FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

AMENDED 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 March 19, 2014, at Eau Claire, Wisconsin. A previous hearing held on December 17, 2013, led to a decision dismissing the claim on January 17, 2014. The petitioner requested a rehearing on January 23, 2014. That request was granted on February 10, 2014.

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]

Petitioner's Representative:

Attorney Peter E. Grosskopf
1324 West Clairemont Avenue, Suite 10
Eau Claire, WI 54701

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Steve Tilbury, ESS & Heather Wolski, Asst. Corp. Counsel
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 Altoona 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 she 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]. 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. Those certificate were transferred to her two sons more than 10 years ago. She has had no interest in the trust since then.

5. 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

This is the second hearing and decision in this matter. The first decision upheld the county agency's decision to end the petitioner's enrollment in the Family Care program, which provides appropriate long-term care services for elderly or disabled adults. The petitioner requested a rehearing, contending that the original decision was based upon a factual error concerning the beneficiaries of a trust. The request for a rehearing was granted because the facts presented at the original hearing were not clear enough for me to confidently render a second decision.

The Family Care Program 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 denied the petitioner's application because it 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. In exchange for their property, the petitioner and [redacted] were given trust certificates. The trust is unartfully drawn, but neither party challenges that it meets the basic requirements needed to establish a trust. 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 cannot hold property unless it is registered with the Wisconsin Department of Financial Institutions if that trust either (1) offers trust certificates to five or more persons or (2) sells or proposes to sell beneficial interests, certificates or memberships in the trust. Wis. Stat. § 226.14(1)(a). This section does not apply to the trust in this matter because it granted certificates to only two persons, the petitioner and [redacted], who then transferred the certificates to the petitioner's two sons. No money was ever exchanged or intended to be exchanged for beneficial interests, certificates or memberships in the trust. This means that the trust must be treated like any other irrevocable trust when determining the petitioner's eligibility.

The original decision relied upon Wis. Stat. § 49.454 to deny benefits. That section 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:
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> 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 "individual" referred to in the statute is the person seeking medical assistance. The original decision determined that the petitioner could receive a benefit under the trust because the trustees could use their discretion to distribute the trust's proceeds and income to trust certificate holders. The decision determined that as a result there were circumstances under which payments from the trust could be made on her behalf. She contends that this finding is wrong because the trust certificates were transferred soon after the creation of the trust to her two children.

The file contains a transfer of the trust certificates that I overlooked when writing the initial decision. *Exhibit 2.* Because the petitioner does not hold the trust certificates, there are no circumstances under which she can receive any payment from the trust. This means that the trust and its assets, including the house, cannot be attributed to her unless she disposed of those assets in a manner that would be considered a divestment.

A divestment occurs if a person or someone acting on her behalf "disposes of resources at less than fair market value" within five years of the later of when she was institutionalized and applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). When a divestment occurs, the person is ineligible for medical assistance for a period determined by the amount of the divestment. The petitioner received nothing of value for the certificates, so the question is whether the transfer occurred within the last five years. The document transferring the certificates is undated. Both parties agree that this does not make the document invalid, but it does place the burden on the petitioner to prove that the transfer occurred more than five years ago. She does this by pointing out that one of the trustees who signed that document died over 10 years ago; her attorney had the trustee's death certificate available to confirm this assertion. This means that, unless the transfer document is forged and the petitioner's testimony concerning it is perjured, the document and transfer also occurred more than 10 years ago. Any finding of forgery or perjury would be pure speculation. Therefore, the preponderance of the credible evidence is that the petitioner did not divest her assets. Because she has no other significant assets, her total assets are less than $2,000, and she is eligible for the Family Care program.

CONCLUSIONS OF LAW

1. The trust the petitioner set up and transferred her house into in 1996 is not a countable asset because there are no circumstances under which she can receive payments from the trust.
2. The petitioner is eligible for medical assistance because her countable assets do not exceed $2,000.

THEREFORE, it is **ORDERED**

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it reinstate the petitioner's medical assistance benefits retroactive to the date that her benefits ended.

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 Madison,
Wisconsin, this 25th day of March, 2014

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\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 March 25, 2014.

Eau Claire County Department of Human Services
Office of Family Care Expansion
Attorney Peter Grosskopf