



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
Case #: MDV - 190237

PRELIMINARY RECITALS

Pursuant to a petition filed on October 2, 2018, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waupaca County Department of Social Services regarding Medical Assistance (MA), a hearing was held on November 28, 2018, by telephone.

The issue for determination is whether the agency correctly determined that Petitioner was ineligible for institutional MA from December 1, 2017 through January 30, 2018 due to divestment.

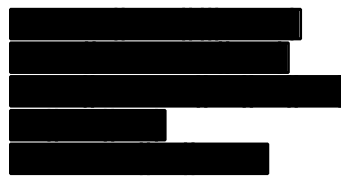
There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: [Redacted]
Waupaca County Department of Social Services
811 Harding Street
Waupaca, WI 54981-2087

ADMINISTRATIVE LAW JUDGE:
Nicole Bjork
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Waupaca County.
2. On September 14, 2018, the agency issued a notice to Petitioner stating that his recent application for MA was denied from December 1, 2017 through January 30, 2018 due to divestment. The agency determined that Petitioner divested \$17,500.00 through money gifted to his children. Specifically, the agency noted \$3,000 in cash gifts to Petitioner's children in 2014, \$7,000 in cash gifts to Petitioner's children and grandchildren in 2015, and \$6,000 in cash gifts to Petitioner's children and grandchildren in 2016. Further, the agency noted \$1,500 to an individual named [REDACTED] that appeared to be a divestment.
3. Petitioner filed a timely appeal.

**DISCUSSION**

A divestment is a transfer of assets for less than fair market value. Wis. Stat., §49.453(2)(a); see also *Medicaid Eligibility Handbook (MEH)*, §17.2.1, available online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. A divestment made within 60 months after petitioner's institutionalization and MA eligibility for nursing home MA may cause ineligibility for that type of Wisconsin MA. Wis. Stat. §49.453(1)(f); *MEH*, §17.3. 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. §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. *MEH*, §17.5.

Petitioner's daughter/POA appeared to testify as to the expenditures the agency determined to be divestment. The agency's rationale was that the \$1500 to [REDACTED] calculated as divestment was determined because there was no verification to support those expenditures. The petitioner's POA's argument was that this amount was spent on her father's personal expenses and not with the intent of becoming eligible for MA. The Wisconsin Administrative Code provides some guidance on divestment:

(d) *Circumstances under which divestment is not a barrier to eligibility.* An institutionalized individual who has been determined to have made a prohibited divestment under this section shall be found ineligible for MA as defined under s. [DHS 101.03 \(95\)](#) unless:

1. The transfer of property occurred as the result of a division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments; or
2. It is shown to the satisfaction of the department that one of the following occurred:
  - a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;
  - b. The resource was transferred exclusively for some purpose other than to become eligible for MA;
  - c. The ownership of the divested property was returned to the individual who originally disposed of it; or d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, "undue hardship" means that a serious impairment to the institutionalized individual's immediate health status exists.

Wis, Adm. Code §DHS 103.065(4)(d).

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the agency, such as the denial of MA due to a divestment of assets was improper given the facts of the case. See 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists under Wis, Adm. Code §DHS 103.065(4)(d).

The *MEH* provides similar guidance:

A divestment that occurred in the look-back period or any time after does not affect eligibility if any of the following exceptions apply:

1. The person who divested shows that the divestment was not made with the intent of receiving Medicaid.

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 he or she 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.**

Any of the following circumstances are sufficient to establish that the *applicant* transferred resources without an intent to qualify for Medicaid.

- The applicant/member had made arrangements to provide for his or her long term care needs by having sufficient financial resources and/or long term care insurance to pay for long term care services for at least a five-year period at the time of the transfer.

An exception to this requirement is allowed if the individual had a life expectancy of less than five years at the time of transfer. If the individual's life expectancy was less than five years at the time of the transfer, a divestment penalty is not applied if resources and/or insurance were sufficient to pay for his or her long term care services for his or her remaining life expectancy.

To measure "sufficient resources," use the average monthly nursing home cost of care in effect at the time of the divestment multiplied by 60. Compare that number to the income, assets, and insurance held by the individual at the time of the divestment, **or**

- **Taking into consideration the individual's health and age at the time of the transfer, there was no expectation of long-term care services being needed for the next five years.** For example, someone who was gainfully employed and 50 years old at the time of the divestment is not expected to have set aside sufficient resources for five years of longterm care, **or**

- **If an individual or couple had a pattern of charitable gifting or gifting to family members (i.e., birthdays, graduations, weddings, etc.) prior to the look-back period,** similar transfers during the look-back period would not be considered to have been given with the intent to divest as long as the total yearly gifts did not exceed 15 percent of the individual's or couple's annual gross income. If the yearly gifted amount exceeds 15 percent of the individual's or couple's annual gross income, and/or there is a gap in the years the gifts occurred, the total amounts gifted for the

years in the look-back period shall be considered divestment. This exemption is not limited to gifts made on traditional gift-giving occasions and does not preclude a pattern of giving to assist family members with education or vocational goals, or

- Resources spent on the current support of dependent relatives living with the individual are not considered to be divestments. The individual must either claim the relative as a dependent for IRS tax purposes, or otherwise provide more than 50 percent of the cost of care and support for the dependent relative.

This list is not intended to be all inclusive when describing divestments which are permissible because the transfer was made without the intent to qualify for Medicaid. Other situations will arise and in those instances, the person's "intent" must be evaluated on a case-by-case basis to determine whether or not a divestment occurred. The fact that a person does not meet the criteria for a specific exception does not create a presumption that the person cannot show that the transfer was made for a purpose other than qualification for Medicaid. For example, a person may be able to show that a transfer to a dependent relative not living at home was made for a purpose other than qualifying for Medicaid.

*MEH §17.4 (emphasis added).*

In this case, Petitioner's daughter testified to the use of the divested funds. Her testimony was that the \$1500 given to ██████████ was for expenses that Petitioner had, such as personal care items. The \$1500 was given in three separate checks for \$500, one on January 25, 2017, one on July 25, 2017 and one on June 4, 2018. However, other than a general statement that the money was spent on personal care items for Petitioner, there was no evidence presented on exactly what that money was spent on or if it was in fact spent on Petitioner's personal expenses. Receipts were not presented. ██████████ did not testify. There was no accounting whatsoever regarding that \$1500. Thus, Petitioner did not establish by the preponderance of the evidence that the \$1500 in checks to ██████████ was for Petitioner's personal expenses and thus, should be considered a divestment.

Additionally, Petitioner gave certain monetary gifts to his family during the lookback period. Specifically, in June 2014, Petitioner gave \$3,000 to his children, \$1000 to each child. This gift occurred after Petitioner received \$3,250 from the estate of his father. Petitioner's daughter testified that Petitioner gifted this amount to his children because he was living comfortably and had no need for \$3000 that he inherited, so he gifted it to his children. In 2014, Petitioner had no indication that he would be entering any nursing facility within 5 years and did not give the \$3000 inheritance to his children because he was trying to reduce his assets in order to receive Medicaid. In fact, Petitioner continued to reside independently after gifting his \$3,000 inheritance to his children. In 2014, Petitioner's gross income was \$37,874 and the \$3,000 he gifted his children from the inheritance he received was substantially less than 15% of his gross income, which would have been \$5,681. Thus, the facts regarding this transaction do not indicate that Petitioner was gifting his assets in order to be deemed eligible for Medicaid, which means this \$3,000 should not be considered a divestment.

Next, Petitioner gave \$7,000 to his children and grandchildren in October 2015, \$1400 to each child and grandchild. This gifting occurred after Petitioner received \$7,462 from his father's Long Term Care Insurance refund. Again, this amount was related to an inheritance from his father's estate. Again, Petitioner determined that he was living comfortably, had enough income to provide for himself and had no indication that he would be entering a nursing facility within the next 5 years. Petitioner did not give the \$7,000 inheritance he received to his children and grandchildren in order to reduce his assets so that he could be deemed eligible for Medicaid. In fact, in 2015, Petitioner's gross annual income was \$78,762

and this \$7,000 gifting was substantially less than 15% of his annual income, which would have been \$11,814. Thus, the facts regarding this transaction do not indicate that Petitioner was gifting his assets in order to be deemed eligible for Medicaid, which means this \$7,000 should not be considered a divestment.

Finally, Petitioner gave \$6,000 to his children and grandchildren in January 2016, \$1200 to each child and grandchild. This gifting occurred after Petitioner received \$6,000 from his father's life insurance policy. Petitioner again determined that he was living comfortably enough, with enough income to provide for himself, that he did not need the \$6,000 and he gifted this inheritance to his children and grandchildren. However, unlike the previous gifts, Petitioner did enter a nursing facility in February 2016, shortly after gifting \$6,000 to his children and grandchildren. Petitioner did earn \$69,790 in 2016 and the \$6,000 did not exceed 15% of his gross income, which would have been \$10,468. However, given that Petitioner entered the nursing facility right after gifting this money, he should have used that money to pay for his nursing care. Under the rules and regulations, Petitioner should not give away funds if he anticipates going into a skilled care facility unless he has enough funds to cover 5 years of care. MEH 17.4. The evidence indicates that in 2014 and 2015, Petitioner did not anticipate that he would need to enter a skilled nursing facility. However, in 2016, when he gifted the \$6,000, he surely anticipated that he would need to enter a skilled nursing facility given that he then immediately entered one. And, while Petitioner was able to pay for the skilled nursing facility until November 2018, he did not have enough funds to pay for the required 5 years. Prior to gifting the \$6,000 in January 2016, Petitioner was required to review his accounts to determine whether he had enough to cover 5 years in a skilled nursing facility, since he knew he was about to enter one. Thus, in this instance, the \$6,000 gifted in January 2016 is considered a divestment.

The preponderance of the credible evidence establishes that the 2014 and 2015 cash gifts to Petitioner's children and grandchildren were not made with the intent to make the Petitioner Medicaid eligible, and thus, were not divestments. However, the \$1500 given to [REDACTED] and then the \$6,000 given to his children and grandchildren in January 2016, were divestments.

### CONCLUSIONS OF LAW

1. The agency incorrectly determined that Petitioner divested \$10,000 (\$3,000 in June 2014 and \$7,000 in October 2015).
2. The agency correctly determined that Petitioner divested \$1,500 to [REDACTED] and \$6,000 to his children and grandchildren in January 2016.

**THEREFORE, it is**

**ORDERED**

That within 10 days, the agency remove the \$10,000 from the divestment penalty and re-determine the divestment penalty amount as \$7,500.

### **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 5<sup>th</sup> Floor, 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.

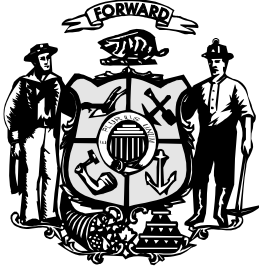
### **APPEAL TO COURT**

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 13th day of December, 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 December 13, 2018.

Waupaca County Department of Social Services  
Division of Health Care Access and Accountability

