DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MED-23/62125

PRELIMINARY RECITALS

Pursuant to a petition filed February 25, 2004, under Wis. Stat. §49.45(5), to review a decision by the Green County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on March 25, 2004, at Monroe, Wisconsin.

The issue for determination is whether a sale by a trust is a divestment of income.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
(petitioner)

Represented by:
Atty. Scott Thompson
P.O. Box 710
Monroe, WI 53566-0710

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: Jeannie Blumer, ESS
Green County Dept. Of Human Services
N3152 State Road 81
Monroe, WI 53566

ADMINISTRATIVE LAW JUDGE:
Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is an 88-year-old resident of a nursing home in Green County.

2. An application for MA was filed on petitioner's behalf on June 27, 2003. Petitioner is the beneficiary of a trust created in her deceased husband's will over twelve years ago. The trust consists of the family farm, and the trustee is required to pay all income from the trust to petitioner.

3. The trust is not petitioner's asset; she is entitled only to its income. The county determined, in conjunction with the trustee and petitioner's attorney, that monthly income from the trust was $1,531.41. After adding that amount to petitioner's other income, petitioner was given a monthly cost of care liability of $2,071.91.

4. On December 23, 2003, the trustee sold the farm property by land contract to himself, his wife, and another couple for $206,000, with monthly payments of $601 until January 15, 2012. The monthly payments are interest only; the principal portion is to be paid in its entirety at the end of the contract. Petitioner reported the sale on January 6, 2004.

5. The county initially did not reduce petitioner's monthly cost of care. After receiving a notice dated February 17, 2004 that increased the cost of care to account for a social security increase, petitioner filed this appeal.

6. After reviewing the case, the county determined that a divestment occurred at the sale of the property, in that petitioner's income was reduced from $1,531.41 to $601 per month. The county determined that petitioner would be ineligible for MA for 30 months beginning February 1, 2004.

DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code, §HFS 103.065(4)(a); MA Handbook, Appendix 14.2.1. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in Wis. Stat., §49.453(3), to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (currently $4,542). MA Handbook, App. 14.5.0 (3-1-03).

The Handbook, App. 14.9.0, provides that income and the right to receive income can be divested with the same penalty as other property divestments. The penalty is based upon the total amount of income transferred, not the monthly amounts that could be received.

Income divestment is described in both the Wisconsin Statute and federal law. Wis. Stat., §49.453(2)(a), quoted above, provides for a divestment penalty when "assets" are transferred at less than fair market value. "Assets" are defined in §49.453(1)(a) as having the meaning given in 42 U.S.C. 1396p(e)(1), which reads as follows:

> (e) Definitions. In this section, the following definitions shall apply:
> (1) The term "assets," with respect to an individual, *includes all income and resources* of the individual and of the individual's spouse, including any income or 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.
> (2) The term "income" has the meaning given such term in section 1382a of this title.

Italics added.

In this case, the trustee is mandated to pay all income from the trust to petitioner. When he reduced the monthly income from $1,531.41 to $601 by selling the trust principal to himself via a land contract, with

no other consideration to petitioner, he did so while under a fiduciary obligation to her. Therefore, he divested $930.41 per month for the sole purpose of reducing petitioner's monthly cost of care liability.

The county concluded initially that a portion of the $206,000 value of the trust was divested, then later concluded that the full $206,000 was divested. The county reasoned that the trustee has the discretion to pay the entire principal of the trust to petitioner. I disagree with the county on that issue. Petitioner is entitled to receive only the income from the trust, and that entitlement continues until her death. Thus I conclude that the divested amount is the monthly $900.41 divestment times the length of petitioner's life expectancy.

When the land contract was written, petitioner was 88 years, 3 months old. Her life expectancy was seven years. See MA Handbook, Appendix 30.10.0. That means she loses 84 months of $900.41 income, for a total of $75,634.44. She thus is ineligible for MA for 16 months beginning February 1, 2004 ($75,634.44 ÷ $4,542 = 16.65).

CONCLUSIONS OF LAW

1. The trustee responsible for acting on petitioner's behalf divested income by selling trust property and reducing monthly income from the trust with no compensation to petitioner.
2. The amount divested is the monthly reduction in income multiplied by the months remaining in petitioner's life expectancy.

NOW, THEREFORE, it is **ORDERED**

That the matter be remanded to the county to change petitioner's divestment amount to $75,634.44 and the divestment penalty to 16 months. The county shall do so within 10 days 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). The appeal must be served on the 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, this 2nd day of April, 2004

/sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals
0330/bcs