



STATE OF WISCONSIN

In the Matter of

(petitioner)
c/o Robert Anderson, Attorney
The Elder Law Firm Of Anderson & Assoc
148 W Hewitt Ave
Marquette, MI 49855

DECISION

MDV-38/87937

The proposed decision of the hearing examiner dated March 26, 2008, is hereby modified as follows and as such is adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed October 9, 2007, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Marinette County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on January 23, 2008, at Marinette, Wisconsin.

The issue for determination is whether the petitioner is ineligible for Institutional MA due to a divestment of resources to a school, for home repairs or improvements, and to WisPACT Trust I, Inc.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o Robert Anderson, Attorney
148 W Hewitt Ave
Marquette, MI 49855

Represented by:

Robert C. Anderson
The Elder Law Firm Of Anderson & Assoc
148 W Hewitt
Marquette, MI 49855-3533

Respondent:

Wisconsin Department of Health and Family Services
1 West Wilson Street, Room 650
P.O. Box 7850
Madison, WI 53707-7850

By: Tammy S Van Domelen, ESS

Marinette County Dept Of Human Services
Wisconsin Job Center Suite B
1605 University Drive
Marinette, WI 54143

ADMINISTRATIVE LAW JUDGE:

Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxxxxx) is a resident of Marinette County.
2. The petitioner, a widow, entered New Care Convalescent Center of Crivitz in July, 2007 at the age of 86. She has and still has a number of medical impairments. (Exhibits O and P)
3. The petitioner was and still is receiving Social Security Retirement payments. She has never been found disabled by a state disability determination unit (DDU) which is contracted with Social Security to determine nonfinancial eligibility for SSDI or SSI, and which is contracted with a state government to determine nonfinancial eligibility for Medicaid.
4. On August 30, 2007, an MA application was filed on the petitioner's behalf. The county agency issued written notice of MA nursing home coverage denial on September 27, 2007. The denial period was from August 1 through December 31, 2007. See Exhibit C.
5. The agency's denial was based on its determination that the petitioner had divested the following: (1) \$5,300 by making a gift of \$5,300 to the Faith Christian School; (2) divested \$19,142.04 by paying for capital improvements on a home owned by her son, (redacted), in which she retained a life estate; and (3) made a payment of \$5,300 to WisPACT Trust I.
6. The petitioner had pledged \$5,300 to the Faith Christian School many years earlier and made the payment in August, 2007. She was not under any legal obligation to do so.
7. The petitioner retained a life tenancy in the property that was her home. (redacted), who is also the petitioner's son, spent \$19,142.04 of the petitioner's money on the home on a number of projects, the largest of which includes the blacktopping of the petitioner's entire drive way over what had been a dirt drive way (\$11,365), insulation and window repairs (\$3,702), repairs to lights and the installation of a security light for safety (\$2,216.56), and new roof gutters (\$845).
8. The petitioner contributed \$5,300 to WisPACT Trust I, which is a pooled trust for disabled persons. As a pooled trust, it was established and managed by a non-profit association. It contains funds for the benefit of the disabled person. It has separate accounts, within each fund, which are maintained for each beneficiary, but for purposes of investment and management, the trust pools these accounts. It is an irrevocable trust.

DISCUSSION

A person seeking medical assistance is ineligible if his assets exceed the MA program's limit. To prevent those with enough funds to pay for their own medical care from becoming a burden to the general public by transferring their assets to recipients such as family members, friends, and charitable organizations, MA law prevents an applicant or recipient from reaching this limit by divesting assets. A divestment is a transfer of assets for less than fair market value. Wis. Stat. Sec. 49.453(2)(a); *Medicaid Eligibility Handbook*, § 4.7.2. (All references to the *Medicaid Eligibility Handbook* are to the one that was in effect at the time of the transfers of assets and the application for MA.) A divestment occurs when an applicant, or a person acting on the applicant's behalf, transfers assets for less than their fair market value on or after the lookback date. §49.453(2)(a), Stats.; *Medicaid Eligibility Handbook*, § 4.7.2. The lookback date is generally 36 months, but is 60 months if an irrevocable trust is involved. §49.453(1)(f), Stats; see also *Medicaid Eligibility Handbook*, § 4.7.3. The lookback date for an institutionalized person begins on the first day that the person is both institutionalized and applies for medical assistance. §49.453(1)(f)1., Wis. Adm. Code. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The period of ineligibility is specified in Wis. Stat. Sec. 49.453(3) to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. See the *Medicaid Eligibility Handbook*, 4.7.5. The period of ineligibility begins on the date of the divestment.

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the county, like the denial of MA due to a divestment of assets was improper given the facts of the case. See, 20 C.F.R.

§§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists. While oral testimony concerning the intent of the applicant is important, great weight must be afforded by the actions taken by the applicant given the overall circumstance at the time. Thus, the most commonly heard explanation that the transfer of assets was done for probate purposes must be well documented and be evident in light of all of the facts. There are three separate transfers that were the basis of the county agency's denial and will be considered in the reverse order of complexity.

I THE CHARITABLE CONTRIBUTION

The first transfer involves the payment of \$5,300 to the Faith Christian School. There is a long history of DHA decisions creating precedent that any charitable contributions are not considered basic and necessary expenses for an applicant, and may not be used to reduce that applicant's assets in order to establish MA asset eligibility. The *Medicaid Eligibility Handbook*, §4.7.2.9 provided the following statement regarding value received:

“Value received” is the amount of money or value of any property or services received in return for the person's property. The value received may be in any of the following forms:

1. Cash.
2. Other assets such as accounts receivable and promissory notes (both of which must be valid and collectible to be of value), stocks, bonds, and both land contracts and life estates which are evaluated over an extended time period.
3. Discharge of a debt.
4. Prepayment of a bona fide and irrevocable contract such as a mortgage, shelter lease, loan or prepayment of taxes.
5. Services which shall be assigned a valuation equal to the cost of purchase on the open market. Assume that services and accommodations provided to each other by family members or other relatives were free of charge, unless there exists a written contract (made prior to the date of transfer) for payment.

The petitioner's payment to Faith Christian School is not allowed as a deduction to her countable assets for MA eligibility purposes because petitioner did not receive anything of value as defined by the above. The petitioner argued that she had pledged the money made years earlier. I note that the pledge was fulfilled very close to when she was to enter the nursing home. Further, a pledge is not a legally binding commitment. The petitioner could have declined to have made that payment. The petitioner has failed to meet her burden of proof to establish that the above charitable gift was not a divestment.

II. REPAIRS OR IMPROVEMENTS TO THE PROPERTY IN WHICH THE PETITIONER RETAINED A LIFE ESTATE INTEREST

The next issue is the expenditure of the petitioner's money in the amount of \$19,142.04 on the property in which she had a life estate. The county agency held that the entire sum was a divestment. The petitioner is incorrect when she argues that the fact that the property is exempt as that term is used in the *Medicaid Eligibility Handbook*, §4.5.8.1.3 is determinative to this issue. The county agency did not find the petitioner ineligible because the property was an available asset or because she had divested herself of it. The county agency is incorrect when it cites the *Medicaid Eligibility Handbook*, §4.1.3.1 as support for its position that the expenses for maintaining the home may not be deducted from the petitioner's assets as that provision concerns the deduction of such expenses from *income*.

The basis for the resolution of this issue lies in statutory and case law. The statutory language regarding a life estate as an interest in property in Wisconsin is found in §700.02(3), Wis. Stats. A tenant for life has all the rights of occupancy in the lands of the remainderman. (See *U. S. v. Cook*, 86 US 591 (1873).) A life tenant has been compared to a trustee in that neither can dispose of the property to the extent it would injure the

remainderman/beneficiary. The difference is that the life tenant may use the property for his or her benefit including the taking of all income and profits. (See Estate of Larson, 261 Wis. 206, (1952).) The life tenant must make all ordinary reasonable and necessary repairs to the property to preserve it for the remainderman. This was discussed in **In re Matthews' Estate**, 210 Wis. 109, 245 N.W. 122, 124 1932.

The ordinary rule is that, as against the life tenant and the remainderman, the remainderman is entitled to have a sufficient sum taken from current income to preserve the physical integrity of the corpus. So a life tenant must make all ordinary, reasonable, and necessary repairs to preserve the property and prevent its going to decay or waste.

This is the same approach that is found in other states. "Life tenants hold a limited, restricted interest in the estate. Although life tenants are required to keep the property in repair, they are not required to permanently improve it." (See **Acord v. Acord**, 70 Ark.App. 409, 19 S.W.3d 644, 647, Ark.App.,2000.)

In this case, just as the petitioner was responsible for making "necessary repairs", the remainderman was responsible for paying for any alteration that increases the value of the property including finishing a basement, adding a room, putting up a fence, putting in new plumbing, wiring, or cabinets, a new roof, and paving a driveway. What is a repair and what is an improvement is the real crux of this issue. (The DHA has previously found that repairs include painting, fixing gutters or floors, plastering, and replacing broken windows. See Decision MED-70/39201 (1999)) The petitioner points to Decision MDV-40/18587 (1997), as a precedent that \$52,000 worth of modifications including the replacement of a roof or windows, tuckpointing, re-grading of a portion of the property to remedy water leaking into the basement, plumbing replacement, and the razing and reconstruction of a garage were considered deductible repairs. First, prior administrative hearing decisions are not controlling in any subsequent case. Further, the discussion in MDV-40/18587 on this issue was quite brief and did not provide any facts as to the actual modifications made or the reasons why.

I have reviewed the petitioner's expenditures listed in petitioner's exhibit X. I find that they are all ordinary, reasonable, and necessary repairs to preserve the property except for the \$11,365 to blacktop the drive way. The explanation at the hearing is that the petitioner might fall given her need to use a walker and the prior condition of the driveway when she came for a visit to the home. I am not persuaded that a much more cost effective repair to the drive way would not have been sufficient. I find that paving the entire driveway was an improvement that increased the value of the property and as such, was the responsibility of the remainderman. The petitioner received value for the repairs to the property she was obligated to maintain in exchange for \$7,777.04, so that amount was not a disqualifying divestment. The petitioner failed to meet her burden to prove that the \$11,365 payment to blacktop the drive way was not a divestment.

III THE WISPACT TRUST I CONTRIBUTION

The final transfer to be discussed is the \$5,300 contribution to WisPACT Trust I. Per the *Medicaid Eligibility Handbook*, §4.7.13.2, funds used to create an irrevocable trust are considered a divestment. However, per the *Medicaid Eligibility Handbook*, §4.7.13.3, there is no divestment for contributions to a pooled trust such as WisPACT I when it meets the criteria discussed in part below. Preliminarily, the trust must be an exempt asset that as specified at 42 USC 1396(d)(4), which states in part:

(4) This subsection shall not apply to any of the following trusts:...

(C) *A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:*

(i) The trust is established and managed by a non-profit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section

1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter. (Emphasis added)

The statutory provision referred to above (1382c(a)(3) of this title) reads as follows:

(a)(1) For purposes of this subchapter, the term "aged, blind, or disabled individual" means an individual who -

(A) is 65 years of age or older, is blind (as determined under paragraph (2)), or is *disabled (as determined under paragraph (3))*, and

(B)(i) is a resident of the United States, and is either (I) a citizen or (II) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 1182(d)(5) of title 8), or

(ii) is a child who is a citizen of the United States, who is living with a parent of the child who is a member of the Armed Forces of the United States assigned to permanent duty ashore outside the United States, and who, for the month before the parent reported for such assignment, received a benefit under this subchapter...

(3)(A) *Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.* (Emphasis added)

The *Medicaid Eligibility Handbook* in effect at the time of the transfers (Release and Effective date of April 18, 2007) and the MA application reads as follows:

4.5.6.5 Pooled Trusts

Disregard pooled trusts for disabled persons managed by:

- WISH Pooled Trust
- WisPACT Trust I

Note: Contact the CARES CALL Center for instructions on treating any other pooled trusts.

The WISH Pooled Trust and the WisPACT Trust I meet the following conditions:

- a. Are established and managed by a non-profit association. The pooled trust can contain funds that hold accounts funded by third parties for the benefit of the disabled person's own assets or income.
- b. Have separate accounts, within each fund, which are maintained for each beneficiary or the trust, but for purposes of investment and management of funds, the trust pools these accounts. There may be a separate fund with accounts that include or benefit persons who do not have a disability.

- c. Contain accounts with the funds of disabled individuals (based upon SSI and Medicaid rules) that are established solely for their benefit by a parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court. If the account includes a residential dwelling, the individual must reside in that dwelling, but a spouse, caregiver or housemate can also live there with the MA applicant/recipient.
- d. Repay MA to the extent that amounts remaining upon death are not retained by the trust.
 - This requirement can be satisfied when the individual trust account contains liquid assets and has a balance by returning that amount to the MA program after subtracting a reasonable amount for administrative costs.
 - This requirement can also be satisfied when the pooled trust account includes real property, and the real property is retained by the pooled trust so long as the property continues to be used by another MA recipient who is disabled (as established under SSI rules) or elderly (age 65 years or older). In addition, if the account contains liquid assets that had been used to help maintain the real property, the account funds may be retained to continue to maintain the housing that will be used by another MA recipient.

Finally, there is the language from the Program Operations Manual System (POMS) in SI 01120.203, Exceptions to Counting Trusts Established on or after 1/1/00

A. INTRODUCTION

We refer to the exceptions discussed in this section as **Medicaid trust exceptions** because sections 1917(d)(4)(A) and (C) of the Social Security Act (the Act) (42 USC 1396(d)(4)(A) and (C)) set forth exceptions to the general rule of counting trusts as income and resources for the purposes of Medicaid eligibility and can be found in the Medicaid provisions of the Act. While these exceptions are also supplemental security income (SSI) exceptions, we refer to them as Medicaid trust exceptions to distinguish them from other exceptions to counting trusts provided in the SSI law (e.g., undue hardship) and because the term has become a term of common usage.

B. POLICY—EXCEPTION TO COUNTING MEDICAID TRUSTS

1. Special Needs Trusts Established under Section 1917(d)(4)(A) of the Act

(Not applicable to this case)

2. Pooled Trusts Established under Section 1917(d)(4)(C) of the Act

a. General

A pooled trust is a trust established and administered by an organization. It is sometimes called a “master trust” because it contains the assets of many different individuals, each in separate accounts established by individuals, and each with a beneficiary. By analogy, the pooled trust is like a bank that holds the assets of individual accountholders.

Whenever you are evaluating the trust, it is important to distinguish between the master trust, which is established by the nonprofit association, and the individual trust accounts within the master trust, which are established by the individual or another person for the individual.

The provisions of the SSI trust statute do not apply to a trust containing the **assets of a disabled individual** which meets the following conditions:

- The pooled trust is established and maintained by a **nonprofit association**;
- **Separate accounts** are maintained for each beneficiary, but assets are pooled for investing and management purposes;
- Accounts **are established solely for the benefit of the disabled individual**;
- The account in the trust is **established by the individual, a parent, grandparent, legal guardian, or a court**; and
- The trust provides that to the extent any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, **the trust will pay to the State** the amount remaining up

to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan.

NOTE: There is no age restriction under this exception.

CAUTION: If a trust which meets the requirements of this section is revocable, the exception to the SSI statutory trust provisions in section 1613(e) of the Act applies, but the trust must still be evaluated under the instructions in [SI 01120.200](#) to determine if it is a countable resource. If the revocable trust meets the definition of a resource ([SI 01110.100B.1.](#)), it would be subject to regular resource-counting rules.

b. Disabled

Under the pooled trust exception, the individual whose assets were used to establish the trust account must meet the definition of disabled for purposes of the SSI program. (Emphasis added)

c. Nonprofit Association

The pooled trust must be established by a nonprofit association. For purposes of the pooled trust exception, a nonprofit association is an organization defined in section 501(c) of the Internal Revenue Code (IRC) and that also has tax-exempt status under section 501(a) of the IRC. (See [SI 01120.203F.](#) for development.)

d. Separate Account

A **separate account within the trust** must be maintained for each beneficiary of the pooled trust, but for purposes of investment and management of funds, the trust may pool the funds in the individual accounts. The trust must be able to provide an individual accounting for the individual.

e. Established for the Sole Benefit of the Individual

Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual. (See [SI 01120.201F.2.](#) for a definition of sole benefit.) If the account provides a benefit to any other individual, this exception does not apply.

f. Who Established the Trust Account

In order to qualify for the pooled trust exception, the trust **account** must have been established by the disabled individual himself/herself or by the disabled individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

A third party establishing the trust account on behalf of the individual must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust account by a third party without the legal right or authority to act with respect to the assets of the individual may result in an invalid trust.

NOTE: This requirement refers to the individual who physically took action to establish the trust even though the trust was established with the assets of the SSI claimant/recipient.

g. State Medicaid Reimbursement Provision

To qualify for the pooled trust exception, the trust must contain specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan. To the extent that the trust does not retain the funds in the account, the State must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in [SI 01120.203B.3.a.](#)

NOTE: Labeling the trust as a **Medicaid pay-back trust, OBRA 1993 pay-back trust, trust established in accordance with 42 USC 1396,** or as an **MQT**, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

D. PROCEDURE— DEVELOPING EXCEPTIONS TO RESOURCE COUNTING

1. Special Needs Trusts under Section 1917(d)(4)(A) of the Act (Not Applicable)

2. Pooled Trusts Established under Section 1917(d)(4)(C) of the Act

The following is a summary of pooled trust development presented in a step-action format. Refer to the policy cross-references for complete requirements. (Modified for space)

STEP	ACTION
1	<p>Was the trust account established with assets of a disabled individual? (See SI 01120.203B.2.b.)</p> <ul style="list-style-type: none"> • If yes, go to Step 2. • If no, go to Step 8.
8	<p>The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under SI 01120.203E.</p>

The overarching issue is whether the petitioner’s contribution to WisPACT I was not a divestment even though a DDU had not found her to have met the Social Security Disability rules. In Wisconsin, the DDU is the Disability Determination Bureau (DDB). The petitioner argued that she did not need the DDB to determine whether she met those standards for several reasons. First, she argued that she did not have to be eligible for or receiving Social Security, SSI or Medicaid in order to meet the definition of a disabled person. Based on the above statutory language, that is quite clear. Such a requirement is also not in the *Medicaid Eligibility Handbook*. However, that does not negate the fact that the petitioner had to meet the definition in 1382c(a)(3), supra. That is the definition that is the basis of the applicable Social Security disability/SSI standards found in the Code of Federal Regulations, Title 20, Part 416, Subpart I, and by reference Appendices 1 and 2, Subpart P, Part 404. A review of all of the above text shows that the word disabled is always used. The term disabled did not have to be used as the requirements for the Pooled Trust exemption could have read that an individual must be unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. The term “disabled” carries with it the clear implication that it is the Social Security definition of disability.

Given that it is the Social Security definition of disability, the next issue is whether the DDB must be the agency to determine whether it is met. Given that there must be someone to ascertain whether the definition is met, what other agency besides the DDB would do so? The county agency does not have the time and is not trained to make disability determinations, which is why they send such applications to the DDB. The fact that county agencies make presumptive disability determinations is not proof that they are capable of doing so. The presumptive determinations are limited to cases where disability is very obvious and the county agency determinations are only temporary and must be upheld by the DDB. The Administrative Law Judges are not going to make such an initial determination as their function is to *review* agency decisions. With all due respect, a not for profit private agency cannot make that determination since it is the state agency that is the Medicaid agency and nowhere do I see a delegation of authority, even if one was permitted by federal law. The only agency able to make a determination that a person meets the definition of disability is the Disability Determination Bureau.

The next assertion is that the county agency was required to seek and initiate the process for the determination of disability from the DDB. Many regulations and Handbook provisions are cited that indicate that the county agency must initiate such a process to determine if an applicant is eligible for MA. However, the petitioner has always been nonfinancially eligible for MA as she is 86 years old. Being disabled is merely an alternate way to become

nonfinancially eligible. Thus, *in terms of determining nonfinancial MA eligibility*, a disability determination was not necessary. Related to this is the petitioner's argument that the county never asked her to verify that she met the definition of disabled. As the petitioner stated that she was never found disabled by Social Security, there was nothing to verify. If she had stated that she was found disabled, the county agency would have requested some form of documentation to so prove.

Finally, the petitioner raised several equal protection challenges in her briefs. This is a question of constitutional law. She also argued that the county agency failed to inform her that the DDB had to do the disability determination. That is an equitable argument. Department Administrative Law Judges do not have the authority to decide constitutional questions or grant relief based upon claims of equitable estoppel. Administrative agencies only have those powers specifically delegated to them. See Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F. Supp. 540, 545 (D.C. Wis. 1977)

For petitioner to have used "the assets of an individual who is disabled" to fund the trust account and thereby get the WisPACT I exception to divestment, the DDB determination had to have been made by the time of funding. However, because there was no process in place at the time of petitioner's funding to request that DDB make such a determination outside of the eligibility process, out of fairness to the petitioner, I am remanding this case to the department as well as the other parties so that it can establish within 30 days of the date of the Final Decision, a process by which the county agency may send such an application to the DDB and the DDB will know what it is supposed to do with it. After the process is established, the petitioner can then send an application/request for a disability determination to the DDB through the county agency. If the DDB finds that the petitioner *met* the disability standards, the \$5,300 will not be considered a divestment. The petitioner has the right to appeal a negative determination by DDB.

IV HARDSHIP DETERMINATION

The petitioner requests that if the above transfers are found to be divestments, that a determination of hardship be made. As discussed above, the function of Administrative Law Judges is to review agency decisions. There is no record that the county agency ever made a determination that a hardship exists. That process would have to be like the one in POMS §SI 01120.203 (E. PROCEDURE--DEVELOPMENT OF UNDUE HARDSHIP WAIVER) which include instructions for an undue hardship finding.

V COST MOTION

In the written legal argument, the petitioner also requested attorney's fees. Wis. Stat. § 227.485(5) states, in relevant part, as follows:

The prevailing party shall submit, within 30 days after service of the proposed decision, to the hearing examiner and to the state agency which is the losing party an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

Wis. Admin. Code § HA 3.11(1) confirms that a cost motion filed pursuant to Wis. Stat. 227.485 must be filed with the Division of Hearings & Appeals and the department or agency within 30 days of service of the final decision if petitioner is the prevailing party. Given that this is a proposed decision, not a final decision, and that the request was not in the proper format, it is premature at this time.

CONCLUSIONS OF LAW

1. The contribution to the Faith Christian School must be considered a divestment.
2. All of the expenses for the house in which the petitioner has a life estate were repairs and were not divestments except for the surfacing of the driveway as that was an improvement and as such was a divestment of \$11,365.

3. Because the Disability Determination Bureau did not find that the petitioner met the Social Security definition of disability, the payment of \$5,300 to the WisPACT Trust I was a divestment.
4. Administrative Law Judges do not have the authority to decide constitutional questions or grant relief based upon claims of equitable estoppel.
5. There has been no agency determination as to the existence of a hardship.
6. The request for attorney's fees is premature as there is no final decision.

NOW, THEREFORE, it is

ORDERED

That the case be remanded to the department so that it can establish within 30 days of the date of the Final Decision, a process by which the county agency may send such an application to the DDB and the DDB will make a determination as to whether an individual seeking to contribute funds to a pooled trust meets the Social Security disability standards. After the process is established, the department will notify the petitioner and the county agency exactly how the process works. The petitioner can then send an application/request for a disability determination to the DDB through the county agency. If the DDB finds that the petitioner *met* the disability standards at the time of the MA application, the \$5,300 will not be considered a divestment. In that event, the county agency will reduce the divestment by \$13,077.04 (\$5,300 + \$7,777.04, and recalculate the period of ineligibility for institutional MA. If the DDB finds that the petitioner *did not meet* the disability standards, the \$5,300 will be considered a divestment. In that event, the county agency will reduce the divestment by \$7,777.04, and recalculate the period of ineligibility for institutional MA accordingly. The petitioner has the right to appeal a negative determination by DDB. In all other respects, the petition for review herein be and the same is hereby dismissed.

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 rehearing. You may also ask for a rehearing 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 as "PARTIES IN INTEREST" in the proposed decision. 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 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes § 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 Wisconsin Department of Health and Family 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 650, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in the proposed decision. The process for Court appeals is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this _____ day of
_____, 2008.

Karen E. Timberlake, Secretary
Department of Health and Family Services