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I. In General

§3.1 A large part of Medicaid planning involves structuring the applicant's assets and income in a manner designed to achieve eligibility while preserving those assets for the benefit of the spouse, heirs, and beneficiaries. In determining eligibility, income and assets are viewed separately and must be distinguished in assessing a client's situation. The attorney must understand how the Medicaid rules treat different types of assets and income, as well as different types of ownership arrangements. In this chapter we will examine asset eligibility rules. The rules applicable to income are discussed in chapter 5.

The Medicaid application measures the amount of assets owned by the applicant on the application date for both single and married applicants. The application establishes that, as of the date of the application, the assets are below the allowable amounts. For a single person, the allowable amount of countable assets is \$2,000. Planning for a married applicant also requires the preparation of an asset declaration that measures the amount of countable assets on the snapshot date. The snapshot date is the date that represents the first period after September 30, 1989, that the applicant has been in a hospital or nursing home or on a MI Choice Waiver (MI Choice) for a continuous period of 30 days or more. BEM Item 402, at 3, 7. The amount of assets the applicant owns on the snapshot date is

used to calculate the amount of assets the spouse is allowed to keep over and above the \$2,000 in assets the applicant may retain. The amount of assets the spouse is allowed to keep is the protected spousal amount (PSA) (see §3.41).

Only *countable assets*, assets that are neither unavailable nor excluded, are counted for determining whether an applicant qualifies for Medicaid. You must first determine what countable assets exist in the estate (see §§3.3–3.23). Then you must determine the value of those assets (see §§3.25–3.38).

II. Asset Eligibility Rules

§3.2 The asset eligibility rules for Medicaid assistance in a nursing home or through the MI Choice program are as follows:

- A single person must have no more than \$2,000 of countable assets. BEM Item 400, at 6–7.
- For a married person whose spouse is not in a Medicaid-certified nursing home or on MI Choice, the combined countable assets of the couple must be no more than the PSA plus \$2,000. BEM Item 402, at 6. Calculating the PSA is explained in §3.41.
- For a married couple both of whom are in a Medicaid-certified nursing home or on MI Choice, they must each own no more than \$2,000. No PSA is allowed. Rather, each of them will be treated as separate individuals, and each will be eligible when they have less than \$2,000 of countable assets. BEM Item 402, at 5–6.

The asset eligibility test requires that eligibility be met for at least one day in the month being tested. BEM Item 400, at 6. This requirement means that even if the client becomes eligible for benefits only on the very last day of the month, the client is entitled to Medicaid benefits for the entire month.

It typically takes two or three months (sometimes longer) for the Department of Health and Human Services (DHHS) to process a Medicaid application (see §8.7). During the months that the application is pending, it is important for the applicant to remain financially eligible, as each of those months may be reviewed separately for eligibility.

III. Countable Assets

A. In General

§3.3 Countable assets are assets that are (1) available and (2) not excluded. BEM Item 400, at 1–2. Therefore, an initial step in working with an applicant is to review the assets in which they have an ownership interest and to determine whether any of these assets are, or could be, unavailable or excluded.

B. Availability of Assets

§3.4 Some assets an individual owns may not be considered resources for Medicaid purposes because they do not meet the availability test. If an asset is unavailable, the value of the Medicaid applicant's interest in the asset

will not be considered in determining eligibility. For the availability of assets titled in a trust, see §§3.39–3.40.

An asset may be unavailable because reasonable efforts to sell the asset have been unsuccessful. An asset that is unavailable for this reason is referred to as a nonsalable asset. BEM Item 400, at 13.

C. Jointly Owned Assets as Unavailable

§3.5 Before the 2011 changes to BEM Item 400, a common approach to protecting jointly owned assets was provided by the rules of BEM Item 400, at 10–11, which state that an asset is unavailable if it meets a three-part test: (1) the asset is owned jointly by the Medicaid applicant and someone other than his or her spouse, (2) the nature of the joint ownership arrangement is such that the Medicaid applicant would not be able to sell the asset without the cooperation of the nonspouse joint owner, and (3) the nonspouse joint owner refuses to sell the asset.

However, in 2011, an exception was added to this rule providing that “jointly owned real property is only excludable if it creates a hardship for the other owners.” *Id.* The applicable hardship standard set forth in BEM Item 400, at 11, makes it almost impossible for a hardship to be established. As a result, this once-beneficial planning tool for excluding nonhomestead real property is no longer viable. While it is widely believed that this rule violates federal law, there appears to be little opportunity, at least for now, to use the unavailable jointly owned property rule for excluding real estate. Other non-real estate assets may still be excluded through this approach, although these situations arise much less frequently.

Jointly owned noncash assets that are not real property, such as stocks, can be deemed unavailable if the nonspouse co-owner refuses consent to sell the asset and the asset cannot be sold without the owner’s consent. See form 3.1 for an affidavit concerning a stock certificate.

D. Nonsalable Assets

§3.6 The second way assets may be treated as unavailable is when the assets cannot be sold for a reasonable value. The BEM refers to these assets as “non-salable.” BEM Item 400, at 13. The BEM provides two alternate methods for establishing that an asset is nonsalable.

The first method applies only to real estate, notes, mortgages, and land contract interests. Under this method, an asset is nonsalable, and therefore unavailable, if the asset has actually been listed for sale at or below its fair market value and no reasonable offer to purchase has been received. Note that the BEM does not define the term “reasonable.” When this method is used, the asset must continuously remain up for sale as long as Medicaid benefits continue. When a reasonable offer is received, the asset is no longer unavailable. BEM Item 400, at 13.

The second method applies to a broader category of assets as well as to real estate. This approach allows an asset to be treated as nonsalable, and therefore

unavailable, if two knowledgeable sources state that due to some specific condition, the asset is not salable. BEM Item 400, at 13. Knowledgeable sources must be located in the applicant's geographic region. Realtors, bankers, or stock brokers are examples of the types of individuals who would qualify as knowledgeable sources. *Id.*

See form 3.2 for an affidavit of nonsalability of real property and form 3.3 for an affidavit of nonsalability of other types of assets. Note that an affidavit may not be necessary in all cases. A letter from the appropriate knowledgeable source (e.g., an antiques dealer) on letterhead will serve in the majority of cases. In addition, to help the caseworker sort through the large amount of paperwork submitted with the application and asset declaration, an explanation or statement of the asset's nonsalability is typically sent as a cover to an affidavit (as well as to all of the other evidence submitted, see exhibits 8.1 and 8.2). See form 3.4.

IV. Excluded Assets

A. In General

§3.7 Some types of assets are not considered countable, based on the nature of the asset. These assets are called excluded or exempt assets. As with unavailable assets, the value of an excluded asset is not considered when conducting an initial assessment or calculating eligibility for a Medicaid applicant.

B. Homestead Exclusion

§3.8 Most notable among the excluded assets is the homestead. Under the homestead exclusion, one house, all adjoining land, and all buildings situated on that land are excluded provided the applicant or his or her spouse lives there or lived there at some time in the past. It does not matter whether the property is in Michigan or in another state. However, to be exempt, the total *equity value* of the homestead must not exceed \$552,000 (in 2015). BEM Item 400, at 31–32. *Equity value* is the fair market value of the property reduced by any legally enforceable encumbrance. BEM Item 400, at 30. Note that this equity value cap of \$552,000 (in 2015) does not apply, and there is no limit to the value of the exempt homestead, if the spouse of the person applying for Medicaid lives in the homestead or if the home is occupied by a child of the Medicaid recipient who is under age 21 or is blind or disabled. BEM Item 400, at 32. In addition, the federal law provides that the value cap of \$500,000 will be adjusted annually based on the consumer price index. 42 USC 1396p(f)(1)(C).

In 2012, a troubling change was made to the definition of *homestead*, which appears in the Bridges Policy Glossary (BPG), at 32. Although the language of BEM Item 400 continues to say that all buildings located on the property adjoining the homestead are excluded, the glossary now defines *homestead* to not include the other *residences* on the property. This change would seem to cause a second (third or fourth) house or unit on the homestead property to be treated as a separate countable asset. Attorneys facing cases in which such facts exist will need to decide how to address this conflict in the policy language as well as the likelihood

that one or more additional buildings in which someone does or could reside will be treated as countable assets.

The homestead equity value cap should not be confused with estate recovery. The value cap addresses whether or not the homestead will be exempt. As discussed in chapter 10, estate recovery potentially applies to a homestead (or any other asset) of any value, following the death of the Medicaid beneficiary.

For the homestead to be excluded, title to the homestead must not be held in a revocable trust. Property that would otherwise be excluded as an excluded homestead, if titled in the applicant's revocable trust, will be counted. See §3.39.

Some additional factors regarding the homestead exclusion:

- Only one homestead may be excluded.
- There is no standard in the BEM or caselaw for how long someone must live in a place for it to become their homestead, unless the homestead is held in life estate, in which case the applicant must have lived in the homestead for at least one year after purchase to qualify for the exclusion.
- When determining whether or not land is adjoining, the rule is that land separated by roads and rivers is still adjoining and therefore still excluded. Only land that is “completely separated” by land owned by someone else is disqualified. BEM Item 400, at 31–32.
- A house that an applicant owns and that he or she never lived in may be an excluded homestead if it is occupied by a spouse, child, grandchild, stepchild, parent, stepparent, grandparent, aunt, uncle, niece, nephew, cousin, sibling, stepsibling, or stepcousin subject to the requirement that the relative is “dependent in any way” on the applicant. BEM Item 400, at 33.
- The homestead exclusion may be applied to real estate held in fee simple, a life estate, or a life lease or to a manufactured (mobile) home.
- The proceeds for the sale of a homestead or funds set aside for repairs when a homestead is destroyed may be excluded if they are (1) not commingled with other countable resources and (2) not in certificates of deposit. This exclusion is limited to a period of 12 months for proceeds from the sale of a home and requires that during that time period there be a written purchase agreement in place for the purchase of a replacement home. BEM Item 400, at 17.
- When excluding a homestead for a single individual in a nursing home, it is not necessary that the excluded property be the last place he or she lived. The rules allowing for the exclusion of a homestead in which the owner formerly lived require only (1) that the person lived there at some time in the past, (2) that the person has retained an ownership interest, and (3) that the person is now in a nursing home. BEM Item 400, at 31–33.
- If the person's homestead is a life estate, he or she must live in the home for at least one year in order for it to qualify as an exempt homestead. Otherwise, the purchase of the homestead will be treated as a divestment.