

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: 2008-16958
Issue No: 2010
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
January 20, 2009
Delta County DHS

ADMINISTRATIVE LAW JUDGE: Ivona Rairigh

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 telephone hearing was held on January 20, 2009. Claimant did not appear as she is in a nursing home. Claimant was represented by [REDACTED], and by [REDACTED]. Department was represented by [REDACTED] by a three way telephone connection.

ISSUE

Did the department correctly determine that the claimant divested her assets and was therefore not eligible for Medicaid (MA) nursing home payments from December 1, 2007 to May 6, 2008?

FINDINGS OF FACT

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

1. Claimant, through her POA, applied for MA on November 29, 2007.
2. Claimant's POA provided copies of checks for [REDACTED] claimant gifted to the POA and another family member on March 23, 2006, May 31, 2006 and July 17, 2006 (Department's Exhibit #8 and 9).
3. Department determined that the claimant divested assets in the amount of [REDACTED]. Claimant's MA application was approved, but divestment penalty was applied, resulting in claimant's ineligibility for nursing home payments from December 1, 2007 to May 6, 2008.
4. Department sent the claimant a notice of the MA eligibility and divestment determination on February 14, 2008. Claimant requested a hearing on March 20, 2008.

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 (PAM), the Program Eligibility Manual (PEM) and the Program Reference Manual (PRM).

That the claimant gave a total of \$30,000 to her POA and another relative in March, May and July, 2006 is not in dispute. Claimant's POA testified that the claimant gave this money to her and the other relative because they have been helping the claimant and taking care of her.

Departmental policy states:

MA DIVESTMENT

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). PEM, Item 405, p. 1.

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." PEM, Item 405, p. 1.

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

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

MA will pay for other MA-covered services. PEM, Item 405, p. 1.

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. PEM, Item 405, p. 1.

TRANSFER OF RESOURCES

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. PEM, Item 405, p. 2.

Transfer 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. PEM, Item 405, p. 2.

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 "Medicaid Trusts" PEM 401. PEM, Item 405, p. 4.

Entire Period

Transfers that occur **on** or **after** a client's baseline date can be considered for divestment. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment. PEM, Item 405, p. 4.

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) PEM, Item 405, p. 4.

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). PEM, Item 405, pp. 4-5.

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.

Home Caretaker & Personal Care Contracts

A contract/agreement that pays prospectively for expenses such as repairs, maintenance, property taxes, homeowner’s insurance, heat and utilities for real property/homestead or that provides for monitoring health care, securing hospitalization, medical treatment, visitation, entertainment, travel and/or transportation, financial management or shopping, etc, would be considered a divestment. Consider all payments for care and services which the client made during the “look back” period as divestment.

Note: The preceding are examples and should not be considered an all inclusive or exhaustive list.

Relatives who provide assistance or services are presumed to do so for love and affection, and compensation for past assistance or services shall create a rebuttable presumption of a transfer for less than fair market value. A relative is anyone related to the client by blood, marriage or adoption.

Such contracts/agreements shall be considered a transfer for less than fair market value unless the compensation is in accordance with all of the following:

- . The services must be performed **after** a written legal contract/agreement has been executed between the client and provider. The services are not paid for until the services have been provided. The contract/agreement must be dated and the signatures must be notarized **and**
- . At the time of the receipt of the services, the client is not residing in a nursing facility, adult foster care home, institution for mental diseases, inpatient hospital,

intermediate care facility for mentally retarded or eligible for home and community based waiver, home health or home help. At the time services are received, the services must have been recommended in writing and signed by the client's physician as necessary to prevent the transfer of the client to a residential care or nursing facility. Such services cannot include the provision of companionship **and**

- . DHS will verify the contract/agreement by reviewing the written instrument between the client and the provider which must show the type, frequency and duration of such services being provided to the client and the amount of consideration (money or property) being received by the provider, **or** in accordance with a service plan approved by DHS. If the amount paid for services is above fair market value, then the client will be considered to have transferred the asset for less than fair market value. If in question, fair market value of the services may be determined by consultation with an area business which provides such services, **and**
- . The contract/agreement must be signed by the client or legally authorized representative, such as an agent under a power of attorney, guardian, or conservator. If the agreement is signed by a representative, that representative cannot be the provider or beneficiary of the contract/agreement.

Assets transferred in exchange for a contract/agreement for personal services/assistance or expenses of real property/homestead provided by another person after the date of application are considered available and countable assets. PEM, Item 405, pp. 5-6.

Claimant's transfer of [REDACTED] [REDACTED] does not satisfy the requirements in departmental policy to be considered compensation for past assistance or services.

No documentation or testimony has been offered to show that a written legal contract/agreement for such services was executed between the claimant and her relatives prior to performance of any services. Claimant's representatives contest department's divestment determination on the basis that it is "unfair" because the divestment policy is being applied retroactively to the date of the transfer for less than fair market value.

Claimant was found eligible for MA on December 1, 2007 and she was in a [REDACTED] [REDACTED] is therefore claimant's baseline date. Claimant transferred [REDACTED] for less than fair market value after February 8, 2006. Look-back period for claimant's resource transfer is therefore 60 months from the baseline date, to include March, May and July, 2006. It is noted that the claimant sold her home in February, 2006 for the sum of [REDACTED], and used some of these funds to pay for her nursing home stay, expenditure allowed under department's policy. Departmental policy further states:

PENALTY PERIOD

No Maximum Penalty

There is no maximum limit on the penalty period for divestment under this new policy.

Any penalty period established under previous policy continues until it ends. Apply the penalty policy in place at the time of transfer for any transfers made before February 8, 2006. PEM, Item 405, p. 9.

Computing Penalty Period

The penalty period is computed on the total "Uncompensated Value" of all resources divested.

Determine the "Uncompensated Value" for each resource transferred and combine into a total "Uncompensated Value."

Divide the total "Uncompensated Value" by the average monthly private LTC Cost in Michigan for the client's "Baseline Date." This gives the number of full months for the penalty period. Divide the fraction remaining by 30 to determine the number of days for the penalty period in the remaining partial month. Apply the total penalty months and days.

The 1st day the client is eligible to receive MA coverage for LTC, MIChoice, home help, or home health services is the 1st day after the penalty period ends.

The penalty period starts with the first day of the calendar month in which divestment occurred provided it is not already part of a penalty period. When periods overlap, start the new period on the date after the previous period ends. PEM, Item 405, p. 9.

LTC Cost for baseline date being in calendar year 2007 was [REDACTED]. Department correctly determined that the claimant did transfer her resources of [REDACTED] for less than fair market value and therefore divested herself of these funds. Department also correctly determined that the claimant was ineligible for LTC payments due to this divestment.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department correctly determined that the claimant divested her assets and was therefore not eligible for LTC (nursing home) payments from December 1, 2007 to May 6, 2008.

Accordingly, department's action is AFFIRMED, and it is SO ORDERED.

/s/ _____
Ivona Rairigh
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: February 10, 2009

Date Mailed: February 12, 2009

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.

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The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the mailing 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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