

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:

[REDACTED]

Reg. No: 2013-5397
Issue No: 2021
Case No: [REDACTED]
Hearing Date: January 23, 2013
Ottawa County DHS #70

ADMINISTRATIVE LAW JUDGE: Landis Y. Lain

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon claimant's request for a hearing. After due notice, a telephone hearing was held on January 23, 2013. Claimant is in Long Term Care and did not appear for the hearing. Claimant was represented at the hearing by [REDACTED] [REDACTED] Claimant's spouse [REDACTED] and son [REDACTED] appeared and testified on her behalf. The department was represented by Assistant Attorney General [REDACTED] [REDACTED] ([REDACTED] Witnesses [REDACTED] [REDACTED] and [REDACTED] appeared and testified on behalf of the department.

ISSUE

Did the department of Human Services (the department) properly deny claimant's application for Medical Assistance (MA-M) based upon its determination that claimant had excess assets?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. On August 16, 2012, the department received a Long Term Care Medical Assistance application for claimant requesting Medical Assistance benefits.
2. On September 27, 2012 the trust documents were sent to the DHS Bureau of Legal Services for evaluation.
3. On October 4, 2012, the trust evaluation was returned to the DHS caseworker, indicating that the assets in both trusts were countable.
4. On October 10, 2012, the department caseworker sent claimant notice that claimant's application for Medical Assistance was denied because claimant possessed in excess of \$2000 in countable, available assets.

5. On October 16, 2013, claimant filed a request for a hearing to contest the department's negative actions.

CONCLUSIONS OF LAW

The regulations governing the hearing and a ppeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An oppor tunity for a hearing shall be granted to an ap plicant who requests a hearing because his or her clai m for assistance has been den ied. MAC R 400.903(1). Clients h ave the right to contes t a department decision affecting elig ibility or benefit levels whenever it is believed that the decis ion is incorrect. The department will provide an adm inistrative hearing to review the dec ision and determine the appropriateness of that decision. BAM 600.

The Medical Assistance (MA) program is estab lished by Title XIX of the Social Sec urity Act and is implemented by T itle 42 of the C ode of Federal Regulations (CFR). The Department of Human Services (DHS or department) administers the MA program pursuant to MCL 400.10, *et seq.*, and MCL 400.105. Department policies are found in the Program Administ rative Manual (BAM), the Program Eligibili ty Manual (BEM) and the Program Reference Manual (PRM).

Title XIX of the Soc ial Securit y Act, co mmonly referred to as "The Medicaid Act," provides for medical assist ance services to individuals **who lack the financial means to obtain needed health care**. 42 U.S.C. §1396. (Emphasis added)

The Medicaid program is administered by the federal governmen t through the Centers for Medicaid and Medicare Services (CMS) of the Department of Health and Human Services (HHS). The state and federal gove rnments share financial responsibility for Medicaid services. Each state may choose whet her or not to partici pate in the Medicaid program. Once a state chooses to participate, it must operat e its Medicaid program in accordance with mandatory feder al requirements, i mposed both by the Medicaid Act and by im plementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

Participating states must pr ovide at leas t seven categories of medical services to persons determined to be eligible Medic aid recipients. 42 U SC §1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21). One of the seven mandated services is *nursing facility services*. 42 USC §1396d(a)(4)(A).

For medical assistanc e eligibility, the Department has defi ned an asset as "any kind of property or property interest, whether real, pe rsonal, or mixed, whethe r liquid or illiquid, and whether or not presently vested with po ssessionary rights." NDAC 75-02- 02.1-01(3). Under both federal and state law, an asset mu st be "actually av ailable" to an applicant to be considered a countable asset for determi ning medical assistanc e eligibility. [*Hecker, 527 N.W.2d at 237 \(On Petition for Rehearing\)*](#); [*Hinschberger v. Griggs Count y*](#)

Social Ser v., 499 N.W.2d 876, 882 (N.D.1993) ; 42 U.S.C. § 1396a(a)(17)(B) ; 1 J. Krauskopf, R. Brown, K. Tokarz, and A. Bogutz, *Elderlaw: Advocacy for the Aging* § 11.25 (2d ed. 1993). Yet, “actually available” resources “are different from those in hand.” *Schweiker v. Gray Panthers*, 453 U.S. 34, 48, 101 S.Ct. 2633, 2642, 69 L.Ed.2d 460 (1981) (emphasis in original) . NDAC 75-02-02. 1-25(2) explains: Only such assets as are actually available will be considered. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available. Assets will be reasonably evaluated... See also 45 C.F.R. § 233.20(a)(3)(ii)(D).

As noted in *Hecker*, if an applicant has a legal ability to obtain an asset, it is considered an “actually available” resource. The actual-availability principle primarily serves “to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes non-existent resources to recipients.” *Heckler v. Turner*, 470 U.S. 184, 200, 105 S.Ct. 1138, 1147, 84 L.Ed.2d 138 (1985).

The focus is on an applicant's actual and practical ability to make an asset available as a matter of fact, not legal fiction. See *Schrader v. Idaho Dept. of Health and Welfare*, 768 F.2d 1107, 1112 (9th Cir.1985) . See also *Lewis v. Martin*, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970) (invalidating California state regulation that presumed contribution of non-AFDC resources by a non-legally responsible and non-adoptive stepfather or common law husband of an AFDC recipient's mother).

Determining whether an asset is “actually available” for purposes of medical assistance eligibility is largely a fact-specific inquiry depending on the circumstances of each case. See, e.g., *Intermountain Health Care v. Bd. of Cty. Com 'rs*, 107 Idaho 248, 688 P.2d 260, 264 (Ct.App.1984); *Radano v. Blum*, 89 A.D.2d 858, 453 N.Y.S.2d 38, 39 (1982) ; *Haynes v. Dept. of Human Resources*, 121 N.C.App. 513, 470 S.E.2d 56, 58 (1996) . Interpretation of the “actually available” requirement must be “reasonable and humane in accordance with its manifest intent and purpose...” *Moffett v. Blum*, 74 A.D.2d 625, 424 N.Y.S. 2d 923, 925 (1980) . That an applicant must sue to collect an asset the applicant has a legal entitlement to usually does not mean the asset is actually unavailable. See, e.g., *Wagner v. Sheridan County S.S. Bd.*, 518 N.W.2d 724, 728 (N.D.1994); *Frerks v. Shalala*, 52 F.3d 412, 414 (2d Cir. 1995); *Probate of Marcus*, 199 Conn. 524, 509 A.2d 1, 5 (1986) ; *Herman v. Ramsey Cty. Community Human Serv.*, 373 N.W.2d 345, 348 (Minn.Ct.App.1985). See also *Ziegler v. Dept. of Health & Rehab. Serv.*, 601 So.2d 1280, 1284 (Fla.Ct.App.1992) . At issue here is the methodology utilized in determining the availability of an individual's “resources” for purposes of evaluating his or her eligibility. SSI recipients, and thus SSI-related “medically needy” recipients, may not retain resources having a value in excess of \$2,000. 42 U.S.C. § 1382(a)(1)(B).

The regulations governing the determination of eligibility provide that resources mean cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his support and maintenance. If the individual has the right, authority or power to liquidate the property, or his share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse). [20 C.F.R. § 416.1201\(a\)](#).

Assets must be considered in determining eligibility or SSI related categories. Assets mean cash, any other personal property and real property. (BEM, Item 400 Page 1). Countable assets cannot exceed the applicable asset limit. Not all assets are counted. Some assets are counted for one program but not for another program. (BEM Item 400, Page 1). The department is to consider both of the following to determine whether and how much of an asset is countable: An asset is countable if it meets the availability test and is not excluded. The department is to consider the assets of each person in the asset group. (BEM, Item 400, Page 1). Asset eligibility exists when the asset groups countable assets are less than or equal to the applicable asset limit at least one day during the month being tested. (BEM, Item 400, Page 4). An application does not authorize MA for future months if the person has excess assets on the processing date.

The SSI related MA asset limit for SSI related MA categories that are not medicare savings program or QDWI is \$2000.00 for an asset group for one person and \$3000.00 for an asset group of 2 people. BEM, Item 400 Page 5. An asset must be available to be counted. Available means that someone in the asset group has the legal right to use or dispose of the asset. BEM, Item 400, Page 6. The department is to assume an asset is available unless the evidence shows that it is not available. Availability might be affected by joint ownerships and efforts to sell or the possibility of domestic violence. BEM, Item 400, Page 6.

A Medicaid trust is a trust that meets conditions 1 through 5 below:

The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, an MA post-eligibility patient-pay amount, a diversion penalty or an initial assessment amount. A person's resources include his spouse's resources (see definition).

The trust was established by:

1. The person.
2. The person's spouse.
3. Someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or the person's spouse, or an attorney, or adult child.

4. Someone else (including a court or administrative body) acting at the direction or upon the request of the person or the person's spouse or an attorney ordered by the court.
5. The trust was established on or after August 11, 1993.
6. The trust was not established by a will.
7. The trust is **not** described in Exception A, Special Needs Trust, or Exception B, Pooled Trust in this item. BEM 401, page 10.

Pertinent Department policy states:

Count as the person's countable asset the value of the countable assets in the trust principal if there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust. Real property (land) left to children in equal shares have no estate tax on the transfer of property,

Count as the person's countable asset the value of the trust's countable income if there is any condition under which the income could be paid to or on behalf of the person. Individuals can keep income made off of property and the money goes to the individual not the trust. Property cannot be taken out of the trust. BEM 401, page 9.

The trust principal is considered an available asset of the person who is legally able to:

- Direct use of the trust principal for his needs.
- Direct that ownership of the principal revert to himself. BEM 401, page 15

In the instant case, an Irrevocable Declaration of Trust and Trust Agreement for the benefit of [REDACTED], claimant's spouse was created on April 17, 2012 purporting to establish a trust for the sole benefit of claimant's spouse, with her son, [REDACTED] named as Trustee. Claimant is to be referred to as "me" or "I" throughout the document. (Department Exhibit page 162)

ARTICLE FIVE of the Trust states in pertinent part:

"During each fiscal year of the trust, trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime such part or all of the net income and principal ("Resources") of the Trust as trustee determines is necessary in order to distribute the resources in an actuarially sound basis; provided, however, during the first fiscal year of the trust the distribution shall be made to me subsequent to March 14, 2012, but prior to March 14, 2013. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table for females attached hereto as Exhibit I, to determine the appropriate minimum portion of resources to be distributed in any fiscal year. **During my lifetime, no resources of the trust can be used for**

anyone other than me, except for Trustee fees.” (Department Exhibit page 166)(Emphasis added)

Article Five does not state that the proceeds of the trust are to be paid to or for the benefit of claimant's spouse, but to claimant. Claimant's counsel argues that there is a scrivener's error in the document. The trust document is a duly executed legal document. Either it must be considered entirely as a valid legal document or it must in its entirety be considered invalid. The department is not under obligation to interpret or determine when mistakes have been made in a legal document. The department is not obliged to interpret legal documents so that they benefit the claimant when the legal document is inconsistent in its terms. The department must consider the trust document in its entirety. The department must count as the person's countable asset the value of the countable assets in the trust principal if there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust. Article Five of the trust document directs that the use of the proceeds be used for claimant, the trust grantor, in this case. The principal is considered an available asset of the person who is legally able to direct use of the trust principal for his needs or direct that ownership of the principal revert to himself.

Under the circumstances, the department has established by the necessary competent, material and of substantial evidence on the record that it was acting in compliance with department policy when it determined that claimant had in excess of \$2000.00 in countable available assets because the cash value when added to claimant's assets resulted in more than \$2000 in countable available assets for claimant. The department's case must be upheld. This Administrative Law judge has no equity powers and cannot make a decision in contravention of department policy.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the claimant has in excess of \$ 2000.00 in countable available assets for purpose of medical assistance benefit eligibility. The department properly denied claimants' application for Medical Assistance under the circumstances in determining that claimant had excess countable available assets.

Accordingly, the department's decision is **AFFIRMED**.

/s/ _____
Landis Y. Lain
Administrative Law Judge
for Maura D. Corrigan, Director
Department of Human Services

Date Signed: January 24, 2013

Date Mailed: January 25, 2013

NOTICE: Administrative Hearings may order a rehearing or reconsideration on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. Administrative Hearings will not order a rehearing or reconsideration on the Department's motion where the final decision cannot be implemented within 90 days of the filing of the original request.

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the mailing of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt date of the rehearing decision.

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