



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MQB/170244

PRELIMINARY RECITALS

Pursuant to a petition filed November 23, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waupaca County Department of Social Services in regard to Medical Assistance, a hearing was held on January 05, 2016, at Waupaca, Wisconsin.

There were two case numbers involving this petitioner, MGE/170243 and MQB/170244. Although the petitioner sent in one request for hearings, and the parties' documents only listed one case number, the hearing and the record involved both cases numbers. The Division of Hearings and Appeals opened two cases because there were two denials. One was a denial for institutional Medicaid and the other was a denial for Medicare Premium Assistance. Both programs have an asset limit, and the issue is whether a large trust put the petitioner over the asset limit for both programs. All of the documents were accepted into the record under both case numbers. The petitioner did not realize that there were two cases, and was willing to withdraw one appeal, however, I am not certain that the attorney knew that there were two denials. For these reasons, I am addressing each case number separately.

The issue for determination is whether a trust, created by the petitioner's wife's will, at her death in January 2015, with joint assets from the petitioner's marriage is an asset for QMB eligibility.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By [Redacted]

Waupaca County Department of Social Services
811 Harding Street

Waupaca, WI 54981-2087

ADMINISTRATIVE LAW JUDGE:  
Corinne Balter  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Waupaca County.
2. On September 17, 2015 the agency received the petitioner's application for institutional Medicaid (MA) coverage.
3. After receiving the petitioner's application, the agency requested additional verification. The petitioner, through his attorney, timely provided the agency the requested verification.
4. On November 18, 2015 the agency sent the petitioner a notice that they denied the petitioner's application for institutional MA coverage because his assets were over the \$2,000 asset limit. The agency counted the petitioner's assets as follows:
  - a. \$688,011.88 – trust assets
  - b. \$4,522.70 – burial assets
  - c. \$1,758.23 – checking account
  - d. \$152.35 – savings account
5. The petitioner's wife died on January 18, 2015. When his wife died the household's property, which included the petitioner's property, was transferred to the [REDACTED] via the petitioner's wife's will. This is an irrevocable trust. The petitioner's and his wife's daughter is the trustee. The trust allows the trustee "absolute discretion to determine whether to distribute or not to distribute income and principal for [the petitioner's] benefit." Upon the petitioner's death, "all of the balance remaining in trust shall be distributed to [their] daughter," who is also the trustee.
6. Although this trust is titled a "special needs trust," it does not meet the requirements of a special needs trust under the Medicaid rules because neither the petitioner nor his spouse were determined to be disabled before the age of 65 and there is no language that any remainder left in the trust after the petitioner's death would first go to the State to cover the costs of the petitioner's Medicaid. The inventory value of the wife's estate was \$688,011.88. This is also the amount that the agency determined to be in the [REDACTED]
7. On November 23, 2015 the Division of Hearings and Appeals received the petitioner's Request for Fair Hearing.

### DISCUSSION

QMB is a Medicare Savings program. Medicare Savings programs are a sub-program of MA in which eligible participants have either their Medicare Part A, Part B, or Part A and B, premiums paid by the MA program even though the participants are not eligible for MA. See MA Handbook, Appendix 32.1. It is mandated by the Wis. Stat., §49.468(1). The asset limit for the Medicare Savings programs for an individual range from \$4,000 to \$7,280. MA Handbook, Appendix 32.6. Because this is a MA program, the countable asset determination is the same as any other MA program.

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). The Medicaid Handbook summarizes Wis. Stat. §49.454, and goes on to state:

these policies do not apply to irrevocable **trusts created by the 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*), § 16.6.4.2.

Wis. Stat. §49.454 closely mirrors 42 U.S.C. 1396p(d)(3). Both similarly exclude trusts created by will.

The only issue is whether agency correctly determined that over \$600,000 in an irrevocable trust, created by the petitioner's wife's will, was an available asset barring the petitioner's MA eligibility. The trust at issue was created by the petitioner's wife's will. She died in January 2015. At the time of her death, the total marital property transferred to this irrevocable trust. The petitioner and his late wife's daughter is the trustee. The trust allows the trustee "absolute discretion to determine whether to distribute or not to distribute income and principal for [the petitioner's] benefit." Upon the petitioner's death, "all of the balance remaining in trust shall be distributed to [their] daughter," who is also the trustee. I further note that the petitioner's daughter testified that her parents met in college, married, and had her, and grew their life together.

If there was not a distinction for trusts created by a will, then there would no dispute that this trust was an available asset. However, the petitioner's attorney is correct that the policy manual and statutes exclude trusts created by will. There is no question that this trust was created by the petitioner's wife's will, and thus I must conclude that it is not an available asset. This is consistent with ALJ Tedesco's decision in MGE/166562.

I note that the notice stated that the petitioner was over the program income limit, however, neither party addressed this issue during the hearing. Given that the assets were incorrectly determined, I am remanding this case back to the county to re-determine the petitioner's eligibility if the petitioner still wants this coverage.

### **CONCLUSIONS OF LAW**

The county incorrectly determined that a trust, created by the petitioner's wife's will, at her death in January 2015, with joint assets from the petitioner's marriage is an asset for Medicare Savings Plan Eligibility.

**THEREFORE, it is**

**ORDERED**

This case is remanded back to the county for the county to determine if the petitioner is still seeking coverage by a Medicare Savings Plan. If so, the county must re-determine the petitioner's assets without the trust. If the petitioner is asset eligible, the county must then determine whether he is income eligible. The county shall comply with this order 10 days from my date of decision. In all other respects this 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**

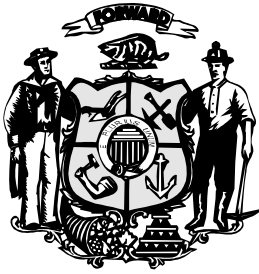
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those 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 Milwaukee,  
Wisconsin, this 8th day of February, 2016

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\sCorinne Balter  
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 February 8, 2016.

Waupaca County Department of Social Services  
Division of Health Care Access and Accountability

