Minnesota Department of **Human Services**

**DECISION OF**

**STATE AGENCY**

**ON APPEAL**

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| In the Appeal of: | Leroy Vait |
| For: | Medical Assistance and Long Term Care Services |
| Agency: | Renville County Human Services |
| Docket: | 155286 |

On October 2, 2014, Human Services Judge Douglass C. Alvarado held an evidentiary hearing under Minn. Stat. § 256.045, subd. 3.

The following people appeared at the hearing:

Tracy Sherman, Appellant's Authorized Representative (Pluto Legal, PLLC)
Laura Zdychnec, Long, Reher & Hanson, Attorney for Appellant
David Torgelson, Renville County Attorney
Jill Pelzel, Renville County Human Services
Melissa Koford, Renville County Human Services
Susan Eiler, Renville County Human Services (retired)
Meg Heinz, Minnesota Department of Human Services
Traci Sherman, Pluto Legal, PLLC, Appellant's Authorized Representative
Jessica Lindstrom, Long, Reher & Hanson, Attorney (observing)
Lauren Fink, Pluto Legal, PLLC (observing)
Rosemary Vait, Appellant's spouse (observing)
Michael Vait, Appellant's son (observing)

The Human Services Judge, based on the evidence in the record and considering the arguments of the parties, recommends the following findings of fact, conclusions of law, and order.

## STATEMENT OF ISSUES

The issue raised in this appeal is:

> Whether Renville County Human Services correctly denied the Appellant's application for Medical Assistance and Long-Term Care Services effective April 1, 2014.

## FINDINGS OF FACT

1. By Health Care Notice of Action dated July 14, 2014, Renville County Human Services (herein Agency) denied the Appellant's application for Medical Assistance benefits and payment of Long-Term Care Services effective April 1, 2014. *Exhibit # 1, Tab 4.* On August 6, 2014, the Appellant's Representative filed a request challenging the denial of assistance for Leroy Vait, which the appeals office received on August 11, 2014. *Exhibit # 1, Tab 2.* Human Services Judge Alvarado held an evidentiary hearing via videoconference on October 2, 2014. Attorneys from the Minnesota Department of Human Services (DHS) Health Care Compliance Unit requested to observe the hearing. Upon objection of the Appellant to their presence as observers, these individuals were excluded from the hearing. The judge accepted into evidence 21 exhibits.[1] At the hearing the Agency was requested to submit additional exhibits.

[1] The following exhibits were accepted into evidence as follows: *Exhibit # 1*) Renville County exhibits at Tab 1) State Agency Appeals Summary; Tab 2) Appeal Request by letter dated August 6, 2014; Tab 3) letter to Pluto Legal, PLLC, from Melissa K. dated August 7, 2014; Tab 4) Health Care Notice of Action dated July 14, 2014; Tab 5) email correspondence between Traci Sherman and Susan Eiler dated June 18, 2014 and June 19, 2014; Tab 6) Request for Information dated June 14, 2014; Tab 7) Asset Assessment Results dated June 14, 2014; Tab 8) Health Quest Incident Ticket # 251907; Tab 9) Health Quest Incident Ticket # 272446; Tab 10) Minnesota Health Care Programs Manual (HCPM) Chapter 19.45.05; Tab 11) HCPM Chapter 19.45.10; Tab 12) HCPM Chapter 19.25.15.15; Tab 13) HCPM Chapter 19.25.40.05; Tab 14) Minnesota Department of Human Services (DHS) Memo – Evaluation of Life Estates by Institutionalized and Community Spouses; Tab 15) Case Notes from May 5, 2014 to July 14, 2014; *Exhibit # 2*) April 4, 1997 deed conveying Nicollet County property; *Exhibit # 3*) November 6, 2002 deed conveying Renville County property (W ½ of SW ¼); *Exhibit # 4*) November 6, 2002 deed conveying Renville County property (E ½ of E ½ of SE ¼); *Exhibit # 5*) November 6, 2002 deed conveying Brown County property; *Exhibit # 6*) January 29, 2014 deed conveying Leroy Vait's Renville County life estates to Rosemary Vait; *Exhibit # 7*) January 29, 2014 deed conveying Leroy Vait's Nicollet County life estate to Rosemary Vait; *Exhibit# 8*) Statement of Michael Vait dated August 22, 2014; *Exhibit # 9*) Statement of Thomas Vait dated September 11, 2014; *Exhibit # 10*) letter to Pluto Legal, PLLC. From LeAnn Frank dated August 25, 2014; *Exhibit # 11*) letter to Renville County Human Services to Traci Sherman dated April 28, 2014; *Exhibit # 12*) letter to Renville County Human Services from Lauren Fink dated May 6, 2014, with attachments; *Exhibit # 13*) May 15, 2014 notes/attachment Health Quest 251907; *Exhibit # 14*) Funeral Directors Life Insurance Company (FDLIC) Annuity Policy MN1051312; *Exhibit # 15*) FDLIC Annuity Policy MN1051313; *Exhibit # 16*) Handwritten notes regarding

Additionally, the record was held open until October 24, 2014, for the Appellant to provide written closing arguments, and until November 7, 2014, for the Agency to provide a written closing statement in response to the Appellant's arguments. On October 6, 2014, the Agency submitted two additional exhibits.[2] At the request of the Agency, the deadline for submission of the Agency's closing statement was extended to November 10, 2014. The record was closed on November 10, 2014.

2. The Appellant (D.O.B. March 14, 1930) is married to Rosemary Vait (D.O.B. September 12, 1933). *Exhibit # 1, Tab 15 and Exhibit # 18.* Rosemary Vait resided in the family home in Renville County until April 2013, when she moved into her son's home. *Id. and Exhibit # 1, Tab 8.*

3. On April 4, 1997, the Appellant and Rosemary Vait conveyed a life estate to the Appellant and Rosemary Vait for their lives with a remainder interest in fee to Michael Vait for real property in Nicollet County (W ½ of NE ¼). *Exhibit # 2.*

4. On November 6, 2002, the Appellant and Rosemary Vait conveyed real properties in Renville County (W ½ of SW ¼ and E ½ of E ½ of SE ¼ ) to Michael Vait retaining a legal life estate in the Appellant and Rosemary Vait. *Exhibit # 3.*

5. The Appellant and Rosemary Vait conveyed real property in Brown County (Lot 65 of Government Lot 10, Section 25, Township 111, Range 32) to Thomas Vait on November 6, 2002, reserving a legal life estate in the Appellant and Rosemary Vait. *Exhibit # 5.*

6. The Appellant has resided in a long-term care facility since September 14, 2012, following a hospitalization on September 11, 2012. *Exhibit # 1, Tab 15 and Exhibit # 18.*

7. On March 11, 2013, the Appellant purchased a burial annuity policy in the amount of $15,882. *Exhibit # 14.* Rosemary Vait purchased a burial annuity policy in the amount of $15,807 on March 11, 2013. *Exhibit # 15.* The right to cancel these policies expired on midnight of the thirtieth day after receipt of the policies. *Exhibits # 14 & 15.*

8. On January 29, 2014, the Appellant and Rosemary Vait conveyed to Rosemary Vait, the Appellant's right, title and interest in real property in Renville County (W ½ of SW ¼ and E ½ of E ½ of SE ¼ ). *Exhibit # 6.* The Appellant and Rosemary Vait

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burial annuities; *Exhibit # 17*) email correspondence to Susan Eiler from Traci Sherman dated June 18, 2014 with attachments; *Exhibit # 18*) Case Notes from May 5, 2014, to August 20, 2014; *Exhibit # 19*) DHS Health Care Training regarding asset assessment dated October 12, 2009, November 10, 2009, January 13, 2010 and May 4, 2010; *Exhibit # 20*) Blank DHS Designation of Assets Form 3340C effective January 2011; and *Exhibit # 21*) HCPM Chapter 19.45.10 (archived versions effective December 1, 2006, and February 1, 2008).

[2] On October 6, 2014, the Agency submitted two exhibits which were marked as follows: *Exhibit # 22*) Application for Payment of Long-Term Care Services dated April 29, 2014; and *Exhibit # 23*) MAXIS Asset list.

also conveyed to Rosemary Vait the Appellant's right, title and interest in real property in Nicollet County (W ½ of NE ¼) on January 29, 2014. *Exhibit # 7.*

9. On March 2, 2014, Ms. Vait entered into a partnership agreement with a son listing farms in two counties which were the subject of life estates. *Exhibit # 1, Tab 8.* This farm partnership provides income to Ms. Vait. *Exhibit # 1, Tab 15.* On April 18, 2014, ownership of a Ford 150 pickup truck was transferred from the Ms. Vait to the farm partnership. *Id.*

10. On April 29, 2014, an application for Medical Assistance payment of Long-Term Care Services was filed on behalf of the Appellant. *Exhibit # 1, Tab 15, Exhibits # 11, 18 & 22 and testimony of S. Eiler.* The Appellant's Authorized Representatives were Lauren Fink, Cheryl Vos and and Traci Sherman of Pluto Legal, PLLC. *Exhibit # 22.* Ms. Vait's ownership of a 2012 Jeep Grand Cherokee and life estates owned by Ms. Vait in Nicollet, Renville and Brown Counties were reported. *Id.* Social Security income for the Appellant and Ms. Vait and self-employment income from a farm partnership for Ms. Vait were also reported. *Id.*

11. The Agency conducted an Asset Assessment pursuant to the application for Long-Term Care Services on behalf of the Appellant. *Exhibit # 1, Tab 7 and Exhibits # 15 and 18 and testimony of S. Eiler.* The Agency considered the non-excluded assets owned by the Appellant and Rosemary Vait (the community spouse) on September 11, 2012, to determine the amount of Rosemary Vait's community spouse asset allowance. *Exhibit # 1, Tab 7 and testimony of S. Eiler.* Availability of these assets was not considered when determining the amount of the community spouse asset allowance. *Testimony of S. Eiler.* The assets counted as of September 11, 2012, were as follows: a checking account # 00252443 valued at $12,280.98; savings account # 8501 valued at $3,701.28; savings account # 8460 valued at $10,336.96; Certificate of Deposit #8460 valued at $12,996.18; First National money market account valued at $5,076.02; Frandsen money market account valued at $43,255.53; Lincoln FN7122497 (annuitized annuity) valued at $10,316.54; Lincoln 357143632 (annuitized annuity) valued at $45,035.56; 2012 Grand Cherokee Jeep valued at $23,506; life estate in Nicollet County property for the Appellant at age 82 ($462,100 ÷ 2 x .40295) valued at $93,101.60; life estate in Nicollet County property for Rosemary Vait at age 79 ($462,100 ÷ 2 x .45357) valued at $104,797.35; life estate in Brown County property for the Appellant ($12,200 ÷ 2 x .40295) valued at $2,458; and life estate in Brown County property for Rosemary Vait ($12,200 ÷ 2 x .45357) valued at $2,766.78.[3] *Exhibit # 1, Tab 7 and Exhibit # 22.* The total counted assets as of September 11, 2012, were $369,628.78. *Id.* Ms. Vait's community spouse asset allowance was $113,640, which was the 2012 maximum amount of assets the community spouse could keep under the Medical Assistance rules.[4] *Exhibit #*

[3] The life estate interest in Renville County was excluded as homestead property for Ms. Vait. *Exhibit # 1, Tabs 7 & 15.*

[4] See: HCPM, Chapter 22.40.

*1, Tab 15.*

12. The Agency determined that the Appellant and Rosemary Vait had counted assets on the date of the request for payment of Long-Term Care Services in April 2014 as follows: checking account # 00252443 valued at $25,615.55; savings account # 8501 valued at $27,167.70; First National money market account valued at $80.58; Frandsen money market account valued at $4,266.62; Lincoln FN7122497 valued at $11,193.98; Lincoln 357143632 valued at $43,255.93; 2012 Grand Cherokee Jeep valued at $22,925; Leroy Vait burial annuity ($3,145 B fund and $2,622 CAI) valued at $5,767; Rosemary Vait burial annuity ($4,145 B fund and $2,547 CAI) valued at $6,692; life estate in Renville property ($222,100 x .43649) valued at $96,966.64; life estate in Renville County property ($4,300 x .43659) valued at $1,877.34; life estate in Nicollet County property ($592,900 x .43659) valued at $258,854.21; life estate in Brown County property for the Appellant ($12,200 ÷ 2 x .36998) valued at $2,256.88; and life estate in Brown County property for Rosemary Vait ($12,200 ÷ 2 x .43659) valued at $2,663.20.[5] *Exhibit # 1, Tab 7 & Tab 15 and Exhibits # 18 & 22.* Again, availability of the assets held by the Appellant and Ms. Vait was not considered by the Agency. *Exhibit # 18 and testimony of S. Eiler.*

13. On April 30, 2014, the Appellant's Authorized Representative inquired about the inclusion of life estates held by the Appellant and Ms. Vait in the Medical Assistanc eligibility Asset Assessment, contending that such assets are unavailable to both the institutionalized and the community spouse. *Exhibit # 18 and testimony of S. Eiler.* The Agency was verbally advised by the Minnesota Department of Human Services (DHS) that all assets of the community spouse must be considered unless excluded and that only if the community spouse gave the life estate interest to the institutionalized spouse would the asset be considered unavailable. *Id.* This information was conveyed to the Appellant's Authorized Representative. *Id.*

14. On May 5, 2014, the Agency made a DHS Health Quest request (Incident Ticket # 251907) to confirm whether there were any changes in the consideration of the value of life estate interests for the community spouse on the DHS 3340A Asset Assessment Results. *Exhibit # 1, Tab 8 and Exhibit # 18 and testimony of S. Eiler.* The Health Quest further inquired as to what verification was needed to exclude a vehicle which is an asset used for self-employment. *Id.*

15. On May 5, 2014, the Agency determined that the Appellant and Rosemary Vait had counted assets in the amount of $369,628.78. *Exhibit # 1, Tab 15, Exhibit # 18.Id. and Exhibit # 1, Tab 7.* Ms. Vait's community spouse asset allowance was $117,240, which was the 2014 maximum amount of assets the community spouse could

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[5] Certain assets were transferred into a partnership account after April 1, 2014. *Exhibit # 1, Tab 15.* The Appellant is not contesting the valuation of the marital assets with the exception of the life estate and burial annuity values.

keep under the Medical Assistance rules.[6] *Exhibit # 1, Tab 7.*

16. By letter dated May 6, 2014, Lauren Fink of Pluto Legal, PLLC, contended that the Agency incorrectly counted the value of life estate interests held by Ms. Vait toward her community spouse asset allowance, because it is not a salable asset and therefore is not a resource for purposes of determining Medical Assistance eligibility. *Exhibits # 12 & 18.* Ms. Fink requested that the Agency remove the value of these life estate interests held by Ms. Vait from her community spouse assets allocation. *Exhibit # 12.* Attached to this letter was a copy of the Order from Audrey Larson v. Minnesota Department of Human Services and Polk County Social Services, Court File No. 60-CV-13-465, In re Estate of Perrin, 796 N.W.2d 175 (Minn. Ct. App. 2011) and In re Estate of Ruddick, No. 62-PR-10-183 (March 2, 2012). *Id.* This information was forwarded to DHS. *Testimony of S. Eiler.* The Larson decision was not considered with regard to the Health Quest inquiry regarding the Appellant because the order of the District Court related only to the Larson case and did not have statewide implications. *Testimony of M. Heinz.*

17. On June 14, 2014, the Agency requested the Appellant's Authorized Representative complete and return the Asset Assessment Results by June 26, 2014, designating which assets Rosemary Vait would keep for her community spouse allotment of $117,240 so that the Appellant's eligibility for Medical Assistance could be determined. *Exhibit # 1, Tabs 6 & 7 and testimony of S. Eiler.* This list of counted assets included burial annuities and life estates owned by the Appellant and Ms. Vait regardless of whether they were available. *Exhibit # 1, Tab 7, Exhibit 17 and testimony of S. Eiler.* It also included the 2012 Jeep Grand Cherokee owned by the Appellant and/or Ms. Vait.[7] *Exhibit # 1, Tab 7 and testimony of S. Eiler.*

18. Health Quest ticket # 251907 was "closed"/answered on June 19, 2014, by Meg Heinz. *Exhibit # 1, Tab 8.* Ms. Heinz responded that "At the time there is a request for MA payment of LTC services the couple will need to determine which assets will be attributable to each spouse"; that availability was not a factor when calculating the total non-excluded assets; but that once the assets are attributed to the community spouse asset allowance, the availability of an asset is considered when evaluating the assets attributable to the LTC spouse. *Id. and testimony of S. Eiler and M. Heinz.*

19. No designation of assets reserved to the community spouse was received by the Agency. *Testimony of S. Eiler and M. Koford.* The Appellant's Authorized Representative returned the Asset Assessment with handwritten notes indicating that the burial annuities were unavailable, the 2012 Grand Cherokee Jeep should be excluded and

[6] See: HCPM, Chapter 22.40.

[7] The 2012 Ford 150 pickup truck was considered an excluded asset by the Agency on the basis that this was the vehicle used by the community spouse for transportation with the highest value. *Exhibit # 1, Tab 15 and testimony of S. Eiler.*

all life estates counted only for determining the community spouse asset allowance. *Exhibit # 17 and testimony of S. Eiler.* The Authorized Representative requested, in pertinent part, by email dated June 18, 2014, that the Agency remove the value of the 2012 Jeep Grand Cherokee, life estate interests held by Rosemary Vait and the irrevocable burial annuities in excess of the burial fund exclusion and burial space from consideration when computing Ms. Vait's community spouse asset allowance and provided a copy of archived HCPM Chapter 19.25.15.15 effective September 1, 2011, Chapter 19.25.25 and Chapter 19.30.10. *Id.*

20. By Health Care Notice of Action dated July 14, 2014, the Agency denied the application for Medical Assistance payment of Long-Term Care Services on behalf of the Appellant effective April 1, 2014, because the Agency did not receive the information regarding which assets would make up the community spouse asset allowance and therefore, all assets were attributed to the Appellant. *Exhibit # 1, Tab 4 and testimony of M. Koford.* These assets exceeded the $3,000 asset limit. *Id.* When determining the Appellant's eligibility for Medical Assistance payment of LTC services the Agency viewed the life estates and burial agreements as unavailable to the Appellant. *Exhibit # 1, Tab 15 & Exhibit #18 and testimony of M. Koford.* The total counted assets for the Appellant were $125,156.72. *Id.*

21. By letter dated August 6, 2014, the Appellant's Authorized Representative requested clarification of the July 14, 2014, denial notice and redetermination of the Appellant's eligibility for Long-Term Care Services. *Exhibit # 1, Tab 2 and testimony of M. Koford.* The Authorized Representative argued that the life estate interests of the Appellant and Ms. Vait as well as their funeral policies are not counted assets for the purpose of determining Medical Assistance eligibility. *Id.* This letter also acted as a Notice of Appeal of the denial determination. *Id.*

22. On August 7, 2014, the Agency responded to the Appellant's Authorized Representative inquiry of June 18, 2014, indicating that "The life estate interest and any amount of an annuity or life insurance funded burial in excess of the excluded amount are considered unavailable assets when determining medical assistance eligibility." However, availability of an asset is not a factor when determining which assets will be attributable to each spouse once an Assets Assessment has been completed. *Exhibit # 1, Tab 3, Exhibit # 18 and testimony of M. Koford.* Since the Agency did not receive the information requested regarding the attribution of assets the Agency "counted all non-excluded, available assets toward Leroy's asset limit, which caused Leroy to be over the $3,000 asset limit for Medical Assistance." *Id.*

23. On August 13, 2014, the Agency made a follow-up DHS Health Quest request (Incident Ticket # 272446) seeking information on how to evaluate marital assets for a long term care spouse when the long term care applicant and community spouse have not selected which assets would be kept by the community spouse. *Exhibit # 1, Tab 9 and testimony of M. Koford.* This ticket was "closed"/answered on August 13, 2014, by Meg

Heinz. *Id.* Ms. Heinz responded that the assets coded in MAXIS as owned by the long term care spouse exceed the $3,000 asset limit and the assets coded in MAXIS as owned by the community spouse exceed the community spouse asset allowance. *Id.* Furthermore, Ms. Heinz noted that the HCPM provides that long term care services may be denied when the community spouse refuses to cooperate in the asset assessment process, unless the assets that the long term care spouse has access to are equal to or below the asset limit for Medical Assistance eligibility and if certain conditions are met. *Id.* Finally, Ms. Heinz noted that if Medical Assistance payment of long term care services is approved without cooperation of the community spouse, a cause of action exists against the community spouse for the dollar value of assets over the community spouse asset allowance or the amount of the Medical Assistance expenditures, whichever is less. *Id.*

24. By letter dated August 22, 2014, Michael Vait advised the Agency that he does not wish to purchase the life estate interest or sell his remainder interest in real property in Renville and Nicollet Counties in which Rosemary Vait has a life estate interest. *Exhibit # 8.*

25. By letter dated August 25, 2014, LeAnn Frank, Loan Officer of Frandsen Bank & Trust opined that life estates are not saleable in the Fairfax, Minnesota area. *Exhibit # 10.*

26. Thomas Vait advised the Agency by letter dated September 11, 2014, that he does not wish to purchase the life estate interest or sell his remainder interest in real property in Brown County in which the Appellant and Rosemary Vait have a life estate interest. *Exhibit # 9.*

27. In its written Closing Statement of November 10, 2014, the Agency stipulated that the irrevocable burial annuity should not have been considered an available asset when determining the Appellant's eligibility for Medical Assistance payment of his Long-Term Care Services.

## APPLICABLE LAW

28. A person may request a state fair hearing by filing an appeal either: 1) within thirty days of receiving written notice of the action; or 2) within ninety days of such notice if the Appellant can show good cause why the request for an appeal was not submitted within the thirty day time limit. *Minn. Stat. § 256.045, subd. 3.*

29. The Commissioner of Human Services has jurisdiction over this appeal under Minn. Stat. § 256.045, subd. 3 and 42 U.S.C. § 1396r-5(e)(1).

30. Pursuant to Minn. Stat. § 256B.08 an applicant for Medical Assistance, or a person acting in the applicant's behalf, must file an application with a local Agency in the

manner and form prescribed by the state Agency. When an application for Medical Assistance hereunder is filed with a county Agency, such county Agency must promptly make or cause to be made such investigation as it deems necessary. *Id.* The object of such investigation must be to ascertain the facts supporting the application made hereunder and such other information as may be required by the rules of the state Agency. *Id.* Upon the completion of such investigation the county Agency must promptly determine eligibility. *Minn. Stat. § 256B.09.* Minn.R. 9505.0095 requires the applicant to provide all necessary information and documents and give the local Agency written authorization to contact sources who are able to verify the required information to the local Agency. An applicant who refuses to authorize verification of an eligibility factor including a social security number must be denied Medical Assistance eligibility. *Id.*

31. Minn. Stat. § 256B.056 sets forth the eligibility requirements for Medical Assistance benefits. Unless specifically required by state law or rule or federal law or regulation, the methodologies used in counting income and assets to determine eligibility for Medical Assistance for persons whose eligibility category is based on blindness, disability, or age of 65 or more years are the methodologies for the Supplemental Security Income (SSI) program. *Id. at subd. 1a.* An applicant must verify, among other factors, income and assets. Persons whose eligibility category is based on blindness, disability, or age of 65 or more years, must not individually own more than $3,000 in assets, or if a member of a household with two family members, husband and wife, or parent and child, the household must not own more than $6,000 in assets, plus $200 for each additional legal dependent. *Minn. Stat. § 256B.056, subd. 3(a).* Minn. Stat. § 256B.059 sets forth the asset limits for institutionalized and community spouses and the availability of such assets.

32. At the beginning of the first continuous period of institutionalization of a person beginning on or after October 1, 1989, at the request of either the institutionalized spouse or the community spouse, or upon application for Medical Assistance, the total value of assets in which either the institutionalized spouse or the community spouse had an interest at the time of the first period of institutionalization of 30 days or more must be assessed and documented and the spousal share of those assets must be assessed and documented. *Minn. Stat. § 256B.059, subd. 2.*

33. At the time of initial determination of eligibility for Medical Assistance benefits following the first continuous period of institutionalization on or after October 1, 1989, assets considered available to the institutionalized spouse must be the total value of all assets in which either spouse has an ownership interest, reduced by the community spouse resource allowance (referred to in Minnesota Statutes as the community spouse asset allowance). *42 U.S.C. § 1396r-5(c)(1)(A) and Minn. Stat § 256B.059, subd. 5(a).* After the spousal share[8] is determined, the community spouse is permitted to retain a

[8] "Spousal share" means one-half of the total value of all assets, to the extent that either the institutionalized spouse or the community spouse had an ownership interest at the time of the first continuous period of institutionalization.

specified maximum amount indexed to inflation, which is referred to as the community spouse resource allowance (CSRA). *42 U.S.C. §§ 1396r-5(c)(2)(B), (f)(2)(A), (g). See also Houghton ex rel. Houghton v. Reinertson, 382 F.3d 1162, 1166.* All resources held by either the institutionalized spouse, community spouse, or both must be considered to be available to an institutionalized spouse but only to the extent that the amount of such resources exceed the community spouse resource allowance (CSRA).[9] *42 U.S.C. § 1396r-5(c)(2) and Minn. Stat. 256B.059, subd. 5(a).* Any and all resources above the CSRA must be spent before the institutionalized spouse will be eligible for Medicaid. *Houghton at 1166-67 and 42 U.S.C. § 1396r-5(c)(2).* For purposes of determining initial eligibility for Medical Assistance benefits, assets do not include assets excluded under the Supplemental Security Income (SSI) program. *Minn. Stat. 256B.059, subd. 5(e). See also: 42 U.S.C. § 1396r-5(c)(5).*

34. 42 U.S.C. § 1382(b) and 20 C.F.R. § 416.1210 set forth the resources specifically excluded when determining eligibility for SSI benefits. Property which is so essential to the means of self-support of such individual (and such spouse) as to warrant its exclusion, as determined in accordance with and subject to limitations prescribed by the Commissioner of Social Security is excluded when determining SSI eligibility. *42 U.S.C. § 1382b(a)(3).* There is no limitation on property (including the tools of a tradesperson and the machinery and livestock of a farmer) that is used in a trade or business or by such individual as an employee with regard to such resource exemption. *Id.* Household goods, personal effects, and an automobile owned by the individual (or their eligible spouse) is also an exempt resource for SSI purposes, to the extent that the total value does not exceed such amount as the Commissioner of Social Security determines to be reasonable. *Id.* at (a)(2).

35. The Social Security Administration's Program Operations Manual System (POMS)[10] provides that any assets that are resources not specifically excluded are counted against the statutory limit for SSI benefits. *POMS § SI 01110.001.* Resources are defined as cash or other liquid assets or any real or personal property that an individual (or spouse,

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*Minn. Stat. § 256B.059, subd. 1(c) and 42 U.S.C. § 1396r-5(c)(1)(A)(ii).*

[9] Minnesota Department of Human Services policy as contained in the Health Care Programs Manual (HCPM) sets forth the "Steps to Determine Asset Eligibility for the LTC Spouse". *HCPM, Chapter 19.45.10 (effective January 1, 2011).* If the total value of all non-excluded assets owned by the LTC spouse and the community spouse is more than the community spouse asset allowance, the Agency should consult with the spouses to determine which assets will make up the community spouse asset allowance. *Id.* Once assets are attributed to the LTC spouse the Agency must follow Method A or Method B depending on the LTC spouse's basis for eligibility. *Id.* At this stage the availability of an asset is considered. *Id.*

[10] "The POMS is a set of guidelines through which the Social Security Administration "further construe[s]" the statutes governing its operations. Clark v. Astrue, 602 F.3d 140, 144 (2d Cir.2010). POMS guidelines are entitled to "substantial deference, and will not be disturbed as long as they are reasonable and consistent with the statute." Bubnis v. Apfel, 150 F.3d 177, 181 (2d Cir.1998). But courts have declined to defer to the POMS where "the plain language of the statute and its implementing regulation do not permit the construction contained within the manuals." Oteze Fowlkes v. Adamec, 432 F.3d 90, 96 (2d Cir.2005)." *Lopes v. Department of Social Services, 696 F.3d 180, at 186.*

if any) owns; has the right, authority or power to convert to cash; and is not legally restricted from using for his/her support and maintenance. *20 C.F.R. § 416.1201(a) and POMS §§ SI 01110.100 & 01110.110.* Property does not cease to be a resource simply because it has no current market value. *POMS § SI 01110.100.* Even though there is no value to count, the property remains a resource and if the property develops a market value at a later time, there has been an increase in the value of a resource rather than a receipt of income. *Id.* If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. *20 C.F.R. 416.1201(a)(1).* If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse). *Id.* Despite having an ownership interest, property cannot be a resource if the owner lacks the legal ability to access funds for spending or to convert noncash property into cash. *POMS § SI 01120.010.*

36. Life estates are not a specifically excluded resource under federal SSI regulations.[11] POMS § SI DEN 01140.110 identifies a life estate as an ownership interest in real property (as opposed to a permissive use of property) which is a resource counted toward the SSI limit. The life estate and remainder interest tables used to compute the value of life estate resources are set forth at POMS § SI 01140.120.

37. In Minnesota, for purposes of asset verification, "an individual is not required to make a good faith effort to sell a life estate that is not excluded" under the home equity provisions of Minn. Stat. § 256B.056, subd. 2 and the life estate is "deemed not salable unless the owner of the remainder interest intends to purchase the life estate, or the owner of the life estate and the owner of the remainder sell the entire property."[12] *Minn. Stat. § 256B.056, subd. 4a.* This subdivision applies only for the purpose of determining eligibility for Medical Assistance, and does not apply to the valuation of assets owned by either the institutional spouse or the community spouse when assessing the spousal share. *Id.* The value of a life estate interest in non-homestead real property for purposes of the spousal share is determined by multiplying the equity value of the property by the mortality figure for the life estate owner as found in the Life Estate Mortality Table.[13] *HCPM, Chapter 19.25.15.15.* The value of a life estate interest is considered an unavailable asset unless the remainderman purchases the life estate interest from the life estate owner or the life estate owner and the remainderman sell both the life estate and the remainder interest in the property. *Id.* The Minnesota District Court, Ninth District held in Audrey Larson v. Minnesota Department of Human Services, Court File

[11] See: 20 C.F.R. §§ 416.1210-416.1249.

[12] This provision is consistent with 42 U.S.C. 1382b(b) which provides that any real property which cannot be sold because the owner's reasonable efforts to sell have been unsuccessful is exempt from the disposition of property requirements in determining eligibility for SSI benefits. Real property that an individual has made reasonable but unsuccessful efforts to sell throughout a 9-month period of conditional benefits is excluded for as long as: the individual continues to make reasonable efforts to sell it; and including the property as a countable resource would result in a determination of excess resources. *POMS § SI 01130.140.*

[13] See: HCPM, Chapter 19.25.15.20.

No. 60-CV-13-465 (2013) that a life estate that is not salable is not valued when determining Medical Assistance eligibility for an institutionalized spouse.[14] This District Court decision was not appealed by the Minnesota Department of Human Services. Even though the life estate interest is not an available asset, an institutionalized spouse's interest in a life estate is subject to a Medical Assistance lien pursuant to Minn. Stat. § 514.981, subd. 6.[15]

38. Minnesota Department of Human Services policy as contained in the Health Care Program Manual (HCPM) provides that if the total value of all non-excluded assets is more than the Community Spouse Asset Allowance plus the institutionalized spouse's asset limit, the spouses are permitted to select which assets will make up the Community Spouse Asset Allowance. *HCPM, Chapter 19.45.10.*

39. The U.S. Court of Appeals, Tenth Circuit has held that the plain reading of 42 U.S.C. § 1396r-5 suggests that resources are pooled in the initial Medical Assistance eligibility determination, but analyzed separately after Medical Assistance eligibility was established. Houghton *at 1174.* During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse. *42 U.S.C. § 1396r-5(c)(4).* The Court in Houghton looked at the relevant legislative history of 42 U.S.C. 1396r-5 and found that the "attribution of resources into spousal shares, and the subsequent imposition of limits on the community spouse's shares, would occur only once, at the time of initial application." Houghton *at 1174.*

40. A person who satisfies all Medical Assistance eligibility requirements at any time within a month is eligible for the entire month beginning with the first of the month unless: A) eligibility ends because the person dies; B) the starting date is delayed by an income spenddown requirement; C) the starting date of retroactive eligibility begins; or D) federal law limits the beginning date of eligibility to another date. *Minn. R. 9505.0110, subp. 3.*

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[14] In the Larson case, Audrey Larson applied for Medical Assistance payment of Long-Term Care Services. She was an institutionalized spouse. Her husband, the community spouse, was the owner of a life-estate interest. The County determined that the assets owned by Mr. and Mrs. Larson (which included a value assigned to a life-estate interest) exceeded the asset allowances and the application for Medical Assistance benefits was denied. On administrative appeal, the Commissioner of Human Services affirmed the denial of Medical Assistance benefits.

[15] Minn. Stat. § 514.981, subd. 6(c)(2) provides that if the Medical Assistance recipient's interest was a life estate in real property, the lien must be a lien against the portion of the remainder equal to the percentage factor for the life estate of a person the Medical Assistance recipient's age on the date the life estate ended according to its terms or the date of the Medical Assistance recipient's death as listed in the Life Estate Mortality Table in the health care program's manual. If the Medical Assistance recipient owned the interest in real property in joint tenancy with others, the lien shall be a lien against the portion of that interest equal to the fractional interest the Medical Assistance recipient would have owned in the jointly owned interest had the Medical Assistance recipient and the other owners held title to that interest as tenants in common on the date the Medical Assistance recipient died. *Id. at subd. 6(c)(3).*

41. An institutionalized spouse may be found eligible for Medical Assistance even though assets in excess of the allowable amount are found to be available under paragraph (a) if the assets are owned jointly or individually by the community spouse, and the institutionalized spouse cannot use those assets to pay for the cost of care without the consent of the community spouse, and if: (i) the institutionalized spouse assigns to the commissioner the right to support from the community spouse; (ii) the institutionalized. spouse lacks the ability to execute an assignment due to a physical or mental impairment; or (iii) the denial of eligibility would cause an imminent threat to the institutionalized spouse's health and well-being. *Minn. Stat. §256B.059, subd. 5(b).*

## CONCLUSIONS OF LAW

42. The Appellant's hearing request was timely since it was submitted within 30 days of the July 14, 2014, denial notice.

43. The Appellant has resided in a long-term care facility since September 2012. An application for Medical Assistance payment of Long-Term Care Services was filed on behalf of the Appellant on April 29, 2014. The Agency conducted an asset assessment of the assets owned by the Appellant and his community spouse or in which they had an interest in September 2012. One-half of these assets, not specifically excluded by law, exceeded the maximum community spouse asset allowance of $113,640.[16] Therefore, Ms. Vait received the maximum community spouse asset allowance. These counted assets included non-homestead life estate interests held by the Appellant and his wife. There is no dispute among the parties that the availability of an asset is not considered in determining the community spouse asset allowance. Furthermore, the value assigned to particular assets at the time of the asset assessment used to determine the community spouse asset allowance is not contested by the Appellant.

44. After his institutionalization but prior to his application for Medical Assistance, the Appellant transferred his life estate interests in real property held in Renville and Nicollet Counties to Ms. Vait. Furthermore, Ms. Vait moved out of the homestead property which was subject to a life estate in Renville County. The Appellant retained his life estate interest in real property held in Brown.

45. The Agency's treatment of these assets is in issue in this appeal in that the Appellant contends that since the life estate has no value, the life estate interests should not be counted toward the amount of assets which Ms. Vait may reserve as her community spouse asset allowance. The Appellant further contends that the Agency incorrectly relied upon the advice of the Minnesota Department of Human Services as contained in the Health Quests # 251907 and # 272446 which failed to incorporate the ruling in the Larson decision.

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[16] *HCPM, Chapter 22.40.*

46. The Agency contends that: the Agency followed DHS policy in the treatment of life estate interests when computing the Appellant's Medical Assistance eligibility; the Larson decision is not precedential because it was issued by a state District Court and thus does not have statewide implications; and DHS policy deserves deference in the interpretation and administration of the Medical Assistance program.

47. The life estate ownership interests held by the Appellant and Ms. Vait permit them the right, authority or power to convert the property to cash. This is true regardless of whether or not there is a salable market for such property interests. The power of the Appellant to transfer his ownership rights in life estates held in Renville and Nicollet Counties was demonstrated in the January 29, 2014, transfer of these interests to his community spouse. Furthermore, the Appellant and Ms. Vait are not legally restricted from using the properties which are subject to the life estates for their support and maintenance. Presumably this is at the heart of the reluctance of Ms. Vait to designate her life estate interests to her institutionalized spouse (i.e. the income from the life estate will contribute to her self-support/minimum spousal income allowance). Therefore, the preponderant evidence establishes that the life estate interests held by the Appellant and his community spouse are resources/assets which are not excluded.

48. However, the Minnesota legislature has specified that after computation of the community spouse asset allowance, life estates are deemed to be not salable when determining Medical Assistance eligibility unless the owner of the remainder interest intends to purchase the life estate, or the owner of the life estate and the owner of the remainder sell the entire property. In this case, the owners of the remainder interests have advised the Agency in writing that they do not intend to purchase the life estates. The Agency contends that Minn. Stat. § 256B.056, subd. 4a applies only to verification of assets for eligibility purposes and not to the "valuation of assets." However, it begs the question "What is being verified if not the value of the asset?"

49. 42 U.S.C. § 1382b(b) provides insight to this inquiry. This provision authorizes the Commissioner of Social Security to prescribe the period(s) of time and the manner in which property must be disposed of in order not to be included in determining an individual's eligibility for SSI benefits. "Any real property" which cannot be sold because the owner's reasonable efforts to sell it have been unsuccessful must be exempt from the dispositional requirements. *Id.* at (b)(2)(C). POMS SI § 01130.140 further clarifies that such property is an excluded resource for as long as the individual continues to make reasonable efforts to sell it and including the property as a countable resource would result in a determination of excess resources. Therefore, such property need not be sold/utilized to meet a SSI applicant's needs. DHS policy as contained in the Health Care Programs Manual provides that non-homestead real property that a "client" is making a good faith effort to sell is considered an unavailable asset for Medical Assistance purposes. *HCPM, Chapter 19.15.* Minn. Stat. § 256B.056, subd. 4a exempts the individual holder of the life estate interest from the asset disposition requirement by

relieving that individual of the burden of verifying that the owner's reasonable efforts to sell the interest have been unsuccessful. The Minnesota statute does not specify that only persons applying for Medical Assistance are not required to make a good faith effort to sell a life estate. Thus, pursuant to state and federal law, a life estate interest is not an asset which must be utilized to meet an institutionalized individual's Medical Assistance needs. This is true regardless of whether the life estate interest is held by the institutionalized spouse or the community spouse.

50. Assets of both spouses must be pooled when Medical Assistance eligibility is determined. While the Appellant is the individual for whom Medical Assistance eligibility is being determined, the property interests of his community spouse are not considered separately until after the eligibility phase and should not be afforded different treatment when determining the Appellant's eligibility for Medical Assistance. Assets which are exempt from disposition requirements and which are not available to be used to meet the applicant's Medical Assistance needs should not be counted in the eligibility determination. While the life estate interest remains a resource/asset to the owner of that interest, the interest is not valued until such time as it is sold. Therefore, it cannot be determined that the Agency correctly assigned a value to life estates if claimed by the community spouse and no value (because of unavailability) if claimed by the institutionalized spouse when determining Medical Assistance eligibility.

51. The Agency has stipulated not to consider any of the irrevocable burial annuity funds with regard to the Medical Assistance eligibility determination.

52. Finally, the Agency looked at the value of two automobiles (a 2012 Ford F150 and a 2012 Jeep Grand Cherokee) when determining Medical Assistance eligibility. The Ford F150 was transferred to a farm partnership on April 18, 2014. There is no controversy that this vehicle, once transferred to the partnership, was used for the self-support of Ms. Vait. Since this asset was owned by the Appellant and/or Ms. Vait on April 1, 2014, the Agency found that it was not exempt as an asset used for self-support. Nevertheless, the Agency exempted the Ford 150 under the automobile exemption for Ms. Vait since it had a higher value than the 2012 Jeep Grand Cherokee. The value of the Jeep was counted as an available asset in the eligibility determination.

53. There is no provision in state or federal statute which requires an applicant to establish eligibility as of the first of the month of application. Pursuant to Minn. R. 9505.0110, subp. 3, a person who satisfies all eligibility requirements at any time within a month is eligible for the entire month beginning with the first of the month with certain exceptions. Inasmuch as the 2012 Ford 150 was used in a partnership which provided self-support for Ms. Vait at the time of the Medical Assistance application, it is an exempt self-support asset which leaves the 2012 Jeep Grand Cherokee as an exempt automobile asset.

54. When the values of the life estates used to compute the community spouse

asset allowance, the burial annuities and both automobiles are removed from the computation of the Appellant's Medical Assistance eligibility, the value of the counted assets (as contained in Exhibit 1, Tab 7, page 3) held by the Appellant and Ms. Vait at the time of the April 2014 application, is $111,580.36. These assets do not exceed the 2014 maximum community spouse asset allowance of $117,240 and the institutionalized spouse's asset allowance of $3,000. Therefore, the Appellant is asset eligible for Medical Assistance payment of his Long-Term Care Services effective April 1, 2014.

55. It is noted that this appeal did not include a review whether the Appellant meets the income eligibility provisions of the Medical Assistance program since no negative action was taken on this basis of eligibility.

## RECOMMENDED ORDER

THE HUMAN SERVICES JUDGE RECOMMENDS THAT the Commissioner of Human Services REVERSE the Agency's determination to deny the Appellant's application for Medical Assistance benefits and payment of Long-Term Care Services and ORDER the Agency to provide the Appellant with such assistance retroactive to April 1, 2014, if otherwise eligible.

Douglass C. Alvarado
Douglass C. Alvarado
Human Services Judge

12/22/14
Date

## ORDER OF THE COMMISSIONER

IT IS THEREFORE ORDERED THAT based upon all the evidence and proceedings, the Commissioner of Human Services adopts the Human Services Judge's recommendation as her final decision.

FOR THE COMMISSIONER OF HUMAN SERVICES:

Tanya Hermanek
Assistant Chief Human Services Judge

12-23-14
Date

cc: Rosemary Vait for Leroy Vait, Appellant
Pluto Legal, PLLC, Appellant's Authorized Representative
Laura Zdychnec, Long, Reher & Hanson, Appellant's Attorney
David Torgelson, Renville County Attorney
Renville County Human Services

## FURTHER APPEAL RIGHTS

**This decision is final, unless you take further action.**

If you disagree with this decision, you may:

- Request the decision be reconsidered; or
- Appeal to District Court.

### Right to Reconsideration

You may make a written request to the Appeals Office to reconsider this decision. The request must state the reasons why you believe your appeal should be reconsidered. The request may include legal arguments and may include proposed additional evidence supporting the request; however, if you submit additional evidence, you must explain why it was not provided at the time of the hearing. The request must be ***in writing***, be made ***within 30 days of the date of this decision,*** and a ***copy of the request must be sent to the other parties***. Send your written request, with your docket number listed, to:

Appeals Office
Minnesota Department of Human Services
P.O. Box 64941
St. Paul, MN 55164-0941

Fax: (651) 431-7523

### Appeal to District Court

You may start an appeal in the district court. This is a separate legal proceeding, and you must start this ***within 30 days of the date of this decision*** by serving a notice of appeal upon the other parties and the Commissioner. The law that describes this process is Minn. Stat. § 256.045, subd. 7.