



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

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In the Matter of

(petitioner)

DECISION

MED-71/67136

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The proposed decision of the hearing examiner dated February 8, 2005 is hereby adopted as the final order of the Department.

**REQUEST FOR A REHEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, 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 must explain what mistake the examiner 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.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. 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 thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Wisconsin Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of  
Madison, Wisconsin, this 29th day of  
April, 2005.

/s

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Diane Welsh, Deputy Secretary  
Department of Health and Family Services



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

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In the Matter of  
  
(petitioner)

PROPOSED DECISION

MED-71/67136

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 13, 2004, under Wis. Stat. §49.45(5), to review a decision by the Wood County Dept. of Social Services to deny Medical Assistance (MA), a hearing was held on January 26, 2005, at Wisconsin Rapids, Wisconsin.

The issue for determination is whether a trust is an available asset.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:  
  
(petitioner)

Represented by:  
  
Atty. Nicholas J. Brazeau, Jr.  
Brazeau, Potter, Wefel & Nettesheim  
P.O. Box 639  
Wisconsin Rapids, WI 54495

Wisconsin Department of Health and Family Services  
Division of Health Care Financing  
1 West Wilson Street, Room 250  
P.O. Box 309  
Madison, WI 53707-0309

By: Janet Rude, ESS  
Wood County Dept. Of Social Services  
400 Market Street  
P.O. Box 8095  
Wisconsin Rapids, WI 54494-8095

**ADMINISTRATIVE LAW JUDGE:**

Brian C. Schneider  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Wood County.
2. Petitioner's mother is her court-appointed guardian. On September 12, 2003, petitioner's mother signed a document creating a trust on petitioner's behalf. Petitioner's father was named trustee. The funds for the trust were from petitioner's accumulated assets. Petitioner's mother was named as grantor. The trustee has discretion to use the trust funds on petitioner's behalf. The grantor cannot revoke the trust.

3. Petitioner formerly received Supplemental Security Income (SSI) and MA as an SSI recipient. SSI ended in late 2004. Petitioner applied for MA at the county agency on November 1, 2004.
4. The county determined that the trust, with a value of approximately \$45,000, was an available asset. By a notice dated November 30, 2004, the county denied MA based upon petitioner's assets being over the limit.
5. MA was continued pending this decision.

### DISCUSSION

The MA asset limit for an individual is \$2,000. Wis. Stat., §49.47(4)(b)3m. If available assets are above that limit, the person is not eligible for MA. The statute does not allow for outstanding debts to be deducted from assets, nor does it provide any exceptions for unusual situations.

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. §49.454(1)(a). If the trust is revocable, the corpus of the trust is counted against the MA asset limit. §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. §49.454(3)(a).

There is an exception for a trust described in 42 U.S.C. 1396p(d)(4). Wis. Stat., §49.454(4). Such a trust is for a disabled person under age 65 with the provision that upon the person's death the state will receive the proceeds up to the amount of MA paid by the state for the person. This is a "special needs trust." That exception does not apply in this case because the trust proceeds are to be passed to members of petitioner's family upon her death.

Wis. Adm. Code, §HFS 103.06(7)(a)3 provides that for SSI-related MA applicants, the pertinent SSI standards on treatment of trusts shall apply. As a disabled adult, petitioner is an SSI-related applicant. Wis. Adm. Code, §HFS 103.03(1)(c).

The SSI standards are important to this case. In 1999 the Foster Care Independence Act of 1999 (P.L. 106-169) was passed. Section 205 of the Act provided generally that trusts established with the assets of an individual are considered available assets for SSI purposes. See the SSI Program Operations Manual System (POMS), §SI 01120.201A. SSI rules now provide that the corpus of a trust is considered an available asset if it was established using funds of the SSI applicant/recipient to the extent the corpus can be used for the person's benefit. This is true even if the trust limits payments for public benefit programs. See POMS, §SI 01120.201C.2.d.

The MA Handbook, Appendix 4.5.6.2, provides that a revocable trust is considered an available asset. A trust is considered to be revocable even if it is called "irrevocable" if the grantor is able to terminate the trust. The Handbook, App. 4.5.6.3, provides that the principle of any irrevocable trust is considered to be unavailable. A trust is considered to be irrevocable if the grantor cannot take any action to revoke the trust.

The trust in this case is irrevocable. Neither the grantor (petitioner's mother acting as petitioner's guardian) nor petitioner can take any action to revoke the trust. Only the trustee can revoke the trust.

Clearly there is a conflict between the statute, the SSI rules, and the Handbook. The statute provides that if there are "circumstances," any circumstances, in which the trustee can distribute funds on the person's behalf, the corpus is available. For that reason I do not believe that the limitations written into the trust are effective. The trust provides that the trustee cannot distribute funds that could be received from public

benefit programs. However, there are no exceptions in the statute. If any part of the trust can be distributed, the trust is available. Furthermore, the SSI rules specifically provide that such limitations are ineffective in preventing application of the law to the trust.

The Handbook provision makes the provision concerning special needs trusts meaningless. See Handbook, App. 4.5.6.4 concerning special needs trusts. If all irrevocable trusts are unavailable, there would be no point to setting up a special needs trust with the state as a beneficiary in the event of the person's death. The only advantage to a special needs trust would be that, in the case of an institutionalized individual, adding funds to the trust would not be considered divestment. Of course, for practical purposes funds would never be added to a special needs trust once the person was institutionalized because the funds would eventually be paid to the state after the person's death.

I conclude that the MA Handbook provision is in conflict with both state and federal law, and therefore it must be disregarded. Federal and state law require that this trust be considered an available asset.

I note that the worker stated that the trust was considered available because it was revocable. I believe she did not understand the basis for the decision. She testified that the trust was referred to the county corporation counsel, who concluded that it was available. Because Ms. Rude made reference to the special needs trust, it is evident to me that the corporation counsel likely was looking at the provisions concerning irrevocable trusts in Wis. Stat., §49.454. Even if the county erroneously concluded that the trust was revocable, that error does not bind the Division of Hearings and Appeals. The trust must be considered to be available under current law.

#### **CONCLUSIONS OF LAW**

1. The trust established on petitioner's behalf is an available asset for MA purposes because funds can be distributed for her benefit.
2. The MA Handbook provision that all irrevocable trusts are unavailable is superceded by state and federal law and thus is invalid.

**NOW, THEREFORE, it is** **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

#### **NOTICE TO RECIPIENTS OF THIS DECISION:**

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health and Family Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of  
Madison, Wisconsin, this 8th day of  
February, 2005

/s

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Brian C. Schneider  
Administrative Law Judge  
Division of Hearings and Appeals  
0207/bcs