

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.: 2008-10881

Issue No.: 2010

Case No.: [REDACTED]

Load No.: [REDACTED]

Hearing Date:

June 15, 2009

Houghton County DHS

ADMINISTRATIVE LAW JUDGE: Michael J. Bennane

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9; MSA 16409 and MCL 400.37; MSA 16.437 upon Claimant's request for a hearing. After due notice, a telephone hearing was held on June 15, 2009. Claimant was represented by Attorney

[REDACTED].

ISSUE

Did the department properly determine that claimant's irrevocable trust was not classified as an "Exception B" trust for the purposes of the Medical Assistance Program (MA) because claimant was over 65 years of age?

FINDINGS OF FACT

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

- (1) On August 17, 2007, the Claimant transferred assets from a bank account into a Pooled Accounts Trust. (Department exhibit 8-14).

- (3) On August 31, 2007, the Claimant applied for MA benefits.
- (4) The Claimant resides in a Long Term Care Facility and was 69 years of age at the time of application.
- (5) On May 19, 2008, the Department determined that the trust was not an “Exception B” trust because claimant was over the age of 65 years of age and that the transfer of assets to the trust constituted “divestment” pursuant to department policy.
- (6) On December 18, 2007, the Claimant requested a hearing contesting the department’s imposition of a “divestment period” in determining claimant’s eligibility under the Medical Assistance Program.

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; MSA 16.490(15). Department policies are found in the Program Administrative Manual (PAM), the Program Eligibility Manual (PEM) and the Program Reference Manual (PRM).

Under department policy all assets and resources of Medical assistance applicants must be counted in determining eligibility under the program. An individual may not be eligible for Medical Assistance (MA) if the countable assets and resources is in excess of certain limits. PEM 400. Trust accounts may be considered assets under the MA program and the value of those assets counted in making a determination of eligibility. PEM 410 p. 8-9. However certain trusts are excluded from this asset determination. In an “Exception B” Pooled trust assets are

not counted in determining eligibility, although income a MA recipient receives from the trust is considered. PEM Item 401 pp. 7-8.

An “Exception B” pooled trust meets all of the following conditions:

- The trust must be unchangeable with regard to the provisions that make it an Exception B, Pooled Trust. This is necessary to ensure that a trust initially meeting the other conditions still meets those conditions when the person dies.
- The trust contains the resources of a person who is disabled (not blind) per PEM 260.
- The trust is established and managed by a nonprofit association.
- A separate account is maintained for each beneficiary of the trust, but for purposes of investment and management of funds, the trust pools these accounts.
- Accounts in the trust are established for the benefit of persons who are disabled (not blind) per PEM 260. This means the trust must ensure that none of the principal or income attributable to a person's account can be used for someone else during the person's lifetime, except for “Trustee Fees” per PEM 405.
- Accounts in the trust are established by courts or by disabled persons':
 - Parents.
 - Grandparents.
 - Legal guardians/conservators.
- The trust says that if any funds are distributed from the trust after the person's death, the trustee has an automatic duty to repay Medicaid.

When a person has lived in more than one state, the trust must provide that the funds remaining in the trust are distributed to each state in which the individual received Medicaid, based on the state's proportionate share of the total amount of Medicaid benefits paid by all of

the states on the person's behalf. Examples of circumstances under which a trust **fails** this repay condition are: Requiring a trustee to reimburse Medicaid only if Medicaid first submits a claim; failing to provide that repaying Medicaid has priority over all debts and expenses except those given higher priority by law. PEM 401 p. 7. The department treats assets and income transferred into an "Exception B, Pooled Trust" as a part the trust for the entire month of transfer. PEM 401 p. 8. Divestment means a transfer of a resource by a client or his spouse that:

- Is within a specified time, and
- Is a transfer for "less than fair market value", and
- Is not listed below under "transfers that are not divestment". PEM 406 p. 1.

Converting an asset (Asset Conversion) from one form to another of equal value is not divestment even if the new asset is exempt. Most purchases are conversions. PEM 405. p.7. Persons who apply for Medical Assistance may qualify under more than one MA category. Federal law gives them the right to the most beneficial category. The most beneficial category is the one that results in eligibility or the least amount of excess income. PEM Item 105 p. 2.

In the present case the claimant transferred funds from a bank account into an irrevocable pooled trust account. The trust conforms to standards of an "Exception B, Pooled Trust" as set forth in policy as cited above. Therefore the assets are not countable toward determining eligibility and transfers to the trust are not considered "divestment" under the Medical Assistance program. The department's position is stated in a memo dated November 30, 2007 which reads in part:

Springhill Housing Corporation established this trust on October 25, 1999. Virginia Derocha, through her guardian and conservator, executed an irrevocable Joinder Agreement on August 17, 2007.

Because this is an irrevocable transfer, **do not count the trust as an available asset.**

This trust does not meet the guidelines for an Exception B Trust. PEM 401, page 7 requires that the person must be disabled according to PEM 260, which specifies that the individual must be under the age of 65. This is based on the Social Security Act, 42 U.S.C. 1396p (d)(4)(C). Virginia Derocha is over the age of 65 (she is 69 years old, DOB 07/16/1938).

This **is divestment.** Do a divestment determination in accordance with the instructions found in PEM 405, page 4. Refer to PEM 405, page 9 **Computing Penalty Period.**

The trustee has the discretion to distribute funds from the trust to support the special needs of Virginia Derocha. Any payments received **directly** by Virginia Derocha from the trust must be counted as her unearned income (PEM 401, page7)

The department therefore argues that in order to have an “Exception B Trust” the trust must be for a “disabled person” and claimant is not a “disabled person” since she is over the age of 65. Therefore claimant “divested” the income when the transfer was made and claimant is subject to a divestment penalty. The department references PEM Item 260 in making the argument that claimant is not disabled. However this policy does not indicate that a person is required to be under 65 years of age to be disabled. In making this decision the department may have erroneously applied policy in PEM 405 which states that “Transfers to a trust established ‘solely for the benefit of’ a disabled person under age 65 are not divestment”. However this is not the only way a transfer of funds to a trust is excluded as a divestment. In this claimant’s case the transfer of assets from claimant’s bank account to the “Exception B Trust” appears to be an “Asset Conversion” as defined above in which assets are converted from one form to another of equal value. The transfer is not considered “divestment” under PEM 405 p. 7. The department decision in applying a “Divestment Penalty” in determining claimant’s eligibility under the Medical Assistance Program did not conform to department policy.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that Claimant's trust is an "Exception B, Pooled Trust" and the department erred in applying a "Divestment Penalty" in determining claimant eligibility under the Medical Assistance Program.

Therefore it is ordered that the Department's decision in this regard being is hereby **OVERRULED**.

It is further ordered that department grant Medical Assistance Benefits retroactive to August 17, 2007, **if she is otherwise eligible**.

/s/

Michael J. Bennane
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: 09/03/09

Date Mailed: 09/08/09

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.

MJB/jlg

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