



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

██████████
c/o Attorney Scott Thompson
P O Box 710
Monroe, WI 53566

MDV-23/99503

PRELIMINARY RECITALS

Pursuant to a petition filed October 31, 2008, under Wis. Stat. § 49.45(5) and Wis. Ad min. Code § HA 3.03(1), to review a decision by the Green County Dept. of Human Services in regards to the denial of Medical Assistance (MA), a hearing was held on January 20, 2009, at Monroe, Wisconsin. At the request of the county agency, the record was held open for 7 days for the submission of additional information, which has been received. The petitioner consented to holding the record open for 5 days at her request.

The issue for determination is whether the county agency correctly denied the petitioner's application for Institutional – Medical Assistance and imposed a divestment penalty period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Represented by:

██████████
c/o Attorney Scott Thompson
P O Box 710
Monroe, WI 53566

Attorney Scott Thompson
P. O. Box 710
Monroe, WI 53566-0710

Respondent:

Wisconsin Department of Health Services
1 West Wilson Street, Room 651
P.O. Box 7850
Madison, WI 53707-7850

By: Jeanne Blumer, ES Supervisor
Green County Dept Of Human Services
N3152 State Road 81
Monroe, WI 53566

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # ██████████ (d.o.b., ██████████) is an 89 year-old single institutionalized resident of Green County. She applied for Medical Assistance on August 14, 2008, seeking MA coverage back-dated to June 1, 2008.

2. On June 26, 2008, the petitioner, as grantor, established an IRREVOCABLE ANNUITY in the amount of \$82,000, naming herself as annuitant. The ANNUITY provides that, effective August 1, 2008, she will be paid \$1,138.88 per month for 72 months or until her death, whichever occurs first. If she dies before 72 months elapse, then the balance remaining in the ANNUITY is payable to the petitioner's adult daughter, [REDACTED]. The ANNUITY payments are fully assignable. The ANNUITY does not provide for the accrual of any interest on the principal. The ANNUITY also provides for an exception to irrevocability by its terms in that the petitioner may withdraw all principal in the ANNUITY if Medical Assistance discontinues or is not renewed. See, Exhibit E, Attachment 2.
3. The ANNUITY, by its terms, will be paid out if the petitioner survives that long, by July, 2014.
4. On June 19, 2008, the petitioner quit claimed non-homestead property located in Arkansas to [REDACTED] for the total consideration of \$10. The conveyed realty had a property tax assessed value of \$13,500.
5. On a date unknown in June, 2008, the petitioner also conveyed \$4,000 in cash to a relative.
6. On September 22, 2008, the county agency issued a Negative Notice to the petitioner informing her that her application for MA was denied, effective June 1, 2008, due to a divestment of a total of \$99,490; and that she would be ineligible for 17.81 months, i.e., until October 31, 2009.
7. On September 22, 2008, the county agency also issued a Positive Notice to the petitioner informing her that she was eligible for MA card services only, effective June 1, 2008.
8. On October 31, 2008, the petitioner filed an appeal with the Division of Hearings & Appeals contesting the denial of MA and the divestment penalty period.
9. The petitioner concedes that she divested \$13,490 in the Arkansas real estate transaction of June 19, 2008, and \$4,000 in the cash transfer also occurring during June, 2008.
10. In June, 2008, the petitioner's estimated life expectancy under the MA Life Expectancy Table was age 95. If she survives, she will be 95 on May 31, 2014, and continue to be that age through May 30, 2015. See, *Medicaid Eligibility Handbook*, § 39.8.

DISCUSSION

A person seeking Medical Assistance is ineligible if her assets exceed \$2,000. Wis. Stat. § 49.47(4)(b)3g. In order to prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by passing their assets to potential heirs, MA law prevents a recipient from reaching this limit by divesting assets. A divestment occurs when an applicant, or person acting on the applicant's behalf, transfers assets for less than their fair market value during the lookback period. The lookback period is generally 36 months. Wis. Stat. § 49.453(1)(f). Divesting assets renders recipients ineligible for MA for the number of months obtained by dividing the amount of disposed assets by the statewide average monthly cost to a private pay patient in a nursing home. Wis. Admin. Code § HFS 103.065(5)(b); Wis. Stat. § 49.453(3); see also, *Medicaid Eligibility Handbook* § 17.5. This amount was then \$6,259 per month. *Medicaid Eligibility Handbook*, § 17.5 (Release 08-03, effective July 1, 2008). The county agency originally determined that the petitioner was ineligible for Medical Assistance for 17.81 months, beginning with June, 2008, because she divested a total of \$99,490 in assets in June, 2008. The agency apparently used an earlier applicable private pay rate. In the agency Summary, this period was subsequently stated to be for 15.89 months, rounded down to 15 months, using \$6,259 per month as the private pay rate.

The petitioner, by Attorney Thompson, concedes that she clearly divested \$17,490 in June, 2008, i.e., the realty (\$13,490) and cash (\$4,000) transfers. Her attorney contests that part of the agency determination providing that the act of establishing the IRREVOCABLE ANNUITY instrument providing for the

delivery of the cash assets (\$82,000) was a divestment. Rather, he asserts that this ANNUITY constitutes fair market value return for the cash given by the petitioner as grantor, and the income she then receives under the ANNUITY as annuitant.

The Department's written policy defines an annuity as follows:

16.7.4 Annuities

An annuity is a written contract under which, in return for payment of a premium or premiums, an individual will receive a series of payments at regular intervals for a specified time period.

The annuitant is the person entitled to the payments. A purchaser can name himself/herself or another person as the annuitant. The purchaser may also name a beneficiary to receive annuity payments after the annuitant's death.

Medicaid Eligibility Handbook, § 16.7.

The Department's written policy manual provides for the following treatment of annuities in the divestment instructions:

17.11 Annuities

It is divestment if an institutionalized person transfers assets or income to an annuity (See 16.7.4 Annuities) when any of the following conditions exist:

1. S/he chooses a settlement option that has a pay-out schedule extending beyond his/her life expectancy.

The *divested amount* is the total of all payments scheduled after the month in which the person's age exceeds his/her life expectancy.

Determine the person's life expectancy as follows:

- a. Find his/her age on the date s/he chose the settlement option.
- b. Consult 39.8 Life Expectancy Table for his/her life expectancy.

Example 1: A 76-year-old man purchases an annuity and chooses a settlement option on January 1, 1994. The annuity will make \$100 payments to him beginning January 1, 1994 and ending December 31, 2010. His life expectancy is age 86. He will turn 87 on December 1, 2004. Total the payments from January 1, 2005 through December 31, 2010. The total is the divested amount.

The life expectancy value can be adjusted based on a medical condition diagnosed by a physician before the person transferred funds to the annuity or trust.

2. S/he purchases an annuity that has no cash or surrender value, and s/he does not choose a settlement option.

The divested amount is the amount the institutionalized person paid for the annuity. (If there is a cash or surrender value, count it as an available asset.)

3. S/he purchases an annuity in which neither s/he nor his/her spouse nor a blind or permanently disabled child of any age of either spouse is named the annuitant.
4. S/he purchases an annuity in which there are not fixed, periodic payments made within his/her life expectancy.

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Wisconsin Medicaid Handbook, App. 17.11.

I have reviewed the policy, above. Clearly, the petitioner's annuity does not contravene subsections 1, 3 & 4, above. In addition, subsection 3 uses the conjunctive phrase "...and s/he does not choose a settlement option". That means a person cannot simply transfer assets into an annuity and then decline to take any payments. The settlement option here is \$1,138.33 per month for 72 months. This annuity meets subsection 2 as well.

However, regardless of the policy statement above, under Wisconsin law whenever an individual or his or her spouse transfers assets to an irrevocable annuity in an amount that exceeds the *expected value of the benefit the individual* or his or her spouse has transferred assets for less than fair market value. Wis. Stat. § 49.453(4)(a); See also, Wis. Admin. Code § HFS 103.065(4)(at)1.; see also, *Medicaid Eligibility Handbook*, § 17.11 et. seq. "Expected value of the benefit" means the amount that an irrevocable annuity will pay to the annuitant during his or her lifetime. Wis. Stat. § 49.453(1)(c); See also, Wis. Admin. Code § HFS 103.065(3)(c). A transfer to an irrevocable annuity is not in excess of the expected value only if, among other things, the periodic payments back to the grantor include principal and interest that, at the time the transfer is made, is at least the applicable federal rate required under section 1274(d) of the Internal Revenue Code [as defined in Wisconsin Statute section 71.01(6)]. Wis. Stat. § 49.453(4)(a)1.a. See also, *Buettner v. DHFS*, 2003 WI App 90, 264 Wis. 2d 700, 714-715, 663 N.W.2d 282. The payments under the instant irrevocable annuity do not include any interest. Thus, the transfer by petitioner to the IRREVOCABLE ANNUITY must be considered to have exceeded the expected value of the benefit and, therefore, was divestment. The transaction itself is also very sharp practice. The divestment statutes do not contemplate that an applicant can simply dole out a sizeable liquid asset to herself by self-executing an instrument that converts it to an income stream without the reasonable and prudent course of dealing to generate interest on the sizeable asset to maximize income. Here, no income is contemplated by the purported annuity. The transaction also looks very much like a sham and artifice, not a transaction between parties exchanging fair market value. The petitioner raised no other argument, asserting only that this was not a divestment, not that it was less divestment that the agency found. The county agency decision must be sustained under these facts. Nothing in this decision prevents the petitioner from re-applying in the future after curing the divestment.

CONCLUSIONS OF LAW

That the county agency, ultimately, correctly determined that the petitioner divested \$99,490, and she is ineligible for MA for a penalty period of 15 months, beginning with June, 2008.

NOW, THEREFORE, it is

ORDERED

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

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 Wisconsin Statutes § 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 Wisconsin 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 650, P.O. Box 7850, Madison, WI 53707-7850.

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 Wisconsin Statutes §§ 227.52 and 227.53.

Given

under my hand at the City of
Madison, Wisconsin, this 26th day of
January, 2009

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

210/KDD

cc:

