



**STATE OF WISCONSIN  
Division of Hearings and Appeals**

---

In the Matter of

(petitioner)  
c/o Atty. Patricia Nelson  
2401 N. Mayfair Rd., Suite 210  
Wauwatosa, WI 53226

DECISION

MDV-45/55210

---

**PRELIMINARY RECITALS**

Pursuant to a petition filed October 17, 2002, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Ozaukee County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on November 25, 2002, at Port Washington, Wisconsin. With the consent of the parties, the record was held open for 43 days for post-hearing argument.

The issue for determination is whether the agency correctly denied the petitioner's MA application for institutional MA services, pursuant to a divestment of assets theory.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(petitioner)  
c/o Atty. Patricia Nelson  
2401 N Mayfair Rd, Suite 210  
Wauwatosa, WI 53226

Wisconsin Department of Health and Family Services  
Division of Health Care Financing  
1 West Wilson Street, Room 250  
P.O. Box 309  
Madison, WI 53707-0309

By: Carolyn Godersky, ES Spec.  
Ozaukee County Dept. of Social Services  
121 W. Main Street  
PO Box 994  
Port Washington, WI 53074-0994

**ADMINISTRATIVE LAW JUDGE:**

Nancy J. Gagnon  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Ozaukee County.
2. On December 17, 1996, the petitioner and (X) entered into a Marital Property Agreement classifying all of their property as marital property. On that date, they also established the X Living Trust and transferred most of their property into the Trust. The X Living Trust (Trust) was a revocable trust for the benefit of the petitioner and Mr. X, who were also the Trustees.
3. The Trust provided that upon the death of either spouse, his or her one-half share of marital property would be distributed to the Family Trust contained in the Trust document, which would then distribute that property to the children of the parties.
4. The petitioner's spouse died on December 24, 2000.
5. The petitioner entered the X Nursing Home on December 27, 2000, as a private pay patient. She paid for her nursing home care through April, 2002, and died in October, 2002.
6. The petitioner applied for MA on August 20, 2002. She sought coverage retroactive to May 1, 2002.
7. The county agency issued written notice of the denial of the petitioner's MA application with respect to coverage for institutional care; she was approved for so-called "card services." The basis for denial was the Department's view that the transfer of Mr. X's one-half share of marital property was a divestment. As a result of this divestment determination, the agency imposed a 48-month divestment disqualification period, ending in November, 2004.

### DISCUSSION

A single person cannot be eligible for institutional/nursing home MA if she has nonexempt assets exceeding \$2,000. To prevent a person from simply giving away her assets when the specter of nursing home costs appears, the MA program has developed policies to limit eligibility in the event of such giveaways, or prohibited "divestments."

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; *MA Handbook*, Appendix 14.2.1 (01-01-02). A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for institutional MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; *MA Handbook*, App. 14.3.0. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (\$4,292 in 2002). *MA Handbook*, Appendix 14.5.0. In this case, the agency calculated a disqualification period of 48 months.

In this case, the petitioner and her late husband held available assets in the form of a revocable trust until the date of his death, December 24, 2000. If the petitioner had given away any of the Trust assets to their children prior to December 24, 2000, that transfer would unquestionably have been a divestment. If the divestment occurred before December 24, 2000, but within 36 months of the petitioner's August, 2002,

MA application, she would unquestionably have been ineligible for MA institutional care payments for a period of time.

The petitioner argues that the December 24, 2000, transfers from the Trust should not be treated as divestment because they are post-death transfers, rather than pre-death transfers. By its terms, the Trust automatically transferred half of its assets to the petitioner's children upon Mr. X's death. Therefore, when Mr. X died, the petitioner was no longer able to gain access to half of the Trust funds.

In support of her position, the petitioner cites to a portion of the federal MA divestment statute:

- (3)(A) In the case of a revocable trust—
- (i) the corpus of the trust shall be considered resources available to the individual;
  - (ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and
  - (iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c). [the divestment subsection]

42 U.S.C. §1396p(d)(3)(A). However, this language does not answer the question posed by this case. This federal language merely tells me that (1) the petitioner would have been asset ineligible for MA prior to her husband's death because she was sitting on the assets of a revocable trust, and (2) the payouts from a revocable trust are divestments. *Id.*, (3)(A)(i),(iii). This federal language does not distinguish between payouts from a revocable trust before or after one of the trust donors has died; therefore, the distinction stressed by the petitioner (pre-death transfer versus spouse's post-death transfer) is not addressed.

I can find no pertinent legal authority that prevents the December 24, 2000 transfer from being a prohibited divestment. Both the Wisconsin divestment statute and code provision declare that a prohibited divestment is a transfer of assets by the applicant, her spouse, or someone acting on her behalf, for less than fair market value within 36 months of her MA application. Wis. Stat. §49.453(2); Wis. Admin. Code §HFS 103.065(1),(2),(4)(a). With respect to jointly owned assets, the statute provides:

(6) COMMON OWNERSHIP. For purposes of sub. (2), if a covered individual holds an asset in common with another person in a joint tenancy, tenancy in common, or similar arrangement, the asset, or the affected portion of the asset, is considered to be transferred by the covered individual when an action is taken, either by the covered individual or by any other person, that reduces or eliminates the covered individual's ownership or control of the asset.

*Id.*, (6). See also, in accord, *MA Handbook*, Appendix 14.7.0. Thus, this language indicates the transfer from the Trust to the children, caused by Mr. [REDACTED]'s action of dying, is still considered a divesting transfer by the "covered individual," the petitioner. Thus, unless the more specific statutory language on

irrevocable trusts, discussed below, controls, the common ownership section leads to the conclusion that the transfer that occurred upon the spouse's death was a prohibited divestment.

There is, however, an MA statutory section dealing with trusts. The language on revocable trusts matches the federal language given above. Wis. Stat. §49.454(2). That language does nothing to rebut the presumption that a divesting transfer occurred. The pertinent language for an irrevocable trust is as follows:

(3) TREATMENT OF IRREVOCABLE TRUST AMOUNTS. For purposes of determining an individual's eligibility for, or amount of benefits under, medical assistance:

...

(b) Any portion of an irrevocable trust from which ...no payment could be made to or for the benefit of the individual, is considered to be an asset transferred by the individual subject to s.49.453. The asset is considered to be transferred as of the date of the establishment of the trust, or, if later, the date on which payment to the individual was foreclosed. ...

*Id.*, §49.454(3)(b). If one views the death of the petitioner's spouse as the conversion of the revocable Trust into an irrevocable trust, then this provision applies, and a divestment occurred on the spouse's date of death. The spouse's date of death is "the date on which payment to the individual was foreclosed." Thus, one is again led to the conclusion that a prohibited divestment occurred when the petitioner's spouse died. See in accord, prior DHA Decision No. MDV-23/43023 (Div. of Hearings & Appeals, April 5, 2000)(DHFS).

Finally, the petitioner argues that failure to exempt the Trust transfer on December 24, 2000, is an interference with a person's constitutional right to make a will and dispose of property at death. The MA divestment statute does not preclude a person from making and will and disposing of his property. The petitioner and her spouse were free to dispose of the property in ways that were wise and/or unwise. They elected to structure their affairs in a way that may have been wise in terms of avoiding taxes or probate costs, but was unwise in terms of eligibility for the MA program or other areas. They freely made that choice. Unfortunately for the petitioner, their choice as to how to structure the disposition of their property turned out not to have maximized the length of time that the petitioner could receive institutional MA.

#### CONCLUSIONS OF LAW

1. The county agency correctly determined that the petitioner was ineligible for institutional MA until November, 2004, due to her divestment of assets from the Trust on December 24, 2000.

NOW, THEREFORE, it is

ORDERED

That the petition herein be 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 concerning Medical Assistance (MA) must be served on 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 \_\_\_\_\_, 2003.

---

Nancy J. Gagnon  
Administrative Law Judge  
Division of Hearings and Appeals  
41/NJG MDVtrust MDVestateplan