XS-6u (Rev 6/86)

STATE OF WISCONSIN
DEPARTMENT OF HEALTH & SOCIAL SERVICES

In the Matter of

[redacted]

DECISION

MDV-29/#90855

PRELIMINARY RECITALS

Pursuant to a petition filed October 11, 1995, under sec. 49.45(5), Wis. Stats., to review a decision by the Juneau County Dept. of Human Services to deny the petitioner's application for MA, a hearing was held on January 24, 1996, at Mauston, Wisconsin. Hearings set for November 10, 1995, and December 13, 1995, were rescheduled at the petitioner's request.

The issue for determination is whether the county agency correctly denied MA due to divestments of assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST: Petitioner:
[redacted]

Wisconsin Dept. of Health & Social Services
Bureau of Welfare Initiatives
1 W. Wilson St., Room 350
P.O. Box 7851
Madison, WI 53707-7851
By: Gail Hallinan, ESS Manager
Juneau County Dept. of Human Services
220 E. La Crosse Street
Mauston, WI 53948

EXAMINER: Kenneth D. Duren, Attorney
Department of Health & Social Services

FINDINGS OF FACT

1. Petitioner (SSN: [redacted] CARES No. [redacted] is a resident of Juneau County.

2. The petitioner was hospitalized on July 25, 1995; she was transferred to a skilled nursing facility in Juneau County on August 1, 1995.

3. The petitioner transferred her one-half tenancy in common interest in her homestead property to her adult daughter, [redacted], by quit claim deed, on July 12, 1995; [redacted] had been the other tenant in common holding the remaining one-half interest. See, Exhibit #4.

4. On or about July 31, 1995, [redacted] withdrew $4,000 from a joint checking account she held together with the petitioner with the transaction description of [redacted]. See, Exhibit #6.

5. On or about August 4, 1995, [redacted]d deposited the proceeds of six certificates of deposit (CDs) solely owned by the petitioner, into the joint checking account they shared; the proceeds of the six CDs totalled $14,683.33. See, Exhibits #6 & #7.

6. On or about August 4, 1995, [redacted] withdrew $12,000 from the joint checking account she held together with the petitioner with the transaction description that the withdrawal was to "reclaim assets". See, Exhibit #6.

7. On August 15, 1995, the petitioner applied for MA at the county agency.

8. On September 15, 1995, the county agency issued a Positive Notice to the petitioner informing her that her application for MA had been approved for the period of August 1, 1995, through July 31, 1996, for "Card Services" which would cover medical costs other than nursing facility charges, and that her Medicare Part B premiums would be paid by the State, which would cause an increase her Social Security check in the following months. See, Exhibit #1.

9. On September 15, 1995, the county agency also issued a Negative Notice to the petitioner informing her that her application for MA to cover nursing home costs was denied due to the divestments of assets, as follows: $29,370 on July 12, 1995, when she quit claimed her one-half interest in her residence to her daughter; and $16,000 of cash assets when she transferred $4,000 on July 31, 1995, and $12,000 on August 4, 1995. The county agency also informed the petitioner that she was ineligible for payment of nursing home charges for a period of 15 months, i.e., until October 12, 1995, due to the total divested of $45,370. See, Exhibit #2.

10. The petitioner filed an appeal with the Department on October 11, 1995.

11. [redacted] quit-claimed the entire residence property previously unified in her ownership on July 12, 1995, to [redacted] and [redacted] as joint tenants on October 24, 1995. See, Exhibit #4.

12. During the years preceding the petitioner's application for MA, she has been receiving approximately $310 per month of Social Security benefits; [redacted] has paid for the balance of [redacted] support and maintenance, in the followings amounts:

1988	$2,388.45
1989	$1,634.72

1990	$1,192.69
1991	$1,198.76
1992	$2,092.16
1993	$1,910.67
1994	$4,896.01
1995	$2,010.01
TOTAL	$17,323.47

See, Exhibits #3 & #5. The petitioner also paid approximately $2,000 of support and maintenance for the petitioner's basic needs during each of the years preceding the above table, for the years of 1982-1987; and $1,500 per year for the years of 1979-81.

D I S C U S S I O N

A disqualifying divestment occurs for MA purposes when an institutionalized individual, his/her spouse, or a person acting on his/her behalf disposes of nonexempt property for less than fair market value. Sec. 49.45(453), Wis. Stats., §HSS 103.065(4), Wis. Adm. Code, MA Handbook, Appendix 14.2.2. "Disposal" is defined in the Handbook as "the act of changing legal title or other right of ownership to another person or persons." Id. If a divestment occurs, the individual is ineligible for MA for the number of months obtained by dividing the disposed amount by the statewide average monthly cost to a private pay patient in a nursing home. §HSS 103.065(5)(b), Wis. Adm. Code.

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the county, like the denial of MA due to divestments of assets in excess of program limits within the 30 months prior to application, was improper given the facts of the case. See, 20 C.F.R. 416.200-416.202; see also, 42 C.F.R. §435.721(d).

In *this* case, that means that the petitioner must establish, by a preponderance of the evidence submitted at the hearing, that the county denial due to the petitioner's divestment of assets in excess of program limits was incorrect because the assets counted (the value of the real estate and bank accounts) were *not* divested by the petitioner to her daughter for less than fair market value, or were otherwise exempt.

The petitioner's attorney demonstrated that the realty had been reconveyed back to the petitioner on October 24, 1995. See, Exhibit #4. He argues that this cures this particular divestment. See, [redacted] Letter, dated October 25, 1995, citing MA Handbook, App. 14.4.0(3). as authority for this position.

The county agency conceded that this change in circumstances would cause the county to review this part of the divestment determination, but the county agency had not yet done so. This change of circumstances, however, leaves the issue of the denial for the period between application and the re-conveyance in issue.

As to the $16,000 of cash transferred to [redacted], [redacted]e argues that for years prior to the application for MA, [redacted] paid expenses on behalf of [redacted] with the understanding that the CD's titled in [redacted] name were

security for this debt. Consequently, he argues, value was received for the transfer, and this sum was not divested. See, Noble Letter, dated October 10, 1995, citing MA Handbook, App. 14.2.9(3).

The county agency response to this assertion is that the prior expense payments by [redacted] for [redacted] were continual and repeated gifts occurring throughout the years, and that [redacted] has no proof evidencing any debt was owed to her by [redacted]

As to the realty divestment, the petitioner is, in part, correct. The divestment has been cured, as of October 24, 1995, due to the return conveyance. See, §HSS 103.065(4)(d), Wis. Admin. Code; MA Handbook, App. 14.4.0(3). However, the initial determination of September 15, 1995, was correct at that time. The subsequent re-conveyance means simply that the county must re-determine MA eligibility as of the date of the re-conveyance.

I turn now to the latter argument, that the transfer of the $16,000 cash was the return of value received by [redacted] from [redacted], to consider the evidence in greater detail.

The Handbook provides as follows:

> "Value received" is the amount of money or value of any property or services received in return for the person's property. The value received may be in any of the following forms:
>
> 1. Cash.
>
> 2. Other assets such as accounts receivable and promissory notes (both of which must be valid and collectible to be of value), stocks, bonds, and both land contracts and life estates which are evaluated over an extended time period.
>
> 3. Discharge of a debt.
>
> 4. Prepayment of a bona fide and irrevocable contract such as a mortgage, shelter lease, loan, or prepayment of taxes.
>
> 5. Services which shall be assigned a valuation equal to the cost of purchase on the open market. Assume that services and accommodations provided to each other by family members or other relatives were free of charge, unless there exists a written contract (made prior to the date of transfer) for payment.

MA Handbook, App. 14.2.9.

[redacted] testified that she had provided approximately $35,408.86 in cash to the petitioner to pay for all of the monthly living expenses incurred by [redacted] which exceeded her Social Security income, between 1979 and [redacted] institutionalization in August, 1995. [redacted] testified that she had an oral agreement with her mother that she would be compensated for all of these payments at a later, unspecified time, when [redacted] would turn over her certificate of deposit assets to [redacted] in return for all of the expenses paid by [redacted]

Upon direct questioning of [redacted] by the examiner, as to specifically when the conversations occurred at which [redacted] promised to give [redacted] the CD funds in return for [redacted] ongoing support, the petitioner was vague and unsure in her testimony regarding such dates or the exact terms and conditions of the support to be provided or the date, or dates, when the CD balances would be transferred.

[redacted] testified that the first such conversation occurred shortly after the death of her father in 1975. At that time, [redacted] and [redacted] were concerned about meeting [redacted] future support and maintenance needs. [redacted] claimed that the two women reached an understanding that [redacted] would help defray [redacted] expenses, and [redacted] would ultimately turn over the CDs to [redacted]

[redacted] testified that she paid the excess expenses for [redacted] on a regular basis for all the years since her father's death. (Her documentation establishes that actual payments began in about 1979. See, Exhibit #3.) She stated that approximately once each year on dates unspecified, she would meet with [redacted] to discuss [redacted] ongoing needs, and would re-discuss the anticipated transfer of the CDs to [redacted] However, [redacted] was always unwilling to transfer the CDs at any time prior to her institutionalization on or about August 1, 1995, because these CDs were her life's savings and they represented "security" to [redacted]

Concurrent with, or immediately after, [redacted] was institutionalized, [redacted] as power-of-attorney, closed the CD accounts, transferred the proceeds to the joint checking account, and withdrew $16,000, taking sole possession of this sum.

As proof that this transfer was in return for value received, due to cash payments made by [redacted] for [redacted], [redacted] produced two hand written documents on which she listed, when considered together, estimated gross annual payments for the period of 1979-1987, and an itemized list of all expense payments actually made on an annual basis, with check numbers, for the remaining period of 1988-1995. It is clear that these lists were not contemporaneous ledgers made to keep track of the expeditures at the time they were made, but an after the fact compilation of expenses paid. See, Exhibit #5.

[redacted] also testified that no written document was ever executed confirming her understanding with her mother. Finally, she admitted that she did not press her mother to cash the CDs when she had expended cash exceeding the amounts held by [redacted] in the CDs, and that she kept paying the expenses because it was her mother and she did not want to take away her sense of "security" in knowing that the CDs were there in case of an emergency.

I find the testimony of [redacted] credible as to the fact that she expended the funds alleged on behalf of her mother during the period of 1979-1995. I do not, however, find her testimony credible as to [redacted]s intention to reimburse her, as value received, with the CD proceeds in return for all of the sums paid by [redacted] during these years. Her testimony on the existence of the "understanding" to do so, was vague, self-serving, and uncorroborated by any other witness or any written document as to the existence of the agreement. In short, it is a mere assertion that the "understanding" existed, which fails, standing alone, to establish the agreement existed.

Her testimony was also contradicted by the fact the [redacted] kept paying for her mother's expenses long after she had exceeded the total of the CD assets held by her mother without seeking reimbursement.

Finally, her testimony is contradicted by the fact that [redacted] was apparently sufficiently competent to convey the quit claim deed to [redacted] on July 12, 1995, and yet not even a contemporary document memorializing the "understanding" was produced which could have substantiated [redacted] claim that the CD proceeds were now to be transferred to her by [redacted] for past payment of the expenses of [redacted]

I must conclude that these expenses were paid by [redacted] over the years out of concern for her mother's well-being and quality of life, and that they were of a donative nature, rather than arising from a contractual, or contract-like, arrangement to reimburse value received by [redacted] over the years.

In short, [redacted] circumstances in this case are not in substance any different than any child with an expectation that his or her parent's assets will be left to them in the future. Unfortunately, intervening forces, like the institutionalization of a parent and the attendant expenses, may cause such an expectation to go unfulfilled when the asset is consumed to defray medical and institutional expenses.

I conclude that the petitioner has failed to present *sufficient* credible evidence which establishes, by the preponderance of the evidence presented, that the county agency MA denial action was incorrect.

The county agency determination that the cash assets were divested was correct, and no divestment exception applied here. This determination is affirmed.

C O N C L U S I O N S O F L A W

1) The county agency correctly concluded that the petitioner had divested her interest in realty with a value of $29,370 to her daughter on July 12, 1995, and was a countable asset for MA eligibility purposes at the time of application.

2) The petitioner has cured the divestment described in Conclusion #1, by the occurrence of the re-conveyance of the property interest to her as of October 24, 1995.

3) The county agency correctly concluded that the petitioner had divested her interest in $4,000 of cash to her daughter on July 31, 1995, and $12,000 of cash on August 4, 1995, and that both sums were countable assets for MA eligibility purposes at the time of application.

NOW, THEREFORE, it is

O R D E R E D

That part of the petitioner's appeal which concerns the county agency determination that the petitioner divested $16,000 of cash assets, be and the same herein is, dismissed. IT IS FURTHER ORDERED, that the matter of the divestment of a realty interest is remanded to the county agency with instructions to re-determine the petitioner's total period of ineligibility for MA coverage of nursing home costs. These actions shall be completed within ten days of the date of this decision.

REQUEST FOR A REHEARING

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 Office of Administrative Hearings, 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 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 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Department of Health and Social 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 8TH day of FEBRUARY, 1996.

Kenneth D. Duren, Attorney
DEPARTMENT OF HEALTH & SOCIAL SERVICES
02/07/96/kdd

cc: Petitioner
Juneau Co. DHS
[redacted].