



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-40/54978

PRELIMINARY RECITALS

Pursuant to a petition filed September 24, 2002, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Milwaukee County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on November 27, 2002, at Milwaukee, Wisconsin.

The issue for determination is whether the county agency incorrectly determined that the petitioner is ineligible for institutional MA services due to divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
(petitioner)

Represented by:
David P. Cohn, Atty.
405 East Lincoln Avenue
Milwaukee, WI 53207

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: James Schoeder, ESS Supr. and Tanya McCarthy, ESS
Milwaukee County Dept Of Human Services
1220 W. Vliet St, 3rd Floor
Milwaukee, WI 53205

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 Milwaukee County. He applied for institutional MA in May 2002.
2. Petitioner is 100 years old. He was admitted to a nursing home in May 2002. Prior to his admission to the nursing home, petitioner lived in the same home with his daughter. The daughter provided care for petitioner so that petitioner's entry into the nursing home was

significantly delayed. The living arrangement existed for at least the two (2) years immediately prior to petitioner's admission to the nursing home.

3. In May 2002, petitioner transferred his home to his daughter. The attorney drafting the deed erroneously referred to the property as "not" homestead property. The attorney subsequently corrected the error.
4. In reviewing petitioner's application for institutional MA, the county agency determined that petitioner had not transferred his "home," and that he had divested property in transferring real estate to a third party without receiving fair market value.

DISCUSSION

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 nursing home MA may cause ineligibility for that type of MA. Wis. Stat. Sec. 49.453(1)(f); *Handbook*, App. 14.3.0. 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. *MA Handbook*, Appendix 14.5.0. In this case, the agency calculated a divestment of \$159,300, with a disqualification period of 37 months, ending May 31, 2005.

It was undisputed that petitioner transferred a home valued at \$159,300 to his daughter within 36 months of an application for institutional MA. The parties are also in agreement as to the length of the ineligibility period that would ensue if the transfer were a divestment. The evidence and testimony admitted during the hearing demonstrate that petitioner's daughter did not pay anything in return for the home. Thus, the only remaining issue is whether the transfer of petitioner's home to his daughter met an exception to the divestment rules.

One exception to the divestment rules exists if the institutionalized person or his spouse divests homestead property to:

A minor or adult child of the institutionalized person. The child must have:

- (1) Been residing in the person's home for at least 2 years immediately before the person became institutionalized, and
- (2) Provided care to him/her which permitted him/her to reside at home rather than in the institution, or which permitted him/her to avoid becoming a community waivers participant. This care must have been provided for the entire 2 years immediately before the person became institutionalized. [The agency must get a notarized statement that the person was able to remain in his/her home because of the care provided by the child.

MA Handbook, App. 14.4.0(7)(2)(d) (emphasis in original). Petitioner's daughter, who was the grantee of the home in question, testified that she resided in the home for at least 2 years prior to her father going into

the nursing home. She also testified that she had provided care for him in the form of cooking, washing of clothes, arranging for and taking him to doctor's appointments, as well as other caretaker tasks. See also, Exhibit 7. The daughter gave testimony that her father was 99 years old when in went into the institution. An affidavit was submitted from a family friend stating that petitioner would have had to go into an institution much earlier had the daughter not provided the care in question. Exhibit 9.

The county agency appears to take issue with a statement in the deed in this matter that the property was not homestead property. An affidavit was submitted by the real estate attorney showing that this was merely a typographical error.

The overall testimony and documentation presented at hearing support a conclusion that: 1) petitioner's daughter resided with petitioner in the home for at least 2 years, 2) that petitioner's daughter provided care to petitioner that allowed him to reside in the home rather than in the institution, and 3) that the care was provided in the home for the entire 2 years immediately before petitioner became institutionalized. The criteria for the above-described exception to the divestment rules were met in this case.

Two side issues must be addressed here. The parties agreed that the record would be held open for three (3) weeks for submission of a doctor's affidavit concerning the need for the daughter's care of petitioner and for submission of an emailed argument by petitioner's counsel. The administrative law judge has already received the emailed brief, and a review of the exhibits revealed that a notarized doctor's statement would not be necessary. See, *MA Handbook*, App. 14.4.0(7)(2)(d) (notarized statement submitted by a third party and doctor's letter are sufficient here); see also, Exhibits 8 and 9. The county representatives indicated that they would not be making any further submissions so, for the reason discussed below, this decision is being issued prior to the expiration of the open record period.

The county worker requested that any decision in this case be issued as proposed. She did not clearly articulate why the request was made. If signed by the Secretary of the Department, a proposed decision would serve as precedent for other fair hearing decisions, but the process would result in an additional open record period and delay in the decision. Regardless, this administrative law judge has not noted a conflict between federal or state law and Department policy; i.e., which would have required issuance of a proposed decision. It appeared undisputed that petitioner's nursing home has started proceedings to evict him. The benefits of an expedited decision in this matter outweigh any value of a proposed decision.

It appears that the county worker was acting in good faith in questioning this transfer. The original designation of the real estate as "not homestead" resulted in a factual issue. But credible testimony was given that petitioner intended to return to the home – even after his admission to the nursing home.

CONCLUSIONS OF LAW

The county agency acted incorrectly in determining that petitioner had divested assets since petitioner transferred his home to his daughter who had lived with and cared for him in excess of two (2) years immediately prior to his admission to the nursing home and since petitioner would have entered the nursing home much earlier had it not been for the daughter's care.

NOW, THEREFORE, it is ORDERED

That the petition herein be remanded to the county agency with instructions to certify the petitioner for institutional MA from the day of his admission to the nursing home in May 2002 onward, if he was otherwise eligible, within 10 days of the date of this Decision. In all other respects, the petition 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 5th day of
December, 2002

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