



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MDV-66/110878

PRELIMINARY RECITALS

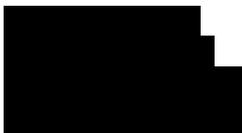
Pursuant to a petition filed April 07, 2010, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Washington County Department of Social Services in regard to Medical Assistance, a hearing was held on May 04, 2010, at West Bend, Wisconsin.

The issues for determination are whether a divestment has occurred, when it occurred, if it occurred, whether the agency correctly determined the value of the divestment and whether the agency correctly calculated the penalty period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Sally Chapman and Linda Hunt
Washington County Department of Social Services
333 E. Washington Street
Suite 3100
West Bend, WI 53095

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Washington County.
2. An application for institutional Medicaid was filed on behalf of Petitioner in January 2010.

3. Petitioner's January 2010 application was denied as the county agency determined that a divestment had occurred. The agency imposed a 386 day penalty period effective October 1, 2009 and running through October 21, 2010.
4. The property that the county agency determined had been divested was a parcel of real estate located in Oneida County and \$9500.00 in cash. The agency determined that real estate divestment occurred in April 2009 as a quit claim deed was signed on that date and a withdrawal from Petitioner's checking account in the amount of \$9500 was made in November 2009 for the benefit of others.
5. The county agency determined the value of the divested real property to be \$172,000 based on the December 2008 Oneida County real estate tax bill. From that sum was deducted \$20,000 in improvements and payments of \$80568.26 for a net real estate divestment of \$71,431.74.
6. Petitioner signed a sale agreement, apparently on June 1, 2005b that agreed to transfer the Oneida County property to her sons JW and DW for \$100,000. JW and DW signed a note on June 1, 2005 in which they agree to pay \$100,000 to Petitioner in 24 equal installments of principal plus accrued interest at the rate of 4.57% beginning June 1, 2006. Interest in the amount of 12% was to accrue on any unpaid balances of principal and interest. No payments were made on this note but beginning in October 2008 the brothers began making periodic payments to Petitioner for her care. Through December 2009 those payments totaled \$80,568.26. As noted at Finding # 5 those payments were credited reducing the amount of the divestment.
7. A check in the amount of \$9500 was drawn from Petitioner's account and made payable to the Oneida County Treasurer in November 2009. As the family owns other real estate in Oneida County the agency could not determine for which property the money was paid so concluded that it was a divestment.
8. The total divestment was determined by the agency to be \$80,931.74 (\$71,431.74 + \$9500). This was divided by the daily private pay rate of \$209.16 applicable at the time of application to arrive at a 386 day penalty period ($\$80,931.74/209.16 = 386$).

DISCUSSION

Petitioner was represented at the hearing by her sons JW and DW. They maintain that there should be no divestment as their mother intended to transfer the subject property to them in 2001 though it was not formalized until the 2005 sale agreement. They contend that that agreement was essentially a land contract. Alternatively they argue that if there is a divestment, the value of the property should be \$120,000 based on the 2005 agreed to price and they should be given credit for contributions to their mother that exceeds the \$120,000 value. They contend that those contributions are the \$80,568 as well as the \$20,000 in property improvements. They also believe that they should be credited with an additional cash payment from December 2009 in the amount of \$10,000, the \$9769 for real estate taxes and penalties paid going back to the year 2002 and the \$9500 noted at Finding # 7.

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse transfers assets at less than fair market value, the individual is ineligible for Institutional MA, which provides coverage of nursing facility services. *42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code §DHS 103.065(4)(a); Medicaid Eligibility Handbook (MEH), §17.2.1.* Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (these are called "MA card services").

Previously, the penalty period was calculated as the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. The Federal Deficit Reduction Act of 2005 (DRA) requires the imposition of partial months of ineligibility for divestments. For all divestments that occur on or after January 1, 2009, the penalty periods are to be calculated as the number of days for which Medicaid will not pay for long term care services. Penalty periods are no longer

rounded down to whole months. In order to impose partial months of ineligibility, as required by the DRA, all divestment penalties will be calculated in days, using the average daily nursing home cost to a private pay patient. *Medicaid Eligibility Handbook, § 17.5*. Thus to determine the penalty period for a divestment the average daily rate is computed by multiplying the average monthly rate by 12 and dividing by 365. Also see *Operation Memo 09-01, issued January 7, 2009 at page 12*. Finally, I also note that divestments occurring after January 1, 2009 are added together and the total used to determine the length of the penalty period. *Operations Memo 09-01, at page 4*.

The first issue is when Petitioner actually conveyed the subject property to her two sons. While the sons contend that it was in 2005 and while Wisconsin real property statutes (*see generally Chapter 706, Stats.*) do recognize conveyances made other than by deed, the *Medicaid Eligibility Handbook, at §17.2.2.1*, defines the transfer of property date for purposes of the Medicaid program as follows: "If the Medicaid member has transferred real property, such as a homestead, the official date of transfer is the date the Quit Claim Deed was signed." Here the quit claim deed was executed on April 10, 2009. Thus, that is the date of the transfer that must be used.

The April 2009 transfer date does not mean that it was a disqualifying divestment if there is proof to the contrary. For example, when services are provided by a family, there has to be a contemporaneous recording of what they were and on what dates. Further, if goods or services were purchased for the applicant, there must be documentation of what they were and evidence that the intent was they were purchased in exchange for the eventual ownership for the property. In this case, the county agency accepted \$80,568.26 as such services as well as the \$20,000 for property repairs and those sums were not subjects considered at the hearing. As for the \$9769 for taxes and penalties going back to 2002, the \$10,000 payment made in late 2009 and the November 2009 \$9500 payment; I am not allowing those as additional deductions from the divestment. Quite frankly, the record keeping by the sons concerning these amounts is not sufficient to demonstrate what they were for.

I do, however, have a problem with the valuation used here. Real estate property tax bills contain an assessment of value as of January of the year for which the taxes are levied. *§70.10, Wis. Stats.; also generally the State of Wisconsin Department of Revenue website with respect to real estate tax bills*. Here the agency determined the value of the property using a December 2008 tax bill which would have reflected a January 2008 value. Given the fact that the application was made in 2010 the December 2009 tax bill was available and that value would more accurately demonstrate the value of the property in April 2009 than the December 2008 tax bill reflecting a January 2008 value. Unfortunately the December 2009 tax bill was not made available at the hearing so the agency will have to obtain it and redetermine the penalty period based on that value. (There is some indication that the value as of January 2009 was about \$144,000; using this number the amount of the divestment would be about \$44,000 with a penalty period of about 210 days.)

CONCLUSIONS OF LAW

1. That the agency correctly concluded that a divestment occurred with the April 2009 transfer of Petitioner's Oneida County property to her sons.
2. That the property value used was based on an outdated real estate tax bill and should have used the value for the year of the divestment.

THEREFORE, it is

ORDERED

That this case is sent back to the agency with instructions to redetermine the value of the real estate involved here using the December 2009 tax bill and to redetermine the penalty period using that 2009 value. This must be done within 10 days of the date of this Decision.

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 25th day of June, 2010

/sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals

c: 