



FH  
[REDACTED]

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

---

In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

**DECISION**  
Case #: MGE - 210403

---

**PRELIMINARY RECITALS**

Pursuant to a petition filed on September 22, 2023, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Burnett County Department of Social Services regarding Medical Assistance (MA), a hearing was held on November 8, 2023, by telephone. Hearing requests for FoodShare and Medicare Savings Programs (QMB) were voluntarily withdrawn at hearing, and dismissals of those actions will be issued separately from this Decision.

The issue for determination is whether the respondent correctly determined that petitioner's trust is an excludable asset only during the period of time that petitioner and/or his spouse reside in the home that constitutes the trust's corpus.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

**Petitioner:**

[REDACTED]  
[REDACTED]  
[REDACTED]

**Petitioner's Representative:**

[REDACTED]

**Respondent:**

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

By: Dayna Stellbrecht  
Burnett County Department of Social Services  
7410 County Road K, #280  
Siren, WI 54872

**ADMINISTRATIVE LAW JUDGE:**

Peter McCombs  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Pierce County.
2. Petitioner established the [REDACTED], and [REDACTED], [REDACTED] Irrevocable Trust (the Trust) on July 16, 1996. At the time of the Trust creation, the assets constituting the corpus of the Trust were (1) real property identified as Lots Nineteen (19) and Twenty (20), [REDACTED], [REDACTED], Pierce County, Wisconsin (the Real Property); and (2) corporate stock of [REDACTED] [REDACTED]
3. [REDACTED] [REDACTED] ceased business operations on or about June 25, 2015.
4. The Real Property is the primary residence of petitioner and his wife, [REDACTED] [REDACTED].
5. On or about August 15, 2023, the petitioner applied for MA benefits.
6. The respondent denied the petitioner’s MA application on August 29, 2023, due to assets exceeding program limits.
7. Following petitioner’s appeal of the denial, the respondent identified an error in its countable asset determination pertaining to an irrevocable trust, and petitioner’s long term care MA eligibility was confirmed effective October 3, 2023.

**DISCUSSION**

The petitioner is the primary beneficiary of an irrevocable trust. The trust was created by their son, [REDACTED] [REDACTED], as grantor. The principal of the trust presently consists of real estate that comprises the Real Property, which is the primary residence of petitioner and/or his spouse.

The agency denied the petitioner’s MA application because it determined that he had available assets held in an irrevocable trust that exceeded program limits. The trust asset consisted of the Real Property valued by the agency at \$252,800.00.

Treatment of an irrevocable trust is described in the *Medicaid Eligibility Handbook (MEH)*, § 16.6.4.2:

If the resources of the individual or the individual’s spouse were used to form all or part of the principal of the trust, some or all of the trust principal and income may be considered a non-exempt asset, available to the individual. 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, the portion of the principal from which, or the income on the principal from which, payment to the individual could be made shall be considered non-exempt assets, available to the individual.

The *MEH* provision is based on Wis. Stat., §49.454(3)(a), which describes when a trust is counted toward the asset limit. It applies in medical assistance matters “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; whereas the contents of irrevocable trusts are covered by the statute and are considered 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 difference between trusts created by the individual seeking medical assistance and those created by a third party is explained in the *MEH*, §§ 16.6.4.1. and 16.6.4.2. Section 16.6.4.1 states:

If the resources of someone other than the individual or their spouse (i.e. a third party), were used to form the principal of an irrevocable trust, the trust principal is not an available asset unless the terms of the trust permit the individual to require that the trustee distribute principal or income to him or her.

Under *MEH*, § 16.6.4.2, :

If the resources of the individual or the individual’s spouse were used to form all or part of the principal of the trust, some or all of the trust principal and income may be considered a non-exempt asset, available to the individual. 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, the portion of the principal from which, or the income on the principal from which, payment to the individual could be made shall be considered non-exempt assets, available to the individual.

*Id.*

Pursuant to the terms of the trust, the trustee is required to use the Trust assets for the sole purpose of supporting petitioner and his wife as the primary beneficiaries, in the sole discretion of the trustee. The income and corpus of the Trust is to be used when there are no other funds available to support the general welfare of the beneficiaries.

The county agency concluded that, because distributions could be made to the petitioner under the terms of the trust, all of the trust must be considered an available asset. No evidence was presented that the principal real estate held in the irrevocable trust produced any income or that any disbursements had been made to the petitioner from the trust; the trustee testified at hearing that the Trust produces no income and that the Real Property is the primary residence of petitioner and his wife.

Following the filing of the request for fair hearing, the agency reviewed this matter and concluded that the Real Property was improperly included as a countable asset because it is the primary residence of petitioner and his spouse. Administrative rules specify that:

An individual’s home is an excluded asset.

A home is defined as any property an individual has an ownership interest in and which serves as their primary place of residence. An individual's primary place of residence is the property they consider their principal home and to which, if absent, they intend to return. It can be real or personal property, fixed or mobile, and located on land or water.

The home can include any of the following:

- The shelter in which they reside
- The land on which the shelter is located
- Related buildings on the land

The home can include more than one lot. Land is considered part of the home as long as the lots adjoin one another and are not separated by land in which neither the individual nor their spouse has an ownership interest. Easements and public rights of way, such as utility lines and roads, do not separate other land from the home plot. For example, there are farms where the land is on both sides of a road and considered a part of the home. If land is completely separated from the home property by land in which neither the individual nor their spouse has ownership interest, it should not be considered part of the home.

*MEH*, § 16.8.1. At hearing, the trustee questioned whether the Real Property would be a counted asset where the petitioner and his spouse no longer resided in the home.

The agency reviewed Wisconsin case law in arriving at its response to this question. An example of interpreting Medicaid law consistent with the intent of the program rather than merely reviewing the language of the law in a vacuum is found in *Hedlund v. Wisconsin DHS*, 2010 AP 3070 (2011), where the Wisconsin Court of Appeals closed an attempt to create a loophole in Wis. Stat., § 49.454. Under that statute, if a person uses his or his spouse's assets to create a trust that provides some benefit to him, that trust is counted when determining whether he meets the Medicaid asset limit. But if someone else's funds are used to create the trust, the trust's assets are not counted when determining his eligibility. The ██████ gave all of their assets to their children who then immediately used those assets to set up a trust for their parents' benefit. They then argued that the trust was not available because their children's assets, rather than their assets, were used to create the trust. The court in *Hedlund*, 2010 AP 3070, ¶ 16 indicated that the purpose of the statute is to:

prevent those with sufficient available resources, albeit in a trust, from receiving medical assistance before they use their own resources for their care. This purpose would be thwarted if an applicant for medical assistance could transfer assets to another, who then, at the direction or request of the applicant, puts the assets in trust of the benefit of the applicant.

This decision is noteworthy in regard to the petitioner's case because if the court had merely looked at the provision in isolation rather than in the context of the purpose of the medical assistance program it would likely have come to the opposite result. Usually, the term "one's assets" refers to assets that person has legal title to. When the trust was created for the ██████, their children had legal title, albeit briefly, to the assets used for the trust. The court recognized that determining what the legislature meant by the term "one's assets", without considering that term in context of the purpose of the Medicaid program, would undermine that program.

I concur with the agency's reasoning here, and find that the circumstances in [REDACTED] are reflective of the circumstances surrounding the creation of the petitioner's Trust. As such, when the Real Property ceases to qualify as an exempt asset (i.e., the primary residence of petitioner and/or his spouse), the agency may correctly count the Real Property as an asset of the petitioner.

Petitioner's representative argued that the Trust was created for the express purpose of preserving his parents' ability to pursue MA coverage without risking their property. However, as he acknowledged at hearing, the law evolved. It is petitioner's responsibility to ensure that his estate planning evolved along with it.

### CONCLUSIONS OF LAW

1. Petitioner's home is an excluded asset while the home is the primary residence of petitioner and/or his spouse.
2. Petitioner's home comprises the corpus of the Trust, and may be a countable asset of petitioner when it no longer is deemed the primary residence of either petitioner or his spouse.

**THEREFORE, it is**

**ORDERED**

That 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, 5<sup>th</sup> 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.

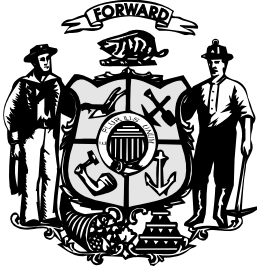
### **APPEAL TO COURT**

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 8th day of December, 2023

  
vs \_\_\_\_\_  
Peter McCombs  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin \DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
5<sup>th</sup> Floor North  
4822 Madison Yards Way  
Madison, WI 53705-5400

Telephone: (608) 266-7709  
FAX: (608) 264-9885  
email: [DHAMail@wisconsin.gov](mailto:DHAMail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on December 8, 2023.

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

