



STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

In the Matter of

[REDACTED]

DECISION  
MDV-40/97114

The proposed decision of the hearing examiner dated November 26, 1996 is revised as follows and is hereby adopted as the final order of the Department.

Replace the second paragraph of the PRELIMINARY RECITALS with the following:

The issue for determination is whether the county agency correctly determined that the petitioner was ineligible for institutional MA for three months due to divestment. More specifically, the question is whether the contract at issue transferred assets at fair market value within the meaning of section 49.453(5), Stats., thereby avoiding divestment.

Replace the introductory paragraph and sections I. and II. of the DISCUSSION with the following:

There is no dispute that the petitioner transferred assets totalling \$11,322.80 to his daughter-in-law on May 21, 1996. The question is whether the transfer, made pursuant to a written contract, constitutes a divestment for MA purposes. See sec. 49.453(2), Stats. If it was a divestment, the petitioner was correctly made ineligible for MA payment of nursing home services for three months.

I. THE TRANSFER CONSTITUTED A DIVESTMENT.

The relevant statutory provision on personal services contracts reads as follows:

CARE OR PERSONAL SERVICES. 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 a relative as payment for care or personal services that the relative provides to the covered individual, the covered individual or his or her spouse transfers assets for less than fair market value unless the care or services directly benefit the covered individual, the amount of the payment does not exceed reasonable compensation for the care or services that the relative performs and, if the amount of the payment exceeds 10% of the community spouse resource allowance limit specified in s. 49.455(6)(b)1., the agreement to pay the relative

is specified in a notarized written agreement that exists at the time that the relative performs the care or services.

Sec. 49.453(5), Stats. See also MA Handbook, Appendix 14.8.0 (There are no personal service contract provisions in the corresponding federal statute -- 42 USC 1396p,1382b.)

The Department agrees with the hearing examiner insofar as she determined that certain of the items in the contract do not directly benefit the petitioner. The Department, however, disagrees with the examiner regarding the remaining portions of the contract. The statute requires that payment made to the relative not exceed reasonable compensation for the care or personal services that the relative performs. In this case, the compensation is not reasonable, items covered in the contract do not constitute care or services performed by the relative and there is no certainty what, if any, care or services would actually be provided.

As a first step, the statute requires the provision of care or personal services. The contract provides in part that petitioner will be furnished a telephone, clothing, appliances and beverages. Those items are not care or personal services, they are property or goods. As such, they do not meet the requirements of the statute. Furthermore, the items in the contract that could be characterized as personal services fall outside the scope of the statute. The care or personal services provided must have a "prevailing local market rate" attached to them, according to the definition of 'reasonable compensation.' Simple favors performed within the ordinary family relationship like those contained in the contract do not have "market rates."

Even assuming that those services fall within the purview of the statute, the compensation provided in the contract does not bear a reasonable relationship to those services. For example, shopping for a telephone and delivering it to the petitioner is a project that could be estimated to take a few hours at most. In his letter of December 5, 1996, to the Milwaukee Department of Social Services, petitioner's attorney stated that 10% of the relative's time would be devoted for "providing a telephone". Based on that statement, compensation for "providing a telephone" under the contract would be approximately \$1,000. As noted above, this would not include the telephone itself nor subsequent service or repair since those items would not be care or personal services provided by the relative. Compensation of almost \$1,000 for shopping for and delivering a phone is patently unreasonable. The identical point can be made with regard to clothing, appliances and beverages.

It is obvious that the starting point for determining compensation under the contract was the \$11,322.80 worth of assets to be transferred to relatives. There is no reference in the contract to any rate of pay. After execution of the contract, petitioner's attorney argued in his letter of August 27, 1996, that two relatives would divide the assets equally. Assuming a 3-year life expectancy, he argued that the contract thereby implicitly created a monthly compensation rate of \$157.25 for each relative. At the hearing, a daily rate of \$4.00 was estimated on the basis of a life expectancy of 5.2 years. But \$4.00 per day for 5.2 years only totals \$7,592.00, so the second

relative would also be receiving \$4.00 per day for roughly half of those 5.2 years. The point is that determination of the rate of compensation was strictly after-the-fact. There was not any semblance of arms-length negotiation or consideration of fair market value by the parties prior to execution of the contract.

Further, the lack of reference in the contract to frequency or duration of service performance adds to the unreasonableness of the compensation. In the absence of any reference to a rate of pay, a reasonable purchaser who agreed to pay a fixed gross amount for services would certainly specify in the contract how often and for how long he expected those services to be performed. To pay a blanket amount with no specification of frequency or duration of services to be performed is inherently unreasonable.

Even if the fair market value is to be received in the future, there must be some degree of certainty that it will be received. For example, transferring assets into an annuity contract is not a divestment, but only if there is a schedule for a known income flow that will actually provide the recipient with fair market value in return for the assets, assuming a certain life expectancy. In this case, since it is speculative whether most of the services to be performed will in fact be needed, and consequently provided, there is no definitive way to calculate whether fair market value will be received.

While the statute appears to permit future care and services to satisfy the fair market value requirement, it only permits it if the care and services actually will be performed. This is evident when the statute refers to transferring assets "for care or personal services that the relative provides," to assuring that payment does not exceed reasonable compensation for "care or services that the relative performs" and to requiring that the contract exists at the time the relative "performs the care or services." The only certainty in the contract at issue is that if the petitioner needs a beverage or a television repaired then the family will run that errand. However, there is no certainty as to the extent that any of these services will in fact be needed and therefore provided. Absent this certainty, it is impossible to determine that fair market value is received in return for the transferred assets.

In a fair market setting, the package of care and personal services would be identified, and a reasonable amount of compensation for performance of those services would thereafter be determined. In that setting, a party purchasing services under a contract would not reasonably agree to pay roughly \$1,000 for a service provider to shop for and deliver a telephone. Nor would he enter into similar arrangements for clothing, appliances and beverages. Likewise, a reasonable purchaser would not say, "Here, I have \$11,322.80; what will you do for me for that amount of money?" Before agreeing to pay a blanket amount for services, a reasonable purchaser would insist on specificity *vis a vis* service performance.

But reasonableness of the compensation was not a concern of the parties. The objective was to transfer the assets. The starting point was insertion of the total amount of assets into the contract as compensation. Then petitioner's attorney compiled a list of personal property and other goods,

coupled with some personal services that relatives would normally perform in any event, and inserted those items into the contract as the services to be performed.

Because items in the contract were not care or personal services performed by the relative, because the services that were contained in the contract lacked any measure of certainty and because the compensation was unreasonable, the transfer of assets was for less than fair market value and therefore constituted a divestment.

Re-number section III. of the DISCUSSION as II.

Replace CONCLUSION OF LAW #3 with the following:

With reference to the remaining portions of the contract, fair market value has not been received. Since fair market value has not been received, a disqualifying divestment has occurred.

Replace the ORDERED section of the decision with the following:

That the decision of the Milwaukee County Department of Social Services denying MA eligibility is affirmed and the petition is dismissed.

Thank you for your assistance.

#### 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 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 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.

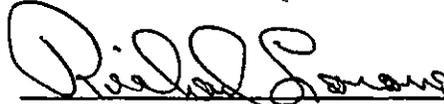
#### APPEAL TO COURT

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 Workforce Development, P.O. Box 7946, Madison, WI 53707-7946

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 20th  
day of February, 1997.

  
Richard Lorang, Deputy Secretary  
DEPARTMENT OF HEALTH AND FAMILY SERVICES



STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

In the Matter of

PROPOSED

DECISION

[REDACTED]

MDV-40/97114

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition filed August 7, 1996, under sec.49.45(5), Wis. Stats., to review a decision by the Milwaukee County Dept. of Social Services to deny Medical Assistance (MA) for three months, a hearing was held on October 21, 1996, at Milwaukee, Wisconsin.

The issue for determination is whether the county agency correctly determined that the petitioner was ineligible for institutional MA for three months due to divestment. More specifically, the question is whether money transferred pursuant to a personal services contract is a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Department of Workforce Development  
Bureau of Welfare Initiatives  
1 W. Wilson St., Room 350  
P.O. Box 7851  
Madison, WI 53707-7851  
By: Tim Pollard, ES Spec.  
Milwaukee County Dept. of Social Services  
1220 W. Vliet Street  
Milwaukee, WI 53205

EXAMINER:

Nancy Gagnon, Attorney  
Division of Hearings and Appeals

### F I N D I N G S O F F A C T

1. Petitioner (SSN: [REDACTED]; CARES No. [REDACTED]) is a resident of a nursing home in Milwaukee County.
2. The petitioner applied for MA on June 20, 1996. On July 23, 1996, the county agency issued written notice to the petitioner that his MA eligibility would begin on August 1, 1996. MA certification was not provided for May, June, and July, 1996.
3. The petitioner entered the nursing home on May 21, 1996.
4. On May 21, 1996, the petitioner also executed an "Agreement to Furnish Supplemental Support." See Exhibit 2. The Agreement immediately assigned assets and cash totalling \$11,322.80 to the petitioner's daughter-in-law, [REDACTED].
5. Per the Agreement, the supplemental services that [REDACTED] will perform for the petitioner while he is in the nursing home are as follows:
  - doing laundry,
  - providing "certain nursing services,"
  
  - providing a telephone,
  - providing transportation to social events,
  - securing and delivering clothing,
  - securing and delivering beverages,
  - repairing and replacing appliances used by the petitioner, and not provided by the home (e.g., radio, TV),
  - providing transportation to church services,
  - providing transportation to Carol's summer home for vacation,
  
  - upon petitioner's death, supervising burial/cremation and other funeral arrangements,
  - upon death, paying for "ancillary expenses" of the funeral which are not covered by public/private benefits to which petitioner is entitled.
6. [REDACTED] rate of compensation is \$4.00 daily. Petitioner's daughter, [REDACTED] is also authorized to perform contract services at a rate of \$4.00 daily.
7. The petitioner's life expectancy is 5.2 years.

### D I S C U S S I O N

There is no dispute that the petitioner transferred assets totalling \$11,322.80 to his daughter-in-law on May 21, 1996. The question is whether the transfer, made pursuant to a written personal services contract, constitutes a divestment for MA purposes. See s.49.453(2), Wis. Stats. If it was a divestment, the petitioner was correctly made ineligible for MA payment of nursing home services for three months.

I. LOOKING ONLY AT THE PERSONAL SERVICES CONTRACT STATUTE, MOST OF THE PROJECTED SERVICE PROVISION WOULD NOT BE A DIVESTMENT.

The relevant statutory provision on personal services contracts reads as follows:

(5) CARE OR PERSONAL SERVICES. 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 a relative as payment for care or personal services that the relative provides to the covered individual, the covered individual or his or her spouse transfers assets for less than fair market value unless the care or services directly benefit the covered individual, the amount of the payment does not exceed reasonable compensation for the care or services that the relative performs and, if the amount of the payment exceeds 10% of the community spouse resource allowance limit specified in s.49.455 (6)(b)1., the agreement to pay the relative is specified in a notarized written agreement that exists at the time that the relative performs the care or services.

Ibid., (5). See also MA Handbook, Appendix 14.8.0. (There are no personal service contract provisions in the corresponding federal statute--42 USC 1396p, 1382b.) The petitioner transferred assets to his daughter-in-law, a "relative" as defined at s.49.453(1)(h), Stats. Her rate of compensation is reasonable. The transfer was for provision of personal services pursuant to a written, notarized agreement that existed at the time service began. However, satisfaction of the first criterion (the services directly benefit the covered individual) is not present with respect to three "services" identified in the contract. Two of the identified services--doing laundry and providing nursing services--do not directly benefit the petitioner because they are an unnecessary duplication of services that the state is paying the nursing home to perform. See ss.HSS 132.60(1)(a)3, & (c)2, and 132.62, Wis. Adm. Code. The third "service" that does not directly benefit the petitioner is not a service at all: paying for ancillary funeral expenses. The example given at hearing was that Mr. Golke would like to have a "big lunch" given after his funeral. A big lunch for one's funeral guests does not directly benefit the decedent, who obviously cannot partake in it. After elimination of these three service categories, the contract appears to pass muster under the narrow conditions of s.49.453(5).

II. THE VERY SPECIFIC STATUTORY LANGUAGE ON PERSONAL SERVICES CONTRACTS OVERRIDES THE MORE GENERAL DIVESTMENT STATUTE LANGUAGE REQUIRING THAT "FAIR MARKET VALUE" BE RECEIVED FOR TRANSFERRED RESOURCES.

State statute and code require that an MA applicant obtain fair market value in exchange for a transferred resource:

(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)

Sec. HSS 103.065(4)(a), Wis. Adm. Code. See also s.49.453(2)(a), Stats.

The county agency argues that, to the extent that services have not yet been performed under the contract, the petitioner has not received fair market value for his assets. The Department has held under other circumstances that the promise of future services is not receipt of fair market value. E.g., prepayments of nursing home bills do not make an applicant eligible until the prepaid period has elapsed.

However, relying on the familiar principle of statutory construction that the specific controls the general, I must conclude that the petitioner received fair market value (other than the exceptions noted in Discussion I) for his transfer. The personal services contract language at s.49.453(5) states that [REDACTED] received fair market value for his transfer if the services directly benefit him, the amount of compensation is reasonable, and the agreement to pay the relative is contained in a notarized, written agreement which exists when the services are provided. All of these elements are present here, so I must conclude that fair market value was received. If I had drafted this statute, I would have added an element requiring the refund to the petitioner's estate of transferred funds which were not used to pay for services actually provided. E.g., if the petitioner died one month after the agreement/nursing home admission, the bulk of the transferred funds would go into the estate because few services were actually provided. However, the statute does not contain such a requirement, and I cannot make one up. Thus, the bulk of this transfer is not a prohibited divestment.

III. THE INSTANT TRANSFER WAS NOT MADE EXCLUSIVELY FOR SOME PURPOSE OTHER THAN TO BECOME ELIGIBLE FOR MA.

Petitioner also argues that his divestment should be disregarded because it was performed "exclusively for some purpose other than to become eligible for MA." See s.HSS 103.065(4)(d)2b, Wis. Adm. Code. This has no merit. A divestment occurring on the date of nursing home admission is highly suspect. The purported motivation for the divestment--to assure social visits and errand running by the resident's family--is not convincing. Many families would do this without charging "grandpa." There certainly is not enough in this record to persuade me that the transfer was performed exclusively for a purpose other than MA qualification.

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

1. That portion of a service contract that offers to provide services already provided by the nursing home, such as laundry and nursing services, does not assure provision of services that directly benefit a nursing home resident.
2. That portion of a service contract that offers to pay for ancillary funeral expenses does not assure provision of services that directly benefit a nursing home resident.

3. With the exception of the items referred to in Conclusions #1 and #2, fair market value has been received for the portion of the petitioner's resources transferred under a personal services contract (with a relative) which pays for services not yet rendered. To the limited extent that fair market value has not been received, a disqualifying divestment has occurred.

4. The petitioner's transfer of resources on the date of his nursing home admission pursuant to a personal services contract was not a transfer made exclusively for a purpose other than qualifying for MA.

NOW, THEREFORE, it is

**O R D E R E D**

That the petition herein be remanded to the county agency with instructions to (1) allow the petitioner's representative 10 days to submit to the county a written breakdown of actual and anticipated allowable personal services versus the cost/compensation of "services" disallowed under Conclusions #1 and #2, and (2) subtract the allowable services from the divested amount, and adjust the period of ineligibility accordingly, within 20 days of the date of this Decision.

**NOTICE TO RECIPIENTS OF THIS DECISION:**

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P. O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15 day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Workforce Development for final decision-making.

The process relating to Proposed Decisions is described in sec. 227.46(2), Wis. Stats.

Given under my hand at the City of  
Madison, Wisconsin, this 26th  
day of November, 1996.

Nancy Gagnon  
Nancy Gagnon, Attorney  
Division of Hearings and Appeals  
1101-04/ng