



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
Case #: MGE - 190017

PRELIMINARY RECITALS

Pursuant to a petition filed on September 20, 2018, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the La Crosse County Department of Human Services (County agency) regarding Medical Assistance (MA). Hearings were held on December 3, 2018 and January 8, 2019, by telephone. The hearing was rescheduled once at the petitioner’s request from October 29, 2018 and adjourned a second time from December 3, 2018 to allow the parties additional time to submit testimony and evidence.

The hearing record was held open until February 6, 2019 to allow the parties to submit post-hearing briefs. The petitioner’s legal counsel submitted his written argument on January 29, 2019 and the County submitted its response on February 6, 2019. Petitioner’s legal counsel submitted a written rebuttal on February 14, 2019 after the record was closed. As the arguments raised in the petitioner’s February 14, 2019 letter are duplicative of the arguments brought forth by the petitioner’s counsel at the hearing and in his initial post-hearing submission, the February 14, 2019 letter was not included as part of the record.

The issue for determination is whether the County agency correctly denied the petitioner’s application for institutional Medicaid based upon a failure to provide requested verification of Trust assets.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By:

La Crosse County Department of Human Services

300 N. 4th Street
 PO Box 4002
 La Crosse, WI 54601

ADMINISTRATIVE LAW JUDGE:
 Kristin P. Fredrick
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a former resident of Clark County who passed away on February 13, 2018. Prior to his death, the petitioner was married to [REDACTED] and residing in a skilled nursing facility while his wife resided in the community.
2. The petitioner applied for institutional medical assistance on October 17, 2017. (Resp. Ex. 2)
3. On or about November 8, 2017 in response to a request for verification, the county agency received a copy of the [REDACTED] Irrevocable Trust (the "Trust"). The Trust was created in 2008 by the petitioner and his wife and was funded with their own assets. (Testimony of [REDACTED] 1/19/19; Resp. Exs. 3 and 12)
4. On November 28, 2017 the county agency denied the petitioner's MA application based upon a determination that the Trust was revocable thereby making the Trust assets countable and further finding that the Trust assets exceeded the program's asset limit. (Resp. Ex. 4)
5. The petitioner appealed the November 2017 denial to the Division of Hearings and Appeals (DHA) on December 21, 2017. A hearing regarding that appeal was held on March 28, 2018. The hearing record was held open to give the petitioner an opportunity to submit documentation of the Trust assets, but no additional documentation was submitted by the petitioner. However, post-hearing the agency conceded that the Trust was irrevocable. Based upon the agency's concession, a Decision was issued on July 6, 2018 remanding the matter to the agency to rescind the November 2017 denial. DHA Decision, MGE-185327 (7/6/18). (Resp. Ex. 6)
6. Based upon guidance that the DHS Calls Center emailed to the county agency in May 2018 and following the DHA July 6 decision remanding the matter to the agency, on July 12, 2018, the county agency sent a Notice of Proof Needed to the petitioner's representative, requesting specifically, "a detailed listing of what assets are held in the trust, when they were added, along with a detailed accounting record of the trust are needed to determine eligibility." The due date for the requested proof was July 23, 2018. (Resp. Exs. 7 and 8)
7. On July 16, 2018 a paralegal from the [REDACTED] requested on behalf of the petitioner an extension on the due date for providing the requested verification. The agency extended the due date to August 3, 2018. (Resp. Exs. 1 and 9)
8. On August 2, 2018 the [REDACTED] sent a fax to the agency requesting an extension of the August 3, 2018 deadline to provide requested proof/verification. The extension request was not immediately uploaded to the agency file, however, and on August 6, 2018 an automatic Notice of Denial of Benefits denying the application was sent out. However, the matter was reopened after the [REDACTED] brought the extension request to the agency's attention. (Resp. Exs. 10, 11 and 14)
9. On August 7, 2018 a list of assets held by the Trust and dating back to the Trust inception in 2008 was submitted to the agency. (Resp. Ex. 12)

10. On August 13, 2018 the agency advised the [REDACTED] that a final extension would be granted and issued another Notice of Proof Needed on August 14, 2018 extending the deadline to August 23, 2018. Specifically, the Notice included the following statement:
- A final extension has been granted for verification requested. EXTENDED AND FINAL DUE DATE: 8/23/18. The agency requests a COMPLETE listing of all of the assets that have been added/removed from the trust, the dates the transfers occurred, and the values of the assets. A complete and detailed accounting record of the trust is required, which includes transaction histories from the assets held in the trust.
- (Resp. Ex. 14)
11. On August 22, 2018 the [REDACTED] submitted to the agency the following documentation: (a) copy of a May 1, 2014 settlement statement for vacant land that resulted in payment to the petitioner and his wife in the amount of \$59,109.94 in exchange for their life estate; and (b) copies of Fiduciary Income Tax Returns for the [REDACTED] Irrevocable Trust for the years 2011 through 2017. (Resp. Ex. 15)
12. Neither the [REDACTED] nor the petitioner's representatives requested another extension of time to produce additional documentation after the August 22 submission until after the August 23, 2018 deadline had passed.
13. On August 27, 2018 the agency sent petitioner a Notice of Denial of Benefits denying the application because all of the requested verification necessary to make an eligibility determination was not received. Specifically, the county economic support supervisor testified that based upon the documentation received and the lack of detailed accounting she could not determine whether Trust income had been distributed, if principal payments had been paid out and/or whether a divestment had occurred. The county worker also testified that the documentation submitted omitted information related to a bank account and a parcel of land owned by the Trust and therefore she did not have all of the information needed to make an eligibility determination. (Testimony of [REDACTED] 12/3/18; Resp. Ex. 16)
14. On August 28, 2018 a list of assets making up the Trust as of August 2018 was submitted to the county agency. (Resp. Ex. 18)
15. On August 30, 2018 a paralegal from the [REDACTED] contacted the county agency and advised that additional documentation to support the petitioner's application and the verification requested was now available. However, the agency worker advised that the application was denied and refused to grant an extension of time to submit additional documentation. (Testimony of [REDACTED], 1/8/19; Resp. Ex. 1)
16. The petitioner's representative(s) appealed the August 27, 2018 denial notice to the Division of Hearings and Appeals on September 20, 2018.

DISCUSSION

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. *Medicaid Eligibility Handbook (MEH)*, § 18.4. Assets are counted if they are "actually available" to the applicant. Wis. Admin. Code, § DHS 103.06(1)(a). Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. *MEH*, §18.4.1. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility. See, Wis. Stat. §49.455(6)(b); *MEH*, §18.4.3. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible. In the present matter,

the petitioner applied for institutional Medicaid on October 17, 2017. The petitioner was found not eligible in November 2017 due to assets in excess of the program limit when the county agency counted assets from an irrevocable trust.

Whether assets from a trust are counted towards the asset limit, depends upon the nature of the trust and how funds from the trust are distributed. 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).

Section 49.454(3)(a), of the Wisconsin Statutes states that if the irrevocable trust's assets or income can be used for the applicant's benefit, some or all of the trust's assets or income will be considered available when determining eligibility for medical assistance:

If there are circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to or for the benefit of the individual could be made is considered a resource available to the individual, and payments from that portion of the corpus or income:

1. To or for the benefit of the individual, are considered income of the individual.
2. For any other purpose, are considered transfers of assets by the individual subject to s. 49.453.

Wis. Stat. § 49.454(3)(a). In cases where a trust is established with resources of the individual or their spouse, a portion of the principal and/or income to be paid to the individual under the terms of the trust may be considered non-exempt assets and available to the individual. *MEH*, §16.6.4.2.

Moreover, a person cannot give away their assets in order to get under the asset limit. Doing so is considered a divestment, which occurs if they or someone acting on their behalf "disposes of resources at less than fair market value" within a "look back date" period. Wis. Stat. § 49.453(2); *MEH*, §17.2.1. The look back date is five years before the latter of when an applicant was institutionalized or when they applied for medical assistance. Wis. Stat. § 49.453(1)(f); *MEH*, § 17.5.3. When someone improperly divests their assets, they become ineligible for MA for a number of days, which is determined by dividing the amount given away by the statewide average daily cost to a private pay patient in a nursing home when the person applied. Wis. Stat. §49.453(3); Wis. Admin. Code, § DHS 103.065(5)(b); *MEH*, § 17.5.

Given the above guidance, agencies justifiably require documentation of when/how trust assets are distributed in making their MA eligibility determination and whether a divestment has occurred. Medicaid rules therefore require recipients to verify assets. Wis. Admin. Code, § DHS 102.03(3)(h). According to Wis. Admin. Code, § DHS 102.03(1):

An application for MA shall be denied when the applicant or recipient is able to produce required verifications but refuses or fails to do so....If the applicant or recipient is not able to produce verifications, or requires assistance to do so, the agency may not deny assistance but shall proceed immediately to verify the data elements

Agencies must allow at least 30 days from the date of application or 10 days from the date of the request, whichever is later, to verify the information. *MEH*, § 20.7.1.1. *see also* Wis. Admin. Code § DHS 102.03(1).

Medical assistance policy instructs when to approve or deny an application:

Begin or continue benefits when:

- The member provides requested verification within the specified time limits and is otherwise eligible.
- Requested verification is mandatory, but the member does not have the power to produce the verification and s/he is otherwise eligible

MEH, §20.8.1.

Deny or reduce benefits when all of the following are true:

- The member has the power to produce the verification.
- The time allowed to produce the verification has passed.
- The member has been given adequate notice of the verification required.
- You need the requested verification to determine current eligibility. Do not deny current eligibility because a member does not verify some past circumstance not affecting current eligibility

MEH, § 20.8.3. Ultimately, the applicant has the responsibility to produce verification. *Id.* at § 20.5. In addition, the applicant has the responsibility to resolve questionable information. *Id.* And finally, the applicant has the duty to articulate difficulty obtaining information and to request assistance from the agency if he/she is having difficulty verifying information. *Id.*, at § 20.1.4.

The underlying facts in this matter are largely undisputed. The petitioner applied for institutional Medicaid in October 2017. The petitioner disclosed a Trust as part of the application. Although the Trust was titled “irrevocable”, the county agency denied the petitioner’s application based upon their determination that the Trust was actually revocable and their finding that the Trust assets were available and countable thereby putting the petitioner over the program asset limit and financially ineligible for MA. The petitioner appealed and a hearing was held in March 2018. The hearing record was held open to allow the petitioner’s legal counsel to submit additional documentation in support of the petitioner’s financial eligibility. While the matter was held open, the county agency advised that after consultation with the DHS Call Center they were conceding that the Trust was irrevocable. Thereafter, a Decision was issued on July 6, 2018 remanding the matter to the county agency to rescind the denial based upon the agency’s concession that the Trust was irrevocable. (Resp. Ex. 6)

On July 12, 2018 the county agency issued a Notice of Proof Needed and requested “a detailed listing of what assets are held in the trust, when they were added, along with a detailed accounting record of the trust are needed to determine eligibility.” (Resp. Ex. 8) The deadline for supplying the requested verification was originally July 23, 2018 but was extended twice at the petitioner’s request. On August 14, 2018 a Notice of Proof Needed was sent to the petitioner extending the deadline for a second time and requiring submission of the requested verifications by August 23, 2018 stating as follows:

A final extension has been granted for verification requested. EXTENDED AND FINAL DUE DATE: 8/23/18. The agency requests a COMPLETE listing of all of the assets that have been added/removed from the trust, the dates the transfers occurred, and the values of the assets. A complete and detailed accounting record of the trust is required, which includes transaction histories from the assets held in the trust.

(Resp. Ex. 14).

At the hearing in the most current appeal, the county worker testified that she needed a list of the Trust assets and an accounting of the Trust assets to determine whether the assets should be counted or whether a

divestment had occurred. The county worker acknowledged that funds existing in the Trust more than five years prior to the petitioner's application would not be counted towards the petitioner's asset limit nor considered as part of a divestment. The county worker further testified that at the time of the August 27 Notice of denial, she was aware that the list of Trust assets omitted reference to a bank account at Abby Bank in Abbotsford and that she was aware there was no documentation related to the sale of the parcel of land previously held by the Trust. It is not disputed that instead of seeking further clarification from the petitioner's representatives, the worker testified that the county agency decided to deny the application on August 27, 2018 based upon the lack of requested verification produced, including specifically, no list of assets currently held in the Trust or a detailed accounting of the assets in the Trust.

The petitioner's legal representative was all aware as early as May 2018 that the County agency would need a detailed accounting of Trust assets, including whether income from the Trust was paid to the petitioner per the letter of the Trust or whether any assets had been added to the Trust in the last five years that may be considered a divestment. Moreover, the hearing record in the petitioner's prior appeal was held open to allow the petitioner's legal counsel to submit documentation of the Trust assets that would be necessary to determine if the petitioner was financially eligible for institutional Medicaid. Yet, no documentation was submitted at that time.

The county agency granted two extensions of time for the petitioner to submit the requested proof following the July 12, 2018 Notice of Proof Needed being sent. After two extensions, the deadline for submitting the requested proof was set for August 23, 2018. The petitioner's representatives do not assert that they were unable to produce the requested proof or verification documentation or that it was unavailable to them. Rather, the petitioner's financial representative testified that she had difficulty compiling ten years of documentation by the August 23, 2018 deadline although it was apparently compiled by August 30, 2018. The petitioner's representatives presented no evidence that they advised the agency that they were having difficulty compiling the requested documents or that they requested an extension of the August 23, 2018 deadline before it passed.

Petitioner's counsel argues that the agency's request for ten years of documentation was excessive, unreasonable, and impliedly unnecessary. Further, the petitioner's counsel asserts that the county agency had all of the information necessary to make a determination of eligibility and even if assets were omitted, the county worker was aware of at least part of those assets and chose not to seek further clarification. Alternatively or additionally, the petitioner's counsel asserts that even assuming all of the assets had been listed, their value was far below the program asset limit. The petitioner's legal counsel asserts that the funds in the Trust at the time of the denial were the same funds used to create the Trust in 2008 and therefore exempt. However, that is not entirely accurate because Trust assets included real estate that had been sold within the last five years. Accordingly, the county agency was justified in seeking verification and an accounting of those assets in order to complete an eligibility determination, including identifying whether a divestment occurred.

Contrary to the petitioner's legal counsel, I do not find that that the county agency abused their authority by requiring the petitioner's representatives to produce the requested documentation and specifically a detailed accounting. As the petitioner's legal counsel would or should be aware, even assets in an irrevocable trust could be considered non-exempt assets and potentially available to the petitioner "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...". *MEH*, §16.6.4.2. The county agency was simply requesting the documentation necessary to determine whether the petitioner was financially eligible for institutional Medicaid and if so, whether a divestment had occurred, which is their job. The denial in this matter could easily have been avoided had the petitioner's representatives or his legal counsel produced a detailed accounting of the Trust assets during the last five years. At no time did the petitioner's representatives or the [REDACTED] express confusion to the agency as to what was meant by a

“detailed accounting” nor was this asserted at hearing. So, it is safe to assume that the petitioner’s representatives and his legal counsel should have been well aware of what was being requested by the county agency as of July 12, 2018, if not earlier (based upon the communications that occurred in the prior appeal). Regardless, the simple fact remains that neither the petitioner’s representatives nor his legal counsel produced a detailed accounting of the Trust assets to the county agency before the deadline. Instead, the petitioners merely produced evidence of what assets existed in the Trust as of May 2008, along with evidence that a portion of real estate held in the Trust had been sold in 2014, and evidence of the yearly tax returns showing the Trust annual income.

It wasn’t until after the August 23, 2018 deadline for providing the requested proof had already passed and a denial already issued that an itemized list of assets held in the Trust current as of August 2018 was even submitted. (Resp. Ex. 18) There was no explanation offered by the petitioner’s representatives as to why this information was not submitted prior to the August 23, 2018 deadline. However, even if it had, it still does not equate to a detailed accounting of the Trust assets because it fails to explain or account for the changes that occurred between the assets listed as of 2008 and those listed in the Trust as of 2018.

Finally, as was disclosed at the hearing, during their preparation for hearing the petitioner’s representatives and legal counsel discovered additional funds (from the sale of Trust real estate in 2017) that should have been included and counted as part of the Trust assets. Had the petitioner’s representatives and legal counsel put forth the same amount of effort towards compiling documentation requested by the county agency prior to the denial as they did to prepare documents for this appeal hearing, there may not have been a second denial and the present appeal may have been avoided.

The petitioner’s representatives, including legal counsel, had the power and ability to produce the requested verification. They were in sole control of the documents and there is no evidence or testimony presented to demonstrate that the petitioner’s representatives were unable to provide the requested proof. Yet, the petitioner’s representatives failed to produce a detailed accounting of the Trust assets by the August 23, 2018 deadline and did not request additional time to produce more documents until after the verification deadline had passed. I find that the petitioner’s representatives and legal counsel were given ample notice of the type of verification required, i.e. a detailed accounting, and were afforded adequate time to comply. This information was necessary to determine the petitioner’s eligibility. Therefore, I find that based upon a preponderance of evidence, the petitioner’s representatives have failed to establish that the county agency erred in denying the petitioner’s application for institutional Medicaid due to their failure to submit requested proof of verification and documentation, including specifically a detailed accounting of Trust assets.

CONCLUSIONS OF LAW

The county agency correctly denied the petitioner’s application for institutional Medicaid based upon a failure to provide requested verification and detailed accounting of assets in an irrevocable trust.

THEREFORE, it is

ORDERED

The petitioner’s appeal is hereby 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, 4822 Madison Yards Way, 5th Floor North, 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 Madison,
Wisconsin, this 11th day of March, 2019

\s _____
Kristin P. Fredrick
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on March 11, 2019.

La Crosse County Department of Human Services
Division of Health Care Access and Accountability

