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[REDACTED]

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

In the Matter of

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

DECISION
[REDACTED]

PRELIMINARY RECITALS

Pursuant to a petition filed June 11, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Dodge County Department of Human Services in regard to Medical Assistance, a hearing was held on July 21, 2015, at Juneau, Wisconsin.

The issue for determination is whether the agency erred in its denial of the MA application based on its counting assets of an irrevocable testamentary trust as available to her.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

Attorney Elaine Shanebrook
120 N Main Street Suite 310
PO Box 87
[REDACTED]

Respondent:

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

By: [REDACTED]

Dodge County Department of Human Services
143 E. Center Street
Juneau, WI 53039-1371

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Dodge County.
2. Petitioner's husband died on 6/16/12.

3. Petitioner's husband's will established a testamentary trust benefitting petitioner. The trust became irrevocable at the husband's death. Terms of the trust do not allow petitioner to distribute the funds of the trust to herself.
4. Petitioner applied for MA. The agency denied he based on excess assets of the trust.
5. Petitioner appealed.

DISCUSSION

MA certification is available if **all** conditions of eligibility-- including meeting the asset test are providing necessary, requested verification, are satisfied. Wis Admin. Code § DHS 103.08(1). Certification pursuant to an application can be made retroactive for up to three months. For a single person seeking Institutional MA coverage, the asset limit is \$2,000. Wis. Stat. §49.47(4)(b). See also *MA Eligibility Handbook (MEH)*, Table 39.4 (EBD), viewable online at <http://www.emhandbooks.wi.gov/meh-ebd/>.

The agency *must* request verification of non-exempt assets for Institutional MA applicants. *MEH*, §20.3.5. The agency requested verification of the Trust principal under this rubric. The *MEH* also says that verification of *exempt* assets is not required. Exempt assets are listed in the statute: a homestead, household/personal possessions, a motor vehicle, burial spaces/agreements, small life insurance policies, and certain burial funds. Wis. Stat. §49.47(4)(b). The problematic asset in this case, a trust, is not an exempt asset, although it proves below to be a non-exempt, *unavailable* asset. Because the trust was not an exempt asset, the agency was correct to require verification.

The agency was concerned that the petitioner's Trust is an available asset that puts her over the \$2,000 asset limit. The Trust is irrevocable, because the grantor is deceased and therefore cannot revoke it. The *MEH* instruction is as follows:

16.6.4 Irrevocable Trusts

An irrevocable trust is a trust that cannot, in any way, be revoked by the grantor.

16.6.4.1 Trust Established With Resources of a Third Party

If the resources of someone other than the individual or their spouse (i.e. a third party), were used to form the principal of an irrevocable trust, the trust principal is not an available asset...

16.6.4.2 Trust Established With Resources of the Individual or Spouse

If the resources of the individual or the individual's spouse were used to form all or part of the principal of the trust, some or all of the trust principal and income may be considered a non-exempt asset, available to the individual. If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual at any time no matter how distant, the portion of the principal from which, or the income on the principal from which, payment to the individual could be made shall be considered non-exempt assets, available to the individual.

This treatment applies regardless of:

- the purpose for which a trust is established;
- whether the trustees have or exercise any discretion under the trust;
- any restrictions on when or whether distributions may be made from the trust; **or**,
- any restrictions on the use of distributions from the trust.

<p>Example 1: Doug is a 65 year old Medicaid applicant. Several years ago, Doug transferred his life savings of \$60,000 to an irrevocable trust, naming himself as the beneficiary. Doug's</p>
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brother, Jim was appointed as the trustee. Under the terms of the trust, Jim could disburse up to \$10,000 annually, from either trust principal or trust income, either directly to Doug or indirectly to provide some benefit for Doug. The trustee had sole discretion as to when and how these trust disbursements would be made, but under no circumstance could they exceed \$10,000 in a 12 month period. Because the entire corpus (principal of the fund) could eventually be distributed, \$60,000 would be considered an available non-exempt asset for Doug's Medicaid eligibility determination, even if the trustee decides not to make any actual disbursements.

...

The policies described above also do not apply to irrevocable trusts created by a 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 (bold emphasis added). In its written submission, the agency failed to address this express exclusion for irrevocable testamentary trusts. At hearing, the agency representative stated that the entirety of the agency's argument is in the written submission. Thus, I have received no argument from the agency to counter the petitioner's interpretation.

Because the Trust was created by a will, and the terms of the Trust do not permit the beneficiary to distribute principal or income to her, the Trust is an unavailable asset. Thus, the agency erred in counting this as an available asset.

CONCLUSIONS OF LAW

The agency erred in counting this as an available asset.

THEREFORE, it is

ORDERED

That the matter is remanded to the agency for a redetermination of eligibility without consideration of the irrevocable testamentary trust as an available asset. This redetermination shall be completed within 10 days. If otherwise eligible, petitioner's benefits shall be retroactive to her application date.

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 21st day of August, 2015

\sJohn P. Tedesco
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 August 21, 2015.

Dodge County Department of Human Services
Division of Health Care Access and Accountability
Attorney Elaine Shanebrook