

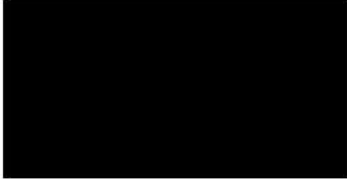


## State of Wisconsin\DIVISION OF HEARINGS AND APPEALS


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October 22, 2025



Attorney David DePeau  
Kewaunee County Department of Social Services  
810 Lincoln Street  
Kewaunee, WI 54216

RE:   
Case No. MDV - 218743

Dear Parties:

Enclosed is a copy of the Final Decision in the above-referenced matter.

Sincerely,



Shannon Buboltz  
Legal Associate Supervisor

c: East Central IM Partnership - email  
Division of Health Care Access and Accountability - email  
Attorney Jacob Spear - email



STATE OF WISCONSIN  
DEPARTMENT OF HEALTH SERVICES

In the Matter of

DECISION

Case No: MDV-218743

The attached proposed decision of the Administrative Law Judge dated August 12, 2025 is hereby adopted as the final order of the Department.

**REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5<sup>th</sup> Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 201 E. Washington Ave, Room E200B, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

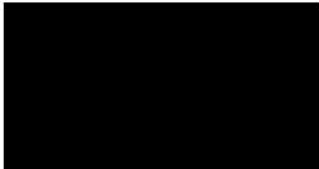
Given under my hand at the City of  
Madison, Wisconsin, this 22nd day  
of October, 2025.

Kirsten L. Johnson, Secretary  
Department of Health Services

FH  


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

In the Matter of



**PROPOSED DECISION**  
Case #: MDV - 218743

**PRELIMINARY RECITALS**

Pursuant to a petition filed on June 13, 2025, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Kewaunee County Department of Social Services regarding Medical Assistance (MA), a hearing was held on July 22, 2025, by telephone.

The record was held open until August 12, 2025, to give the parties an opportunity to brief the issue of whether the Petitioner failed to make a claim for assets to which she was entitled. Kewaunee County submitted its brief on August 5, 2025. Counsel for the Petitioner filed the reply brief on August 8, 2025.

Because the facts of this case are novel, this decision will be issued as proposed to allow the Department of Health Services to review this case.

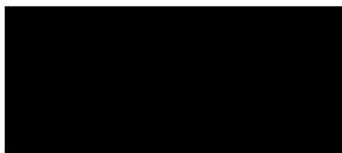
NOTE: By agreement of the parties, the findings of fact and conclusions of law contained in the decision issued in case MGE-217917 (Exhibit 1) are hereby adopted for the purposes of this decision.

The issue for determination is whether the Kewaunee County Department of Social Services (the agency) correctly imposed a divestment penalty of 1102 days (\$375,998.78 / \$340.99).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:



Petitioner's Representative:

Attorney Jacob Spear  
Heirloom Law Group  
6844 Hardwood Rd.  
Republic, MI 49879

Respondent:

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

By: Attorney David DePeau, Kewaunee County Corporation Counsel  
Kewaunee County Department of Social Services

810 Lincoln Street  
Kewaunee, WI 54216

ADMINISTRATIVE LAW JUDGE:  
Mayumi M. Ishii  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kewaunee County.
2. Petitioner's husband lived in a nursing home in Michigan until his death on January 22, 2025. (Petitioner Exhibit 1)
3. Petitioner and her husband are beneficiaries of a revocable trust. (Respondent Exhibit 1)
4. The trust funds are held in a [REDACTED] checking account ending in [REDACTED] and a [REDACTED] account ending [REDACTED] (Respondent Exhibit 2)
5. On January 7, 2025, a withdrawal of \$376,006.78 was made from the checking account. (Respondent Exhibit 2, pg. 42)
6. On January 8, 2025, the Petitioner's husband, through his power of attorney (POA), purchased an annuity in the amount of \$375,998.28. The Petitioner's husband was the sole owner of the annuity and the only named payee/annuitant. The beneficiary upon the husband's death was the Wisconsin Department of Health Services and the contingent beneficiaries were the Petitioner's five children. (Petitioner's Exhibit 1)
7. Since the Petitioner had not yet become Medicaid eligible, the children received the proceeds from the annuity upon the husband's death on January 22, 2025. (Petitioner's Exhibit 1 and 9)
8. The Petitioner most recently applied for MA on February 28, 2025. (Petitioner's Exhibit 1)
9. On June 11, 2025, the agency sent the Petitioner a notice indicating that she was eligible for MA, as of May 1, 2025, but that there was a 1102-day divestment penalty because she divested \$375,998.78. (Respondent's Exhibit 4)
10. The Petitioner filed a request for hearing that was received on June 13, 2025. (Petitioner's Exhibit 9)

### DISCUSSION

The administrative rules concerning divestments that occurred after August 9, 1989 are found under Wis. Admin. Code §DHS 103.065 (4), which states, "An institutionalized individual or someone acting on behalf of that individual who disposes of resources at less than fair market value ... shall be determined to have divested. A divestment results in ineligibility for MA for the institutionalized individual..." *Wis. Admin. Code §DHS 103.065 (4)(a) See Also Wis. Stats. §49.453(2); 42 U.S.C. §1396P(c)(1)(A) and (B)*

It is undisputed that the funds used to purchase the \$375,998.78 annuity in question were from comingled assets held in a trust that was intended to serve the needs of both spouses. Upon the death of the Petitioner's spouse, the money held in the annuity was given to the Petitioner's children, as the named beneficiaries.

The agency asserts that a divestment occurred when Petitioner's spouse used the comingled funds from their trust to purchase the annuity. However, an individual is not disqualified from receiving medical assistance by reason of a divestment, if the assets were transferred to the individual's spouse or to another person for the sole benefit of the individual's spouse. *42 U.S.C. §1396P (c)(2)(B)(i); See also Medicaid Eligibility Handbook (MEH) §17.2.6.9* The assets in question were transferred to the Petitioner's spouse. Whether they were transferred to Petitioner's spouse for his sole benefit, rather than a means to transfer assets to the children is questionable, given how quickly Petitioner's spouse passed away. However,

suspicion is not proof, and so the assets are presumed to have been given to Petitioner's spouse for his benefit, and as such, the transfer of assets to Petitioner's spouse was not a divestment.

The remaining question, then, is whether the Petitioner had a claim to the funds in the annuity upon her husband's death. The agency asserts that under Wisconsin marital property law, the Petitioner had a claim to half the annuity, regardless of the beneficiary designation. As such, by failing to make a claim on that inheritance, the Petitioner divested assets.

The fact that the annuity was solely in the spouse's name does not, upon the spouse's death, exclude the proceeds from the annuity from being counted as an asset for the Petitioner. Nor, does her exclusion as a beneficiary require the agency to completely disregard the money from the annuity, when counting the Petitioner's assets:

The term 'assets', with respect to an individual, including all income and resources which the individual or such individual's spouse is entitled to but does not receive because of action –

- (A) By the individual or such individual's spouse,
- (B) By a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or
- (C) By any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

42 U.S.C. §1396P (c)(h)(1)

In applying the forgoing federal regulations, the Wisconsin Medicaid Eligibility Handbook states the following:

#### **17.2.7.3 Refusal To Claim**

Refusal to take action to claim a portion of the estate of a deceased spouse or parent despite statutory entitlement to that portion is an unallowable divestment and results in a penalty period.

This includes situations in which the will of the institutionalized person's spouse precludes any inheritance for the institutionalized person. Under Wisconsin law, a person is entitled to a portion of their spouse's estate. If the institutionalized person does not contest their spouse's will in this situation, the inaction is an unallowable divestment and results in a penalty period if both:

- The value of the abandoned portion is clearly identified.
- There is certainty that a legal claim action will be successful as determined by the IM agency's Corporation Counsel. The IM agency may not consider the actions taken to avoid income or assets a divestment without this determination from the agency's Corporation Counsel.

*MEH §17.2.7.3*

In the case at hand, the Petitioner had a claim to the money in the annuity upon the death of her spouse.

First, Wis. Stats. §766.15(1) states, "Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be



varied by a marital property agreement.” Should a spouse fail to act in good faith, the other spouse may file a claim under Wis. Stats. §766.70 (1). Petitioner’s spouse certainly was not acting in good faith when he removed almost all of the money from the checking account in their joint trust, and purchased a \$375,998.78 annuity, solely in his name, and left the Petitioner just under \$7000 to pay for her long-term care needs.

Second, Wis. Stats. §766.31(1) states that all property of spouses is marital property unless it was obtained before the marriage, or there is a signed agreement designating the property as the property of only one spouse, and under Wis. Stats. §766.31(3), each spouse has a present undivided one-half interest in each item of marital property.

There is no assertion, and no evidence that the money used to purchase the annuity was acquired before the Petitioner and her husband were married, and there is no assertion and no evidence that the Petitioner signed any kind of marital property agreement, or property assignment designating the funds used to purchase the annuity as the sole property of Petitioner’s spouse. As such, she had an interest in half of the money used to purchase the annuity, and ultimately in half of the annuity, itself. Upon the death of Petitioner’s spouse, the Petitioner, as the surviving spouse, retained her undivided one-half interest in the annuity, and could have made a claim for her half of the asset against the beneficiary designation of the annuity. *See* Wis. Stats. §861.01

It should also be noted that by designating the State of Wisconsin and the children as beneficiaries of the annuity, that Petitioner’s spouse was making a gift of marital property to 3<sup>rd</sup> persons upon his death. Under Wis. Stats. §766.53, “a spouse acting alone may give to a 3rd person marital property that the spouse has the right to manage and control only if the value of the marital property given to the 3rd person does not aggregate more than either \$1,000 in a calendar year, or a larger amount if, when made, the gift is reasonable in amount considering the economic position of the spouses.” Unless both spouses acted together to make the gift, any other gift of marital property to a 3rd person entitles the other spouse to seek remedies under Wis. Stats. §766.70 (6). (*Id.*)

The gift upon the death of Petitioner’s spouse was significantly more than \$1000 in a calendar year, and the Petitioner’s spouse acted without the Petitioner when he purchased the annuity and made the beneficiary designations that did not include the Petitioner. Given that leaving the \$375,998.78 to the children left the Petitioner with just under \$7000 to pay for her long-term care needs, the gift was not reasonable when taking into consideration the economic position of the spouses. As such, Petitioner had a reasonable claim for her half of the funds in the annuity, and by failing to make that claim, divested the asset.

Given the timing of when the annuity was purchased, and the amount of the annuity, it is more likely than not that Petitioner’s spouse purchased the annuity and set up beneficiaries as he did, in order to make the Petitioner eligible for Medicaid.

Based upon the foregoing, the divestment was  $\frac{1}{2}$  of the value of the annuity or \$187,999.36 ( $\$375,998.78 \div 2$ ). Therefore, the divestment penalty is  $\$187,999.36 \div \$340.99$  daily rate = 551 days. *See MEH §§ 17.3.1.1 and 39.4.6*

Petitioner’s attorney argues, without explanation or citation to law, that Michigan marital property laws should apply in this case. I find no basis upon which to apply Michigan law here. On the contrary, the Petitioner was residing in Wisconsin and applying for MA in Wisconsin. However, even if Michigan law applied, Petitioner certainly had a reasonable basis upon which to file a claim against her spouse/the POA. Under Michigan law, surviving spouses can make claims on the estates of decedents. *See MLC-Section 700.2202* In addition, trustees have a fiduciary duty to the beneficiaries of the trusts they administer, and

there are consequences for breaching that duty, including compelling the trustee to pay money or restoring property. *See MCL – Section 700.7901* There is certainly a reasonable basis upon which to conclude that the trustee/Petitioner's spouse did not act in accordance to the trust, since the trustee did not leave Petitioner much money in the trust to cover her long-term care expenses.

### **CONCLUSIONS OF LAW**

1. The agency correctly determined that a divestment occurred.
2. The agency did not correctly determine the divestment penalty.

**THEREFORE, it is**

### **ORDERED**

That if, and only if, this matter is adopted by the Secretary of the Department of Health Services, this matter is remanded and that within 10 days of this decision, the agency reduce the divestment penalty to 551 days. In all other respects, the petition is dismissed.

### **NOTICE TO RECIPIENTS OF THIS DECISION:**

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH. If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as 'PARTIES IN INTEREST.'

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,  
Wisconsin, this 12<sup>th</sup> day of August, 2025

Mayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals