



State of Wisconsin DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
4822 Madison Yards Way
Madison, WI 53705

Telephone: (608) 266-7709
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

March 13, 2024



Princeton Perry
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

RE:



Case No. MDV - 210958

Dear Parties:

Enclosed is a copy of the Final Decision in the above-referenced matter.

Sincerely,

Amanda Eve
Legal Associate

c: Miles - email
Division of Health Care Access and Accountability - email
 - email



STATE OF WISCONSIN
DEPARTMENT OF HEALTH SERVICES

In the Matter of

DECISION

Case No: MDV-210958

The attached proposed decision of the Administrative Law Judge dated January 23, 2024 is hereby adopted as the final order of the Department.

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, 4822 Madison Yards Way, Madison, WI 53705-9100 **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.

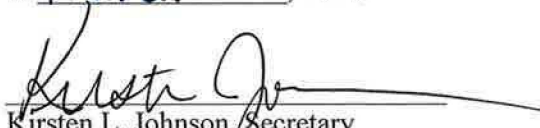
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

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, Madison, WI, 53703, **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 request (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
Madison, Wisconsin, this 13th day
of March, 2024.


Kirsten L. Johnson, Secretary
Department of Health Services



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



PROPOSED DECISION
Case #: MDV - 210958

PRELIMINARY RECITALS

Pursuant to a petition filed on November 7, 2023, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services regarding Medical Assistance (MA), a hearing was held on December 19, 2023, by telephone.

The issues for determination are:

1. Whether the agency correctly determined there was a divestment of the Petitioner's assets and correctly imposed a 149 day divestment penalty period from May 15, 2023 through October 11, 2023.
2. If there was a divestment, whether the agency correctly denied the Petitioner's undue hardship request.
3. Whether the agency correctly determined the Petitioner's enrollment date for Community Waivers.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: Princeton Perry
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. On May 19, 2023, an MA application was submitted on behalf of the Petitioner. The Petitioner requested Community Waivers enrollment. On June 1, 2023, the agency processed the application. The agency became aware of two properties in [REDACTED] that the Petitioner had owned and were sold by his power of attorney in 2022.
3. In June 2023, the Petitioner was found to be functionally eligible for community waivers.
4. On June 2, 2023, the agency requested verification of assets, including information regarding the sale of the two properties, with a due date of June 21, 2023. On June 22, 2023, the agency again requested verification of assets with a due date of July 3, 2023.
5. On June 8, 2023, the agency received the closing statements for the two properties in [REDACTED].
6. On June 28, 2023, the agency updated the case with additional verification that had been submitted. On June 29, 2023, the agency issued a notice of decision to the Petitioner informing him that he was not eligible for MA and Community Waivers because his counted assets were over the asset limit.
7. On July 18, 2023, the agency received additional asset verification. On July 27, 2023, the agency issued a notice of decision to the Petitioner informing him that he was enrolled in MA effective July 1, 2023. The notice did not contain information about his eligibility for Community Waivers.
8. On August 3, 2023, the Petitioner's authorized representative contacted the agency about the two properties in [REDACTED]. She provided verification that the property on [REDACTED] sold for \$72,000 and the property on [REDACTED] sold for \$43,000. The County determined that these properties were sold for less than fair market value, based on information it obtained about the property values from Zillow.
9. On August 4, 2023, the agency issued a notice of decision to the Petitioner informing him that he was enrolled in MA effective September 1, 2023 but not enrolled in Community Waivers because a divestment of \$116,100 had occurred and a divestment penalty period of 376 days was imposed from September 1, 2023 through September 10, 2024.
10. On August 9, 2023, the agency received additional information regarding [REDACTED] property and removed this as a basis for divestment. The agency continued to find a divestment concerning the [REDACTED] property.
11. On August 25, 2023, the agency issued a notice of decision to the Petitioner informing him that the Petitioner was not enrolled in Community Waivers because a divestment of \$46,800 had occurred and a divestment penalty period of 149 days was imposed from September 1, 2023 through January 27, 2024.

12. On November 10, 2023, the agency adjusted the divestment penalty period to May 15, 2023 through October 11, 2023. The Petitioner was enrolled in Community Waivers effective November 1, 2023.

DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat., §49.453(2)(a); Wis. Admin. Code, §DHS 103.065(4)(a); Medicaid Eligibility Handbook MEH § 17.2.1. The penalty period is the number of days determined by dividing the value of property divested by the average daily nursing home cost to a private pay patient. MEH § 17.5.2.

A divestment that occurred in the look back period or any time after does not affect eligibility if the person who divested can show that the divestment was not made with the intent to qualify for Medicaid. MEH § 17.2.6.1. There must be evidence that shows the specific purpose and reason for making the transfer and establish that the resource was transferred for a purpose other than to qualify for Medicaid. The individual's intent must be evaluated on a case-by-case basis to determine whether a divestment occurred. Id.

There are several issues that were raised in this case but the first issue that must be resolved is whether the agency correctly determined that there was a divestment concerning the [REDACTED] property. More specifically, the question is whether the agency correctly determined the fair market value of the property which led to its determination that there was a divestment. The MEH states as follows regarding how the agency is to determine fair market value of an asset:

Fair market value FMV is an estimate of the price an asset has when sold on the open market. The FMV is based on the time an asset is transferred and not when the transfer is reported to or evaluated by the IM agency.

The FMV of real property can be established by:

- **Assessment**
Property tax assessments or appraisals may document a property's FMV if both the IM agency and applicant or member agree that it accurately represents the FMV.
- **Statements from Realtors**
Statements from one or more realtors giving the FMV.
- **Comparative Market Analysis**
Prepared by a realtor, a Comparative Market Analysis estimates the FMV of the applicant or member's property by evaluating the recent sale prices of comparable properties. If the IM agency requests this document, the agency must pay for it.

The applicant or member has the right to file a fair hearing if they disagree with the FMV of the property determined by the IM agency.

MEH, § 17.2.4.

The agency acknowledges that there were errors in determining the divestment and concedes that the agency did not specifically request information from the Petitioner's POA or AR regarding the fair market value of the [REDACTED] properties. The agency further concedes that it erred in its search for information regarding the property tax assessments for the properties. It acknowledges that it relied solely on the fair market value estimate it found on Zillow.

The Petitioner's authorized representative (AR) contends there was no divestment because the agency did not correctly determine the fair market value and the sale of property was not done to qualify the Petitioner for MA. She notes that the agency did not contact her or the POA to obtain information about the fair market value of the properties and the agency's reliance on a Zillow estimate did not meet the requirements of determining fair market value in the MEH. She has since submitted information from realtors, including statements from realtors about the condition of the properties, photographs, and the appraisal/assessment information on file with the county. The county's assessment of the property's fair market value was \$76,000.

The Zillow website contains the following statements concerning its estimate of fair market value of real property:

The Zestimate® home valuation model is Zillow's estimate of a home's market value. A Zestimate incorporates public, MLS and user-submitted data into Zillow's proprietary formula, also taking into account home facts, location and market trends. **It is not an appraisal and can't be used in place of an appraisal.**

The nationwide median error rate for the Zestimate for on-market homes is 2.4%, while **the Zestimate for off-market homes has a median error rate of 7.49%**. The Zestimate's accuracy depends on the availability of data in a home's area. Some areas have more detailed home information available — such as square footage and number of bedrooms or bathrooms — and others do not. The more data available, the more accurate the Zestimate value will be.

<https://www.zillow.com/z/zestimate/> (emphasis added).

Based on the evidence, I conclude the agency did not correctly determine the fair market value of the [REDACTED] property. The agency not only did not follow the MEH in determining the fair market value of the property, but it did not submit any evidence at all of the fair market value of the [REDACTED] property, not even the Zillow estimate. Even if it had submitted evidence of the Zillow estimate, determining fair market value from a Zillow estimate is not acceptable under the requirements of the MEH.

A taxing district's estimated fair market value is done for purposes of tax assessment, and it does not consider a variety of detailed factors that an open market has on a property's value. The Wisconsin Court of Appeals has adopted the IRS definition of fair market value to mean the price that property will bring when it is offered for sale by a person who desires but is not obligated to sell and is bought by a person who is willing but not obligated to buy. *First Wisconsin Nat'l Bank v. Wilson*, 121 Wis. 2d 505, 360 N.W.2d 548 (Ct. App. 1984).

The Petitioner's AR submitted ample evidence that the sale was an arm's length transaction for a property that was in very poor condition, including photographs, listing history, and realtor statements. The home was considered unsafe and required demolition. Based on all the evidence presented, I conclude that the

arm's length sale of the [REDACTED] property along with the photographs and realtor statements of the property's condition demonstrates that it was sold at fair market value. Therefore, the agency incorrectly determined there was a divestment of \$46,000 from the sale of the property.

The AR also asserts that the properties were not sold to qualify for MA. The POA sold the properties to continue to privately pay for care for the Petitioner. The AR provided statements from the nursing facility to show that the POA continued to pay for the Petitioner's care privately from those funds until the funds were exhausted. I found the evidence to be credible that the Petitioner's POA did not sell the properties for purposes of qualifying for MA. For that additional reason, there was no divestment.

Because there was no divestment, the agency did not correctly determine the date the Petitioner was eligible to enroll in Community Waivers. The Petitioner was functionally and financially eligible for MA and Community Waivers effective July 18, 2023. The Petitioner's eligibility and enrollment date should be backdated to July 18, 2023.

Because there was no divestment, there is not a need to address the issue of the undue hardship waiver request.

CONCLUSIONS OF LAW

There was no divestment concerning the sale of the Sandy Road property. The Petitioner's eligibility and enrollment date for MA and Community Waivers should be backdated to July 18, 2023.

THEREFORE, it is

ORDERED

That if this Proposed Decision is adopted by the Secretary of the Department of Health Services as the Final Decision in this matter, the agency must, within 10 days of the date of the Final Decision, take all necessary administrative steps to revise the petitioner's FCP enrollment date to July 18, 2023.

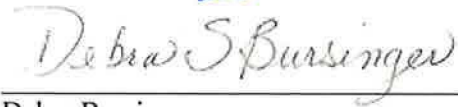
NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH. If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as 'PARTIES IN INTEREST.'

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,
Wisconsin, this 23rd day of January, 2024



Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals