



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

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In the Matter of

[REDACTED]  
[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MGE/170853

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 16, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Eau Claire County Department of Human Services in regard to Medical Assistance, a hearing was held on January 12, 2016, at Eau Claire, Wisconsin.

The issue for determination is whether a trust established by the petitioner is an available asset.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: [REDACTED]  
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 applied for institutional medical assistance on August 5, 2015. The county agency denied his application on December 1, 2015.

3. The petitioner and his late wife set up a revocable trust on September 25, 1992. They were the grantors, the trustees, and the beneficiaries of the trust. *Exhibit 1.*
4. The petitioner's trust allowed him and his wife to transfer assets into irrevocable trusts. They transferred their real property into that trust on that date. The petitioner continued to live their until he entered the nursing home. It is unclear if they transferred any other asset into the trust.
5. The irrevocable trusts allowed the petitioner to receive any income derived from the assets in those trusts. Control over disposal of the assets was transferred to a third trustee, called an adverse trustee.
6. On February 5, 2014, the petitioner, as the surviving trustee, conveyed property to T.H. and K.D.-H. It is unclear what this property was, but it is not the homestead property that was transferred into the irrevocable trust in 1992.
7. Article I, § D.2, of the trust, which pertains to property in irrevocable trusts, states that if the petitioner's personal physician states in writing that the petitioner will never be able to live at home again, and this statement is attested to by another physician familiar with the petitioner's physical or mental condition, then he "shall have no further right to any income from or use of any asset in this Trust."
8. Two physicians certified that the petitioner was incapacitated on September 22, 2014. *Exhibit 2.*
9. When the petitioner applied for medical assistance he had the following assets either in his various trusts or in his own name:
  - a. House: \$129,200
  - b. Land: \$2,900
  - c. Checking Account \$1,945.16.
10. The petitioner purchased his trust forms from [REDACTED], which provided the following explanation under a section in its General Information titled, *How Does [REDACTED] Pocket Trust work?*

This feature is unique to [REDACTED] trust forms. When our Trust forms were drafted our advisors heeded the belief that a person should have the right to transfer any and all of their assets into a separate "irrevocable" Trust, by which act they would relinquish all rights to such assets for the remainder of life, except the right to enjoy the use of, and income from such assets until they died. It is argued that because the Trustor no longer has a "general power of appointment," or the right to liquidate the asset and use the money for any reason, no other party can force him or her to do so. The procedure for transferring assets to such Pocket Trust has been explained this way: One simply changes the title to the assets being transferred to this trust to the Trustor and the first listed Successor Trustee as "Co-trustees of the LASTNAME SPECIAL TRUST, U/D/T dated \_\_\_\_\_" (e.g.: John Q. Public and Jane D. Smith, Co-trustees of the PUBLIC SPECIAL TRUST, U/D/T dated January 2, 1990). The I.R.S. calls this added Co-trustee an "Adverse Trustee." The Trust Agreement provides that the Trustor will still have the right to manage the assets in the new "Pocket Trust" (sell, rent, encumber, exchange, etc.) as long as the proceeds from any sale, exchange or loan go back into another asset held in the same Trust. The Trust Agreement provides that the only one who is authorized to invade the corpus of the Pocket Trust is the Adverse Trustee serving as Co-trustee with the Trustor. If the Adverse Trustee, in his or her absolute discretion, decides to invade the corpus of this Trust, he or she, as a "Remainderman Beneficiary" (the party who is named to ultimately receive a portion of the Trust assets), is adversely affected (there won't be as much left when the Trustor dies), so the I.R.S. trusts his or her judgement in this matter. The Trustor gets all of the income from it until his or her death or until he or she becomes a permanent resident of a long term care facility. When the Trustor dies,

assets of the Pocket Trust will be distributed to each of the Beneficiaries on record as of the date such assets were transferred into this Trust. The Trustor's only power to change Beneficiaries is to add a charity or increase the share going to a charity. Since the asset is no longer owned by the Trustor (because it has been irrevocably transferred) any time that a financial statement is filled out by the Trustor, or in his or her behalf, after having transferred an asset to the Pocket Trust, those assets must not be listed as part of the Trustor's assets. No Trustee can invade the corpus of this Pocket Trust, for payment of any debt of the Trustor. The Adverse Trustee alone, in his or her absolute discretion, may invade the corpus. [emphasis in original]

### DISCUSSION

A person cannot receive institutional medical assistance if his "actually available" assets exceed \$2,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat. §§ 49.46(1) and 49.47(4). The county agency denied the petitioner's August 5, 2015, application for these benefits after determining that assets in a trust he and his late wife established in 1992 with their own assets were available. He contends that they were not.

Section 49.454, Wis. Stats., determines when a trust is counted toward the medical assistance asset limit. The section applies "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, his spouse, or someone acting on the individual's behalf or request. Wis. Stat. § 49.454(1)(a). All revocable trusts covered by the statute are available. Irrevocable trusts covered by the statute are available "[i]f there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual" seeking or receiving medical assistance. Wis. Stat. § 49.454(3)(a). This provision does not apply to trusts set up by others for the individual's benefit. Wis. Stat. § 49.454(1)(b) and (4).

The petitioner and his wife purchased off-the-shelf trust forms from [REDACTED]. The resulting trust is difficult to follow because, at 50 pages, it is a bloated mess meant to cover all situations without the intervention of a lawyer, and it is written in the sort of legalese practiced by jailhouse lawyers. The main document is a revocable trust set up with the assets of the petitioner and his wife, who are its trustees and beneficiaries. This revocable trust allowed them to establish irrevocable trusts for their various assets. I could not determine exactly what assets they transferred into irrevocable trusts, but one such trust does include their primary asset, their house, which is now assessed at \$129,200.

The irrevocable trusts added a third trustee called an "adverse trustee," He alone could invade the corpus of the trust and sell off its assets. He was also the "remainderman" beneficiary of the trust, meaning that after the petitioner and his spouse both died, he would inherit whatever assets remained. But although the petitioner gave up some control over his assets to the adverse trustee, [REDACTED] general information document made it clear that the primary purpose of the irrevocable trusts is to allow him to have use of and income from all of his assets, while shielding those assets from anyone who may attempt to recover debts from him. A section of that the information document titled "How Does [REDACTED] [REDACTED] Pocket Trust work?" explains:

When our Trust forms were drafted our advisors heeded the belief that a person should have the right to transfer any and all of their assets into a separate "irrevocable" Trust, by which act they would relinquish all rights to such assets for the remainder of life, *except the right to enjoy the use of, and income from such assets until they died*. It is argued that because the Trustor no longer has a "general power of appointment," or the right to liquidate the asset and use the money for any reason, no other party can force him or her to do so...*The Trustor gets all of the income from it until his or her death or until he or she becomes a permanent resident of a long term care facility*. [underlining in original; other emphasis added]

The trust itself provides that if the petitioner's personal physician and another physician familiar with his medical history affirm in writing that he will never be able to live at home again, then he "shall have no further right to any income from or use of any asset in this [irrevocable] Trust." *Trust*, Article I, § D.2. Two physicians certified that the petitioner could never return home on September 22, 2014.

Under Wis. Stat. § 49.454, if any assets remained in a revocable trust, they were available and countable when determining medical assistance eligibility. More importantly for this decision, as long as there were circumstances under which the petitioner could receive payments or benefits from the irrevocable trusts, those assets also were considered available and countable. These circumstances continued until September 22, 2014, when two physicians declared him incapacitated. At that point, under the terms of the trust, he lost all right to any income paid by the trust or the use of any assets held by it.

A person cannot become eligible for medical assistance by giving away his assets. Doing so is considered a divestment, which occurs if he or someone acting on his behalf "disposes of resources at less than fair market value" within the "look back date." The look back date is five years before the latter of when he was institutionalized and when he applied for medical assistance. Wis. Stat. § 49.453(1)(f); *Medicaid Eligibility Handbook*, § 17.5.3. If someone improperly divests his assets, he is ineligible for institutional medical assistance for the number of days obtained by dividing the amount given away by the statewide average daily cost to a private pay patient in a nursing home when he applied; this is currently \$252.95. Wis. Admin. Code, § DHS 103.065(5)(b). *Medicaid Eligibility Handbook*, § 17.5.2.

The petitioner divested his assets because when he went from having them to not having them (according to medical assistance rules), he did not receive anything in return for them. He applied for medical assistance on August 5, 2015, so his lookback date is August 5, 2010. This means his eligibility depends upon whether he divested those assets when he and his wife set the irrevocable trust up in 1992 or when he gave up his right to receive financial benefits through the trust in 2014.

Any argument that the divestment occurred when the trust was set up rather than in 2014 contradicts the purpose of Wis. Stat. § 49.454, which was enacted to prevent a person from using a trust to receive medical assistance when he has his own money to pay his medical bills. This is illustrated in a Congressional report that accompanied the bill for the federal law on which § 49.454 is based:

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.

*House Report 265*, 99th Cong., 1st Sess., pt.1, at 72, cited with approval in *Gonwa v. Department of Health and Family Services*, 2003 WI App 152 ¶ 36,

Under § 49.454, as far as medical assistance eligibility is concerned, all of the trust's assets were considered the petitioner's until September 22, 2014, because there were circumstances under which payments could be made to or for his benefit. If the assets were attributed to him until 2014, then he could not have divested them in 22 years earlier when he established the trust—if he had he would no longer have had them after he established the trust. What he seeks is for the assets to disappear from 1992 through 2014, even though medical assistance law holds that they were attributable to him and countable throughout this period. Neither Congress nor the Wisconsin legislature continue to allow this legal sleight of hand. Therefore, the trust remained attributable to him until September 22, 2014, when he no longer

could receive any benefits from it. Because this was within the five-year lookback period, the assets count when determining his medical assistance eligibility, and make him ineligible for the program.

I cannot determine exactly what assets the petitioner divested and what one he still had on the relevant dates. Therefore, I will remand this to the county agency with instructions to determine the amount of the divestment and the length of the penalty period. If the petitioner disagrees with this determination, he may file a new appeal. If he disagrees with any other portion of this decision, he must either ask for a rehearing or appeal to circuit court.

### CONCLUSIONS OF LAW

1. All assets in the trust the petitioner established with his wife in 1992 and moved into irrevocable trusts were available for institutional medical assistance purposes until two physicians certified that he was incapacitated on September 22, 2014.
2. The petitioner divested any assets he held in irrevocable trusts on September 22, 2014.
3. The petitioner is ineligible for institutional medical assistance because he divested assets within his lookback period.

**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 determine how long he is ineligible for institutional medical assistance because of a divestment. When doing so, it shall assume that all of the assets in the trust he established with his late wife in 1992 were divested on September 22, 2014. The petitioner may file a new appeal if he disagrees with the length of the ineligibility period. But if he disagrees with the finding that his trust was an available asset until September 22, 2014, he must ask for a rehearing or appeal to circuit court in the manner outlined below.

### **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**

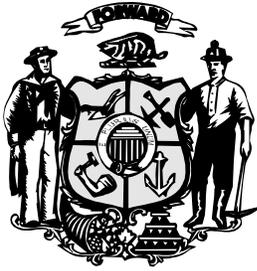
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those 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 2nd day of March, 2016

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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 2, 2016.

Eau Claire County Department of Human Services  
Division of Health Care Access and Accountability