



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

In the Matter of

[REDACTED]

DECISION

FCP-27/104896

The proposed decision of the hearing examiner dated November 3, 2009, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed June 18, 2009, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Jackson County Department of Human Services in regard to Medical Assistance, a hearing was held on September 29, 2009, at Black River Falls, Wisconsin. Hearings scheduled for July 28, 2009, and August 27, 2009, were rescheduled at the petitioner's request. The record was held open for 13 days at the petitioner's request.

The issue for determination is whether funds held by the petitioner's tribe for his benefit in an irrevocable trust count toward his medical assistance asset limit.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Attorney:

Ellen J. Henningsen
Disability Rights-Wisconsin
131 W. Wilson St., Ste. 700
Madison, Wi 53703

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53702

By:

[REDACTED] County Department of Human Services

[REDACTED]
[REDACTED] WI [REDACTED]

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED] resides [REDACTED] County. He is an enrolled member of the Ho-Chunk tribe.
2. The petitioner is 47 years old.
3. The petitioner was first determined disabled by the Social Security Administration in March 1992 and has been disabled since. He was placed under guardianship because of developmental disabilities on May 15, 2001.
4. The Ho-Chunk tribal regulations require the tribe to place all per capita payments for incompetent members into an incompetent's trust fund. The tribal court has discretion over whether to release these funds and cannot release them for healthcare if those needs are "met from other Tribal funds or other state or federal public entitlement programs, and upon a finding of special need by the Ho-Chunk Tribal Court." 2 HCC [Ho-Chunk Nation Code] § 8.4.
5. The tribe established a trust fund for the petitioner in March 2002. As of May 8, 2009, the petitioner's trust held \$69,868.56, all funded by money received through various tribal gaming activities. The petitioner has never had legal title to the assets used to fund the trust.
6. The county agency denied the petitioner's application for medical assistance family Care Benefits on May 5, 2009, because it determined that the trust placed his assets over the program's limit.

DISCUSSION

The petitioner is a 47-year-old enrolled Ho-Chunk Indian who was found disabled by the Social Security Administration in 1992 and incompetent by the [REDACTED] County Circuit Court in 2001. After being found incompetent, the tribe, acting pursuant to its own ordinances and federal law, stopped making per capita payments to him and began placing the money into an irrevocable incompetent's trust fund administered by the tribal court. When he applied for medical assistance, the county agency denied his application because it determined that the trust was an available asset that pushed his assets over the medical assistance limit.

The agency relies Wis. Stat. § 49.454, which states that when an individual or someone acting on his behalf uses his own assets to set up a trust, those assets are 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(1)(a) and (3)(a). *See also, Medicaid Eligibility Handbook*, § 16.6.4.2. This statute derives its authority from 42 USC § 1396p(d), a similar federal statute. Tribes have some degree of sovereignty, but tribal law is subservient to acts of Congress, a principle first laid down over a century ago in *Lone Wolf v. Hitchcock*, 187 U. S. 553 (1903), and upheld since. To accept the county's logic, I must find that the petitioner's own funds were used to set up the trust and that any tribal ordinance limiting the medical assistance program's ability to obtain those funds conflicts with a federal law requiring that the funds be used for his healthcare.

The petitioner's attorney claims that none of the funds in the petitioner's trust were ever his and that federal law allows the tribe to set up the trust as it did. The Ho-Chunk tribe receives substantial gaming revenue each year. That revenue is distributed pursuant to the tribe's per capita distribution ordinance found at 2 HCC [Ho-Chunk Nation Code] § 12. The ordinance derives its authority from the Indian Gaming Regulatory Act. 25 U.S.C. § 2710(b)(3), which states:

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary [of the United States Department of Interior] as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B); [requires that tribes use gaming revenues to fund tribal government operations or programs to provide for the general welfare of the Indian tribe and its members];

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

The Ho-Chunk ordinance states that the funds from which the per capita distributions are made remain the property of the Nation until payment is actually distributed, and such distribution may only be made in accordance with the ordinance. 2 HCC § 8.4. The ordinance does not provide for distributions to minors and legally incompetent members; instead it directs that per capita payments be disbursed to a trust fund controlled by the Nation. 2 HCC § 12.8. In short, the assets of the Nation are placed into a trust for the benefit of these members. It is a third-party trust, not a trust funded with petitioner's assets.

A recipient does not have to personally create or fund a trust for it to be considered a self-funded trust. As long as the recipient's own assets are used, the trust is self-funded even if "a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual..." establishes the trust. Sec. 49.454(1). The choice of that person to place an individual's assets in a trust rather than permitting the individual to control them is deemed the choice of the individual. But no choice was exercised on petitioner's behalf and thus deemed to be his. By operation of its legislation a per capita amount of the Nations' assets were placed in an irrevocable trust to be used for petitioner's benefit. With sole discretion vested in the trustee whether or not to distribute funds, the funds are considered unavailable to petitioner and therefore not a resource for eligibility purposes. POMS § 01120.105(A)2.

Because I find that the Ho-Chunk per capita payments were never the assets of the petitioner, I do not need to consider petitioner's claim that the trust is a payer of last resort and the impact that would have under § 49.454. Consequently, I do not need to discuss petitioner's arguments that the prior MKB-27/100568 decision was incorrectly decided, and I expressly do not overrule it.

CONCLUSIONS OF LAW

The trust set up by Ho-Chunk tribe for the benefit of the petitioner is not an available asset for medical assistance purposes.

ORDERED

That this matter is remanded back to the county agency to redetermine petitioner's eligibility consistent with this decision.

Given under my hand at the
City of Madison, Wisconsin,
this 16th day of
MARCH, 2010.

S/MARK THOMAS
Mark Thomas, Deputy Secretary
Department of Health Services