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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

Date Mailed: September 6, 2019
MOAHR Docket No.: 14-019177-R
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Alice C. Elkin

HEARING DECISION
ON REMAND FROM THE MICHIGAN SUPREME COURT

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to the order of the Michigan Supreme Court in *Hegadorn v Dep't of Human Serv Dir*,¹ 503 Mich 231; 931 NW2d 571 (2019), remanding to the Michigan Office of Administrative Hearings and Rules (MOAHR) three cases, including the above-captioned matter, for additional administrative proceedings.

A hearing decision was issued by the undersigned on April 15, 2015 in the above-captioned matter, under MOAHR docket no. 14-01977, following a March 19, 2015 hearing. In the hearing decision, the undersigned found that [REDACTED],² who then resided in a long-term care facility, was ineligible for Medicaid because she had assets with a value in excess of the \$2,000 asset limit for eligibility. This conclusion rested on a finding that the irrevocable trust funded with assets of [REDACTED] and her husband, [REDACTED], and created solely for the benefit of [REDACTED] (the SBO Trust) was a countable asset. Because the difference between the value of the trust corpus in the SBO Trust at the time of application and the applicable protected spousal amount that was reserved for the benefit of [REDACTED] as the community spouse, exceeded the \$2,000 Medicaid asset limit, it was found that the Michigan Department of Health and Human Services (Department) properly denied [REDACTED] January 30, 2014 Medicaid application due to excess assets.

[REDACTED] appealed. The case ultimately made its way to the Michigan Supreme Court, which consolidated [REDACTED] case with those of two other similarly-situated women in long-term care facilities who had been denied Medicaid by the Department on the basis that the solely for the benefit trusts created in each case for the benefit of the women's husbands were countable assets and made them ineligible for Medicaid due to excess

¹ During the course of the legal proceedings culminating in the Court's decision, the Department of Human Services was reorganized as the Department of Health and Human Services.

² Ms. Ford passed away during the course of these legal proceedings and her interests are represented by the personal representatives of her estate.

assets. In its May 9, 2019 decision, the Michigan Supreme Court concluded that the solely for the benefit irrevocable trusts created in each of the three cases for the benefit of the spouses not in long-term care (the community spouses) were not *per se* countable assets. Rather, it found that the principal of the trusts could become a resource available to the spouse residing in a long-term care facility (the institutionalized spouse), and thus a countable asset, if all the following conditions are met:

- (1) assets of the institutionalized spouse are used to form the principal of the trust, 42 USC 1396p(d)(2)(A);
- (2) the institutionalized spouse, his or her spouse, or one of the other entities listed under 42 USC 1396p(d)(2)(A)(i) through (iv) established the trust using a means other than a will; and
- (3) there are “any circumstances under which payment from the trust could be made to or for the benefit of” the institutionalized spouse, 42 USC 1396p(d)(3)(B)(i).

503 Mich at 264-265.

Because there was no dispute that the first two prongs were satisfied in each of the three cases before the Court, the issue in the cases concerned the third prong: whether there were “any circumstances under which payment from the trusts could be made to or for the benefit of” the institutionalized spouses. The Supreme Court concluded that the determination of whether there are “any circumstances” under which payment from the solely for the benefit trusts could be made to or for the benefit of the institutionalized spouses required a review of the language of the trust documents themselves. Finding no such review in the original administrative proceedings, the Court vacated the administrative hearing decisions and remanded the cases to MOAHR for the proper application of the any-circumstances test and additional administrative proceedings necessary to evaluate the legal validity of the Department’s decision to deny each woman’s Medicaid application. 503 Mich at 269-270.

On July 2, 2019, MOAHR issued a Notice of Hearing On Remand from the Michigan Supreme Court scheduling a hearing for [REDACTED] case on July 31, 2019 to address the Supreme Court’s instructions:

If the ALJs determine that circumstances exist under which payments from the [solely for the benefit of] trusts could be made to or for the benefit of the institutionalized spouse, then the ALJs should explain this rationale and affirm the Department’s decision. However, if no such circumstances exist, the ALJs should reverse the Department’s decisions and order that the Medicaid applications be approved.

An in-person hearing was held as scheduled at the Department’s Ypsilanti office on July 31, 2019. [REDACTED] interests were represented by attorney [REDACTED] The

Department was represented by Assistant Attorney General (AAG) [REDACTED]. [REDACTED] Eligibility Specialist, was present on behalf of the Department but did not participate in the hearing.

ISSUE

Did the Department properly deny Petitioner's January 30, 2014 application for 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. On January 10, 2014, [REDACTED] husband executed an irrevocable trust that, per its terms, was intended as a "solely for the benefit" trust within the meaning of 42 USC 1396p(c)(2)(B). The trust (SBO Trust) was funded with assets of [REDACTED] and [REDACTED] (Hearing Decision, p. 2; Certified Record, Item 2, Exhibit D, pp. 16-25).
2. Section 2.2 of the SBO Trust provided that, during [REDACTED] lifetime, the assets in the trust were to be distributed to [REDACTED] on an actuarially sound basis and were limited to [REDACTED] use:

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 whatever part of the net income and principal (the Resources) of the Trust that Trustee determines is necessary to distribute the resources on an actuarially sound basis. However, during the first fiscal year of the Trust, the distribution shall be made to me after **August 1, 2014**, but before **December 1, 2014**. 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 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 Trust at a rate that is calculated to use up all of the Resources during my lifetime. The Resources of the Trust shall be valued on the first day of **July** of each fiscal year of the Trust, except that in the first fiscal year the Resources of the Trust shall be valued as of the date of their contribution to the Trust.

(Hearing Decision, p. 2; Certified Record, Item 2, Exhibit D, p. 18.)

3. Upon [REDACTED] death, the terms of the SBO Trust provided that, after any expenses were paid from the trust, the balance of the trust would be distributed to [REDACTED] children and/or their descendants (Certified Record, Item 2, Exhibit D, p. 19).
4. The Department acknowledged that, under the terms of the SBO Trust, there were not any circumstances under which payment from the trust could be made to or for the benefit of [REDACTED]

CONCLUSIONS OF LAW

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

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act, 42 USC 1396 to 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 to 430.25. The Department (formerly known as the Department of Human Services) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105 to 400.112k.

The Michigan Supreme Court remanded each of the three consolidated cases on the limited issue of whether there were any circumstances in the terms of solely for the benefit trusts in each case under which payments from the trusts could be made to or for the benefit of the institutionalized spouses. The Court explained that application of the any-circumstances rule would result in the assets in an irrevocable solely for the benefit trust being available to the institutionalized spouse “if there any circumstances, whether likely or hypothetical, under which the trust could make a payment to or for the benefit of the institutionalized spouse. If an irrevocable trust can make payments only to the community spouse, then those payments will satisfy the any-circumstances rule only if there is evidence that the payments could be for the benefit of the institutionalized spouse.” 503 Mich at 262-263.

At the hearing on [REDACTED] case, the AAG representing the Department conceded that the terms of the SBO Trust did not provide any circumstances under which payment from the trust could be made to or for the benefit of Ms. Ford. A review of the trust terms confirms that, during [REDACTED] lifetime, distributions from the SBO Trust were limited to Mr. Ford, with payments made to [REDACTED] on an actuarially sound basis with

the intent that the assets in the trust would be used up by him during his lifetime. The trust terms further provided that, if there were assets remaining in the trust upon [REDACTED] death, those assets would be distributed to [REDACTED] children or their descendants after payment of expenses. (Certified Record, Item 2, Exhibit D, pp. 18-19). Therefore, the trust terms support the Department's position that there are no circumstances under which payment from the SBO Trust could be made to or for the benefit of [REDACTED]. Because there are no circumstances under which payment from the SBO Trust could be made to or for the benefit of [REDACTED] the SBO Trust is not a countable asset. The parties acknowledged that, when the SBO Trust is excluded as a countable asset, the value of [REDACTED] remaining assets at application did not exceed \$2,000. An individual in long term care who has assets valued at or below \$2,000 is asset eligible for Medicaid for disabled individuals. Michigan Department of Health and Human Services, Bridges Eligibility Manual (BEM) 400 (December 2013), p. 7; BEM 211 (January 2014), p. 4. Therefore, the Department improperly denied [REDACTED] January 30, 2014 Medicaid application due to excess assets.

While the AAG did not dispute that, based on the finding that the SBO Trust was not countable, the Department erroneously denied [REDACTED] application due to excess assets, she did dispute the conclusion that the application should consequently be approved without the Department further assessing other eligibility factors. Generally, when an ALJ finds that the Department erred in denying a Medicaid application because one of the eligibility criteria was not satisfied, the Department is ordered to reprocess the application to determine whether the remaining financial and nonfinancial eligibility criteria have been satisfied. See Michigan Department of Health and Human Services, Bridges Eligibility Manual (BEM) 163 (July 2017), pp. 1-2; BEM 164 (April 2017), pp. 1-2; BEM 166 (April 2017), pp. 1-2. However, when it vacated the ALJs' hearing decisions and remanded each of the consolidated cases for additional administrative proceedings necessary to determine the validity of the Department's decisions to deny plaintiffs' Medicaid applications, the Court instructed that "if no such circumstances exist [under which payments from the trust could be made to or for the benefit of the institutionalized spouse], the ALJs should reverse the Department's decision and *order that the Medicaid applications be approved.*" 503 Mich at 269 (emphasis added). Thus, the Michigan Supreme Court required approval of [REDACTED] application upon a finding at the administrative proceedings that the SBO Trust was not a countable asset.³

In arguing that additional assessment was necessary, the AAG primarily focused on the requirement that the Department must, as part of the Medicaid eligibility process, calculate an applicant's patient pay amount, the monthly amount of a person's income that Medicaid considers available for meeting the cost of long-term care services. Petitioner's counsel did not dispute that the calculation of a patient pay amount was

³ It is further noted that Petitioner's counsel asserted at the hearing that asset eligibility was the only eligibility factor at issue in [REDACTED] case and that, at the initial proceedings, once the excess asset issue had been resolved, the Department had found [REDACTED] eligible for Medicaid long-term-care assistance in October 2014. The AAG did not dispute this assertion.

required and agreed that approval of [REDACTED] Medicaid application would be subject to calculation of her patient-pay amount. In fact, BEM 546 (July 2019), p. 1, requires that, once an applicant in long term care is eligible for Medicaid, the Department must determine the post-eligibility patient pay amount for that individual. Thus, in this specific case, once [REDACTED] was asset-eligible for Medicaid, she was eligible for Medicaid subject only to the calculation of her patient pay amount. Therefore, it is found that the Department improperly denied [REDACTED] application and, per the Supreme Court instructions and, under the specific circumstances limited to this case, the application is approved subject to calculation of the patient pay amount.

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 [REDACTED] January 30, 2019 application.

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. Based on the finding that the SBO Trust is not a countable asset and, per the instructions of the Michigan Supreme Court, approve Ms. Ford's January 30, 2014 Medicaid application;
2. Calculate [REDACTED] patient pay amount for January 2014 ongoing;
3. Provide [REDACTED] with the Medicaid coverage she is eligible to receive from January 2014 ongoing; and
4. Notify the interested parties of its decision in writing.

AE/tm



Alice C. Elkin
Administrative Law Judge
for Robert Gordon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

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

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

Counsel for Respondent

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DHHS

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Authorized Hearing Rep.

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner

Estate of [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Counsel for Petitioner

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

cc: ME—D. Smith; EQADHShearings
AP Specialist Washtenaw (4)