DHA-15 (R10/97)

# STATE OF WISCONSIN
## Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-47/87892

### PRELIMINARY RECITALS

Pursuant to a petition filed October 9, 2007, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Pierce County Dept. of Human Services in regard to medical assistance, a hearing was held on December 14, 2007, at Ellsworth, Wisconsin.

The issue for determination is whether the petitioner is ineligible for institutional medical assistance because of a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

(petitioner)

Respondent:

Wisconsin Department of Health and Family Services
1 West Wilson Street, Room 650
P.O. Box 7850
Madison, WI 53707-7850
By: Janet Huebner, ESS
Pierce County Dept Of Human Services
412 Kinne Street
PO Box 670
Ellsworth, WI 54011

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

### FINDINGS OF FACT

1. The petitioner (CARES #xxxxxxxxxx) resides in a nursing home in Pierce County.
2. The petitioner applied for institutional medical assistance in August 2007. The county agency determined that she was eligible for only card services through January 2008 because of a divestment.

3. The petitioner was born on (redacted).
4. The petitioner's husband entered the nursing home on May 19, 2003, and the petitioner entered on August 7, 2006.
5. The petitioner and her husband quitclaimed their homestead property to their son on August 28, 2003. The deed gave them the right to occupy the property but held that those rights "shall terminate when it is no longer feasible for one or both of the Grantors to occupy said residence due to health or other reasons."
6. The petitioner gave away $5,300.01 in cash on September 7, 2006, October 6, 2006, and November 2, 2006.
7. The petitioner transferred two life insurance policies worth a total of $7,318.62 to her daughter on July 13, 2007.
8. The petitioner transferred her remaining interest in her real estate to her son when she entered the nursing home.
9. The total value of the property in question on August 7, 2007, was $437,700.

## DISCUSSION

A person seeking medical assistance is ineligible if her assets exceed $2,000. Wis. Stat. § 49.47(4)(b)3g. In order to prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by passing their assets to potential heirs, MA law prevents a recipient from reaching this limit by divesting assets. A divestment occurs when an applicant, or person acting on the applicant's behalf, transfers assets for less than their fair market value during the lookback period. The lookback period is generally 36 months. Wis. Stat. § 49.453(1)(f). Divesting assets renders recipients ineligible for MA for the number of months obtained by dividing the amount of disposed assets by the statewide average monthly cost to a private pay patient in a nursing home. Wis. Adm. Code § HFS 103.065(5)(b); Wis. Stat. § 49.453(3); *see also*, *Medicaid Eligibility Handbook* § 4.7.5. This amount is now $5,584 per month. *Medicaid Eligibility Handbook,* § 4.7.5. The county agency determined that the petitioner was ineligible for medical assistance because she divested $104,188.77 in assets between August 7, 2006, and July 13, 2007.

The main asset in dispute is real estate worth $437,700 that the petitioner and her husband owned outright until they quitclaimed it to their son on August 28, 2003. The deed gave the petitioner and her husband the right to occupy the property, but held that those rights "shall terminate when it is no longer feasible for one or both of the Grantors to occupy said residence due to health or other reasons." The county agency contends that the petitioner retained a life estate worth $80,970.12 when she moved out on August 7, 2006. She argues that her remainder interest had no value because the entire value of the property had been transferred in 2003.

The legal definition of a life estate and the rationale behind medical assistance provisions relating to life estates and divestments provide the basis for finding that the petitioner held a life estate. Section HFS 103.06(6) of the Wisconsin Administrative Code defines "life estate" as a "claim or interest a person has in a homestead or other property, the duration of the interest being limited to the life of the party holding it with that party being entitled to the use of the property including the income from the property in his or her lifetime." The petitioner has the right to live on and use the property during her lifetime. While certain circumstances can end this right before she dies, there is no clear time when those circumstances occur: Under what circumstances does the right end when it is unfeasible for only one party to live in the house? Under what circumstances does the right end when it is unfeasible for both parties to live in the house? What is meant by unfeasible? Who determines when this standard is met? The deed does not mention a doctor or guardian. What are the circumstances other than health that could make it unfeasible for them to live in the house?

Even if the petitioner's attorney drafted the deed more carefully, I would find that she retained a life estate. Despite her attempted distinction, there is no practical difference between her interest and any other life estate. Property is only valuable to a person when it can be used. The petitioner's lawyer designed the deed to allow the petitioner to retain the property as long as she could use it. Thus the only distinction between a regular life estate and the remainder estate established here is that the one here was set up to avoid using the property to pay for the petitioner's medical costs. This directly contradicts the policy behind establishing the divestment laws and regulations. Any contention that the petitioner could not sell her interest is a diversion. Life estates are rarely sold because their purpose is to allow a person to have a place to live while transferring the main property right to another, who is almost always a close relative. The real value of the retained right is not what it is worth to some third party, because a third party is rarely contemplated, but rather what living on the property is worth to the grantor of the deed. This is clearly true here. When the petitioner and her husband executed the deed they obviously intended to give all their rights to the property to their son after they could no longer live on it. Furthermore, the value of the property interest that the petitioner's son received when his mother entered the nursing home is the same as it would be if she had retained a regular life estate when executing the deed and then given up that interest when she went into the nursing home. Because there is no practical difference to either the petitioner or her son between an interest that allows her to live on the property for the rest of her life and one that allows her to live there as long as she is able to do so, the value of the interest divested is that of a life estate..

The county agency used the St. Croix 2007 Property Report to determine that the property was worth $437,700. The petitioner does not dispute this. Because the petitioner owned the property with her husband it attributed only half of the value to her as instructed by *Medicaid Eligibility Handbook*, § 4.7.10.1. When a recipient terminates a life estate without receiving anything in return, the *Medicaid Eligibility Handbook*, § 4.7.10, instructs the worker to determine the amount of the divestment as follows:

> To calculate the divested amount multiply the FMV of the property at the time the life estate was terminated by the number from MEH table 8.1.2 which corresponds to the age of the life estate holder at the time the life estate was terminated.

The petitioner was 84 when she divested her life estate. The life estate multiplier for a person this age is .36998, which is what the county worker used. When the petitioner's half of the $437,700 property is multiplied by this amount, it equals $80,970.12; again this is what the agency correctly determined. The petitioner also divested $5,300.01 in cash in each of the next three months. Finally, the petitioner transferred two insurance policies worth $7,318.62 to her daughter on July 13, 2007. Multiple divestments are guided by policies found in the *Medical Eligibility Handbook*, §4.7.6. It states the following:

> For multiple divestments:
>
> 1. Add together all the divested amounts of transfers in the lookback period or any time thereafter that are connected in any of the following ways:
>
>     a. Transfers that occur in the same month. [*See also* §HFS 103.065(4)(am), Wis. Adm. Code.]
>     b. Transfers that occur in both months of a period of any two consecutive months.
>     c. Transfers with a penalty period (4.7.5) that extends into a month in which there is another transfer.

d. Transfers with penalty period (4.7.5) that extends into the month immediately preceding a month in which there is another transfer.

2. Calculate the penalty period (4.7.5).

The $80,970.12 life estate divestment and the three $5,300.01 cash divestments occurred in consecutive months and must be added together. They total $96,870.15. When divided by $5,584, it leaves the petitioner ineligible for benefits for 17 months beginning in August 2006. This period runs beyond July 2007, when she transferred the life insurance policies, so that divestment must also be added to the others. Doing so results in a total divestment of $104,188.77, which causes an 18-month period of ineligibility beginning in August 2006 and ending at the end of January 2008. Because this is what the agency found, I must uphold its decision.

## CONCLUSIONS OF LAW

1. The petitioner divested a life estate when she moved out of her residence to enter the nursing home.
2. The county agency correctly determined that the petitioner was ineligible for institutional medical assistance for 18 months beginning in August 2006 because of a divestment.

**NOW, THEREFORE, it is** **ORDERED**

That the petition herein be and the same hereby is 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 and Family 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 Eau Claire, Wisconsin, this 7th day of January, 2008

/sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals
214/MDO