

*Irrev Trust - No Cure
allowed*



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

In the Matter of

[REDACTED]

DECISION

MDY-13/106538

PRELIMINARY RECITALS

Pursuant to a petition filed September 9, 2009, under Wis. Stat., §49.45(5), to review a decision by the Dane County Department of Human Services to deny Medical Assistance (MA), a hearing was held on December 14, 2009, at Madison, Wisconsin. Hearings set for September 29, October 21, and November 18, 2009 were rescheduled at the petitioner's request.

The issue for determination is the length of a divestment penalty.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED] (not present)

Petitioner's Representative:

Attorney John F. Koenig
6041 Monona Drive, Suite 100
Madison, WI 53716-3930

Respondent:

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

By: Alyssa Gunderson, ESS
Dane County Dept. of Human Services
1819 Aberg Avenue
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Dane County. She currently resides in a nursing home.

2. An application for nursing home MA was filed on petitioner's behalf on May 29, 2009. On July 6, 2009, the county denied MA because assets, specifically a checking account, were over the limit.
3. A new application was filed on September 27, 2009. The new worker requested information concerning petitioner's assets and the creation of a trust in March, 2009. Eventually the worker concluded that the checking account was not a barrier to eligibility. However, the worker did conclude that a divestment occurred, but it appeared that there would be a nine-month divestment period starting in July, 2009.
4. On March 18, 2009, petitioner's attorney-in-fact created an irrevocable trust with petitioner as grantor and him as trustee as well as a principal beneficiary. The trust was to contain the proceeds of four assets. On that day he sent notices to managers of two funds that they were to turn the funds over to the trust. The values of the four assets as of March 18, 2009 were \$61,440.
5. The \$26,957 proceeds of one fund were placed in the trust account on April 6, 2009. The proceeds of another fund, in the amount of \$23,315.10, were not received by the trustee until early July, 2009 and were deposited in the trust fund on July 14. The other two assets were never placed in the trust account. One fund (the SAM account) of some \$9,800 was used for petitioner's care. There also was an annuity cash surrender that appears to still exist in its original form.
6. After the creation of the trust, the trustee made several withdrawals and gave the funds to himself totaling \$25,300. He then paid for petitioner's care with the \$25,300.

DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code §HFS 103.065(4)(a); MA Handbook, Appendix 17.2.1. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services (\$6,259 in 2009). MA Handbook, App. 17.5.

A transfer into an irrevocable trust, where the MA applicant/recipient's assets form the trust, and where there are no circumstances where payments can be made to the applicant/recipient, is described specifically in 42 U.S.C. 1396p(d)(3)(B)(ii) as being a divestment. See also Wis. Stat. §49.454(3)(b); MA Handbook, App. 17.13.3. 42 U.S.C. 1396p(d)(4) describes exceptions to that rule. Exceptions are so-called Special Needs Trusts, which provide that the state will be repaid any MA payments upon the individual's death, and pooled trusts for disabled individuals. See also Wis. Stat. §49.454(4). The MA Handbook, App. 17.13.4, adds as exceptions annuities, irrevocable burial trusts, and trusts established by a will.

Petitioner clearly divested property by creating the irrevocable trust in March, 2009, and she does not argue otherwise. The issue before me is the length of the divestment period. The original reason for denial was due to assets, but by the time of the hearing the asset issue was resolved and only the divestment issue remains.

The county questions the start date of the divestment penalty. Department policy is that the penalty period begins on the date the person is otherwise eligible for MA except for the imposition of the

divestment penalty. See Exhibit 8, BEM/DFS Operations Memo no. 09-01, dated January 7, 2009, page 3. The county questions whether the penalty should begin in July, when petitioner received the second transfer of funds (the CPA: 15 Account). If that money was available until July, petitioner would not have been eligible until July. I find, however, that second fund was not available prior to July. Testimony was that the trustee requested the disbursement of the fund immediately after the trust was created, but the fund management did not disburse the money until July. Thus the divestment penalty would begin with the March, 2009 creation of the trust.

Article 2.01 of the Trust document provides that petitioner irrevocably transfers the property described in Schedule A. See Exhibit 9. The four assets listed on Schedule A were the CPA: 15 Account valued at \$23,315.10, the Prudential Annuity valued at \$1,212.53, the LPL Financial Account (also called the SAM account) valued at \$9,805.51, and the LPL Financial Account valued at \$27,107.60. The total transferred on that date thus was \$61,440.74. At that point petitioner no longer had access to the funds; by the terms of the document only the trustee had access. I note here that Schedule A is not included in the hearing record, and thus I am trusting Atty. Koenig's summary of the accounts listed on the Schedule.

I find, therefore, that petitioner divested \$61,440.74 on March 18, 2009. That the smaller LPL account was not actually transferred to the trust account does not change that fact. It was the trustee's decision to forego the transfer, not petitioner's decision. That makes the divestment penalty 9.8 months (\$61,440.74 divided by \$6,259).

The next question is whether the divestment penalty should be lessened because the trustee gave back money to petitioner by paying for her care. I conclude that it should not because there is no authorization to do so. Article 4.04 of the trust provides that the trustee could use trust principal for the benefit of Lifetime Principal Beneficiaries in his discretion. Article 1.11 defines such beneficiaries are petitioner's children. Article 4.05 prohibits any distributions to petitioner or on petitioner's behalf. The trustee's apparent use of trust principal to pay for petitioner's care appears to have violated that prohibition. Furthermore, he did not give the money directly to petitioner; he gave it to himself and then paid for petitioner's care. I thus conclude that the divestment penalty cannot be reduced because there was no authorization in the trust to give back property to petitioner.

I will remand the matter to the county with instructions to determine petitioner's nursing home MA eligibility effective the first month after the 9.8 month divestment penalty period, with the finding that the divestment occurred March 18, 2009, and that petitioner otherwise was eligible for MA except for the divestment.

CONCLUSIONS OF LAW

1. Petitioner divested \$61,440.74 on March 18, 2009, by creating an irrevocable trust that date.
2. Petitioner was eligible for MA that date except for the divestment.
3. The divestment penalty period was 9.8 months.
4. Because the trustee was not authorized to use trust principal on petitioner's behalf, he was not authorized to give property back to petitioner, and thus the penalty period cannot be reduced by any subsequent actions by the trustee.

THEREFORE, it is

ORDERED

That the matter be remanded to the county with instructions to determine petitioner's nursing home MA eligibility effective the first month after the 9.8 month divestment penalty period, with the finding that the divestment occurred March 18, 2009, and that petitioner otherwise was eligible for MA that date except for the divestment.

REQUEST FOR A REHEARING

This is a final administrative 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. Your request must explain what mistake the Administrative Law Judge 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.

To ask for a rehearing, 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 in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 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 Department of Health Services. 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: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53

Given under my hand at the City of Madison,
Wisconsin, this 4th day of January, 2010

/s/Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals

c:

