[redacted], MICHIGAN 49849

Date Mailed: November 12, 2019
MOAHR Docket No.: 14-011356-R
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Landis Lain

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 [redacted] *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.

The In-person Remand Hearing was held on August 9, 2019, from Howell, Michigan. Petitioner was represented by Attorney James Steward (P23098). The Michigan Department of Health and Human Services (MDHHS or Department) was represented by Assistant Attorney General Geraldine Brown (P67601). Eligibility Specialist, Patty Holihan, appeared as a witness for the Department but did not testify.

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

[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.

(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 Petitioner's Medical Assistance 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 Petitioner's case 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 Administrative Hearing was held in this matter on November 5, 2014.

A Hearing Decision and Order, in the above captioned matter, was issued by the undersigned Administrative Law Judge (ALJ) on November 13, 2014, Michigan Administrative Hearing System Docket Number 14-011356. In the hearing decision, the undersigned ALJ found that the Department of Human Services acted in accordance with Department policy when it determined that the assets in the [redacted] Sole Benefit Trust were countable assets for purposes of Medical Assistance benefit eligibility determination because they existed outside the SBO trust on the date of Petitioner's entry to Long Term Care; and that Petitioner had in excess of $2000 in countable available assets for purposes of Medical Assistance and Retroactive Medical Assistance benefit eligibility on May 1, 2014.

This conclusion rested on a finding that the irrevocable trust funded with assets of Petitioner and her husband, the community spouse, and created solely for the benefit of the community spouse (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 the community spouse as determined by the initial asset assessment, exceeded the $2,000 Medicaid asset limit, it was found that the Michigan Department of Health and Human Services (Department) properly denied Petitioner's Medicaid application due to excess assets.

Petitioner appealed the Decision. The case ultimately made its way to the Michigan Supreme Court, which consolidated Petitioner's 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 SBO 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 assets.

ISSUE

Did the Department properly deny Petitioner's application for Medical Assistance (MA) based upon its determination that Petitioner 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 December 20, 2013, [redacted] (hereinafter referred to as Claimant) entered long-term care (LTC) and is a resident of [redacted] of Howell.

2. On January 23, 2014, the [redacted] Irrevocable Trust/Sole Benefit Trust was established by Claimant's spouse for the sole benefit of Claimant's spouse.

3. On [redacted], 2014, Claimant's Attorney applied for Medical Assistance benefits for Claimant.

4. On [redacted], 2014, an initial asset assessment was conducted with a begin date of December 20, 2013, (the date Claimant entered long term care).

5. The Department determined in the initial asset assessment that on December 20, 2013, Claimant and his spouse had combined resources in the amount of $487,755.33.

6. The Department determined that the spousal share limit was $115,920.00 which was protected from being counted as Claimant's asset.

7. The Department determined that Claimant had countable assets in the amount of $371,835.33.

8. The Claimant and his spouse have several assets including a sole benefit trust.

9. On October 22, 2013, the [redacted] Sole Benefit Trust document was sent to the Office of Legal Services/Trust and Annuities Unit for evaluation.

10. On October 31, 2013, the trust was evaluated as follows: the [redacted] sole benefit trust is an irrevocable Medicaid trust and there are circumstances under which payment of principal income can be made to or on behalf of [redacted] (Claimant) from the trust. Therefore, the assets in this trust are countable.

11. On [redacted], 2013, the Medicaid application was processed in bridges resulting in a Medicaid (MA) denial.

12. The Department determined that the Claimant's total initial asset assessment as of [redacted], 2013, was $371,835.33 with a protected spousal amount of $115,920.00.

13. The Department determined that the Claimant's total assets in the application month of [redacted] 2014, was $371,835.33 due to the trust being countable at application for trust evaluation.

14. On [redacted], 2014, the Department caseworker sent Claimant's representative notice of case action that the application for Medical Assistance was denied.

15. On [redacted], 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.

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*. (Emphasis Added)

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 Supreme 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).

The Medicaid Program is governed by a complex web of interlocking statutes, as well as regulations and interpretive documents published by state and federal agencies. The program was created by Title XIX of the Social Security Act of 1965, PL 89-97; 79 Stat 343, codified at 42 USC 1396 *et seq*. Medicaid is generally a need-based assistance program for medical care that is funded and administered jointly by the federal government and individual states. *Ketchum v Dep't of Health and Human Servs, 314 Mich App 485; 488; 887 NW2d 226 (2016)*.

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)

> "'Each participating State develops a plan containing reasonable standards . . . for determining eligibility for and the extent of medical assistance' within boundaries set by the Medicaid statute and Secretary of Health and Human Services." *Wis Dep't of Health & Family Servs v Blumer*, 534 US 473, 479; 122 S Ct 962; 151 L Ed 2d 935 (2002), quoting *Schweiker v Gray Panthers*, 453 US 34, 36-37; 101 S Ct 2633; 69 L Ed 2d 460 (1981). The Supreme Court enacted the Medicare Catastrophic Coverage Act of 1988 (MCCA), codified at 42 USC 1396r-5. As the Supreme Court has recently explained, the MCCA was enacted "to protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance," which is why "Congress installed a set of intricate and interlocking requirements with which States must comply in allocating a couple's

income and resources." *Blumer*, 534 US at 480. Congress has been particularly active in its efforts to prevent spousal pauperization while at the same time limiting the ability of wealthier individuals to shelter income and assets using estate planning tools. [redacted], 13-14.

A person who falls in the optional medically needy category, like each plaintiff here, cannot qualify for Medicaid benefits if his or her *countable assets* and income exceed $2,000 during the period in which he or she applies for benefits. See *Mackey*, 289 Mich App at 698; *BEM 400* at 7; *BEM 402* at 4. According to *BEM 401*, "[h]ow much of the principal of a trust is a countable asset depends on" "[t]he terms of the trust" and "[w]hether any of the principal consists of countable assets or countable income." *BEM 401* (July 1, 2014), p 10. With respect to irrevocable trusts, such as those at issue here, *BEM 401* instructs the Department to "[c]ount 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." *Id*. at 11. The legal authority for *BEM 401* derives from two parts of the federal Medicaid statutes: 42 USC 1396a and 42 USC 1396p. See *BEM 401* at 17-18. However, additional rules applicable only to institutionalized spouses are described in 42 USC 1396r-5. These additional rules serve as a starting point for evaluating an institutionalized spouse's eligibility for Medicaid benefits. *Hegadorn*, 14-15.

When determining an institutionalized spouse's eligibility for Medicaid benefits, a computation of the couple's total joint resources is taken "as of the beginning of the first continuous period of institutionalization," which may or may not be the same month in which one applies for benefits. 42 USC 1396r-5(c)(1)(A). The stated purpose of this first computation is to determine the amount of the "spousal share" allocated to the community spouse. 42 USC 1396r-5(c)(1)(A)(ii). The couple's resources are divided into those that are countable and those that are exempt. One-half of the total value of their countable resources "to the extent either the institutionalized spouse or the community spouse has an ownership interest" is considered a spousal share. *Id*.

"The spousal share allocated to the community spouse qualifies as the [community spouse resource allowance or] CSRA, subject to a ceiling . . . indexed for inflation" by Congress. *Blumer*, 534 US at 482. The CSRA is the monetary value of assets that may be retained by or transferred to the community spouse without those resources being counted against the institutionalized spouse for his or her initial eligibility determination. See 42 USC 1396r-5(c)(2)(B) and (f); *Blumer*, 534 US at 482-483. Available resources in excess of the CSRA will generally disqualify an institutionalized spouse from receiving Medicaid benefits unless they are spent down prior to filing an application. 42 USC 1396r-5(c)(2); *Blumer*, 534 US at 482-483.

Once the amount of the CSRA is determined, a second calculation is required to determine the resources available to the institutionalized spouse for the purpose

> of determining the institutionalized spouse's initial Medicaid eligibility. 42 USC 1396r-5(c)(2). This calculation is based on the resources available to the institutionalized spouse on the day that the institutionalized spouse submits his or her application for Medicaid benefits. "In determining the resources of an institutionalized spouse at the time of application for benefits . . . , *all the resources held by* either the institutionalized spouse, community spouse, or both, shall be considered to be *available to* the institutionalized spouse" to the extent that they exceed the CSRA. 42 USC 1396r-5(c)(2)(A) and (B) (emphasis added). "[A]fter the month in which an institutionalized spouse is determined to be eligible for benefits . . . , no resources of the community spouse shall be deemed available to the institutionalized spouse." *Hegadorn*, 16.

Petitioner fell within the medically needy category for those over the age of 65. Therefore, to be eligible for Medicaid benefits, Petitioner was required to reduce her countable assets to $2000 or below.

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).*

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 (applicant's, spouse's, joint) total countable assets as of the first day of the first continuous period of care that began on or after September 30, 1989. BEM 402, page 7

In conducting the initial asset assessment, the Department must count both Petitioner’s and his spouse’s total combined assets which were in existence as of May 1, 2014, when Petitioner entered long-term care.

A married man entered a nursing home on December 6, 1989. He was released on June 10, 1990 and returned home.

> On March 16, 1991 he re-entered the nursing home and has been there continuously ever since.

> He applied for MA on [redacted], 1991. To determine his asset eligibility, do an initial asset assessment for [redacted], 1989 - the first day of the first continuous period of care that began on or after September 30, 1989. BEM 402, page 7

Petitioner's community spouse placed Petitioner's half of the assets into an irrevocable trust on January 23, 2014. Subsequent transfer of assets by the community spouse to an irrevocable trust does not make the assets unavailable on the date of initial asset assessment, the date assets were required to be counted and separated. The community spouse's transfer of Petitioner's assets to an irrevocable trust does not undo the initial asset assessment determination amount. The initial amount of combined assets was $487,755.33. The protected spousal amount limit was $115,920.00 leaving Petitioner with total countable assets as of long-term care entry date of $371,835.33. Thus, the entire amount attributed to Petitioner applicant during the initial asset assessment must be counted for purposes of Medicaid eligibility determination. To create a Trust, there must be assignment of designated property to a trustee with the intention of passing title. In this case, the Trustor and creator/grantor of the trust is the community spouse, not the Medicaid applicant. The only contributor to the Trust is the community spouse, because the community spouse's signature is the only one on the executed document. The community spouse cannot contribute the assets of applicant spouse to a Trust without permission. There is no documentation in this file that the Medicaid applicant gave express permission for the applicant's assets to be transferred to a Trust.

BEM 401, page 10 (2014) 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. (Emphasis Added)

Department caseworkers are ordered to count payments from an irrevocable Medicaid trust to or on behalf of someone other than the person as follows:

> If the other person never contributed to the principal - any payment of countable assets or countable income is a resource transfer for less than fair market value for purposes of BEM 405.
>
> If the other person contributed to the principal - any payment of countable assets or countable income exceeding the other person's proportional contribution to the principal is a resource transfer for less than fair market value for purposes of BEM 405. *BEM 401 page 15*

Section 2.2 of the trust document states:

> **Distribution of Resources**. 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 such part of all of the net income and

principal ("Resources") of the Trust as Trustee determines is necessary in order to distribute the resources in an actuarially sound basis.

Section 3.3 of the Trust document states:

> **Distribution if Spouse Survives**. At my death, if my Spouse is surviving, Trustee shall distribute the remaining property to the Trustee of the Special Supplemental Care Trust for [redacted], created by my will dated the same day as this agreement, as my Will may be amended from time to time.

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 Petitioner's spouse over his 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 Petitioner'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. If the principal of the trust can be paid to the spouse at some time in the future, and spouses are responsible for one another, the condition, however remote, does exist.

Medicaid eligibility determination is a complicated process. Medicaid policy dictates that spouses are responsible for one another. *BEM 402 page 4.* The formula for asset eligibility is:

- The value of the couple's (applicant, spouse, joint) countable assets for the month being tested.
- MINUS the protected spousal amount (in this item).
- EQUALS the client's countable assets. Countable assets must not exceed the limit for one person in BEM 400 for the category(ies) being tested. *BEM 402, page 4*

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 Petitioner 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. In this case, 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 Petitioner, which makes the assets countable for Petitioner.

A Solely for the Benefit of trust (SBO Trust) does not make assets disappear or become uncountable simply by the creation of such a trust. *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.

42 USC 1396p9(d)(3)(B)(i) states explicitly:

> (1)(A) In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).
>
> (1)(A) In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).
>
> (B)(i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) of this section, 60 months) before the date specified in clause (ii).

(ii) The date specified in this clause, with respect

(I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan, or

(II) a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value.

(III) a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value.

Moreover, the trustee and alternative trustee of the [redacted] Irrevocable Trust are children of [redacted]. This third-party transaction is not an arm length transaction. This action allows Petitioner's spouse to appropriate Petitioner's half of the marital assets (as determined by initial asset assessment) by attempting to remove them from Petitioner and transfer them to a trust for the benefit of the community spouse. Such an action is not in compliance with federal regulations, Michigan law or Department policy. Though Department policy in BEM 402 page 5 allows a Medical Assistant applicant (client) to transfer additional personal assets to the community spouse, there is no legal provision whereby the *community spouse* can unilaterally transfer an applicant's assessed assets to themselves or to a third-party Solely for the Benefit Trust for the community spouse's benefit.

Bridges Policy Glossary at page 6, defines an Arm Length Transaction as a transaction between two parties who are not related and who are presumed to have roughly equal bargaining power. It consists of all the following three elements:

- It is voluntary.
- Each party is acting in their own self-interest.
- It is on an open market.

By definition, a transaction between two relatives is not an arm length transaction. Thus, the Trust is not irrevocable; and there are circumstances under which the Petitioner's community spouse could possess the assets, which makes them available to Petitioner.

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 the 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 law. Such an attempt must fail. The Petitioner's community spouse cannot unilaterally decide to retain assets in excess of that allowed by law and policy. Petitioner and spouse were not indigent. They, at all times relevant to this MA application, retained sufficient assets to pay Petitioner's LTC, and in fact, retained excess assets for purposes of Medical Assistance benefit eligibility on the date of the initial asset assessment. The department's determination must be upheld. Clearly, there is a circumstance or conditions under which payments could be made from the trust to or for the benefit of the applicant spouse and as of the application date, any assets in the Trust from which such distributions could potentially be made are countable for the Medical Assistance application.

The SBO Trust did not come into effect until after the initial asset assessment, which is the determinative factor for what assets are countable for purposes of Medical Assistance eligibility determination. Thus, at the time of the entry into long term care, Petitioner retained in excess of $2000 in countable, available assets, which must be counted for purposes of Medical Assistance benefit eligibility.

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 [redacted] Sole Benefit Trust were countable assets for purposes of Medical Assistance benefit eligibility determination during the initial asset assessment; and that the Petitioner had an excess of $2000 in countable available assets for purposes of Medical Assistance and retroactive Medical Assistance benefit eligibility on the date of the application. The Department properly denied Petitioner's application for Medical Assistance under the circumstances and determined that she had an excess of $2000 of countable available assets.

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

LL/nr

Landis Lain
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

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Livingston County DHHS- via electronic mail

BSC4- via electronic mail

D. Smith- via electronic mail

EQAD- via electronic mail

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