FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/153022

PRELIMINARY RECITALS

Pursuant to a petition filed October 21, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Eau Claire County Department of Human Services in regard to Medical Assistance, a hearing was held on December 17, 2013, at Eau Claire, Wisconsin. A hearing scheduled for November 19, 2013, was rescheduled at the petitioner's request.

The issue for determination is whether a common law trust must be considered an available asset when determining whether the petitioner remains eligible for Family Care medical assistance.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Steve Tilbury
Eau Claire County Department of Human Services
721 Oxford Avenue
PO Box 840
Eau Claire, WI 54702-0840

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [redacted]) is a resident of Eau Claire County.

2. The petitioner lived in a house in [redacted] until September 2013 when she moved to an apartment in Eau Claire. The assessed value of the house is $77,300. The petitioner has not verified whether this house is for sale.

3. The petitioner and [redacted] transferred the house the petitioner lived in and that they jointly owned into an irrevocable trust on April 5, 1996, the day the trust was created. The trust named the petitioner's two children as the beneficiaries. The trust originally named three trustees. [redacted] L. is the only surviving trustee. The petitioner has never been a trustee.

4. In exchange for their property, the petitioner and [redacted] were given trust certificates. They are the only trust certificate holders.

5. The trust grants the trustees the right to make "such distributions of portions of the proceeds and incomes as in their sole discretion, and in accordance with the Minutes of this Common Law Trust Organization, making such distributions of portions of the proceeds and incomes as in their sole discretion, and in accordance with the Minutes and, upon final liquidation distributing the assets to the existing Trust Certificate Holders as their contingent rights may appear…" *Exhibit A*.

6. The trust allows the following payments in case of a disability or some other incapacitation:

   PAYMENT OR distribution to a minor or to persons under legal disability or to a person adjudged incompetent but who, by reason of illness or physical disability, shall be unable to use or disburse such payment or distribution, may have said payment or distribution made by the Trustees for the assistance of such Trust Certificate Holder in any one or more of the following ways as in the sole discretion of the Trustees, to wit:

   A. Directly to such Trust Certificate Holder;

   B. To the duly qualified legal representative of such Trust Certificate Holder or to a Guardian or Guardian ad litem;

   C. To a relative or friend who has care or custody of such Trust Certificate Holder;

   D. To a Trustee of this Common Law Trust Organization, directing said Trustee to use such distributions directly for the assistance of such Trust Certificate Holder or tot eh dependents of such Holder.

   Exhibit A.

7. The county agency seeks to end the petitioner's medical assistance because it considers the house she moved out of an asset available to her.

DISCUSSION

The county agency seeks to end the petitioner's enrollment in the Family Care program, which provides appropriate long-term care services for elderly or disabled adults. It is supervised by the Department of Health and Family Services, authorized by Wis. Stat. § 46.286, and comprehensively described in Chapter DHS 10 of the Wisconsin Administrative Code. Recipients must meet the medical assistance financial limits. Wis. Admin. Code, § DHS 10.34(2). For a single person such as the petitioner, medical assistance limits eligibility to those whose available assets do not exceed $2,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat. § 49.47(4)(b)3g. Medicaid rules require recipients to verify relevant information. Wis. Admin. Code, § DHS 102.03(3). The county agency contends that a house worth over $77,000 that she placed in a trust 18 year ago and moved out of late last year is an available asset unless she verifies that it is for sale. Homestead property that is listed with a realtor is not considered available. *Medicaid Eligibility Handbook,* § 16.2.2. The petitioner concedes that she has not listed the property with a realtor and thus cannot verify this information. She contends that the property is not available to her because she has not owned it since she placed it in the trust. This means that her failure to verify that the property is

for sale is irrelevant. What matters is whether her placing the property in a trust prevents the agency from counting it against her asset limit.

The petitioner owned the house with her friend [redacted]. On April 5, 1996, they transferred the house to an irrevocable common law trust in which [redacted] and two other persons, now both deceased, were named trustees and the petitioner's two children were named as the beneficiaries. The county agency contends that the trust is invalid because it is not registered with the Wisconsin Department of Financial Institutions. Wisconsin law states that any common law trust that offers trust certificates to five or more persons cannot hold property unless it is registered with the Wisconsin Department of Financial Institutions. Wis. Stat. § 226.14(1)(a). This section does not apply to the trust in this matter because certificates were granted to only two persons, the petitioner and [redacted]. This means that the trust must be treated like any other irrevocable trust when determining the petitioner's eligibility.

Section 49.454 of the Wisconsin Statutes determines how trusts affect medical assistance eligibility. Its provisions apply "if assets of the individual or the individual's spouse were used to form all or part of the corpus of the trust" and the trust was set up by the individual, her spouse, or someone acting on the individual's behalf or request. Wis. Stat. § 49.454(1)(a). It states that the assets in all revocable trusts covered by the statute are available; the assets in irrevocable trusts covered by the statute are available under the following circumstances:

> If there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to or for the benefit of the individual could be made is considered a resource available to the individual, and payments from that portion of the corpus or income:
>
> 1. To or for the benefit of the individual, are considered income of the individual.
> 2. For any other purpose, are considered transfers of assets by the individual subject to s. 49.453.

Wis. Stat. § 49.454(3)(a).

The petitioner's attorney contends that this statute does not apply to the petitioner, pointing out that the section of the trust pertaining to "Holders of Trust Certificates" deprives her of any power concerning the operation of the trust. It states:

> A HOLDER OF a Trust Certificate shall NOT have a Legal or Equitable title or interest in or to the property or assets of Corpus of this Common Law Trust Organization. Said Holders of Trust Certificate shall not be personally liable for any act or omission of any Trustee or officer or agent or employee of the Common Law Trust Organization. Said Holders of a Trust Certificate shall have NO voice or roll, whatsoever, in the management, control, administration or meetings of this Common Law Trust Organization. Trust Certificates Holders shall hold their Trust Certificates as Tenants in Common at the death of any Trust Certificate Holder, said Trust Certificate shall IMMEDIATELY become null and void.

It is true that this section deprives the petitioner of any control over the trust's income and assets. But whether assets are available under § 49.454(3)(a) does not depend upon the control the medical assistance recipient exercises over them. Rather, availability depends upon whether there are any circumstances under which the recipient can receive some payment from the trust, regardless of who determines when or how those payments can be made. Although this trust apparently contains only the house the petitioner lived in, the trustees have "exclusive management and administration and control over the property," meaning that they could sell or rent it, which would allow them to provide payments from the trust. The language of the trust indicates that it anticipates that the trust could generate proceeds and income. It grants the trustees the right to make "such distributions of portions of the proceeds and incomes as in their

sole discretion, and in accordance with the Minutes of this Common Law Trust Organization, making such distributions of portions of the proceeds and incomes as in their sole discretion, and in accordance with the Minutes and, upon final liquidation, distributing the assets to the existing Trust Certificate Holders as their contingent rights may appear…" The "final liquidations" refers to a clause calling for the end of the trust after 25 year, or earlier if the trustees unanimously agree. When the trust ends, the trustees are instructed to "liquidate the assets, distribute the Corpus in a Pro-Rata manner to the then lawful Holders of Trust Certificates as their contingent rights appear."

In addition, the trust states the following regarding distributions to those with disabilities:

> PAYMENT OR distribution to a minor or to persons under legal disability or to a person adjudged incompetent but who, by reason of illness or physical disability, shall be unable to use or disburse such payment or distribution, may have said payment or distribution made by the Trustees for the assistance of such Trust Certificate Holder in any one or more of the following ways as in the sole discretion of the Trustees, to wit:
>
> A. Directly to such Trust Certificate Holder;
>
> B. To the duly qualified legal representative of such Trust Certificate Holder or to a Guardian or Guardian ad litem;
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> C. To a relative or friend who has care or custody of such Trust Certificate Holder;
>
> D. To a Trustee of this Common Law Trust Organization, directing said Trustee to use such distributions directly for the assistance of such Trust Certificate Holder or tot eh dependents of such Holder.

These provisions provide circumstances under which payment from the trust could be made to or for the petitioner's benefit. This means that the trust, including the house transferred into that trust, is available to her when determining her eligibility for medical assistance. Therefore, the petitioner is ineligible for medical assistance because her countable assets exceed $2,000.

CONCLUSIONS OF LAW

1. The trust the petitioner set up and transferred her house into in 1996 is a countable asset because there are circumstances under which she can receive payments from the trust.
2. The petitioner is ineligible for medical assistance because her countable assets exceed $2,000.

THEREFORE, it is **ORDERED**

The petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge 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.

To ask for a rehearing, 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 for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. 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 served and filed with the appropriate court 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).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 17th day of January, 2014

\sMichael D. O'Brien
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 January 17, 2014.

Eau Claire County Department of Human Services
Office of Family Care Expansion