STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o Attorney Robert Weber
2932 Northwestern Ave.
Racine, WI 53404

DECISION

MDV-30/35213

The proposed decision of the hearing examiner dated October 28, 1998 is amended as follows, and as amended, is issued as the final order of the Department.

In the Discussion section, in the first paragraph of the first subsection on page 2, the first word of the last line, "applicable," is replaced with "application "

At the end of the section A BROADER DEFINITION OF "ANNUITY" IS NOT SUPPORTED BY OTHER CASE LAW, on page 7 the following is inserted:

> **Even if the transaction is construed to meet the formal annuity requirement of periodic fixed payments, in substance it is merely a camouflage for divestment.**
>
> The hearing examiner concludes above that the transaction is not an annuity because of its failure to meet the requirement of fixed, periodic payments. But even if it were conceded that the minimal $25 monthly payments (with the large balloon payment at the end) technically met the requirement of fixed, periodic payments, the result would not change. This transaction has no legitimate underlying economic substance, but is designed to camouflage a divestment in order to secure MA eligibility.
>
> As noted in earlier sections of this decision, courts look to the substance of an "annuity" transaction rather than its form. In one instance specifically cited above, it was noted that a transaction designed to look like an annuity with fixed, periodic payments will not be considered as such if it is designed to "merely camouflage" a loan transaction.
>
> Similarly, the transaction at issue here must be defeated because it is in substance not an annuity, but a divestment. Except to attain MA eligibility, there is no rational basis for transferring $103,255 in assets in return for $25 monthly payments and a balloon payment at the end of life expectancy.

REQUEST FOR A REHEARING

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 which 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 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). The appeal must be served on the Wisconsin Department of Health and Family Services, 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 Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison,
Wisconsin, this 17th day of
December, 1998.

Richard Lorang, Deputy Secretary
Department of Health and Family Services

DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

PROPOSED
DECISION

MDV-30/35213

PRELIMINARY RECITALS

Pursuant to a petition filed June 17, 1998, under Wis Stat § 49 45(5), to review a decision by the Kenosha County Dept of Social Services in regard to Medical Assistance (MA), a hearing was held on August 17, 1998 at Kenosha, Wisconsin At petitioner's request, the record was held open for 35 days, until September 21, 1998 The county representative submitted a letter on September 14, 1998 Petitioner made additional submissions on September 7, 1998, and September 21, 1998

The issue for determination is whether the county agency had correctly denied MA based on a divestment

There appeared at that time and place the following persons

PARTIES IN INTEREST.

Petitioner·

Petitioner's Representative·

Attorney Robert Weber
(same address)

Wisconsin Department of Health and Family Services
Bureau of Health Care Financing
1 West Wilson Street, Room 250
P.O Box 309
Madison, WI 53707-0309
By Thomas Buening, ESS Supervisor and Kathi Tolnai, ESS
Kenosha County Human Services Dept
8600 Sheridan Road
Kenosha WI 53140

EXAMINER
Peter D. Kafkas, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN ____________, CARES # ____________) is a resident of Kenosha County. He is an applicant for MA

2. In June 1996, petitioner transferred his home to his two sons. His home had a value of $106,800. In December 1997, his sons gave him a promissory note in exchange for the property. See, Petitioner's Brief, page 1. The promissory note provided for interest only until a lump sum payment in 2002. Exhibit C Petitioner then applied for Title 19, which was denied.

3 On April 24, 1998, petitioner and his sons cancelled the promissory note and endorsed a document entitled "Irrevocable Annuity." The second transaction involved proceeds from the sale of the home (balance on the promissory note) and an additional $50,454 petitioner still had. The document stated that $103,255 in cash was being given to the sons on the date of execution. In return, the sons were to give petitioner $25 per month for 66 months. The document stated the total of the monthly payments would be $1,500 On the 66th month, the sons were to pay a lump sum, balloon payment, to petitioner in the amount of $106,755. Exhibit 2, "Irrevocable Annuity," page 2

4. The document provided that petitioner could not sell the annuity The payment amounts were not fixed. Nominal payments were to be made the first 66 months and a balloon payment of the substantial return amount during the last month The payments were not to vary based on varying rate of return on an investment Less than 2% of the repayment total was to be made the first 65 months Over 98% of the repayment total was to be paid the 66th month Id

5 The document signed on April 24, 1998, had no fair market value

DISCUSSION

PROPERTY WAS DIVESTED SINCE IT WAS TRANSFERRED FOR LESS THAN FAIR MARKET VALUE

"'Divestment' is the transfer of income, non-exempt assets, and homestead property . . which belong to an institutionalized person or his/her spouse or both [f]or less than the fair market value of the income or asset." MA Handbook, App 14 2.0 The "'[d]ivested amount' is the net market value minus the value received " Id at 14 2 7. "If there was a divestment [, and no exceptions apply,] the institutionalized person must be determined ineligible for a period of time " Id at 14 5 0 Regarding a denial of an applic~~able~~ Tion for benefits, the petitioner has the burden of establishing eligibility

It was undisputed petitioner transferred $103,255 to his two sons in cash on April 24, 1998 In return, he was to receive $25 monthly payments for 66 months and a $106,755 payment also in the 66th month Exhibit 2, page 2, Document entitled "Irrevocable Annuity " Petitioner could "not sell, pledge, or otherwise use as security the amount invested or due from th[e] annuity " Id at 1 The annuity was unsecured Id A cursory review of the return payment amounts reveals that the tiny yield on this contract is not even that of a simple bank account or Treasury bill, both of which have no risk "Fair market value or full value of property is defined as '[t]he amount it will sell for upon arms-length negotiation in the open market, between an owner willing but not obliged to sell, and a buyer willing but not obliged to buy '" *City of West Bend v Continental IV Fund*, 193 Wis.2d 481, 486, 535 N W 2d 24 (Ct App. 1995) (citations omitted) Because this transaction was between petitioner and his sons, the examiner can not rely on the value attributed by the family to this contract It clearly was not "arms-length " No person of sound mind would give $103,255 to an unrelated third party in exchange for the unsecured, low yield, and non-alienable, promises in the instant document Petitioner presented no evidence, expert or otherwise, that the contract had any "fair market value " This agreement, which could not be sold, pledged, or used as security, had no fair market value. Under a traditional analysis it is clear a divestment occurred here. The purpose of the transaction was not an investment It was to transfer assets to children and obtain MA eligibility

COMPUTATION OF DIVESTMENT AMOUNTS FOR ANNUITIES IS MADE DIFFERENTLY

Petitioner argues that the examiner should find that the transfer was in return for an annuity. In general, with annuity divestments, "[t]he amount of assets that is transferred for less than fair market value [or divested] is the amount by which the transferred amount exceeds the expected value of the benefit." Wis Stat. § 49.453(4)(b) "'Expected value of the benefit' means the amount that an irrevocable annuity will pay to the annuitant during his or her expected lifetime" which is computed according life expectancy tables. Id. at (1)(c); see also, id. at (4)(c) and MA Handbook, App. 30 10 0 Under this computation scheme, rate of return is not a factor As long as at least payments totaling the original payment amount are scheduled to be returned during the expected lifetime of the transferor (under the life expectancy table), no divestment will be found This computation makes some sense where fixed, periodic payments are scheduled. Even if a large amount of money is "paid" for an annuity, a certain income level and/or asset level is guaranteed per month or year. It would result in strange MA eligibility determinations were graduated or lump-sum balloon payments considered annuities, i e , $1 per month annuity payments resulting in virtually no assets or income for MA purposes - with ineligibility only the last month of life expectancy because of a lump-sum payment. If the person would pass away before the date in the life expectancy table, no MA ineligibility will ever have occurred If the person would pass away after the life expectancy period, MA eligibility will have been long deferred (regardless, a new "annuity" could be drafted so no ineligibility would occur) Thus, the examiner must determine whether petitioner purchased an annuity from his sons. If the title on a document determines whether it is an annuity, there is a financial incentive for a prospective MA recipient to title all lump-sum payment agreements, monthly payment promissory notes, and mixed lump-sum, monthly payment promissory notes as annuities.

The determination of divestment amounts discussed here may not be the exclusive way to determine an annuity divestment amount. This examiner does not need to reach this issue given the discussion infra

THE DOCUMENT SIGNED WAS NOT AN ANNUITY SINCE THE SUBSTANCE OF THE REPAYMENTS WERE NOT TO BE MADE IN FIXED, PERIODIC PAYMENTS

Annuities have long been "described as a sum paid yearly or at other specified intervals in return for the payment of a fixed sum by the annuitant " *Bodine v Comm. Of Internal Revenue*, 103 F 2d 982, 984 (3rd Cir.), cert. denied, 308 U S. 576 (1939) The term has been "generally understood as an agreement to pay a specified sum to the annuitant annually during his life " *Hess v U S*, 74 F.Supp 135, 138 (D C. Minn 1947) (citations and quotation marks omitted) "The label applied to the agreement between [what was typically an] insurer and [alleged annuitant] need not be determinative of its character Courts have been "concerned with the substance of the transaction rather than the form." *Id.* Therefore, "[a]n examination of the authorities does not warrant the conclusion that an annuity contract is an insurance contract. It [has long been] defined as a yearly payment of a certain sum of money granted to another in fee for life or for years . . . ." *Knight v Finnegan*, 74 F Supp 900, 902 (E D Mo 1947) There has been some expansion or refining of the term over the years For example, "[w]hen a purchaser invests in a "variable" annuity, the purchaser's money is invested in a designated way and payments to the purchaser vary with investment performance **In a classic "fixed" annuity, in contrast, payments do not vary.**" *NationsBank of N. C., N. A v. Variable Annuity Life Ins Co.*, 513 U. S 251, 254 (1995) (emphasis added) (hybrid annuity is a mixture of the two). The long history of cases defining a basic annuity has resulted in a clear and common understanding that one of its attributes is fixed, unchanging periodic payments. See, 4 Am Jur Annuities § 1 (1998) ("An annuity is a right – bequeathed, donated, or purchased – to receive fixed or certain periodical payments, either for life or a stated period of time.") and Black's Law Dictionary 82 (5th ed. 1979) ("A right to receive fixed, periodic payments, either for life or for a term of years.")

It could be argued that the definition of an annuity should include variable annuities, which are discussed supra See, *NationsBank of N C, N A*, 513 U. S at 254 (1995). Again, a variable annuity is

> [a] contract calling for payments to the annuitant in varying amounts depending on the success of the investment policy of the insurance company; unlike a straight annuity which requires the payment of a fixed amount. The purpose of this type of annuity is to offset deflated value of [the] dollar caused by inflation.

Black's Law Dictionary 83(5th ed 1979) (emphasis added). However, the use of variable annuities to avoid divestment rules contradicts the language of the relevant administrative code section, which states:

> "Annuity" means a written contract under which, in return for payment of a premium or premiums, an individual or individuals have the right to receive **fixed, periodic payments for life or up to a fixed point in time.**

Wis. Adm Code, § HFS 103.065(3)(a) (emphasis added) Something is "fixed" when it is "[o]f an **established, unchanging, or permanent character; settled; lasting; stable . . . [k]eeping nearly the same relative position** " Funk and Wagnalls, The New International Dictionary of the English Language Vol. I, 479 (in both editions) (1967 and 1989) (emphasis added) The general use of annuities engenders fixed payments The legislature did not add the word "variable" in front of the word annuity in the relevant statutes. See, Wis Stat. § 49 453(4)(b) As discussed supra, courts have generally required annual or more frequent payments for an annuity definition to apply The administrative code's requirement of fixed, periodic payments is reasonable and consistent with the statutes and common understanding of the word "annuity "

The document which petitioner signed was intended to look somewhat like an annuity – it contemplates titular fixed payments over 66 months Exhibit 2, document entitled "Irrevocable Annuity," page 2 These miniscule payments of $25 a month do not make the substance of the transaction an annuity If so, not considering other possible limitations, a party could transfer over a million dollars to a relative and, in return, the relative could make payments of $1 per month for all but the last month of life expectancy and over a million dollars during the last month of life expectancy – qualifying a person with extremely large assets immediately for MA The annuity label is not, in itself, binding. The lump sum payment of over $100,000 near the last month of life expectancy for petitioner clearly did not qualify as a "fixed, periodic payment." Even if the administrative code and/or statutes had lumped "variable annuities" with "annuities," the document in question would not qualify It did not envision a periodic payment based on "investment performance" as in a variable annuity The nominal payments totaling less than 2% of the overall repayment did not change the true character of the transaction. This was essentially a payment of $103,255 in return for some diminutive monthly payments and a lump sum balloon payment of $106,755 (over 98% of the balance) in 66 months The true essence of the agreement was the lump sum, balloon payment, not the small, token, monthly payments The lack of an arms-length relationship, the total unsecured nature of the transaction, along with the inability of petitioner to transfer or sell his interest, further mitigate against an annuity being found to truly exist here Again, these transactions are most commonly with a business or an insurance company as an "investment " See, *Nationsbank*, 513 U S at 254

THE TRANSACTION SHOULD NOT BE DIVIDED INTO A LUMP SUM PAYMENT AND ANNUITY

It could also be argued that the nominal fixed, periodic payments should be separated from the lump sum, balloon payment so that the divestment amount would be reduced First, the 66 months of $25 payments would not affect when MA or how much MA would be received See, MA Handbook, App. 14 5.2

(divide the divested amount by average nursing home cost ($3,334), i e , $1,500/$3,334 = .4 months, with required rounding on the overall balance, no change) The examiner notes that 66 payments of $25 would be $1,650, not $1,500 as stated in the document. For simplicity and because of lack of clarity, $1,500 is being used in the most of the discussion here Second, it would be difficult to determine what amount was purportedly paid for these modest payments (presumably less than the $1,500 or $1,650) Third, the county agency used a divestment period shorter than it should have been even under the most generous computations. Even if the full $1,650 were deducted, the period should be 30 months, i.e., $103,225 - $1,650 = $101,575, $101,575/3,334 = 30 46640671866 months, rounded down to 30 months. The county agency used a shorter ineligibility period of 29 months. Exhibit 3, July 27, 1998 Summary Letter. Fourth, the substance of the overall transaction makes it clear that an annuity was not created

THE COUNTY AGENCY HAD COMPUTED THE INELIGIBILITY PERIOD WHICH WAS TOO SHORT

Petitioner's counsel argues that any ineligibility (divestment) period should run from an earlier transfer of petitioner's home The following facts were undisputed by the parties In June 1996, petitioner transferred a property worth $106,800 to his sons. In December 1997, the sons give petitioner a promissory note for the property The county agency denied MA based on the transaction; i e , divestment On April 24, 1998, petitioner and his sons voided the promissory note, and signed the "Irrevocable Annuity" which is the issue in this case (The "annuity" states it was signed April 29, but the examiner is relying on petitioner's brief and statements at the hearing, which delineated an April 24 transaction date.) The annuity agreement clearly states that petitioner was transferring $103,255 (in cash) to his sons on April 29th, 1998 (or April 24) Exhibit 2, page 1, "Irrevocable Annuity." It was undisputed that the $103,255 represented proceeds from the promissory note (over $50,000) and more than $50,000 petitioner still had. If, as petitioner purports, $103,255 cash was given to petitioner's sons on April 24, 1998, that is when the divestment occurred Petitioner has supplied no authority for the use of the earlier promissory note date *Cf*, MA Handbook, App 14 5 0 It is also curious how the proceeds of the promissory note would be a little over $50,000 when the note was signed less than two years earlier, was originally for over $100,000, and had provided for only interest payments until 2002 Exhibit C, page 1, "Promissory Note." On numerous occasions, even petitioner's counsel referred to over $150,000 being transferred to the sons for the "annuity " This would be an additional ground for imposition of a period of ineligibility if the annuity had "passed muster." Also, this could increase the ineligibility period The examiner is not disturbing the county agency's computation See, MA Handbook, App 14.5 2 (Likely (or possible) effect would only be one month increase)

PETITIONER'S *DE FACTO* ARGUMENTS DO NOT CHANGE THE RESULT IN THIS MATTER

Petitioner's engagement into this transaction was between the issuance of a Draft Operations Memo dated April 16, 1998, and an Operations Memo dated June 9, 1998 Both memos required, among other things, "payments equally distributed (by amount) over the life of the annuity " Draft Operations Memo dated April 16, 1998, Operations Memo dated June 9, 1998 (parenthesis in original)

After the transaction in this case, and after the second operations memo, an attorney, Bruce Tammi, (who is not counsel in this case) wrote to the department stating that he was the "originator of the use of private irrevocable annuities in the State of Wisconsin " He said that "welfare law is completely statutory in nature and [the] department must comform its policies and actions to the mandates of the Wisconsin Statutes " He demanded retraction of the memos or a listing of specific statutory or administrative code provisions within 10 days or he would file a mandamus action against the department The Medicaid Eligibility Chief wrote back that the "draft Operations Memo that described" changes to MA policy on "Annuities with Balloon Payments" needed additional legal research She said she was informing a county agency that received a preliminary draft that the policy change in that operations memo was not to be implemented at that time. Counsel in this case apparently received a copy of the attorney's letter and response (which did not deal with the current case) from the other attorney

Although the correspondence discussed above does not deal with the current case, the examiner will consider it. It is *de facto* argument by petitioner.

The letter from the Medicaid Eligibility Chief refers to the "draft memo." It is not clear whether the Final Operations Memo dated June 9, 1998, is being referenced. The county representative in this case stated that Kenosha County never received a retraction of the Operations Memo dated June 9, 1998. He said although the letter "clearly says that they have [issued a withdrawal of the memo], in reality, it hasn't come out." He also stated that the policies reiterated in the operations memo were used in Kenosha County prior to issuance of the memos. He said, "Nothing has changed, that is the idea." He also stated, "Nothing has changed in Kenosha County, Nothing has changed." The Operations Memo dated June 9, 1998, states, "This is a clarification of an existing policy ." Nevertheless, as the current status of the Operations Memo dated June 9, 1998 is unclear, the examiner is not relying on it as policy of the department. The retraction of the operations memo would not delete the administrative code requirement of "fixed, periodic payments" for an annuity to exist Moreover, Attorney Tammi's letter to the department had erred in stating that "welfare law is completely statutory " Mandatory Wisconsin case authority, persuasive case authority, and administrative code provisions may all be considered in determining, or along with, the common or legal meaning for a word such as "annuity." The term "annuity" is not defined in the Wisconsin Statutes. That does not mean an examiner is required to defer to the title "Irrevocable Annuity" on any particular document. Petitioner can not state that he relied on the July 22, 1998, department letter since the April 24, 1998, transaction occurred prior to it Nor does the July 22, 1998, correspondence from the department state that transactions such as the one here are not divestments under department policy Such a policy statement would be contrary to Wis. Adm Code § HFS 103 065(3)(a), which requires fixed, periodic payments for annuities.

A BROADER DEFINITION OF "ANNUITY" IS NOT SUPPORTED BY OTHER CASE LAW

In an attempt to determine whether any primary or secondary authority existed for a broader definition of "annuity," the examiner found a publication from a Continuing Legal Education Course (CLE) *Basic Annuities in the Medical Assistance Context* 1997 (State Bar of Wisconsin CLE Course Handbook, Special Problems of the Aging October 1997) This publication contains a subsection dealing with "Annuities at Hearing " *Id* It states "[a]nnuities are contractual arrangements in which an individual pays a sum of money to another in return for a future stream of income or payments " *Id* (emphasis added). "[P]ages 284 through 296 of 2 AM [sic] Jur Legal Forms 2d" is cited as supporting the broad "future stream of income or payments" definition *Id* The legal forms in the publication are also cited in support of the broad definition 2A Am Jur 2d Legal Forms 2d Annuities § 21 5 (1997) states "[a] bargained-for annuity given in exchange for property is a contract in which the consideration on one side is the establishment of fixed payments for some term of years rather than immediate payment . .." (Emphasis added). This publication notes that the title given to a document is not determinative since "a contract to pay an annuity that is merely camouflage for a loan at a usurious rate of interest may be treated by the courts as a loan within the prohibition of usury statutes " Id (emphasis added). U.S. Supreme Court Opinions from 1893 to present, Wisconsin Supreme Court Opinions from June 21, 1939, to present, and Wisconsin Court of Appeals Opinions from August 16, 1978, to present do not contain the phase "future stream of income or payments" as a definition of an annuity

All of the forms, except one, in 2A Am Jur Legal Forms 2d Annuities dealing with general annuities provide for fixed, periodic payments 2A Am Jur Legal Forms 2d Annuities § 21·7 – 21·19 (1997 & Supp June 1998 (no forms in pkt part)) Some forms do contain provision for payment to a remainder in a real estate transaction (or to a beneficiary) upon death, but this is not a lump sum payment to the annuitant. See, eg., Id at § 21 15 Two forms that provide for a lump sum payment at the end of a certain number of years are entitled "Annuity Trusts " Id. at § 21 17-18 (emphasis added) One form provides for a cost of living increase based on the Consumer Price Index (CPI). Id. at § 21.25. This is a protection against inflation as discussed regarding a variable annuity See, supra, Black's Law Dictionary 83 (5th ed. 1979) (discussion of inflation protection for a variable annuity). There is no support for the broad "future stream of income or payments" definition for the generic term "annuity."

The author of the letter to the department, Attorney Bruce A. Tammi, is listed as an author or presenter relating to the "future stream of income or payments" discussion. B Tammi, *Annuities at Hearing* a subsection of *Basic Annuities in the Medical Assistance Context* 1997 (State Bar of Wisconsin CLE Course Handbook, Special Problems of the Aging October 1997) However, another author writes, "[s]ome attorneys have considered annuities with smaller income streams and a balloon payment at the end. If these are 'actuarially sound' it should be arguable that they would be permitted. However, I believe a challenge from the Department could be expected." J. Jeager, *Advanced Planning Techniques* a subsection of *Basic Annuities in the Medical Assistance Context* 1997 (State Bar of Wisconsin CLE Course Handbook, Special Problems of the Aging October 1997). CLE materials are not typically granted great weight as secondary authority. Nevertheless, given the dearth of publications contradicting the **fixed** and **periodic** requirements for payments in annuities, it is the closest publication to supporting petitioner's position in any way. The CLE materials do not persuade in this case If fixed, periodic payments are not required, any document entitled "annuity" will have to be treated as such. As the U.S Supreme Court stated in *Nationsbank*, "[i]n a classic **"fixed" annuity . . . payments do not vary."** *NationsBank*, 513 U S. at 254 (emphasis added).

A PROPOSED DECISION IS PROPER IN THIS MATTER

The Division of Hearing and Appeals has been presented with a wide variety of divestment issues concerning annuities. Such issues have involved diverse areas such as distinctions of annuities versus trusts and annuities versus promissory notes The structure of various alleged annuities has also differed in cases presented to the Division; i.e , small payments with lump sums, graduated payments, and other varying payment schedules County representatives are trained extensively concerning the MA Handbook Annuities are not defined in this handbook County workers statewide are not trained in legal interpretation of statutory authority. Different county agencies have periodically raised different issues concerning alleged annuities The issue of the explicit definition of an annuity has apparently never been raised Decisions of various examiners at the Division of Hearings and Appeals have differed on annuity divestment issues See, DHA Case Nos MED-40/##16089 and 16621 and MDV-40/##16822, 17567, and 17602 (Wis. Div Hearings & Appeals Oct 7, 1997 (combined cases)), on rehearing DHA Case Nos MED-40/16089 and MDV-40/16822, 17567, and 17602 (Wis Div Hearings & Appeals Oct 7, 1997 (again combined cases)) (divestment found), DHA Case No MED-40/87846 (Wis Div. Hearings & Appeals June 6, 1995) (no divestment found), DHA Case No MED-40/11073) (Wis Div Hearings & Appeals (no divestment found, different result on promissory note issue); and DHA Case No.MDV-45/22152 (Wis. Div Hearings & Appeals July 6, 1998) (divestment found) and on rehearing (by the same examiner) DHA Case No MDV-45/22152 (Wis Div Hearings & Appeals aprox. Sept. 2, 1998) (no divestment found – discussion of Tammi letter and Department reply discussed above). Decisions of the Division of Hearings and Appeals do not serve as precedent for other hearing decisions unless issued as proposed decisions and adopted as final by the Secretary of the Department of Health and Family Services Previous decisions did not explicitly deal with the definition of an annuity. This decision involves a new analysis of the issue Issuing a proposed decision allows the parties to fully comment before a final decision is issued It provides for a uniform policy in this area.

CONCLUSIONS OF LAW

1. The county agency correctly determined that the $103,255 petitioner transferred to his sons was divested since he did not receive fair market value in return

2. The county agency correctly determined that petitioner did not purchase an annuity since the contract did not call for fixed, periodic payments, but instead for nominal payments and a varying balloon payment.
3. The county agency correctly determined that petitioner did not purchase an annuity given the other terms of the agreement in combination with the relationship between the parties
4. The county agency correctly determined the ineligibility period relying on the April 24, 1998, transaction date since the document stated that petitioner transferred at least $103,225 in cash on that date

NOW, THEREFORE, it is **ORDERED**

That the petition for review herein be and the same is hereby 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 Secretary of the Department of Health and Family Services for final decision-making

The process relating to Proposed Decisions is described in sec 227 46(2), Wis Stats

Given under my hand at the City of Madison, Wisconsin, this 9th day of October, 1998

Peter D Kafkas, Attorney
Division of Hearings and Appeals
1003/PDK

cc