



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

In the Matter of

DECISION

MDV-23/44181

PRELIMINARY RECITALS

Pursuant to a petition filed April 7, 2000, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Green County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on May 31, 2000, at Monroe, Wisconsin.

The issue for determination is whether the petitioner is ineligible for MA due to a divestment of assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Represented by:

Attorney Scott Thompson
P O Box 710
Monroe, WI 53566-0710

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: Jeannie Blumer, ES Supervisor
Green County Dept Of Human Services
N3152 State Road 81
Monroe, WI 53566

EXAMINER:

Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN, CARES #) is a resident of Green County.
2. Petitioner and petitioner's spouse sold their home by warranty deed on May 14, 1999.
3. The proceeds of the sale were deposited in a joint savings account. On June 19, 1999, that account was closed and the money placed in a POD account titled to only petitioner's spouse.

4. Petitioner and petitioner's spouse signed a marital property agreement in which the petitioner waived any interest in that bank account or in any asset in her spouse's estate.
5. Petitioner's spouse died on September 4, 1999, and the money in the bank account passed to the designated beneficiaries.
6. The petitioner applied for MA on January 11, 2000.

DISCUSSION

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; MA Handbook, Appendix 14.2.1. 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. Sec. 49.453(1)(f), Stats.; Handbook, App. 14.3.0. 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 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 \$3,726].

The issue is whether a divestment occurred. The petitioner argued that there was no disqualifying divestment because a transfer of either homestead or non-homestead property to a spouse cannot affect MA eligibility. See MDV-70/10486 and MA Handbook, Appendix 14.4.0, items #7, #8 (04-01-99). See also s. HSS 103.065(4)(b) and (cm), Wis. Adm. Code, which states:

(cm) *Permitted divestment on or after July 1, 1990, to an exempt party - non-homestead property.* Transfer of a non-homestead resource at less than fair market value on or after July 1, 1990, is not divestment resulting in ineligibility under this section to the extent that the resource was transferred:

1. To or from the individual's spouse or to another individual for the sole benefit of the spouse; (Emphasis added.)

This provision is not relevant to this case because the disqualifying transfer was not the transfer from the petitioner to petitioner's spouse. I conclude that a divestment occurred following petitioner's spouse's death, when the proceeds from the sale of the home were transferred pursuant to the terms of the marital property agreement and his will. Until the sale of the house, it remained an exempt asset of petitioner for MA purposes. Petitioner's personal representative made the transfer of half of the sale proceeds. Prior to his death, petitioner's spouse could have changed his will at any time. Only upon his death did the will require the transfer of the asset to his children. At that point, petitioner no longer had any interest in the property. Petitioner's spouse's act of transferring the property, and petitioner's acquiescence to the transfer pursuant to the marital property agreement became effective. The triggering of the personal representative's duty under the will to transfer the property is the act of divestment. Thus, the divestment period began when the will's provision for transferring the property to others, for less than fair market value, occurred.

At the hearing, a reference was made to the Wisconsin Supreme Court decision, Tannler v. Wisconsin DHSS, 211 Wis. 2d 179, 564 N.W. 2d 735 (1997). It has been argued 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 14.2.1, however, says that a divestment penalty occurs only if there is a likelihood that a claim against the estate would succeed. Because of the marital property agreement, any claim would not succeed.

However, reliance on Tannler for that interpretation is misplaced. This case is distinguished from Tannler in one vital respect. Tannler involved an interpretation of events that occurred pursuant to the Spousal Impoverishment provisions found at §49.455, Wis. Stats. Spousal Impoverishment rules provide that if an institutionalized person applies for MA, and he or she has a spouse residing in the community, the applicant may seek the protections offered by §49.455, as originally mandated by the federal Medicaid Catastrophic Coverage Act of 1988 (MCAA). Under §49.455(6), the institutionalized spouse, after being determined eligible for MA under the Spousal Impoverishment provisions, may transfer assets to the community spouse for the community spouse's needs and use. Once the assets are transferred to the community spouse, the community spouse may divest them without a penalty against the institutionalized spouse. MA Handbook, App. 14.4.0, no. 2. Any divestment by a community spouse is a specific exception to the divestment rules found at §49.453, Stats.

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. That the community spouse left a will giving his property to persons other than his wife was not an issue because he could divest his property. Justice Abrahamson's concurring opinion best states the interplay of the policies:

Anyone who works with the medical assistance statutes begins by appreciating that the federal and state statutes are extremely complex and may be fairly described as incomprehensible.... This case illustrates the difficulties posed by the legislative compromises made in this difficult field.

... Certain divestments are acceptable; others are not....

The case at bar involves the interplay of the divestment and spousal impoverishment provisions. Under the court's interpretation the community spouse retains the freedom to make testamentary gifts; yet at the community spouse's death the assets available by law to the institutionalized spouse are used for the care of that spouse. The court's interpretation of the statutes attempts to fit the congressional plan of enabling the community spouse to keep and dispose of his or her own assets while requiring an institutionalized person to use his or her assets for self care. Thus the holding of the court attempts to comport with the spousal impoverishment provisions as well as the divestment goals.

See Tannler, Concurring Opinion, 211 Wis. 2d at 191-193.

In this case the Spousal Impoverishment provisions were not effectuated because both the petitioner applied for MA after the death of her husband. Thus, he was never designated the "community spouse" so he never had the freedom to transfer the asset without consequence as provided by the Spousal Impoverishment provisions. The money from the sale of the home was not part of a Community Spouse Asset Share as allowed by §49.455(6)(b), Stats. While a community spouse under §49.455 retains the freedom to make testamentary gifts, an MA recipient not protected by the Spousal Impoverishment rules does not retain that right. He or she remains subject to the divestment provisions of §49.453. That is, a divestment occurs when the MA applicant or his or her spouse transfers an asset for less than fair market value. Here, the divestment occurred with the transfer of the assets pursuant to petitioner's spouse's will, as acquiesced to by petitioner.

CONCLUSIONS OF LAW

1. When petitioner's spouse died, marital property agreement and will provisions became effectuated requiring the transfer of his property to his children, and the triggering of those provisions caused a divestment of the property's value.

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 that 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 _____ day
of _____, 2000.

Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
97/JAN

cc: GREEN COUNTY DEPT OF HUMAN SERVICES