

Divestment by Death



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

In the Matter of

DECISION

[REDACTED]  
c/o Molly Fellenz, Benefit Specialist,  
Coalition Of WI Aging Groups  
2850 Dairy Drive Suite 100  
Madison, WI 53718

MDV-5/105182

**PRELIMINARY RECITALS**

Pursuant to a petition filed June 30, 2009, under Wis. Stat., §49.45(5), to review a decision by the Brown County Dept. of Human Services to discontinue Medical Assistance (MA), a hearing was held on August 5, 2009, by telephone. A hearing set for July 22, 2009 was rescheduled at the agency's request.

The issue for determination is whether a divestment occurred following petitioner's husband's death.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
c/o Atty. Molly Fellenz,  
Coalition of WI Aging Groups  
2850 Dairy Drive Suite 100  
Madison, WI 53718

Respondent:

Wisconsin Department of Health Services  
1 West Wilson Street, Room 651  
P.O. Box 7850  
Madison, WI 53707-7850

By: Lindsey Kraft, ESS  
Brown County Human Services  
111 N. Jefferson St.  
Green Bay, WI 54301

**ADMINISTRATIVE LAW JUDGE:**

Brian C. Schneider  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Brown County.

2. Petitioner applied for nursing home MA in late 2008 and was granted coverage. In 2009 the worker discovered that there was a trust of which petitioner was a beneficiary. Eventually the worker determined that a divestment occurred when the trust was shifted from revocable to irrevocable.
3. On April 14, 2009, the county sent a notice informing petitioner that MA would end May 1 because of a divestment. Petitioner's daughter, who was her representative throughout the process, did not receive the notice because she had moved. Eventually she discovered that MA was closed, and she filed this appeal soon after the discovery.
4. In 1996 petitioner and her husband created a revocable trust.
5. On May 26, 2006, the couple amended the revocable trust to provide that upon petitioner's husband's death the assets in the revocable trust would transfer to a separate irrevocable trust set up by petitioner's husband on that same day. Also on May 26, 2006, the couple signed a marital property agreement stating that all assets in the trust were solely the property of petitioner's husband.
6. Petitioner's husband died on July 18, 2006. Under the terms of the revocable trust the couple's home, valued at \$230,000, passed into the irrevocable trust and petitioner lost any interest or claim on the property.
7. The county determined that the couple divested the home effective the date of petitioner's husband's death. Using the divestment formula the county determined that the divestment period would be for 37 months, through July 31, 2009. Since petitioner already received MA through April, 2009, the actual ineligibility period was only for May, June, and July, 2009.
8. At no time prior to December, 2008 did petitioner or her husband apply for or receive MA.

### DISCUSSION

As a first point, typically an appeal must be filed within 45 days of the negative action. Wis. Stat. §49.45(5). However, the Division of Hearings and Appeals has long taken the position that the 45 days do not run until the person is made aware of the negative action. In cases where the agency sends a notice to the last known address, the person has the burden to prove that she did not receive the notice. Petitioner's daughter explained that she moved prior to the notice being mailed, and although she filed a forwarding request with the post office, she did not receive the notice. She only found out about the action until June, 2009, and she appealed within 45 days of actually receiving notice. I find that her testimony was credible, and thus the appeal was timely.

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Admin. Code §HFS 103.065(4)(a); MA Handbook, Appendix 17.2.1. Divestment does not impact on eligibility for standard medical services such as physician 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 (currently \$6,259). MA Handbook, App. 17.5.

A transfer into an irrevocable trust, where the MA applicant/recipient's assets form the trust, and where there are no circumstances where payments can be made to the applicant/recipient, is described specifically in 42 U.S.C. 1396p(d)(3)(B)(ii) as being a divestment. See also Wis. Stat. §49.454(3)(b); MA Handbook, App. 17.13.3. 42 U.S.C. 1396p(d)(4) describes exceptions to that rule. Exceptions are so-called Special Needs Trusts, which provide that the state will be repaid any MA payments upon the individual's death, and pooled trusts for disabled individuals. See also Wis. Stat. §49.454(4). The MA

Handbook, App. 17.13.4, adds as exceptions annuities, irrevocable burial trusts, and trusts established by a will.

Revocable trusts are considered to be assets of the applicant/recipient. Wis. Stat., §49.454(2), Handbook, App. 16.6.3.

The easy answer to the issue in this case is that, of course, a divestment occurred. On the date of petitioner's husband's death, an asset available to petitioner was transferred into a trust under which petitioner had no claim. The transfer occurred due to the action of petitioner and her husband. Under the plain language of the statutes, a divestment of the value of the home occurred.

Petitioner cited a prior fair hearing decision, no M DV-66/90762, dated June 17, 2008, 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. The problem is that this situation is not a Tannler situation.

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 she divests the assets, the divestment could affect her potential MA eligibility, but not the eligibility of the institutionalized spouse who already was eligible.

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.

The point is that Tannler only addressed divestments that occurred following Spousal Impoverishment MA eligibility determinations. Because the community spouse could do as she wished with the property without affecting the institutionalized spouse's eligibility, the issue of divestment for the institutionalized spouse only occurred after the community spouse's death (admittedly, an unusual situation since the institutionalized spouse generally predeceases the community spouse). In non-Spousal Impoverishment situations, the divestment rules do not change. If EITHER spouse transfers property in such situations, a divestment occurs.

In the fair hearing decision cited by petitioner, the classic post-Tannler process was followed. The institutionalized spouse applied for and was granted MA in July, 2007. At that point the couple's assets were in a revocable trust that would have been counted as an asset for MA purposes. Although the decision's facts do not mention whether Spousal Impoverishment provisions were utilized, they would have to have been utilized to make the institutionalized spouse eligible for MA. Otherwise the couple's total assets would have had to have been less than \$3,000. Furthermore, in the Discussion the

Administrative Law Judge discussed Spousal Impoverishment, so it follows that he was aware that the MA eligibility was based upon Spousal Impoverishment.

In this case petitioner's husband died long before petitioner ever applied for MA. Thus she never was determined eligible for MA under Spousal Impoverishment. Tannler thus does not come into play. There was no legal basis for a Spousal Impoverishment community spouse to transfer assets because Spousal Impoverishment never was implemented. Instead petitioner and her husband made an agreement that upon his death, all of her interest in the home would be transferred to an irrevocable trust. Their agreement could have been modified or revoked at any time prior to his death. Thus the divestment occurred when he died, and the county correctly determined the penalty period based upon the home's value.

I note that Attorney Hooper's February, 2009 letter suggested that the divestment should be only one-half of the home's value. However, under divestment rules the assets of both spouses are counted, and thus the full value of the home was divested.

### **CONCLUSIONS OF LAW**

1. The county correctly determined that a divestment occurred when petitioner's home was transferred into an Irrevocable Trust under which she had no access to the assets.
2. A Tannler analysis of the transfer does not apply because petitioner never was determined eligible for MA under Spousal Impoverishment rules.

**NOW, THEREFORE, it is**

### **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

### **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 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 \_\_\_\_\_ day  
of \_\_\_\_\_, 2009.

---

Brian C. Schneider  
Administrative Law Judge  
Division of Hearings and Appeals  
bcs

0810/

cc:

