



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

(petitioner)
c/o Cal R. Tillisch, Attorney
Goyke, Tillisch & Higgins, L.L.P.
P.O. Box 2188
Wausau, WI 54402-2188

DECISION

MDV-37/61571

PRELIMINARY RECITALS

Pursuant to a petition filed January 23, 2004, under Wis. Stat. § 49.45(5) (2001-02), to review a decision by the Marathon County Department of Social Services (County) in regard to the Medical Assistance (MA), a hearing was held on February 19, 2004 in Wausau, Wisconsin.

The issue for determination, for purposes of MA divestment, is the Fair Market Value (FMV) of the residential properties at issue in this matter.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner) (not present at the February
19, 2004 hearing)
c/o Cal R. Tillisch
Attorney at Law
Goyke, Tillisch & Higgins, L.L.P.
P.O. Box 2188
Wausau, Wisconsin 54402-2188

Represented by:

Cal R. Tillisch
Attorney at Law
Goyke, Tillisch & Higgins, L.L.P.
P.O. Box 2188
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Wisconsin Department of Health and Family Services
Division of Health Care Financing
Room 250
1 West Wilson Street
P.O. Box 309
Madison, Wisconsin 53707-0309

By: Diane L. Meulemans, Assistant Corporation Counsel
Office of the Corporation Counsel
Marathon County
Room 133
500 Forest Street
Wausau, Wisconsin 54403-5568

OTHER PERSONS PRESENT:

petitioner's wife
Linda Dockstader, ESS

ADMINISTRATIVE LAW JUDGE

Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx; CARES #xxxxxxxxxx; DOB [REDACTED]) is a resident of Marathon County.
2. Petitioner applied for institutional MA on November 25, 2003. Exhibit #2.
3. Petitioner and his wife owned 3 residential properties in the city of Wausau, Wisconsin; on July 30, 2003 they sold 1 of the properties to one of their sons; on July 30, 2003 and September 9, 2003 they sold the other 2 properties to another of their sons; for all three properties the market value as of May 2003 as determined by appraisal was less than the market value as determined by the County for property tax assessment purposes. Exhibits #1, #1B, #1C, #1D, #4A, #4B, #4C & #8.
4. The appraisals that determined the market value of the 3 properties as of May 2003 were done by a disinterested professional appraiser who inspected the properties, was paid for his services, and provided a detailed written report for each property; the appraiser based his appraisal of the properties on an "as is" condition. Exhibits #1B, #1C, #1D, #4A, #4B & #4C.

DISCUSSION

With certain exceptions not applicable here, if an individual, or another person acting on behalf of the individual, transfers assets for less than 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) (2001-02); See also, Wis. Admin. Code § HFS 103.065(4)(a) (February 2002); Medicaid Eligibility Handbook (MEH), Appendix 14.2.0 et. seq.

This section of the Wisconsin Statutes requires the County to examine whether a transfer lacks economic substance by determining whether the asset transfer was made for less than its FMV. *Buettner v. DHFS*, 2003 WI App 90 ¶¶ 1 & 13, 264 Wis. 2d 700, 705 & 712-713, 663 N.W.2d 282. The substance of a transaction, rather than its form, must be examined. *Id.* ¶ 14.

FMV is an estimate of the prevailing price an asset would have had if it had been sold on the open market at the time it was transferred. MEH 14.2.6. It is the amount an asset will sell for upon arms-length negotiation in the open market, between an owner willing but not obligated to sell, and a buyer willing but not obligated to buy. *Buettner* ¶ 18.

In this case the properties were sold to petitioner's sons and petitioner's wife admits that she "gave the boys a break because they were not using a realtor." Therefore, the actual sale price cannot be taken as a reliable indicator of FMV.

The County maintains that the FMV is the market value determined by the County for property tax assessment purposes. However, the County offers little to support this argument. Exhibit #8. Usually a property is not even inspected for purposes of determining market value for property tax assessment purposes.

The appraisals in this case, on the other hand, were done by a disinterested professional appraiser who inspected the properties, was paid for his services, and provided a detailed written report for each property. There is no question that the appraisals, and not the property tax assessment market value, are the best indicator of FMV in this case.

Petitioner claims that the FMV is the appraised value discounted by 5%. Exhibit #1. Petitioner makes 3 arguments to support this: (1) no realtor was involved and there was no realtor commission; (2) sales of properties are often negotiated below their appraised value; and, (3) the age and condition of the properties (the properties were sold "as is"). None of these arguments justify a discount from the appraised value. First, the fact a realtor was not involved (or was involved) has no effect on the FMV. The FMV remains the same whether a realtor is involved or not. Second, properties are, of course, sometimes sold below their appraised value, but there is no evidence in this case that the properties at issue here would have been sold below their appraised value if they had been sold in an arms-length negotiation in the open market. Third, the appraiser inspected the properties and based his appraisal of the properties in this case on an "as is" condition.

CONCLUSIONS OF LAW

For the reasons discussed above, for purposes of MA divestment the FMV of the residential properties at issue in this matter is the appraised value as of May 2003 (without any discount).

NOW, THEREFORE, it is

ORDERED

That this matter be REMANDED to the County and that, within 10 days of the date of this Decision, the County recalculate petitioner's divestment penalty period using, for the residential properties at issue in this matter, the appraised value as of May 2003 (without any discount) as the Fair Market Value (FMV).

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
Madison, Wisconsin, this 7th day of
April, 2004

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