DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o John Graettinger, Attorney
2645 North Mayfair Rd Suite 130
Milwaukee, WI 53226-1304

DECISION

MDV-40/39925

PRELIMINARY RECITALS

Pursuant to a petition filed May 13, 1999, under Wis. Stat. § 49.45(5), to review a decision by the Milwaukee County Dept. of Human Services in regards to Medical Assistance (MA), a hearing was held on July 15, 1999, at Milwaukee, Wisconsin.

The issue for determination is whether the county agency correctly computed the petitioner's divestment penalty period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]
c/o John Graettinger, Attorney
2645 North Mayfair Rd Suite 130
Milwaukee, WI 53226-1304

Represented by:

John Graettinger, Attorney
Same Address

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: Addie Robertson, ESS
Milwaukee County Dept Of Human Services
1220 West Vliet Street
Milwaukee WI 53205

EXAMINER:
Kenneth D. Duren, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN [redacted], CARES [redacted] is an 83 year old institutionalized resident of Milwaukee County; she first began residing in a nursing home in January, 1999. She applied for MA on a date unknown in April, 1999.

2. On May 3, 1999, the county agency issued a Negative Notice to the petitioner informing her that her application for MA was denied because she had divested her home on August 27, 1997, at a

value of $92,700, and that she would be ineligible for 26 months during which she would receive only MA card services. See, Exhibit #1.

3. The county agency determined the penalty period described in Finding #2, above, by dividing the net market value divested of $92,700 by the monthly state average nursing home cost in 1998, i e., $3,513, [See, MA Handbook, App.14.3.0(05-01-98)(superseded by subsequent updates for 1999], as follows; ($92,700 ÷ $3,513 = 26.387702 months).

4 The petitioner filed an appeal with the Division of Hearings & Appeals on May 13, 1999

5. The estimated fair market value of the petitioner' homestead for real estate property tax purposes in 1997, was $90,300. See, Exhibit #6.

6 On August 27, 1997, the petitioner transferred by quit claim deed most of her interest in her homestead to her son and daughter-in-law; she retained a life estate in the property and conveyed all other interests in the property to them. See, Exhibit #3.

7. The value received or retained by the petitioner and represented by the life estate interest, in August, 1997, was $37,896.20, under MA program rules.

8. On August 27, 1997, the petitioner transferred real property with a value of the difference between the net market value ($90,300) of the property and the value actually received by the petitioner in the form of a life estate ($37,896 20), to her son and daughter-in-law, i e , a total of $52,403.80; for no further consideration or reimbursement.

DISCUSSION

Here, the county agency determined that the petitioner divested $92,700 of homestead realty in August, 1997, and that she was ineligible for 26 months thereafter because of the transfer.

A divestment occurs when an institutionalized individual, her spouse, or another person acting on her behalf, transfers assets for less than fair market value, on or after the individual's "look-back date " Wis Stat. § 49.453(2)(a). The "look-back date" is defined as 36 months before, or with respect to trusts, 60 months before, the first date the individual is both institutionalized and an MA applicant. Ibid., (1)(f). If such a transfer occurs, the individual is ineligible for MA for nursing home services for a number of months determined by totaling the value of all assets transferred during the look-back period and dividing that amount by the average monthly cost to a private patient of nursing facility services at the time of the MA application Ibid., (3)(b). At present, that monthly average amount is $3,726. See, MA Handbook, App. 14.5.0 (04-01-99). The ineligibility period begins with the month of the first divesting transfer of assets. Ibid., (3)(a)

Here, the petitioner admits that she transferred her primary residence to her son and his wife, by quit claim in August, 1997, retaining a bundle of rights her attorney characterizes as a "life estate" by the terms of the Quit Claim Deed. He asserted, in essence, that this life estate was value received that should be subtracted from the amount divested in computing a penalty period.

The county agency representative testified that she could not conclude from a reading of the Quit Claim Deed passage that this was a life estate, and that when she referred the document to the Corporation Counsel's Office, two attorneys there reviewed the passage and simply responded that the transaction appeared to be a divestment See, Exhibits #3 & #8 Accordingly, for purposes of calculating the penalty period of ineligibility, the county agency treated the fair market value of the divested property as entirely divested Robertson based her estimate of fair market value on the fair market value estimate contained in the 1998 property tax bill See, Exhibit #3.

The Corporation Counsels' legal opinions were of little usefulness. It was clear that a divestment had occurred; the petitioner even admits that some amount has been divested. The relevant question is, how much value was received or retained for the life estate rights retained?

I have reviewed the Quit Claim Deed. The rights reserved clearly form a life estate interest. See, Wis. Stat. § 700.02; see also, Exhibit #7, Black's Law Dictionary, 4th Ed. (1951), at p. 1074, definition of "LIFE ESTATE". The county's attorneys provided no guidance to the ESS on this point, possibly because they were unaware that the life estate value could be computed by use of MA Handbook tables.

"*Fair market value*" (*fmv*) is an estimate of the value the asset would have had if sold at the time it was transferred. MA Handbook, App. 14.2.6. The "*net market value*" is the *fmv* at the time of the transfer minus outstanding encumbrances Ibid, at 14.2.8. The "*Divested amount*" is the net market value minus the value received. Ibid, 14.2.7. The "*value received*" is the amount of money, or the value of the property, the transferor received in return for the property. Ibid, at. 14.2.9. Value received may include an estimate of the value of a life estate received or retained by the transferor in the property. The value of a life estate is established for MA purposes pursuant to the use of a table found at the MA Handbook, App. 30.2.0. See also, MA Handbook, App. 11.7.5. & App. 14.10.0. At the time of the transaction, the petitioner was 81 years old, the Table requires the use of a multiplier. Here, the applicable multiplier to determine the value of the life estate interest is .41967. (The multiplier for the value of the remainder interest is .58033.) The best evidence of the *fmv* of the home at the time of the transfer is the 1997 property tax *fmv* estimate, i e., $90,300. See, Exhibit #6.

Accordingly, the correct computation of the amount divested here is as follows: (a) the *net market value* is $90,300 ($90,300 (fmv) - $0 (costs/encumbrances) = $90,300); (b) the *value received* is $37,896.20 ($90,300 (net market value) x .41967 (life estate table coefficient) = $37,896.20), and therefore, (c) the *amount divested* is $52,403.80 ($90,300 (net market value) - $37,896.20 (value received) = $52,403.80 (amount divested).

The correct penalty period should have been 14.06 months [$52,403.80 (*divested amount*) ÷ $3,726 (*average monthly cost of nursing home*) = 14.064197 (*months of ineligibility*)]. This sum is always rounded down to the nearest whole month, i.e., 14 months. MA Handbook, App. 14 5.0. The correct penalty period was 14 months, beginning with the month of the transfer in August, 1997, as the first month of the period. She therefore remained ineligible through only September, 1998, due to this divestment

The matter must be remanded for reduction of the penalty period and a review and re-determination of the petitioner's MA eligibility.

CONCLUSIONS OF LAW

That the county agency incorrectly computed the petitioner's divestment penalty period because it did not treat a life estate as value received by the petitioner in computing the amount divested

NOW, THEREFORE, it is **ORDERED**

That the matter is remanded to the county agency with instructions to reduce the petitioner's divestment penalty period from 26 months to 14 months; review and re-determine the petitioner's eligibility for MA retroactive to the first date of eligibility requested in her application of April, 1999; and to certify her as eligible for MA for all periods of time since the first date for which she is found eligible under the application, if any. These actions are to be completed 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 that 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 the Wisconsin Department of Health and Family Services, as respondent, 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 20th day of July, 1999.

Kenneth D. Duren

Kenneth D. Duren, Attorney
Division of Hearings and Appeals
716/

cc: MILWAUKEE COUNTY DHS 9366
Susan Wood, DHFS