

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF: [REDACTED]
Claimant

Reg. No: 2008-22170
Issue No: 2010
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
August 3, 2009
Oakland County DHS

ADMINISTRATIVE LAW JUDGE: Jonathan W. Owens

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon Claimant's request for a hearing. After due notice, an in person hearing was held on August 3, 2009. The Claimant's two sons appeared on her behalf and were represented by her attorney.

ISSUE

Was there a divestment for purposes of Medical Assistance (MA) Long Term Care (LTC) eligibility?

FINDINGS OF FACT

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

1. On December 1, 2007 the Claimant executed a Personal Service Contract with her sons [REDACTED] The agreement provided services such as:
Monitoring health status, secure health care, personal needs, visitation, financial

management, dealing with others, and overseeing resident's rights. The total compensation for the above services being [REDACTED].

2. On December 21, 2007 the Claimant applied for MA.

3. On March 6, 2008 the Department denied the Claimant's application for MA for the period of December 2007 through March 24, 2008 based upon divestment.

4. On May 19, 2008 the Claimant requested a hearing.

CONCLUSIONS OF LAW

The Medicaid Assistance (MA) program is established by Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). The Department of Human Services (formerly known as the Family Independence Agency) administers the MA program pursuant to MCL 400.10, *et seq.*, and MCL 400.105. Department policies are found in the Program Administrative Manual (PAM), the Program Eligibility Manual (PEM) and the Program Reference Manual (PRM).

The Medical Assistance program provides medical assistance to individuals and families who meet the Medical Assistance financial and non-financial eligibility factors. The goal of the Medical Assistance program is to insure that central healthcare services are made available to those who otherwise would not have financial resources to purchase them. PEM Manual Item 100. Assets must be considered in determining eligibility for SSI related Medical Assistance categories (aged, disability, etc.). PEM Manual Item 100. To be eligible for Medical Assistance countable assets cannot exceed the asset limit. The asset limit for a Medical Assistance household of one for a disabled individual is [REDACTED]. PEM Manual Item 400. Divestment of assets results in a penalty period under the Medical Assistance program, not ineligibility. PEM, Item 405.

In the present case, Claimant requested a hearing on May 19, 2008. The Department answered the Claimant's request for hearing stating the Claimant's Personal Care Contract was a divestment.

Relevant policy PEM Item 405, p. 1-8:

MA ONLY

Divestment results in a penalty period in MA, **not** ineligibility. Only LTC and waiver clients (see PEM 106) are penalized. Divestment policy does **not** apply to Qualified Working Individuals (PEM 169).

Divestment means a transfer of a resource (see "RESOURCE DEFINED" below) by a client or his spouse that:

Is within a specified time (see "LOOK-BACK PERIOD" below), and

Is a transfer for "LESS THAN FAIR MARKET VALUE", and

See "Annuity Not Actuarially Sound" and "Joint Owners and Transfers" below and PEM 401 about special transactions considered transfers for less than fair market value.

Is **not** listed below under "TRANSFERS THAT ARE NOT DIVESTMENT."

During the penalty period, MA will **not** pay the client's cost for:

LTC services, or
Home and community-based services, or
Home Help, or
Home Health.

MA will pay for other MA-covered services.

Do **not** apply a divestment penalty period when it creates an undue hardship. See "UNDUE HARDSHIP" below.

LOA 2 does **not** support this policy. You must manually compute the divestment penalty period and notify the client.

RESOURCE DEFINED

Resource means all the client's and his spouse's assets and income. It includes assets and income the client or spouse were entitled to but did not receive because of action by:

The client or spouse, or

A person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or his spouse, or

Any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse.

TRANSFER OF RESOURCE

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. Not all transfers are divestment. Examples of transfers include:

Selling an asset.

Giving an asset away.

Refusing an inheritance.

Payments from a "**MEDICAID TRUST**" that are **not** to, or for the benefit of, the person or his spouse. See PEM 401.

Putting assets or income in a trust. See PEM 401.

Giving up the **right** to receive income such as having pension payments made to someone else.

Giving away a lump sum or accumulated benefit.

Buying an annuity that is **not** actuarially sound.

Also see "Joint Owners and Transfers" for examples.

Transfers by Representatives

Treat transfers by any of the following as transfers by the client or spouse.

Parent for minor.

Legal guardian.

Conservator.

Court or administrative body.

Anyone acting in place of, on behalf of, at the request of or at the direction of the client or spouse.

Joint Owners and Transfers

When a client jointly owns a resource with another person(s), any action by the client or by another owner that reduces or eliminates the client's ownership or control is considered a transfer by the client.

██████████ is applying for MA. In 1990, he added his sister's name to his bank account. Each is free to withdraw as much money as desired so adding the sister's name did **not** affect the client's ownership or control. On September 1, 1993, the sister withdrew ██████████ and deposited the money in her own bank account. ██████████ is considered to have transferred ██████████ on September 1, 1993, the day he no longer had ownership and control of his money.

██████████ is applying for MA. On September 1, 1993, ██████████ gave his sister half interest in real estate. His equity value at the time was ██████████. The ownership arrangement prevents either sibling from selling without the other's permission. ██████████ transferred a resource on September 1, 1993, the day he reduced his ownership and control by giving his sister part ownership and the power to prevent sale. The amount transferred depends on whether his sister is refusing to sell. The transferred amount is:

██████████ if she now refuses to sell.

The asset is unavailable and **not** countable for purposes of ██████████ asset eligibility.

██████████ if she now agrees to sell.

Unless otherwise excluded, one-half the equity for the month being tested is a countable asset for purposes of ██████████ asset eligibility.

The same policy applies to resources the client's spouse owns jointly with other persons.

No penalty is imposed if the parties involved verify that the resource transferred actually belonged solely to the person to whom it was transferred.

Annuity Not Actuarially Sound

Purchase of an annuity that is **not** actuarially sound is a transfer for less than fair market value. The transfer was made by the annuity's owner.

Owner means the person who pays the premium for the annuity.

Annuitant means the person to whom the annuity payments are made during the guarantee period of the annuity.

An annuity is **not** actuarially sound if the annuitant is **not** expected to live until the end of the guarantee period of the annuity. Use the Life Expectancy Tables, EXHIBIT I - FEMALE or EXHIBIT II - MALE to make this determination.

Guarantee period may be called “annuity certain” or “period certain”.

■■■■ purchased an annuity at age 65 with a guarantee period of 10 years and payments starting at purchase. John’s life expectancy is 14.96 years. The annuity is actuarially sound.

■■■■ purchased an annuity at age 70 with a guarantee period of 15 years and payments starting five years after purchase. The annuity is **not** actuarially sound because ■■■■ life expectancy at purchase was 15.35 years while the guarantee period ends in 20 years (five year delay plus 15 years).

■■■■ purchased an annuity at age 65 with a guarantee period of 25 years. The annuity is not actuarially sound because ■■■■ life expectancy is only 18.96 years.

The amount transferred for less than fair market value for an annuity that is **not** actuarially sound is the amount that would be paid after the end of the person’s life expectancy.

■■■■ purchased an annuity at age 65 with a guarantee period of 25 years. The annuity is **not** actuarially sound because ■■■■ life expectancy is only 18.96 years. The amount transferred for less than fair market value is the value of the payments due in the last 6 years of the annuity (25 minus 18.96 = 6.04).

■■■■ purchased an annuity at age 70 with a guarantee period of 15 years and payments starting five years after purchase. The annuity is **not** actuarially sound because ■■■■ life expectancy at purchase was 15.35 years while the guarantee period ends in 20 years. The amount transferred for less than fair market value is the value of the payments due in the last 4 years of the annuity (20 - 15.35 = 4.65).

LOOK-BACK PERIOD

The first step in determining the period of time that transfers can be looked at for divestment is determining the baseline date. See “Baseline Date” below.

Once you have determined the baseline date, you determine the look-back period. The look back period is 60 months for all transfers made after

February 8, 2006 and 36 or 60 months (depending on the type of resource transferred) for transfers made on or before February 8, 2006. See “Sixty Months” and “Thirty-Six Months” below.

Entire Period

Transfers that occur **on** or **after** a client’s baseline date must be considered for divestment. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment.

Penalty Situation

A divestment determination is **not** required unless, sometime during the month being tested, the client was in a penalty situation. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be:

In an LTC facility, or
“APPROVED FOR THE WAIVER” (PEM 106).

Baseline Date

A person’s baseline date is the **first** date that the client was eligible for Medicaid and:

In LTC, or
“APPROVED FOR THE WAIVER” (PEM 106), or
Eligible for Home Health services, or
Eligible for Home Help services

A client’s baseline date does **not** change even if:

The client leaves LTC, or
The client is no longer “APPROVED FOR THE WAIVER” (PEM 106).

Sixty Months

Look-back 60-months from the “Baseline Date”, **for all transfers except:**

Look back 36 months from the “BASELINE DATE” for payments from an irrevocable “Medicaid Trust” to or for a person who is not the client or his spouse. See PEM 401.

LESS THAN FAIR MARKET VALUE

Less than fair market value means the compensation received in return for a resource was worth less than the fair market value of the resource.

Also see “Annuity Not Actuarially Sound” above.

Compensation must have tangible form and intrinsic value.

Relatives can be paid for providing services; however, assume services were provided for free when no payment was made at the time services were provided. A client can rebut this presumption by providing tangible evidence that a payment obligation existed at the time the service was provided (e.g., written agreement signed at the time services were first provided). The policy in PAM 130 allowing use of best available information or your best judgment as verification does **not** apply.

Value of Transferring Right to Income

When a person gives up his right to receive income, the fair market value is the total amount of income the person could have expected to receive.

Use EXHIBIT I - LIFE EXPECTANCY TABLE - FEMALE or EXHIBIT II - LIFE EXPECTANCY TABLE - MALE to compute the fair market value of a lifetime income source such as a pension. Base the calculation on the person's sex and age on the date of transfer.

TRANSFERS THAT ARE NOT DIVESTMENT

The following transfers are not divestment.

Transferring Excluded Assets

Transfers of assets that are **not** countable assets under SSI-related MA policy are **not** divestment.

Transfer of the following may be divestment:

Homestead of L/H and waiver client (see PEM 106) or the L/H and waiver client's spouse even if the transfer occurred before the client was institutionalized or approved for the waiver.

Assets that were **not** countable because they were unavailable or **not** salable.

Transferring Excluded Income

Transferring income that is **not** countable income for SSI-related MA according to PEM 500 is **not** divestment.

Transfers Involving Spouse

It is **not** divestment to transfer resources from the client to:

The client's spouse, or

To another "SOLELY FOR THE BENEFIT OF" the client's spouse.

Transfers from the client's spouse to another "SOLELY FOR THE BENEFIT OF" the client's spouse are **not** divestment.

Transfers Involving Child

Transfers to the client's blind or disabled (see PEM 260) child, regardless of the child's age or marital status, are **not** divestment. This includes transfers to a trust established "SOLELY FOR THE BENEFIT OF" the child.

Transfer to Funeral Plan

See "Life Insurance Funded Funeral" in PEM 400 when a person has irrevocably transferred ownership in life insurance or a similar device designated for funeral expenses.

Transfer to Trust

Transfers to a trust established "SOLELY FOR THE BENEFIT OF" a disabled (see PEM 260) person under age 65 are **not** divestment.

Purchase of Funeral Contract

Placing money in an irrevocable prepaid funeral contract (see PAM 805) is **not** divestment.

Asset Conversion

Converting an asset from one form to another of equal value is **not** divestment even if the new asset is exempt. Most purchases are conversions.

Using [REDACTED] from savings to buy a used car priced at [REDACTED] is conversion for equal value.

Trading a boat worth about [REDACTED] for a car worth about [REDACTED] is conversion for equal value.

Payment of expenses such as one's own taxes or utility bills is also **not** divestment.

Transferring Homestead to Family

It is **not** divestment to transfer a homestead to the client's:

Spouse (see "Transfers Involving Spouse" above).

Blind or disabled child (see "Transfers Involving Child" above).

Child under age 21.

Child age 21 or over who:

Lived in the homestead for at least two years immediately before the client's admission to LTC or PEM 106 waiver approval, **and**

Provided care that would otherwise have required LTC or PEM 106 waiver services, as documented by a physician's (M.D. or D.O.) statement.

Brother or sister who:

**Is part owner of the homestead, and
Lived in the homestead for at least one year immediately before
the client's admission to LTC or PEM 106 waiver approval.**

Transfers for Another Purpose

As explained below, transfers exclusively for a purpose other than to qualify or remain eligible for MA are **not** divestment.

Assume transfers for less than fair market value were for eligibility purposes until the client or spouse provides convincing evidence that they had no reason to believe LTC or waiver services might be needed.

Mr. Smith, age 40, was in good health when he gave his vacation cottage to his nephew. The next day Mr. Smith was in an automobile accident. His injuries require long-term care. The transfer was **not** divestment because Mr. Smith could **not** anticipate his need for LTC services.

Preservation of an estate for heirs or to avoid probate court is **not** acceptable as "another purpose."

That the asset or income is **not** counted for Medicaid does **not** make its transfer for "another purpose."

Trustee Fees

Trusts which designate a business as trustee (e.g., bank) usually must compensate the trustee. Reasonable compensation is **not** divestment. Reasonable compensation means compensation within the prevailing rate for the community. For example, banks usually base their fee on a percentage of the value of the principal. There may be a basic charge in addition to the percentage or the percentage may vary based on the value of the trust.

SOLELY FOR THE BENEFIT OF

All of the following conditions must be met for a transfer or for a trust to be solely for the benefit of a person.

The arrangement must be in writing and legally binding on the parties.

The arrangement must ensure that none of the resources can be used for someone else during the person's lifetime, except for "Trustee Fees."

The arrangement must require that the resources be spent for the person on an actuarially sound basis. This means that spending must be at a rate that will use up all the resources during the person's lifetime. Life expectancies are in Exhibit I - FEMALE or EXHIBIT ii - MALE.

Trusts meeting the criteria for "Exception A" or "Exception B" in PEM 401 do **not** have to spend resources on an actuarially sound basis.

In the instant case the Claimant's representative asserts the Department wrongly determined the Claimant's Personal Service Contract as a divestment. The Claimant asserts the policy regarding such agreements was put in place after the agreement was signed and after the application was made for MA. The Claimant is correct in that the Department must utilize the policy in place at time of application.

At the time of application the Department policy required transfers made by the client or spouse must not be for "LESS THAN FAIR MARKET VALUE". In the instant case the "services" listed are services that are the responsibility of the long term care facility and/or are general and do not have intrinsic value. The facility should be monitoring health status, securing health care, and handling personal needs. The remaining items are items normally provided by family members.

The Claimant's sons both testified they visited their mother daily and assisted with her care. They indicated they helped getting her dressed, going to the bathroom and meal time. The issue presented is whether these items being provided are of an "intrinsic value". This Administrative Law Judge finds these remaining "services" are of intrinsic value but the contract for Personal Service has no intrinsic value and appears to have been entered into in order to make the Claimant eligible for MA. As indicated above the items testified to being provided by the Claimant's sons are items being provided by the nursing home the Claimant was in.

As a welfare program that was intended to provide needed services to the poor in our society, Medicaid is available only to certain low-income individuals and families who fit into an eligibility group that is recognized by federal and state law. An individual Medicaid recipient bears the burden of establishing his or her eligibility. *Rutherford v Department of Social Services*, 193 Mich APP 326, 329; 493 NW2d 410 (1991). The purpose of rules limiting the transfer of assets is to assure that individuals that receive nursing home and other long term care service under Medicaid are in fact poor and have not transferred assets that should be use to purchase the needed benefits before Medicaid benefits are made available. *Ronnev. supra.* at 320.

This Administrative Law Judge finds that there was a transfer of assets to the caretaker via the “Personal Service Contract” and that the transfer of the assets is considered divestment. The benefit Claimant was to receive in exchange for the payment was the caretaker’s obligation to perform personal services in the future on “as needed” basis. Possible future obligations have no “fair market value”. These obligations must be seen as only “possible” since circumstances may occur in which the obligation no longer exists. Therefore, the transfer of the [REDACTED] on behalf of the “Personal Services Contract” to the caretaker was made for less than fair market value and therefore was a divestment. Therefore, the department must impose a divestment penalty associated with this transfer.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the Department of Human Services was acting in compliance with Department policy.

Accordingly, the Department's decision is UPHELD.

/s/
Jonathan W. Owens
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: 9/22/09

Date Mailed: 9/25/09

NOTICE: Administrative Hearings may order a rehearing or reconsideration on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. Administrative Hearings will not order a rehearing or reconsideration on the Department's motion where the final decision cannot be implemented within 90 days of the filing of the original request.

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt date of the rehearing decision.

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