STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:

[redacted]

Reg. No: 20088044
Issue No: 2010
Case No: [redacted]
Load No: [redacted]
Hearing Date:
May 29, 2008
Grand Traverse County DHS

ADMINISTRATIVE LAW JUDGE: Janice G. Spodarek

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, a hearing was held on May 29, 2008. Claimant was represented at the administrative hearing by [redacted].

ISSUE

Did the DHS properly apply a divestment penalty for a closed period of time from August, 2007 through September, 2007?

FINDINGS OF FACT

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

1. At all relevant times, to the issues herein, claimant was a resident in a long-term care facility.

2. On August 15, 2007, claimant's guardian who had power of attorney on her behalf withdrew [redacted] of claimant's money from a bank account and invested the monies into a LLC. Claimant is not allowed to access the money for two years.

3. On September 18, 2007, an application was made for Medicaid long-term care benefits.

4. Subsequent to claimant's application, the DHS forwarded the LLC to the DHS Medicaid policy for determination.

5. The Medicaid policy unit returned information to the local office that the department was to apply a divestment penalty. The department approved and continued the Medicare savings program.

6. On November 16, 2007, the department issued notice opening claimant's LTC MA with a divestment penalty.

7. Claimant's guardian subsequently revised the investment vehicle and claimant was subsequently approved long-term care Medicaid. The revision made claimant eligible for LTC and resulted in a closed ended period at issue herein—from August, 2007 through October, 2007.

8. The record was held open for the submission of additional documentation requested by counsel.

9. On November 23, 2007, claimant filed a hearing request. SOAHR scheduled the case 8 months later—May 29, 2008.

10. In 2008 and 2009 the undersigned Administrative Law Judge was on an extended leave of absence with no protected time given before or after the leave of absence.

11. The LLC is titled: "Operating Agreement for [claimant's family name] family, LLC." Claimant's guardian who has power of attorney to handle claimant's property and financial matters on behalf of claimant are named as the two individuals with investment interest. The only voting interest in the LLC is claimant's guardian. The LLC paper identifying the operating agreement repeatedly discusses profits from the business property without identifying any discernable business.

12. Claimant's guardian, who has power of attorney on behalf of claimant, is identified in the operating agreement as the only individual who has voting power. Sales can only be made to claimant's guardian. Claimant's guardian is the sole potential purchaser and seller. Claimant's guardian is claimant's fiduciary in her financial and legal matters.

13. The DHS Lansing policy and procedure interpretation and direction to the local office with regards to the LLC: claimant's guardian is sole management of the business and powers to act on behalf of the company. Claimant's guardian has sole say in the dissolution of the company. Claimant's guardian acting as power of attorney withdrew [redacted] from claimant's bank account on [redacted], and placed the money in the LLC for which the guardian has control over. Claimant's guardian then

determined that no action would be taken for two years. No conveyance can be made for two years.

14. The Policy Unit assessment dated October 15, 2007 is adopted and incorporated by reference herein. Exhibits 18-20.

CONCLUSIONS OF LAW

The Medical 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 (DHS or department) administers the MA program pursuant to MCL 400.10, et seq., and MCL 400.105. Department policies are found in the Program Administrative Manual (BAM), the Program Eligibility Manual (BEM) and the Program Reference Manual (PRM).

Applicable Asset Policy and Procedure to the case herein is found primarily in PEM Item 400. This policy states in part:

DEPARTMENT POLICY

FIP, SDA, RAPC, LIF, Group 2 Persons Under Age 21, Group 2 Caretaker Relative, SSI-Related MA, and AMP

Assets must be considered in determining eligibility for FIP, SDA, RAPC, LIF, Group 2 Persons Under Age 21 (G2U), Group 2 Caretaker Relative (G2C), SSI-related MA categories and AMP.

FIP, SDA, RAPC, LIF, G2U, G2C and AMP consider only the following types of assets:

- "CASH" (which includes savings and checking accounts).
- "INVESTMENTS".
- "RETIREMENT PLANS".
- "TRUSTS".

Assets Defined FIP asset rules apply to RAPC.

Assets means cash, any other personal property and real property. Real property is land and objects affixed to the land such as buildings, trees and fences. Condominiums are real property. Personal property is any item subject to ownership that is not real property (examples: currency, savings accounts and vehicles).

Overview of Asset Policy

Countable assets cannot exceed the applicable asset limit. Not all assets are counted. Some assets are counted for one program, but not for another program. Some programs do not count assets (see “PROGRAMS WITH NO ASSET TEST” below).

You must consider both of the following to determine whether, and how much of, an asset is countable.

- Availability:
  - See “AVAILABLE”.
  - See “JOINTLY OWNED ASSETS”.
  - See “NON-SALABLE ASSETS”
- Exclusions.

An asset is countable if it meets the availability tests and is not excluded.

Note: The assets considered by FIP, RAPC, SDA, LIF, G2U, G2C, and AMP are limited. See below.

You must consider the assets of each person in the asset group. See the program's asset group policy below.

An asset converted from one form to another (example: an item sold for cash) is still an asset.

Applicable DHS policy and procedure regarding Trusts is found primarily in PEM 401. This item states in part:

A trust is a right of property created by one person for the benefit of himself or another.

Trust Definitions

Beneficiary - the person for whose benefit a trust is created.
Grantor or settlor - the person who established the trust. It includes anyone who furnishes real or personal property for the creation of the
trust.

Principal (or corpus) - the assets in the trust. The assets may be real property (example: house, land) or personal property (example: stocks, bonds, life insurance policies, saving accounts).

Trustee - the person who has legal title to the assets and income of a trust and the duty to manage the trust for the benefit of the beneficiary.

FIP/SDA/AMP Trust Policy

FIP, SDA and AMP Only

The Probate Court decides availability of the trusts it administers. A grantor must petition the Probate Court to make the principal available.

For other trusts, the principal is an available asset of the person who is legally able to:

- Direct use of the principal for his needs.
- Direct that ownership of the principal revert to himself.

MA Trust Policy LIF, G2U, G2C, and SSI-Related MA Only
See PEM 401.

Medicaid Eligibility Policy Section

Send all trusts and annuities to Medicaid Eligibility Policy Section for evaluation. Your referral must be in writing and include the following information:

- Your name, telephone number and local office.
- Client's name.
- Grantor's relationship to the client.
- Source of the assets used to establish the trust (example: money from client's lawsuit settlement, client's savings).
- Legible copies of the complete trust document, any amendments or addenda to the trust, correspondence, and similar information.
- Legible copies of all documents transferring ownership of property to the trustee.
- Relationship to the client of persons who transferred resources to trustee (example: client's parent, client's guardian).

Advice is only available to local offices and only for purposes of determining eligibility when a trust actually exists. Advice is not available for purposes of estate planning, including advice on proposed trusts or proposed trust amendments.

GENERAL DEFINITIONS

MA ONLY

These definitions apply to all trust policy. There are special definitions for Medicaid trusts.

Beneficiary – the person for whose benefit a trust is created.

Grantor or settler – the person who established the trust. Any person who contributes to a trust is considered a grantor.

Principal or corpus – the assets in the trust. The assets may be real property (e.g., house, land) or personal property (e.g., stocks, bonds, life insurance policies, savings accounts).

Trust – a right of property created by one person for the benefit of himself or another. It includes any legal instrument or device that exhibits the general characteristics of a trust but is not called a trust or does not qualify as a trust under state law. Examples of such devices might be annuities, escrow accounts, pension funds and investment accounts managed by someone with fiduciary obligations.

Applicable DHS MA Divestment Policy and Procedure is found primarily in PEM Item 405. Applicable to the case herein, relevant portions of this policy state in part:

DEPARTMENT POLICY

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

  NOTE: 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.

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.

NOTE: 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.

Exception: 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.

Example: Using $5,000 from savings to buy a used car priced at $5,000 is conversion for equal value.

Example: Trading a boat worth about $8,000 for a car worth about $8,000 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.

Example: 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.

Exception:

- 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 a 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 - MALE.

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

After a careful review of the substantial and credible evidence on the whole record, this Administrative Law Judge concurs that the department's finding in a divestment penalty for the three months at issue herein. Specifically, the definition of divestment requires a showing of a transfer for less than the fair market value. This ALJ concurs that the department's assessment that the transfer of claimant's monies which the guardian

POA withdrew from her bank account and placed it into a vehicle or she had no control over the monies for two years was not a conversion to an excluded asset but was a conversion to an unavailable asset. Claimant had control of the funds prior to the withdrawal; after the withdrawal, claimant had no control for two years. PEM Item 405, p. 5. Thus, the transfer was for less than the fair market value.

Applicable Asset Policy and Procedure herein is found primarily in PEM Item 400. This policy states in part:

> The asset was not transferred from a countable asset to an excluded asset, it was transferred from a countable asset to a jointly held unavailable/noncountable asset. PEM Item 405, p. 6.

Furthermore, policy states that the department is to assume that transfers for less than the fair market value where specifically done for eligibility purposes absent convincing evidence otherwise. In reference to this issue, the department states:

> [Claimant] is 92 years of age and has been diagnosed with dementia, senility and delusions, there is reason to believe that that she would have needed LTC based on her age and physical condition. This appears to be exploitation of an elder. A non-related adult, who is the power of attorney, has used that authority to remove the immediate control of the money and give himself full control through the creation of the LLC. At this time it is unknown what or if there is a product or service that this LLC would provide, and based on the information from the State Bar website, the actions of the power of attorney breaches his responsibility as her power of attorney and exploits this 92-year-old woman from immediately using her own money so she can afford and receive the very best care for her final days. Because of the actions of her power of attorney, the client will be ineligible for long-term care services for a period of 17 months and 2 days. Exhibit 19.

As noted above, due to claimant's POA subsequently revising the investment vehicle, the only months at issue herein are from August, 2007 through September, 2007.

This ALJ finds that a divestment penalty was correction and is hereby upheld.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department's actions were correct.

Accordingly, the department's application of the divestment penalty on claimant's LTC case for a closed ended period of time--from August, 2007 to September, 2007 was correct and is hereby UPHELD.

/s/

Janice G. Spodarek
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: December 13, 2010

Date Mailed: December 13, 2010

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.

JGS/vc

cc: [redacted]