



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)
c/o John V. Kitzke, Attorney
W62 N588 Washington Ave., Suite 202
Cedarburg, WI 53012

DECISION

MDV-66/66108

PRELIMINARY RECITALS

Pursuant to a petition filed October 18, 2004, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Washington County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on December 20, 2004, at West Bend, Wisconsin. The ALJ participated by telephone. A hearing set for November 15, 2004, was rescheduled at the petitioner's request.

The issues for determination are (1) whether the petitioner and his spouse had assets in excess of the limit for a spousal impoverishment case, and (2) whether the petitioner divested assets as funds were transferred into an LLC.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o John V Kitzke, Attorney
W62 N588 Washington Ave Suite 202
Cedarburg, WI 53012

Represented by:

Atty. John V. Kitzke
W62 N588 Washington Avenue, Suite 202
Cedarburg, WI 53012

Respondent:

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: Jane Clune, ES Spec.

Washington County Dept. of Social Services
333 E. Washington Street
Suite 3100
West Bend, WI 53095

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 Washington County.
2. The petitioner entered a nursing home on January 13, 2004, and has resided there continuously thereafter. He has a spouse who resides in the community.
3. As of January 13, 2004, the petitioner and his spouse had assets totaling \$196,695.46.
4. On February 27, 2004, the community spouse purchased an annuity with a purported value of \$120,000, for \$19,000. The annuity was created with X Investments, LLC, as the transferee and entity responsible for making the annuity payments. The managing members of the LLC signed the Operating Agreement to form the LLC on February 27, 2004. The shareholders of the LLC are the petitioner's daughters. The Annuity Agreement calls for the spouse to transfer \$120,000 to the LLC. In exchange, the LLC agreed to pay the spouse \$1,033.64 monthly from March 27, 2004, through May 27, 2017. The Annuity Agreement does not specify a time schedule for payment by transferor or a declaration of default conditions for non-payment by the transferor. See Exhibit 8.
5. The petitioner's spouse, age 73, has a life expectancy ending at age 87 (here, June, 2017). Three companies have declined to purchase the annuity – Loyal Funding, Alliance Funding Resources, and Seaside Equity Associates.
6. The initial \$19,000 payment by the spouse to the LLC was the liquidation of some assets previously held in the X Investment Club.
7. The community spouse wrote checks to the LLC for \$55,000 on April 3, 2004, for \$41,910 on June 12, 2004, and \$10,000 on June 25, 2004. The spouse also transferred \$4,000.95 from an account to the LLC on April 4, 2004, and \$5,687.44 on May 12, 2004, creating total transfers into the LLC of \$135,598.39. The LLC refunded an overpayment of \$15,000 to the spouse on July 16, 2004.
8. The "provenance" of two IRAs currently owned by the couple is as follows: In February, 2004, the couple had an account with Baird with a balance of \$45,186. After subtraction of sales charges, Baird closed the account and transferred the balance of \$41,056.06 to the couple's checking account. Nearly simultaneously, a Fidelity IRA was also liquidated at \$4,008.95. The spouse then made a nursing home payment, dropping the total liquidated amount to \$35,000. This \$35,000 was then placed into two American Funds IRAs on July 19, 2004. See Exhibit 6. Ownership of these American Fund IRAs did not cause the couple's assets to exceed \$94,760.
9. The petitioner applied for Institutional/Long-Term Care MA on July 22, 2004. The agency issued written notice of denial on September 21, 2004.

DISCUSSION

To qualify for Institutional MA and most other types of MA, an applicant cannot have assets exceeding a specified asset limit. A single, institutionalized person is ineligible for MA if his nonexempt assets exceed \$2,000. However, a married institutionalized person with a community spouse could have been eligible if the couple's assets did not exceed \$94,760 (\$2,000 + \$92,760 Community Spouse Asset Share) in 2004. *Medicaid Eligibility Handbook (MEH)*, 5.10.4.2 (2004).

The agency has viewed the petitioner's 2004 asset reductions as occurring at the time of each individual transfer of funds to the limited liability corporation (LLC), rather than as one transaction occurring when the LLC was formed on February 27, 2004. From the agency's perspective, the couple's assets did not drop below the special \$94,760 asset limit for a "spousal impoverishment" case until the \$41,910 transfer occurred on June 12, 2004. For instance, when the petitioner transferred \$19,000 to the LLC on February 27, 2004, the couple's assets dropped to \$177,695.46 (\$196,695.46 - \$19,000), rather than down to \$76,695.46 (\$196,695.46 - \$120,000 annuity) as argued by the petitioner.

Prior cases that I have decided regarding annuities have always featured a complete funding of the annuity before it begins paying out. This serial payment scenario is new to me. I am bothered by the fact that the Annuity Agreement contains neither a deadline for completing payment of the \$120,000, nor a default clause explaining what will happen if full payment is not made. Although the petitioner offered an explanation for the delayed funding here (balky account representatives), I am concerned that concluding that such serial, after-the-fact funding of the annuity will open the door to abuse of the MA program. What if MA is started, on the theory that the couple's assets have been drawn down under the asset limit, and then the assets are never actually transferred over to fund the private annuity? Thus, I will agree with the county that the assets here were drawn down as the funds were physically transferred to the LLC (e.g., \$41,910 on June 12, 2004). This means that the petitioner was ineligible for MA due to excess assets until June, 2004.

Next, the agency questions whether the petitioner continues to be over the asset limit. This query centers on whether the couple currently owns both the Baird account (liquidated at \$41,056.06) and two American Funds IRAs totaling \$35,000. If they still own both, they are over the asset limit. The hearing witnesses credibly testified that the Baird account was liquidated no later than June 10, 2004. See the provenance of these accounts in Finding #7. I find the spouse's version of events to be credible. If she lied about this account at hearing, the agency is free to pursue an overpayment determination and collection action against her. Thus, the couple did not continue to be over the asset limit after the June 12, 2004, transfer to the LLC.

The agency also asserts that the transfers into the LLC from April through June, 2004, were prohibited divestments. Divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; *MA Eligibility Handbook (MEH)*, 4.7.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; *MEH*, 4.7.3. 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.

An LLC can have various functions or attributes, and its specific attributes will drive the determination as to whether a divestment occurred in any given case. In this case, the LLC's function is to be the transferee in the creation of the annuity. The Department has specific policy on evaluation of annuities as a divestment vehicle:

4.7.11 ANNUITIES

It is divestment if an institutionalized person transfers assets or [income](#) to an annuity ([4.5.7.4](#)) 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 [8.1.10](#) for his/her life expectancy.

Example: 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.

MEH, 4.7.11 (1-1-02). See also, Wis. Stat. §49.453(4). The instant annuity does not run afoul of the divestment policy. The petitioner chose a settlement option that has a pay-out schedule that does not extend beyond the spouse's life expectancy, a settlement option was selected, the spouse is the annuitant, and there are fixed, periodic payments made within her life expectancy. The monthly \$1,033.64 payments that will run from March, 2004, through May, 2017, with five percent interest will total \$164,348. Thus, no divestment occurred with respect to this \$120,000 annuity.

Finally, the subject annuity is not currently an available asset. Department policy on availability of annuities as assets reads, in pertinent part:

4.5.7.4.1 **Annuities purchased after March 1, 2004.**

Treat Annuities purchased after March 1, 2004 as available assets in accordance with the following:

...

Annuities that cannot be surrendered.

Determine the value of annuities that cannot be surrendered (e.g. immediate annuities in the payout phase) as follows

1. Total deposits made to the annuity.

Plus

2 Earnings on the deposits not previously paid out

Minus

3. Payouts

Equals

4. Annuity's Value

Applicants/recipients who own annuities that **cannot be surrendered** will be provided an opportunity to prove that the annuity is unavailable. (**Note:** This does not apply to annuities that can be surrendered) The annuity will be considered to be an unavailable asset **only** if documentation is provided from at least three companies active in the market stating their unwillingness to purchase the annuity. Payments from an annuity that is considered to be unavailable must be counted as income. Annuities that are considered to be unavailable must also be evaluated for possible divestment, in accordance with [\(4.7.11\)](#).

MEH, 4.5.7.4.1 (1-11-05). Per its terms, the petitioner's annuity cannot be surrendered. The petitioner has supplied three letters from appropriate companies stating their unwillingness to purchase the annuity. See Exhibit 9. Thus, all of the \$120,000 annuity's "face value" has been an unavailable asset since its funding was completed on June 12, 2004.

CONCLUSIONS OF LAW

1. The agency correctly determined that the petitioner's community spouse did not complete the purchase of a \$120,000 annuity until June 12, 2004, when the last installment of the \$120,000 purchase price was paid to the transferee. Thus, the couple's assets did not fall below the \$94,760 spousal impoverishment asset limit until June 12, 2004, and the petitioner was ineligible for MA due to excess assets until that date.
2. The petitioner was not ineligible due to excess assets from June 12, 2004, through the date of hearing, as the questioned Baird account was liquidated no later than June 12, 2004.
3. The petitioner's spouse's transfers to purchase the \$120,000 annuity were not divestments, as they did not violate the conditions found at *MEH*, 4.7.11.
4. The petitioner's spouse's \$120,000 annuity is not an available asset.

NOW, THEREFORE, it is

ORDERED

That the petition herein be remanded to the county agency with instructions to certify the petitioner for Institutional MA, consistent with the Conclusions of Law above, if otherwise eligible, within 10 days of the date of this Decision. In all other respects, the petition is 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 11th day of
February, 2005

/s/Nancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
67/NJG