



STATE OF WISCONSIN  
Division of Hearings and Appeals

In the Matter of



**DECISION**

Case #: MDV - 214223

PRELIMINARY RECITALS

Pursuant to a petition filed on July 19, 2024, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services regarding Medical Assistance (MA), a hearing was held on September 10, 2024. The matter was set for a briefing schedule on the continuation of benefits, and both parties timely submitted their positions. A second day of hearing was held on November 6, 2024, by telephone.

The issues for determination are whether the petitioner’s MA benefits should be continued pending this Decision and whether the agency correctly imposed a divestment penalty against the petitioner effective April 1, 2024.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney Matthew Kaplan  
Hildebrand Law Firm LLC  
500 W. Silver Spring Dr.  
Ste. K300  
Glendale, WI 53217

Respondent:

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

By: Amanda Eschenberg  
Waukesha County Health and Human Services  
514 Riverview Avenue  
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County.
2. On June 5, 2020 an irrevocable trust agreement (Trust) was created for the petitioner.
3. On July 15, 2020 an immediate annuity was created for the petitioner in the amount of \$79,669, with a first payment to begin on August 15, 2020 in the amount of \$3631.72.
4. In August of 2020 petitioner filed a MA application but was denied due to being over the asset limit.
5. In December 2020 petitioner filed another MA application. Petitioner was determined eligible effective March 1, 2021 for Community Waivers.
6. In February 2023 petitioner moved from her community living arrangement to a Skilled Nursing Facility (SNF) which resulted in her MA program changing from Community Waivers to Institutional Medicaid.
7. On January 16, 2024 petitioner submitted a renewal for her MA.
8. During the processing of the petitioner's renewal, the agency discovered that the home at [REDACTED] [REDACTED] (home) that was held in the Trust was sold on August 16, 2021 after petitioner's father passed away. Petitioner's father had a life estate on the property and petitioner had a remainder interest on the property.
9. On January 18, 2024 the agency requested verification for the sale of the home. On January 26 verifications were received and processed on January 19, 2024. The agency processed the verifications and discovered that the profit from the sale of the home was deposited in [REDACTED] Account [REDACTED]. In reviewing this account, the agency found that in addition to the profit from the sale of the home, additional funds were in the bank account and that the account was held by the Trust.
10. On January 29, 2024 the agency requested verification of the [REDACTED] Account [REDACTED] and the Trust documents to verify the availability of the Trust. The due date was extended to February 19, 2024.
11. On February 19, 2024, the verification requested was not received.
12. On February 20, 2024 the agency issued a notice of decision to the petitioner advising that her MA would close April 1, 2024 due to lack of verification.
13. After the petitioner's case closed, the agency and petitioner were in contact. The agency explained that verification could still be provided to re-open petitioner's benefits.
14. On March 6, 2024, the agency received the full Trust Contract and Schedule A as only the Trust Certificate was provided at the December 2020 application, which was accepted by the agency as the best available evidence at that time due to Covid rules. At the time of application in 2020, the Schedule A had only reported the home had been transferred to the Trust when it was established.

Verification of the additional funds in account [REDACTED] had not yet been provided and the agency did not re-open the case as not all verification requested had been received.

15. On April 5, 2024, petitioner explained to the agency that the other funds in the Trust's bank account were from two IRAs that had been liquidated and put into the Trust and that petitioner had a 22-month divestment. The agency explained that the agency did not have a divestment penalty on file and had no record that IRA funds were transferred to the Trust.
16. On May 28, 2024 the agency received verification of account [REDACTED].
17. On June 5, 2024 the agency issued a notice to petitioner advising her that it imposed a divestment penalty of \$162,143.42 to start on April 1, 2024 through August 26, 2025. The divestment penalty included the value of petitioner's remaining interest in the home at the time she quit claimed the property on June 5, 2020 in the amount of \$71,929.50 and included the IRA funds (noted as American funds as well in the evidence) transferred to the Trust on July 31, 2020 and August 10, 2020 in the amount of \$90,213.92.

## DISCUSSION

### **1. Request for continuation of benefits**

On February 20, 2024 the agency issued a notice to petitioner, via her legal representative, advising petitioner that her MA was closing April 1, 2024 due to failing to verify. See Exhibit 20. The petitioner later submitted the requested verification on May 28, 2024. The agency reactivated petitioner's case on June 3, 2024 and imposed a divestment penalty of \$162,143.42 to start on April 1, 2024 through August 26, 2025. The agency issued a notice to the petitioner on June 5, 2024 advising her of the divestment penalty. The petitioner requested a fair hearing on July 19, 2024. The request for fair hearing did not request the petitioner's benefits be continued.

On September 10, 2024 the fair hearing in this matter commenced. At that time petitioner's legal representative inquired as to the continuation of petitioner's MA benefits pending the hearing decision before the Division of Hearings and Appeals (DHA). I note that petitioner has been represented in some legal capacity throughout her receipt of MA, however, I will continue to refer to her and her representatives as "petitioner" for purposes of this Decision. The parties were allowed to brief the issue as to whether petitioner's MA benefits should be continued and both parties timely submitted their positions. I add that there was no dispute that she remained eligible for MA card services effective April 1, 2024.

Petitioner's argument was that the requests for verification preceding the closure were satisfied prior to closure. Petitioner also argues that the notice of February 20, 2024 implied that her benefits would be continued during the appeal process, and that while she may not have made that request clear on the request for fair hearing form, she still retains that right. She argues that her silence on this subject does not constitute a waiver of her right, citing *State v. Anderson*, 2002 WI 7, ¶ 14, 249 Wis. 2d 586, 638 N.W. 2d 301. Finally, she argues she clearly showed by filing the Request for a Fair Hearing that she objects to the agency terminating her MA benefits "in the first place and that she desires to continue receiving those benefits moving forward."

The agency's argument was that because petitioner's MA started in March of 2021, due to the "Covid policy" waiving renewals, petitioner did not have a review until January 2024. Petitioner submitted a timely renewal on January 16, 2024, and it was processed by the agency on January 17, 2024. Prior to that time, the only change reported was that petitioner had a change in living arrangement and moved from a

community living arrangement to a Skilled Nursing Facility (SNF) in February of 2023 (which resulted in her MA program changing from Community Waivers to Institutional Medicaid).

During the processing of the renewal, the agency discovered that the home, in which petitioner had remainder interest, was sold on August 16, 2021. The agency requested verification of the sale of home, the Trust Contract with the Schedule A, and proof of where the funds from the sale of the home went. The agency processed verifications provided which included the proof of the sale of the home and the bank account where the funds from the sale were deposited (████████ Account ██████████). In reviewing this account, the agency found that in addition to the \$89,000.00 profit from the sale of the home, an additional \$73,924.41 was in the account, and that the account was held by the Trust. A new request for verification was issued requesting what the other funds in the account were from and for the Trust documents and Schedule A to verify the availability of the Trust. When that information was not received, the notice was issued on February 20, 2024 notifying the petitioner that her case would close due to lack of verification. Further contact was had with petitioner and the agency explained that verification could still be provided to re-open her benefits. Verification ultimately occurred and the agency discovered that the other funds in the Trust were from an American funds IRA that had been put into the Trust. The agency then instituted the divestment penalty which is further described below.

The parties' arguments do not truly address the issue of the continuation of benefits, but rather the underlying reason for case closure and divestment. If I find the agency closed the case in error, or incorrectly imposed a divestment penalty, then petitioner's benefits could potentially be reinstated as of April 1, 2024 and those issues are addressed below. The question of the *continuation of benefits* is a different question, however. Petitioner's reliance on *State v. Anderson* as support that her failure to "check the box" requesting a continuation of benefits somehow still gives her a right to continuation is misplaced. Certainly, the DHA is not required to conduct a colloquy to determine the intent and accuracy of every request for fair hearing. Further, her appeal was filed on July 19, 2024, specifically contesting the "coverage denied based on divestment penalty." The effective date of the action was stated as April 1, 2024, and the box for continued benefits was clearly not marked. The determination not to grant continued benefits was correctly made under the DHA's prevailing protocols and based on the law when she filed her appeal. Continued benefits were not requested and therefore they were not granted. The regulation at Wis. Adm. Code § HA 3.05(5) provides:

In cases involving discontinuance, reduction, suspension of assistance or benefits or change in the form of payment of assistance, the division shall order that the adverse action be stayed and benefits continued unchanged pending the hearing decision if the hearing request was filed within the time limits specified in 42 CFR 431.230 and 431.231 for medicaid or within the time limits specified in 7 CFR 273.13 and subject to the exceptions therein for food stamps or, for social services and public assistance, **if the hearing request was filed prior to the effective date of the adverse action.**

Wis. Adm. Code § HA 3.05(5)(emphasis added).

The petitioner neither filed her hearing request prior to the effective date of April 1, 2024, nor requested her benefits be continued on her appeal form. I find no legal basis under which her benefits should be continued. I add, assuming petitioner finds this unfair, that it is the long-standing position of the DHA that its hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

## 2. Whether the agency correctly imposed a divestment penalty against the petitioner effective April 1, 2024.

I find no evidence in this record that petitioner had verified the requested information prior to case closure on April 1, 2024 and that closure was proper. On March 6, 2024, the agency received the full Trust Contract for the irrevocable trust and the Schedule A. The Trust Contract had been requested because only the Trust Certificate had been provided with the 2020 applications. The Trust Certificate was accepted as the best available evidence in 2020 due to Covid rules. In 2020, the Schedule A (which shows the assets held in the Trust) was not provided and the only asset shown to be in the Trust was the home. On April 5, 2024, petitioner explained to the agency that the other funds in the Trust (that had not been verified causing case closure) were from IRAs that had been liquidated and put into a bank account held by the Trust. Petitioner explained at that time petitioner had calculated a 22-month divestment. That divestment was determined by the petitioner, not the agency.

The non-exempt asset limit for a single person applying for/receiving Institutional MA or MA Waivers is \$2,000. See Wis. Stat. § 49.47(4)(b)3g.e; see also *MEH*, § 16.1, available online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm#t=home.htm>. A person cannot give their assets away and receive less than fair market value in return to get under the asset limit. A divestment is a transfer of assets for less than fair market value. See Wis. Stat. § 49.453(2); *MEH* § 17.1. A divestment or divestments made after 2008, and within 60 months before an application/review for MA may cause ineligibility for that type of MA. See Wis. Stat. § 49.453(1)(f), Stats.; *MEH* § 17.3. The ineligibility is only for nursing home care and Community Waivers services and does not impact eligibility for other medical services such as medical care, medications, and medical equipment. The penalty period is calculated in days, which is determined by dividing the value of property divested by the average daily cost of nursing facility services. See Wis. Stat. § 49.453(3)(b); *MEH* § 17.3.2.

### a. Divestment #1: Home

The agency imposed the first divestment penalty for the home. At the time of the 2020 applications, the only reported asset in the Trust was the home property held in a life estate in Milwaukee. Petitioner's father had been residing in the home at the time it was transferred to the Trust on June 5, 2020. As explained at hearing, the agency conceded it had erroneously exempted that asset in 2020 by incorrectly interpreting the MA policy in *MEH* § 16.8.1.3. During the January 2024 renewal, it was found that petitioner did not meet the definition of "institutionalized person" under that policy at original application as she was living in the community in an assisted living facility in New Berlin and was not found functionally eligible for Community Waivers until November 16, 2020. See *MEH* § 27.4.1. The divestment imposed was for the value of petitioner's remaining interest in the home at the time she quit claimed the property on June 5, 2020. See *MEH* §§ 17.2.2 and 16.8.1.6. At that time, the remainder interest was \$71,929.50 and that it what was counted for this divestment.

### b. Divestment #2: the IRA funds

During the processing of the 2024 renewal, the agency also discovered that the home, in which petitioner had a remainder interest, was sold on August 16, 2021. The agency requested verifications as noted above. The agency processed the verifications which included [REDACTED] Account [REDACTED]. In reviewing this account, the agency found an additional \$73,924.41 in the account and that the account was held by the Trust. A new request for verification was issued. It was not until after petitioner's case closed April 1, 2024 that the agency found out that IRA funds (noted as American funds as well in the evidence) transferred to the Trust on July 31, 2020 and August 10, 2020 in the amount of \$90,213.92. The agency argues that this should have been reported at applications in 2020, and had this been reported,

the agency would have imposed a divestment penalty then of 314 days and petitioner would not have eligible for benefits until September 2021.

The petitioner argues that she had a 22-month divestment and the MA compliant annuity was created to get her through a penalty period and cover/pay for the divestment. There was no dispute that the income from the annuity was used to determine her cost share while she was eligible for Community Waivers. Petitioner argues that MA paid for her benefits after she was found eligible, and she privately paid for her care as well using up the annuity over the course of the penalty period. She argues that the facility would therefore be getting paid twice. She argues because the [self-imposed] 22-month divestment has been paid through that annuity, that the second imposition of a divestment is invalid and unfair. She argues that the agency did not ask enough questions, such as “why did you set up an annuity?”, “what divestment penalty period have you calculated?”, “what funds are we not asking for?”. Further, the petitioner argues that the [REDACTED] Account [REDACTED] was provided earlier but the agency failed to investigate it.

The agency argues it did not know of the intent of the MA-compliant annuity, only that there was one in 2020. The agency argues that MA-compliant annuities are not considered divestment. See, e.g., *MEH* § 17.2.6.14. Thus, the annuity was not considered a divestment in 2020 and the agency calculated no penalty period. Based on the information at the time of the 2020 applications the agency only had information showing the Trust held the home (which was exempted erroneously), and the MA-compliant annuity was considered an allowable divestment. It was not reported in the application or in verification provided that showed the agency that her IRAs had been liquidated and moved into a bank account held by the Trust. The agency argues that had this information been known at the time of application in November 2020 a divestment penalty would have been imposed and petitioner would have opened for MA benefits until the penalty had been served.

I find no basis for overturning the imposition of the divestment on the house - even if it was not discovered until 2024 and the agency had erroneously exempted it earlier. I also find no basis for overturning the imposition of the divestment on the IRAs. The petitioner may have known and prepared for the divestment of the home with the annuity, but the agency never imposed a divestment and no notice of decision issued to the petitioner ever indicated a divestment was imposed. I find no authority for an applicant to determine and rely on its own divestment calculation. The agency asked for the petitioner’s asset information at the time of applications in 2020 but not all of the information was reported. I cannot find the agency erred in failing to ask about assets it was not made aware of. Petitioner is essentially arguing that the MA compliant annuity “cured” at least some of the divestment by using it to privately pay, but a divestment cannot be cured by something that was not a divestment, and the annuity was not a divested asset. See *MEH* §§ 17.3.5.1. Based on the evidence before me, I find the agency correctly imposed the total divestment penalty of \$162,143.42 from April 1, 2024 through August 26, 2025.

### CONCLUSIONS OF LAW

1. Petitioner was not entitled to receive continued MA benefits pending this Decision.
2. The agency correctly imposed a divestment penalty against the petitioner in the amount of \$162,143.42 from April 1, 2024 through August 26, 2025.

**THEREFORE, it is**

**ORDERED**

The petition for review herein is dismissed.

## 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 North, 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.

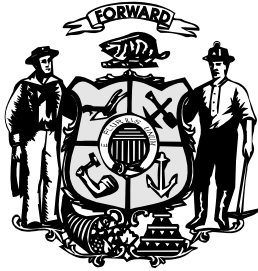
## APPEAL TO COURT

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 27th day of November, 2024

\s \_\_\_\_\_  
Kelly Cochrane  
Administrative Law Judge  
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on November 27, 2024.

Waukesha County Health and Human Services  
Division of Health Care Access and Accountability  
Attorney Matthew Kaplan