Date Mailed: November 3, 2021

[redacted]
[redacted]
[redacted], TX [redacted]

MOAHR Docket No.: 21-003617
Agency No.: [redacted]
Petitioner: [redacted]

[redacted]
[redacted]
[redacted]
[redacted] MI [redacted]

MOAHR Docket No.: 21-004265
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 October 20, 2021, from Lansing, Michigan.

The Petitioner was represented by Attorney Nicholas Lamb (P55563). Witnesses [redacted] and [redacted], Petitioners' respective daughters and alleged Legal Guardians appeared to testify on Petitioners' behalf (No Legal Guardianship paperwork was submitted with the evidence) Petitioners are both in Long Term Care, are alleged to suffer from dementia, and did not appear at the hearing.

The Department of Health and Human Services (Department or Respondent or MDHHS) was represented by Assistant Attorney General Erin Harrington (P71394). Witnesses Nicholas Hebert (Eligibility Specialist) and Annette Reyna-Flores (Eligibility Specialist) appeared and testified on the Department's behalf.

This hearing is consolidated with [redacted], Docket #21-004265 by stipulation of the parties.

The following documents were admitted as evidence on the record without objection:

A. Exhibit A pages 1-20 (August 9, 2021, Hearing Summary and attached documents (case #[redacted]

B. Exhibit B pages 1-12 were admitted as evidence (Brief of Petitioners)
C. Exhibit C pages 1-12 were admitted as evidence (September 16, 2021, Hearing Summary and attached documents James Grant (case # [redacted]

ISSUE

Did the Department properly deny Petitioners' applications for Medical Assistance and Retroactive Medical Assistance (MA-LTC) based upon the determination that Petitioners retained excess assets at all times relevant to the application periods?

FINDINGS OF FACT

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

1. Petitioners [redacted] and [redacted] are a married couple who are both in long-term care facilities.

2. On [redacted], 2021, Petitioner [redacted] filed an application for Medical Assistance benefits, along with a retroactive-MA application for the months of [redacted] and [redacted] 2021.

3. On [redacted], 2021, Petitioner [redacted] filed an application for Medical Assistance benefits, along with a retroactive-MA application for the months of [redacted] and [redacted] 2021.

4. The Department denied both Petitioners' Medical Assistance applications based upon the determination that Petitioner possessed assets of [redacted] and were over the countable asset limit for the program.

5. On July 15, 2021, a Healthcare Coverage Determination Notice was sent to each Petitioner indicating that the value of the countable assets is higher than allowed for this program.

6. On July 30, 2021, the Michigan Office of Hearings and Rules (MOAHR) received a Request for Hearing from Petitioners to contest the negative action.

CONCLUSIONS OF LAW

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

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). Clients 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 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.

Title XIX of the Social Security Act, commonly referred to as "The Medicaid Act," provides for Medical Assistance services to individuals **who lack the financial means to obtain needed health care**. *42 U.S.C. §1396*. (Emphasis added)

The Medicaid program is administered by the federal government through the Centers for Medicaid and Medicare Services (CMS) of the Department of Health and Human Services (HHS). The state and federal governments share financial responsibility for Medicaid services. Each state may choose whether or not to participate in the Medicaid program. Once a state chooses to participate, it must operate its Medicaid program in accordance with mandatory federal requirements, imposed both by the Medicaid Act and by implementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

Participating states must provide at least seven categories of medical services to persons determined to be eligible Medicaid recipients. *42 USC §1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21)*. One of the seven mandated services is *nursing facility services*. *42 USC §1396d(a)(4)(A)*.

For Medical Assistance eligibility, the Department has defined an asset as "any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights." NDAC 75-02-02.1-01(3). Under both federal and state law, an asset must be "actually available" to an applicant to be considered a countable asset for determining Medical Assistance eligibility.

Hecker, 527 N.W.2d at 237 (On Petition for Rehearing); Hinschberger v. Griggs County Social Serv., 499 N.W.2d 876, 882 (N.D.1993); 42 U.S.C. § 1396a(a)(17)(B); 1 J. Krauskopf, R. Brown, K. Tokarz, and A. Bogutz, Elderlaw: Advocacy for the Aging § 11.25 (2d ed. 1993). Yet, "actually available" resources "are different from those *in hand*." *Schweiker v. Gray Panthers, 453 U.S. 34, 48, 101 S.Ct. 2633, 2642, 69 L.Ed.2d 460 (1981)* (emphasis in original). NDAC 75-02-02.1-25(2) explains: Only such assets as are actually available will be considered. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available. Assets will be reasonably evaluated···· *See also 45 C.F.R. § 233.20(a)(3)(ii)(D)*.

As noted in *Hecker,* if an applicant has a legal ability to obtain an asset, it is considered an "actually available" resource. The actual-availability principle primarily serves "to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes non-existent resources to recipients." *Heckler v. Turner,* 470 U.S. 184, 200, 105 S. Ct. 1138, 1147, 84 L.Ed.2d 138 (1985).

The focus is on an applicant's actual and practical ability to make an asset available as a matter of fact, not legal fiction. *See Schrader v. Idaho Dept. of Health and Welfare, 768 F.2d 1107, 1112 (9th Cir.1985). See also Lewis v. Martin, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970)* (invalidating California state regulation that presumed contribution of non-AFDC resources by a non-legally responsible and non-adoptive stepfather or common law husband of an AFDC recipient's mother).

Determining whether an asset is "actually available" for purposes of Medical Assistance eligibility is largely a fact-specific inquiry depending on the circumstances of each case. *See, e.g., Intermountain Health Care v. Bd. of Cty. Com'rs,* 107 Idaho 248, 688 P.2d 260, 264 (Ct.App.1984); *Radano v. Blum,* 89 A.D.2d 858, 453 N.Y.S.2d 38, 39 (1982); *Haynes v. Dept. of Human Resources,* 121 N.C.App. 513, 470 S.E.2d 56, 58 (1996). Interpretation of the "actually available" requirement must be "reasonable and humane in accordance with its manifest intent and purpose····" *Moffett v. Blum,* 74 A.D.2d 625, 424 N.Y.S.2d 923, 925 (1980).

That an applicant must sue to collect an asset the applicant has a legal entitlement to usually does not mean the asset is actually unavailable. *See, e.g., Wagner v. Sheridan County S.S. Bd.,* 518 N.W.2d 724, 728 (N.D.1994); *Frerks v. Shalala,* 52 F.3d 412, 414 (2d Cir.1995); *Probate of Marcus,* 199 Conn. 524, 509 A.2d 1, 5 (1986); *Herman v. Ramsey Cty. Community Human Serv.,* 373 N.W.2d 345, 348 (Minn.Ct.App.1985). *See also Ziegler v. Dept. of Health & Rehab. Serv.,* 601 So.2d 1280, 1284 (Fla.Ct.App.1992) At issue here is the methodology utilized in determining the availability of an individual's "resources" for purposes of evaluating his or her eligibility. SSI recipients, and thus

SSI-related “medically needy” recipients, may not retain resources having a value in excess of $2,000. *42 U.S.C. § 1382(a)(1)(B)*.

Pertinent Department policy dictates:

Clients have the right to contest a department decision affecting eligibility or benefit levels whenever they believe the decision is incorrect. The department provides an administrative hearing to review the decision and determine its appropriateness in accordance with policy. This item includes procedures to meet the minimum requirements for a fair hearing. BAM 600, page 1

Assets must be considered in determining eligibility for FIP, SDA, RCA, G2U, G2C, RMA, SSI-related MA categories, CDC and FAP. FIP, SDA, RCA, G2U, G2C, CDC and RMA consider only the following types of assets:

- Cash (which includes savings and checking accounts).
- Investments (which includes 401(k), Roth IRA etc.).
- Retirement Plans.
- Trusts.

Assets mean:

- Cash (see Cash in this item).
- Personal property. Personal property is any item subject to ownership that is not real property (examples: currency, savings accounts and vehicles).
- Real property. Real property is land and objects affixed to the land such as buildings, trees and fences. Condominiums are real property. BEM 400, page 1

All types of assets are considered for SSI-related MA categories. BEM 400, page 2 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. At application, do not authorize MA for future months if the person has excess assets on the processing date.

If an ongoing MA recipient or active deductible client has excess assets, initiate closure. However, delete the pending negative action if it is verified that the excess assets were disposed of. Payment of medical expenses, living costs and other debts are examples of ways to dispose of excess assets without divestment. LTC and waiver patients will be penalized for divestment; see BEM 405, MA DIVESTMENT. BEM 400, page 6

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 400, page 8

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

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

The Medicaid Trust Unit/eligibility policy section must determine if a trust established on or after August 11, 1993, is a Medicaid trust using Medicaid trust definitions and Medicaid trust criteria. The policy unit also has to determine if the trust is a Medicaid trust and whether there are countable assets for Medicaid trusts; whether there is countable income for Medicaid trusts; and whether there are 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.

Count 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.

Petitioners' position:

Petitioners ask MDHHS to determine that [redacted] and [redacted] are assets-eligible for Medicaid because at the time of their application their assets were unavailable to them. If MDHHS does not so determine, we ask the administrative law judge to find that MDHHS did not follow its policies and to order that [redacted] and [redacted] are approved for Medicaid. Having exhausted their lifetime savings paying for their care, in [redacted] 2021 [redacted] and [redacted] each applied for Nursing Home Medicaid. [redacted] lives at [redacted] [redacted] lives at [redacted], also in [redacted] Both applicants lack the ability to make their own legal decisions. Both have court-appointed guardians who live in Texas and Oklahoma, have health conditions that make travel inadvisable, and for whom it would be a hardship to travel to Michigan during the COVID-19 pandemic. For instance, it is 1,300 miles from [redacted] Texas to [redacted] Michigan. This is approximately 19 hours drive time. For [redacted] it would take her 13 hours of driving to cover the 873 miles between [redacted] and [redacted] [redacted] however, does not have authority as trustee to act for the trust. In addition, [redacted] visited Michigan before the pandemic, with the purpose of doing banking for [redacted] and [redacted] As part of the Medicaid application process, the petitioners tried to spend down excess assets from Petitioners' bank accounts to pay their care costs to [redacted] and [redacted] from funds on deposit at [redacted] Bank. The petitioners learned, however, that [redacted] Bank recognizes neither [redacted] authority to handle the accounts (she is [redacted] [redacted] daughter and guardian, as well as trustee for the trust that holds the bank accounts), nor mine (attorney for [redacted] and for [redacted] [redacted] daughter and guardian). As a result of [redacted] Bank's action and legal position, there is no one with authority to access or spend down the applicants' assets.

Moreover, since Petitioners sold their house in January 2021 to pay off past-due care bills, they do not have enough assets to private-pay for their medical care. Nor do they have a home to return to if they are involuntarily discharged from care. The petitioners wish to emphasize that if [redacted] Bank had allowed them to, they would have spent all their assets on care for Petitioners, during or before June 2021. Had petitioners been able to complete the spend downs, Petitioners would have had countable assets less than [redacted] each in [redacted] and would have been asset eligible for Medicaid. Counsel for petitioners is continuing to

work on getting legal authority to access the assets at [redacted] Bank. As soon as the funds are available, the petitioners will immediately pay all of their assets to the care facilities, [redacted] and [redacted].

Therefore, the Petitioners ask the MDHHS to determine that Petitioners are assets eligible for Medicaid. Even though the couple has assets totaling more than [redacted] the bank accounts, we believe determining the applicant eligible is correct policy because the agency's specific asset and availability tests, as set out in BEM Item 400, do not seem to account for the present situation, in which the applicants are trying to spend down otherwise countable assets that are unavailable to them because of a bank. We believe it would be contrary to agency policy to deny Medicaid when Petitioners cannot spend down the assets that to date have counted against them. Instead, petitioners ask DHHS to apply a one-time exception and allow eligibility.

In the instant case, the undersigned Administrative Law Judge finds:

BEM 400 page 12 gives specific instructions as to which jointly held assets are unavailable. An asset is unavailable if all the following are true, and an owner cannot sell or spend his share of an asset:

- Without another owner's consent.
- The other owner is not in the asset group.
- The other owner refuses consent.

The Department is instructed to count the entire amount unless the person claims and verifies a different ownership. Then, each owner's share is the amount they own. BEM 401, page 13

The "[redacted] Trust" is an account holder for two Key Bank accounts, as reflected in the bank statements. Both Petitioners are Grantors of the Trust and serve as Co-Trustees during their respective lifetimes. The trust created between the Petitioners is a revocable trust, which means it can be amended and/or revoked. The beneficiaries listed are the Petitioners.

Under BEM 401, the trust and its proceeds are countable and available to Petitioners.

The revocable trust in question has two [redacted] Bank accounts ending in [redacted] and [redacted] [redacted] Bank account [redacted] had a balance of [redacted] on March 24, 2021; [redacted] on April 26, 2021; [redacted] on May 26, 2021; and [redacted] on June 24, 2021. (See Exhibit C attached to Petitioner's October 13, 2021, Hearing Brief.)

[redacted] Bank account [redacted] had a balance of [redacted] on March 24, 2021; [redacted] on April 26, 2021; [redacted] on May 26, 2021; and [redacted] on

June 24, 2021. (See Exhibit D attached to Petitioner's October 13, 2021, Hearing Brief)

The Petitioners also had three other bank accounts through [redacted] Credit Union. The total amount held in these three accounts and the two [redacted] Bank accounts is [redacted] When the Department divided the total countable assets in half, it came out to [redacted] which is reflected in the Bridges Medicaid Asset calculator and net worth chart. (See Exhibit E and F attached to Petitioner's October 13, 2021, Hearing Brief).

Petitioners submitted bank account statements with the funds being held in a revocable trust with the total balance reflecting over [redacted]. The account balances never fell below [redacted] in countable available assets at any time relevant to the Petitioners Medical Assistance or Retroactive Medical Assistance applications.

Because the couple is married, even with the attribution of half of the jointly held assets to each spouse, both were continuously over the asset limit for Medical Assistance benefit eligibility for the entire application period.

The Department is required to "include in each applicant's case record facts to support the agency's decision on his application." 42 CFR 435.914(a). See also MCL 400.37. Verification is documentation or other evidence that establishes the accuracy of items submitted by the Claimant on the application. BAM 130 Verification and Collateral Contacts, p 1.

The burden is on the applicant to establish that s/he is entitled to the benefits of the Act." *Nelson v Gardner*, 386 F2d 92, 94 (6th Cir, 1967); BAM 130, p 1. The documents used to verify income and assets "must correspond to the period used to determine eligibility or benefit amount." BAM 130, p 2; see also BEM 400 Assets, p 27, 28, 61, and 65; BEM 500 Income Overview, p 13-15; BEM 501 Income from Employer, 5, 6, 9, and 12; BEM 502, 503, and 504.

The Department properly relied on [redacted] Bank and [redacted] Credit Union Bank account statements in making their determination as to [redacted] and [redacted] Medicaid eligibility.

The Administrative Law Judge finds that Petitioner had total assets in excess of [redacted] on the dates of application for Medical Assistance eligibility. There is a condition under which the principal and/or income could be paid to or on behalf of the person from the trust. Petitioners set up the trust for themselves and retain legal control of and dominion over the distribution of the proceeds contained in their joint bank accounts. Neither of the Guardians appear to have authority as trustee to act for the trust.

Petitioners also allege hardship. Policy dictates that a client whose countable assets exceed the asset limit is nevertheless asset eligible when an **undue hardship** exists. The Department must assume that denying MA will not cause undue hardship unless there is evidence to the contrary. An undue hardship exists when the client's physician (M.D. or D.O.) states that:

- Necessary medical care is not being provided, and
- The client needs treatment for an emergency condition.

A medical emergency is any condition for which a delay in treatment may result in the person's death or permanent impairment of the person's health. A psychiatric emergency is any condition that must be immediately treated to prevent serious injury to the person or others. BEM 402, page 11. Petitioners have not established an undue hardship in this case. There has been no conservatorship established for Petitioners for the Guardians to access and pay out countable available assets that Petitioners are legally entitled to access and use.

Petitioners' representative also argues that he requested the Department to assist in providing help to qualify Petitioners for Medical Assistance and that the Department erred in failing to do so.

Pertinent Department policy dictates:

> Verification means documentation or other evidence to establish the accuracy of the client's verbal or written statements. (BAM 130, page 1) The client must obtain required verification, but the local office must assist if they need and request help. (BEM 130, page 3)

In this case, Petitioners provided sufficient verifications to allow the Department to determine the Petitioners assets and lack of eligibility for Medical Assistance. There is no Department policy which requires the Department to locate a way to qualify Petitioners for Medical Assistance eligibility when the circumstances for such eligibility are absent.

Petitioners' allegations that the assets are unavailable because Petitioners have dementia, and the Banks will not allow anyone else to access the funds in their stead are equitable arguments to be excused from Department policy requirements. This Administrative Law Judge has no equity powers and cannot act in contravention of Department policy.

The Department has established by the necessary, competent and material evidence on the record that it acted in accordance with Department policy when it denied Petitioner's application for Medical Assistance based upon the facts that Petitioners possessed in excess of [redacted] in countable available assets, in excess of the allowable amount for Medical Assistance 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, if any, finds that the Department's determination that each Petitioner has more than [redacted] in countable, available assets for Medical Assistance and Retroactive Medical Assistance eligibility was correct under the circumstances. The Department properly denied Petitioners' applications.

Accordingly, the actions of the Department are **AFFIRMED.** The hearing scheduled for November 4, 2021, for [redacted] is cancelled.

It is so **ORDERED.**

Landis Y Lain

LL/ml

Landis Lain
Administrative Law Judge

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

Via Email:
MDHHS-Lenawee-Hearings
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