

Marquette Volunteer Legal Clinic & Legal Action of Wisconsin, Inc.

Non-Probate Transfers:
Avoiding Probate and Inadvertent Medicaid Divestments

Presenter: Attorney Patricia M. Cavey
Contact Information: pcavey@sbcglobal.net
Telephone: 414-847-6252

- I. Checklist at Intake
 - list of assets – for estate planning or public benefit programs
 - Location, amounts, title
 - cash equivalents: checking, savings, investments, certificates of deposit
 - stock certificates
 - exempt assets: life insurance; automobile; funeral/burial insurance/trusts
 - Home/mortgage
 - veteran status
 - power of attorney documents; HIPPA release, will, trust
- II. Beneficiary Designations
 - A. Cash Equivalents:
 - Payable on Death, Transfer on Death vs. Adding Joint Tenant on accounts
 - B. House
 - Quit Claim Deed with Life Estate vs. Transfer on Death Deed
 - Reverse Mortgage available for care costs to avoid Medicaid and lien
 - C. Re-titling and Avoiding Divestment
 - See Fair Hearing Decision attached
 - Bank Accounts & Nursing Home Patient Accounts
- III. Forms
 - SBW Form 9-2009 Designation of TOD Beneficiary
 - PR-1831 Form – Transfer by Affidavit (\$50,000 and under)
 - HT-110 Form – Termination of Decedent's Property Interest

DHA-15 (R10/97)



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

(petitioner)

DECISION

MDV-55/56449

PRELIMINARY RECITALS

Pursuant to a petition filed January 15, 2003, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the St. Croix County Dept. of Human Services in regard to medical assistance, a hearing was held on February 19, 2003, at New Richmond, Wisconsin.

The issue for determination is whether the petitioner is ineligible for medical assistance as the result of a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
(petitioner)

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: Sherry Bonte, ESS
St. Croix County Dept Of Human Services
1445 N. Fourth Street
New Richmond, WI 54017-1063

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of St. Croix County.
2. The petitioner and her husband signed a warranty deed on February 22, 1993 that transferred their house and related property to their children. They retained the right to occupy the property, but those rights "shall terminate when it is no longer feasible for one or both of the Grantors to occupy said residence due to health or other reasons."
3. The petitioner's husband died at some point prior to the hearing.

4. The petitioner entered the nursing home on June 12, 2002. At that time her interest in the property ended.
5. The petitioner was born on August 14, 1923. She was 79 years old when she entered the nursing home.
6. The fair market value of the property in question is \$131,000.
7. The petitioner was found eligible for institutional medical assistance on November 15, 2002. However, on January 6, 2003 the county agency reversed its determination and found that she was eligible only for MA card services because she divested a life estate interest in the property upon entering the nursing home.

DISCUSSION

A person seeking medical assistance is ineligible if her assets exceed \$2,000. §49.47(4)(b)3g, Wis. Stats. In order to prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by passing their assets to potential heirs, MA law prevents a recipient from reaching this limit by divesting assets. A divestment occurs when an applicant, or person acting on the applicant's behalf, transfers assets for less than their fair market value during the lookback period. The lookback period is generally 36 months, although longer periods exist for trusts. §49.453(1)(f), Wis. Stats. Divesting assets renders recipients ineligible for MA for the number of months obtained by dividing the amount of disposed assets over the asset limit by the statewide average monthly cost to a private pay patient in a nursing home. §HFS 103.065(5)(b), Wis. Adm. Code; §49.453(3), Wis. Stats.; *see also, MA Handbook*, App. §14.5.0. This amount is now \$4,542 per month. *BHCE/BWP Operations Memo*, No. 03-05; *MA Handbook*, Appendix, §14.5.0.

The petitioner and her husband signed a warranty deed on February 22, 1993 that transferred their property to their children. They retained the right to occupy the property, but those rights "shall terminate when it is no longer feasible for one or both of the Grantors to occupy said residence due to health or other reasons." Her attorney argues that her interest had no value because it was less than that found in a life estate. He points out that it would be difficult to assign a value to it because it would be almost impossible to sell on the open market.

These arguments fail to convince me. §HFS 103.06(6) defines "life estate" as a "claim or interest a person has in a homestead or other property, the duration of the interest being limited to the life of the party holding it with that party being entitled to the use of the property including the income from the property in his or her lifetime." The petitioner has the right to live on and use the property during her lifetime. While the deed allows certain circumstances to end this right before her life ends, there is no clear time when those circumstances occur: Under what circumstances does the right end when it is unfeasible for only one party to live in the house? Under what circumstances does the right end when it is unfeasible for both parties to live in the house? What is meant by unfeasible? Who determines when this standard is met? The deed does not mention a doctor or guardian. What are the circumstances other than health that could make it unfeasible for them to live in the house?

Even if the petitioner's attorney drafted the deed more carefully, I would find that she retained a life estate. Despite her current attorney's attempt at distinction, there is no practical difference between the interest held by the petitioner and any other life estate. Property is only valuable to a person when it can be used. The petitioner's lawyer designed the deed to allow the petitioner to retain the property as long as she could use it. Thus the only distinction between a regular life estate and the remainder estate established here is that the one here was set up to avoid using the property to pay for the petitioner's medical costs. This directly contradicts the policy behind establishing the divestment laws and regulations. The contention that the petitioner could not sell her interest is a diversion. Life estates are rarely sold because their purpose is to allow a person to have a place to live while transferring the main property right to another,

who is almost always a close relative. The real value of the retained right is not what it is worth to some third party, because a third party is rarely contemplated, but rather what living on the property is worth to the grantor of the deed. This is clearly true here. When the petitioner and her husband executed the deed they obviously intended to give all their rights to the property to their children after they (the petitioner and her husband) could no longer live on it. Further, the value of the property interest that the petitioner's children received when their mother entered the nursing home is the same as it would be if she had retained a regular life estate when executing the deed and then given up that interest when she went into the nursing home. Because there is no practical difference to either the petitioner or her children between an interest that allows the petitioner to live on the property for the rest of her life and one that allows her to live there as long as she is able to do so, the value of the interest divested is that of a life estate.

Left unanswered is the amount of the divestment. The county agency found that the petitioner divested \$79,283.82. It arrived at this figure by assuming that the property's value is \$131,000 and that the divestment occurred when the petitioner was 70 years old, which is how old she was when she signed the deed. The property's value is unchallenged. However, if the divestment occurred when the petitioner was 70 it does not affect her medical assistance because more than three years have passed since then. This is incorrect because she did not give up the remainder of her life estate until she entered the nursing home in 2002. She was then almost 79 years old. The value of a life estate is determined by multiplying the value of the estate by a multiplier found at *MA Handbook*, Appendix, §30.2.0. For person who is 79 years old, the multiplier is .45357, which then multiplied by the \$131,000 value of the property results in a divestment of \$59,417.67. When this is divided by the \$4,542 monthly cost of nursing home care, it results in 13 months of ineligibility.

The petitioner raised one other objection to finding her ineligible. She contends that the county agency should be estopped from removing her from medical assistance because her attorney relied upon an earlier definition of a life estate when drafting the deed. As the petitioner's current attorney points out, estoppel occurs when one party performs an action that another party relies upon and as a result commits some action to its detriment. The definition of a life estate has not changed in recent years. Rather, the county agency corrected an incorrect interpretation of that definition. There is no evidence that the earlier attorney relied upon the county's prior interpretation, or even that the county agency was using that interpretation when the attorney drafted the deed. Because the definition has not changed and there is no evidence that the petitioner relied upon an incorrect interpretation of the definition, there was nothing different for the petitioner's attorney to rely upon to his detriment.

CONCLUSIONS OF LAW

1. The petitioner held a life estate in the property she lived in until she entered the nursing home.
2. The petitioner divested \$59,417.67 when entered the nursing home and gave up her remaining interest in the property.

NOW, THEREFORE, it is

ORDERED

That this matter is remanded to the county agency within instructions that within 10 days of the date of this decision it shall find that the petitioner is ineligible for institutional medical assistance for 13 months from the date that she entered the nursing home. In all other respects the decision of the county agency is upheld.

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 for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

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 Eau
Claire, Wisconsin, this 9th day of April,
2003

/sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals
86/MDO

State Bar of Wisconsin Form 9-2009
DESIGNATION OF TOD BENEFICIARY
Under Wis. Stat. § 705.15

Document Number

Document Name

THIS DESIGNATION is made by _____

_____ (collectively, "Owner") of the following described
real estate located in _____ County, State of Wisconsin (the "Property") (attach
Exhibit A if more space is needed):

Owner transfers the Property without probate upon death of the sole owner, or upon the last to
die of multiple owners, to the following TOD beneficiary, without warranties:

Select A or B:

- A. _____
Insert name of beneficiary, whether one or more. This revokes all
previous TOD beneficiary designations.
- B. The sole purpose of this instrument is to revoke all previous TOD
beneficiary designations.

This designation is effective only upon the recording of this instrument.

This transaction is Fee Exempt under Wis. Stat. § 77.25(10m), and exempt from the filing of a transfer
return under Wis. Stat. § 77.21(1).

Dated _____

* _____ (SEAL) * _____ (SEAL)
 * _____ (SEAL) * _____ (SEAL)

AUTHENTICATION

Signature(s) of _____
authenticated on _____

ACKNOWLEDGMENT

STATE OF WISCONSIN)
) ss.
_____ COUNTY)

* _____
TITLE: MEMBER STATE BAR OF WISCONSIN
(If not, _____
authorized by Wis. Stat. § 706.06)

Personally came before me on _____,
the above-named _____
to me known to be the person(s) who executed the foregoing
instrument and acknowledged the same.

THIS INSTRUMENT DRAFTED BY:

* _____
Notary Public, State of Wisconsin
My Commission (is permanent) (expires: _____)

(Signatures may be authenticated or acknowledged. Both are not necessary.)

Recording Area

Name and Return Address

Parcel Identification Number (PIN)

This _____ homestead property.
(is) (is not)

STATE OF WISCONSIN, _____ COUNTY

IN THE MATTER OF _____

**Transfer by Affidavit
(\$50,000 and under)**

Decedent _____

Register of deeds recording area
Name and return address

_____ parcel identification number

Note: Use black ink only.

UNDER OATH, I STATE THAT:

1. The decedent, whose date of birth was _____, and date of death was _____, died domiciled in _____ County, State of _____ with a post office address of: _____

2. I am: an heir, having the following relationship to the decedent: _____
 the person who was guardian of the decedent at the time of the decedent's death.
 trustee of a revocable trust created by the decedent.

3. The total gross value of the decedent's property subject to administration in Wisconsin on the date of death did not exceed \$50,000.

4. The total gross value of the decedent's property subject to administration in Wisconsin at the date of decedent's death was \$ _____.

5. The decedent:
 did did not receive Medical Assistance/Medicaid.
 did did not receive Family Care and/or Partnership benefits (through a Managed Care Organization - MCO/CMO).
 did did not receive benefits from the Community Options Program (COP).
 did did not receive benefits from the Wisconsin Chronic Disease Program.
 was was not patient or inmate of a state or county hospital or institution, or responsible for any person owing an obligation to the state or county. If so, explain: _____

The affiant lacks information to complete this section.

6. If the decedent was ever married, complete the following: (If more than one spouse, see attached.)
Name of spouse (living or deceased): _____
 Married to decedent Divorced from decedent at time of decedent's death.
The spouse did did not receive benefits from the Community Options Program (COP).
The spouse did did not receive benefits from the Wisconsin Chronic Disease Program.

Transfer by Affidavit (\$50,000 and under)

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Case No. _____

The affiant lacks information to complete this section.

7. I ask that the following property be transferred to me under §867.03(1g), Wisconsin Statutes:

DESCRIPTION OF REAL ESTATE AND/OR PERSONAL PROPERTY TO BE TRANSFERRED (If real estate, list legal description and tax parcel number. If personal property, specifically describe property including name of financial institutions and account numbers, if any.)	GROSS VALUE

8. By accepting the decedent's property under this section, I assume a duty to apply the property transferred for the payment of obligations according to priorities established under §859.25, Wisconsin Statutes, and to distribute any balance to those persons designated in the appropriate governing instrument, as defined in §854.01, Wisconsin Statutes, or if there is no governing instrument, according to the rules of intestate succession under ch. 852, Wisconsin Statutes.

9. If a decedent or decedent's spouse has received any of the benefits that are listed on page 1 of this affidavit or if unknown, a duplicate affidavit must be sent by certified mail with return receipt requested to the Estate Recovery Program for the State of Wisconsin, Department of Health Services prior to submission of this affidavit for recording. The proof of prior mailed notice should accompany the affidavit for recording, with the delivery date on the mail receipt being at least 10 days prior.

Subscribed and sworn to before me
on _____

Notary Public/Court Official

My commission expires: _____

Signature

Name Printed or Typed

Address

This document was drafted by: _____
Print or Type Name

Register of Deeds Office viewed the certified mail receipt.

ONLY if this affidavit describes an interest in or lien on real estate, then a certified copy or duplicate original of this affidavit must be recorded with the register of deeds in each county in Wisconsin where the real estate is located.

TRANSFER BY AFFIDAVIT (§867.03, Wisconsin Statutes)

(1c) DEFINITION. In this section, "guardian" has the meaning given in §54.01(10) or 880.01(3), 2003 statutes.

(1g) GENERALLY. When a decedent leaves property subject to administration in this state which does not exceed \$50,000 in value, any heir of the decedent, trustee of a revocable trust created by the decedent or person who was guardian of the decedent at the time of the decedent's death may collect any money due the decedent, receive the property of the decedent and have any evidence of interest, obligation to or right of the decedent transferred to the affiant if the heir, trustee or guardian provides to the person owing the money, having custody of the property or acting as registrar or transfer agent of the evidences of interest, obligation to or right, or, if the property is an interest in or lien on real property, provides to the register of deeds preliminary to the recording required under sub. (2m), proof of prior mailed notice under sub. (1m) if applicable and an affidavit in duplicate showing all of the following:

(a) A description of and the value of the property to be transferred.

(b) The total value of the decedent's property subject to administration in this state at the date of decedent's death.

(c) Whether the decedent or the decedent's spouse ever received the family care benefit under §46.286, medical assistance under subch. IV of ch. 49, long-term community support services funded under §46.27(7) or aid under §§49.68, 49.683 or 49.685.

(1m) NOTICE OF AFFIDAVIT. (a) Whenever an heir, trustee or person who was guardian of the decedent at the time of the decedent's death intends to transfer a decedent's property by affidavit under sub. (1g) and the decedent or the decedent's spouse ever received the family care benefit under §46.286, medical assistance under subch. IV of ch. 49, long-term community support services funded under §46.27(7) or aid under §§49.68, 49.683 or 49.685, the heir, trustee or person who was guardian of the decedent at the time of the decedent's death shall give notice to the department of health services of his or her intent. The notice shall include the information in the affidavit under sub. (1g) and the heir, trustee or person who was guardian of the decedent at the time of the decedent's death shall give the notice by certified mail, return receipt requested.

(b) An heir, trustee or person who was guardian of the decedent at the time of the decedent's death who files an affidavit under sub. (1g) that states that the decedent or the decedent's spouse received the family care benefit under §46.286, medical assistance under subch. IV of ch. 49, long-term community support services funded under §46.27(7) or aid under §§49.68, 49.683 or 49.685 shall attach to the affidavit the proof of mail delivery of the notice required under par. (a) showing delivery date that is not less than 10 days before the day on which the heir, trustee or person who was guardian of the decedent at the time of the decedent's death files the affidavit.

(2) RELEASE OF LIABILITY OF TRANSFEROR. Upon the transfer to the heir, trustee or person who was guardian of the decedent at the time of the decedent's death furnishing the affidavit with an attached proof of mail delivery if required under sub. (1m) (b), the transferor is released to the same extent as if the transfer had been made to the personal representative of the estate of the decedent.

(2g) OBLIGATION OF AFFIANT. By accepting the decedent's property under this section the heir, trustee, or guardian assumes a duty to apply the property transferred for the payment of obligations according to priorities established under §859.25 and to distribute any balance to those persons designated in the appropriate governing instrument, as defined in §854.01, of the decedent or if there is no governing instrument, according to the rules of intestate succession under ch. 852. An heir or guardian may publish a notice to creditors in the same manner and with the same effect as a trustee under §701.065. This subsection does not prohibit any appropriate person from requesting administration of the decedent's estate under §856.07 or ch. 865.

(2m) RECORDING OF AFFIDAVIT. (a) If an affidavit under sub. (1g) describes an interest in or lien on real property a certified copy or duplicate original of the affidavit shall be recorded in the office of the register of deeds in each county in this state in which the real property is located.

(b) For purposes of a transfer under this section of an interest in or lien on real property, the recording of the affidavit copy or duplicate original constitutes the transfer to the affiant under sub. (1g) of the evidence of the interest in or lien on real property.

(3) APPLICABILITY. This section is additional to §109.03(3) for payment of decedent's wages by an employer directly to the decedent's dependents.

Address for: Department of Health Services
Estate Recovery Program
P. O. Box 309
Madison, WI 53701-0309

NOTE: If you are providing a copy of this affidavit to the Estate Recovery Program or a financial institution, include decedent's social security number on a separate document.

TERMINATION OF DECEDENT'S PROPERTY INTEREST

Use black ink

Table with columns: DECEDENT'S NAME, DATE OF DEATH, ADDRESS OF DECEDENT AT DATE OF DEATH, CITY, ST, ZIP

PRESENTATION OF DEATH CERTIFICATE
I certify that I have viewed a certified copy of the decedent's death certificate.
REGISTER OF DEEDS SIGNATURE DATE

Recording area

Interest in property is terminated under (please check appropriate statute):

- s. 867.045 which pertains to property in which the decedent was a joint tenant, had a vendor's or mortgagee's interest, or had a life estate.
s. 867.046 which pertains to property of a decedent specified in a marital property agreement; survivorship marital property; or a third party confirmation.

Name and return address:

Parcel Identification Number

Presentation of recorded document establishing interest in real estate.

DOCUMENT # VOLUME/REEL PAGE/IMAGE RECORDS/DEEDS

Description of the real estate. See Attached

Description of personal property (if any) being transferred.

You may list savings accounts, checking accounts and securities on attached pages. Indicate person(s) receiving property.

DECLARATION: I(We) declare that this document is, to the best of my(our) knowledge and belief, true, correct and complete and is in conformity with the provisions and limitations of the Wisconsin Statutes. (If more space is needed, attach pages.)

Table with 4 columns: Name and Address, Applicant's Interest in Property, Applicant Signature(Notarized), Date

This document was drafted by:(print or type name below)

STATE OF WISCONSIN, County of
Subscribed and sworn to before me on:

by the above named person(s):

NOTE: SEE DIRECTIONS, Wisconsin Register of Deeds Association Form HT-110 Webalta Version 03/2007

Signature of Notary or other person authorized to administer an oath (as per s 706.06, 706.07)

Print or type name:

Title:

Date Commission Expires:

DIRECTIONS FOR COMPLETING THE HT-110 FORM

A. WHO MAY USE THIS FORM

This form may be used by persons entitled to receive property of a decedent under sections 867.045(1) and/or 867.046(2) of the Wisconsin Statutes. **Note: Complete form TOD-110 for transfers to a Transfer on Death beneficiary.**

Section 867.045 pertains to the decedent's interest as a joint tenant or life tenant in real property, in vendors' interests in land contracts, and in mortgagees' interests in mortgages. The surviving joint tenants, remaindermen or any person interested in the property may file this form.

Section 867.046(2) pertains to the decedent's interest in real property, in vendors' interests in land contracts, in mortgagees' interests in mortgages, or in savings accounts, checking accounts, or securities. These interests may be (1) specified in a marital property agreement, (2) held as survivorship marital property with the decedent's surviving spouse, or (3) a third party confirmation. The remainder/surviving person(s), or person(s) receiving the interest, or any interested person may file this form.

B. WHAT PROPERTY MAY BE TRANSFERRED

This form may be used to transfer only the following non-probate property in which the decedent had an interest:

1. Real estate in Wisconsin. (Includes vendee's interest in a land contract as per OAG opinion 1/97).
2. Vendors' interests in land contracts.
3. Mortgagees' interests in mortgages.
4. Savings accounts and checking accounts.
5. Securities.

C. WHERE SHOULD THIS FORM BE RECORDED

If the decedent had an interest in real estate, a land contract, or a mortgage, record this form with the Register of Deeds of the county in which the real estate is located. If this form does not include real estate, a land contract, or a mortgage, record this form with the Register of Deeds of the county in which the decedent lived prior to death.

If the decedent had an interest in more than one parcel of real estate, land contract or mortgage, and the relevant real estate is located in different counties, a separate form must be filed with the Register of Deeds of each county in which the relevant real estate is located. On any form recorded with a Register of Deeds, only list the real estate, land contract, or mortgage related to real estate located in that particular county.

D. COMPLETING THIS FORM

Complete the form accurately and legibly, using black ink.

If needed, ask your attorney for help with legal questions and contact your register of deeds for information on recording requirements.

If you are transferring securities and bank accounts, your banker may provide assistance, if needed.

Submit with this form:

1. A certified copy of the death certificate.
2. A copy of the document that shows joint tenancy, life estate, survivorship marital property, vendor's interest, or mortgagee's interest.
3. A copy of the real estate tax bill for each parcel for the year immediately preceding the decedent's death. Many counties no longer require the property tax bill to be attached to the HT-110. Check the WRDA website to be certain.
(<http://www.wrdaonline.org/HT110TaxBills.htm>)
4. The recording fee of \$25. Your check for \$25 should be made out to "Register of Deeds."

Describing real estate (if any):

1. Attach the complete and accurate legal description of each parcel of real estate. A copy of your deed will have this information, but if part of the land was sold off prior to decedent's death it must be excluded from the legal description.
2. If your county requires a parcel identification number, that number is found on the property tax bill. There will be a number for each tax parcel. Check the WRDA website to see if your county requires a parcel identification number
<http://www.wrdaonline.org/RecordingDocuments/PIN.htm>

Describing personal property (if any):

1. Securities – Provide the name of the company, the certificate or serial numbers, if any and the ownership interests (such as the number of shares of stock, percentage interest or number of units in a partnership or limited liability company).
2. Savings and Checking Accounts – Provide the names and addresses of financial institutions in which savings and checking accounts are located along with the account numbers.
3. Vendor's interest in land contract and mortgagee's interest in mortgage – Attach a copy of your land contract or mortgage containing a legal description of the real estate affected. No tax bill is required for a vendor's or mortgagee's interest.

NOTE: If you are the person(s) signing this form, your signatures(s) on the form must be notarized.