



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MDV-30/115352

PRELIMINARY RECITALS

Pursuant to a petition filed November 03, 2010, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance, a hearing was held on December 13, 2010, at Kenosha, Wisconsin.

The issue for determination is whether the county agency correctly denied petitioner's application for Medical Assistance (MA) due to a divestment of assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney Justin Hemsing
5455 Sheridan Road, Suite 202
Kenosha, WI 53140

Respondent:

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

By: Roberta Bloner, ESS; Karen Mayer, FHC; Lauren Fox, ES Supervisor
Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

Also in appearance: [REDACTED], petitioner's daughter and POA; [REDACTED] petitioner's son;
[REDACTED] petitioner's daughter-in-law; and [REDACTED] petitioner's daughter.

ADMINISTRATIVE LAW JUDGE:

Catherine G. Demski
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.

2. On September 23, 2010, the county agency received an application, on behalf of petitioner, for Institutional Medicaid with a requested backdate of September 1, 2010.
3. On October 22, 2010, the agency issued a Notice of Decision to petitioner's representative, informing her that the application was denied, and a divestment period of September 1, 2010 through May 26, 2012 had been determined. (Exhibit 1).
4. Prior to the transfer of the properties via Quit Claim Deeds executed on September 15, 2010, the petitioner owned two parcels in ██████████ Wisconsin. The two parcels are adjacent to one another, and the addresses are ██████████ and ██████████ ██████████ Wisconsin ██████████. The properties have two separate tax identification numbers.
5. The petitioner transferred the assets and received nothing in exchange for them.
6. Petitioner resided at ██████████ and her daughter LL also resided at that address. LL was petitioner's caregiver, and her presence allowed petitioner to stay in the home rather than be in a nursing home or assisted living facility.
7. The petitioner leased out the property at ██████████ to her children, and the first floor of that property was used as storage for both properties. Petitioner's two children paid \$300 per month for each of their rental units.
8. On September 15, 2010, the petitioner's daughter and POA (NH) transferred real property (██████████ ██████████ Wisconsin) with a value of \$125,400 to petitioner's other daughter (LL).
9. On September 9, 2010, NH purchased a riding lawn mower in the amount of \$4075.46 with petitioner's funds. The lawn mower remains at the property located at ██████████. At that time, the petitioner was still residing at ██████████.
10. The petitioner's children took action to transfer the petitioner's real property and purchase the lawn mower at the time that they applied for MA for their mother because they learned that their mother could have no more than \$2000 in assets in order to be eligible.
11. On November 3, 2010, the petitioner's representative filed an appeal of the agency's denial.

DISCUSSION

A person seeking Medical Assistance is ineligible if her assets exceed \$2,000. Wis. Stat. § 49.47(4)(b)3g. In order to prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by passing their assets to potential heirs, MA law prevents a recipient from reaching this limit by divesting assets. A divestment occurs when an applicant, or person acting on the applicant's behalf, transfers assets for less than their fair market value during the lookback period. The lookback period is generally 36 months. Wis. Stat. § 49.453(1)(f). Divesting assets renders recipients ineligible for MA for the number of months obtained by dividing the amount of disposed assets by the statewide average monthly cost to a private pay patient in a nursing home. Wis. Admin. Code § HFS 103.065(5)(b); Wis. Stat. § 49.453(3); *see also, Medicaid Eligibility Handbook (MEH)*, § 4.7.5.

The parties have agreed that the transfer of the property at ██████████ was not a divestment under the caregiver-child exception. *MEH*, § 17.4. Therefore, the remaining issues for consideration relate to the transfer of the adjacent property located at ██████████ and the purchase of the lawn mower.

Transfer of Real Property at 5510 42nd Avenue

A. Caregiver-Child Exception

The petitioner argues first that the ██████████ property should be exempt for the same reason that the ██████████ property was exempt—the caregiver-child exception. The argument is that the two properties are actually

one homestead, as they have been owned by the same party (the petitioner) for many years, and they have been used in conjunction with one another. Specifically, a portion of the [REDACTED] property was used as storage for the [REDACTED] property. The petitioner relies upon the following provision as a basis for this argument:

16.8.1 Home/Homestead Property

A home is a place of abode and lands used or operated in connection with it. In urban situations the home usually consists of a house and lot. A home can consist of a house and more than one lot. As long as the lots adjoin one another, they are considered part of the home.

Homestead property may have more than one building or house on it. This applies to urban home owners as well as farm families. In farm situations the home consists of the house and buildings together with the total acreage property upon which they are located that is considered a part of the farm. There will be farms where the land is on both sides of a road and considered a part of the home.

Land should be considered part of the home property if it is not completely separated from the home property by land in which neither the individual nor his/her spouse has an ownership interest.

Easements and public rights of way (utility lines, roads, etc.) do not separate other land from the home plot.

If land is completely separated from the home property by land in which neither the individual nor his/her spouse has ownership interest it should not be considered part of the homestead property.

MEH, § 16.8.1. While the provisions above certainly anticipate a situation where a home may consist of two or more houses and/or lots, I am not convinced that was the case in this situation. In this situation, while the properties were adjacent to one another and both owned by the petitioner, and the one property was even used as storage for the other property, the fact remains that the two parcels were two separate homes. The petitioner and a tenant resided in one home (in two separate units), and the petitioner's two children resided in the other home. The petitioner even collected rent from her children for their use of the second property. In fact, when petitioner's son testified, he indicated that he maintained the property at [REDACTED] and his sister "took care of ma's property."

The use of the term "may" in the above policy provisions indicates that it is within the agency's discretion (or permissible) to determine if two houses on two separate lots comprise one "home," but it is not mandatory. I do not find that the agency has erroneously exercised that discretion by determining that the two homes on two separate lots were actually two separate homes. In fact, it seems apparent that they were two separate homes, housing four different family units—petitioner, an unrelated tenant, petitioner's son's family, and petitioner's daughter. The fact that the petitioner chose to use a portion of the second property as storage for the first property does not negate the fact that the two buildings were used as separate properties and separate homes. An owner may use her rental properties for many different purposes, and storage is frequently one of them.

I find that the agency correctly concluded that the transfer of petitioner's home at [REDACTED] [REDACTED] [REDACTED] was an exception to the rule regarding divestment (under the caregiver-child exception), but the petitioner cannot use the same exception to attempt to piggy-back a second property into that category.

B. Transfer of Exempt Business Property

The petitioner has asserted a second, alternative argument with respect to the transfer of the [REDACTED] property. The argument is that the [REDACTED] property was an exempt business asset, the transfer of which was not a divestment. The following is the policy provision relied upon by petitioner:

Business assets are generally income producing property. Exclude assets directly related and essential to producing goods or services.

In EBD cases, all real and non-real business property is exempt if the business is *currently operating* (15.6.1.3 Operating) for the self-support of the EBD individual. There is no profitability test.

MEH, § 15.6.3.1 (emphasis added). The petitioner's argument falls short in several respects. First, the provision which the petitioner relies upon requires that the business be currently operating in order to be exempt. Here, the petitioner transferred the asset free of charge to her children, and therefore, the business is no longer operating. The petitioner is not receiving any income from the property to put toward her self-support. Therefore, the provision does not apply to petitioner's circumstance.

Second, even if the asset were exempt, the income from the business property is not exempt, and the Divestment portion of the manual provides as follows with respect to income divestment:

Income received by an institutionalized person and transferred in the month of receipt is considered divestment.

Example 1: Mr. M. resides in a nursing home. He receives a pension check of \$3,000 a month. Mr. M. immediately signs the check over to his son. This is a divestment.

Unless there is reason to believe otherwise, assume that ordinary household income was legitimately spent on the normal costs of living.

However, there may be divestment if the person transferred amounts of regularly scheduled income which s/he ordinarily would have received. Such a transfer usually takes the form of a transfer of the right to receive income.

When you find the institutionalized person has transferred income or the right to receive income, calculate a penalty period based on the total amount of income transferred.

Example 2: Donald transfers his rights to his \$325,000 pension to his daughter. The *divested amount* is \$325,000, not the \$4,500 the daughter expects to receive each month from the pension.

MEH, § 17.9. In this case, the situation is similar to that posed in Example 2 above. The petitioner transferred her \$125,400 rental property to her daughter, and that rental property produced \$600 per month in income. As above, the full \$125,400 would be held against petitioner because she transferred her interest in the income-producing property.

Overall, the petitioner's argument runs counter to the purpose of the divestment rules. As mentioned above, the divestment penalties are meant to prevent people from transferring assets in an attempt to circumvent the asset requirements and qualify for MA when they otherwise would not. If petitioner's argument was accepted, then it would also be true that the owner of a multi-million dollar company could simply give the company away and then qualify for MA, claiming poverty. Such a scenario is non-

sensical. The purpose behind the aforementioned exception for business assets when determining eligibility for MA is to protect individuals who own small businesses or farms so that they do not have to sell the source of their livelihood in order to pay for their health insurance. The purpose is to enable those individuals to *maintain* their businesses and receive MA. The petitioner transferred her "business" to her children free of charge. She is not interested in maintaining a livelihood any longer. Therefore, the exception can no longer apply to her.

Given all of the above reasons, the transfer of the property located at [REDACTED] was a divestment, and the agency was correct in its determination.

Purchase of Lawn Mower

The county agency determined that there was a divestment of \$4075.46 due to the purchase of a lawn mower by the petitioner's POA on September 9, 2010. The petitioner has argued that the purchase was necessary in order to maintain the petitioner's property, that petitioner still resided at the property at the time that the purchase was made, and that the purchase amounts to exempt personal property.

When determining whether a transfer of assets, such as the cash purchase of a lawn mower, amounts to a divestment, one may look at the intent behind the transaction. The handbook provides as follows:

The person must present 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. Verbal assurances that s/he was not trying to become financially eligible for Medicaid are not sufficient. Take into consideration statements from physicians, insurance agents, insurance documents, and bank records that confirm the person's statements.

MEH, § 17.4, no. 1. In this case, the petitioner's daughter testified that the main purpose behind transferring the properties and purchasing the lawn mower was so that her mother could qualify for MA, as the asset limit for her mother to be eligible was only \$2000.

The petitioner also argued that the lawn mower is personal property that is an exempt asset, under the following provision:

Do not count household goods as an asset.

Household goods include:

1. Items of personal property, found in or near the home, that are used on a regular basis; **and**
2. Items needed by the household for maintenance, use and occupancy of the premises as a home.

MEH, § 16.7.1.1. The petitioner argues that the lawn mower is just like any other household good that the petitioner owns, and it should not be counted as an asset. If the petitioner already had a lawn mower prior to the look-back period, then that would be true. However, the clear testimony in this case was that the lawn mower was purchased after the family knew that the petitioner would be living at the nursing home. The petitioner had no intent to use the lawn mower for maintenance of her house, as the house was going to be transferred by Quit Claim Deed a week later. There was testimony that the properties were in need of a better lawn mower, but, again, the problem is that the parties knew at the time of the purchase that their mother was going to be institutionalized.

Another similar argument was made that the petitioner never gave the lawn mower away, and it remains in her possession at the properties. However, the properties no longer belong to the petitioner; they

belong to the petitioner's daughter. Furthermore, the lawn mower will be used solely by the petitioner's children for the maintenance of the aforementioned properties, which no longer belong to the petitioner. Clearly, this purchase was made as an attempt to decrease petitioner's assets in an attempt to qualify her for MA. The intent of the purchase was to give the lawn mower to her children, which would have been the same as giving her children the cash to purchase the brand new lawn mower themselves.

CONCLUSIONS OF LAW

The county agency correctly determined that the petitioner is not eligible for MA due to a divestment of assets.

THEREFORE, it is

ORDERED

That the petition for review is hereby dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge 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.

To ask for a rehearing, 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 for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be 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 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Department of Health Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53

Given under my hand at the City of Milwaukee,
Wisconsin, this 14th day of January, 2011

/sCatherine G. Demski
Administrative Law Judge
Division of Hearings and Appeals

c:

