



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MGE/170243

PRELIMINARY RECITALS

Pursuant to a petition filed November 23, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waupaca County Department of Social Services in regard to Medical Assistance, a hearing was held on January 05, 2016, at Waupaca, Wisconsin.

There were two case numbers involving this petitioner, MGE/170243 and MQB/170244. Although the petitioner sent in one request for hearings, and the parties' documents only listed one case number, the hearing and the record involved both cases numbers. The Division of Hearings and Appeals opened two cases because there were two denials. One was a denial for institutional Medicaid and the other was a denial for Medicare Premium Assistance. Both programs have an asset limit, and the issue is whether a large trust put the petitioner over the asset limit for both programs. All of the documents were accepted into the record under both case numbers. The petitioner did not realize that there were two cases, and was willing to withdraw one appeal, however, I am not certain that the attorney knew that there were two denials. For these reasons, I am addressing each case number separately.

The issue for determination is whether a trust, created by the petitioner's wife's will, at her death in January 2015, with joint assets from the petitioner's marriage is a countable asset for Medicaid (MA) eligibility.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Pamela Kolb

Waupaca County Department of Social Services

811 Harding Street
Waupaca, WI 54981-2087

ADMINISTRATIVE LAW JUDGE:
Corinne Balter
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Waupaca County.
2. On September 17, 2015 the agency received the petitioner’s application for institutional Medicaid (MA) coverage.
3. After receiving the petitioner’s application, the agency requested additional verification. The petitioner, through his attorney, timely provided the agency the requested verification.
4. On November 18, 2015 the agency sent the petitioner a notice that they denied the petitioner’s application for institutional MA coverage because his assets were over the \$2,000 asset limit. The agency counted the petitioner’s assets as follows:
 - a. \$688,011.88 – trust assets
 - b. \$4,522.70 – burial assets
 - c. \$1,758.23 – checking account
 - d. \$152.35 – savings account
5. The petitioner’s wife died on January 18, 2015. When his wife died the household’s property, which included the petitioner’s property, was transferred to the [REDACTED] via the petitioner’s wife’s will. This is an irrevocable trust. The petitioner’s and his wife’s daughter is the trustee. The trust allows the trustee “absolute discretion to determine whether to distribute or not to distribute income and principal for [the petitioner’s] benefit.” Upon the petitioner’s death, “all of the balance remaining in trust shall be distributed to [their] daughter,” who is also the trustee.
6. Although this trust is titled a “special needs trust,” it does not meet the requirements of a special needs trust under the Medicaid rules because neither the petitioner nor his spouse were determined to be disabled before the age of 65 and there is no language that any remainder left in the trust after the petitioner’s death would first go to the State to cover the costs of the petitioner’s Medicaid. The inventory value of the wife’s estate was \$688,011.88. This is also the amount that the agency determined to be in the [REDACTED]
7. On November 23, 2015 the Division of Hearings and Appeals received the petitioner’s Request for Fair Hearing.

DISCUSSION

The petitioner’s attorney presents the issue in this case as being limited to whether a trust with more than \$600,000 is a countable asset. The agency determined this was a countable asset, and denied the petitioner’s institutional Medicaid application. Because the agency denied the application on the asset ground, the agency did not take the next step, and determine whether or not there was a divestment. Thus, the divestment issue, which is the crux of this case, is not before me at this time. Nonetheless, given the petitioner’s actions through his wife’s probate, and the fact that I conclude that this trust is not a countable asset, I felt compelled to briefly address the divestment issue.

The MA asset limit for an individual is \$2,000. Wis. Stat., §49.47(4)(b)3g. If assets are above that limit, the person is not eligible for MA. The statute does not allow for outstanding debts to be deducted from assets, nor does it provide any exceptions for unusual situations. In determining the value of a bank account in a given month, the agency does not count income received in that month. *Medicaid Eligibility Handbook (MEH)*, § 16.1.0.

Wis. Stat., §49.454 describes the treatment of trusts where assets of the MA applicant were used to form the trust and the trust was created by the applicant or a person with legal authority to act on the applicant's behalf. Wis. Stat. §49.454(1)(a). If the trust is revocable, the corpus of the trust is counted against the MA asset limit. Wis. Stat. §49.454(2). If the trust is irrevocable, but there are circumstances under which payment could be made for the benefit of the MA applicant, the portion of the trust that could be paid on the applicant's behalf is considered an available resource. Wis. Stat. §49.454(3)(a). The Medicaid Handbook summarizes Wis. Stat. §49.454, and goes on to state:

these policies do not apply to irrevocable **trusts created by the will**, unless the terms of the trust permit the individual/beneficiary to require that the trustee distribute principal or income to him or her. (*MEH*), § 16.6.4.2.

Wis. Stat. §49.454 closely mirrors 42 U.S.C. 1396p(d)(3). Both similarly exclude trusts created by will.

The only issue is whether agency correctly determined that over \$600,000 in an irrevocable trust, created by the petitioner's wife's will, was an available asset barring the petitioner's MA eligibility. The trust at issue was created by the petitioner's wife's will. She died in January 2015. At the time of her death, the total marital property transferred to this irrevocable trust. The petitioner and his late wife's daughter is the trustee. The trust allows the trustee "absolute discretion to determine whether to distribute or not to distribute income and principal for [the petitioner's] benefit." Upon the petitioner's death, "all of the balance remaining in trust shall be distributed to [their] daughter," who is also the trustee. I further note that the petitioner's daughter testified that her parents met in college, married, and had her, and grew their life together.

If there was not a distinction for trusts created by a will, then there would no dispute that this trust was an available asset. However, the petitioner's attorney is correct that the policy manual and statutes exclude trusts created by will. There is no question that this trust was created by the petitioner's wife's will, and thus I must conclude that it is not an available asset. This is consistent with ALJ Tedesco's decision in MGE/166562.

The petitioner's attorney seems fixed on the special needs exception. This is not a special needs trust, regardless of the title. For a trust to be a special needs trust, the beneficiary must be disabled, the trust must have been created before the beneficiary was 65, and the trust must have a provision that the State would be repaid for the medical assistance benefits in the event the petitioner dies with funds in the trust. 42 USC 1396p(d)(4)(a), *MEH*, § 16.6.5 This trust does not meet any of the three listed criteria.

I feel compelled to note that although the trust is not an available asset for determining MA eligibility, it appears to be a large divestment. The divestment issue is not before me. Nonetheless, I note a 1985 Congressional report concerning a statute meant to limit the ability of persons to become eligible for MA by placing money in trusts stated:

The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar "techniques" to qualify for the program, they are diverting scarce Federal and State resources from low income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee.

House Report 265, 99th Cong., 1st Sess., pt.1, at 72, quoted with approval in *Gonwa v. Department of Health and Family Services*, 2003 WI App 152 ¶ 36. Both the Department of Health Services and the Wisconsin Court of Appeals looked skeptically upon legal sleight-of-hand techniques that make assets disappear. *Hedlund v. Wisconsin Dept of Health Services*, 2011 WI App 153. The *Hedlund* case is distinguishable from this case in that it did not involve a trust created by a will. However, in *Tannler* the Court of Appeals considered “whether an institutionalized person's failure to assert a claim against his or her deceased ‘community spouse's’ estate constitute[d] a divestment under the Medical Assistance (MA) program.” *Tannler v. Wisconsin Dept of Health Services*, 211 Wis.2d 179 (1997). The Court concluded “that the failure to make a spousal election is an “action” for purposes of determining MA eligibility under Wis. Stat. § 49.453 as defined by 42 USC § 1396p(e)(1),” and therefore a divestment. *Id.* The handbook further states that it is also divestment if a person takes an action to avoid receiving income or assets he or she is entitled to, included an inheritance. *MEH*, §17.2.1.

In this case the petitioner took nearly \$700,000 that would have been available to pay for his care and shifted this money to an irrevocable trust via his wife’s will. This transfer occurred less than one year before the petitioner applied for institutional MA coverage. If the asset is unavailable, then the issue becomes whether or not it is a divestment. The petitioner’s attorney has presented an argument that it is not a divestment. However, under the *Tannler* case this transfer appears to be a divestment. This case will be remanded to the county to re-determine the petitioner’s MA eligibility excluding the assets in the [REDACTED]. If the petitioner is asset eligible, then the county must determine whether the transfer of nearly \$700,000 in January 2015, via the petitioner’s wife’s will, is a divestment. Finally if it is a divestment, which I believe it most likely is, the county must determine the amount of this divestment.

CONCLUSIONS OF LAW

The agency incorrectly concluded that a trust, created by the petitioner’s wife’s will, at her death, in January 2015, with joint assets from the petitioner’s marriage was a countable asset for MA eligibility.

THEREFORE, it is

ORDERED

That this case is remanded back to the agency to determine whether the petitioner’s total countable assets, excluding this trust, are under the MA asset limit. If the assets are below the asset limit, then the agency must determine whether the transfer of nearly the entire marital estate in the petitioner’s wife’s will to this irrevocable trust is a divestment barring the petitioner’s MA eligibility. If the county determines that there is a divestment, the county must determine the amount of the divestment, and the divestment penalty period. The agency shall comply with this order 10 days from the date of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 8th day of February, 2016

\sCorinne Balter
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 8, 2016.

Waupaca County Department of Social Services
Division of Health Care Access and Accountability

