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

IN THE MATTER OF:

[redacted]

Reg. No.: 2014-33704
Issue No.: 2008
Case No.: [redacted]
Hearing Date: April 29, 2014
County: Marquette

ADMINISTRATIVE LAW JUDGE: Darryl T. Johnson

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 following Claimant's request for a hearing. After due notice, a telephone hearing was held on April 29, 2014, from Lansing, Michigan. Participants on behalf of Claimant included attorney [redacted]. Participants on behalf of Department of Human Services (Department) included Assistant Attorney General [redacted], Assistance Payment Supervisor [redacted] and Eligibility Specialist [redacted].

ISSUE

Did the Department properly deny Claimant's application for Medical Assistance (MA) based on excess assets?

FINDINGS OF FACT

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

1. Claimant applied for MA.

2. Claimant previously established a trust of which he is the sole beneficiary for the purpose of enabling his wife to be eligible for MA.

3. On February 20, 2014, Department mailed Claimant a Notice of Case Action (NCA) informing him that his application for MA had been denied due to excess assets. (Exhibit 1, pages 8-13).

4. On March 20, 2014, Claimant requested a hearing.

CONCLUSIONS OF LAW

Clients have the right to contest a department decision affecting eligibility or benefit levels whenever it is believed that the decision is incorrect. The department will provide an administrative hearing to review the decision and determine the appropriateness of

that decision. BAM 600. The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An opportunity for a hearing shall be granted to an applicant who requests a hearing because her claim for assistance is denied. MAC R 400.903(1).

The Medical Assistance (MA) program is established by the Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). The Department of Human Services (formerly known as the Family Independence Agency) administers the MA program pursuant to MCL 400.10, *et seq*., and MCL 400.105.

The Department determines a client's eligibility for MA benefits based on, among other things, the client's assets. BEM 400. Department policy further provides that a couple's (his, her, their) total countable assets are determined as of the first day of the first continuous period of care that began on or after September 30, 1989. BEM 402.

During the hearing the parties agreed that divestment was not at issue. The parties narrowed the issue down to whether the exception to BEM 401 applies in this case.

Here, Claimant applied for MA benefits on August 31, 2012. The Department denied the application for excess assets. The Department obtained a legal opinion that all of the assets contained in Claimant's Sole Benefit Trust (SBT) were countable under the general rule stated in BEM 401, at page 9, 7/1/2012.

> 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*. (BEM 401, p 9).

Claimant argues that the Department improperly found the assets in Claimant's trust were countable.

Article II of the Claimant's trust contains the critical language at issue. Article II states:

> **2.1** ***During my lifetime.*** Trustee shall hold, administer, and distribute the Spousal Benefit Trust assets and income in one undivided trust solely for my benefit during my lifetime as provided in this Agreement.
>
> **2.2** ***Distribution of resources.*** During each fiscal year of the Spousal Benefit Trust, Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime whatever part of the net income and principal (the Resources) of the Spousal Benefit Trust that Trustee determines is necessary to distribute the resources on an actuarially sound basis. However, during the first fiscal year of the Spousal Benefit Trust, the distribution shall be made after December 1, 2013 but before December 31, 2013. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table attached

> to this Agreement as Exhibit A, to determine the appropriate minimum portion of the Resources to be distributed in any fiscal year. During my lifetime, no resources of the Spousal Benefit Trust may be used for anyone other than me, except for Trustee fees. Notwithstanding anything in this Agreement to the contrary, Trustee shall distribute the Resources of the Spousal Benefit Trust at a rate that is calculated to use up all of the Resources during my lifetime. The resources of the Spousal Benefit Trust shall be valued on the first day of February of each fiscal year of the Spousal Benefit Trust, except that in the first fiscal year the resources of the Spousal Benefit Trust shall be valued as of the date of their contribution to the Spousal Benefit Trust.
>
> **2.3** ***Spendthrift provision and termination of Trustee's discretionary powers.*** No interest in the principal or income of this Spousal Benefit Trust shall be anticipated, assigned, or encumbered or be subject to any creditor's claim or to legal process before its actual receipt by me.

The Department relied on the Social Security Program Operations Manual (POMS) to show that the assets in the trust were a countable asset.

SI 01120.201(D)(2)(b) explains the policy if there are restrictions on payments of trust assets:

> . . . if a payment can be made to or for the benefit of the individual under any circumstances, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a in this section applies (i.e. the portion of the trust that is attributable to the individual is a resource).

SI 01120.201D.2.a gives the following example:

> If a trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant on his or her 100th birthday, the entire $50,000 is considered to be a payment which could be made to the individual under some circumstances and is a resource.

Despite the examples provided in POMS, the answer to the question of whether Claimant's Trust assets are countable assets is by no means clear. In the example immediately above, the $50,000 could be paid to the beneficiary if he needs a heart transplant on his 100th birthday. In that case, the entire $50,000 would be a countable asset. The Assistant Attorney General in this case argued that Claimant's Trustee could go to Probate Court and have the Trust amended to allow distributions at a rate faster than an actuarially sound basis. While that is so, that requires an amendment to the trust, or at least a judicial order modifying the express terms of the Trust. The express terms of the Trust, however, require distribution on an actuarially sound basis. Claimant is 78 and, based upon the actuarial tables (Exhibit 1 Pages 27-28) he is expected to live another 8.94 years. An argument could be made that the countable portion for eligibility purposes is only that portion that would be distributable each year. If that rationale were applied to the above example, the $50,000 would only be a

countable asset during the applicant's 100th year. Because that example states that the $50,000 is a resource, then in the instant case the assets held in Claimant's Trust must be considered a resource.

In Mackey v Dep't of Human Services, 289 Mich App 688; 808 NW2d 484 (2010) the Michigan Court of Appeals expressed some of the Congressional intent behind changes in legislation that were adopted to address the burgeoning practice of "Medicaid planning."

> Like many federal programs, since its inception the cost of providing Medicaid benefits has continued to skyrocket. The act, with all of its complicated rules and regulations, has also become a legal quagmire that has resulted in the use of several " loopholes" taken advantage of by wealthier individuals to obtain government-paid long-term care they otherwise could afford. The Florida District Court of Appeal accurately described this situation, and Congress's attempt to curb such practices:
>
> > After the Medicaid program was enacted, a field of legal counseling arose involving asset protection for future disability. The practice of "Medicaid Estate Planning," whereby "individuals shelter or divest their assets to qualify for Medicaid without first depleting their life savings," is a legal practice that involves utilization of the complex rules of Medicaid eligibility, arguably comparable to the way one uses the Internal Revenue Code to his or her advantage in preparing taxes. *See generally* Kristin A. Reich, Note, *Long-Term Care Financing Crisis— Recent Federal and State Efforts to Deter Asset Transfers as a Means to Gain Medicaid Eligibility,* 74 N.D. L.Rev. 383 (1998). Serious concern then arose over the widespread divestiture of assets by mostly wealthy individuals so that those persons could become eligible for Medicaid benefits. *Id.; see also Rainey v. Guardianship of Mackey,* 773 So.2d 118 (Fla. 4th DCA 2000). As a result, Congress enacted several laws to discourage the transfer of assets for Medicaid qualification purposes. *See generally* Laura Herpers Zeman, *Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly,* 13 Quinnipiac Prob. L.J. 187 (1988). Recent attempts by Congress imposed periods of ineligibility for certain Medicaid benefits where the applicant divested himself or herself of assets for less than fair market value. 42 U.S.C. § 1396p(c)(1)(A); 42 U.S.C. § 1396p(c)(1)(B)(i); Fla. Admin. Code R. 65A-1.712(3). More specifically, if a transfer of assets for less than fair market value is found within 36 months of an individual's application for Medicaid, the state must withhold payment for various long-term care services, i.e., payment for nursing home room and board, for a period of time referred to as the penalty period. Fla. Admin. Code R. 65A-1.712(3). Medicaid does not, however, prohibit eligibility altogether. It merely penalizes the asset transfer for a certain period of time." Mackey at 684. (Some citations omitted.)

In the case at hand, the Department is not contending that there has been a divestment that would subject Claimant to a penalty period. It is contending that the Trust assets are available resources.

> "As one court has noted, however, Medicaid contains loopholes permitting transfers that are inconsistent with the goals of that legislation, *Mertz v. Houstoun,* 155 F.Supp.2d 415, 427-428 (E.D.Pa., 2001), and our judicial duty is to enforce the purposes of the law *as expressed in the applicable statutory provisions, James v. Richman,* 547 F.3d 214, 219 (C.A.3, 2008) (in interpreting 42 USC 1396, the court noted that " we do not create rules based on our own sense of the ultimate purpose of the law ... but rather seek to implement the purpose of Congress as expressed in the text of the statutes it passed"), not to just enforce a generalized purpose or intent." Mackey at 698.

Congress has provided a means whereby Claimant, who was a "community spouse," was able to shelter assets while his wife was receiving Medicaid. Now that he is no longer a "community spouse" but instead is in need of Medicaid himself, the Congressional intent is not to provide a means whereby the couple's assets can be preserved for their heirs.

The Administrative Law Judge finds that the entire Trust assets can be considered an asset when there are restrictions on payments of Trust assets as in this case.

DECISION AND ORDER

The Administrative Law Judge, based upon the above Findings of Fact and Conclusions of Law, finds that the Department acted properly when it denied Claimant's application for MA. Accordingly, the Department's MA decision is **UPHELD**.

Darryl T. Johnson
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: April 30, 2014

Date Mailed: April 30, 2014

NOTICE: Michigan Administrative Hearing System (MAHS) 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. MAHS 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. (60 days for FAP cases)

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the receipt 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.

Claimant may request a rehearing or reconsideration for the following reasons:

- A rehearing **MAY** be granted if there is newly discovered evidence that could affect the outcome of the original hearing decision.
- A reconsideration **MAY** be granted for any of the following reasons:

  - misapplication of manual policy or law in the hearing decision,
  - typographical errors, mathematical error, or other obvious errors in the hearing decision that effect the substantial rights of the claimant:
  - the failure of the ALJ to address other relevant issues in the hearing decision.

Request must be submitted through the local DHS office or directly to MAHS by mail at

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P. O. Box 30639
Lansing, Michigan 48909-07322

DTJ/las

cc: [redacted]