



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
[Redacted]
Redact
[Redacted]

DECISION

MGE/161519

PRELIMINARY RECITALS

Pursuant to a petition filed October 24, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Dunn County Department of Human Services in regard to Medical Assistance, a hearing was held on December 19, 2014, at Menomonie, Wisconsin. A hearing scheduled for November 14, 2014, was rescheduled at the petitioner's request.

The issue for determination is whether the county agency correctly denied the petitioner's application for medical assistance because she had to verify the assets in a terminated trust.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]
[Redacted]
Redact
[Redacted]

Petitioner's Representative:

Attorney [Redacted]
[Redacted]

Respondent:

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

By: [Redacted]
Dunn County Department of Human Services
808 Main Street
PO Box 470
Menomonie, WI 54751

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. The petitioner (CARES # [Redacted]) is a resident of Dunn County.

2. The petitioner applied for institutional medical assistance on August 29, 2014. The county agency denied that application on September 30, 2014, because she failed to verify the assets in a trust that had been terminated.
3. The petitioner used her assets to establish an irrevocable family trust for her “general support and welfare” on October 16, 2006. That trust named her son the trustee and directed that during her lifetime he use the assets solely for her support and the maintenance of the trust’s property.
4. The trust directed the trustee to terminate it if its existence caused the petitioner to be ineligible for medical assistance or some other public benefits. He terminated the trust pursuant to this provision on June 14, 2014.

DISCUSSION

The county agency denied the petitioner’s application for institutional medical assistance because she did not verify the assets in family trust set up with her funds for her benefit in 2006 and terminated in June of 2014. The agency seeks to discover what funds were in the trust because it contends that she divested them by giving them to relatives when the trust ended. A person is ineligible for medical assistance if her available assets exceed \$2,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat. § 49.47(4)(b)3g. She cannot reach this limit by divesting her assets. This occurs if the applicant 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 when she applied for medical assistance. Wis. Admin. Code, § DHS 103.065(4)(a); Wis. Stat. § 49.453(1)(f). If the person improperly divests her assets, she is ineligible for institutional medical assistance for the number of months obtained by dividing the amount given away by the statewide average monthly cost to a private pay patient in a nursing home when she applied. Wis. Admin. Code, § DHS 103.065(5)(b).

Applicants must verify information, including assets, but only if the information is “necessary for the determination of eligibility.” If they do not, the agency must deny eligibility. Wis. Admin. Code, § DHS §§ 102.03(3)(h) and 102.02. The petitioner contends that she did not have to verify the assets in the trust because the agency did not need to know what those assets were to determine her eligibility. First, she argues, any assets in the trust were divested when she set it up in 2006. Because this was more than five years ago, it no longer affects her eligibility. Second, she argues, even if the assets were still attributed to her until the trust ended, the trustee who gave them away was not acting on her behalf. Because a divestment only occurs if she or someone acting on her behalf gives the assets away, there was no divestment.

The petitioner relies primarily on *Artac v. DHFS*, 2000 WI App 88, 234 Wis.2d 480, 610 N.W. 2d 115. Artac used her assets she set up a trust for the benefit of her daughter, Redact, but retained a life estate on the house she lived in. The trustee, Redact, who was not a residual beneficiary, was directed to end the trust if two physicians determined that Artac was incompetent. They did, and Redact ended the trust, which allowed Redact to take all the assets, including the house free and clear of any life estate. *Id.*, ¶2. The agency and the Division of Hearings and Appeals found her ineligible after determining that Artac divested her life estate when the trust was terminated.

The court of appeals reversed. It found first that because Artac had no interest in the trust property after the trust was created, any property in it was divested when it was created. Because this was before the lookback date, it no longer affected her eligibility. *Id.*, ¶14.

The court’s second finding is more important because it bears on the petitioner’s argument that the trustee was not acting on her behalf when he terminated the trust. The court found that the trustee’s actions could not lead to a divestment by Artac because Redact was not acting her behalf. A trust, it pointed out

generally has three elements: a trustee, a beneficiary and trust property. The trustee acts on behalf of the beneficiary. Thus, **Redact** acted on **Redact**'s, not Artac's behalf when she distributed the trust property and Artac did not divest an 'asset' as defined in the statutes.

Id., ¶16.

The petitioner's situation differs substantially from Artac's. She, unlike Artac, was the beneficiary of the trust: she set it up for her own "general support and welfare." While the trust existed, her trustee, who was her son and the trust's residual beneficiary, was required to use its assets solely for her support and the maintenance of the trust's property. Artac, on the other hand, set a trust up for someone else's benefit. This means that the petitioner's trustee, unlike Artac's, had a legal obligation to act on her behalf. If, as the petitioner argues, her trustee did not act on behalf, he violated the fiduciary duty the trust required of him. There is no evidence that this violation happened. This means that the holding in *Artac* that no divestment occurred because the trustee was not acting on her behalf does not apply here. In the current matter, the petitioner's trustee was acting on her behalf as a matter of law.

This leaves the issue of whether any potential divestment that occurred happened in 2006 or in 2014. The petitioner's argument that the divestment occurred when she set up the trust rather than when it was closed is contrary to the logic of Wis. Stat. § 49.454, a statute designed to prevent a person from using a trust to receive medical assistance when she has her own money to pay her medical bills. Section 49.454(3)(a), holds that if the person or someone acting on her behalf sets up an irrevocable trust with her own funds and "there are circumstances under which payment from the trust could be made to or for [her] benefit," the trust is considered an available asset when determining her medical assistance eligibility. Wis. Stat. §§ 49.454(1)(a) and (3)(a). This principle applies regardless of "the purpose for which a trust is established" or "any restriction on the use of distributions from the trust." *Medicaid Eligibility Handbook*, § 16.6.4.2. No one disputes that there were circumstances under which payments could be made from the trust for the petitioner's benefit. Indeed, the trust was set up for no other purpose: It was established "to provide for [her] general support and welfare" and "[i]n no event shall the trustee use the trust assets during the [petitioner's] life for any other purpose than [her] support and the maintenance of the property" in the trust. *Trust*, § II and IV.

Under § 49.454, as far as medical assistance eligibility is concerned, all of the trust's assets were considered the petitioner's as long as the trust existed. If the assets were hers throughout this period, then she could not have divested them when she established the trust—if she had she would no longer have had them after she established the trust. What she seeks is for the assets to disappear from 2006 through 2014, even though medical assistance law holds that she had them throughout this period. Medical assistance rules no longer allow such magical thinking.

Both Congress and Wisconsin courts have frowned on attempts to make assets disappear through financial sleight of hand. In *Hedlund v. Wisconsin DHS*, 2010 AP 3070 (2011), the court of appeals closed an attempt to create a loophole in § 49.454. The Hedlunds gave all of their assets to their children who then immediately set up a trust for their parents' benefit with those assets. They then argued that § 49.454 did not apply because the children rather than their parents' funds were used to create the trust. The court in *Hedlund*, 2010 AP 3070, ¶ 16 indicated that the purpose of current statute is to

prevent those with sufficient available resources, albeit in a trust, from receiving medical assistance before they use their own resources for their care. This purpose would be thwarted if an applicant for medical assistance could transfer assets to another, who then, at the direction or request of the applicant, puts the assets in trust of the benefit of the applicant.

In *Gonwa v. Department of Health and Family Services*, 2003 WI App 152 ¶ 36, the court of appeals quoted *House Report 265*, 99th Cong., 1st Sess., pt.1, at 72, which accompanied the federal legislation on

which the Wisconsin law was based, with approval. That report provides the rationale for limiting a person's ability to set up a trust that would allow her to avoid using her own funds for her medical care:

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.

The petitioner's trust was nothing if not an attempt to create the now barred Medicaid qualifying trust. Its corpus and assets were meant to "supplement any funds" she is "entitled to receive as social security, supplemental social security, and medical assistance." To ensure that her funds only supplemented and did not pay for care available from public sources, the trust ordered the trustee to "terminate this trust as to any beneficiary to whom medical assistance, SSI, or the benefits of any other public or private program, may be denied by reason of the existence of this trust..." *Trust*, § II. For the reasons discussed, her trust did not shield her assets from counting toward the medical assistance asset limit.

Because the assets in trust remained attributable to her until it was dissolved, any assets that she no longer held after this were divested within five years of when she applied for medical assistance. To receive medical assistance, she must verify any assets in the trust. Because she did not, the county agency correctly determined that she was ineligible for the program.

CONCLUSIONS OF LAW

1. The petitioner divested whatever assets were in her trust when that trust was dissolved.
2. The county agency correctly determined that the petitioner was ineligible for medical assistance because she failed to verify the assets that were in her trust.

THEREFORE, it is

ORDERED

The petitioner's appeal is 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, 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 27th day of January, 2015

\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 27, 2015.

Dunn County Department of Human Services
Division of Health Care Access and Accountability
Attorney Redact