DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-3/51440

PRELIMINARY RECITALS

Pursuant to a petition filed November 30, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Barron County Dept. of Social Services in regard to medical, a hearing was held on February 21, 2002, at Barron, Wisconsin. A hearing scheduled for January 14, 2002 was rescheduled at the petitioner's request.

The issue for determination is whether the petitioner is ineligible for medical assistance as the result of a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
(petitioner)

Represented by:
Arnold R. Koehler
P O Box 430
Rice Lake, WI 54868-0430

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: Judy Ferber, ESS
Barron County Dept Of Human Services
Courthouse Room 338
330 E Lasalle Ave
Barron, WI 54812

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Barron County.

2. The petitioner's spouse was born on March 7, 1913. The petitioner was born on October 26, 1919.

3. On May 22, 2001 the petitioner and her spouse sold the remainder interest in their house and its attached property to their children on a land contract for $65,400. The petitioner and her spouse retained a life estate. The contract called for the children to make a down payment of $5,000 and pay $500 per month for 175 months. Interest was set at 5.4%.

4. The land contract cannot be assigned unless all of the parties agree to the assignment.

5. The assessed value of the property as shown on the 2000 property tax statement was $83,800.

6. The petitioner's spouse resided in a nursing home on May 22, 2001, the date the property was sold.

7. The petitioner entered the nursing home on August 7, 2001.

8. The petitioner's spouses life expectancy when the property was sold was five years. *MA Handbook,* Appendix, §30.10.0.

9. The petitioner's life expectancy when the property was sold was 10 years. *Id.*

10. The value of the remainder interest to the petitioner's spouse at the time of the sale was $28,97.07.

11. The value of the remainder interest to the petitioner at the time of the sale was $24,315.83.

12. The county agency denied the petitioner's request for institutional medical assistance because it considered the sale of the remainder interest a divestment.

DISCUSSION

This is a companion case to MDV-3/51439. The discussion below is quoted verbatim from that decision so references to the petitioner are actually references to the petitioner's spouse in this matter and references to the petitioner's spouse are references to the petitioner in this matter.

The petitioner and his wife both seek nursing home coverage from medical assistance. Medical assistance rules require that to do so their assets must not exceed $3,000. §49.47(4)(b)3g.e., Stats. Those rules prevent them from reaching the $3,000 limit by divesting assets. A divestment occurs when an applicant, or person acting on the applicant's behalf, transfers assets for less than their fair market value during the lookback period. The lookback period is generally 36 months before a person enters an institution. §49.453(1)(f), Wis. Stats. Ineligibility lasts for a period arrived at by dividing the amount divested by the average monthly cost of private nursing home care. §49.453(3), Stats. Nursing home care currently averages $4,075 per month. *MA Handbook,* Appendix, §14.5.0. The issue here is whether the petitioner and his wife divested assets when they sold the remainder interest in their home on a land contract to their children.

The facts are that the petitioner and his wife retained a life estate in their home and sold the remainder interest to their children on a land contract for $65,400. That contract called for the children to make a down payment of $5,000 and pay $500 per month for 175 months. Interest was set at 5.4%. Their house's assessed value according to their 2000 property tax statement was $83,800. The land contract cannot be assigned unless all of the parties agree to the assignment. At the time of the sale the petitioner was 88-years-old and his life expectancy was five years. His wife was 81-years-old and her life expectancy was 10 years. The petitioner was in the nursing home at the time of sale; his wife entered on August 7, 2001.

The county agency determined that both the petitioner and his wife divested assets and were thus ineligible for institutional care when they entered into the land contract. It considers the sale

a divestment because by making the contract non-assignable without the written consent of all of the parties it was not an available asset. *See MA Handbook,* Appendix, §11.6.12. Because it was not an available asset the petitioner and his spouse cannot sell the contract and use it for their own support and maintenance. *Id.* The county agency determined the amount of the divestment by assuming that the petitioner and his spouse each were entitled to half, or $41,900 of the value of the property and using the life estate remainder multipliers for a person of that spouse's age and sex found in the *MA Handbook,* Appendix, §30.2.0. Because the petitioner was 88-years-old at the time of the sale, his $41,900 was multiplied by .69141 to obtain a $28,970.07 divestment. After dividing this amount by the $4,075 monthly rate for private pay rooms it found him ineligible for seven months from May through November 30, 2001. For his 81-year-old spouse a .58033 multiplier was used to find a $24,315.83 divestment. She was found ineligible for five months from May through September 30, 2001.

I disagree with the county's analysis and the amount of the divestment. As noted, the county agency found there was a divestment because the petitioner and his wife could not assign the land contract and it used the value of the remainder interest to determine the amount of the divestment. But as long as the buyer makes the payments, the remainder interest of the petitioner and his spouse is not affected by the non-assignability clause. Because the remainder interest is the portion of the property that the petitioner and his wife gave up, even if the clause were removed they would have no additional control over those to whom the remainder interest could be assigned. More importantly from a financial eligibility standpoint, because their payments are set in the contract those payments remain the same whether the contract is assigned or not. The county's position on the non-assignability clause would be stronger if it used the value of the life estate to determine the amount of the divestment because this portion of the property is what the petitioner and his wife retained and now cannot sell without the approval of others. However, at this point the petitioner and her husband have a doctor's statement saying that it is likely that they will return to the home within six months so the property is exempt from the asset limit. If at some point it becomes clear that neither the petitioner nor his wife can return to the home and the sale of the house is blocked by one of the parties, this matter can be reviewed again.

A greater problem with the land contract is that it extends beyond the expected life of both the petitioner and his spouse. Therefore, although the $65,400 sale price of the remainder interest is greater than $53,285.90 value established when adding the values of those interests set by the county for the petitioner and his wife ($28,970.07 plus $24,315.83), it is likely that both the petitioner and his wife will die before receiving the full $60,400. A decision issued by Administrative Law Judge Brian Schneider in DHA Decision No. MDV-70/#50266 dealt with the problem of land contract payments extending beyond the expected life span of the seller. While Division of Hearings and Appeals decisions are not binding on later decisions, I am persuaded by his approach. He pointed out that the Wisconsin statutes and administrative code as well as the *MA Handbook* were all silent on this problem. He then applied the rules concerning the transfer of property to an annuity. Those rules provide that when a recipient transfers funds to an irrevocable annuity, and payments on the annuity are scheduled to extend beyond the recipient's life expectancy, there is a divestment in the total amount of payments scheduled to be made after the person's life expectancy. §HFS 103.065(4)(at), Wis. Adm. Code; *See also MA Handbook*, Appendix 14.11.0. Mr. Schneider gave the following reasoning for his finding on page 2 of his decision:

> In an irrevocable annuity, a person transfers a sum of money in exchange for the promise of guaranteed periodic payments for a specified period of time. The rule thus provides that if the specified time period runs beyond the person's life expectancy, the payments scheduled to be made thereafter add up to a divestment. In this case, rather

than transferring a sum of money, petitioner transferred a parcel of real estate. In return, she was guaranteed periodic payments for a specified period of time that runs beyond her life expectancy. The transaction has the same effect as the annuity divestment.

Left to determine is the amount of the actual divestment. What the petitioner and his wife transferred here was the remainder interest in their property. Although the contract gives this value as $65,400 I find that $28,970.07 and $24,315.83 values determined by using the *MA Handbook* are a more appropriate determination of the value of what the petitioner and his wife transferred. This is because the petitioner and his spouse did not actually give up $65,400. Rather they gave up a piece of property that according to medical assistance guidelines is worth less than that. I am aware that the higher $65,400 value was put in the contract because it was based upon the life expectancy of the last of the spouses to die. While this figure may be somewhat more actuarially sound it is too difficult to apply in this case because the *MA Handbook* does not contain a last to die table and because it is necessary to determine separate divestment periods for the petitioner and his wife. However, because the petitioner and his wife received the payments over a period of time, interest needs to be added to those payments. The 5.4% interest rate set by the contract is reasonable.

For the five years expected to remain in the petitioner's life from the time of the sale I will adopt the county agency's approach and assign to him half of the $5,000 down payment and half of the $500 monthly payments. According to standard loan calculation charts this means that he would have to receive the $250 payments for 145 months to receive full value for the $28,970 less the $2,500 down payment. *https://www.loanliner.com/lrpresenter/LoanCalculator.asp.* Because he is only expected to live five years, or 60 months, 85 of the $250 payments would come after his death. This comes to a $21,250 divestment, which when divided by $4,075 a month translates into a five month divestment period running from May through the end of September 2001.

When this same process is used for the petitioner's wife's $24,315.83 remainder interest, the length of the payment period is 112 months. Because her life expectancy was 10 years, or 120 months, she did not divest any assets when she entered into the land contract.

A final concern is the potential for default by the children. If this occurs the amount of the divestment will change and the county agency can reopen this matter.

CONCLUSIONS OF LAW

The petitioner has been eligible for institutional medical assistance since she entered the nursing home because she did not divest assets when sold the remainder interest in her property on a land contract.

NOW, THEREFORE, it is **ORDERED**

That this matter be remanded to the county agency with instructions that within 10 days of the date of this decision it reduce the length of the petitioner's ineligibility for institutional medical assistance from seven months to zero months and find her retroactively eligible for assistance for August through September 2001. Nothing in this order prevents the county agency from finding the petitioner ineligible for medical assistance in the future as the result of a divestment if her children discontinue payments on the land contract.

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 for benefits 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 Eau Claire, Wisconsin, this 13th day of March, 2002

/sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals
319/MDO