STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MAP/156301

The attached proposed decision of the hearing examiner dated April 24, 2014, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed March 21, 2014, under Wis. Stat., §49.45(5), to review a decision by the Marquette County Dept. of Human Services in regard to Medical Assistance (MAP), a hearing was held on April 17, 2014, by telephone.

The issue for determination is whether real estate held in a WISPACT trust is an available asset.

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Cheryl Selbach
Marquette County Dept. of Human Services
P.O. Box 99
Montello, WI 53949-0099

ADMINISTRATIVE LAW JUDGE:
Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #[redacted]) is a resident of Marquette County.

2. Petitioner received MA under the Medicaid Purchase Plan (MAPP) program until November 1, 2013. It was closed because the county discovered that petitioner was the co-owner of non-homestead real estate valued at $194,000. Petitioner filed appeal no. MAP-154963. In a decision dated February 24, 2014, this ALJ concluded that the appeal was untimely but suggested that the issue might still be worked out with more information on the ownership of the property.

3. In 2009 petitioner and her brother inherited the property (a cottage in Vilas County). Soon after a WISPACT trust was created for petitioner because she is disabled, and the property was conveyed to petitioner's brother and to the trust as tenants in common on October 22, 2009.

4. Petitioner reapplied for MAPP soon after the February 24 fair hearing decision. The county continues to deny eligibility on the basis that her share of the Vilas County property must be counted against the MAPP $15,000 asset limit.

DISCUSSION

The MAPP program allows disabled individuals to work but to retain eligibility for MA. Wis. Stat. §49.472; MA Handbook, Appendix 26.1. If net income is below 250% of the federal poverty level, the person is eligible for the program. Wis. Admin. Code, §DHS 103.03(8)(b); MA Handbook, App. 26.4.2. The asset limit for MAPP is $15,000. Wis. Stat., §49.472(3)(b); MA Handbook, App. 26.4.1.

Wis. Admin. Code, §DHS 103.06(7)(a)3 provides that trusts are treated using pertinent Supplemental Security Income (SSI) standards. A WISPACT trust is one that is created partly to assist a disabled individual in maintaining eligibility for SSI and related programs. Such a trust is based on 42 USC 1396p(d)(4)(C). To be exempt such a trust must be managed by a non-profit association, kept separately for each beneficiary, be established for a disabled individual by the individual (among others), and include provision to repay Medicaid upon the beneficiary's death.

The MA Handbook (MEH), App. 16.6.6, discusses pooled trusts including WISPACT trusts. The Handbook essentially restates the §1396p conditions to determine whether a WISPACT trust is exempt, but it adds an important proviso that impacts petitioner's eligibility: "If the account includes a residential dwelling, the individual must reside in that dwelling." Because of that provision, the county continues to conclude that petitioner is ineligible for MAPP despite her only substantial asset being in a WISPACT trust. In other words, because the primary asset in the WISPACT trust is non-homestead real estate, the trust cannot be considered exempt, and its value is counted against the $15,000 asset limit.

MEH App. 16.6.6 applies to pooled trusts in addition to WISPACT trusts. One of these additional trusts is the Wisconsin Initiatives in Sustainable Housing (WISH) pooled trust, a trust intended to secure long term affordable housing for people with disabilities. The language in MEH App. 16.6.6 regarding residential dwellings is intended to address the WISH pooled trusts only, as outlined in DHS/DWD Operations Memorandum 04-15, based on guidance from the federal Center for Medicare and Medicaid Services (CMS). The limitation is not intended to apply to WISPACT trust accounts.

However, the analysis does not end here. MEH App. 16.6.6.3 states, as a condition for assets held in a pooled trust to be disregarded for purposes of eligibility determinations, the pooled trust must:

> 3. Contain accounts with the funds of disabled individuals (based upon SSI and Medicaid rules) that are established solely for their benefit by a parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court. If the account includes a residential dwelling, the individual must reside in that dwelling, but a spouse, caregiver or housemate can also live there with the Medicaid applicant/recipient.

MEH App. 16.6.6.3.

In this case the WISPACT trust account created for the Petitioner contains a residential dwelling, not funds or fungible assets. In addition, this residential dwelling is owned only in part by the Trust; the remaining ownership interest is held by the Petitioner's brother as tenants in common with the WISPACT Trust. It is not clear what actions the WISPACT Trust could take with this residential dwelling, but it is clear that the Trust could not take any independent action to benefit the Petitioner nor could it take any action without also affecting the non-Trust co-owner of the real property. Assets held in pooled trusts are managed in a manner that may provide benefits to multiple trust account beneficiaries. This management principal, however, does not extend to providing benefits to individuals outside the pooled trust. In the situation wherein the only asset in the Pooled Trust account is held in ownership both by the Pooled Trust and by an individual or entity outside the Pooled Trust, the account fails to meet the requirement that the trust account be for the sole benefit of the trust beneficiary, and therefore fails to qualify as an exempt asset for purposes of an MA eligibility determination.

To address this situation the Trust could, if it chose to do so, convert its ownership interest in the residential dwelling into cash, at which time the Petitioner could reapply for medical assistance. Cash or other fungible assets wholly within a pooled trust account can clearly be delineated as for the sole benefit of the account beneficiary and would otherwise make the pooled trust account exempt for MA eligibility purposes. That decision, however, is for the Trust and the Petitioner to make.

CONCLUSIONS OF LAW

1. The requirement in the MEH that a Pooled Trust beneficiary reside in a residential dwelling held by the Pooled Trust does not apply to the Petitioner's WISPACT Trust account.

2. Because the Petitioner's has not established that her WISPACT trust is for her sole benefit, the trust account is not an exempt asset for MA eligibility purposes.

THEREFORE, it is **ORDERED**

That the Petitioner's appeal is hereby dismissed.

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, WI, 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 request (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 11th day of August, 2014.

Kevin E. Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services

FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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PROPOSED DECISION

MAP/156301

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ADMINISTRATIVE LAW JUDGE:
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I am troubled by this result because there is no such limitation in the U.S. Code provision. In addition, there is no explanation in the Handbook as to why the limitation on real property exists or what authority allows the limitation.

Because the limitation does not exist in the U.S. Code provision, and I am unaware of any authority for the limitation, I conclude that the WISPACT trust must be considered to be exempt. That would make petitioner eligible for MAPP because she has no other assets that would put her over the limit. I am sending the decision to the Deputy Secretary as proposed, however, so that the apparent conflict with the federal statute can be reviewed.

CONCLUSIONS OF LAW

1. A limitation on the MA exemption for a WISPACT trust concerning real property held by the trust is in conflict with the federal statute that allows such trusts to be created and exempted for SSI and MA purposes.
2. Petitioner's WISPACT trust is an exempt asset for MA purposes.

THEREFORE, it is **ORDERED**

That if the proposed decision is adopted by the Department, petitioner's WISPACT trust shall be deemed to be exempt for MA purposes, and the county shall re-determine petitioner's MAPP eligibility with the exemption in consideration.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decisions is described in Wis. Stats. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 24 day of April, 2014

Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals