



FH  
[REDACTED]

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

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In the Matter of

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

**DECISION**  
Case #: MGE - 198180

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**PRELIMINARY RECITALS**

Pursuant to a petition filed on March 2, 2020, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department regarding Medical Assistance (MA), a hearing was held on March 24, 2020, by telephone.

The issue for determination is whether the agency correctly determined that the petitioner's testamentary trust was an available asset that placed her over the MA asset limit.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

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

Respondent:

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

By: [REDACTED], Fair Hearing Coordinator  
Kenosha County Human Service Department  
8600 Sheridan Road  
Kenosha, WI 53143

**ADMINISTRATIVE LAW JUDGE:**

Kelly Cochrane  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County.

2. On July 1, 2017 petitioner's husband passed away and left half of his estate (\$84,061.54) to the petitioner via an irrevocable testamentary trust.
3. On January 2, 2020 petitioner applied for MA.
4. On February 25, 2020 the agency issued a notice to petitioner advising her that she was denied MA due to being over the asset limit.

### DISCUSSION

The only issue presented by the parties at the hearing is whether the agency properly determined that the petitioner is over the asset limit for MA due to the agency counting the petitioner's interest in the testamentary trust as a countable, available asset.

A person cannot receive MA if his/her available assets exceed \$2,000. Wis. Admin. Code, §DHS 103.06(1)(a); Wis. Stat. §§ 49.46(1) and 49.47(4). The agency denied petitioner's MA because it contends that her asset of the testamentary trust is available and over the \$2000 limit. It based its opinion on MA rules holding that when an applicant or her spouse sets up a trust with either of their resources, the trust's assets are counted when determining eligibility if there are circumstances under which the applicant could receive money or assets from the trust. *See Medicaid Eligibility Handbook (MEH)*, §16.6.4.2. This policy follows from Wis. Stat. §49.454.

However, Wis. Stat. §49.454(1)(a), indicates that the statute's provisions do not apply to trusts established by will. The *MEH* section the agency relies on also reflects this: "The policies [attributing a trust's assets to the applicant] 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* §16.6.4.2. The trust in question was set up by a will. While it allows the trustee to distribute principal or income to the petitioner, it does not require this. Thus, Wis. Stat. §49.454 does not make the trust an available asset and the department cannot deny her eligibility on that basis. This is also consistent with previous DHA decisions in MGE/166562, MQB/170244, and MGE/198180

I further refer to the Social Security Program Operations Manual System (POMS) policy which describes when a trust is a countable resource under SI 01120.200 (available online at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0501120200>). Under SI 01120.200,

Trust principal is a resource for SSI purposes if a trust beneficiary (applicant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his or her food or shelter needs. The trust principal is also a resource for SSI purposes if the trust beneficiary can direct the use of the trust principal for his or her support and maintenance under the terms of the trust.... Additionally, if the trust beneficiary can sell his or her beneficial interest in the trust, that interest is a resource.

As the petitioner does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for her own support and maintenance, the trust principal is not her resource for SSI purposes, and should not be counted for her MA eligibility here. There may be an issue of divestment, but that issue was not raised and will not be addressed herein.

### CONCLUSIONS OF LAW

The agency incorrectly determined that the petitioner's testamentary trust was an available asset that placed her over the MA asset limit.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to county to take all administrative steps necessary to re-determine the petitioner's MA eligibility effective with her January 2, 2020 application. The agency may not count the testamentary trust as a countable asset in making that determination. The agency shall issue a new notice of decision regarding petitioner's MA eligibility with new appeal rights. These actions shall be completed within 10 days of the date of this decision.

**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, 4822 Madison Yards Way 5<sup>th</sup> Floor, 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.

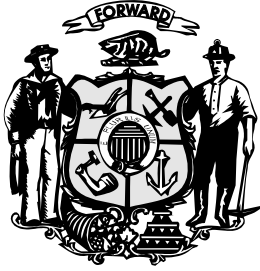
**APPEAL TO COURT**

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, **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 May, 2020

\s \_\_\_\_\_  
Kelly Cochrane  
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 May 8, 2020.

Kenosha County Human Service Department  
Division of Health Care Access and Accountability