



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

c/o David Van de Water, Attorney
Michigan Avenue At North Eighth Street
802 Michigan Avenue
Sheboygan, WI 53081-3483

DECISION

MDV-59/60290

PRELIMINARY RECITALS

Pursuant to a petition filed October 27, 2003, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Sheboygan County Dept. of Human Services in regards to the denial of Institutional - MA, a hearing was held on November 19, 2003, at Sheboygan, Wisconsin. At the request of the petitioner, the record was held open for 30 days for the submission of a written argument.

The issue for determination is whether the county agency correctly denied the petitioner's application for Institutional - MA due to a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o David Van de Water
Michigan Avenue At North Eighth Street
802 Michigan Avenue
Sheboygan, WI 53081-3483

Represented By:

David Van de Water, Attorney
SAME ADDRESS

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: Kathy McMullen, ESS
Sheboygan County Dept Of Human Services
3620 Wilgus Ave
Sheboygan, WI 53081

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN: xxx-xx-xxxx; CARES PIN: xxxxxxxxxxx) is an institutionalized resident of Sheboygan County.

2. On or about July 16, 2002, the petitioner was first institutionalized; she requested, and the county agency performed, an asset assessment for the petitioner and her husband, ████████.
3. On August 30, 2002, LB executed his "Last Will and Testament", leaving all of his residual estate after debts, burial expenses, and estate administration expenses, to his children in equal shares and specifically stating that he made no provision for his wife (petitioner) stating, "My reasons do not in any way reflect a lack of love or affection for her, but are based entirely upon present existing circumstances." No further explanation for excluding his wife as an heir were stated therein. See, Exhibit #8.
4. On September 25, 2002, the petitioner and her husband each executed a Marital Property Agreement delineating that LB was individual owner of \$259,989 in assets (including the farm homestead with a listed value of \$125,700); and the Agreement listed the petitioner's individual assets as a Social Security benefit payment (\$302) and the cash value of a life insurance policy for \$4,598.10, i.e., total assets of \$4,900.10.
5. On or about November 14, 2002, LB died.
6. On October 8, 2003, the petitioner applied for Institutional-MA.
7. On October 16, 2003, the county agency issued a Notice of Decision to the petitioner informing her that her application for MA was denied due to income in excess of MA income limits, but that she may become eligible for MA if she met a six month deductible.
8. On October 15, 2003, the county agency issued a manual, case-specific, Positive Notice to the petitioner informing her that she was eligible for MA "card services" only, effective October 1, 2003.
9. Also on October 15, 2003, the county agency issued a manual, case-specific, Negative Notice to the petitioner informing her that her application for Institutional – MA had been denied because her late husband had divested all of their assets to their children; that the divestment had occurred within the past 36 months prior to application; that he had divested a total of \$270,812; and that as a consequence, she would not be eligible for Institutional – MA for a penalty period of 59 months.
10. The petitioner filed an appeal with the Division of Hearings & Appeals on October 27, 2003.

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 14.2.1 (01-01-02). 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. 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 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 (\$4,542 in 2003). Medicaid Eligibility Management

Handbook (MEMH), Appendix 14.5.0. In this case, the agency calculated a disqualification period of 59 months, based on a divested amount of \$270,812.

The Medicaid Eligibility Management Handbook, Appendix 14.2.1, 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,
2. 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 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.

See also, the text of WI Stat § 49.453(2).

The first issue is whether and when a divestment occurred.

I conclude that a divestment occurred following LB's death, when the bulk of the couple's assets, including the farm/homestead were transferred to his estate pursuant to the terms of the marital property agreement and his will. His executor is then directed to carry out the terms of the will, and a probate court will subsequently affirm these acts. Medicaid Eligibility Management Handbook, Appendix 14.2.1, subsecs. (2c) & (2d). Until the occurrence of the husband's demise, the homestead remained an exempt asset of petitioner and LB for MA purposes. The transfer of all estate assets is being carried out by an executor acting on his behalf and at his direction in his will. Prior to his death LB could have changed his will at any time. Only upon his death did the will require his executor/personal representative to seek to transfer the property pursuant to probate proceedings. At that point petitioner (wife) no longer had any interest in the property. Thus, the husband's executor (or personal representative) took title pending delivery to remainderman named in the husband's will. The triggering of the personal representative's duty to transfer the property is the act of divestment. Therefore, the divestment period began at the demise of LB on November 14, 2002, when the will's provision for transferring the property to others, for less than fair market value, occurred.

Petitioner points to the Wisconsin Supreme Court decision, Tannler v. Wisconsin DHSS, 211 Wis. 2d 179, 564 N.W. 2d 735 (1997). He argues 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, petitioner argues, any claim would not succeed.

Petitioner's reliance on Tannler is misplaced, however. 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 WI Stat § 49.455. 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.

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

In this case the Spousal Impoverishment provisions were not effectuated because the institutionalized person was not eligible for MA, and no post eligibility transfer to her husband ever occurred. Therefore, while a community spouse protected under WI Stat § 49.455 retains the freedom to make testamentary gifts, a mere spouse of an institutionalized person not already eligible for MA is not protected by the Spousal Impoverishment rules and does not retain that right. The petitioner remains subject to the divestment provisions of WI Stat § 49.453.

While a hypothetical failure to make a claim against LB's estate could be a second, and later act of divestment, *the primary divestment occurred with the transfer of the assets to the probate estate pursuant to LB's will*. The fact that in this case the petitioner did make a spousal claim is irrelevant. That aspect of this case is a "red-herring".

As to the petitioner's legal defenses, they are without merit. This case does not concern community spouse MA laws. When the petitioner applied for Institutional – MA (10/03), her spouse was deceased (11/02). The petitioner is now a single institutionalized person seeking MA. She does not get the protections of MCAA. The same goes for the argument that only her half of the value should be counted, if any. Divestment law proscribes transfer by the petitioner or her spouse. The whole of assets divested by a spouse are countable against the applicant for divestment penalty computation purposes. Period. See, WI Stat § 49.453(2). The MA Program specifically directs that the divested amount is the amount

divested by the applicant, and the amount also divested by his spouse, *combined*. See, MA Handbook, Apps. §§ 14.2.1; 14.2.2, 14.2.2.1; 14.2.6; 14.2.7; 14.7.0; 14.10.1; and 14.4.0. The petitioner's attorney asserted that only the petitioner's divested ½ interest should be counted. That is not what MA rules require, however. No relevant exception applies under these facts.

Likewise, a homestead that is no longer a homestead does not carry the exempt status after it is transferred to another. The petitioner is institutionalized; her husband is deceased; and the executor of his estate has taken possession of the probate estate and is acting, or has acted, to convey the property to remaindermen denominated in the husband's will. And even if it was a homestead, the act of giving away homestead realty is *not* an enumerated exception to the divestment provision. See, WI Stat § 49.453(2).

The asserted "lack of intention" in making the divestment to (be eligible) to receive MA is belied by the sequence of events. The petitioner's institutionalization; a concurrent asset assessment; 44 days later the spouse executes a will excluding his wife and favoring his other heirs while referencing his wife and her then existing circumstances (i.e., she was institutionalized) as the reason for not providing for her; 26 days after that the couple executes a Marital Property Agreement saying that the bulk of the assets are the husband's solely; and 50 days later, the husband dies.

I did not fall of the turnip truck yesterday. This pattern is clearly designed to allow the couple to transfer assets to other kin while seeking to make the petitioner eligible for public assistance for the costs of her institutionalization. The giving away of all assets to kin is the other side of the coin in which an applicant says, as here, "I do not have any assets and need public assistance". That dog won't hunt.

The only argument with any merit is that the divestment should be reduced by any amount the wife recovers, if any, as a consequence of her claim against the estate. A divestment can be cured at any time by taking back part or all of the divested assets. If she succeeds in the future, she should report the cure or recovery of assets, and seek a re-determination. At this point in time, it is mere conjecture.

The agency denial of Institutional-MA, and the calculation of a 59 month penalty period, is affirmed.

CONCLUSIONS OF LAW

That the county agency correctly denied the petitioner's application for Institutional – MA and determined that she was subject to a 59 month penalty period commencing as of the month of her husband's death, i.e., November, 2002.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be, and the same hereby is, 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 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 thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals 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 20th day of
January, 2004

/s/Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
129/KDD