



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of


c/o Bruce Tammi, Attorney
Tammi, Cohn & Cavey
405 East Lincoln Avenue
Milwaukee, WI 53207

DECISION

MDV-66/38178

PRELIMINARY RECITALS

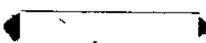
Pursuant to a petition filed January 4, 1999, under Wis. Stat. § 49.45(5), to review a decision by the Washington County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on May 20, 1999 at West Bend, Wisconsin. Hearings previously set for February 17, March 22 and April 20 were rescheduled at the petitioner's request. At the request of the petitioner, the record was held open for 40 days for the submission of additional information.

The issues for determination are (1) whether the policy directive in the March 17, 1999, *BWI Operations Memo*, 99-19, is applicable to a December 21, 1998 MA termination, and (2) whether Department policy correctly treats the instant "balloon annuity" as a divestment that disqualifies the petitioner from MA-paid nursing home care

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner


c/o Bruce Tammi, Attorney
Tammi, Cohn & Cavey
405 East Lincoln Avenue
Milwaukee, WI 53207

Respondent:

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 Rachel Stutzman, ESS
Washington County Dept Of Social Services
333 East Washington Street
Suite 3100
West Bend, WI 53095

EXAMINER.

Kenneth P. Adler, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner _____ is a resident of Washington County. Her date of birth is December 8, 1908.
2. On May 12, 1988 petitioner executed a Warranty Deed creating a life estate for herself in the farm property on which she resided. The remainder interest was owned by four individuals Orville Theisen (son); Juanita Theisen, Carol Banse (daughter) and Richard Banse. Exhibit 4
3. On September 1, 1995 petitioner entered a nursing home. She has resided in the facility continuously since that time.
4. Petitioner's son-in-law Richard Banse was appointed her Power of Attorney (POA).
5. On November 27, 1998 petitioner's POA executed a Warranty Deed selling the life estate interest to the owners of the remainder interest in the property for a sum of \$106,264.07. Exhibit 4
6. On November 27, 1998 petitioner was 89 years old with a life expectancy of 6 years
7. On November 27, 1998 petitioner's POA also entered into a Private Annuity Agreement in which he placed the proceeds of the transfer of her interest in the subject property. The \$106,264.07 was to be paid over a 60 month period under the terms of the private immediate annuity. The annuity paid 59 monthly payments of \$25 per month beginning December 1, 1998 with a balloon payment of \$136,883.98 as the final, and 60th payment. Exhibit 2
8. On November 30, 1998 the property was sold for a gross sales price of \$369,900.00. After deduction of the expenses of sale, the net sale proceeds to the sellers was \$324,302.39.
9. Petitioner's POA informed the county agency on November 30, 1998 of the transfer of the subject property from the petitioner to the other three owners
10. On December 3, 1998 the county agency issued a letter to petitioner's POA requesting a copy of the closing statement transferring the property. Exhibit 3
11. On December 21, 1998 the county agency issued a notice of decision informing petitioner her MA would be discontinued effective 12/31/98. The explanation was "closed case due to divestment." The references for the action taken were listed as "14.2.1, 14.2.6 Manual." Exhibit 1

DISCUSSION

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." The Wisconsin state statutes, administrative code and MA Handbook all provide directives regarding the classification and treatment of a divestment of assets. Wis. Stat. § 49.453, Divestment of Assets, provides the specifics as follows:

Wis Stat. § 49.453(2)(a) states

(2) INELIGIBILITY FOR MEDICAL ASSISTANCE FOR CERTAIN SERVICES (a) Institutionalized individuals Except as provided in sub (8), if an institutionalized individual or his or her spouse, or another person acting on behalf of the institutionalized individual or his or her spouse, *transfers assets for less than fair market value on or after the institutionalized*

individual's look-back date, the institutionalized individual is ineligible for medical assistance for the following services for the period specified under sub. (3)

- 1 For nursing facility services.
- 2 For a level of care in a medical institution equivalent to that of a nursing facility

(emphasis added)

Wis Stat. § 49.453(4) specifically addresses divestment of assets to irrevocable annuities:

(4) IRREVOCABLE ANNUITIES. (a) For the purposes of sub. (2), whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to an irrevocable annuity *in an amount that exceeds the expected value of the benefit*, the covered individual or his or her spouse *transfers assets for less than fair market value*.

(b) *The amount of assets that is transferred for less than fair market value under par. (a) is the amount by which the transferred amount exceeds the expected value of the benefit.*

(c) The department shall promulgate rules specifying the method to be used in calculating the expected value of the benefit, based on 26 CFR 1.72-1 to 1.72-18, and specifying the criteria for adjusting the expected value of the benefit based on a medical condition diagnosed by a physician before the assets were transferred to the annuity.

(emphasis added)

“Annuity” is not defined in the statutes. However, Wis. Stat. § 49.453(1)(c) defines “expected value of the benefit” as follows:

(c) “Expected value of the benefit” means the amount that an irrevocable annuity will pay to the annuitant during his or her expected lifetime as determined under sub. (4)(c).

The Wisconsin Administrative Code § HFS 103.065(4)(a) defines “divestment” 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 individual becomes institutionalized if the individual is receiving MA on the date he or she becomes institutionalized or, if the individual is not receiving MA on that date, 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)

The divestment of assets to an irrevocable annuity is treated as follows at Wis Admin Code § HFS 103.065(4)(at):

(at) Transfer of resources to an irrevocable annuity on or after October 1, 1993 1
Whenever an institutionalized individual or his or her spouse, or another person acting on behalf of the institutionalized individual or his or her spouse, *transfers funds* on or after October 1, 1993, *to an irrevocable annuity in an amount that exceeds the expected value of the benefit*, the institutionalized individual or his or her spouse shall be determined to have divested. (emphasis added)

“Annuity” under the code is defined at Wis Admin. Code §HFS 103.065(3)(a) as follows.

(a) “Annuity” means a written contract under which, in return for payment of a premium or premiums, an individual or individuals have the right to receive fixed, periodic payments for life or up to a fixed point in time

“Expected value of the benefit” is defined

(c) “Expected value of the benefit” means the amount that an irrevocable annuity will pay to a primary annuitant or to joint annuitants during his or her expected lifetime.

Finally, the MA Handbook, drafted by the Department pursuant to Wis. Stat § 49.45(34) to assist county economic support workers who administer the medical assistance program, defines “divestment” as follows:

“Divestment” is the transfer of income, non-exempt assets, and homestead property, which belong to an institutionalized person or his/her spouse or both

1. For less than the fair market value of the income or asset
2. By an institutionalized person

MA Handbook, Appendix 14.2.1

Appendix 14.2.6 defines “fair market value” as an estimate of the prevailing price an asset would have had it been sold on the open market at the time of the transfer.

On March 17, 1999 the Department issued a *BWI Operations Memo 99-19* to clarify the above Handbook provision Although that memo was not utilized by the county agency, it is referenced because it was to be used to clarify the policy provision which was relied upon by the county agency when it concluded a divestment of assets occurred

The county agency asserts a divestment occurred in this case because the petitioner transferred a life estate in property to a Private Annuity Agreement purchasing a nonassignable, unsecured, private financial instrument with exceptionally low monthly income payments of \$25 until the final “balloon” payment of \$136,883.98 at the end of the agreement The agency believes that the cash was not transferred for fair market value as such an agreement would not be valuable to anyone other than the petitioner.

In determining a divestment occurred, the county agency relied upon the MA Handbook provisions detailed above The county did not specifically state the transfer was viewed as a transfer to an

irrevocable annuity, but asserted it was a transfer of assets for less than fair market value which meets the definition of a divestment.

The petitioner's representative first asserts that the Private Annuity Agreement which is the subject of this case is an annuity and therefore must be reviewed under the provisions of Wis. Stat. § 49.453(4) and Wis Admin. Code § HFS 103.065(4)(at). Reviewing those sections, the petitioner's representative argues that both the state statutes and administrative code provisions provide that a transfer of resources to an irrevocable annuity is a divestment only if the "amount transferred exceeds the value of the benefit." As the expected value of the benefit exceeds the amount transferred, the petitioner's representative asserts the transaction does not qualify as a divestment.

The petitioner's representative further asserts the specific provision of Wis. Stat. § 49.453(4) takes precedence over the general provision of Wis. Stat. § 49.453(2). Therefore, he argues that in determining whether the transfer of assets to the Private Annuity Agreement was a prohibited divestment, the Department "may not determine that the subject annuity is a transfer of assets for less than fair market value under sec. 49.453(2)(a) Stats. even though it is not a transfer of assets for less than fair market value under the specific provisions of sec. 49.453(4), Stats." See post-hearing brief, page 11

In addition, the petitioner's representative correctly points out that neither the statutes nor the administrative code require any particular rate of return nor any particular size or frequency of payments. Therefore, he asserts the transfer of assets to the Private Annuity Agreement is not a divestment under either Wis. Stat. § 49 453 nor Wis. Admin. Code § HFS 103.065. Finally, he asserts that the transfer of assets to the Private Annuity Agreement was not a divestment under the MA Handbook provisions cited above

I. THE POLICY DIRECTION IN BWI OPERATIONS MEMO 99-19 APPLIES TO THE PETITIONER'S DECEMBER 31, 1998 MA TERMINATION.

While the county indicates it did not rely on the *BWI Operations Memo* when making its decision, that Memo repeatedly indicates that it is merely clarifying the Department's existing position. Under this circumstance, the Memo can be used to clarify the policy already in existence. Also, as noted below, the Department clarified its divestment policy pertaining to annuities in two final decisions from the Department Secretary on December 17, 1998. Given that the policy clarification was already made in December, 1998, there is no apparent reason not to apply it the petitioner's December, 1998 termination

II. UNDER DEPARTMENT POLICY, AS EXPRESSED IN BOTH BWI OPERATIONS MEMO 99-19 AND TWO FINAL HEARING DECISIONS OF THE DEPARTMENT SECRETARY, THE PETITIONER'S PURCHASE OF THE "BALLOON ANNUITY" WAS A PROHIBITED DIVESTMENT.

Financial instruments similar to the one reviewed here, sometimes called "balloon annuities," have been the subject of prior fair hearing decisions. Due to the hearing examiners' perceived need for clarity in the Department's policy provisions concerning such "balloon annuities" and their use as divestment tools, two hearing decisions were issued in "proposed" status to the Secretary of the Department of Health and Family Services. In adopting those two decisions, which ruled that the "balloon annuities" involved were MA-disqualifying divestments, the Secretary's designee's final decisions concluded that (1) a financial instrument with a huge balloon payment at the end does not fit the §HFS 103 065(3)(a) definition of an annuity because the payments throughout the life of the annuity are not fixed and level, and (2) that even if the instruments were construed to meet the formal annuity requirement of periodic fixed payments, in substance the transactions were merely a camouflage for divestment, and must therefore not be allowed

See, Final Decisions No. MDV-30/35331, & MDV-30/35213 (Wis. Div. of Hearings & Appeals December 17, 1998)

The two final decisions referenced above addressed all the arguments raised in the current appeal and I find the reasoning and conclusions in those decisions persuasive in relation to this appeal. First, I conclude the "balloon annuity" which is the subject of this appeal does not meet the definition of an "annuity" pursuant to Wis. Admin. Code § HFS 103.065(3)(a) as the payments are not fixed. While the petitioner's representative presented an expert witness who testified that a "fixed" annuity is one in which the annuity company determines the rate of interest paid to purchaser, and that various commercial "fixed" annuities have payments which vary over the terms of the annuity, I do not find these assertions more persuasive than the authorities referenced in MDV-30/35213.

Second, in reviewing the Private Annuity Agreement which is the subject of this appeal I can find no directive that the Agreement is irrevocable. The petitioner's representative states "(t)here are many forms of annuities, but only transfers to irrevocable annuities may result in divestment under applicable statutory and administrative code provisions." See post-hearing brief, page 13. It is not clear why in one portion of his brief he argues the Agreement falls under the provisions of Wis. Stat. § 49.453(4) as an irrevocable annuity, while in a later portion of his brief argues "there is no legal basis for finding that the subject Private Annuity Agreement is anything other than an immediate type annuity contract." By its own terms, I must conclude this Agreement is not an irrevocable annuity and therefore would clearly be reviewed under the general divestment provisions of Wis. Stat. § 49.453(2).

Third, I conclude the assets were transferred for less than fair market value under the reasoning of MDV-30/35213. While the petitioner's representative alleges this was an "arms-length transaction and made economic sense" I am not convinced of this assertion. See post-hearing brief, page 17. The agreement by its own terms is unsecured, and cannot be transferred, assigned, sold or hypothecated. Exhibit 2. I adopt the definition of fair market value as the "amount it will sell for upon arms-length negotiation on the open market" and conclude this instrument does not meet that definition by its very terms and provisions. See MDV-30/35213

Finally, I do not find the petitioner's representative's argument that the Department engaged in "illegal rule making" when drafting a policy memo to be persuasive. State ex rel. Clifton v. Young, 133 Wis 2d 193, 200 (Ct. App. 1986), 394 N.W. 2d 769, cited by the petitioner's representative as support for his assertion, deals with a policy memo issued by the former Dept. of Health & Social Services defining parole procedures and attempting to provide uniform application of particular administrative code provisions.

The final decisions from the Secretary which are referenced above are considered a statement of Department policy, and are binding on a hearing examiner until such time as the pertinent law changes (either statutorily or by case law). Therefore, I must follow the Department Secretary's decisions here, and declare the transfer of \$136,883.98 is a disqualifying divestment that causes the petitioner to be ineligible for MA.

CONCLUSIONS OF LAW

1. That petitioner did not purchase an annuity as defined at Wis. Admin. Code § HFS 103.065(3)(a) because the contract does not call for fixed, periodic payments, but instead requires nominal payments and a varying balloon payment at its conclusion.
2. That the county agency correctly determined that the \$136,883.98 transferred by the petitioner's POA to the Private Annuity Agreement was a divestment as petitioner did not receive fair market value in return for her cash transfer.

3. In accord with BWI Operations Memo 99-19 and DHA Decisions No MDV-30/35213 & 35331, the county agency correctly terminated petitioner's institutional MA

NOW, THEREFORE, it is ORDERED

That the petition for review herein be 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

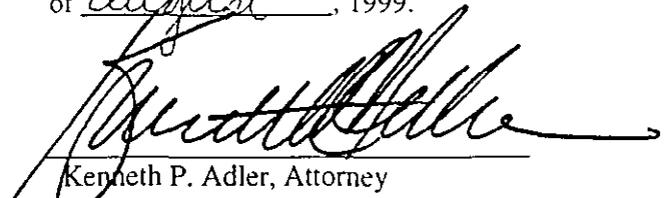
APPEAL TO COURT

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).

Appeals concerning Medical Assistance (MA) must be served on the Wisconsin Department of Health and Family Services, 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 13th day
of August, 1999.


Kenneth P. Adler, Attorney
Division of Hearings and Appeals
813/

cc: Washington County DHSS
Susan Wood, DHFS