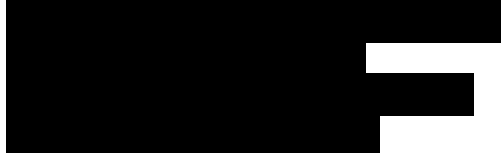


**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES**

IN THE MATTER OF:



Reg. No.: 14-013694
Issue No.: 2001
Case No.: [REDACTED]
Hearing Date: November 19, 2014
County: Oakland #3

ADMINISTRATIVE LAW JUDGE: Landis Y. Lain

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, an in person hearing was held on November 20, 2014, from Southfield, Michigan. Claimant was represented at the hearing by [REDACTED]. Participants on behalf of the Department of Human Services (Department) included [REDACTED], Eligibility Specialist, acting as Hearings Facilitator.

ISSUE

Did the Department of Human Services (DHS or the Department) properly deny Claimant's application for Medical Assistance - Long Term Care (MA - LTC) based upon its determination that Claimant had 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. On May 12, 2014, claimant entered long-term care.
2. On July 31, 2014, Claimant's attorney applied for Medical Assistance benefits for Claimant.
3. On September 19, 2014, an initial asset assessment was conducted with a begin date of May 12, 2014, (the date Claimant entered long term care).
4. The department determined in the initial asset assessment that on May 12, 2014, Claimant and spouse had combined resources in the amount of [REDACTED].
5. The department determined that the community spousal share was [REDACTED] which was protected from being counted as Claimant's asset.

6. The department determined that Claimant had countable assets in the amount of [REDACTED], Exhibit 6.
7. The Claimant and spouse have several assets including a sole benefit trust.
8. The "Trust Solely for the Benefit of Cecile Harwood" (SBO) document was sent to the Office of Legal Services/Trust and Annuities Unit for evaluation.
9. On September 18, 2014, the "Trust Solely for the Benefit of [REDACTED]" was evaluated as follows: pursuant to Medicaid trust policy regarding your revocable trust that BEM 401, page 11, because there is a condition under which payments can be made to or on behalf of [REDACTED] from the trust, the countable asset for [REDACTED] is the value of all the countable net income and the countable assets in the principal of the trust. The trustee will have to provide all of the items and their value that are contained in the trust solely for the benefit of [REDACTED]. Count any payments made by the Trust to [REDACTED] or her legal representative as an unearned income, Exhibit 8.
10. The Medicaid application was processed in bridges resulting in a Medicaid (MA) denial.
11. The Department determined that the Claimant's total initial asset assessment as of December 20, 2013, was [REDACTED] with a protected spousal amount of [REDACTED], Exhibit 6.
12. The Department determined that the Claimant's total assets in the application month, was [REDACTED] due to the trust being countable at application for trust evaluation, Exhibit 6.
13. On September 19, 2014, the Department caseworker sent Claimant's representative notice of case action that the application for Medical Assistance was denied.
14. On September 29, 2014, Claimant's representative filed a request for a hearing to contest the Department's action, stating that the Department incorrectly applied BEM Item 400, 401 and 402 and that is denial of claimant's due process rights that claimant was not notified of the change in interpretation of Department policy.

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 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 his or her claim for assistance has been denied. MAC R 400.903(1). Claimants 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.

In this case, claimant's representative argues:

Claimant was a married man applied for Medicaid on July 31, 2014. The community spouse was not applying for Medicaid for herself. On May 6, 2014 claimant's spouse established the Solely for the Benefit of [REDACTED] with a third-party trustee. Prior to applying for Medicaid, claimant's spouse transferred the excess assets to the trust. Pursuant to Article 1 Section 1.3 said trust is irrevocable. Per the terms of said trust there is no condition under which the principal could be paid to or on behalf of claimant from said trust. Payments were to be made only to claimant's spouse. According to Article 1 Section 2.1(a), claimant's spouse shall not receive payment during the first fiscal year. Any payment made from said trust is not unearned income for claimant because he is not the beneficiary of trust. On August 20, 2014, DHS published a memo reinterpreting the "Solely for the Benefit Of" trust. This reinterpretation comes after 15 years of the SBO being an effective Medicaid planning tool.

The Medical Assistance (MA) program is established by the Title XIX of the Social Security Act, 42 USC 1396-1396w-5, and is implemented by 42 CFR 400.200 to 1008.59. The Department of Human Services (formerly known as the Family Independence Agency) administers the MA program pursuant to MCL 400.10 and MCL 400.105.

The Medical Assistance (MA) program is established by 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 (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 Administrative Manual (BAM), the Program Eligibility Manual (BEM) and the Program Reference Manual (PRM).

Title XIX of the Social Security Act, commonly referred to as "The Medicaid Act," provides for Medical Assistance 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 government through the Centers for Medicaid and Medicare Services (CMS) of the Department of Health and Human Services (HHS). The state and federal governments share financial responsibility for Medicaid services. Each state may choose whether or not to participate in the Medicaid program. Once a state chooses to participate, it must operate its Medicaid program in accordance with mandatory federal requirements, imposed both by the Medicaid Act

and by implementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

Participating states must provide at least seven categories of medical services to persons determined to be eligible Medicaid recipients. 42 USC §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 Assistance eligibility, the Department has defined an asset as “any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.” NDAC 75-02-02.1-01(3). Under both federal and state law, an asset must be “actually available” to an applicant to be considered a countable asset for determining Medical Assistance eligibility. *Hecker*, 527 N.W.2d at 237 (On Petition for Rehearing); *Hinschberger v. Griggs County Social Serv.*, 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).

Under BEM, Item 400, an eligible Medical Assistance recipient may not possess in excess of \$2000 in assets.

Assets mean cash, any other personal property and real property. **Real property** is land and objects affixed to the land such as buildings, trees and fences. Condominiums are real property. **Personal property** is any item subject to ownership that is **not** real property (examples: currency, savings accounts and vehicles). BEM, Item 400, page 1. Countable assets **cannot** exceed the applicable asset limit. Not all assets are counted. An asset is countable if it meets the availability tests and is **not** excluded. Available means that someone in the asset group has the right to use or dispose of the asset. BEM, Item 400, page 5. All types of assets are considered for SSI-related MA. BEM, Item 400, page 2. For Medicare Savings Programs (BEM 165) and QDWI (BEM 169) the asset limit is:

- . \$4,000 for an asset group of one.
- . \$6,000 for an asset group of two.

For all other SSI-related MA categories, the asset limit is:

- . \$2,000 for an asset group of one.
- . \$3,000 for an asset group of two. BEM, Item 400, page 5.

BEM, Item 401, controls Medical Assistance Trust. Policy defines trust as a right of property created by one person for the benefit of himself or another. It includes any legal instrument or device that exhibits the general characteristics of a trust but is not called a trust or does not qualify as a trust under state law. Examples of such devices might be annuities, escrow accounts, pension funds and investment accounts managed by someone with fiduciary obligations. A trustee is defined by policy as the person who has the legal title to the assets and income of a trust and the duty to manage the trust with the benefit of the beneficiary. BEM, Item 401, p. 1.

The Department caseworker is to refer a copy of the trust to the Medicaid eligibility policy section for evaluation. An evaluation of the trust advises local offices on whether the trust is revocable or irrevocable and whether any trust income or principle is available. Advice is only available to local offices for purposes of determining eligibility or for an initial assessment when a trust actually exists. Advice is not available for purposes of estate planning including advice on proposed trust or proposed trust limits. BEM, Item 401, p. 2.

The Medicaid Trust Unit/eligibility policy section must determine if a trust established on or after August 11, 1993, is a Medicaid trust using Medicaid trust definitions and Medicaid trust criteria. The policy unit also has to determine if the trust is a Medicaid trust and whether there are countable assets for Medicaid trusts; whether there is countable income for Medicaid trusts; and whether there is transfers of assets for less than fair market value. BEM, Item 401, p. 3.

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 definition).
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. BEM, Item 401, pages 5-6.

In this case, the SBO Trust meets all of the criteria of a Medicaid trust. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, and MA post-eligibility patient pay amount, a divestment penalty or an initial asset amount. The trust was established by the Claimant's spouse. The trust was established/amended on or after August 11, 1993. The trust was not established by will. The trust does not meet the condition of an exception A, special needs trust; or exception B, pooled trust as described in BEM, Item 401.

An initial asset assessment is needed to determine how much of a couple's assets are protected for the community spouse.

An initial asset assessment means determining the couple's (his, her's, their) total countable assets as of the first day of the **first** continuous period of care that began on or after September 30, 1989.

Example: A married man entered a nursing home on 12/6/89. He was released on 6/10/90 and returned home.

On 3/16/91 he re-entered the nursing home and has been there continuously ever since.

He applied for MA on 10/2/91. To determine his asset eligibility, do an initial asset assessment for 12/6/89 - the first day of the first continuous period of care that began on or after September 30, 1989. BEM Item 402, page 7

In conducting the initial asset assessment the Department must count both Claimant's and his spouse's total combined assets which were in existence as of the date when Claimant entered long-term care. Claimant's spouse did not create the trust or place assets into an irrevocable trust until May 6, 2014. The spouse's transfer of assets to an irrevocable trust does not undo the initial asset assessment amount. The initial amount of combined assets was [REDACTED]. The protected spousal amount limit was [REDACTED], leaving Claimant with total countable assets as of long-term care entry date of [REDACTED]. Thus, the entire amount must be counted for purposes of Medicaid eligibility determination.

BEM, item 401, page 10 states that the following are countable assets:

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.

The Department is to 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 Item 401, page 11.

Section 2.2 of the trust document states:

Distribution of Resources. Subject to the above distribution parameters during the first fiscal year, Trustee, in its sole and absolute discretion, may distribute to (or otherwise for the benefit of) Cecile Harwood all (or such lesser portion of the remaining principal (if any) of the trust as Trustee determines to be in Cecile Harwood's best interest.

The Trustee was advised to distribute all the assets on an actuarially sound basis, which for Medicaid purposes means that it must be returned to claimant's spouse over her lifetime. BEM, Item 405 pages 11 – 12. The "available" standard used for assets does not apply to trusts. BEM, Item 400, page 12. Thus, even if the trust had limitations on the yearly amounts, all assets are expected to be paid to Claimant's spouse, so there are conditions under which the principal could be paid to or on behalf of the person and all assets are countable. BEM, Item 401, page 11.

A Solely for the Benefit of trust (SBO Trust) does not make assets disappear or become uncountable simply because by the creation of such a trust. Medicaid policy dictates that spouses are responsible for one another. BEM 401, page 4 indicates that all income and assets of a person and the person's spouse are a resource for both spouses. It includes income and assets that the person or spouse is entitled to but does not receive because of an action by the person or the spouse; by some else with legal authority to act in place of or on behalf of the person or spouse; or by someone else acting at the direction or upon the request of the person or spouse.

In an application for LTC for an individual, the assets of both spouses are calculated when determining if there are excess assets, BEM 402, page 4.; 42 USC 1396r-5(c). The couple is permitted to retain \$2,000 for the applicant spouse, BEM 400, page 7, plus the amount calculated as the Spousal Protected Resource amount, BEM 402; 42 USC 1396r-5. Medicaid is the joint state/federal program that provides payment for covered health care services for eligible **indigent** individuals. MCL 400.105, *et seq*; 42 USC 1396a, *et seq*. Medicaid is a means tested program. If Medicaid applicants have sufficient assets, income or insurance to pay for health care they do not qualify for the Medical Assistance program. Federal law allows a community spouse to retain a certain amount of assets. Any assets retained by the applicant or community spouse which exceed those allowed by law are necessarily countable. Transfers from the client's spouse to another SBO irrevocable trust are not divestment. BEM 405, p.9. Department policy requires that the distributions to the community spouse be counted for the applicant's eligibility. The trust requires that assets be distributed back to the beneficiary community spouse during his/her lifetime. Therefore, there is a condition under which

the principal could be paid to or on behalf of the person, which makes the assets countable.

POMS SI 01120.201 explains the policy:

a. General rule for irrevocable trusts

In determining whether an irrevocable trust established with the assets of an individual is a resource, we must consider how payments from the trust can be made. *If payments from the trust could be made to or for the benefit of the individual or individual's spouse (SI 01120.201F in this section), the portion of the trust from which payment could be made that is attributable to the individual is a resource.*

b. Circumstance under which payment can or cannot be made

In determining whether payments can or cannot be made from a trust to or for the benefit of an individual (SI 01120.201F.1.), take into consideration any restrictions on payments. Restrictions may include use restrictions, exculpatory clauses, or limits on the trustee's discretion included in the trust. *However, if a payment can be made for the benefit of the individual under any circumstance, 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.*

The POMS contains the emphasis for “*any circumstance*”, no matter how unlikely or distant in the future and 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 circumstance and is a resource. (POMS SI 01120.201(D)(2))

In this case, the community spouse's attempt to circumvent both federal law and policy by creating a SBO trust to shelter excess personal assets is an attempt to retain assets which are in addition to/exceed the amounts allowed by policy and federal law. Such an attempt must fail. The claimant's spouse cannot retain assets in excess of that allowed by law and policy. Claimant and spouse are not indigent. They, at all times relevant to this application, retained sufficient assets to pay claimant's LTC, and in fact, retained excess assets for purposes of Medical Assistance benefit eligibility. The department's determination must be upheld.

DECISION AND ORDER

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, finds that the Department has established by the necessary competent, material and substantial evidence on the record that it acted in accordance with Department policy when it determined: that the assets in the Sole Benefit Trust were countable assets for purposes of Medical Assistance benefit eligibility determination; and that claimant had in excess of \$2000 in countable available assets for purposes of Medical Assistance and retroactive Medical Assistance benefit eligibility on the date of application. The department properly denied claimant's application for Medical Assistance under the circumstances and determined that she had in excess of \$2000 of countable available assets.

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



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

Date Signed: 11/25/2014

Date Mailed: 11/26/2014

NOTICE OF APPEAL: 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 or Reconsideration was made, within 30 days of the receipt date of the Decision and Order of Reconsideration or Rehearing Decision.

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).

A Request for Rehearing or Reconsideration may be granted when one of the following exists:

- Newly discovered evidence that existed at the time of the original hearing that could affect the outcome of the original hearing decision;
- Misapplication of manual policy or law in the hearing decision which led to a wrong conclusion;

- Typographical, mathematical or other obvious error in the hearing decision that affects the rights of the Claimant;
- Failure of the ALJ to address in the hearing decision relevant issues raised in the hearing request.

The Department, AHR or the Claimant must specify all reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration. A request must be *received* in MAHS within 30 days of the date the hearing decision is mailed.

The written request must be faxed to (517) 335-6088 and be labeled as follows:

Attention: MAHS Rehearing/Reconsideration Request

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

LYL/sw

cc:

