DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-13/50679

PRELIMINARY RECITALS

Pursuant to a petition filed September 27, 2001, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Dane County Department of Human Services in regard to Medical Assistance (MA) eligibility, a hearing was held on October 30, 2001, at Madison, Wisconsin.

The issue for determination is whether the county agency correctly denied institutional MA services to the petitioner due to an alleged divestment of a $67,000 property. More specifically, the issue is whether the petitioner received an "expected value of the benefit" equal to the value of the transferred property, when he accepted a private annuity as payment for the property.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:	By:
(petitioner)	Atty. James Jaeger

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: Jean Scott, ES Spec.
Dane County Dept. of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Dane County.

2. The petitioner applied for institutional MA on May 11, 2001. As part of the application process, the county agency determined that the petitioner and his wife had combined countable assets of $148,004.92 as of the month of his institutionalization (December, 2000). The petitioner's wife continues to reside in the community. The county agency calculated the asset limit for this "spousal impoverishment" case as $76,002.46 ($74,002.46 Community Spouse Asset Share [CSAS] + $2,000 for the petitioner). Initially, the agency determined that the household was over the $76,002 asset limit. The petitioner contested this determination in a prior fair hearing, and prevailed. See DHA Decision No. MRA-13/49848 (Div. of Hearings & Appeals, August 3, 2001)(DHFS).

3. In redetermining the petitioner's MA eligibility after the prior decision, the agency determined that the petitioner had divested property valued at $67,000, and it issued written notice of denial of institutional MA benefits on September 24, 2001. The agency advised that there would be a 16-month disqualification period, ending on June 30, 2002. MA "card services" were commenced effective March 1, 2001. See Exhibits 6B,C.

4. The petitioner's wife has owned a piece of nonhomestead land in Bayfield County with a cottage and two garages since 1956. On March 22, 2001, she sold the property to her two sons and executed a warranty deed to them. The purchase price was $58,000, which was the assessed value of the property at the time. The actual value of the property at the time of sale was $67,000, per a later, professional assessment. See Exhibit 10.

5. As payment for the transferred property, the two sons executed a Private Annuity Agreement (hereinafter, "Annuity") on March 22, 2001. The Annuity calls for the transferees to pay (petitioner's spouse) equal, $700 monthly payments for the rest of her life, or for a period of 132 months, if less, beginning in April, 2001. (petitioner's spouse) is 77 years old, with a life expectancy of 11 years (i.e., 132 months). The sons have actually made all of the payments called for to-date. The Annuity contains an interest rate of 6.2 per cent on the principal amount of $55,000. The Annuity states that (petitioner's spouse) "retains no security interest, mortgage, lien, or pledge with respect to the real property transferred hereunder." However, the Annuity does not bar her from suing the transferees for nonpayment, nor does it bar her from selling the Annuity to a third party. See Exhibit 5C.

6. In March, 2001, the long-term federal rate required in section 1274(d) of the Internal Revenue Code, was 5.44 per cent. See Exhibits 7, 11, 12.

DISCUSSION

I. BACKGROUND ON SETTING THE ASSET LIMIT IN A SPOUSAL IMPOVERISHMENT CASE.

The asset limit for this case was set pursuant to "spousal impoverishment" rules. "Spousal impoverishment" rules were created with passage of the federal Medicare Catastrophic Coverage Act of 1988 (MCCA), which included extensive changes in state Medicaid (MA) eligibility determinations in cases involving married persons. In spousal impoverishment cases, the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. Wis. Stat. §49.455(1). Generally, no income of a community spouse is considered to be available for use by the other spouse during any month in which that other spouse is institutionalized. Wis. Stat. § 49.455(3).

The MCCA created asset eligibility limits for spousal impoverishment households that are more generous than those for a non-spousal impoverishment household (e.g., $2,000 for a single person). When initially determining whether an institutionalized spouse is MA asset eligible, county agencies are instructed to review the combined assets of the institutionalized spouse and the community spouse. *MA_Handbook*, Appendix 23.4.1. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the CSAS (i.e., an asset limit) to determine eligibility.

MA Handbook, Appendix 23.4.1, explains the asset eligibility determination process. In this case, the parties agree that the CSAS was $74,002.46. Following the prior fair hearing decision, the parties also now agree that the couple's assets in March, 2001, were under $76,002. Therefore, the petitioner passed the spousal impoverishment asset test, and the agency then moved on to consider whether he was ineligible for institutional MA due to divestment.

II. THE DEPARTMENT INCORRECTLY DETERMINED THAT A DIVESTMENT OF $67,000 OCCURRED WHEN THE PETITIONER'S WIFE ACCEPTED A PRIVATE ANNUITY AS PAYMENT FOR TRANSFERRED REAL ESTATE.

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; *MA Handbook*, Appendix 14.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; *Handbook*, 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 sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (currently $4,075).

The agency asserts (petitioner's spouse) sale of nonexempt real property to her sons on March 22, 2001, was a divestment that renders her spouse ineligible for full MA services for a period of time. The agency argued that divestment occurred because a Department analyst concluded that the private annuity that (petitioner's spouse) accepted as payment for the property was not equivalent to the full market value of the transferred property. The analyst's e-mail communication to the agency included the following passage:

> This is divestment, because the applicant has given the house to her sons for $700 with a promise that they would make more payments until the house is paid for. This is an unsecured promissory note. If the sons fail to make a payment or payments, the applicant will not get the house back, as s/he would with a land contract. ...

See Exhibit 4.

In response, the petitioner argues that his wife has entered into a legitimate private annuity, which is not simply a divestment tool. To counter the abuse of private annuities as divestment schemes, the Legislature amended the MA statutory divestment language in 1999 to clarify the elements that a non-divestment annuity must possess:

> **49.453 Divestment of assets. ...**
> (4) IRREVOCABLE ANNUITIES, PROMISSORY NOTES AND SIMILAR TRANSFERS. (a) For the purposes of sub.(2), whenever a covered individual or his ... spouse, ...transfers assets to an irrevocable annuity, or transfers assets by promissory note or similar instrument, in an amount that exceeds the expected value of the benefit, the covered individual or his ... spouse transfers assets for less than fair market value. A transfer to an annuity...is not in excess of the expected value only if all of the following

are true:

1. The periodic payments back to the transferor include principal and interest that, at the time that the transfer is made, is at least at one of the following:

   a. For an annuity, promissory note or similar instrument that is not specified under subd. 1.b or par. (am), the applicable federal rate required under section 1274(d) of the Internal Revenue Code, as defined in s.71.01(6).

   b. [not applicable]...

2. The terms of the instrument provide for a payment schedule that includes equal periodic payments, except that payments may be unequal if the interest payments are tied to an interest rate and the inequality is caused exclusively by fluctuations in that rate. ...

(am) Paragraph (a)1. does not apply to a variable annuity that is tied to a mutual fund that is registered with the federal securities and exchange commission.

(b) The amount of assets that is transferred for less than fair market value under par. (a) is the amount by which the transferred amount exceeds the expected value of the benefit.

(c) The department shall promulgate rules specifying the method to be used in calculating the expected value of the benefit, based on 26 CFR 1.72-1 to 1.72-18, and specifying the criteria for adjusting the expected value of the benefit based on a medical condition diagnosed by a physician before the assets were transferred to the annuity, or transferred by promissory note or similar instrument. In calculating the amount of the divestment when a transfer to an annuity, or a transfer by promissory note or similar instrument, is made, payments made to the transferor in any year subsequent to the year in which the transfer was made shall be discounted to the year in which the transfer was made by the applicable federal rate specified under par. (a) on the date of the transfer.

Wis. Stat. 49.453(4). I conclude that the petitioner's wife has satisfied the statute's requirement that a legitimate annuity have periodic payments with interest in excess of the minimum rate required by §1274 of the Internal Revenue Code. *Id.*, (4)(**a**)**1.a**. She has also satisfied the statute's requirement that a legitimate annuity have a payment schedule with equal periodic payments. *Id.*, (4)(**a**)**2**. The only remaining question is whether the asset/real property was transferred for less than the "expected value of the benefit." *Id.*, (4)(**b**) **&** (**c**).

To support his argument that the "expected value of the benefit" at least equaled the value of the $67,000 Bayfield property, the petitioner introduced the unrebutted testimony of an expert witness, accountant Kathleen Vallard. The petitioner argues, and points to Vallard's testimony for support, that the value of the payment stream for this annuity is *$69,418.24*. Specifically, Vallard testified that she calculated the "expected value of the benefit" by using the Net Present Value function of the Microsoft Excel spreadsheet, which is an industry standard program, and came up with the value of $69,418.24. Net Present Value is the present value of this Annuity's stream of payments, expressed as a lump sum; Net Present Value is also sometimes referred to as the "time value of money." In this case, Vallard was looking at *today's* value of a stream of $700 payments over an 11-year period. If the $700 payments were multiplied by 132 months, the total would be $92,400. However, this payment stream is not worth $92,400 today, due to interest costs. To account for interest expense, the Net Present Value calculation discounted the 132 payments of $700 each by the 5.44% federal rate. See Exhibit 13. As mentioned above, the result was $69,418.24.

Equating Net Present Value to the "expected value of the benefit" in the statute is not unreasonable. The statute "defines" expected value of the benefit by cross-referencing to a rule definition:

> (c)"Expected value of the benefit means the amount that an irrevocable annuity will pay to the annuitant during his or her expected lifetime as determined under sub. (4)(c).
>
> ...
>
> [4](c) The department shall promulgate rules specifying the method to be used in calculating the expected value of the benefit,
>
> ...

Wis. Stat. §49.453(1)(c), & (4)(c). The rule definition is as follows:

> (c) "Expected value of the benefit" means the amount that an irrevocable annuity will pay to a primary annuitant or to joint annuitants during his or her expected lifetime.

Wis. Admin. Code §HFS 103.065(3)(c) (November, 2000). This definition suggests that the expected value of the benefit could be the total $92,400 pay-out. However, nothing in this definition suggests the petitioner's use of Net Present Value, which is a lower number, is inappropriate. Also, the *MA Handbook* provision on annuities does not offer a definition or other guidance regarding the "expected value of the benefit." Thus, I am left with deciding whether a Net Present Value calculation can reasonably be construed to be an "expected value of the benefit." In light of the rule definition, and the lack of any policy guidance, I conclude that it is.

In addition to compliance with the MA divestment statue's requirements for a nondivesting annuity, the Annuity also met policy requirements for a nondivesting annuity, found at *MA Handbook*, Appendix 14.11.0 (4-1-99 & 10-01-01). The policy states that a divestment occurs when an asset is transferred in exchange for an annuity with any one of four defects. The first defect is a pay-out schedule that extends beyond the transferor's life expectancy. This did not occur in the instant case. The second defect is that the annuity either has no surrender value OR the transferor did not choose a settlement option. The transferor chose the settlement option of receiving monthly payments of $700. The third defect is that neither the institutionalized person nor his spouse is the annuitant. This did not occur here, as (petitioner's spouse) is the annuitant. The fourth defect is that the annuity lacks fixed, periodic payments that will be made within life expectancy. That also did not occur here. Thus, the Annuity passes policy muster. I find no requirement in the statute or policy that requires an annuity to be secured by real estate, as suggested to the county agency by the Call Center policy analyst.

CONCLUSIONS OF LAW

1. The petitioner's spouse's transfer of real property in March, 2001, in exchange for a private annuity with a Net Present Value in excess of the real property's value, was not a divestment.

NOW, THEREFORE, it is **ORDERED**

That the petition herein be remanded to the county agency with instructions to redetermine the petitioner's institutional MA eligibility (back to March, 2001) in light of the Conclusion above, within 10 days of the date of this Decision.

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 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).

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, this20th day of
December, 2001

/sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
34/NJG