COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2440

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MARTHA S. STEIL,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 DYKMAN, J. Martha Steil appeals from an order affirming a decision of the Division of Hearings and Appeals that denied her application for institutional medical assistance. Steil argues that she complied with the

requirements for eligibility under WIS. STAT. § 49.453 (1997-98),[1] and she is therefore entitled to receive medical assistance for nursing facility services. We disagree and affirm.

I. Background

¶2 Martha Steil created a document entitled "Period Certain Annuity Agreement" in September 1998. Steil was then approximately eighty-seven years old and living in a nursing home in Dodge County. The document transferred approximately $600,000 to a limited liability company owned by Steil's son and daughter. In return Steil was to receive an annual payment from 1999 to 2006, followed by a lump sum payment of the balance, near the end of Steil's life expectancy. The document provided for four percent interest to Steil, though the annual payment was to be $5000, about one-fourth of the accrued interest.

¶3 Steil applied for institutional medical assistance in 1999. The Dodge County Human Services and Health Department denied her claim because it concluded that the annuity agreement was a divestment. She appealed this decision to the Wisconsin Division of Hearings and Appeals (DHA), which upheld the denial. Steil then appealed to the Dodge County Circuit Court, which affirmed DHA's decision. Steil appeals.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

II. Analysis

A. Standard of Review

¶4 In an appeal from a decision to deny medical assistance benefits, we review the decision of the administrative agency, not that of the circuit court. *See* ***Artac v. DHFS***, 2000 WI App 88, ¶9, 234 Wis. 2d 480, 610 N.W.2d 115. Here, Steil challenges the hearing examiner's interpretation of WIS. STAT. § 49.453. When we review an administrative agency's interpretation of a statute, there are three possible levels of deference: great weight, due weight, or de novo. ***Zip Sort, Inc. v. DOR***, 2001 WI App 185, ¶11-¶14, __ Wis. 2d __, 634 N.W.2d 99. The parties argue vigorously over the appropriate standard of review in this case. Relying on ***Artac***, Steil asserts that we should apply a de novo standard because the decision to deny benefits was made by DHA, rather than DHFS. DHFS, in contrast, contends that ***Artac*** does not apply because "the decision in this case was a final decision of [DHFS] which was lawfully delegated for purposes of the fair hearing process to a DHA hearing examiner." We need not decide, however, whether great weight, due weight, or de novo is the appropriate standard of review because we conclude that DHA's decision should be affirmed regardless which of the three standards we apply.

B. Requirements of WIS. STAT. § 49.453

¶5 Medical assistance is a joint federal and state program aimed at ensuring medical care for the poor and needy. ***Tannler v. DHSS***, 211 Wis. 2d 179, 190, 564 N.W.2d 735 (1997). Accordingly, to be eligible for medical assistance in Wisconsin, one must meet a number of requirements under WIS. STAT. ch. 49, both financial and non-financial. Because individuals are generally not eligible to receive medical assistance unless they have limited assets, those

seeking medical assistance may need to spend down their assets before they can qualify. ***Id.*** at 191-92 (ABRAHAMSON, C.J., concurring). However, under WIS. STAT. § 49.453, individuals become ineligible for certain services if they transfer assets in a manner prohibited by the statute. The purpose of prohibiting certain types of asset transfers is to prevent those who could afford to pay for their own medical needs from receiving medical assistance. ***Id.*** at 190.

¶6 There are two provisions relevant to our inquiry: WIS. STAT. § 49.453(2) and (4). WISCONSIN STAT. § 49.453(2)(a) provides:

> (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.
>
> 3. For services under a waiver under 42 USC 1396n.

Section 49.453(4)(a)-(b) provides:

> (4) IRREVOCABLE ANNUITIES. (a) For the purposes of sub. (2), whenever a covered individual[2] or his or her

[2] Under WIS. STAT. § 49.453(1)(am) a "covered individual" is "an individual who is an institutionalized individual or a noninstitutionalized individual." There is no dispute that Steil is an "institutionalized individual" under WIS. STAT. § 49.453.

> 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 value of the benefit.

¶7 Thus, paragraph (2)(a) states that individuals may be ineligible to receive medical assistance for nursing care facilities for a period of time if they have transferred assets for "less than fair market value."[3] Under paragraph (4)(a), an irrevocable annuity is transferred for less than fair market value when the amount transferred "exceeds the expected value of the benefit." "Expected value of the benefit," in turn, is defined in WIS. STAT. § 49.453(1)(c) as "the amount that an irrevocable annuity will pay to the annuitant during his or her expected lifetime as determined under sub. (4)(c)."

¶8 Steil does not address WIS. STAT. § 49.453(2)(a) but directs the whole of her argument to WIS. STAT. § 49.453(4). She argues that she has complied with that provision because she will receive the amount of her initial investment plus four percent interest after seven years, which is within her life expectancy according to tables used by DHFS. Therefore, she asserts, her transfer did not exceed the value of the benefit under the statute and she remains eligible for medical assistance.

[3] WISCONSIN STAT. § 49.453(8) provides that sub. (2) does not apply if the transferred assets are exempt under 42 U.S.C. 1396p(c) or if DHFS determines that it would create an "undue hardship." Steil does not contend that 42 U.S.C. 1396p(c) should apply here or that applying sub.(2) will create an undue hardship for her. Further, there is no dispute that the "annuity" was an "asset" as defined by the statute or that it was transferred after Steil's look-back date.

¶9 We disagree, however, that whether an annuitant will eventually be paid an amount equal to her initial investment is the sole factor that DHFS may consider in determining if an annuity has rendered an individual ineligible for medical assistance under WIS. STAT. § 49.453. The test is whether Steil transferred an asset for less than fair market value. Paragraph (4)(a) merely provides one way in which an applicant can fail that test. It does not state the converse, namely, that a transfer has been made for fair market value under paragraph (2)(a) so long as the document contemplates that the annuitant will get back what she paid some time before the end of her life expectancy.

¶10 We therefore agree with DHA that WIS. STAT. § 49.453 required it to examine whether the transfer had any economic substance in determining whether it was made for less than fair market value. Legislative intent supports this conclusion. As noted above, the purpose of the medical assistance program is to ensure medical care for those who cannot pay for the care they need, and the divestment provisions are intended to ensure that *only* those persons receive assistance. Steil does not assert that she cannot pay for the care she needs. Rather, she conceded at oral argument that the primary purpose of transferring $600,000 into the annuity was to make her eligible to receive medical assistance.[4] Allowing applicants to obtain medical assistance by divesting themselves of assets to family members for no economic advantage but rather solely to meet the limited

[4] Steil offered that one purpose of the transfer was for probate concerns, and to insure that the family farm passed intact to her children. As DHA noted, however, "if probate costs were the main concern, the large lump-sum payment would have been set for after the end of [Steil's] life expectancy."

assets requirements of WIS. STAT. ch. 49 would contradict the basic purpose of the statute.

¶11 DHA found that Steil's transfer was made for less than fair market value. It noted that the annuity was unsecured and unassignable, provided a below market interest rate, ceased payments if Steil died, and made only token annual payments. In addition, it pointed out that Steil's children were the owners of the LLC to which Steil transferred her assets. Although no experts testified, it does not take an accountant to determine, as DHA did, that "no unrelated person of sound mind would purchase [Steil's annuity] for close to $600,000."[5] Steil failed to offer any evidence to the contrary and does not argue in her brief that she satisfied the test for fair market value under paragraph (2)(a). We therefore cannot conclude that DHA erred in finding that Steil's annuity was transferred for less than fair market value.[6]

¶12 Steil challenges the conclusion of the hearing examiner by pointing to subsequent legislation that amended WIS. STAT. § 49.453(4) so that it expressly prohibited lump sum payments, and instead required all payments to be equal. *See* 1999 Wis. Act 9, § 1430-32.[7] She argues that if the previous version of the statute

[5] In fact, DHA concluded that the annuity had *no* market value because it prohibited Steil from selling her interest. We need not decide whether this determination is correct, however, because we agree with DHA that the annuity was transferred for *less* than market value, which is what WIS. STAT. § 49.453 prohibits.

[6] As an alternative ground for its decision, DHA concluded that WIS. STAT. § 49.453(4) is not applicable because Steil's document was not an "annuity" as contemplated by the statute. Because we conclude that Steil's transfer was not made at fair market value regardless whether or not it was an annuity, we need not decide whether Steil's document was in fact an annuity.

[7] The language of WIS. STAT. § 49.453(2)(a) was not changed by 1999 Wis. Act 9.

had prohibited her transaction, the legislature would not have needed to amend the statute. We find this argument unpersuasive.

¶13 WISCONSIN STAT. § 49.453(4)(a) (1999-2000), as amended, provides:

> (4) IRREVOCABLE ANNUITIES, PROMISSORY NOTES AND SIMILAR TRANSFERS. (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, or transfers assets by promissory note or similar instrument, 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. A transfer to an annuity, or a transfer by promissory note or similar instrument, is not in excess of the expected value only if all of the following are true:
>
> 1. The periodic payments back to the transferor include principal and interest that, at the time that the transfer is made, is at least at one of the following:
>
> a. For an annuity, promissory note or similar instrument that is not specified under subd. 1. b. or par. (am), the applicable federal rate required under section 1274 (d) of the Internal Revenue Code, as defined in s. 71.01 (6).
>
> b. For an annuity with a guaranteed life payment, the appropriate average of the applicable federal rates based on the expected length of the annuity minus 1.5%.
>
> 2. The terms of the instrument provide for a payment schedule that includes equal periodic payments, except that payments may be unequal if the interest payments are tied to an interest rate and the inequality is caused exclusively by fluctuations in that rate.

It is true that there is a presumption that the legislature intends to create a new right or withdraw an existing one when it amends a statute. ***Lang v. Lang***, 161 Wis. 2d 210, 220, 467 N.W.2d 772 (1991), and we agree with Steil that 1999 Wis. Act 9, § 1430-32 added express requirements to WIS. STAT. § 49.453. Among

other things, it now expressly states that a transfer exceeds the expected value of the benefit (and thereby is deemed to have been transferred at less than fair market value) unless the annuity provides for: (1) equal payments, § 49.453(4)(a)2; (2) periodic payments that include both principal and interest, § 49.453(4)(a)1; and (3) interest that accrues at a particular rate, § 49.453(4)(a)1a-b.

¶14 We do not agree, however, that the legislature's decision to explicitly add these requirements to the statute suggests that, prior to the amendment, transfers with no economic substance were permitted by the statute. First, we note that the text of the amendment suggests that it was intended to clarify the meaning of "exceeds the expected value of the benefit" rather than substantively alter the requirements of WIS. STAT. § 49.453. *See* ***ProCD, Inc. v. Zeidenberg***, 86 F.3d 1447, 1452 (7th Cir. 1996) ("New words may be designed to fortify the current rule with a more precise text that curtails uncertainty.") Although the statute now enumerates additional specific requirements with which an annuity must comply under WIS. STAT. § 49.453, the ultimate question is still the same, namely, whether the annuity was transferred for less than fair market value.

¶15 Regardless whether the amendment was a clarification or substantive change, however, Steil's transfer failed to meet the statutory requirements. Steil's annuity did not just fail to provide for equal payments or a required interest rate. Rather, Steil has conceded that there was virtually no economic advantage to be gained from the annuity, and that the purpose of the transfer was to qualify for medical assistance. With or without the amendment, Steil was required to show that she received fair market value for the transfer. Because she failed to do this, WIS. STAT. § 49.453 made her ineligible to receive medical assistance for nursing care facilities.

C. Operations Memo 99-19

¶16 In concluding that Steil was ineligible to receive institutional medical assistance, DHA relied partially on an operations memo issued by DHFS in 1999. The memo concluded that documents that combine small payments with large, lump-sum, balloon payments are prohibited by WIS. STAT. § 49.453. Because the amended version of WIS. STAT. § 49.453 includes a provision expressly requiring equal payments, but the previous version does not, Steil contends that the memo added a requirement not in the statute, constituting a new rule. Further, Steil asserts that because DHFS did not follow the rulemaking procedures under WIS. STAT. ch. 277 before issuing the memo, DHFS exceeded its authority and DHA violated Steil's right to due process when it applied the "new rule" without giving Steil notice.

¶17 We have already concluded that WIS. STAT. § 49.453 prohibited Steil's transfer, with or without the memo. We therefore need not decide whether DHA improperly relied upon the memo.

¶18 Steil also argues that "[u]ntil the amendment of § 49.453, there were no established criteria for determining the fair market value of the annuity transactions in question; persons of ordinary intelligence, therefore, lacked adequate notice of what they must do to conform their actions to the requirements of the law." In essence, Steil is arguing that before 1999 Wis. Act 9 was enacted, WIS. STAT. § 49.453(2) and (4) were unconstitutionally vague because they failed to enumerate criteria for determining the meaning of "fair market value." Steil does not develop this argument and there is no indication in the record that she has notified the attorney general that she is challenging the constitutionality of a statute. Steil has therefore waived this issue. *See* ***Kurtz v. City of Waukesha***, 91

Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979) (holding that when a party challenges the constitutionality of a law, attorney general must be served with a copy of the proceeding and be given the opportunity to be heard); ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (holding that court of appeals may decline to review an issue inadequately briefed). Furthermore, we are unpersuaded that a person of ordinary intelligence would believe that an annuity created with no economic substance at a below market interest rate falls within the meaning of "fair market value."

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.