



## STATE OF WISCONSIN

---

In the Matter of

(petitioner)

DECISION

MPC-13/78330

---

The proposed decision of the hearing examiner dated November 1, 2006 is hereby adopted as the final order of the Department.

### **REQUEST FOR A REHEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named as "PARTIES IN INTEREST" in the proposed decision. Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes § 227.49. A copy of the statutes can be found 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 no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Wisconsin Department of Workforce Development. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: Office of the Secretary, 201 East Washington Avenue, Room 400X, P.O. Box 7946, Madison, WI 53707-7946.

The appeal must also be served on the other "PARTIES IN INTEREST" named in the proposed decision. The process for Court appeals is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of Madison,  
Wisconsin, this 14th day of December, 2006.

/s

---

Susan J. Reinardy, Deputy Secretary  
Department of Health and Family Services



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

---

In the Matter of  
  
(petitioner)

PROPOSED  
DECISION

MPC-13/78330

---

**PRELIMINARY RECITALS**

Pursuant to a petition filed July 31, 2006, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Dane County Dept. of Human Services in regards to the discontinuance of the petitioner’s eligibility for the Wisconsin Partnership Program (WPP) and the determination of her cost share, a hearing was held on September 27, 2006, at Madison, Wisconsin. A hearing set for August 31, 2006, was rescheduled at the petitioner’s request. At the joint request of the parties, the record was held open for 30 days submission of arguments, i.e., 15 days for the petitioner to submit a final argument and 15 days for the county to submit a reply argument.

The issue for determination is whether the county agency correctly discontinued the petitioner’s eligibility for the Wisconsin Partnership Program because of her countable income and determined she must meet a \$1,207.56 monthly cost share.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(petitioner)

Represented by:

James A. Jaeger, Attorney  
Hill Glowacki Jaeger & Hughes LLC  
P O Box 3006  
Madison, WI 53704

Respondent:

Wisconsin Department of Health and Family Services  
Division of Health Care Financing  
1 West Wilson Street, Room 250  
P.O. Box 309  
Madison, WI 53707-0309

By: Paulette Penick, ESS I  
Dane County Dept Of Human Services  
1819 Aberg Avenue  
Suite D  
Madison, WI 53704-6343

**ADMINISTRATIVE LAW JUDGE:**

Kenneth D. Duren  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES #xxxxxxxx) is a 61 year-old resident of Dane County. She lives in a private residence. In July, 2006, she was eligible for the Wisconsin Partnership Program (WPP) and provided services by the county agency’s WPP contracted administering entity, ElderCare. See, Exhibit #1.
2. On July 7, 2006, the county agency first became aware that the petitioner had an additional stream of unearned income not previously reported, i.e., \$838 per month of Social Security Disability Insurance Benefits (DIB). Prior to this time, the agency had budgeted the petitioner’s income as \$798 per month in pension benefits and \$264 per month in annuity payments, i.e., \$1,062 per month gross income. See, Exhibit #1.
3. On July 10, 2006, the county agency issued a Notice to the petitioner informing her that her income had increased and that, beginning in August, 2006, she would be required to meet a “spend down requirement” of \$1,272.33 per month in order to continue to be eligible for coverage by the Wisconsin Partnership Program. See, Exhibit #2.

4. The agency computed the spend down referenced in Finding of Fact #3 by counting the petitioner's gross income as composed of \$838 (DIB benefit) + \$798 (Pension payment) + \$264 per month (Annuity payment) = \$1,959 (gross income). After subtracting the \$20 disregard and \$75 per month for health insurance premium costs, the agency determined that she had a net countable income for WPP purposes of \$1,864. This sum exceeds the Medicaid income limit for 1 person (\$591.67) by \$1,272.33, which is her monthly spenddown to continue eligibility. See, Exhibit #2.
5. On July 18, 2006, the agency re-computed the petitioner's WPP budget and determined that she had gross unearned income from the same three sources of \$1,900. After subtracting the \$20 disregard and \$80.77 per month for health insurance premium costs, the agency determined that she had a net countable income for WPP purposes of \$1,799.23. This sum exceeds the Medicaid income limit for 1 person (\$591.67) by \$1,207.56, which is her amended monthly spenddown (a/k/a "cost share") to continue eligibility. See, Exhibit #6.
6. On July 31, 2006, the petitioner filed an appeal with the Division of Hearings & Appeals contesting the spenddown determination made by the county agency.
7. On August 9, 2006, the Dane County Circuit Court, Probate Branch, by Peggy J. Young, Probate Court Commissioner, issued an ORDER APPROVING EXECUTION OF TRUST AND TRANSFER OF ASSETS TO TRUST in Case No. 05-GN-28. This Order "authorized and directed" the petitioner's guardian to execute the Trust transferring the payments to the petitioner from the DFAS Annuity into the Trust (i.e., the \$264 monthly annuity payment). See, Exhibit #8.
8. On August 9, 2006, the petitioner's son and guardian, (redacted), executed the (redacted) IRREVOCABLE TRUST (hereafter referenced as "the TRUST") as directed by the Probate Court, as settlor. The TRUST instrument expressly provided that the DFAS Annuity payments were to be paid into the TRUST; that [REDACTED] is the settlor and the trustee; that the petitioner and guardian relinquishes all right to alter, amend, revoke or terminate the agreement; that the beneficiary of the TRUST is (petitioner); that the TRUST property and all income is to be used for the beneficiary's benefit; that the TRUST is a purely discretionary supplemental care fund for her benefit to maintain her "...health care, support and general welfare..." when such care is not available from "...any public agency, office or department of the state where she lives or of the United States,..." or otherwise; and that upon her death, the trust terminates and any "remaining net trust assets shall first be paid to the State of Wisconsin or any other state paying Medicaid benefits to the beneficiary up to an amount equal to the total amount of Medicaid paid on behalf of the Beneficiary under the State Medicaid plan of Wisconsin or any other State paying such benefits to the beneficiary." See, Exhibit #8.
9. In July, 2006, the county agency had determined the petitioner's gross income (approximately \$1,062 per month) placed her in the so-called Group B category of WPP eligibility, resulting in a significantly lower monthly cost share/spenddown. When the DIB payment is included in her income, she became, in August, 2006, a Group C category member for WPP eligibility purposes, increasing the monthly cost share/spenddown to \$1,207.56.

### DISCUSSION

Wis. Admin. Code §HFS 103.06(7)(a)3 provides that for SSI-related MA applicants, the pertinent SSI standards on treatment of trusts shall apply. As a disabled adult, petitioner is an SSI-related applicant. Wis. Admin. Code §HFS 103.03(1)(c).

Wis. Stat. § 49.454 describes the treatment of trusts where assets of the MA applicant were used to form the trust and the trust was created by the applicant or a person with legal authority to act on the applicant's behalf. Wis. Stat. § 49.454(1)(a). If the trust is revocable, the corpus of the trust is counted against the MA asset limit. Wis. Stat. § 49.454(2). If the trust is irrevocable, but there are circumstances under which payment could be made for the benefit of the MA applicant, the portion of the trust that could be paid on the applicant's behalf is considered an available resource. Wis. Stat. § 49.454(3)(a).

There is an exception for a trust described in 42 U.S.C. § 1396p(d)(4). This exception is recognized by the State of Wisconsin. See, Wis. Stat. § 49.454(4). See also, Wis. Stat. § 880.19(5)(b). Such a trust is for a disabled person under age 65 with the provision that upon the person's death the state will receive the proceeds up to the amount of

MA paid by the state for the person. This is called a "special needs trust." It is one of three exceptions under federal law that are identified, generally, as "Medicaid Payback Trusts." As the Wisconsin Court of Appeals quoted, with approval, from the United States Code:

A trust containing the assets of an individual under age 65 who is disabled....and *which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.*

42 U.S.C. § 1396p(d)(4)(A) (emphasis added).

*Marjorie A.G. v. Dodge County DHS*, 261 Wis. 2d 679, ¶ 11 (Wis. Ct. App. 2003).

The petitioner asserts that 42 U.S.C. § 1396p(d)(4) controls, and has been more completely explained in a federal policy interpretation known as HCFA Transmittal No. 64, § 3259.7. The Department has acknowledged that this Transmittal, generally, provides the correct guidance for the treatment of irrevocable trusts in Wisconsin under Medicaid law. See, *Estate of Gonwa v. DHFS*, 265 Wis. 2d 913, ¶ 33 (Wis. Ct. App. 2003).

HCFA Transmittal No. 64, § 3259.7 A, provides, in the parts relevant here, as follows:

Special Needs Trusts. – A trust containing the assets of an individual under age 65 who is disabled (as defined by the SSI program in § 1614(a)(3) of the Act) and which is established for the sole benefit of the individual by a parent, grandparent, legal guardian of the individual, or a court is often referred to as a special needs trust. To qualify for an exception to the rules in this section, the trust must contain a provision stating that, upon the death of the individual, the State receives all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under your State Medicaid plan. In addition to the assets of the individual, the trust may also contain the assets of individuals other than the disabled individual.

When a trust is established for a disabled individual under age 65, the exception for the trust discussed above continues even after the individual becomes age 65. However, such a trust cannot be added to or otherwise augmented after the individual reaches age 65. Any such addition or augmentation after age 65 involves assets that were not the assets of an individual under age 65. Thus, those assets are not (Note: word omitted here in text) be subject to the exemption discussed in this section.

To qualify for this exception, the trust must be established for a disabled individual, as defined in § 1614(a)(3) of the Act. When the individual in question is receiving either title II or SSI benefits as a disabled individual, accept the disability determination made for those programs.

HCFA Transmittal No. 64, § 3259.7 A.

Attorney Jaeger further argues that prospective income, like the annuity payments at issue here, may be assigned directly to the irrevocable special needs trust. When using such an instrument, this prospective income stream is treated as an asset under the federal schema, just like under the third exception classification, known as "Miller Trusts" (a/k/a, "Miller – Type or Qualifying Income Trusts [QIT]"). This interpretation is confirmed by Transmittal No. 64. See, HCFA Transmittal No. 64, § 3259.7 B 1; and see, § 3259.7 C 3. The rules for the treatment of income assigned to Miller Trusts also apply to the other two exception categories, "Special Needs Trusts" and "Pooled Trusts". *Ibid.*

The Transmittal makes it clear that a prospective income stream diverted directly to an irrevocable special needs trust is treated as an unavailable asset for Medicaid *eligibility determination* purposes. See, HCFA Transmittal No. 64, § 3259.7 B; § 3259.7 C.

However, the Transmittal also provides that all income, including the income stream diverted into the three types of irrevocable payback trusts allowed, is to be used for *post-eligibility* purposes. See, HCFA Transmittal No. 64, §

3259.7 C 5. The width and breadth of the meaning and applicability of this provision is not fully described in the Transmittal, but it notes that the total income, including the diverted income, may be used as the starting point for post-eligibility computation to arrive at patient liability or recipient cost shares for institutionalized persons or persons receiving community-based waiver services, after allowances for personal needs, spousal or family support allowances, and home maintenance allowances, for example. HCFA Transmittal No. 64, § 3259.7 C 5b.

In addition, the Wisconsin Court of Appeals, has affirmed the right of a guardian, with court approval, to transfer annuity payments (derived from a legal settlement with the federal government under the Vaccine Compensation Act) to be poured directly into an irrevocable Medicaid Payback Trust under Wisconsin probate statutes. See, *Marjorie A.G. v. Dodge County DHS*, 261 Wis. 2d 679, ¶ 1 (Wis. Ct. App. 2003).

The agency has responded that the petitioner's arguments "...turn the MA rules upside down and allow anyone who has to make a spenddown have someone appointed to be their guardian and to divert however much sums of income they wanted to divert to specially created trusts." Supervisor Penick also asserts that the petitioner's assurance that "...what's left at the time of their death goes to the state" means nothing if the guardian has no limits as to what they can spend it on."

The agency representative posits a commonsense, and reasonable "good public policy" argument. But the federal rules in 42 U.S.C. 1396p(d)(4), as incorporated by reference in Wis. Stat. § 49.454(4) and interpreted in HCFA Transmittal No. 64, § 3259.7, clearly allow for the diversion of specific income streams into an irrevocable special needs trust, irrevocable pooled trust, or irrevocable Miller – type trust. In addition, recent Wisconsin caselaw also supports the assertion of the petitioner that the Department embraces HCFA Transmittal No. 64 as binding on the Medicaid Program in the interpretation of the treatment of trusts. See, *Estate of Gonwa v. DHFS*, 265 Wis. 2d 913, ¶ 33 (Wis. Ct. App. 2003). The law provides the limitations for such diversions. The person must be disabled, under 65 and otherwise meet the criteria. Not just any recipient can perform this conversion of income to an excluded asset. In addition, the facts in a given case impose a limitation as well. The petitioner cannot transfer all of her income into such a trust; she still lives in the community and has a cost of living for which the funds are necessary.

The agency also referenced the specter of "divestment"; but that issue is not before me in this case. The agency never found any divestment occurred here. And in any event, HCFA Transmittal 64, § 3259.7 C 3, casts doubt on whether this small income diversion would be a divestment event. The federal policy statement allows for such trust funds to be used for medical cares, administrative fees of the trust, income taxes owed by the trust, attorney's fees for the trust, food, clothing or mortgage payments. In any event, in this case the monthly diversion of \$264, *even if it were a divestment*, would not affect eligibility at all being far less than the average monthly cost of nursing home care in Wisconsin, i.e., \$5,339. See, *Medicaid Eligibility Handbook*, § 4.7.5. Likewise, see also the "multiple divestment" policy, at *MEH*, § 4.7.6.

I have reviewed the record very carefully. The petitioner is under 65, and adjudicated disabled. Her guardian, approved and directed by a Circuit Court, has executed an irrevocable trust providing for the transfer of the annuity payments directly to the TRUST. The TRUST provides that the trust *res* will be used for the benefit of the petitioner/recipient, and that at death any funds remaining will go to repay MA to the extent MA has paid her bills. No more is required to establish that this is a valid special needs trust under federal law. See, 42 U.S.C. 1396p(d)(4); Wis. Stat. § 49.454(4); HCFA Transmittal No. 64, § 3259.7 A. Accordingly, the \$264 monthly annuity payment is exempt from counting as income for MA eligibility (and therefore WPP eligibility) purposes. For eligibility testing, her gross monthly income is \$1,636.

The Department has provided online written policy guidance to its Wisconsin Partnership Program (WPP) eligibility determination agents, like the county agency here, as well as to recipients, for the determination of WPP eligibility, and post-eligibility determinations like cost sharing (i.e., the spenddown to be required of an otherwise eligible individual) as follows:

#### **4. How is Medicaid financial eligibility determined?**

There are three eligibility group mechanisms. Think of them as doorways to eligible status.

##### ***Group A.***

Some people are *categorically eligible*. They already receive Medicaid through

Supplemental Security Income (SSI) and must have had a disability determination from the Social Security Administration.

In addition, there are several SSI-related categories of special Medicaid eligibility, including 503, Widow/Widower, and Adult Disabled Child. These are people who used to get SSI, but lost it when their social security check increased. These cases are unusual and the rules are complex, so consult with a county economic support worker if you find someone this seems to fit.

**Group B.**

Some people have countable income lower than the special income limit. The special income limit is \$1737 per month this year. These people are also automatically eligible, but subject to a *post-eligibility* test for cost sharing. The Economic Support worker calculates personal, spousal, dependent and excess housing cost allocations and determines the final cost share, if any.

**Group C.**

Some people with countable income over \$1737 have medical expenses so high that they become eligible. These expenses must reduce their countable income to less than the *Medically Needy Income Limit*, currently \$591.67. This is known as *spending down* to eligibility. For Partnership participants, the monthly medical and remedial expenses are assumed to equal the capitation rate when determining eligibility, but not when determining the *spend down* amount.

Like Group B participants, after determining eligibility, further calculations are needed to determine what spousal and dependent allocations can be made, and determine the final cost share, if any. Group C participants do not receive an allowance for excess housing costs. After these allocations are made, the *spend-down* amount is the remaining countable income that is greater than the Medically Needy Income Limit. The *spend-down* is paid in to the contract agency.

Let's consider some people who might fit into each of these groups. For the following basic examples, assume each person is not married, has no dependents, and has countable assets of \$2000 or less.

- *Mr. Anderson was disabled since birth and receives an SSI check every month.*
- *Ms. Blades receives a pension and social security totaling \$1000 every month.*
- *Mr. Clark receives a pension, social security, and rents on his duplex totaling \$1800 every month.*

<http://dhfs.wisconsin.gov/WIpartnership/pdf-wpp/EligibilityQuestions.pdf>; and see also for general information, <http://dhfs.wisconsin.gov/WIpartnership/summary.htm>.

Based upon the clear instructions in HCFA Transmittal No, 64 § 3259.7 C 5, that the income poured into the trust is to be used for “post-eligibility purposes”, and the clear use of the identical term under the policy statement above for Group B determinations, I can only conclude that the correct outcome here is that the petitioner’s gross monthly income for *eligibility determination* purposes was \$1,636, making her eligible under Part B, and her correct gross monthly income for *post-eligibility purposes* under Group B is \$1,900. See, as fully quoted above, <http://dhfs.wisconsin.gov/WIpartnership/pdf-wpp/EligibilityQuestions.pdf>.

The matter will be remanded to the county agency to review and re-determine the petitioner’s cost share as a Group B eligible recipient with post-eligibility gross monthly income of \$1,900.

**CONCLUSIONS OF LAW**

- 1) That the petitioner's annuity income stream of \$264 per month is not countable for Wisconsin Partnership Program eligibility purposes; but it is to be counted for post-eligibility purposes including cost share computation.
- 2) That the matter must be remanded for review and re-determination by the county agency treating the petitioner as a Group B eligible Wisconsin Partnership Program recipient with gross income for post-eligibility purposes of \$1,900 per month.

**NOW, THEREFORE, it is**

**ORDERED**

That the matter is remanded to the county agency with instructions to: rescind the determination of the petitioner's WPP cost share/spenddown taken on July 10, 2006; review and re-determine her eligibility counting her gross monthly income as \$1,636 for eligibility purposes; review and re-determine her post-eligibility monthly cost share counting her gross monthly income for this post-eligibility purpose as \$1,900; with written notice. These actions shall be completed within 10 days of the date of the issuance of a Final Decision of the Secretary of the Department of Health & Family Services, *if and only if*, this Proposed Decision is adopted by the Secretary in its entirety.

**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 IMPLEMENTED 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 & Family Services for final decision-making.

The process relating to Proposed Decision is described in WI Stat § 227.46(2).

Given under my hand at the City of Madison,  
Wisconsin, this 1st day of November, 2006.

/s

\_\_\_\_\_  
Kenneth D. Duren  
Administrative Law Judge  
Division of Hearings and Appeals  
617/KDD