



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED], MI [REDACTED]

Date Mailed: April 12, 2019
MAHS Docket No.: 19-002603
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Landis Lain

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; 42 CFR 438.400 to 438.424; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, a telephone hearing was held on April 10, 2019, from Lansing, Michigan. The Petitioner was represented by Attorney Todd Millar (P48819). Petitioner did not appear. The Department of Health and Human Services (Department) was represented by Rebecca Ferrill, Assistance Payments Supervisor.

Respondent's Exhibits 1-4 were admitted as evidence.

Petitioner's Exhibit A was admitted as evidence.

ISSUE

Did the Department properly deny Petitioner's application for Medical Assistance (MA) based upon its determination that Petitioner possessed 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. Petitioner had been receiving Food Assistance Program (FAP) and Medical Assistance (MA) benefits since May 2012.
2. In July 2018, Petitioner received an insurance settlement.

3. On July 16, 2018, Petitioner submitted a DHS-1046 semiannual contact report but did not report any changes of lump sums received. (Exhibit 1)
4. On January 25, 2019, Petitioner turned in her DHS-1010 for a February 2019 annual redetermination for both her FAP and MA programs. (Exhibit 2)
5. On February 4, 2019, Petitioner completed a telephone interview and informed the caseworker of the settlement and explained how she used the lump sum payment, to open the [REDACTED] Special Needs Trust Agreement, which was created on July 17, 2018. (Exhibit 3)
6. On February 5, 2019, following Bridges Eligibility Manual (BEM) 401, a copy of the trust was sent to the Trust and Annuity Unit for evaluation.
7. On February 20, 2019, the trust evaluation completed by the Office of Legal Services was submitted back to the Department of Health and Human Services caseworker for case processing.
8. The evaluation stated that the trust did not meet the condition of a special needs trust, per BEM 400 pages 7-8. (Exhibit 4)
9. Based on the trust not meeting a special needs trust criterion, this trust was not an excluded asset per Medicaid policy and placed Petitioner over the Medicaid asset limit.
10. The trust evaluation made for food assistance did determine that this is an excluded asset for food assistance.
11. On February 21, 2019, Petitioner was notified that all her programs were closed due to excess assets.
12. On March 4, 2019, Petitioner's legal representative submitted a request for hearing.
13. On March 11, 2019 the Department supervisor completed a review of the case and found an agency error regarding the Food Assistance Program benefits. The food assistance case was closed incorrectly and was reinstated.
14. On March 25, 2019, the Michigan Administrative Hearing System received a copy of the hearing summary and attached documents.
15. Petitioner's representative agreed that the Food Assistance Program case has been reinstated and that the only issue remaining is the medical assistance determination.

CONCLUSIONS OF LAW

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). Petitioners 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.

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. 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).

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. Indigent for purposes of Medicaid eligibility in Michigan means that a one-person household may retain limited 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. 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.

Special Needs Trust A trust is not a Medicaid trust if it meets all the following conditions:

- The trust must be unchangeable with regard to the provisions that make it an Exception A, Special Needs Trust. This is necessary to ensure that a trust initially meeting the other conditions still meets those conditions when the person dies; it must be irrevocable.

- The trust contains the resources of a person who is under age 65 and is disabled (not blind) per BEM 260. See Continuing Exception A when the person has attained age 65.
- The trust was established for the person described above. This means that the trust must ensure that none of the principal or income can be used for someone else during the person's lifetime, except for trustee fees per BEM 405.
- The trust was established by a court, by the person described above, or by the person's: Parent. Grandparent. Legal guardian/conservator.
- The trust imposes on the trustee an automatic duty to repay Medicaid upon the person's death up to an amount equal to the total Medical Assistance paid on behalf of the person. BEM, Item 401, page 8 (Emphasis added)

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 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 1.2 of the trust document indicates:

This is considered a “1st Party Special Needs Trust” and requires repayment to the state for any Medicaid benefits spent on beneficiary from the date of the trust to the date of beneficiary’s death.

The trust evaluation unit determined that the irrevocable Special Needs Trust for the benefit of Petitioner fails this repay condition because the payback is limited to medical assistance paid on Petitioner’s behalf from the date of the trust, July 17, 2018.

BEM 401, page 8, requires that a Special Needs Trust must have a provision that:

“... imposes on the trustee an automatic duty to repay Medicaid upon the person's death up to an amount equal to **the total Medical Assistance** paid on behalf of the person.”

This Administrative Law Judge finds that trust limits the Medicaid repayment that can be collected from Petitioner to the July 17, 2018, initiation of the trust, rather than the total Medicaid Assistance paid on behalf of Petitioner. Thus, the trust does not meet the requirements for the Special Needs Trust and the proceeds are countable.

The Trust evaluation indicates that the Trust is irrevocable according to Section 2.2 of the trust document. BEM 401, page 11, indicates that the department must count as a person's countable asset the value of the countable assets in the trust principal, and the value of the trust countable income, if there is any condition under which the principal and/or income could be paid to or on behalf of the person from the trust.

Section 3.1 of the trust states: distribution of income and principal

The trustee shall hold, administer, and distribute all property allocated to this trust, and all income therefrom, for the sole benefit of beneficiary, during beneficiary's lifetime, unless the trust is earlier terminated. The trustee alone shall be responsible for determining what distributions may be made from this trust. The trustee may distribute to or apply for the benefit of beneficiary such amounts from the principal and income, up to the whole thereof, as the trustee, in the trustee's discretion, considers necessary or advisable to meet beneficiary special needs for the remainder of his life. Such distributions may be made for beneficiary's pleasure or happiness and are not limited by any ascertainable standard. Any undistributed income shall be added to the principal.

The Trust Evaluation Unit indicates that since there is a condition under which the principal and income of the trust can be paid to or on behalf of [REDACTED], the Petitioner, the countable asset for Petitioner is the value of all the countable net income of the countable assets in the principal of the trust. The trustee will have to provide all of the items in their value that are currently contained in the [REDACTED] special needs trust. Count any payments made by the trust to [REDACTED] or her legal representative as her unearned income. BEM 401, page 13, countable income from Medicaid trusts.


In this case, there is a condition under which the principal and/or income could be paid to or on behalf of the person from the trust. The Department's decision 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 funds in the [REDACTED] Irrevocable Trust were countable assets for purposes of Medical Assistance benefit eligibility determination for Petitioner; and that Petitioner had in excess of \$2,000 in countable available assets for purposes of Medical Assistance and retroactive Medical Assistance benefit eligibility on the date of application. The Department properly denied Petitioner's application for Medical Assistance under the circumstances and determined that she had in excess of \$2,000 of countable available assets.

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

LL/hb



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 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) 763-0155; 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

DHHS

Eileen Asam
701 S. Elmwood Suite 19
Traverse City, MI 49684

Grand Traverse County, DHHS

BSC1 via electronic mail

D. Smith via electronic mail

EQADHShearings via electronic mail

Petitioner

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