

\$65,200 to [redacted] on the execution date, and [redacted] promised to pay \$70,200 to [redacted] in the amount of \$15.63 per month for 50 months, plus a final payment of \$64,418.50, to be made on July 31, 2002. See, Exhibit #2.

3. On a date unknown thereafter prior to April 1, 1999, [redacted] became eligible for Institutional-MA, eligibility was approved by the county agency and the Irrevocable Annuity was not counted as an available asset for MA eligibility by the county agency.
4. On or about March 17, 1999, the Department of Health & Family Services issued BWI Operations Memo, #99-19 providing policy guidance to county agencies in the treatment of resources for MA eligibility purposes; the Racine county agency received this directive and implemented the policy directives contained therein in this case at the next required re-certification review; prior to March 17, 1999, the county agency had not considered the transaction described in Finding #2, above, as a divestment and he had been previously found eligible for Institutional - MA.
5. On May 14, 1999, the county agency issued a Positive Notice informing the petitioner that the agency had determined at a review performed on May 5, 1999, that effective June 1, 1999, he was subject to a divestment (ineligibility) penalty period of 17 months for the period of May, 1998, through September, 1999; that he remained eligible for MA Card Services only; and that he would not receive coverage for skilled nursing facility payments or ancillary services in an institution, i.e., Institutional - MA services.
6. The county agency determined that the petitioner had divested a total of \$65,200 in non-exempt assets to his brother on May 22, 1998, and that he was ineligible for 17 months due to this divestment, and the county agency impose the penalty period beginning in May, 1998, and running through September, 1999 as described in the notice language in Finding #5 and Exhibit #1. MA was discontinued to [redacted] effective June 1, 1999.
7. The petitioner filed an appeal with the Division of Hearings & Appeals on June 21, 1999, benefits were not continued pending the hearing decision.

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." Wis. Stat § 49.453(2)(a) The "look-back date" in most cases, including here, is 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 (currently, \$3,726[effective 04/01/99]) 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). See, also, MA Handbook, Apps. 14.1.0 - 14.5.0.

The petitioner's counsel asserts in a brief written argument that: (1) Departmental policy as applied previously by the county agency, and in some fair hearings decisions in similar cases, allowed so-called "balloon annuities" to represent fair market value ("*fmv*"), and the application of a recent BWI Operations Memo, 99-19(03/17/99) directing county agencies that such balloon annuities do not represent fair market value violates due process; (2) that the policy stated in BWI Operations Memo, 99-19(03/17/99) is not the result of "proper rulemaking procedure" after many decisions by the county agency, and at least two by hearing examiners in DHA Case No. MED-40/87846 (Wis. Div. Hearings & Appeals June 6, 1995) and in DHA Case No. MDV-45/22152 (Wis. Div. Hearings & Appeals September 2, 1998) approving "balloon annuities" as not being a divestment event. In short, Mr. Wargo argues that these balloon

annuities were allowed under the law, by the Racine County agency, and at least two DHA examiners before this Memo (and other, and adverse, recent fair hearing decisions), as a return of *fmv*, and that this should continue to be so regardless of the Memo policy directive.

The Department's Secretary has clearly stated in a Final Decision in DHA Case No MDV-30/35331 (Wis. Div. Hearings & Appeals December 17, 1998), that such balloon payment transfers are not repayments made in a fixed and periodic manner such as to meet the requirements of Wis Stat. § 49.453(4) and Wis. Admin. Cod HFS § 103.065(3)(a), which set up the standard for finding an annuity as a divested asset; and, *even if they are such fixed payments, a transaction such as this is merely a camouflage for divestment in substance with no underlying economic substance.* The schema used here is not "fixed" because the bulk of the asset is re-paid in one huge ultimate payment. A "fixed" payment is considered by the Department to be one "...keeping nearly the same relative position..." and "...stable...". See, Operations Memo # 99-19, pp 2-3(03/17/99); see also, Wis. Admin Code § HFS 103.065(3)(a)

The Division's hearing examiners are bound to follow the Final Decision of the Secretary of the Department of Health & Family Services in such policy pronouncements. Prior decisions of other hearing examiners do not carry precedential weight or value. A Final Decision of the Secretary of the Department of Health & Family Services (DHFS), as cited above, does. Likewise, prior errors by the county agency in processing applications are never controlling, or even persuasive, in establishing for this examiner that an applicant meets the requisite financial tests for Medical Assistance. A "fair hearing" contemplates the application of the rules and regulations of a public assistance program in the same manner to all applicants and recipients, even those erroneously determined by the agency to have been eligible for MA in the past, when in fact, they were not.

In fact, I concur fully with the rationale set forth by the Secretary in Case No. MDV-30/35331, and I conclude that it applies here. A repayment schedule which contemplates the payment of a total of \$781.50 in 50 installments and a balloon of \$64,418.50 on the 51st payment is an artifice, a sham, and yes, a camouflage for divestment. No party in an arm's length transaction in the fair market would either agree to such terms or purchase such an annuity from a third party even if the annuity permitted such a sale or assignment by its terms. (This Annuity does not, further derogating its arguable "fair market" value.) Large sums of money are turned over to another for a long period of time, for little or no immediate benefit. An investment of \$65,200 at simple interest of 5% per annum would generate nearly \$3,300 in interest income in the first year alone, and yet this transaction contemplates turning over \$65,200 to another person for over four years in return for "annuity" payments totaling \$781.50 after more than four years have elapsed. Still later, a huge balloon payment at month 51 of the balance remaining due, is payable. The transaction, if completed, will net the Annuitant the grand sum of \$5,000 in payments above and beyond the repaid \$65,200, or approximately 1 1/2 % per annum rate of return. It is also not a coincidence that such transactions are arising in settings where the parties to the transactions are extended family members, and that often the annuitant is elderly.

Finally, as to the two legal arguments proffered by Attorney Wargo, I find them without merit. First, it is the long-standing policy of the Division of Hearings & Appeals - Work & Family Services Unit, f/k/a, the Office of Administrative Hearings, that the Department's hearing examiners do not possess equitable powers nor the power to invalidate law or policy on the basis of constitutionality arguments like "due process". See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. Second, even if I had such authority, the mere fact that a county agency, or even a hearing examiner, erroneously analyzed such annuities in the past, and the mere fortuity that an otherwise ineligible person actually received MA for a period of time to which he was not entitled under the rules of this means-tested financial assistance program, does nothing to persuade me that I should *compound* said error by continuing benefits to which the petitioner is not entitled under law. Rather, the law contemplates that individuals so situated will access their assets, or divested assets, and pay the costs of

medical services until such time as the assets are reduced below the means-test asset level. Finally, I also decline to accept Attorney Wargo's assertion that the Memo's clarification of prior Departmental level policy on this subject is an intervening rule which was not properly promulgated. The policy is, and has been for many years, that non-exempt and countable assets, available or made available and including annuities, which are conveyed for less than fair market value, are divestments. See, Wis. Stat. § 49.453(4)(b), see also, Wis. Admin. Code § HFS 103.065.4(at).

The preponderance of the evidence presented causes me to conclude that the county agency correctly determined that the Irrevocable Annuity had no fair market value whatsoever, and that the petitioner divested the full amount of \$65,200 to his brother. To do otherwise is to affirm the use of technical language and sharp legalistic practices raising form far above substance, in order to frustrate the intent of the legislature in framing the means tests for MA. I decline to do so.

CONCLUSIONS OF LAW

- 1) The county agency correctly determined that the petitioner has divested \$65,200 during the look-back period.
- 2) That the county agency has correctly determined that the petitioner is ineligible for MA due to a divestment penalty period of 17 months.

NOW, THEREFORE, it is ORDERED

That the petition for review herein be, and the same hereby is, 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 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 be found at your local library or courthouse.

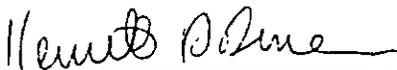
APPEAL TO COURT

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 4th day
of August, 1999.



Kenneth D. Duren, Attorney
Division of Hearings and Appeals
82/

cc: Racine County DHS
Susan Wood, DHFS