DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

MDV-51/40126
MED-51/39971

PRELIMINARY RECITALS

Pursuant to petitions filed May 17, 1999 and June 1, 1999 under Wis Stat. § 49.45(5), to review a decision by the Racine County Dept. of Human Services in regards to Medical Assistance (MA), a hearing was held on June 25, 1999 at Racine, Wisconsin At the request of the petitioner, the record was held open for 21 days for the submission of additional information

The issue for determination is whether the county agency correctly extended petitioner's divestment penalty period from July, 1999 to May, 2001 due to an alleged income divestment resulting from cancellation of promissory notes to the petitioner.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner

By:
Attorney John Wargo
731 Main Street
Racine, WI 53403

Wisconsin Department of Health and Family Services
Bureau of Health Care Financing
1 West Wilson Street, Room 250
P.O Box 309
Madison, WI 53707-0309

By: Pam Vasch, ESS I,

Racine County Dept Of Human Services
1717 Taylor Avenue
Racine WI 53404

EXAMINER
Gary M. Wolkstein, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN CARES) is a resident of Racine County

2. On May 29th and/or May 30th, 1998, the petitioner executed six unsecured Promissory Notes, one each to each of six adult children in identical amounts of $9,166. Each note provided by their respective terms that [redacted] as "Holder", would convey $9,166 to each child, as "Maker(s)", and each of the six children agreed to repay the sum transferred in $68.75 per month installments, under each of the Notes. These payments were to continue every month, until final payment of the remaining balance due, on February 21, 2011. The payment schedule included payment of interest at the rate 9% per annum. Each Promissory Note stated that it was non-negotiable and non-assignable; and that all obligation to make payments under any respective Note was cancelled and extinguished upon the death of the Holder as if paid in full at that time. See Exhibit 3.

3. The petitioner became an institutionalized resident of a Racine County skilled nursing facility on or about June 5, 1998; she applied for MA at the Racine County agency on July 8, 1998

4. On August 7, 1998, the county agency issued a manual Positive Notice informing the petitioner that her application for MA card services was approved, effective June 5, 1998; and that her request for services other than MA card services, (i.e.institutional-MA) was denied due to her divestment of $54,996. The notice also informed [redacted] that the divestment caused a penalty period during which she would be ineligible running from May, 1998, through July, 1999

5. On November 10, 1998, Hearing Examiner Kenneth Duren issued a decision for the same petitioner in Case No. MDV-51/36122. Exhibit 2 In this decision, Attorney Duren concluded that the county agency correctly determined that the petitioner divested $54,996 to her six children in return for non-negotiable, non-assignable, and non-enforceable Promissory Notes with no fair market value. Exhibit 2, page 8. This asset divestment resulted in a divestment penalty period running from May, 1998 through July, 1999.

6 On March 27, 1999, the petitioner signed a statement to each of her six children canceling and forgiving any debt owed to her from each child (including the Promissory Notes of Exhibit 3).

7. The county agency sent a June 3, 1999 notice to the petitioner stating that due to the alleged "income divestment" (cancellation of the Promissory Note debts as of March 27, 1999), there is income divestment of $9,607.50 creating a divestment period from March, 1999 through May, 2001. See Exhibits 1 & 5.

8. As of May 11, 1999, the petitioner has made payments of about $23,642 to the Ridgewood Nursing Home. See Exhibit 4.

DISCUSSION

In a Fair Hearing such as this, the petitioner has the burden of proof to establish his or her eligibility for Medical Assistance and that the divestment determination and denial actions taken by the county agency were improper given the facts of the case The burden of going forward then shifts to the county to rebut the petitioner's case and establish facts sufficient to overcome his or her evidence of an incorrect action.

A divestment occurs when an institutionalized individual, his spouse, or another person acting on his 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). The ineligibility period begins with the month of the first divesting transfer of assets. Ibid., (3)(a).

A parallel divestment definition is found at Wis. Admin. Code § HFS 103.065(4), and states in the parts relevant here, as follows:

> (4) DIVESTMENT. (a) *Divestment resulting in ineligibility* An institutionalized individual or someone acting on behalf of that individual who disposes of resources at less than fair market value within 30 months . . . immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. . .

(Emphasis added).

Petitioner executed 6 virtually identical Promissory Notes, as "Holder", whereby she loaned $9,166 to each of her 6 adult children, separately as individual "Maker(s)", on May 29th or 30th,1998. She subsequently entered an institution and applied for institutional MA.

In the instant case, the county's June 3, 1999 action to extend petitioner's divestment penalty period was not based upon the underlying asset divestment, but resulted from the alleged income divestment of March, 1999 by the cancellation of the promissory notes. See Exhibits 1 and 2. The county agency based its income divestment penalty action upon the MA Handbook, Appendix 14.9.0. "Income Divestment" In sec. 14.9.0., the MA Handbook states income received by an institutionalized person and transferred in the month of receipt is considered divestment. In this case, the petitioner did not transfer any of her income and the petitioner cancelled her children's promissory notes which had already been included in the $54,996 asset divestment penalty. Section 14.9.0 further provides that when an ESS worker finds the institutionalized person has transferred income or the right to receive income, calculate a penalty period based on the total amount of income transferred

On first impression, the county action to impose an income divestment appears correct. However, upon closer scrutiny, such an income divestment amounts to a double penalty against the petitioner. In the petitioner's prior administrative hearing in Case No. MDV-51/36122, Attorney Duren concluded that the county agency correctly determined that the petitioner divested $54,996 to her six children in return for non-negotiable, non-assignable, and non-enforceable Promissory Notes with no fair market value (in which each of the six children agreed to repay $68.75 per month installments under each of the Notes.) Exhibit 2, page 8. This asset divestment resulted in a divestment penalty period running from May, 1998 through July, 1999. Attorney Duren's conclusion was clearly that the total amount of the $54,996 was a divestment and found that the promissory notes and the alleged repayment installment did not have fair market value.

Now, in the instant case, the county agency is contending that an additional divestment (an income divestment) was created by petitioner's March 27, 1999 cancellation of the debt. While it is understandable that the county agency might be confused about imposing the penalty described in the MA Handbook, App 14 9 0, the potential $68.75 repayments (which were cancelled) have already been included in the asset divestment The county agency has already imposed against the petitioner the full

penalty divestment from May, 1998 through July, 1999. In his decision, Attorney Duren found that petitioner's promissory notes did not represent fair market value because of the voluntarily imposed (as opposed to market-imposed) restrictions on their liquidity (notes were non-assignable and non-transferable) Furthermore, Attorney Duren concluded in this same decision that the county agency's determination of the fair market value (*fmv*) of these non-assignable, non-negotiable, Promissory Notes as $0. The county agency supported the position that the promissory notes in question had no fair market value. Therefore, it is inconsistent and contradictory for the county to have argued that the promissory notes were worthless at the last hearing, but now argue that those same notes being forgiven or cancelled create an income divestment.

CONCLUSIONS OF LAW

The county agency incorrectly extended petitioner's divestment penalty period from July, 1999 to May, 2001 due to alleged income divestment resulting from cancellation of promissory notes to the petitioner because those promissory notes had no fair market value.

NOW, THEREFORE, it is ORDERED

The matter is remanded to the county agency with instructions to a) discontinue any income divestment action against the petitioner; and b) certify the petitioner as MA eligible as of August 1, 1999 (the completion of her May, 1998 through July, 1999 asset divestment period), 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 for benefits 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 16th day of August, 1999.

Gary M. Wolkstein, Attorney
Division of Hearings and Appeals
8-12-99gmw

cc: Racine County DHS
Susan Wood, DHFS
Atty. John Wargo