



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MDV/139111

PRELIMINARY RECITALS

Pursuant to a petition filed February 27, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Clark County Department of Social Services in regard to Medical Assistance, a hearing was held on March 22, 2012, at Neillsville, Wisconsin.

The issue for determination is whether the county agency correctly determined that the petitioner is ineligible for institutional medical assistance because she divested assets when she relinquished a life estate to her children.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Petitioner's Representative:

Attorney Tom Harnisch
PO Box 65
Neillsville, WI 54456

Respondent:

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

By: Julie Milz

Clark County Department of Social Services
Courthouse
517 Court Street, Rm. 502
Neillsville, WI 54456-0190

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Clark County.

2. On July 21, 2004, the petitioner signed a warranty deed transferring her homestead property to her children. She retained a life estate. An agreement attached to that deed included the following language:

Grantor and Grantees agree, during the life estate of the Grantor, that if Grantor is voluntarily or involuntarily absent from residing in the residence (including death or hospitalization) for more than one hundred eighty (180) consecutive days, then the life estate interest, possession rights and the tenancy of Grantor in the described real estate shall lapse to the two Grantees as tenants in common and shall terminate the life estate, possession rights and tenancy of Grantor, upon written notice from the two (2) Grantees to the Grantor mailed to the last known address of the grantor that is known to the Grantees. The notice, which Grantees shall provide to the Grantor, shall state that the life estate tenancy, possession rights and interest of Grantor on the described real property, including the residence, have for the Grantor lapsed and have been terminated by the Grantees, due to the absence of the Grantor from residing in the residence as required in this Agreement. This notice by both Grantees, upon mailing to Grantor, shall allow Grantees to take from Grantor the control, ownership, use and possession of the residence, the other buildings, improvements, structures and the described real property and Grantor shall then have no further right, claim, lien or any other interest in the described real property, residence, improvements, structures or other buildings, including any right to a life estate interest, possession, use or control in the residence land and out buildings. This notice, if in compliance with this Agreement, by both Grantees, upon mailing to the Grantor, shall transfer all ownership, possession, use and control, to the two (2) Grantees in tenancy in common, with their complete rights to and responsibilities for the care and maintenance of the described real property, including the residence, other buildings and structures transferred to the two (2) Grantees. Upon proper mailing of this life estate termination notice by Grantees to a Grantor, any responsibilities or duties of the Grantor to the two (2) Grantees or of the two (2) Grantees to the Grantor based on Sections 1-9 of this Agreement, shall terminate, except as noted below. [Grantees are required to properly store Grantors personal property on the site for 90 days after they take over the property.]

3. The petitioner entered a nursing home in March 2011.
4. On November 11, 2011, the petitioner's son, who was acting as her guardian, executed a guardian's deed on her behalf releasing to him and his sister the life estate the petitioner retained in her property. The property was worth \$152,000 on that date and the petitioner was 82 years old.
5. The county agency multiplied the value of the property by .40295 and determined that the petitioner divested \$61,490.17. Then, assuming that the average nursing home stay cost \$6,554 per month, it found that she was ineligible for 285 days, or from January 1 through October 11, 2012.

DISCUSSION

A person cannot receive institutional medical assistance if her assets exceed \$2,000. See Wis. Stat. §§ 49.46(1) and 49.47(4). Generally, a person cannot reach this limit by divesting assets, which occurs if she or someone acting on her behalf "disposes of resources at less than fair market value" within five years of later of when she was institutionalized and applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). A life estate is not considered an asset, but the proceeds from the sale of a life estate are. Wis. Admin. Code, § DHS 103.06(6). A person who terminates her life interest in a property without receiving the value of the life estate commits a divestment. *Medicaid Eligibility*

Handbook, 17.10.1. The value of a life estate is determined by multiplying the entire value of the property by a fraction that depends upon the person's age when the life estate is divested. *Id.*

If the person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private-pay patient in a nursing home at the time she applied. Wis. Adm. Code, § DHS 103.065(5)(b). Beginning on January 1, 2009, county agencies were instructed to use the average daily cost of care and determine ineligibility to the day rather than to the month. The daily amount is currently \$215.48 *Medicaid Eligibility Handbook*, § 17.5.2.2. A divestment does not bar eligibility if "[t]he resource was transferred exclusively for some purpose other than to become eligible for MA."

The petitioner transferred her homestead property to her two children on July 21, 2004, and retained a life estate. She entered a nursing home in March 2011. On November 11, 2011, her son executed a guardian's deed on her behalf that released the life estate to him and his sister. At the time she was 82 years old and the property was worth \$152,000. When she applied for medical assistance early in 2012, the county agency determined that she divested \$61,490.17 and found her ineligible for 285 days, or from January 1 through October 11, 2012. It arrived at \$61,490.17 by multiplying the value of the property by .40295, the multiplier used for an 82-year-old person. *Medicaid Eligibility Handbook*, § 39.1. The petitioner does not dispute the agency's calculations but contends that she transferred the property for a reason other than to become eligible for medical assistance.

The petitioner relies on an agreement attached to the 2004 deed. It indicated that if she is away from the property for more than 180 days, her life estate lapses and her children can take it over upon written notice. *See Finding of Fact No. 2*. The petitioner's attorney indicated that this was standard language in every life estate agreement he drafted and was meant to protect against a person who abandons property and cannot be found, which leaves the property orphaned.

It is important to point out that a divestment did not occur when the petitioner signed the 2004 document because she did not give away any assets at that time. Rather any divestment that occurred took place when her life estate was released in November 2011. I will accept the argument that the 2004 agreement required the petitioner's children to end their mother's life estate. If this agreement caused the petitioner to give up an asset that could otherwise have been used to pay her medical costs, then its purpose becomes relevant when determining whether there was a divestment: To hold that the underlying documents that lead inevitably to disposing assets without receiving anything in return cannot be considered in a divestment action would render divestment laws and regulation useless. A creative lawyer undoubtedly could draft a document for almost any circumstance that would require a person to [assher assets to her children just before she went into the nursing home. This in turn would undermine the purpose of divestment statutes, which is to ensure that those who can afford their medical care pay for that care rather than transferring their assets to potential heirs and leaving the cost of the care to the taxpayers. Because the 2004 agreement led directly to the petitioner losing an asset without receiving anything in return, that agreement must have been drafted exclusively for some purpose other than to allow the petitioner to transfer her assets to become eligible for MA.

I accept that the disappearance of the life estate holder was considered when the language was put into the template used to create the 2004 document. But viewed in the context of the petitioner's case, the language is too broad to believe that it was placed in this particular document *exclusively* for some purpose other than to help the petitioner become eligible for medical assistance. The agreement is between the petitioner and her children and not some arm's-length third party. Given this relationship, the chance of her disappearing from them without a trace is extremely remote. Furthermore, the document specifically ends the life estate if the petitioner leaves the property involuntarily for 180 days because she has been hospitalized. It is hard to picture any circumstance under which she would be hospitalized and her children would not know about it and how to find her. Moreover, ending the life estate upon a long

hospitalization seems to anticipate entry into the nursing home, a time when medical assistance eligibility becomes an issue. I realize that this is boilerplate language, but boilerplate language can be modified to fit a particular situation, which is why people hire an attorney rather than fill in a few blanks on a document picked off the internet. The agreement accompanying the deed could have been modified to indicate that these provisions do not apply if the petitioner's children know where she is. Or it could have given the children the option of taking over the property if they paid her for the value of the life estate. When this document was drafted in 2004, it was much more likely that the petitioner would use it to rid herself of assets than it was that she would disappear. It is implausible that a competent attorney was not aware of and considered this when drafting the agreement. This means that it was not drafted exclusively for some purpose other than for the petitioner to become eligible for medical assistance. Therefore, the asset she divested when this document was enforced was properly considered when determining her eligibility for medical assistance, and the county correctly determined that she is ineligible for medical assistance for 285 days.

CONCLUSIONS OF LAW

1. The petitioner divested an asset when she relinquished a life estate in 2011.
2. The county agency correctly determined that the petitioner was ineligible for medical assistance for 285 days because of a divestment.

THEREFORE, it is

ORDERED

The petitioner's appeal 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 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 4th day of May, 2012

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

c:

