DHA-15 (R10/97)

# STATE OF WISCONSIN
# Division of Hearings and Appeals

In the Matter of

(petitioner)
(petitioner's address)

DECISION

MDV-44/45328

## PRELIMINARY RECITALS

Pursuant to a petition filed July 13, 2000, under Wis. Stat. § 49.45(5) (1997-98), to review a decision by the Outagamie County Health and Human Services (County) in regard to Medical Assistance (MA), a hearing was held on August 21, 2000 in Appleton, Wisconsin. A hearing set for July 31, 2000 was rescheduled at petitioner's request.

The issue for determination is whether petitioner is ineligible for MA from June 1, 2000 through August 2001 due to divestment of assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner: Represented by:

(petitioner)

Dennis M. Wydeven
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Wisconsin Department of Health and Family Services
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BY: Evy Deininger, ESS II
Outagamie County Health and Human Services
Economic Support Division
Human Services Building
Level 2
401 South Elm Street
Appleton, Wisconsin 54911-5985

HEARING OFFICER:

Sean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Outagamie County, Wisconsin.

2. Petitioner applied for MA in June 2000 and requested MA eligibility to begin in June 2000. Exhibit #2.

3. Petitioner made the following divestments in the total amount of $92,400.90 on the dates indicated:

   September 20, 1999: $67,272.00;

   September 23, 1999: $10,000.00;

   September 23, 1999: $6,928.90; and,

   December 20, 1999: $8,200.00;

   TOTAL: $92,400.90.

   Exhibits #1, #2, #3 & #4.

4. Petitioner also had the following additional divestments: June 5, 1997 $11,508.54; another June 5, 1997 $11,508.54; June 19, 1997 $23,017.19; December 22, 1997 $8,000.00; and, December 22, 1998 $8,100.00. Exhibits #1, #3 & #4.

5. None of petitioner's divestments involved trusts. Exhibits #1, #3 & #4.

6. The average nursing home cost to a private pay patient during the time period in question was $3,833.00. Exhibits #1, #3 & #4.

7. The County sent petitioner a manual "Negative Notice" dated June 23, 2000 stating, in relevant part, that petitioner "is NOT eligible for nursing home coverage from 06-01-00 through 08-2001, due to divestment of assets." Exhibit #3 (underline and CAPITALS in original). Exhibit #3B.

8. June 2000 is the first date on which petitioner was both an institutionalized individual and had applied for MA. Exhibit #2.

## DISCUSSION

With certain exceptions not applicable here, if an institutionalized individual, or another person acting on behalf of the institutionalized individual, transfers assets for less than Fair Market Value (FMV) on or after the institutionalized individual's look-back date (such transfers are commonly known as "divestment"), the institutionalized individual is ineligible for nursing facility services under MA for a specified time period. 42 U.S.C. § 1396p(c)(1)(A) (Supp. 2000); Wis. Stat. § 49.453(2)(a)1. (1997-98); Wis. Admin. Code § HFS 103.065(4)(a) (March 2000); MA Handbook, Appendix 14.1.0, 14.2.1, 14.2.2 & 14.5.0.

There is no dispute that petitioner divested assets as noted in Finding of Facts #3 and #4, above. Petitioner does not deny this.

The period of MA ineligibility due to divestment is known as the "penalty period". The penalty period begins with the month of divestment and extends for the number of months that result from dividing the divested amount by the average nursing home cost to a private pay patient. 42 U.S.C. § 1396p(c)(1)(E) (Supp. 2000); Wis. Stat. § 49.453(3)(b) (1997-98); Wis. Admin. Code § HFS 103.065(5)(b) (March 2000); MA Handbook, Appendix 14.5.0. In this case the average nursing home cost to a private pay patient is $3,833.00.

"Multiple divestments" are 2 or more separate divestments made within a 36 month period before the MA application date or the date of entering an institution or at any time thereafter. For multiple divestments the penalty period is calculated as follows:

1. Add together all the divested amounts of transfers in the look-back period or any time thereafter that are connected in any of the following ways:
    a. transfers that occur in the same month;
    b. transfers that occur in both months of a period of any 2 consecutive months;
    c. transfers with a penalty period that extends into a month in which there is another transfer; or,
    d. transfers with a penalty period that extends into the month immediately preceding a month in which there is another transfer.
2. Calculate the penalty period.

MA Handbook, Appendix 14.6.0.

In this case the divestments noted in Finding of Fact #3, above, are multiple divestments and satisfy the criteria in 1.a.-d., above. Therefore, all the divestments noted in Finding of Fact #3, above, are added together and divided by the average nursing home cost to a private pay patient ($3,833.00) in order to arrive at the penalty period. All fractions are rounded downward. MA Handbook, Appendix 14.5.0. This gives a penalty period of 24 months ($92,400.90/$3,833.00 equals 24.1067 rounded downward to 24).

As noted above, the penalty period begins with the month of divestment and extends onward. The first month of divestment relevant here is September 1999; 24 months from September 1999 is August 2001. Thus, the County was correct when it concluded that petitioner is ineligible for MA from June 1, 2000 through August 2001 due to divestment of assets -- although petitioner is actually ineligible for a longer period of time that includes September 1999 through August 2001.

Petitioner also had the additional divestments as noted in Finding of Fact #4, above. These divestments are not relevant here since the penalty periods for these divestments do not impact time periods for which petitioner is requesting MA coverage.

Petitioner does not argue that he has not divested. Instead, petitioner argues that the penalty period for his divestments must end in May 2000. Exhibit #3, p. 3. First, petitioner argues that he divested $171,830.99 on May 16, 1997, that the penalty period for that divestment ends in May 2000, and that that penalty period somehow supplants all other penalty periods. However, any gifting of assets that took place in May 1997 cannot be a divestment since May 1997 is not within the 36-month look-back date that applies in this case.

For an institutionalized individual the "look-back date" is at 36 months (unless a trust is involved, in which case it may be 60 months) before the first date on which the individual is both an institutionalized individual and has applied for MA. 42 U.S.C. § 1396p(c)(1)(B) (Supp. 2000); Wis. Stat. § 49.453(1)(f)1. (1997-98); MA Handbook, Appendix 14.3.0.; See also, Wis. Admin. Code § HFS 103.065(4)(a) (March 2000).

This case does not involve trust and the look-back date is therefore 36 months prior to the first date on which petitioner was both an institutionalized individual and had applied for MA -- which was June 2000. When calculating the look-back date the counting starts with the month before the more recent of the date of application or the date of entry into a nursing home. MA Handbook, Appendix 14.3.0. In case, the earliest the look-back date can be is 36 months prior to June 2000, which is June 1997. This is because the date of the application in this case is June 2000. Thus, June 2000 is the earliest date that can be used when calculating the look-back date. If the date of petitioner's entry into a nursing home is earlier than June 2000, June 2000 must still be used.

Second, petitioner argues that the maximum penalty period is 36 months and that all his divestments taken together exceed this maximum. It is simply not correct that the maximum penalty period is 36 months. There is no maximum penalty period. The legal citations petitioner provides to support his argument ["§1396p(E)" and "42UCSC§1396P"] do not exist. Exhibit #3, p. 2 & Exhibit #3D. It is true, as petitioner seemed to point out at the August 21st hearing, that there is no penalty period for a gift if the gift is made prior to the look-back date -- as was the case with petitioner's $171,830.99 gift. However, this is much different than saying that there is a maximum penalty period. Divestments, which, by definition, must be made after the look-back date, have no maximum penalty period.

## CONCLUSIONS OF LAW

For the reasons explained above, petitioner is ineligible for MA from June 1, 2000 through August 2001 due to divestment of assets.

**NOW, THEREFORE, it is**

## ORDERED

That the petition for review herein be and the same is hereby dismissed.

## 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 the Wisconsin 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 _____ day
of _____, 2001.

_____
Sean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals
10112000/SPM

xc:
Outagamie County Health and Human Services