



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

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In the Matter of  
  
(petitioner)

DECISION

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MDV-68/74982

**PRELIMINARY RECITALS**

Pursuant to a petition filed February 6, 2006, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Waupaca County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on April 24, 2006, at Waupaca, Wisconsin. A hearing set for March 22, 2006, was rescheduled at the petitioner's request.

The issue for determination is whether the petitioner made a disqualifying divestment of the proceeds from the sale of a life estate.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:  
  
(petitioner)

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 Voelker, ESS  
Waupaca County Dept Of Social Services  
811 Harding Street  
Waupaca, WI 54981-2087

**ADMINISTRATIVE LAW JUDGE:**

Joseph A. Nowick  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES #xxxxxxx) is a resident of Waupaca County.
2. On December 21, 2005, the county agency sent a written notice of negative action to the petitioner. The negative action in this case was the determination that the petitioner was ineligible for MA for the month of October, 2005, due to a divestment.
3. The petitioner filed a hearing request with the department on February 6, 2006.

4. The petitioner had a life estate in a property that was sold on September 23, 2005. After deducting expenses, the county agency calculated that the petitioner had life estate proceeds of \$9,348, of which \$8,851 was divested. The petitioner's attorney calculated that the petitioner divested less than \$5,096, which was the average monthly cost of nursing facility services at that time. The county agency found that the petitioner had an Institutional MA disqualification period of 1 month, October, 2005.

### DISCUSSION

Preliminarily, I note that an appeal of a negative action by a county agency concerning MA must be filed within 45 days of the date of the action. Sections 49.45(5) and 49.21(1), Wis. Stats.; Income Maintenance Manual, II-G-3.4.0. The petitioner's appeal was filed 47 days after the date of the action. However, the 45<sup>th</sup> day was a Saturday and the appeal was received on the first work day, Monday, February 6<sup>th</sup>. Thus, it was timely, and jurisdiction exists for considering the merits of the case.

A divestment is a transfer of assets for less than fair market value. Wis. Stat. Sec. 49.453(2)(a); *Medicaid Eligibility Handbook*, §4.7.2. 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. Wis. Stat. Sec. 49.453(1)(f). 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 Wis. Stat. Sec. 49.453(3) to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. *Medicaid Eligibility Handbook*, §4.7.5. In this case, the agency calculated a divestment of \$8,851, with a disqualification period of 1 month, starting on October 1 2005 and ending on October 31, 2005.

The parties are in agreement as to the length of the ineligibility period that would ensue if the transfer was a divestment. There was no disagreement over the actual calculations done by the county agency. By agreement of both parties, the only issue for me to decide is whether the county agency used the correct Life Estate and remainder Interest table to determine the value of the petitioner's life estate. In order to reach a decision on that issue, a little history is needed.

From no later than 1994 until January 11, 2005, the *Medical Assistance Handbook*, (now the *Medicaid Eligibility Handbook*), utilized the Life Estate & Remainder Interest Table in 26 CFR 20.2031 (49 Federal Register, Vol. 49, No. 93, May 11, 1984). The version of the table published in the *Handbook* was also in the Social Security Administration's Policy & Operations Manual Series (POMS), Section 01140.120.

In 2004, I issued a decision in MDV-59/61907 involving the valuation of a life estate that upheld the use of the existing table. That decision stated the following in pertinent part:

The State of Wisconsin uses the table used by the Social Security Administration (SSA). That table is found in the *Social Security Operation Manual (POMS)*, which is the Social Security Administration's policy document for the SSI program. The MA program also uses the table. The *Medicaid Eligibility Handbook (MEH)*, at Appendix 11.8.1.5, mandates the following method to determine the value of a life estate or remainder interest:

1. In the Life Estate and Remainder Interest Table (30.2.0) find the line for the person's age as of the transaction date.
2. Multiply the figure on that line in the Life Estate or Remainder column times the fair market value to determine the value of the life estate or remainder interest.

The petitioner argues that the table in the *Medicaid Eligibility Handbook* is over 25 years old and is not valid given today's economic realities. The validity of that table in the *Medicaid Eligibility Handbook* is beyond the scope of this decision. The Wisconsin Medicaid State Plan states the following:

As a condition for receipt of Federal funds under title XIX of the Social Security Act, the Department of Health and Family Services (Single State Agency) submits the following State plan for the medical assistance program, and hereby agrees to administer the program in accordance with the provisions of this State plan, the requirements of titles XI and XIX of the Act, and all applicable Federal regulations and other official insurances of the Department.

As discussed, the controlling, federal policy authority is found in the *POMS*. For treatment of resources in the MA program, the Department must act consistently with the SSI rules. The relevant provision in the *POMS Manual* on life estates is in table in SI 01140.110, which states:

Using the table in SI 01140.120, multiply the CMV (current market value) of the property by the life estate or remainder interest decimal that corresponds to the individual's age.

The use of the Life Estate and Remainder Interest Table is the law and policy that the county agency must use. I must note that the petitioner seemed to be implying that the use of the table in the *MEH* is unfair. The law does not permit the Division of Hearings and Appeals (DHA) to ignore or substitute another table or exercise equitable powers; i.e., the ability to disregard policy or law based on general considerations of fairness. See, *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). DHA must base its decisions on the law and policy governing the program involved in a specific case, here the MA program.

Despite that decision, on January 11, 2005, the department decided to not use the existing table and instead use the following process found in the *Medicaid Eligibility Handbook*, § 8.1.2 as of that date to determine a client's life estate/remainder interest.

1. Go to the IRS web-site <http://www.irs.gov/businesses/small/article/0,,id=112482,00.html> .
2. Look up the (Section 7520) interest rate for the month and year you are making the valuation. Make a note of the interest rate listed.
3. For Example, the Section 7520 interest rate for October 2004 is 4.4%.

Thus, the department no longer used the table published in the POMS but instead used IRS data. Then in June, 2005, Administrative Law Judge Sean Maloney issued a proposed decision in MDV-14/68839 that was adopted by the department. That decision stated in pertinent part:

Section 8.1.2. of the MEH requires use of the IRS tables. Section SI 01140.120 of POMS requires the use of different tables. Prior to January 2005 the MEH required the use of the same tables as POMS. It is not known why the MEH was changed in January 2005 to require use of the IRS tables. This change is especially puzzling since the Secretary of the Wisconsin Department of Health and Family Services (DHFS) has, in a Final Decision, held that the POMS tables must be used to compute the value of a life estate (and the value of a remainder interest) for purposes of MA. DHA Case No. MED-05/36371 (Wis. Div. Hearings & Appeals Proposed Decision November 18, 1998; Final Decision January 11, 1999) (DHFS).

It is settled law that "Wisconsin's MA eligibility criteria may not be more restrictive than federal SSI eligibility requirements." *Keip v. DHFS*, 2000 WI App 13, ¶ 22, 232 Wis. 2d 380, 397-398,

606 N.W.2d 543 (1999), *rev. denied*, 234 Wis. 2d 177, 612 N.W.2d 733 (2000). Federal SSI eligibility requirements are found in POMS. POMS SI 00501.001. Therefore, Wisconsin's MA eligibility criteria may not be more restrictive than the eligibility requirements found in POMS. Using the IRS tables, as instructed by the MEH, is a more restrictive than POMS since it results in a longer MA divestment penalty period. Therefore, the IRS tables cannot be used and, instead, the POMS tables must be used.

Based on that decision, the department issued a manual update that became effective on October 11, 2005. That update reversed the January 11, 2005 change and restored the use of the table published in the POMS. The release letter dated October 11, 2005 that accompanied the manual release stated: "If you become aware of individuals whose MA eligibility was adversely impacted, using the Life Estate process listed in the MEH from January 11, 2005 through October 10, 2005, redetermine eligibility and benefits." As the department adopted the logic used by ALJ Maloney, it was an admission that the MA program had erred in adopting the IRS method and had to use the table published by the POMS.

The impact on this case is whether the use by the petitioner of the IRS method was correct as the sale of the property (and life estate) was on September 23, 2005, with the cash disbursements made prior to October 11, 2005. Thus, the petitioner argued that the transaction occurred prior to the change in policy and should be governed by the IRS method.

There is no regulation as to whether a new handbook policy can be made retroactive. There is a great many cases on the impact of statutes on events that occurred prior to their effective date. The Wisconsin Supreme Court stated the following in *Gutter v. Seamandel*, 103 Wis.2d 1, 18, 308 N.W.2d 403 Wis., 1981:

The general rule of statutory construction is that statutes are to be construed as relating to future and not to past acts. There is an exception to this rule: if a statute is procedural or remedial, rather than substantive, the statute is generally given retroactive application.

That court also stated the following in *Thorpe v. Thorpe*, 123 Wis.2d 424, 427, 367 N.W.2d 233 Wis.App., 1985:

A statute may be retroactively applied if it is a remedial statute that cures defects or furthers a remedy. *Mosing v. Hagen*, 33 Wis.2d 636, 641, 148 N.W.2d 93, 96 (1967).

Based on these court decisions, I find that when the legislature has made it clear that if a statute is intended to be applied retroactively and it is for a remedial purpose, it passes legal muster. In the case at hand, the policy change in October 11, 2005, was a cure for the department's "defect", which it had created when it adopted the IRS methodology. There is no question that based on the language of the release letter that accompanied the October 11<sup>th</sup> manual material that the department intended that it be applied to cases that had previously used the IRS methodology. Thus, I find that the county agency has correctly applied the Life Estate & Remainder Interest Table found in the *Medicaid Eligibility Handbook*, § 8.1.2 to the petitioner's case.

### **CONCLUSIONS OF LAW**

The petitioner correctly applied the policy in the *Medicaid Eligibility Handbook* on the determination of the petitioner's life interest.

**NOW, THEREFORE, it is**

**ORDERED**

That the petition for review herein 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 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 28th day of  
April, 2006

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/sJoseph A. Nowick  
Administrative Law Judge  
Division of Hearings and Appeals  
130/JAN