DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o John Wargo, Attorney
731 Main Street
Racine, WI 53403

DECISION

MDV-40/39988

PRELIMINARY RECITALS

Pursuant to a petition filed May 19, 1999, under Wis. Stat. § 49 45(5), to review a decision by the Milwaukee County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on July 20, 1999 at Milwaukee, Wisconsin

The issue for determination is whether the county agency acted correctly in discontinuing petitioner's institutional MA.

There appeared at that time and place the following persons:

PARTIES IN INTEREST.
Petitioner·

[redacted]
c/o John Wargo, Attorney
731 Main Street
Racine, WI 53403

Wisconsin Department of Health and Family Services
Bureau of Health Care Financing
1 West Wilson Street, Room 250
P O Box 309
Madison, WI 53707-0309
By Tim Pollard, ESS
Milwaukee County Dept. Of Social Services
1220 West Vliet Street
Milwaukee WI 53205

EXAMINER·
Peter D Kafkas, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1 Petitioner (SSN [redacted], CARES [redacted]) is a resident of Milwaukee County She was a recipient of institutional MA.

2 Petitioner's counsel prepared a document entitled "Irrevocable Annuity" which was dated December 4, 1998. The document stated that petitioner was transferring real estate valued at $85,857 to her daughter The daughter was also petitioner's power of attorney. Exhibit 2

3 The document stated that the daughter would make payments to petitioner in the amount of $15.64 per month for 129 months. A lump sum, balloon payment in the amount of $84,839.44 was to be made on August 31, 2009. Exhibit 2.

4. The document provided that the payments were unsecured, and that petitioner could not sell, pledge, or use as security, any payment due under the document. Petitioner also could not assign any payment without permission of her daughter. The document stated that the daughter would make payments to herself if petitioner died. Exhibit 2.

5 The document stated that petitioner could obtain the amount paid to her daughter, less any of the $15.64 payments made, if the medical assistance program was discontinued. Exhibit 2 The document was prepared solely to obtain MA for petitioner and transfer assets to petitioner's daughter. Petitioner obtained MA coverage after the transaction

6. On April 6, 1999, the county agency sent petitioner a hand-written negative notice stating that petitioner's institutional MA would be discontinued May 1, 1999. The notice stated that petitioner would continue to receive regular card MA services. The notice stated the basis for the discontinuance was that petitioner had divested funds

2 On April 7, 1999, the county agency computer (CARES) erroneously sent petitioner a notice stating that her institutional MA benefits would "remain the same " Exhibit 3

DISCUSSION

THE COUNTY AGENCY ACTED CORRECTLY IN REVIEWING THIS MATTER

Initially, petitioner argues that county agency erred in conducting a review on a more frequent than annual basis. She argues that the discontinuance in this matter was subsequent to a review of the case less than three weeks after the first notice and, therefore, it was a violation of due process

Pursuant to Wis. Adm. Code § HFS 102 03(e), the county agency may conduct a review at any time the agency has a reasonable basis for believing that a recipient is no longer eligible for MA. Id. The agency may review any case at any time when the agency can justify the need MA Handbook, Eligibility/Review Unit, page 3 The agency acted reasonably in reviewing whether petitioner had been erroneously granted benefits.

PETITIONER DIVESTED FUNDS

The parties were not in dispute as to the facts underlying the annuity issue Petitioner signed a document stating that she was transferring her home to her daughter in exchange for the same document, which was entitled an "irrevocable annuity " The document provided for 129 monthly payments at $15.64 each and a lump-sum balloon payment of $84,839 44 at the end of 129 months See, Exhibit 2.

Two previous fair hearing decisions have found that an applicant's "purchases" of documents, which combine token monthly payments with large lump sum, balloon payments to the applicant (such as the document described above) involve divestments See, DHA Case No MED-30/35331 (Wis Div Hearings & Appeals December 17, 1998) and DHA Case No MED-30/35213 (Wis Div Hearings & Appeals December 17, 1998). While prior fair hearing decisions do not typically serve as precedent for subsequent fair hearing decisions, they do serve as precedent or policy if drafted as proposed and the Secretary of the Department issues them as final decisions These fair hearing decisions were drafted as proposed and were issued as final decisions of the Department.

The examiner disagrees with petitioner's implication that prior "final" fair hearing decisions that are issued by the Secretary of the Department are not binding on his decision. Moreover, the Department issued BWI Operations Memo No 99-19, a policy memorandum, which incorporated the two final decisions by reference and reiterated some of the requirements for annuities.

The examiner will briefly address the issue further. In general, where an institutionalized person transfers assets in exchange for a document with no fair market value, it is considered a divestment of the full amount transferred. Id at 2.

It is undisputed that the document the parties signed. 1) was unsecured, 2) did not allow the sale, pledging, or use as security of any of the payments, 3) did not allow for assignment of payments without permission of the payer, 3) was not entered into at arms-length, 4) provided for petitioner's daughter to make payments to herself if petitioner died, and 5) provided much less than 1% interest per annum (which is far below what the $85,857 in real estate could have received on the open market) This document had no fair market value, and certainly no unrelated person of sound mind would purchase it for $85,857.

While there has been an exception for the fair market analysis described above where an annuity is involved, for an annuity to exist a transaction must involve fixed periodic payments See, Wis Stat § 49.453(4)(b) This has been a long-standing aspect of the definition of annuities See, Wis Adm Code § HFS 103.065(3)(a); *Bodine v Comm. Of Internal Revenue*, 103 F.2d 982, 984 (3rd Cir), cert denied, 308 U S. 576 (1939); Hess v U.S , 74 F Supp 135, 138 (D.C. Minn. 1947), *Knight v Finnegan*, 74 F.Supp 900, 902 (E D. Mo. 1947); *NationsBank of N. C., N A. v Variable Annuity Life Ins Co* , 513 U S. 251, 254 (1995) (discussing variable versus fixed annuities), and Black's Law Dictionary 82 (5th ed. 1979).

The huge balloon payment and token monthly payments in this transaction belie the document's characterization as an annuity. "Instruments that fit the pattern of the ordinary annuity are standard fixed-payment mortgage loans." American Institute of Real Estate Appraisers of the National Association of Realtors, The Appraisal of Real Estate, 408 (1983)

Moreover, a document will not be considered to involve an annuity if the characterization is inconsistent with the substance of the transaction; i.e., if the transaction was designed to merely camouflage a divestment or loan transaction DHA Case No MED-30/35331 (Wis. Div. Hearings & Appeals December 17, 1998) and DHA Case No. MED-30/35213 (Wis. Div. Hearings & Appeals December 17, 1998). The document provided that petitioner could get her money back, less any $15 payments already made, if the MA program was discontinued. Exhibit 2 This transaction was designed solely to transfer assets to petitioner's daughter and obtain MA eligibility

Petitioner's counsel also "queries" why the legislature has incorporated the Department's policy in recent assembly and senate bills Again, the two final decisions above and the operations memorandum are binding in this case The examiner may not revisit the issue, but he does note that the bills, which have

not been enacted as of this decision, additionally would require minimum interest rates. There are many possible answers to counsel's "reverse legislative history" query

THE EXAMINER MAY NOT ORDER THAT BENEFITS BE ISSUED MERELY BECAUSE THE COUNTY AGENCY ERRONEOUSLY ISSUED A POSITIVE NOTICE

The county worker in this case stated that the CARES computer (the computer that the county agency uses to track and determine eligibility and benefits) had erroneously issued a positive notice the day after he mailed the negative notice in this case. Exhibits 1 and 3.

Where improper or insufficient notices have been issued, the Division of Hearings and Appeals has typically tolled time limits for filing of hearing requests The Division has not generally ordered issuance of benefits on this basis. Petitioner was obviously aware that her benefits were discontinued since she timely filed a fair hearing request.

Even if the erroneous notice had lead petitioner to believe her benefits were not discontinued, which did not occur here, the examiner would not have equitable powers allowing him to issue benefits where underlying eligibility wouldn't exist. *Wisconsin Socialist Workers 1976 Campaign Committee v McCann*, 433 F. Supp. 540, 545 (E.D. Wis. 1977).

CONCLUSIONS OF LAW

1 The county agency acted correctly in reviewing petitioner's case where petitioner had been erroneously approved for institutional MA benefits.
2 The county agency acted correctly in denying petitioner's application for institutional MA since petitioner had divested assets when she transferred $85,857 to her daughter and did not receive $85,857 in fair market value in return.
3 The county agency acted correctly in denying petitioner's application for institutional MA since the transaction did not involve an "annuity" and therefore did not qualify for an exception to the fair market value analysis applicable to transfers of assets
4. The examiner does not have equitable powers allowing him to order benefits where underlying eligibility does not exist.

NOW, THEREFORE, it is **ORDERED**

That the petition for review 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

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 Milwaukee, Wisconsin, this 13th day of August, 1999.

Peter D. Kafkas, Attorney
Division of Hearings and Appeals
0802/PDK

cc MILWAUKEE COUNTY DHS 9345
Susan Wood, DHFS