



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

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In the Matter of

(petitioner)  
c/o Atty. Patricia M. Cavey  
Tammi, Cohn & Cavey  
405 E. Lincoln Ave.  
Milwaukee, WI 53207

DECISION

MDV-40/#46647

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**PRELIMINARY RECITALS**

Pursuant to a petition filed October 31, 2000, under Wis. Stat. §49.45(5) to review a decision by the Milwaukee County Dept. of Human Services to terminate Medical Assistance (MA), a hearing was held on January 10, 2001, at Milwaukee, Wisconsin. A hearing set for December 13, 2000 was rescheduled at the petitioner's request.

The issue for determination is whether a payment for future personal services was a divestment when the service provider is a business with no employees related to petitioner.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(petitioner)  
c/o Atty. Patricia M. Cavey  
Tammi, Cohn & Cavey  
405 E. Lincoln Ave.  
Milwaukee, WI 53207

Represented by:

Atty. Patricia M. Cavey

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: Patricia Quezaire, ES Supervisor  
Milwaukee County Dept. Of Human Services  
1220 W. Vliet Street  
Milwaukee, WI 53205

**EXAMINER:**

Brian C. Schneider  
Administrative Law Judge  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is an 85 year old resident of a nursing home in Milwaukee County. She has been in a nursing home for several years, and she receives MA to cover the nursing home costs.
2. In October, 2000, petitioner received an inheritance check for \$29,946.95.
3. On October 10, 2000, petitioner's guardian contracted with September Managed Care for Later Years, Inc., a private managed care agency that provides services involving the personal needs of, recreation, and advocacy for, elderly and disabled persons. The contract called for a lump sum payment of the \$29,946.95 inheritance in exchange for services for as long as petitioner lives. When petitioner dies the contract is fulfilled, and there is no provision for a refund or payment to beneficiaries. The contract is non-assignable. See Exhibit 2.
4. Neither the director of September Managed Care nor any employee of the business is related to petitioner.
5. The county determined that the payment for future services was a divestment. It first sent a notice dated October 24, 2000, denying institutional MA effective October 10, 2000. It later sent an amended notice dated November 13, 2000, denying institutional MA effective December 1, 2000, and through April 30, 2001.
6. Petitioner appealed on October 31, 2000. The Division of Hearings and Appeals did not order that benefits be continued pending the hearing decision.

## DISCUSSION

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 MA waiver services. Wis. Stat. §49.453(2)(b); Wis. Adm. Code §HFS 103.065(4)(a); MA Handbook, Appendix 14.2.1. Divestment does not impact on eligibility for standard medical services such as physician 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 (currently \$3,930).

The county concluded that a divestment occurred because the contract was for future services. There is a basis for such a decision. A final decision issued by the Department's Deputy Secretary on February 20, 1997, no. MDV-40/97114, concluded that a contract for future personal services between a nursing home resident and her daughter-in-law was a divestment. That decision, however, construed the impact of Wis. Stat. §49.453(5), which specifically addresses care and personal service contracts between nursing home residents and relatives. The decision clearly expressed concern about the enforceability and reasonableness of a contract that would pay a relative for duties most relatives perform for free.

This case does not involve a contract with petitioner's relatives. September Managed Care is a business that provides care services for the elderly and disabled, even those already receiving care in nursing homes. The agency's director, Marianne Ewig, testified that the Milwaukee Department of Aging is a client that refers individuals, and that it generally has from 30 to 50 clients. The acceptance of a lump sum equal to the amount of petitioner's inheritance is a business decision made by Ms. Ewig, involving some risk on her part if petitioner lives longer than she is expected or likely to live, given that petitioner's health already demands nursing home care.

The key point is that, because no relatives are involved in the business, it is an arms length transaction. Certainly the September Managed Care's acceptance of exactly the amount of petitioner's inheritance raises eyebrows, but that is a fair market business decision made by its director. Because the contract is

based on a fair market, arms length, transaction, I conclude that it is not a divestment. Evidence was presented of services already provided to petitioner. While it is true that family members often provide services such as these for free, they are not required to do so, and as long as they are not benefiting fiscally from the arrangement, I conclude that the transaction is not a divestment.

Because I find that the transaction was not a divestment, I will not address petitioner's arguments concerning faulty notice, or the issue of the failure to order continued benefits. On its merits the decision results in eligibility retroactive to the termination date.

### **CONCLUSIONS OF LAW**

A contract between a nursing home resident and a private managed care agency for future services is not a divestment because it is based on an arms length transaction between unrelated parties.

**NOW, THEREFORE, it is ORDERED**

That the matter be remanded to the county with instructions to rescind the divestment, and to reinstate petitioner's institutional MA, retroactive to December 1, 2000.

### **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). The appeal 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 \_\_\_\_\_, 2001.

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Brian C. Schneider  
Administrative Law Judge  
Division of Hearings and Appeals  
0122/bcs

cc: MILWAUKEE COUNTY DEPT OF HUMAN SERVICES  
DHFS - Susan Wood  
Patricia Cavey-Tammi, Cohn & Cavey