



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

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In the Matter of

(petitioner)  
c/o Jeffery Drach, Attorney  
Drach Law Firm  
500 Third Street Suite 202  
Wausau, WI 54403

DECISION

MDV-37/88496

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 5, 2007, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Marathon County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on March 19, 2008, at Wausau, Wisconsin. Hearings set for January 2, 2008, January 30, 2008, and February 27, 2008, were rescheduled at the petitioner's request (with the respondent joining in the request concerning January 30<sup>th</sup>.) At the request of both parties, the record was held open for 20 days for the submission of additional information and a written argument from the petitioner ((petitioner)), and 20 subsequent days for the submission of additional information and a reply argument from the respondent (county).

The issue for determination is whether the county agency correctly denied the petitioner's application for Medical Assistance due to a divestment of assets.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(petitioner)  
c/o Jeffery Drach, Attorney  
Drach Law Firm  
500 Third Street Suite 202  
Wausau, WI 54403

Represented by:

Jeffery J. Drach, Attorney  
Same Address As Petitioner

Respondent:

Wisconsin Department of Health and Family Services  
1 West Wilson Street, Room 650  
P.O. Box 7850  
Madison, WI 53707-7850

By: Scott Corbett, Assistant Corporation Counsel  
Marathon County Dept Of Human Services  
400 E. Thomas Street  
Wausau, WI 54403

**ADMINISTRATIVE LAW JUDGE:**

Kenneth D. Duren  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxx) is a 72 year-old institutionalized resident of Marathon County. She applied for Elderly, Blind & Disabled - Medical Assistance on July 31, 2007, seeking MA back-dated to April, 2007.
2. The petitioner, by her representatives, admits she divested assets to others for no consideration as follows:

8/22/06	Thrivant Financial Contract #(redacted) Proceeds	\$50,981.36
4/18/07	Life estate deed executed	\$37,470.43
4/24/07	Cash Gifts	\$22,000.00
4/26/07	Thrivant Financial Policy #(redacted) Proceeds	\$ 5,030.79

See, Exhibit #2, p.1.

3. On April 24, 2007, the petitioner was given a Promissory Note as "LENDER", executed by three promisors identified as "MAKERS", to-wit, her three adult children, (redacted), (redacted) and (redacted). The Note stated, among other terms and in the parts relevant here, as follows:

FOR VALUE RECEIVED, the undersigned, (redacted), (redacted) and (redacted), ("Maker" whether one or more), hereby promise to pay to or to the order of (petitioner) ("Lender" whether one or more) at Lender's then current address or such other place as Lender may from time to time designate in writing, the Principal Amount of One Hundred Twenty-Five Thousand Eight Hundred Seventy and 54/100 Dollars (\$124,870.54) as follows:

#### **1. Payment Schedule.**

Payments of principal shall be due and payable in accordance with the amortization schedule attached hereto and incorporated herein by reference as Exhibit A. Said amortization schedule and this Note require a first payment in the amount of Five Thousand Nine Hundred Fifty and 00/100 Dollars (\$5,950.00) to be made no later than April 25, 2007, with subsequent payments to be made monthly in the amount of Five Thousand Nine Hundred Fifty and 00/100 Dollars (\$5,950.00). Provided however, that the entire principal shall be due and payable no later than January 5, 2009.

#### **2. Liability of Maker.**

The Maker and all others who may become liable for all or any part of this obligation hereby agree to be jointly and severally bound and jointly and severally waive and renounce presentment, protest, demand and notice of dishonor and any and all lack of diligence or delays in collection or endorsement hereof and expressly consent that the Lender may, without notice and without affecting the liability of any such party, (i) grant one or more renewals or extensions of this Note for any period or periods of time (ii) release any party liable for this obligation (iii) accept partial payments (iv) release or impair any security which may have been or which may hereafter be granted in connection herewith or (v) make any other indulgence or forbearance with respect thereto.

See, Exhibit #2, Attachment A.

4. On September 21, 2007, the county agency issued a Negative Notice to the petitioner informing her that the agency had determined that she had divested the assets described in Findings of Fact #2 & #3, above, totaling \$241,353.12; that as a consequence she was ineligible for Medical Assistance between August 1, 2006, and February 28, 2010, and eligible for MA card services only, effective May, 2007. The Notice further stated that neither the petitioner nor her power of attorney signed the Promissory



Note agreeing to borrow the funds; the note charged inadequate interest; and the note allows the maker to release any party liable which will result in forgiving a portion or the entire principal of the note. See, Exhibit #1, Attachment B.

5. On November 5, 2007, the petitioner filed an appeal with the Division of Hearings & Appeals contesting the correctness of the divestment action concerning the Promissory Note of April 24, 2007, and the penalty period. The petitioner asserted that the penalty ends effective January 1, 2008.
6. The petitioner did not sign or execute the Promissory Note, but she, or a friend or relative, did convey the sum of \$124,870.54 to her three adult children at the time of execution by the children of their promise to re-pay the sum with 4.8% per annum interest.
7. At the time of the fair hearing on this appeal on March 19, 2008, all periodic installments were paid when due to the petitioner.
8. On September 21, 2007, the county agency issued a Notice to the petitioner informing her application for MA was denied for April, 2007, due to assets in excess of program limits. The agency did not submit a list of counted assets in the hearing record supporting that determination, nor the amount.

### DISCUSSION

A person seeking Medical Assistance is ineligible if her assets exceed \$2,000. Wis. Stat. § 49.47(4)(b)3g. In order to prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by passing their assets to potential heirs, MA law prevents a recipient from reaching this 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. Wis. Stat. § 49.453(1)(f). Divesting assets renders recipients ineligible for MA for the number of months obtained by dividing the amount of disposed assets by the statewide average monthly cost to a private pay patient in a nursing home. Wis. Admin. Code § HFS 103.065(5)(b); Wis. Stat. § 49.453(3); *see also, Medicaid Eligibility Handbook* § 4.7.5. This amount was then \$5,584 per month. *Medicaid Eligibility Handbook*, § 4.7.5. The county agency determined that the petitioner was ineligible for Medical Assistance for 43.22 months, beginning with August, 2006, because she divested \$241,353.12 in assets between August 22, 2006, and April 26, 2007.

The petitioner concedes she divested \$115,482.58 in this time period. Her attorney contests that part of the agency determination providing that the delivery of the cash assets (\$125,870.54) to the petitioner's adult children under the terms of the Promissory Note is a divestment event. Rather, he asserts that this Promissory Note constitutes fair market value return for the cash given to the Makers by the Lender. Under Attorney Drach's theory of the case, this would result in a penalty period ending January 1, 2008, for the first four divestments in Finding of Fact #2, above, and no penalty period arising from the Promissory Note transaction of April 26, 2007.

The *Medicaid Eligibility Handbook* provided, at the time of the agency divestment decision in this case, as follows:

#### **4.7.2.1 Divestment**

"Divestment" is the transfer of income, *non-exempt assets*, and homestead property (4.7.2.3.1), which belong to an institutionalized person or his/her spouse or both:

1. For less than the fair market value of the income or asset by:

- a. An institutionalized person, or
- b. His/her spouse, or
- c. A person, including a court or an administrative body, with legal authority to act in place of or on behalf of the institutionalized person or the person's spouse, or
- d. A person, including a court or an administrative body, acting at the direction or upon the request of the institutionalized person or the person's spouse. This includes relatives, friends, volunteers, and authorized representatives.

It is also divestment if a person takes an action to avoid receiving income or assets s/he is entitled to. Actions which would cause income or assets not to be received include:

- 1. Irrevocably waiving pension income.
- 2. Disclaiming an inheritance.
- 3. Not accepting or accessing injury settlements.
- 4. Diverting tort settlements into a trust or similar device.
- 5. Refusing to take legal action to obtain a court-ordered payment that is not being paid, such as child support or alimony.
- 6. Refusing to take action to claim the statutorily required portion of a deceased spouse's or parent's estate. Count the action as a divestment only if:
  - a. The value of the abandoned portion is clearly identified, and
  - b. There is certainty that a legal claim action will be successful.

This includes situations in which the will of the institutionalized person's spouse precludes any inheritance for the institutionalized person. Under Wisconsin law, a person is entitled to a portion of his/her spouse's estate. If the institutionalized person does not contest his/her spouse's will in this instance, the inaction may be divestment.

The *Handbook* also stated with respect to divestment by promissory notes:

#### **4.7.12 Promissory Notes**

It is divestment if an institutionalized person signs a promissory note that has one of the following:

- 1. A provision that forgives a portion of the principal.
- 2. A balloon payment.
- 3. Interest payments only, with no principal payments.
- 4. An inadequate interest rate (relative to current market rates) at the time the promissory note was signed.

*Medicaid Eligibility Handbook*, § 4.7.12., n/k/a § 17.12 (effective April 30, 2008).



Wis. Stat. § 49.453(4) provides as follows:

(4) IRREVOCABLE ANNUITIES, PROMISSORY NOTES AND SIMILAR TRANSFERS. (ac) In this subsection, “transaction” means any action taken by an individual that changes the course of payments to be made under an annuity or the treatment of the income or principal of an annuity, including all of the following:

1. An addition of principal.
2. An elective withdrawal.
3. A request to change the distribution of the annuity.
4. An election to annuitize the contract.
5. A change in ownership.

(ag) For the purposes of sub. (2), whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to an irrevocable annuity, or transfers assets by promissory note or similar instrument, in an amount that exceeds the expected value of the benefit, the covered individual or his or her spouse transfers assets for less than fair market value. A transfer to an annuity, or a transfer by promissory note or similar instrument, is not in excess of the expected value only if all of the following are true:

1. The periodic payments back to the transferor include principal and interest that, at the time that the transfer is made, is at least at one of the following:

- a. For an annuity, promissory note or similar instrument that is not specified under subd. 1. b. or par. (am), the applicable federal rate required under section 1274 (d) of the Internal Revenue Code, as defined in s. 71.01 (6).
- b. For an annuity with a guaranteed life payment, the appropriate average of the applicable federal rates based on the expected length of the annuity minus 1.5%.

2. The terms of the instrument provide for a payment schedule that includes equal periodic payments, except that payments may be unequal if the interest payments are tied to an interest rate and the inequality is caused exclusively by fluctuations in that rate.

(am) Paragraph (ag) 1. does not apply to a variable annuity that is tied to a mutual fund that is registered with the federal securities and exchange commission.

(b) The amount of assets that is transferred for less than fair market value under par. (ag) is the amount by which the transferred amount exceeds the expected value of the benefit.

(c) The department shall promulgate rules specifying the method to be used in calculating the expected value of the benefit, based on 26 CFR 1.72-1 to 1.72-18, and specifying the criteria for adjusting the expected value of the benefit based on a medical condition diagnosed by a physician before the assets were transferred to the annuity, or transferred by promissory note or similar instrument. In calculating the amount of the divestment when a transfer to an annuity, or a transfer by promissory note or similar instrument, is made, payments made to the transferor in any year subsequent to the year in which the transfer was made shall be discounted to the year in which the transfer was made by the applicable federal rate specified under par. (ag) on the date of the transfer.

(cm) Paragraphs (ag) to (c) apply to annuities purchased before February 8, 2006, for which no transaction has occurred on or after February 8, 2006.

(d) For purposes of sub. (2), the purchase of an annuity by an institutionalized individual or his or her community spouse, or anyone acting on their behalf, shall be treated as a transfer of assets for less than fair market value unless any of the following applies:

1. The state is designated as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual.
2. The state is named as a beneficiary in the 2nd position after the community spouse or a minor or disabled child and is named in the first position if the community spouse or a representative of the minor or disabled child disposes of any remainder for less than fair market value.
3. The annuity satisfies the requirements under par. (e) 1. or 2.

(e) For purposes of sub. (2), the purchase of an annuity by or on behalf of an annuitant who has applied for medical assistance for nursing facility services or other long-term care services described in sub. (2) is a transfer of assets for less than fair market value unless either of the following applies:

1. The annuity is either an annuity described in section 408 (b) or (q) of the Internal Revenue Code of 1986 or purchased with proceeds from any of the following:
  - a. An account or trust described in section 408 (a), (c), or (p) of the Internal Revenue Code of 1986.
  - b. A simplified employee pension, within the meaning of section 408 (k) of the Internal Revenue Code of 1986.
  - c. A Roth IRA described in section 408A of the Internal Revenue Code of 1986.
2. All of the following apply with respect to the annuity:
  - a. The annuity is irrevocable and nonassignable.
  - b. The annuity is actuarially sound, as determined in accordance with actuarial publications of the office of the chief actuary of the social security administration.
  - c. The annuity provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

(em) Paragraphs (d) and (e) apply to all of the following:

1. Annuities purchased on or after February 8, 2006.
2. Annuities purchased before February 8, 2006, for which a transaction has occurred on or after February 8, 2006.

Wis. Stat. § 49.453(4)(c) provides:

**(4c) PURCHASE OF NOTE, LOAN, OR MORTGAGE.** (a) For purposes of sub. (2), the purchase by an individual or his or her spouse of a promissory note, loan, or mortgage after February 8, 2006, is a transfer of assets for less than fair market value unless all of the following apply with respect to the note, loan, or mortgage:

1. The repayment term is actuarially sound.
2. The payments are to be made in equal amounts during the term of the loan, with no deferral and no balloon payment.
3. Cancellation of the balance upon the death of the lender is prohibited.

(b) The value of a promissory note, loan, or mortgage that does not satisfy the requirements under par. (a) 1. to 3. is the outstanding balance due on the date that the



individual applies for medical assistance for nursing facility services or other long-term care services described in sub. (2).

The agency acted to deny the application for Elderly, Blind & Disabled - MA for the reasons stated in Findings of Fact #4 & #8, above.

Based upon the evidence presented in this action, I can only conclude that the interest rate to be re-paid by the promissory note complies with Wisconsin law, as asserted by the petitioner's counsel in his brief of April 8, 2008. See, Wis. Stat. § 49.453(4)(ag)(1)(a); and see, Exhibit #2, attached copy of Internal Revenue Code § 1274.

Likewise, I must conclude, as the petitioner's attorney asserts in his argument, that no statute *requires* the petitioner to actually sign or acknowledge the terms of the instrument. In short, her part of the transaction is primarily to transfer the sum. Rather, it is the "Makers" of the promise that have executed the written expression of the promised terms of the transaction and their obligation to re-pay the Lender. The promissory note is a valid legal instrument for all apparent intents and purposes. The agency has not shown otherwise.

The question presented is whether it is a divestment event. I do not concur with the petitioner that it is *not* a divestment by promissory note simply because the policy in the *Handbook* says that it is divestment if the applicant/recipient "signs" a promissory note and she did not "sign" the promissory note. Likewise, the agency is wrong on the point too. The lack of the petitioner's signature on the promissory note does not mean it *is* a divestment either. Rather, the divestment statute makes it plain that the point is whether assets were transferred by the petitioner via promissory note to another in an amount that exceeds the expected return. See, Wis. Stat. § 49.453(4)(ag). The lack of signature question on the promissory note is a red-herring issue, that diverts attention from what matters in the analysis.

The petitioner transferred the asset to her three children in operation of this legal instrument. The three children are obligated to repay the sum transferred, plus a legally reasonable rate of interest, in equal installments, and apparently they have done so. No testimony or evidence suggests otherwise. There is no balloon payment either, as there are 21 equal payments of \$5,950, and a final 22<sup>nd</sup> payment of the balance due which will be in a similar payment range after computation of accrued interest. The crux of the matter is that the note allows the Lender to release or forgive any party liable or payment, which may result in forgiving a portion or the entire principal of the note.

Wis. Stat. § 49.453(4c) requires that: (1) the promissory note have a repayment term that is actuarially sound; (2) in equal installments with no balloon; and (3) not provide by its terms for cancellation of the balance due upon death of the lender (specifically prohibited).

This note is to be repaid in 22 months to a 72 year-old, in equal installments except for the last payment which may be different due to (allowed) accrued interest [49.453(4)(ag)2]. The agency produced no evidence that the repayment term is actuarially unsound. I have reviewed the promissory note and it does not provide for a specific term providing for cancellation upon the death of the lender.

I can only conclude that it is sufficient on its terms to pass statutory muster, and the amount transferred is not a divestment, but a transaction providing for repayments at fair market value. All available evidence indicates that the repayments have been occurring. *If* the Makers fail make any such payment or the Lender forgives or forbears payment, and the Lender allows this to occur, *then* it would appear that future divestment events could occur whenever fair market return is not made. Her failure to notify the agency of any such forgiven or failed payments could also give rise to overpayment or welfare fraud questions *in such an event*. She would be well-advised to report forgiven, released, or forbearance of non-payment or partial payment, or the like, to the county agency.

No divestment event has occurred because of the transfer of cash under this promissory note of April 24, 2007.

The agency made no specific argument that the petitioner was ineligible due to assets in excess of \$2,000 at the hearing held on March 19, 2008, but it did issue a Notice in September, 2007, stating that she exceeded MA asset limits in April, 2007.

In reply, the petitioner asserted that she had paid a check to her nursing home in April, 2007, for \$6,559, but it did not clear the bank until May, 2007; and that the agency had also denied her application for MA counting these funds as available on April 30, 2007.

I find that these funds were unavailable on April 30, 2007, by the execution of the check by the petitioner, or her representatives, and thus not countable as an asset on that date. No evidence demonstrates that she canceled or recalled the check, or failed to deliver it to the nursing home. Under these facts, the \$6,559 is likewise to be disregarded by the agency in reviewing the petitioner's eligibility for MA retroactive to April 1, 2008.

The matter will be remanded for review and re-determination of the applicable divestment penalty period, and exclusion of the April, 2007, nursing home payment as a countable asset.

#### **CONCLUSIONS OF LAW**

- 1) That the county agency has incorrectly determined that the transfer by the petitioner of \$124,870.54 to her three adult children under the terms of a promissory note executed by the three adult children on April 24, 2007, was a divestment.
- 2) The promissory note of April 24, 2007, provides for repayment within 22 months of the principal in equal installments, and does not provide for the cancellation of the promise to pay upon death of the petitioner.
- 3) The petitioner paid \$6,559 to her nursing home by check executed and delivered to the nursing home in April, 2007; she did not stop payment or cancel the check; and this amount is not countable as an asset for MA purposes in April, 2007.

**NOW, THEREFORE, it is**

#### **ORDERED**

That the matter is remanded to the county agency with instructions to: rescind all September 21, 2007, denials of Elderly, Blind & Disabled - MA to the petitioner arising from her July 31, 2007, application; review and re-determine her eligibility for MA retroactive to April, 2007, treating the transfer of \$124,870.54 by the petitioner to her three adult children as a transfer for fair market value for so long as fair value is returned under the terms of the promissory note of April 24, 2007; and disregarding the nursing home payment made by the petitioner by check in April, 2007 of \$6,559 from her countable assets as of April 30, 2007; with written notice. These actions shall be taken within 10 days of the date of this Decision.

#### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative



Law Judge 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.

To ask for a rehearing, 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 for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wisconsin Statutes § 227.49. A copy of the statutes can be 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 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Wisconsin Department of Health and Family Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, 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 appeals to the Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of  
Madison, Wisconsin, this 16th day of  
May, 2008

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/sKenneth D. Duren  
Administrative Law Judge  
Division of Hearings and Appeals  
527/KDD