

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

IN THE MATTER OF:

██████████
██████████
██████████

Reg. No.: 14-001728
Issue No.: 2001, 2007
Case No.: ██████████
Hearing Date: June 17, 2014
County: Allegan

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

HEARING DECISION

Following Claimant's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 45 CFR 99.1 to 99.33; and 45 CFR 205.10. After due notice, a three-way telephone hearing was held on June 17, 2014 from Lansing, Michigan. Participants on behalf of Claimant included Claimant's attorneys ██████████ ██████████ and ██████████ ██████████. Participants on behalf of the Department of Human Services (Department) included Assistant Attorney General (AAG) ██████████ ██████████ (P64919) and ██████████ (Long Term Care (LTC) Specialist).

ISSUE

Did the Department properly deny Claimant's application for Medical Assistance (MA) or "Medicaid" due to 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 and his spouse (██████████) were married during the relevant time period. (Exhibit 2, p. 4).
2. Beginning in September, 2013, Claimant became ill and requires long-term skilled nursing care. (Exhibit 2, p. 4).
3. On November 26, 2013, Claimant executed a document entitled, "Solely for Benefit of Spouse Irrevocable Trust" (hereafter the "██████████"). The ██████████ identified ██████████ as the Settlor and ██████████ as Trustee. (Exhibit 6, pp. 14-21).

4. On December 18, 2013, \$50,714.59 was transferred into the [REDACTED]. (Exhibit 2, p. 5).
5. On December 27, 2013, Claimant's attorney, on Claimant's behalf, submitted an application for Medicaid benefits. (Exhibit 2, p. 4).
6. On January 22, 2014, the Department's Office of Legal Services/Trusts and Annuities Unit, in a memorandum, determined, among other things, that:
 - a. The [REDACTED] meets the criteria of a Medicaid Trust under BEM 401, page 6. (Exhibit 3, p. 10).
 - b. The [REDACTED] is irrevocable according to Section 1.5 of the document. (Exhibit 3, p. 11).
 - c. The terms of the [REDACTED] require a distribution of income and/or principal to be made between November 26, 2013 and December 31, 2013. (Exhibit 3, p. 11).
 - d. At the time of application (December 27, 2013), the [REDACTED] distribution was available to [REDACTED]. (Exhibit 3, p. 11).
 - e. There is a condition under which principal and income can be paid to June M. Raynes (or on her behalf) from the [REDACTED]. (Exhibit 3, p. 11).
 - f. June M. Raynes' countable assets include the value of all countable net income and countable assets in the principal of the [REDACTED]. (Exhibit 3, p. 11).
 - g. The transfer of assets into the [REDACTED] for [REDACTED] is not a divestment. (Exhibit 3, p. 11).
7. On April 8, 2014, the Department mailed Claimant's attorney a Health Care Coverage Determination Notice (DHS-1606) which denied Claimant's Medicaid application for period of December 1, 2013 ongoing, because the value of his countable assets exceeded the amount allowed for the program. (Exhibit 8).
8. On April 10, 2014, Claimant's attorney filed a Request for Hearing challenging the Department's decision to deny the Medicaid application based on the finding that the Raynes SBOT assets were countable excess assets. (Exhibit 1, pp. 2-3).

CONCLUSIONS OF LAW

Department policies are contained in the Department of Human Services Bridges Administrative Manual (BAM), Department of Human Services Bridges Eligibility Manual (BEM), Department of Human Services Reference Tables Manual (RFT), and Department of Human Services Emergency Relief Manual (ERM).

The Medical Assistance (MA) or “Medicaid” program¹ is established by Title XIX of the Social Security Act, 42 USC 1396-1396w-5; 42 USC 1315; the Affordable Care Act of 2010, the collective term for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152; and 42 CFR 430.10-.25. The Department (formerly known as the Family Independence Agency) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

The Department determines a client’s eligibility for MA benefits based on, among other things, the client’s assets. BEM 400, p. 1 (2-1-2014). Countable assets cannot exceed the applicable asset limit. BEM 400, p. 1. An asset is countable if it meets the availability tests and is **not** excluded. BEM 400, p. 2. An asset must be available to be countable. BEM 400, p. 2. “Available” means that someone in the asset group has the legal right to use or dispose of the asset. BEM 400, p. 8. Exception: This does not apply to trusts because there are special rules about trusts. See BEM 401.

BEM 401 (10-1-2013) contains the Department’s Medicaid policy concerning trusts. Which policy applies also depends on the terms of the trust and when the trust was established. (BEM 401, p. 1). BEM 401 uses different definitions depending upon whether the trust is a “Medicaid trust.” This policy provides a mechanism for evaluating trusts. (BEM 401, pp. 3-4). When evaluating trusts, the Department adopts the following analysis:

Determine if a trust established on or after August 11, 1993, is a Medicaid trust using:

- MEDICAID TRUST DEFINITIONS and
- MEDICAID TRUST CRITERIA.

Use the following policies if the trust is a Medicaid trust:

- COUNTABLE ASSETS FROM MEDICAID TRUSTS.
- COUNTABLE INCOME FROM MEDICAID TRUSTS.
- TRANSFERS FOR LESS THAN FMV.

Determine if a trust established before August 11, 1993, is a MEDICAID QUALIFYING TRUST (MQT). Use the following policies if the trust is an MQT [Medicaid qualifying trust].

- Countable MQT Assets.
- Countable MQT Income.

¹ Medical Assistance (MA) is also referred to as “Medicaid.” BEM 105, p. 1 (1-1-2014).

Use OTHER TRUST policy when a trust is **not**:

- An MQT.
- A Medicaid trust. (See BEM 401, pp. 3-4).

Use the GENERAL DEFINITIONS and these definitions when determining:

- Whether a trust is a Medicaid trust, and
- What is available from and transferred for a Medicaid trust. (BEM 401, p. 4).

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

1. 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 divestment penalty or an initial assessment amount. A person's resources include his spouse's resources (see definition²).
2. The trust was established by:
 - The person.
 - The person's spouse.
 - 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.
 - 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.
3. The trust was established on or after August 11, 1993.
4. The trust was not established by a will.
5. The trust is **not** described in Exception A, Special Needs Trust, or Exception B, Pooled Trust in this item. (See BEM 401, pp.5-6).

² **Resources** - all income and assets of a person and the person's spouse. It includes any income and assets the person or spouse is entitled to but does not receive because of action: (1) by the person or spouse; (2) by someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or spouse; (3) by someone else (including a court or administrative body) acting at the direction or upon the request of the person or spouse. BEM 400, p. 4.

Countable assets are assets that are countable using SSI-related MA policy in BEM 400. Do not consider an asset unavailable because it is owned by the trust rather than the person. (See BEM 401, p 10).

BEM 401, at page 11, further provides, "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."

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, p. 7 (4-1-2014).

BEM 405 covers SBO trusts and provides as follows:

All of the following conditions must be met for a transfer or for a trust to be solely for the benefit of a person.

- The arrangement must be in writing and legally binding on the parties.
- The arrangement must ensure that none of the resources can be used for someone else during the person's lifetime, except for trustee fees.
- The arrangement must require that the resources be spent for the person on an actuarially sound basis. This means that spending must be at a rate that will use up all the resources during the person's lifetime. Life expectancies are in Exhibit I - FEMALE OR EXHIBIT II- MALE. (See BEM 405, pp. 11-12 (10-1-2013)).

The salient issue in this matter concerns the intersection of the Department's Medicaid policies and a "Solely for the Benefit Of Trust" ("██████"). Both parties agree that this matter does not involve a divestment. Moreover, the parties do not dispute the underlying facts; however, the parties do sharply disagree about the interpretation of policy and the terms of the ██████. As indicated above, the instant hearing arose after the Department denied Claimant's Medicaid application due to excess assets. Claimant, prior to submitting the application, executed a ██████ in an attempt to protect his community spouse from the high costs associated with his long-term care needs. There was a transfer of approximately ██████ into the ██████. The ██████ also included a provision that allowed distributions of assets on an actuarially sound basis. The Department; however, found that the language in the ██████ authorized ██████ (the community spouse) to distribute assets, which meant that all the assets in the trust were her available and countable assets. Accordingly, the Department denied the application.

The Department takes the position that, for purposes of Department policy, a SBOT does not prevent assets from being countable; but is only a mechanism to assist an applicant with a spouse who has difficulty managing assets. (See Respondent's Closing Argument, p.1). The Department further argues that the only benefit a ██████ provides

an applicant (or the community spouse) is the ability to avoid a divestment penalty by transferring assets to an irrevocable trust. (Res Arg, p. 1) Because the [REDACTED] is an irrevocable trust with conditions under which payments may be made to the spouse, the Department contends that the assets are countable. The Department explains in its closing argument that BEM 405, p. 9, concerns divestment only, but does not provide that an SBOT allows assets to be uncountable.

Claimant, on the other hand, contends that the [REDACTED] was established as part of the Medicaid application process pursuant to BEM 405, page 11, in order to protect [REDACTED] (the community spouse) and her assets from excessive long-term care expenses. (See Claimant's Memorandum in Support of Request for Hearing, Exhibit 2, pp 2-3). Specifically, Claimant argues that the assets in the [REDACTED] are not available or countable to [REDACTED] because a third party was designated as the trustee who is the only individual who may make distributions based on the life expectancy tables. (CI Mem in Supp, Exhibit 2, p 5). Claimant further argues that the Department ignored section 2.2 of the [REDACTED] which provides that the trustee shall use the life expectancy table as an actuarially sound basis for distribution.

Testimony and other evidence must be weighed and considered according to its reasonableness. *Gardiner v Courtright*, 165 Mich 54, 62; 130 NW 322 (1911); *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). The weight and credibility of this evidence is generally for the fact-finder to determine. *Dep't of Community Health*, 274 Mich App at 372; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, it is for the fact-finder to gauge the demeanor and veracity of the witnesses who appear before him, as best he is able. See, e.g., *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. The [REDACTED] is an irrevocable "Medicaid Trust" as defined by BEM 401, pp. 5-6 because it meets all 5 criteria. Here, (1) the assets in the Raynes SBOT were transferred from the applicant or spouse; (2) the Raynes SBOT was established by the applicant or spouse; (3) the trust was dated after August 11, 1993; (4) the [REDACTED] was not established by a will and (5) the [REDACTED] is not an Exception A (Specials Needs Trust) or Exception B (Pooled Trust).

Policy requires the Department consider the value of the countable assets in the trust principal as the person's countable assets "if there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust." See BEM 401, p. 11. The Department contends that the [REDACTED] **all** assets are expected to be paid to [REDACTED] over Claimant's lifetime. (See Summary of Respondent, Exhibit 9, p. 33. With emphasis added.) The Department also asserts that all assets are countable because the [REDACTED] allows for circumstances under which all of the assets could be paid to or on behalf of [REDACTED]. (See Summary of Respondent, Exhibit 9, p. 33.) A review of the [REDACTED] reveals that [REDACTED] is the trustee and that she controls distribution of assets. (See [REDACTED], Exhibit 6, p.

15). This Administrative Law Judge does not find that the [REDACTED] allows [REDACTED] (the community spouse) to control the assets. In addition, Section 2.2 of the [REDACTED] specifically provides that the trustee shall use the life expectancy tables in determining an actuarially sound basis for distribution. ([REDACTED], Exhibit 6, p. 15).

During the hearing the parties agreed that divestment was not at issue. Both parties relied upon the Social Security Administration's Program Operations Manual (POMS) to support their respective positions.

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 [REDACTED] 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 [REDACTED] 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 the POMS, the answer to the question of whether the [REDACTED] Trust assets are countable assets is less clear. In the above example, the [REDACTED] could be paid to the beneficiary if he needs a heart transplant on his 100th birthday. In that case, the entire [REDACTED] would be a countable asset. It is also possible 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. That would require an amendment to the trust, or at least a judicial order modifying the express terms of the [REDACTED]. The express terms of the [REDACTED], however, require distribution on an actuarially sound basis. Claimant is 86 and, based upon the actuarial tables (See Exhibit 2, p. 8) he is expected to live another 6.31 years. The countable portion for eligibility purposes is only that portion that would be distributable each year. Thus, using the above example, the [REDACTED] would only be a countable asset during the applicant's 100th year.

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 Hershers 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. Rather, the Department argues that the [REDACTED] 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 [REDACTED], who was a “community spouse,” was able to shelter assets while her husband was receiving Medicaid. To adopt the Department’s position would effectively destroy the value of a [REDACTED]. Moreover, BEM 401, p. 11 provides, “A trust may allow use of one portion of the principal, but not another portion. Count only the usable portion.” As indicated above, the countable asset portion for eligibility purposes is that portion that would be distributable each year. Here, the [REDACTED], per Section 2.2, does not permit June Raynes (the community spouse) to control the distribution of assets, but directs the trustee to control distribution on an actuarially sound basis.

In addition, Department policy provides the following for a Medicaid Qualifying Trust (MQT):

The countable asset amount for each person for whom assets must be considered is:

- The maximum payment that could be made from the trust (principal or income) to that person as a beneficiary of the trust if the trustee exercised his full discretion under the terms of the trust
- **Minus** actual payments made by the trust to or on behalf of the person.

Clauses such as those that prohibit distributions that would affect MA eligibility are not considered limits on a trustee's discretion for purposes of this policy. To do otherwise would effectively negate the MQT policy. See BEM 401, p. 16. (See also *Hughes v. McCarthy*, 734 F3d 473 (6 CA 2013)).

The [REDACTED] is not used only to protect against the divestment penalty. The distribution of the [REDACTED] assets was not to be made until after the application was filed, so the assets were not available at the time it was filed. (See Exhibit 6). Again, because the [REDACTED] does not permit [REDACTED] to control the distribution of assets, there was not condition under which Claimant could be paid to or on behalf of the person from the [REDACTED] as provided by BEM 401, p. 11.

Based on the competent, material, and substantial evidence on the whole record, this Administrative Law Judge finds that the entire trust assets cannot be considered an

asset when there are restrictions on payments of Trust assets as in this case. Accordingly, the Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds that the Department did not act in accordance with Department policy when it denied Claimant's application for Medicaid based on excess assets.

DECISION AND ORDER

Accordingly, the Department's decision is **REVERSED**.

THE DEPARTMENT IS ORDERED TO BEGIN DOING THE FOLLOWING, IN ACCORDANCE WITH DEPARTMENT POLICY AND CONSISTENT WITH THIS HEARING DECISION, WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

1. The Department shall reprocess and recertify Claimant's December 23, 2013 application for MA or Medicaid.
2. To the extent required by policy, the Department shall provide Claimant with any retroactive and/or supplemental benefits he is entitled to receive.

IT IS SO ORDERED.



C. Adam Purnell

Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: **7/9/2014**

Date Mailed: **7/9/2014**

CAP/sw

NOTICE OF APPEAL: A party may appeal this Hearing Decision in the circuit court in the county in which he/she resides, or the circuit court in Ingham County, within 30 days of the receipt date.

A party may request a rehearing or reconsideration of this Hearing Decision from the Michigan Administrative Hearing System (MAHS) within 30 days of the mailing date of this Hearing Decision, or MAHS may order a rehearing or reconsideration on its own motion.

