

Procedurally, the time period for the Agency Head to file a Final Agency Decision is May 14, 2015, in accordance with an Order of Extension.

This matter concerns the denial of Petitioner's application due to failure to provide information and the denial of a spousal waiver that would allow Petitioner's application to proceed without information regarding her husband's assets. Petitioner's prior application was filed by her husband and denied on similar grounds. In this application, Petitioner has produced filings under divorce proceedings. Those proceedings show that Petitioner's husband does indeed own property including commercial and residential property in New York State. The property is owned by a corporation called Skylands of Seneca Falls. Petitioner owned the corporation initially but her ownership was transferred to her husband over a number of years. In the prior application Morris County requested that the corporation be assessed for a contemporaneous value. An assessment in 2007 placed its value at \$1.5 million. When no assessment was forthcoming, Morris County denied the application for failure to provide documentation. The Initial Decision and Final Agency Decision upheld the denial finding that Petitioner has not supplied the necessary verifications regarding the business. N.O. v. Morris County Board of Social Services and DMAHS, OAL Dkt. No. HMA 9107-2013.

The instant case shows that Petitioner's husband likewise is refusing to provide information regarding his financial status to the Superior Court Judge overseeing the divorce proceedings. He has ignored court orders to provide information or hire appraisers. He has taken steps to move assets into his paramour's name and relocate to North Carolina. His first divorce attorney

requested to be removed as counsel and to have a lien placed for unpaid fees. ID at 6. Under this cloud, Petitioner is seeking Medicaid benefits to pay for her nursing home care.

The Initial Decision found that Petitioner was entitled to a spousal waiver that would exempt the counting of her husband assets in the Medicaid determination. For the reasons that follow and due to the unique circumstances of this case, I hereby REVERSE the Initial Decision with regard to the spousal waiver but also REVERSE the denial of the November 2013 application for failure to provide information regarding resources owned by Petitioner's husband. As such I hereby return the matter to Morris County to determine Petitioner's November 2013 application without regard to her husband's resources.

The federal statute, 42 U.S.C. § 1396r-5(c)(1)(A), provides that an "institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where- . . . (C) the State determines that denial of eligibility would work an undue hardship." 42 U.S.C. § 1396r-5(c)(3). DMAHS does provide for a waiver of the resource assessment in certain instances when there has been a break in the marital ties and the community spouse refuses to cooperate with the resource eligibility determination. A waiver may be granted in cases where the spouse is deceased but it cannot be verified, the couple is divorced but it cannot be verified, the spouse is uncooperative or the spouse's whereabouts are unknown. Petitioner's willingness to assign any right to support from her community spouse to the State is also a factor that would be considered. Such a waiver is not a guarantee of continuous eligibility and eligibility will be redetermined if circumstances change.

Here Petitioner's husband is not dead, his whereabouts are known and they are not yet divorced. Despite filing Petitioner's prior Medicaid application and appearing at the fair hearing filed on her behalf, he is flagrantly uncooperative. However, I am not persuaded that Petitioner is entitled to a spousal waiver as there is a pending divorce action that will determine the split of marital assets. Her eligibility may be established under the premise that the marital assets are not liquid and not available to her at this time.

In this matter, there are resources owned by Petitioner's husband that would count toward Petitioner's Medicaid eligibility had they remained married. Petitioner, however, is in the midst of a contested divorce proceeding to determine ownership of those assets. As Petitioner is seeking to break the bonds of matrimony, a "spousal" waiver is inappropriate.

However that is not to say that Petitioner is without remedy in having her Medicaid application analyzed without regard to assets in her soon to be ex-husband's name. Unless specifically excluded, all resources are considered when determining Medicaid eligibility. N.J.A.C. 10:71-4.1(b). Under institutional rules, all assets of the couple must be examined to determine eligibility. N.J.A.C. 10:71-4.9. Real property that can be converted to cash for the support and maintenance of an individual is included in the resource determination. However, resources that are inaccessible through no fault of the applicant may not be considered in determining eligibility. Additionally, Medicaid Communication No. 87-26 (effective August 18, 1987) instructs to temporarily exclude the value of a non-liquid resource if the Medicaid applicant or recipient agrees to and cooperates with a plan of liquidation. Once the resource is liquidated, if the

individual's countable resources exceed the maximum limit, the county welfare agency will terminate eligibility until the individual's resources are spent-down to the appropriate limit.

I FIND that, at this juncture, the assets of Petitioner's husband are not countable towards her Medicaid eligibility. Through the divorce proceedings, those assets may become available to her and would affect her eligibility at that time. She may also inevitably not receive any part of those assets in which case the final property settlement will be scrutinized for a transfer of assets.¹ However, I hereby instruct Morris County to process the November 2013 application without regard to assets held solely by Petitioner's husband. Petitioner shall continue to apprise Morris County of any developments with the divorce proceedings.

¹ When examining the division of property, an applicant's failure to assert their right to equitable distribution is subject to a transfer penalty. 42 U.S.C. § 1396p(c)(3) and N.J.A.C. 10:71-4.10(b)3. See H.K. v. DMAHS and Cape May County Board of Social Services, 379 N.J. Super. 321 (App. Div. 2005) (upholding DMAHS' determination where the property settlement "was an undisguised attempt to circumvent Medicaid regulations."). See also, S.G. v. DMAHS, 95 N.J.A.R. 2d (HMA) 33 (1994), affirmed 1995 WL 374666 (App. Div. March 23, 1995) (a divorce judgment does not bar imposing a period of ineligibility due to transfers of assets through the Judgment of Divorce).

THEREFORE, it is on this *2nd* day of APRIL 2015,

ORDERED:

That the Initial Decision is hereby REVERSED;

That Morris County shall determine Petitioner's November 2013 Medicaid application without regard to her husband's resources at this time; and

That Petitioner shall keep Morris County apprised of the divorce proceedings.



Valerie J. Harr, Director
Division of Medical Assistance
and Health Services