



STATE OF WISCONSIN  
Division of Hearings and Appeals

In the Matter of



DECISION

MGE/117071

PRELIMINARY RECITALS

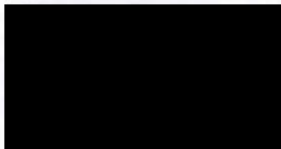
Pursuant to a petition filed January 21, 2011, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to Medical Assistance, a hearing was begun on February 22, 2011, and continued and completed on April 05, 2011, at Green Bay, Wisconsin. At the request of the parties, the record was held open for briefs with attachments to the Division of Hearings and Appeals (DHA). The parties timely submitted their briefs with attachments to DHA.

The issue for determination is whether the county agency correctly discontinued the petitioner's Institutional MA effective February 1, 2011, due to divestment by petitioner refusing to make a claim against her husband's estate.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:



Petitioner's Representative:

Attorney Daniel Walsh  
Walsh & Walsh, S.C.  
1000 N Broadway  
De Pere, WI 54115

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Robin Bona, ESS  
Brown County Human Services  
Economic Support-2nd Floor  
111 N. Jefferson St.  
Green Bay, WI 54301

**ADMINISTRATIVE LAW JUDGE:**

Gary M. Wolkstein  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is an 85 year old institutionalized resident of Brown County who resides in a nursing home.
2. On April 19, 2010, petitioner's application for Institutional MA was received at the county agency and was approved as of May 1, 2010. The combined assets for the couple as of May, 2010 was \$108,232.34. See Exhibit 4 and Petitioner Exhibit A.
3. The petitioner's husband, [REDACTED] was the community spouse. He was also the guardian of the petitioner as of a May 14, 2009 Brown County Circuit Court Order. See Exhibit B.
4. On April 16, 2010, a petitioner filed a petition for Approval Prior to Exercise of Powers over the Estate of a Married Ward on behalf of [REDACTED]. See Exhibit 1.
5. On June 10, 2010 petitioner and petitioner's husband executed a marital property agreement. See Exhibit 3 or Petition Exhibit G.
6. The marital property agreement classified all assets in the names of [REDACTED] and [REDACTED] as [REDACTED]'s individual assets as a transfer between spouses. See Exhibit 3. The marital property agreement stated in pertinent part: "The individual property of [REDACTED] at his death shall be transferred to our children in equal shares as a non-probate transfer pursuant to Wis. Stat. sec. 766.58(3)(f)."
7. On November 27, 2010, petitioner's spouse, [REDACTED] died and [REDACTED]'s standby guardian, [REDACTED] (daughter of [REDACTED] and [REDACTED]), became petitioner's guardian.
8. On January 17, 2011, the county agency sent a Notice of Decision to the petitioner's guardian, [REDACTED] stating that petitioner's Institutional MA would discontinue effective February 1, 2011, due to assets and of \$51,114.09 which are above the MA \$2,000 asset eligibility limit. See Exhibit 4 or Exhibit H.
9. On January 20, 2011, [REDACTED]'s Last Will and Testament was filed with Brown County Probate Court excluding his wife from his estate and leaving the estate to his children. See Exhibit 2. In section III of the will, [REDACTED] gave the residue of his estate to his children in equal shares with the express intent to exclude his wife, [REDACTED] from receiving any property. See Exhibit 2, page 1.
10. During the initial February 22, 2011 and continued April 5, 2011 hearings, the county agency also asserted that the petitioner's February 1, 2011 MA discontinuance was correct due to divestment. The divestment was the institutionalized person's (petitioner) refusal to make a claim against her husband's estate. The county contended that if [REDACTED] had petitioned the Probate Court on [REDACTED]'s behalf to make a marital claim against her husband's estate, the Probate Judge likely would have awarded a marital share to [REDACTED].
11. It is [REDACTED]'s position as of guardian of [REDACTED] that any claim advanced by petitioner would fail because of the Marital Property Agreement and therefore such failure to make a claim against [REDACTED]'s estate cannot be treated as a divestment per Medicaid Eligibility Handbook, sec. 17.2.1(2)(f).

### DISCUSSION

A single person cannot be eligible for institutional/nursing home MA if she has nonexempt assets exceeding \$2,000. To prevent a person from simply giving away her assets when the specter of nursing home costs appears, the MA program has developed policies to limit eligibility in the event of such giveaways, or prohibited "divestments."

A divestment occurs when an institutionalized individual, his spouse, or another person acting on his behalf, transfers assets for less than fair market value, on or after the individual's "look-back date." WI Stat § 49.453(2)(a); Medicaid Eligibility Management Handbook (MEMH), Appendix 17.2.1. The "look-back date" in most cases, including here, is the first date the individual is both institutionalized and an MA applicant. Ibid., (1)(f). A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for institutional MA may cause ineligibility for the institutional type of MA. WI Stat § 49.453(1)(f); Medicaid Eligibility Management Handbook (MEMH), App. 17.3.0. 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 WI Stat § 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 Management Handbook (MEMH), Appendix 17.5.0.

The Medicaid Eligibility Management Handbook, Appendix 17.2.1, further explains divestment actions as follows:

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

1. For less than fair market value of the income or asset,
  - a. By an institutionalized person, or
  - b. By his/her spouse, or
  - c. By a person, including a court or an administrative body, with legal authority to act in place or on behalf of the institutionalized person or the person's spouse, or
  - d. By 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.
2. 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:
  - a. Irrevocably waiving pension income.
  - b. Disclaiming an inheritance.
  - c. Not accepting or accessing injury settlements.
  - d. Diverting tort settlements into a trust or similar device.
  - e. Refusing to take legal action to obtain a court-ordered payment that is not being paid, such as child support or alimony.
  - f. **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:**
    - + the value of the abandoned portion is clearly identified, and
    - + **There is certainty that a legal claim action will be successful.**

Medicaid Eligibility Management Handbook, Appendix 17.2.1. See also WI Stat § 49.453(2).

The MA Handbook provides that if an MA client **or his/her spouse** uses an asset in a way to makes it **unavailable** and doesn't receive fair market value (FMV), treat that asset as divestment. MA Handbook, Appendix 17.2.10, "Unavailability."

During the hearing, the county agency representative argued that the Wisconsin Supreme Court decision, Tannler v. Wisconsin DHSS, held that it was divestment for the institutionalized spouse to refuse to make a claim in her husband's estate. The county alleged that had [REDACTED] petitioned the Probate Court on [REDACTED]'s behalf to make a marital claim in this estate, the Probate Judge likely would have awarded a marital share to [REDACTED].

The Tannler decision resulted from the fallout of the Spousal Impoverishment law that was enacted in 1989. Under Spousal Impoverishment, an institutionalized person can become eligible for MA with higher than usual asset limits if the person has a spouse living in the community. Under the unique law, once an institutionalized spouse becomes eligible for MA, he or she must transfer all assets to the community spouse within one year. See Wis. Adm. Code, §DHS 103.075(5)(d); Handbook, App. 18.4.6.1. At that point, all assets in the community spouse's name belong solely to the community spouse, and the MA program has no claim on those assets. Wis. Stat., §49.455(5)(d); Wis. Adm. Code, §DHS 103.075(5)(c). Essentially then the community spouse can keep or dispose of assets as she wishes; if s/he divests the assets, the divestment could affect her potential MA eligibility, but not the eligibility of the institutionalized spouse who already was eligible.

However, at some point prior to Tannler, the department instituted a policy that if a community spouse died prior to the institutionalized spouse, it would be considered a divestment if the institutionalized spouse failed to make a claim on the community spouse's estate. Tannler addressed the issue of whether the department policy was valid; could it be divestment if the surviving spouse failed to take an action, rather than the traditional idea of taking an action? The Supreme Court in Tannler decided that failure to make a claim on an estate could be considered a divestment unless the claim was likely to fail. For practical purposes thereafter estate planners for the community spouses in such situations would have the couples sign marital property agreements with provisions that the surviving spouse would not make a claim on an estate.

In Tannler, the institutionalized spouse transferred assets pursuant to §49.455(6) to the community spouse. At that point the community spouse could have transferred the assets to anyone without a divestment penalty against the institutionalized spouse. However, after the community spouse/husband predeceased the institutionalized spouse, the issue arose concerning whether the surviving spouse should have elected against his estate. In failing to do so, where there was a likelihood of success, a divestment occurred.

In the instant case, the central contested issue for the hearing was divestment as the basis for the February 1, 2011 discontinuance of petitioner's Institutional MA. Petitioner agreed that the Tannler decision stands for the proposition that any divestment that could occur following a spouse's death could only take place if the surviving spouse/MA recipient failed to make a claim in the decedent's estate. The MA Handbook, Appendix 17.2.1. However, 17.2.1(2)(f) indicates that a divestment penalty occurs only when a party refuses to take action to claim the statutorily required portion of a deceased spouses or parents estate, and count the action as a divestment **only if: the value of the abandoned portion is clearly identified and "there is certainty that a legal claim action will be successful."**

During the hearing and in its brief, the county agency asserted that the petitioner or her guardian should have made a claim against the estate of her husband. The county also alleged, without any reliably evidence, that there was some likelihood that a legal claim action would have been successful against Mr. [REDACTED]'s estate. However, Attorney Walsh responded convincingly that: a) the marital Property Agreement as ordered by the Circuit Court is valid; b) that the marital property agreement serves to classify all assets in the name of [REDACTED] as his individual property; and c) there is no evidentiary certainty that a claim filed by [REDACTED] against the estate of her husband would succeed.

Mr. Walsh further cited to four separate fair hearing decisions, each of which dealt with an institutionalized MA recipient, who lost their spouse (the community spouse) and the county agency asserted that a divestment had occurred. Petitioner cited to those four prior fair hearing decision which used the analysis found in the Wisconsin Supreme Court decision in Tannler v. Wisconsin DHSS, 211 Wis. 2d 179, 564 N.W. 2d 735 (1997), to conclude that a divestment had **not** occurred. DHA decisions in MDV-40/49313, MDV-51/38427, MDV-03/21409, and MDV-70/10486. In each case, the couple had previously executed a Marital Property Agreement similar to that in this instant case. In each case the ALJ concluded that because of the Marital Property Agreement, it was unlikely that a claim in the estate of the community spouse by the institutionalized MA recipient would be successful. As a result the MA benefits in each case were continued.

The county agency failed to establish that there was a defect in the Marital Property Agreement making it invalid. The county agency also did not present any law or policy to establish that it was improper or contrary to law that petitioner and her husband had utilized a marital property agreement in a MA context to classify all assets of the individual property of the community spouse. As a result, the county agency was unable to refute that based upon the marital property agreement, petitioner continued to be eligible for MA and that divestment had not taken place. There is no reliable evidence in the hearing record to indicate with any certainty that a legal action against her husband's estate would be successful. The matter is remanded to the county agency with instructions to restore petitioner's eligibility for MA retroactive to the February 1, 2011 discontinuance

#### CONCLUSIONS OF LAW

The county agency the county agency incorrectly discontinued the petitioner's Institutional MA effective February 1, 2011, due to divestment by petitioner refusing to make a claim against her husband's estate.

**THEREFORE, it is**

#### ORDERED

That the matter is remanded to the county agency with instructions to restore petitioner's Institutional MA retroactive to February 1, 2011, 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 Wis. Stat. § 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 with the appropriate court 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).

Appeals to Circuit Court should name the Department of Health Services as the respondent. After filing the appeal with the appropriate court, it 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 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

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 Wis. Stat. §§ 227.52 and 227.53

Given under my hand at the City of Madison,  
Wisconsin, this 26th day of July, 2011

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/sGary M. Wolkstein  
Administrative Law Judge  
Division of Hearings and Appeals

c: , Brown County Human Services - email  
, Department of Health Services - email  
Daniel Walsh, Walsh & Walsh, S.C. - e-mail