



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: September 26, 2016
MAHS Docket No.: 16-010458
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

HEARING DECISION

Following Petitioner'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; and Mich Admin Code, R 792.11002. After due notice, an in-person hearing was held on September 8, 2016, a hearing room located in [REDACTED], Michigan. Petitioner did not appear, but she was represented by her attorneys, [REDACTED] ([REDACTED] and [REDACTED] [REDACTED] (Petitioner's daughters, [REDACTED] and [REDACTED] attended the hearing, but did not offer any testimony. Assistant Attorney General (AAG) [REDACTED] represented the Department of Health and Human Services (Department). [REDACTED] Eligibility Specialist/Long Term Care (LTC) worker, testified as a witness for the Department. [REDACTED] Assistance Payments Supervisor, attended the hearing, but did not testify.

The Department offered the following exhibits that were admitted into evidence: [Department's Exhibit 1] Hearing Summary dated July 28, 2016; Request for Hearing dated June 18, 2016 (pages 1-2); Request for Hearing dated July 28, 2016 (page 3); Appendix C-authorized representative signature DCH-1426-C dated October 20, 2015 (page 4); Request for Hearing dated July 18, 2016 (page 5); Assets Declaration Patient and Spouse dated October 20, 2015 and "[REDACTED] Medicaid Countable Assets as of 9/9/2015" (pages 6-8); Initial Assessment Notice (DHS-4588) dated December 14, 2015 (pages 9-10); Initial Asset Assessment and Asset Record dated December 14, 2015 (page 11); Obituary for [REDACTED] (March 11, 1928 – June 6, 2016) (page 12); Verification Checklist (DHS-3503) dated June 15, 2016 (pages 13-15); Email from [REDACTED] to [REDACTED] dated July 7, 2016 (page 15); Letter from [REDACTED] attorney, to [REDACTED] dated July 7, 2016; Petition to Determine Ownership of Assets dated July 7, 2015 (pages 17-21) with Exhibit A (Order Regarding Petition for Protective Order (pages 23-24), Exhibit B (List of Assets) dated July 7, 2016 (page 26) and Exhibit C ([REDACTED] Voided Check No. [REDACTED] and No. [REDACTED] dated July 7, 2016 (page 28); Health Care Coverage Determination Notice (DHS-

1606) dated July 8, 2016 (pages 29-32). [Department's Exhibit 2] Summary of Respondent dated September 1, 2016 (pages 1-6); [Department's Exhibit 3] Health Care Coverage Determination Notice dated July 8, 2016 (page 1); [Department's Exhibit 4] SSI and Spousal Impoverishment Standards (page 1); [Department's Exhibit 5] Resource and Asset Rules (pages 1-4).

Petitioner offered the following exhibits into evidence: [Petitioner's Exhibit A] Case Summary with (Petition for Protective Order, pages 1-12); (Power of Attorney, pages 14-23); (Order Regarding Petition for Protective Order, pages 24-25); (BEM 546 (7-1-2015)) (pages 27-29); (BEM 402 (7-1-2015)) (pages 31-32); (BEM 405 (7-1-2015)) (page 34); (Order Regarding Protective Order) (pages 36-37); (MCL 700.5402) (page 39); (Petition to Determine Ownership of Assets) (pages 41-45); (Order Regarding Petition for Protective Order) (pages 47-48); (List of Assets) (page 50); (Bank Voided Check No. [REDACTED] and No. [REDACTED] dated July 7, 2016 (page 52); Order Determining Ownership of Assets (pages 54-55); MCL 700.1302 (page 57); and BEM 400 (7-1-2016) (page 59).

[REDACTED] testified as a witness for the Department. Petitioner did not call any witnesses.

The record closed at the conclusion of the hearing.

ISSUE

Did the Department properly determine that Petitioner was no longer eligible for Medical Assistance (MA or "Medicaid")?

FINDINGS OF FACT

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

1. Petitioner was married to [REDACTED] ("Petitioner's spouse"). [Petitioner's Exhibit A, p. 8].
2. At or about age 88, Petitioner was diagnosed with dementia and possible Parkinson's disease and was no longer able to care for her needs. [Pet. Exh. A, p. 8].
3. Petitioner hoped to qualify for Medicaid Waiver assistance. [Pet. Exh. A, p. 8].
4. On April 6, 2011, Petitioner executed a general durable power of attorney which named Petitioner's spouse as attorney-in-fact. [Pet. Exh. A, pp. 14-22].
5. On August 25, 2015, Petitioner's spouse, by his attorney, filed a Petition for Protective Order with the [REDACTED] County Probate Court which, among other things, sought an Order to transfer all of Petitioner's interests in assets she owns

individually or jointly to her spouse and to determine the value of the assets transferred to be \$ [redacted] [Pet. Exh. A, pp. 4-12].

6. On September 22, 2015, the [redacted] County Probate Court entered an Order Regarding Petition for Protective Order under File No. [redacted]-[redacted]-[redacted] which, in pertinent part, ordered the following:
 - a. Petitioner's spouse, as attorney-in-fact, is authorized to transfer all assets, individually or jointly-owned by Petitioner. [Pet. Exh. A, p. 47].
 - b. The value of the assets transferred for the support of Petitioner's spouse was \$ [redacted] [Pet. Exh. A, p. 47].
 - c. Petitioner "is directed to transfer all property, real and personal, owned by [Petitioner], either individually or jointly with [Petitioner's spouse] (marital assets, to [Petitioner's spouse] individually, and to sign any documents necessary to facilitate these transfers. [Petitioner's spouse] can also sign documents to accomplish said transfers and carry out this Order. This Order specifically includes real estate located at [redacted], [redacted]; [redacted]; [redacted]; [redacted] . . ." [Pet. Exh. A, p. 47].
7. On or about October 20, 2015, the Department received an Application for Health Care Coverage & Help Paying Costs (DCH-1426) purportedly on behalf of Petitioner and/or Petitioner's spouse. [Department's Exhibit 1, p. 4].
8. On October 20, 2015, the Department received an Assets Declaration Patient and Spouse (DHS-4574-B) on behalf of Petitioner and/or Petitioner's spouse. Attached to the DHS-4574 was a document entitled, "[redacted] Medicaid Countable Assets as of 9/9/15" which indicated total countable assets of \$ [redacted] [Dept. Exh. 1, pp. 6-7].
9. On December 14, 2015, the Department mailed Petitioner an Initial Asset Assessment Notice (DHS-4588) which indicated the following:
 - a. The Protected Spousal Amount (PSA) is \$ [redacted] [Dept. Exh. 1, pp. 9-10].
 - b. The asset limit is [redacted]. [Dept. Exh. 1, pp. 9-10].
 - c. The Initial Asset Assessment (IAA) date is September 9, 2015. [Dept. Exh. 1, pp. 9-10].
 - d. The IAA Amount is \$ [redacted] [Dept. Exh. 1, pp. 9-10].
10. On June 6, 2016, Petitioner's spouse was deceased. [Dept. Exh. 1, p. 12].
11. Petitioner's daughters, [redacted] and [redacted], were appointed Co-Personal Representatives of the Estate of [redacted]. [Pet. Exh. A, p. 41].

12. On June 15, 2016, the Department mailed Petitioner's attorney a Verification Checklist (DHS-3503) which requested verification concerning assets, real property, vehicle and life insurance by June 27, 2016. [Dept. Exh. 1, pp. 13-14].
13. On July 7, 2016, Petitioner's attorney sent the Department a letter which included a list of assets in the amount of \$ [REDACTED] that apparently were not properly moved into the name of Petitioner's spouse. The letter referenced a petition which was to be filed with the [REDACTED] County Probate Court to determine the ownership of the estate of Petitioner's spouse. [Dept. Exh. 1, p. 16].
14. On July 8, 2016, [REDACTED] and [REDACTED], as Co-Personal Representatives of the Estate of [REDACTED], filed a Petition to Determine Ownership of Assets with the [REDACTED] County Probate Court. The Petition indicated that Petitioner's spouse, prior to his death, failed to comply with the [REDACTED] County Probate Court's September 22, 2015 Protective Order because "certain assets remain titled jointly to [Petitioner] and [Petitioner's spouse]." The Co-Personal Representatives asked the Probate Court to impose a constructive trust or, in the alternative, declare that Petitioner's spouse is the owner of the following jointly-owned assets:

- [REDACTED] ([REDACTED] Checking # [REDACTED] \$ [REDACTED])
- [REDACTED] Money Market # [REDACTED] \$ [REDACTED]
- [REDACTED] Bank Checking # [REDACTED] \$ [REDACTED]
- [REDACTED] Bank Money Market # [REDACTED] \$ [REDACTED]
- [REDACTED] ([REDACTED] Savings # [REDACTED]-S1 \$ [REDACTED])
- [REDACTED] Savings-Money Market # [REDACTED]-S2 \$ [REDACTED]
- [REDACTED] # [REDACTED] \$ [REDACTED]

[Pet. Exh. A, pp. 41-45].

15. On July 8, 2016, the Department mailed Petitioner's attorney a Health Care Coverage Determination Notice (DHS-1606) which determined that Petitioner was not eligible for MA due to excess assets. [Dept. Exh. 3].
16. Petitioner's attorney requested a hearing on June 18, 2016 to challenge the Department's denial of Medicaid benefits due to excess assets. [Dept. Exh. 1, pp. 1-5].
17. On August 2, 2016, the [REDACTED] Probate Court entered an Order Determining Ownership of Assets, which ordered the following: (1) that the assets listed in the Petition for Protective Order "belonged solely to the Estate of [REDACTED];" (2) all of Petitioner's ownership interests in all of the assets named or referred to in

the Petition for Protective Order “are now assets of the [REDACTED] Estate” and (3) the Co-Personal Representatives shall have the authority to transfer all of the assets under their Letters of Authority. [Pet. Exh. A, pp. 54-55].

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 1396-1396w-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 Department of Human Services) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

In the instant matter, the Department contends that it acted properly when it determined that Petitioner was no longer eligible for Medicaid because she exceeded the [REDACTED] asset limit. The Department submits that Petitioner was determined Medicaid eligible beginning September 1, 2015 following a “Notice of Case Action dated December 15, 2015.” [Dept. Exh 2, p. 2].¹ According to the Department, when Petitioner’s spouse died on June 6, 2016, the Presumed Asset Eligibility Period (BEM 402) had ended and Petitioner was no longer a community spouse; therefore, the Department was required to determine her individual assets at the time under BEM 400. The Department also argues that the September 22, 2015 Probate Court Order did not change the ownership of the assets as much as it directed Petitioner to transfer her assets to her spouse. The Department contends that the couple failed to comply with the Order and that all assets held by Petitioner individually or jointly at the time, are available and countable. The Department states that, at the time all of Petitioner’s countable assets were counted and determined, she was not asset eligible for Medicaid Long-Term Care (LTC) benefits.

Petitioner, on the other hand, takes the position that the Probate Court, under MCL 700.5402, has exclusive legal and equitable jurisdiction regarding the ownership of probate estate assets. [Pet. Exh. A, p. 2]. Essentially, Petitioner contends that the [REDACTED] County Probate Court’s September 22, 2015 Order Regarding Petition for Protective Order, which directed Petitioner to transfer all of her interest in certain assets to Petitioner’s spouse and that her spouse was directed to facilitate the transfer, controls in this matter. Petitioner then states that after Petitioner’s spouse failed to

¹ The notice was not included as an exhibit in the hearing record but Petitioner did not challenge this assertion.

comply with the Order, which left certain assets jointly titled to Petitioner and her spouse, the Estate filed a Petition to Determine Ownership of Assets with the Probate Court. After the Probate Court, on August 2, 2016, issued an Order which definitively determined the ownership of those assets, Petitioner no longer had the legal right to use or dispose of the assets and they were no longer available or countable assets for purposes of Medicaid eligibility. Accordingly, Petitioner contends that the Department erred when it considered the jointly owned assets as Petitioner's assets and found her asset ineligible for Medicaid.

The parties do not disagree about the salient facts. The issue in this matter concerns a matter of policy interpretation. The analysis used to determine the Department's intent when it drafted BEM 400 and BEM 402 is similar to the way a court reviews the legislature's intent when interpreting a statute.

"When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). To this end, we "must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id.* Statutory words must be read in context, and undefined terms are given their plain and ordinary meaning. *Mid-American Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Ford Motor Co v Treasury Dep't*, 496 Mich 382, 389; 852 NW2d 786 (2014) (quotation marks and citation omitted). "A provision of law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or 'when it is *equally* susceptible to more than a single meaning.'" *In re Application of Indiana Mich Power Co for a Certificate of Necessity*, 869 NW2d 276, 277; ___ NW2d ___ (2015), quoting *Koontz*, 446 Mich at 318.

The relevant policies at issue are BEM 400 (7-1-2016), which covers assets, and BEM 402 (7-1-2016), which provide the special MA asset rules. Here, the Department determined that Petitioner was not eligible for MA due to excess assets. Generally speaking, the Department must consider assets when determining eligibility for SSI-related MA categories. BEM 400, pp. 1, 6. However, the Department must use the special asset rules in BEM 402 for certain married L/H² and waiver patients.³

² An L/H patient is defined as, "[t]he Medicaid client who was in the hospital and/or long term care facility (LTC) in an hospital and/or long term care facility (L/H) month. Bridges Program Glossary (BPG) (10-1-2015), p. 38.

³ The waiver is called the MI Choice Waiver Program which provides home and community-based services for aged and disabled persons who, if they did not receive such services, would require care in a nursing home. BEM 106 (7-1-2015), p. 1.

Unless the Special Exception Policy in BEM 402 applies, an initial asset assessment is needed to determine how much of a couple's assets are protected for the community spouse. BEM 402, p. 1.

The Department uses BEM 402, p. 1, to determine asset eligibility for the first period of continuous care that began on or after 9-30-89 when an L/H, PACE⁴, or waiver client:

- Has a community spouse (see below), **and**
- A presumed asset eligible period has **not** yet been established, **or**
- If established, the presumed asset eligible period has **not** ended; see Presumed Asset Eligible Period in this item.

The Department uses BEM 400 to determine asset eligibility for clients who do **not** meet the above conditions. BEM 402, p. 1. The continuous period of care applies to the L/H client who is applying, not the spouse who was hospitalized or in LTC first. BEM 402, p. 2.

The Special Exception Policy, at BEM 402, p. 2, indicates that the Department will not do an Initial Asset Assessment when at the time a client becomes an L/H, PACE or waiver client:

- The individual is already eligible for and receiving, SSI-related MA and one or both of the following is true:
 - The client's asset group for SSI-related MA included the spouse who is now the community spouse.
 - The community spouse is eligible for, and receiving, SSI-related MA from Michigan, including as an SSI recipient.

The client is considered asset eligible; therefore:

- Begin the client's Presumed Asset Eligible Period.
- Do **not** compute a community spouse resource allowance.
- Do **not** send a DHS-4588, Initial Asset Assessment Notice; or DHS-4585, Initial Asset Assessment and Asset Record.

BEM 402, pages 4 and 5, discuss the "Presumed Asset Eligible Period" for SSI-Related Medicaid only and provides, in pertinent part, as follows:

⁴ The Program of All Inclusive Care for the Elderly (PACE). See BEM 167 (1-1-2015), p.1.

Applicants eligible for the **processing month** and recipient's eligible for the first future month are automatically asset eligible for up to 12 calendar months regardless of:

- Changes in the community spouse's assets, or
- The number of MA applications or eligibility determinations that occur during the period.

Exception: The 12-month period ends sooner if any of the following becomes true:

- The continuous period of care ends.
- The client's spouse no longer meets the definition of a community spouse when the spouse enters L/H, a waiver, or PACE.
- The client's spouse dies or the couple divorces. [Emphasis added].

BEM 402, p. 5 indicates:

“When the presumed asset eligible period ends, use BEM 400 to determine the client's asset eligibility. Count only the client's assets, **not** the spouse's assets, to determine continued eligibility. Verify all assets which are still owned by the individual, by the spouse, and jointly owned. Verify the transfers of all assets which were owned at the IAA but which are no longer owned. Review all transfers for divestment.

Note: Because only the client's assets are counted after the presumed asset eligible period, the client may have to transfer some assets to his spouse to make sure that he owns no more than the asset limit for one person at the end of the presumed asset eligible period. . .” [Emphasis added].

The presumed asset eligible period allows time for the client to transfer assets to the community spouse. The client is **not** required to transfer assets to the spouse. However, if they fail to do so, the client may be ineligible for MA after the presumed asset eligible period. BEM 402, p. 5. [Emphasis added].

When the rules in this item [BEM 402] no longer apply, BEM 400 is used to determine continuing asset eligibility. The community spouse is **not** an asset group member. The protected spousal amount is **not** used. Therefore, the client's own countable assets must **not** exceed the appropriate asset limit (currently [REDACTED] for AD-Care or Extended Care categories). BEM 402, pp. 5-6. [Emphasis supplied].

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. Petitioner argues that the jointly-owned assets in question were not available because she did not have the legal right to use or dispose of the assets based on the Probate Court's August 2, 2016 Order Determining Ownership of Assets. [Pet. Exh. A, pp. 54-55]. However, this Order was entered after the Department's July 8, 2016 determination that Petitioner was excess assets for purposes of MA eligibility. According to BAM 600 (10-1-2016), p. 38, the Administrative Law Judge (ALJ) must determine whether MDHHS policy was appropriately applied. In doing so, the ALJ must examine whether the Department followed policy based on the facts, circumstances and information the Department had at the time. The ALJ cannot utilize information gleaned from subsequent events and then, based on the new information, retroactively find that the Department failed to follow policy.

Prior to the August 2, 2016 Order, the Probate Court, on September 22, 2015, entered an Order Regarding Petition for Protective Order which authorized Petitioner's spouse to transfer assets, determined the value of assets and directed Petitioner to transfer property to her spouse and to sign documents necessary to facilitate the transfers. However, Petitioner's spouse, as her attorney-in-fact failed to comply with this Order. By failing to do so, the jointly-owned assets were still available to Petitioner. Under BEM 400, p. 9, the presumption is that an asset is available unless evidence shows that it is not. The evidence the Department had at the time did not overcome the presumption that the assets were available. This Administrative Law Judge acknowledges that the Probate Court, under MCL 700.1302 has exclusive legal and equitable jurisdiction concerning the ownership of probate estate assets, however the Probate Court did not determine the ownership of the assets in question until August 2, 2016. In addition, MCL 700.5402 also does not apply as the Probate Court had not yet declared the ownership of the assets in question at the time the Department determined eligibility on July 8, 2016.

BEM 402 (Special MA Asset Rules) applies because Petitioner was a Medicaid waiver applicant. Here, the ALJ finds that the 12-month Presumed Asset Eligible Period exception was triggered when Petitioner's spouse passed away on June 6, 2016. See BEM 402, p. 5. The plain language of BEM 402, pp. 4-5, indicates that the purpose of the presumed asset eligible period is to allow time for the client to transfer assets to the community spouse. Then, BEM 402, p. 5 states, "[h]owever, if they fail to do so, the client may be ineligible for MA after the presumed asset eligible period." BEM 402, p. 5. The Department must count the Petitioner's assets, not the spouse's assets, to determine continued eligibility. BEM 402, p. 5. However, BEM 402, p. 5, also directs the Department to verify "all assets which are still owned by the individual, by the spouse, and jointly owned." [Emphasis added].

According to BEM 400, p. 6, asset eligibility is required for G2U, G2C, RMA, and SSI-related MA categories. Asset eligibility exists when the asset group's countable assets are less than, or equal to, the applicable asset limit at least one day during the month being tested. For SSI-related MA categories, the asset limit is [REDACTED] for an asset group of one. BEM 400, p. 8. Asset eligibility exists when the asset group's countable assets

are less than, or equal to, the applicable asset limit at least one day during the month being tested. BEM 402, p. 6. If an **ongoing** MA recipient or active deductible client has excess assets, initiate closure. BEM 402, p. 6. [Emphasis in original].

An asset is countable if it meets the availability tests and is **not** excluded. 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. 9. [Emphasis in original]. Here, the assets in question were available to Petitioner as she had the legal right to use and/or dispose of the assets at the time the Department determined her MA eligibility.

This Administrative Law Judge agrees with the Department's position that the assets must be actually transferred during the 12-month Presume Asset Eligibility Period and that after the period ends, any assets still jointly-owned are countable assets. Here, the jointly-owned assets that were not yet transferred following the September 22, 2015 Order and the August 2, 2016 Order, were Petitioner's available assets under BEM 400, p. 9. There is no dispute that under this analysis, Petitioner exceeded the [REDACTED] asset limit and the Department was authorized to initiate closure under BEM 402, p. 6.

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 acted in accordance with Department policy when it determined that Petitioner was not eligible for MA benefits due to excess assets.

DECISION AND ORDER

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

IT IS SO ORDERED.

CP/las



C. Adam Purnell

Administrative Law Judge

for Nick Lyon, 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 Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS 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. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; 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

Counsel for Respondent

[REDACTED]

DHHS

[REDACTED]

[REDACTED]

Petitioner

[REDACTED]

Counsel for Petitioner

[REDACTED]