



Policy Clarification 2019-08-01

Title: Marital Assets Pending Divorce – Legal Impediment

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Program(s) Impacted: Elderly & Disabled Medical Assistance Programs

The purpose of this document is to provide guidance on the treatment of marital assets in determining resource eligibility while a divorce is pending.

Medical KEESM 5200 (3) states the basic policy:

5200 (3) – *“Resources must be available. Resources are considered available when an applicant/recipient has a legal interest therein and the legal ability to make them available.*

(a) A resource shall be considered unavailable when there is a legal impediment that precludes the disposal of the resource. A legal impediment is a barrier to a person’s ability to use or enforce some rights in property or at law. Property is considered unavailable due to legal impediment if the individual does not have the legal right to access property and the property cannot be sold on the open market or, for non-cash property, converted to cash. The refusal or failure of an individual to take actions to make property available, if within the individual’s legal rights to do so, does not constitute a legal impediment.

An example of a legal impediment may include property held pending final action by a court, such as in a divorce proceeding or boundary dispute as the individual does not have access to such assets.”

Marital assets owned by a divorcing couple that may not be consumed or disposed of while the divorce is pending shall not be considered an available resource; however, only restrained assets are to be considered unavailable. Restrained assets are those that the court has ordered may not be transferred without permission of the court or by agreement of both spouses. Verification that the asset(s) is restrained is required. This would include a copy of the petition for divorce filed with the court and the initial order documenting that marital assets are restrained.

The following shall outline the treatment of restrained assets which are unavailable due to legal impediment pending the divorce:

1. **Eligibility Determination** – Assets identified as being unavailable due to legal impediment shall not be valued when determining resource eligibility. Even though the underlying asset may be a countable resource under the normal resource counting rules, the value of the asset is not counted. This is because the owner does not have the ability to access the value of the asset while being restrained by the court under the divorce proceeding. For example, a \$25,000 CD which is being restrained by the court would not be counted as an available resource in determining eligibility.
2. **Community Spouse Resource Assessment (CSRA)** – Any assets determined to be unavailable due to legal impediment (including those restrained by a court pending divorce proceedings) at the time the long term care arrangement began shall be included in determining the community spouse resource allowance (CSRA). Only assets that are specifically exempt shall be excluded from the CSRA. See Medical KEESM 5330 (exempt real property), 5430 (exempt personal property) and 5520 (exempt vehicles).

Example: A married applicant requesting long term care coverage has filed for divorce. The divorce was pending at the time the long term care arrangement began. All of the couple's assets, including two vehicles, their home, household goods, and a \$50,000 whole life insurance policy have been restrained by the court. Even though the assets are unavailable due to legal impediment, the regular asset counting rules are used to calculate the CSRA; therefore, one vehicle is exempt, and one is countable; the home is exempt as the primary residence; the household goods are exempt; and the cash surrender value of the life insurance is countable. Note however as indicated in (1) above that all restrained assets would be excluded in determining actual eligibility.

Divorcing spouses may not wish to complete a division of assets or allocate income, but so long as they are married, that remains an option. In addition, a CSRA must still be completed for eligibility purposes if long term care medical services are requested. See Medical KEESM 8144 and 8244.

3. **Divorce Finalized** – Once the divorce is finalized and the marriage dissolved, a property settlement of the marital assets will also be completed. The property settlement determines the assets awarded to each ex-spouse free and clear of any interest by the other ex-spouse. The divorce and property settlement may or may not occur simultaneously. There may be instances where the property settlement is not finalized until sometime after the marriage has been officially dissolved. Documentation of both the divorce and the settlement is required.
 - (a) **De-Coupled** – For budgeting purposes, the ex-spouses are no longer considered a couple. Legal responsibility for each other has ended; therefore, each spouse shall be budgeted separately as a single individual. Separate budgeting of the ex-spouses is effective the month after the month the divorce is finalized. The couple shall be budgeted together for any month in which they were still legally married.

Example: A married couple files for divorce which is finalized on August 15th. For budgeting purposes, the couple is budgeted together up through the month of August. Beginning in September, each ex-spouse is budgeted separately as a single individual.

- (b) **Asset Availability** – Effective with the month after the month the property settlement is finalized, all previously restrained assets are no longer considered unavailable as the legal impediment has been removed. Only the separate assets awarded to each

ex-spouse shall be considered in determining resource eligibility for that ex-spouse. Once unrestrained and awarded, the asset shall be countable or exempt for resource eligibility purposes based on the regular resource counting rules.

Example: A married couple files for divorce which is finalized August 15th; however, the property settlement was not finalized until September 9th. While separate budgeting methods will apply effective September 1st as noted in (3)(a), all assets previously restrained by the court will remain unavailable until October 1st. Only at that time will the valuation of assets awarded to the ex-spouse for whom eligibility is being determined be considered available.

Note: Some assets may be unrestrained by the court and awarded prior to a final settlement order while others may still be restrained pending further settlement negotiations between the parties. In that instance, only the unrestrained assets shall be considered available – documentation is required.

- (c) **Equitable Share** – If either spouse has received less than what would be considered an *equitable share* of the marital assets, an inappropriate transfer subject to penalty may have occurred. Normally, an equitable share would be roughly one-half of the value of the total marital assets. If the couple was married for a relatively short period of time, or one spouse possessed a greater amount of assets than the other at the time of marriage, a lesser amount may be considered equitable.

If the marital assets were divided approximately 50/50, eligibility staff may assume that each ex-spouse received an equitable share. The final property settlement would not be considered an inappropriate transfer for either spouse. The assets awarded to each ex-spouse would no longer be considered an unavailable asset to either since there is no longer a legal impediment. The asset would then be counted for eligibility purposes under normal resource counting rules beginning with the month after the month the settlement became final – documentation is required.

If the marital assets were not equally divided, eligibility staff should request verification as to why a lesser amount was received. Normally a written explanation from the attorney representing the ex-spouse in the divorce proceeding will be required. If the assets were divided based on guidance provided in state statute, then the division would be considered equitable. If the asset division was completed contrary to state statute, and a lesser amount was received, an inappropriate transfer may have occurred; consultation with Eligibility Policy may be required.

See Medical KEESM 5720 for a description of transfer of property, and 2124.1 concerning requirement to pursue potential resources.

For questions or concerns related to this document, please contact one of the KDHE Medical Policy Staff listed below.

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