



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
c/o Atty Peter Grosskopf
1324 W Clairemont Ave Suite 10
Eau Claire, WI 54701

DECISION

MDV/146580

PRELIMINARY RECITALS

Pursuant to a petition filed January 10, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Dunn County Department of Human Services in regard to Medical Assistance, a hearing was held on April 17, 2013, at Menomonie, Wisconsin. A hearing scheduled for February 20, 2013, was rescheduled at the petitioner's request. A hearing scheduled for March 19, 2013, was rescheduled because the worker had a family emergency.

The issue for determination is whether the county agency correctly determined that the petitioner was ineligible for medical assistance because she had not completely cured her divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
c/o Atty Peter Grosskopf
1324 W Clairemont Ave Suite 10
Eau Claire, WI 54701

Petitioner's Representative:

Attorney Peter Grosskopf
1324 West Clairemont Ave Suite 10
Eau Claire, WI 54701

Respondent:

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

By: Paula Goodell

Dunn County Department of Human Services
808 Main Street
PO Box 470
Menomonie, WI 54751

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) had been a resident of a nursing home in Dunn County since September 26, 2012. She died on October 12, 2012.
2. The petitioner applied for institutional medical assistance on August 30, 2012, requesting benefits retroactive to May 1, 2012.
3. At some point before applying for medical assistance, the petitioner gave \$85,351.29 to her relatives.
4. Those receiving the petitioner's money paid approximately \$89,000 for her nursing home care after receiving that money. Of this amount, \$26,901.59 was paid after May 1, 2012.
5. The county agency determined that only the funds paid on the petitioner's behalf after May 1, 2012, reduced any divestment that occurred when she gave her money away. It determined that \$58,449.70 remained divested, which resulted in a divestment penalty period of 271 days, beginning on May 1, 2012, and ending on January 27, 2013.

DISCUSSION

A person cannot receive institutional medical assistance if her assets exceed \$2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf "disposes of resources at less than fair market value" within five years of later of when they were institutionalized and applied for medical assistance. Wis. Adm. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). If the person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private pay patient in a nursing home when she applied. Wis. Admin. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The currently average daily cost of nursing home care is \$215.48. *Medicaid Eligibility Handbook*, § 17.5.2.2. The date the divestment penalty period begins depends upon when the divestment occurred. If the divestment occurred on January 1, 2009, or later, the period begins on the date the person is institutionalized, has applied for medical assistance, and is otherwise eligible for benefits. If the divestment occurred earlier than this, the penalty period begins the month the divestment occurred. *Medicaid Eligibility Handbook*, § 17.5.3. A divestment penalty period can be reduced or eliminated if the asset is returned. Wis. Admin. Code, § DHS 103.065(4)(d)2.c. Medical assistance eligibility can be made retroactive to "the first day of the month 3 months prior to the month of application" if all of the program's eligibility requirements have been met. Wis. Admin. Code § DHS 103.08(1).

The petitioner went into the nursing home on September 26, 2010, and remained there until she died on October 12, 2012. On August 30, 2012, she applied for institutional medical assistance, requesting benefits retroactive to May 1, 2012. At some point she gave away \$85,351.29 to her relatives. However, they then spent over \$89,000 for her nursing home care. Of this amount, \$26,901 was spent after the May 1, 2012, date on which she seeks to begin her eligibility. The agency reduced the divestment by the \$26,901 spent on her care after the May 1, 2012, date she requests that her eligibility begin. This left a \$58,449.70 divestment, which resulted in a 271-day divestment penalty period beginning May 1, 2012, and ending January 27, 2013.

The agency relies upon *Medicaid Eligibility Handbook*, § 17.5.5.2., which pertains to partial refunds of a divested asset, to continue to count money paid for nursing home care before May 1, 2012 as part of the divestment. That section states: "When part of a resource or its equivalent value is returned through a cash payment, the divested amount and the penalty period is recalculated only if the returned resource is used to pay for medical and remedial expenses incurred during the divestment penalty period or for the cost of

care previously provided to the individual during the divestment penalty period.” Because the divestment penalty period does not begin until the petitioner is otherwise eligible, or May 1, 2012, the agency contends that any money returned in the form of medical payments before that date does not reduce the amount of the divestment or the divestment period.

The petitioner counters that this was a full rather than a partial repayment of the divestment, and that therefore the agency should have relied upon the policy that covers full repayments. That policy, found in the *Medicaid Eligibility Handbook*, § 17.5.5.1., states: “When the entire divested resource or equivalent value is returned to the individual, the entire penalty period is nullified.” That section does not limit repayments to the penalty period, instead stating: “The refunded resources will be counted as available assets beginning with the month in which they were returned.”

The whole discussion has a chicken-and-egg quality to it. If the policy pertaining to partial repayments is invoked, then the petitioner only partially cured the divestment because the limitations spelled out in that policy mean that only those funds returned after May 1, 2012, reduce the divestment. However, if the policy pertaining to a complete repayment is invoked, because those limitations are not present, then the petitioner completely cured the divestment. Regardless of which policy is used, it is important to remember that these policies are only interpretations meant to help workers carry out the law; they are not the actual law, which is found in the statutes and administrative code provisions.

The language of the Wisconsin statute covering this situation, Wis. Stat. § 49.453(8)(a)1, states that a divestment does not occur if the “assets are exempt under 42 USC 1396p(c)(2)(A), (B), or (C). Wis. Stat. § 49.453. The cited federal statute states a divestment does not occur if “all assets transferred for less than fair market value have been returned to the individual.” 42 USC 1396p(c)(2)(C)iii. Similar language is used in Wis. Admin. Code, § DHS 103.065(4)(d)2.c., which states that a divestment does not occur if the “ownership of the divested property was returned to the individual who originally disposed of it.” None of these provisions limit the period in which a divestment can be cured to the divestment penalty period. Indeed, limiting the repayment period to the divestment penalty period only makes any sense at all in relation to these statutes and administrative code provisions if the penalty period refers that for divestments that occurred before January 1, 2009, in which case the penalty period begins when the divestment occurred rather than when the person was otherwise eligible for benefits, the time it begins for later divestments. Viewed in the context of those pre-2009 circumstance, what the *Medicaid Eligibility Handbook*, § 17.5.5.2., did was make it clear that if someone had made nursing home payments on behalf of another person without being reimbursed, the nursing home resident could not claim that those payments retroactively cured any later divestment that might occur.

Policy makers do have some discretion concerning what qualifies as returning an asset. The Department has used this discretion to allow payments to a nursing home to be used to reduce a divestment. This provision makes sense because these payments are something that is clearly for the recipient’s sole benefit, and thus do not allow the person returning the divested asset to retain some partial or tangential value, something that would not be true if a child gave his aging parent a car. But any discretion exercised by the Department must be consistent with medical assistance law. In order to reverse a divestment, those laws require only that assets given away be given back. Neither party disputes that all of the funds the petitioner gave to her children have been returned to her in the form of nursing home payments. Based upon this, I find that there is no divestment and that she is eligible for medical assistance as of May 1, 2012, the date both parties agree she would be eligible if there is no divestment.

CONCLUSIONS OF LAW

1. The petitioner cured her divestment when those who received the benefit of the divestment paid for her nursing home costs.
2. The petitioner was eligible for institutional medical assistance as of May 1, 2012.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it find the petitioner eligible for medical assistance retroactive to May 1, 2012.

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

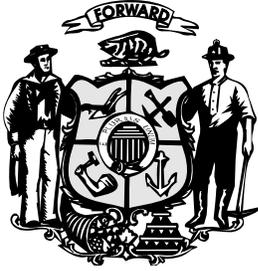
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

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 Madison,
Wisconsin, this 23rd day of April, 2013

\sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on April 23, 2013.

Dunn County Department of Human Services
Division of Health Care Access and Accountability
peter@eclawyers.com