as the remainder person.
>
> Because he or she no longer owns the property, the life estate holder does not have the right to sell or dispose of the property. Because he or she cannot sell or dispose of the property, it is not counted as an available asset to the life estate holder. If the remainder person applied for EBD Medicaid and did not live in the home, the property, minus the value of the life estate, would be counted as an available asset to him or her (the remainder interest).
>
> The value of the life estate is also not considered an available asset to the life estate holder.

Medicaid Eligibility Handbook, Section 17.10.1

In March 2018, the petitioner's home sold and she subsequently applied for healthcare benefits. In determining her eligibility, the agency obtained information regarding the sale of the petitioner's home, noting that she held a life estate. Thus, they applied the life estate calculation to determine the petitioner's life estate value. The life estate value is found by multiplying the fair market value of the property by the number from Section 39.1 of the Life Estate and Remainder Interest table that corresponds to the age of the life estate holder at the time the property was transferred. *Medical Eligibility Handbook, Section 17.10.1.* Petitioner was 87 at the time of the sale, making her number under the table .32262. This number is then multiplied by the fair market value of the home, in this case, the sale price of $115,000. Once the table number is multiplied by the fair market value, a number is generated that determines what the life estate holder should have received in the sale. In this case, that number is $37,101.30. The agency then further reduced that amount by deducting prorated real estate taxes and utilities of $533.52, to give a final net number of $36,567.78.

However, after paying closing costs and her share of the mortgage, which she was obligated to do under the deferred payment loan agreement, the petitioner actually netted $25,869.13. The agency then took the net number they calculated under the life estate value, $36,567.78, and subsequently subtracted what the petitioner actually netted, $25,869.13, for a difference of $10,698.42. The agency found this $10,698.42 to be a divestment, resulting in a 38 day penalty period.

Petitioner contends that the $10,698.42 that she spent for her share of closing costs and the mortgage should not be considered a divestment because she was not disposing any resources at less than fair market value in order to qualify for healthcare benefits. She was simply paying her share of the closing costs on her home, which she was obligated to do under the deferred payment loan agreement that she signed. The agency refuses to recognize the validity of the deferred payment loan agreement that petitioner signed because the agreement states, "I certify that I have title to this property..." The agency argues that petitioner did not have title to the property when she signed that agreement because she was only a life estate holder and therefore the agreement is invalid. However, the agency provided no legal analysis for the claim that the contract, which it was not a party to, is invalid. Further, the parties to the contract can agree to strike any clause that is found invalid without striking the rest of the contract. In any event, it is clear that petitioner entered into this contract and followed the terms of the contract by paying her portion of the closing costs and remaining mortgage. The agency has provided no evidence nor has it cited any authority that concludes closing costs or paying off a loan is a divestment. Other Division of Hearings and Appeals cases have found that realtor fees are not considered a divestment and I cannot imagine that other closing costs would be considered an exception. See DHA Decision MDV-183502, issued December 6, 2017.

In a straight life estate holder analysis, the remaindermen may be responsible for closing costs and any outstanding mortgage. But in this case, there is the extra loan agreement that the petitioner signed, beyond being simply a life estate holder. This document obligated her to pay her share of any closing costs or remaining mortgage, which she did. Thus, her actual net proceeds were $25,869.13, which should be the number the agency uses. See DHA Decision FCP-177944, issued December 13, 2016.

CONCLUSIONS OF LAW

The agency erred in its determination of a divestment based on fees paid by petitioner for her share of closing costs and the remaining mortgage for the sale of the property that she held a life estate in.

THEREFORE, it is **ORDERED**

That this matter is remanded to the agency with instructions to reverse the determination of the divestment of $10,698.42, as well as the related divestment penalty. This action must be completed within 10 days of the date of this decision.

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, 5005 University Avenue, Suite 201, 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 Milwaukee,
Wisconsin, this 2nd day of July, 2018

\s________________________
Nicole Bjork
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 July 2, 2018.

Winnebago County Department of Human Services
Division of Health Care Access and Accountability
Attorney Jeanne Baivier