



Post Planning - FAIL  
NO MPA

FH  
[REDACTED]

STATE OF WISCONSIN  
Division of Hearings and Appeals

In the Matter of



DECISION

MDV/137218

PRELIMINARY RECITALS

Pursuant to a petition filed November 30, 2011, under Wis. Stat. § 49.45(5), to review a decision by the Brown County Human Services to discontinue Medical Assistance (MA), a hearing was held on February 2, 2012, by telephone. A hearing set for January 6, 2012 was rescheduled at the petitioner's request.

The issue for determination is whether the county correctly imposed a divestment penalty.

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney James E. Lewis  
2149 Velp Ave., Suite 206  
Green Bay, WI 54303-5424

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703  
By: John. F. Luetscher  
Brown County Corp. Counsel  
P.O. Box 23600  
Green Bay, WI 54305-3600

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 institutional MA in May, 2011 under Spousal Impoverishment rules. He was granted eligibility, and he then transferred his assets to his wife as required by the Spousal Impoverishment statute.

3. Liquid assets totaled \$49,459. The couple also owned their home. On July 29, 2011, after the assets were transferred to her, petitioner's wife transferred the assets to a revocable trust. The trust provided that upon her death the assets would be distributed to four relatives and other beneficiaries, with no assets going to petitioner.
4. Petitioner's wife died on August 13, 2011. At that point the county worker assumed that the assets would be left to petitioner, and on September 6, 2011, the county notified petitioner that MA would end October 1 because assets were over the limit.
5. After petitioner's power of attorney agent informed the worker of the trust, the worker reviewed the case for possible divestment.
6. On October 28, 2011, the county sent petitioner a notice informing him that MA was denied for the period October 1, 2011 through January 24, 2012 because "Your assets were divested by placing them into a revocable trust." The notice did not state the amount that was determined to be divested.
7. At the hearing the county representative stated that the reason for the divestment was that petitioner failed to make a claim on his wife's estate. She also stated that the divested amount was \$38,065, the amount remaining from the liquid assets. At some point the home was sold; the sale was disclosed at the hearing, but the status of the proceeds was not disclosed.
8. On December 2, 2011, petitioner's agent requested a hardship waiver of the divestment penalty. The worker sent a notice requesting verification, and she specifically told the agent that she needed verification that the assets could not be accessed and the efforts to gain access, and also the date of anticipated discharge. The due date was December 14.
9. On December 13 the agent submitted a statement saying simply that he was informed that petitioner could transfer his assets to his wife, and that the trust was not authorized to distribute funds to petitioner. On December 14 petitioner's attorney notified the worker that they still were attempting to obtain a discharge notice from the facility. The worker extended the due date to December 19.
10. Nothing further was received by December 19. On December 21 petitioner's attorney faxed a copy of a notice from the facility stating that petitioner would be discharged on January 21, 2012 because of non-payment of fees.
11. On December 22, 2011 the county sent a notice denying the hardship request. Exhibit 7.

### DISCUSSION

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 §DHS 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; the determination of the penalty period has been altered to a number of days instead of months. See MA Handbook, App. 17.5.2.2.

This case invokes the Wisconsin Supreme Court decision in Tannler v. Wisconsin DHSS, 211 Wis. 2d 179, 564 N.W. 2d 735 (1997). 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. Admin. 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. Admin. 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.

Wis. Stat., §861.03(2) defines augmented deferred marital property to include marital property owned by the decedent immediately before death that passed outside probate at the decedent's death. Under Wis. Stat., §861.02(1), the surviving spouse has the right to elect an amount equal up to 50% of the deferred marital property. Thus it does not matter if the property is in probate or transfers outside of probate, as in this case. This case thus is a classic Tannler situation. The revocable trust fell within the definition of deferred marital property found at Wis. Stat., §861.03(2)(d). Petitioner had the right to elect up to 50% of his wife's property upon her death. Petitioner's agent has made no effort to make the election of his 50% share. Thus it is divestment, and the county correctly determined it to be so. The divestment was not the act of creating the revocable trust, since petitioner's wife clearly had the right to do so under spousal impoverishment rules. Instead the divestment was the failure to claim the elective share. I can see no reason why the election would fail as there was no agreement or other legal impediment to the election.

That leads to the next issue of how much was divested. The county worker determined that the divested amount was the total left in the bank accounts transferred to the trust. However, only one-half of the property is considered to be divested since the surviving spouse can elect only 50% of the property. Furthermore, the value of the home also would be included in the trust property, and 50% of that amount would also be divested. The county thus determined the divested amount incorrectly, as it should be 50% of the total value of the trust at the death of petitioner's wife. Since I do not know the value of the home (now easily determined because it has been sold), I cannot judge how much actually was divested. I will have to remand the case to the county to re-determine the divested amount.

Finally, I will address the hardship issue under Wis. Admin. Code, §DHS 103.065(4)(d)2.d. To be granted relief from the divestment penalty, the Department requires the applicant to provide a statement of whether the assets are recoverable and if so, the attempts made to recover the assets, and secondly, a copy of the notice from the facility stating the date that the applicant will be discharged. MA Handbook, App. 17.17.5. In this case, by the deadline, petitioner's agent presented only a statement with the blanket conclusion that the trust was not authorized to distribute funds to petitioner. The problem with that statement is that the statute allowing petitioner to elect against the property would take precedence over the trust distribution provisions, and thus petitioner has not satisfied the first requirement of a hardship application because his agent has made no effort to recover the assets. Furthermore, it does not appear that the facility actually did discharge petitioner on January 21, and thus the immediate harm to petitioner is not apparent.

I will remand the case to the county to re-determine the divestment amount. If the divestment period has passed petitioner can reapply for MA.

### **CONCLUSIONS OF LAW**

1. Petitioner divested property by failing to make a statutory election against the property left by his deceased wife.
2. The county determined the amount of the divestment incorrectly by using all of the liquid asset value instead of one-half and by failing to include one-half of the value of the home included in the trust.
3. The county correctly denied the request for hardship waiver because petitioner's agent did not make an effort to recover petitioner's share of the assets.

**THEREFORE, it is**

### **ORDERED**

That the matter be remanded to the county with instructions to re-determine the amount that petitioner divested by failing to elect his one-half share in the proceeds of the revocable trust created by his deceased spouse, and then to determine the correct ineligibility period. The county shall do so within 10 days of this decision. In all other respects the petition for review 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 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).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on 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 7th day of February, 2012

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

c:

