DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-56/72101

PRELIMINARY RECITALS

Pursuant to a petition filed September 12, 2005, under Wis. Stat. §49.45(5), to review a decision by the Sauk County Dept. of Human Services to deny Medical Assistance (MA), a hearing was held on October 19, 2005, at Baraboo, Wisconsin.

The issue for determination is whether petitioner divested a land contract by making it non-assignable.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:
(petitioner)

Represented by:
Attorney William M. Pemberton
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Wisconsin Department of Health and Family Services
Division of Health Care Financing
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Madison, WI 53707-0309
By: Rita Strutz, ESS
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505 Broadway, 4th Floor
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ADMINISTRATIVE LAW JUDGE:
Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

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

2. Petitioner applied for MA on July 14, 2005, seeking MA retroactive to June 23, 2005. By a notice dated August 12, 2005, the county informed petitioner that institutional MA was denied because of a $138,276 divestment that had occurred on January 1, 2004.

3. Petitioner and his wife sold their farm to their son and his wife via a land contract on April 1, 1997. The sale price was $175,000, with payments to be made through April 1, 2007.

4. On January 1, 2004, the parties signed an amendment to the land contract. The amendment reduced the interest rate, extended the payments to January 1, 2011, and made the land contract non-assignable except with the parties' consent. The amount still owed on the contract was $138,276.19.

5. The county determined that petitioner had divested $138,276.19. That amount divested would result in 27 months of ineligibility for institutional MA beginning January 1, 2004 ($138,276.19 divided by $5,096 equals 27.134 months; see MA Handbook, Appendix 4.7.5).

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 4.7.1. 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 $5,096). MA Handbook, App. 4.7.5.

The first issue is whether the land contract had value at all prior to the non-assignment clause. Under the Wisconsin Administrative Code, §HFS 103.06(14), a vendor's interest in a land contract is an available asset to the MA applicant. The value shall be determined by obtaining a fair market estimate from a source active in the market for land contracts. The MA Handbook, App. 4.5.7.12, tells the MA worker to determine the land contract value by taking the original value, subtracting the payments made on principal, any encumbrances, and any value lost to discount.

In this case it is known that the value remaining owed on the land contract as of January 1, 2004, was $138,276.19. There were no encumbrances, and when the county made its determination there was no evidence that any value would have been lost to discount. Therefore, as of that date, petitioner and his wife had an asset valued at $138,276.19.

On that date, petitioner signed an amendment making the land contract unavailable for sale by the very terms of the amendment. He then, in July, 2005, applied for MA. At that point in time the land contract would be considered an unavailable asset by its own terms. The county applied the MA Handbook, App. 4.7.7 to determine that a divestment occurred. That appendix section describes situations where property is held jointly, and one joint owner takes action to limit the other person's ownership or control of the property. That section does not apply to this situation because petitioner himself signed the land contract amendment that limited his control of the property.

Nevertheless, other provisions within the Handbook support the conclusion that a divestment occurred. Appendix 4.7.2.1 provides that a divestment occurs not only when the person actively transfers property, but when the person takes action to avoid receiving assets. That Handbook policy was upheld by the Wisconsin Supreme Court in Tannler v. Wisconsin DHSS, 211 Wis. 2d 179, 564 N.W. 2d 735 (1997). Furthermore, the Handbook, App. 4.7.2.10, makes explicit that if a person makes an asset unavailable and does not receive fair market value, the asset must be treated as being divested.

In this case petitioner took a $100,000-plus asset and by the stroke of a pen made it unavailable. He did not receive fair market value for the concession. The buyer received a lower interest rate and a longer

period to make payments. Petitioner's wife testified that the purpose of the amendment was to make certain that she and petitioner continued to receive an income stream from the property, but that purpose could be achieved by purchasing an annuity if the land contract was sold or paid off.

Petitioner cited a previous fair hearing decision, case no. MDV-3/51440, dated March 13, 2002. See petitioner's exhibits, section 6. In that decision the examiner found that making a land contract non-assignable was not divestment. While the Division of Hearings and Appeals attempts to be consistent in its decisions, prior decisions are not binding unless made as final decisions by the Department's Secretary. My problem with the prior decision is that it cites nothing for its conclusion that making the contract non-assignable was not a divestment. The Handbook provision cited above, App. 4.7.2.10, clearly states the policy that making an asset unavailable is a divestment, and thus would appear to make the prior examiner's conclusion questionable precedent.

Petitioner presented an estimate by Walter Gorski of Boston Note Company that if the land contract had been offered for sale in December, 2003, his company would have paid $127,396 for it. See petitioner's exhibits, section 3, page 6. That is approximately an 8% discount off the stated value of the land contract. I find that discounted value to be credible, and thus the value of the land contract divested should be put at $127,396 instead of the full $138,276 value. Because that value was presented at the hearing I do not fault the county, but nevertheless the divested amount should be reduced to that discounted amount. The correct divestment penalty period thus is $127,396 divided by $5,096 equals 24.999 months, rounded down to 24 months.

Petitioner argues that the divestment should not be counted at all because the community spouse asset allocation could be increased to allow the community spouse's income to be maximized, as allowed by Wis. Stat., §49.455(6)(b)(3). This situation does not fit the community spouse income rule, however. The asset has no value to petitioner and his spouse except for the income it produces. The land contract does not count against the MA asset limit because it is unavailable, so there is no need to increase the asset allocation to allow petitioner's wife to maximize her income.

CONCLUSIONS OF LAW

1. Petitioner and his wife divested a land contract by changing its terms so as to make it non-assignable.
2. The divested amount was not $138,276 as determined by the county but $127,396, which is the amount for which the land contract could have been sold as of January 1, 2004.
3. The penalty period for the divestment is 24 months from the date of transfer, thus through December 31, 2005.

NOW, THEREFORE, it is **ORDERED**

That the matter be remanded to the county with instructions to reduce the divested amount to $127,396 and thus the penalty period for the divestment that occurred in this case to 24 months. The county shall do so within 10 days of this decision. In all other respects the petition for review is hereby dismissed.

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 1st day of November, 2005

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