

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-3352
STATE OF WISCONSIN

Cir. Ct. No. 02-CV-376

**IN COURT OF APPEALS
DISTRICT II**

MARCELLA J. HOPP,

PETITIONER-APPELLANT,

v.

**WISCONSIN DEPARTMENT OF HEALTH AND FAMILY
SERVICES,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Washington County:
ANNETTE K. ZIEGLER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 ANDERSON, P.J. Marcella J. Hopp appeals from a circuit court decision that substantial evidence exists to support the Wisconsin Department of Health and Family Services's determination that she was ineligible for institutional medical assistance (MA) benefits from March 16, 2001, through June 2002. The

Department's decision was based on the finding that she divested her life interest in a condominium on March 16, 2001, when the condominium was sold by an irrevocable trust that she and her late husband Harold had set up in 1999. Because we find that Marcella did not meet the burden of showing that she was eligible for MA, we affirm.

¶2 In April 1999, Harold and Marcella Hopp transferred assets, including the remainder interest in their condominium, to a trust. Both retained a life interest in the condominium, which would be extinguished by the earliest of the following events:

- 1.) the death of the last surviving Grantor; 2.) the conveyance, sale, assignment, gift, or other transfer of all said Grantors' rights, titles, and interests in the property; or
- 3.) at such time as the Grantors no longer occupy said property as their principal residence for an uninterrupted period of 120 days....

The signed and notarized affidavit of the trustee would be conclusive evidence of the termination of the life interest.

¶3 On October 30, 2000, Marcella entered a nursing home while Harold continued to live in the condominium. In December 2000, Marcella applied for MA with the Washington County Department of Social Services. In notices dated January 19 and 29, 2001, the county denied the application based on the transfer of assets to the trust. The value of the interest in the condominium was calculated as the full assessed value of the property, \$130,600. Marcella requested a fair hearing before an administrative law judge (ALJ), and the matter was heard on April 23, 2001. In January 2001, while the hearing was pending, Harold died. In March 2001, the trust sold the condominium to an unrelated third party. Then on July 18, 2001, ALJ Nancy Gagnon issued a decision. She concluded that

Marcella's transfer of assets to the trust was a divestment under WIS. STAT. § 49.454(3)(b) (2001-02),¹ and remanded the matter back to the Department to calculate the value of the interest divested by subtracting the value of Marcella's and Harold's life estates from the fair market value of the property. Marcella's life estate was found to have the value she claimed for it, \$38,470.84.

¶4 This decision (Decision I) also included a recommendation that the Department seek verification from Marcella regarding the disposition of her life estate interest in connection with the sale of the property. When the Department requested verification, Marcella confirmed the sale and asserted that the life estate had terminated before the sale and that she had not received any proceeds from the sale. The record includes no document terminating the life estate. The Department issued a second divestment notice for \$38,470.84.

¶5 Thereafter, Marcella sought and received another fair hearing. On April 17, 2002, ALJ Gary Wolkstein concluded that the life estate had been transferred without compensation or given to the trust to facilitate the sale of the condominium, and the value of the life estate was \$38,470.84. This decision (Decision II) also found that the county had not been notified of Harold's death prior to the first hearing. On circuit court review, the court upheld these findings with one minor adjustment not relevant to this appeal.

¶6 Marcella appeals from Decision II and argues that she did not transfer her life estate on March 16, 2001, and even had she done so, the life estate had no value at that time. She also argues that since the Department did not raise

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the issue of the March 16, 2001 divestment during the April 2001 fair hearing, the issue has been waived and the Department is barred on procedural due process grounds from using it as the basis of a later finding that she is ineligible for MA. Marcella points out that the ALJ's opinion characterizes his rulings as conclusions of law, and argues that our standard of review must be de novo.

¶7 Before there can be conclusions of law, there must be findings of fact to serve as the foundation for the conclusions of law. Whether the extinguishment of the life estate to facilitate the sale of the condominium was a divestment depends on whether there was a transfer, a question of fact. The value of the life estate is clearly a factual finding. We are therefore persuaded by the Department's counter-argument that findings of fact are at issue and that we must apply the substantial evidence test. *See* WIS. STAT. § 227.57(6). Under the substantial evidence test, the evidence is to be construed most favorably to the agency's finding. *Cornwell Pers. Assocs., Ltd. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). Substantial evidence is lacking only where a reasonable person, acting reasonably, could not have reached the decision made by the agency. *Copland v. Wis. Dep't of Taxation*, 16 Wis. 2d 543, 554, 114 N.W.2d 858 (1962).

¶8 Here, the inference drawn by the ALJ was a negative inference based on the absence of evidence. It is the duty of the applicant for MA to demonstrate eligibility, *Estate of Gonwa v. DHFS*, 2003 WI App 152, ¶17, No. 02-2901, which in this case means Marcella had the obligation of supplying evidence that the extinguishment of her life estate was not a divestment.² Marcella

² A divestment includes not only an affirmative transfer of property but also occurs when "a person takes an action to avoid receiving income or assets s/he is entitled to." The Wisconsin
(continued)

did not supply any such evidence. As the circuit court properly observed, the Department could reasonably infer from the facts in the record that the life estate was transferred or given without compensation to the trust in order to facilitate the sale of the condominium.

¶9 The title policy issued to the purchaser of the condominium does not refer to or require a conveyance from Marcella to either the trust or the new purchaser. This strongly suggests that the insurance company was satisfied that Marcella's life estate had been legally terminated or otherwise properly conveyed in such a fashion that the trust could convey good and merchantable title to the purchaser. This in turn suggests that evidence as to the date and manner of that termination was available, but Marcella failed to offer it in this proceeding.

¶10 Alternatively, Marcella argues that her life estate was worthless at the time it was transferred to the trust. But since she offers no evidence as to how or when the life estate was extinguished, the ALJ's finding that it had the value Marcella had previously claimed for it is not unreasonable under the substantial evidence test.

¶11 Marcella's argument that the Department waived the issue of divestment in the sale of the life estate in March 2001 is without merit. The Department informed the ALJ at the April 2001 hearing that the condominium had been sold, and the ALJ directed the Department to seek verification of the matter from Marcella. There was therefore no waiver or loss of jurisdiction. Furthermore, "[t]he Department has an ongoing duty to ensure that a MA recipient

Supreme Court has held that the term "action" includes both an affirmative act and a conscious failure to act. *Tannler v. DHSS*, 211 Wis. 2d 179, 186, 190, 564 N.W.2d 735 (1997).

is eligible and the recipient bears the ongoing burden of proving eligibility.” *Id.*, ¶18.

¶12 Eligibility for MA is not a default presumption which the Department must rebut, but a privilege for which the applicant must prove eligibility. *Id.*, ¶17. In order to demonstrate a right to procedural due process, a person must establish that a constitutionally protected property or liberty interest is implicated. *Stipetich v. Grosshans*, 2000 WI App 100, ¶24, 235 Wis. 2d 69, 612 N.W.2d 346. Since Marcella failed to establish her eligibility for MA, she has no property interest and thus no procedural due process interest.

By the Court.—Order affirmed.

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