



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)
c/o James M Weber, Atty.
Mclario, Helm & Bertling, S C
N88 W16783 Main Street
Menomonee Falls, WI 53051-2890

DECISION

MDV-66/68200

PRELIMINARY RECITALS

Pursuant to a petition filed February 7, 2005, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Washington County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on March 15, 2005, at West Bend, Wisconsin.

The issue for determination is whether petitioner's divestment of a tax deferred annuity can be offset by the amount of taxes paid on the annuity's cash surrender.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o James M. Weber, Atty.
Mclario, Helm & Bertling, S C
N88 W16783 Main Street
Menomonee Falls, WI 53051-2890

Represented by:

James M. Weber, Ptr Rep
N88 W16783 Main Street
Menomonee Falls, WI 53051-2890

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: Rachel Stutzman, ESS and Joann Faber, ESS Supervisor, ESS
Washington County Dept Of Social Services
333 E. Washington Street
Suite 3100
West Bend, WI 53095

Also present: Donald Laatsch, Petitioner's power of attorney
Doreen Laatsch, wife of power of attorney

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Washington County.
2. Petitioner opened a fixed tax deferred annuity on October 20, 1998.
3. On November 2, 2000, petitioner added DL as a joint owner of the annuity.
4. On October 28, 2003 petitioner cash surrendered a tax deferred annuity in the amount of \$97,387.94.
5. The \$97,387.94 was transferred to DL.
6. DL thereafter deposited the \$97,387.94 into a joint bank account with his wife.
7. DL and his wife paid \$43,299 in income taxes on the deferred gain they received from the annuity for tax year 2003.
8. On April 1, 2004 petitioner entered a nursing home.
9. On December 8, 2004 petitioner applied for Institutional MA.
10. On January 19, 2005 the county issued petitioner a negative notice denying the Institutional MA because it determined that petitioner divested \$97,387.94 on October 28, 2003, thereby causing petitioner be ineligible (penalty period) for 19 months, beginning on October 28, 2003 and ending on April 30, 2005. Petitioner's case was opened for MA card services.
11. The penalty period was calculated by dividing the \$97,387.94 by \$5096.

DISCUSSION

Medical assistance rules prevent a person from reaching the program's asset 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, although longer periods exist for trusts. §49.453(1)(f), Wis. Stats. An asset "includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action" by the individual, his spouse or someone acting on his or his spouse's behalf. 42 USC 1396p(e)(1). Divesting assets renders recipients ineligible for medical assistance for the number of months obtained by dividing the amount of disposed assets over the asset limit by the statewide average monthly cost to a private pay patient in a nursing home. §HFS 103.065(5)(b), Wis. Adm. Code; §49.453(3), Wis. Stats.; see also, Medicaid Eligibility Handbook, §4.7.5.

At the time petitioner applied for MA, the statewide average monthly cost to a private pay patient in a nursing home was \$4827. Medicaid Eligibility Handbook, §4.7.5. This would have given a penalty period of 20 months, not the 19 months as incorrectly determined by the county as seen in Finding of Facts #10 and #11, above.

As stated by both parties at hearing, the only issue in this case is what was the value received from the divestment of the annuity. The county argued that the value received was the amount of the cash surrender, or \$97,387.94. The petitioner's attorney argued that the value received should be counted as the cash surrender value less the amount paid by the recipient in taxes, or \$54,088.94 (\$97,387.94 - \$43,299).

The Medicaid Eligibility Handbook, defines the "divested amount" as the net market value minus the value received. See §4.7.2.7. The "net market value" is the fair market value at the time of the transfer minus

any outstanding loans, mortgages, or other encumbrances on the property. Medicaid Eligibility Handbook, §4.7.2.8. Additionally, the "value received" is the amount of money or value of any property or services received in return for the person's property. The value received may be in any of the following forms:

1. Cash.
2. Other assets such as accounts receivable and promissory notes (both of which must be valid and collectible to be of value), stocks, bonds, and both land contracts and life estates which are evaluated over an extended time period.
3. Discharge of a debt.
4. Prepayment of a bona fide and irrevocable contract such as a mortgage, shelter lease, loan, or prepayment of taxes.
5. Services which shall be assigned a valuation equal to the cost of purchase on the open market. Assume that services and accommodations provided to each other by family members or other relatives were free of charge, unless there exists a written contract (made prior to the date of transfer) for payment.

Medicaid Eligibility Handbook, §4.7.2.8.

I conclude that by paying the taxes on the divested annuity that DL discharged a debt of petitioner's, pursuant to §4.7.2.8(3), above, and that should reduce the "divested amount" accordingly. This is also similar to the exception to the divestment rules where divestment is not a barrier to eligibility if the ownership of the property was returned to the individual who disposed of it. §HFS 103.065(4)(d)2.c, Wis. Adm. Code; Medicaid Eligibility Handbook, §4.7.4 (3). As similarly found in DHA Decision No. MDV-70/#42210, the taxes paid were to pay a legal debt owed by petitioner, and were in a sense returned to petitioner - at least in part -which brings me to the amount that should be used to determine the "divested amount."

As petitioner was a joint owner of the annuity with DL, they were able to exercise all ownership rights under the annuity contract. See Exhibit 2. As such, it follows that the responsibility for taxes would have been shared between the two joint owners. Thus, the taxes paid by DL *on petitioner's behalf* would be half of what DL actually paid, or \$21,649.50. Then reducing the divested amount by the value received (\$97,387.94 - \$21,649.50) leaves a divested amount of \$75,738.44.

At the time petitioner applied for MA, the statewide average monthly cost to a private pay patient in a nursing home was \$4827. Medicaid Eligibility Handbook, §4.7.5. Therefore, this would have given a penalty period of 15 months.

CONCLUSIONS OF LAW

Petitioner's divestment of a tax deferred annuity can be offset by the amount of taxes paid on the annuity's cash surrender on petitioner's behalf.

NOW, THEREFORE, it is

ORDERED

That the matter be remanded to the county agency with instructions to redetermine petitioner's MA eligibility by removing the \$97,387.94 divestment, and recalculating the divestment with (1) a divested amount of \$75,738.44 and (2) the statewide average monthly cost to a private pay patient in a nursing home at the time petitioner applied for MA, or \$4827. The county shall take the action within 10 days of the decision.

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 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
Milwaukee, Wisconsin, this 6th day of
May, 2005

/s/Kelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals
67/KLC