



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: MLL - 203437

PRELIMINARY RECITALS

Pursuant to a petition filed on October 12, 2021, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Medicaid Services regarding estate recovery under Medical Assistance (MA), a hearing was held on November 30, 2021, by telephone.

The issue for determination is whether the Department of Health Services, by its agents, correctly denied the petitioner's application for a hardship waiver because it was untimely filed.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: [REDACTED], Section Manager/Estate Recovery Unit
Division of Medicaid Services
PO Box 309
Madison, WI 53701-0309

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County. He is the adult son of [REDACTED] and he is not disabled. [REDACTED] passed away on October 24, 2020.
2. Prior to her demise, [REDACTED] had received public assistance in the form of benefits from the Wisconsin Medical Assistance Program, apparently sub-programs thereof including but not

limited to, the Community Options Program (COP), the Wisconsin Chronic Disease Program (WCDP) and Family Care.

3. On April 13, 2021, the Wisconsin Department of Health Services, Division of Medicaid Services – Estate Recovery Section, was alerted by the Milwaukee County income maintenance agency that the petitioner’s mother was deceased and had assets at the time of her demise.
4. On April 16, 2021, the Department, by the Estate Recovery Section, issued a Notice to the petitioner at his residence address, informing him that the Estate Recovery Program recovers the funds of deceased Medicaid, Community Options Program, Wisconsin Chronic Disease program and Family Care recipients; and returns such recovered funds to the programs to provide benefits for others in need, in care of the State of Wisconsin. The Notice further indicated that the Department had ascertained that Accomondo had possessed assets at the time of her demise in the form of payable on death accounts at the [REDACTED]; and such funds, as well as other assets, were subject to recovery by the State. This Notice directed the petitioner to respond with a complete list of the decedent’s estate’s assets and expenses within 45 days of the date of the Notice.
5. Also, attached to the Notice of April 16, 2021, was a document entitled a NOTICE TO HEIR, BENEFICIARY OR CO-OWNER OF HARDSHIP WAIVER PROVISIONS, that informed the petitioner of his right under law to request a hardship waiver as to his portion of the decedent’s estate, from the provisions of estate recovery of his mother's assets by the State of Wisconsin. This NOTICE informed him that he must file a written request for a hardship waiver within 45 days of the date of this NOTICE, i.e., it must be postmarked by May 31, 2021. It must also assert the relationship of the applicant to the decedent with proof attached of the relationship; and provide a statement of which of the three reasons for granting a hardship waiver applied to the applicant. (The NOTICE then stated the three reasons allowed under law.) See, Exhibit R-1, attached NOTICE TO HEIR, BENEFICIARY OR CO-OWNER OF HARDSHIP WAIVER PROVISIONS, dated April 16, 2021.
6. On April 22, 2021, the petitioner left a voicemail message at the Estate Recovery Section phone number provided, asking for a callback at [REDACTED]. A state employee attempted to call him back on April 23, 2021, but there was no answer and no voice mailbox set up or enabled, so no message could be left. See, Exhibit #1, attached Summary Letter of November 19, 2021.
7. On July 16, 2021, the Department sent a follow-up demand letter to the petitioner demanding payment or surrender of all assets of the decedent in his possession, and/or a complete list of the decedent’s estate’s assets and expenses; and attaching a copy of the complete correspondence packet sent to him of April 16, 2021, and attachments as background information. See, Exhibit R-2.
8. On July 27, 2021, petitioner [REDACTED] called the Estate Recovery Section acknowledging that he had received the July 16, 2021, letter described in Finding of Fact No. 7, above, and had been in contact with his attorney. He related that he had sent the original letter to his attorney and thought it had been taken care of by him, because he himself did not understand what was needed for the waiver. The DHS representative explained to him that it was now passed the deadline for requesting a hardship waiver, and if he did so, it would likely be denied as untimely filed, and then he could request a fair hearing.
9. On July 27, 2021, attorney [REDACTED] contacted the Department’s Estate Recovery Section; was transferred to a hardship waiver specialist who apparently was not available; and [REDACTED] ultimately left a message for a callback at his number.
10. On July 28, 2021, a representative of the Estate Recovery Section called petitioner [REDACTED] for permission to talk with [REDACTED] about his affairs, as no retainer agreement or letter notice of same was on file in the matter. That permission was given, and the DHS representative called

- █████, explained that the deadline for a hardship waiver had passed, but if they applied for it, and it was denied, they could then request a fair hearing. DHS again requested a list of the decedent's expenses and assets, a copy of the petitioner's ForwardHealth card and birth certificate.
11. On August 3, 2021, a DHS representative spoke to the petitioner on the telephone and explained the hardship application process, and that █████ needed to send a copy of his card and birth certificate to █████, so he could give it to DHS. █████ said he would.
 12. On August 4, 2021, Attorney █████ called the Estate Recovery Section and left a voicemail again asking for clarification of what was needed. DHS tried to call back, there was no answer, and a voicemail was left for █████. █████ called back later that day and asked for clarification of the fact that █████ only held a 1/3 interest with two siblings in the decedent's condo. Estate Recovery personnel apparently replied that if a hardship waiver was granted, it would only cover █████'s 1/3 interest. █████ said he would file the hardship waiver application and other documents requested.
 13. On August 17, 2021, petitioner █████ called the Estate Recovery Section and said that he wanted to be exempt from all of this; and he was told that DHS could not honor that request. Rather, it was again explained that he needed to file a hardship waiver application and go through that process; and that nothing had been received requesting such a waiver to date. He asked for yet another copy of the original documents, which were resent to him on August 18, 2021. See, Exhibit R-3.
 14. █████ did not appear in the action any further after August 4, 2021.
 15. On September 13, 2021, the petitioner filed an application for a hardship waiver with the Department seeking waiver of estate recovery against his interest in his mother's assets for the first time. See, Exhibit R-4.
 16. On September 17, 2021, the Department, by the Estate Recovery Section, issued a denial letter to the petitioner informing him that the Department had denied his application for a hardship waiver because it was untimely, i.e., the due date for such an application was May 31, 2021. He was informed in writing of his right to file an appeal with the Division of Hearings & Appeals within 45 days of the date of the denial notice. See, Exhibit R-5.
 17. The petitioner filed an appeal with the Division of Hearings & Appeals on October 12, 2021, contesting the denial of the hardship waiver by the Department, explaining that his application was late because an attorney he retained had let the matter sit on his desk and unacted upon; and asserting for the first time that he qualified automatically for the hardship waiver because he is a "non-disabled adult child who had lived in the home at least two years prior to my mother's admission to the nursing home facility and was providing care that delayed admission to nursing home facility." See, Petitioner's Fair Hearing Request Letter received on October 14, 2021 (postmarked October 12, 2021.) And see, Exhibit R-6.
 18. Subsequent to the filed appeal, the Estate Recovery Section sent to the petitioner an informational letter dated November 5, 2021, outlining his different options regarding his mother's condo and his interest therein. The Department indicated that it would settle its claim against the petitioner's portion of the estate of the decedent if the petitioner would agree to the imposition of a lien either under the status of realty titled transfer on death, or as a caretaker child lien. If the petitioner agreed to either, he was to withdraw his appeal.
 19. The petitioner did not agree and did not withdraw his appeal at any time subsequent.
 20. At no time has █████ or any other attorney appeared on behalf of petitioner █████ in DHA Case No. MLL—203437 since filing of the action.

DISCUSSION

The petitioner timely requested an administrative hearing from the Wisconsin Division of Hearings & Appeals to review the denial of the hardship application. See, Wis. Admin. Code, § DHS 108.02(12)(e).

But the review in this administrative hearing concerns immediately turns on whether the Wisconsin Department of Health Services, by the Estate Recovery Section, correctly denied the petitioner's hardship waiver application because he filed that hardship waiver application instrument with the Department of Health Services too late.

The Wisconsin statutes provide, in the part relevant here, as follows:

(d) *Application and review process.* 1. A waiver applicant shall mail his or her application for a waiver in writing to this department within 45 days after the date the department mailed its claim or affidavit pursuant to s. 49.496 or 49.849, Stats., or its notice under part (c), whichever is later. (Note: irrelevant portions following this portion are omitted here for brevity.)

Wis. Admin. Code, § DHS108.02(12)(d).

Here, the Department of Health Services mailed both its affidavit under s. 49.849 *and* its hardship waiver NOTICE under part (c), to the petitioner on April 16, 2021. It is clear from the record that he received this correspondence soon thereafter, and at no time in this record has he ever denied that he did receive it soon thereafter.

This law is restated in written MA policy as follows:

22.1.5.1 Waiver of Estate Claim

In estates of members who die on or after April 1, 1995, an heir or beneficiary of the deceased member's estate or co-owner or beneficiary of a member's non-probate property may apply for a waiver of an estate claim filed by ERP. To be successful, the person applying for the waiver must show one of these three hardships exist:

1. The waiver *applicant* would become or remain eligible for AFDC, *SSI*, FoodShare, or Medicaid if ERP pursued the estate claim.
2. The deceased member's *real property* is part of the waiver applicant's business (for example, a farm) and the ERP recovery claim would affect the property and result in the waiver applicant's loss of his or her means of livelihood.
3. The waiver applicant is receiving general relief or veteran's benefits based on need under Wis. Stat. § 45.40(1m).

The waiver application must be made in writing within 45 days after the day:

1. ERP mailed its recovery claim to the probate court or its affidavit to the heir, beneficiary, or co-owner **or**
2. ERP mailed its notice of waiver rights, whichever is latest.

The waiver application must include these points:

1. Relationship of the waiver applicant to the deceased member.
2. The hardship under which the waiver is requested.

ERP staff must issue a written decision granting or denying the waiver request within 90 days after the waiver application is received by ERP. In determining its decision, ERP must consider all information provided to it within 60 days of its receipt of the waiver application.

Medicaid Eligibility Handbook, § 22.1.5.1.

Despite multiple contacts with the Department's Estate Recovery Section in April, July and August, 2021, by petitioner [REDACTED] or alternately by his identified attorney, no application for a hardship waiver was filed until the application received by the Department on September 13, 2021. This date is 150 days after the date the Department mailed its affidavit and hardship waiver NOTICE on April 16, 2021. Under the terms of the statute, the Department of Health Services had no choice but to deny the petitioner's hardship waiver application as untimely filed. I affirm that decision here. The statute requires that outcome. The petitioner in effect argues that the result is unfair. It is the longstanding policy of the Division that its administrative law judges do not possess the powers of a court of equity. Rather, I am bound by the four corners of the law. See, *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448 (1944); see also, *Neis v. Education Board of Randolph School*, 128 Wis.2d 309, 314, 381 N.W.2d 614 (Ct. App. 1985). Here, the law directs denial of the hardship waiver application as untimely filed with the Estate Recovery Section.

Finally, as a side-note to the petitioner, he attempted to assert that he is an adult caregiver child and that this renders him exempt from the estate recovery provisions for recovery from a MA recipient decedent's estate. However, he has garbled separate concepts found in MA policy for the protection of homesteads from the imposition of a Medical Assistance lien against the property of *living institutionalized* MA recipients in the section entitled "Notice of Intent to File a Lien" found in the *Medicaid Eligibility Handbook*, at § 22.1.4.1; and concepts in the divestment of assets context of "Homestead Property Given to Spouse or Certain Children or Siblings" found in the *Medicaid Eligibility Handbook*, at §17.2.6.11. The instant dispute involves neither an action imposing a lien against a living MA member/institutionalized person's homestead case, nor a divestment determination case. These provisions about caregivers and disabled adult children, etc., do not apply to a deceased MA recipient's estate, as here. Rather, the waiver right he can assert is defined by the terms of Wis. Admin. Code, § DHS 108.02(12)(b). See, Exhibit R-8. He has not asserted that he meets any of them, and in any event he did not do so within the requisite 45 days.

MA estate recovery is a very complicated area of law. The petitioner would be well-advised to again consult the expertise of a competent estate attorney to arrange his financial affairs vis a vis the assets he expects to receive from his mother's estate.

In this case, the Department has correctly denied his application for a hardship waiver as untimely filed.

CONCLUSIONS OF LAW

That the Department of Health Services correctly denied the petitioner's hardship waiver application of September 13, 2021, because it was untimely pursuant to Wis. Admin. Code, § DHS108.02(12)(d).

THEREFORE, it is

ORDERED

That the petition for review herein be, and the same hereby 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, 5th 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).

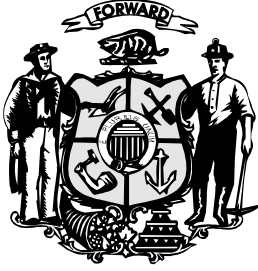
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 2nd day of December, 2021



Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals

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State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on December 2, 2021.

Division of Medicaid Services