

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: 2009-11185
Issue No: 2010
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
May 21, 2009
Grand Traverse County DHS
Manistee County - Appearing

ADMINISTRATIVE LAW JUDGE: Janice 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 three-way telephone hearing was held on May 21, 2009. Claimant was represented at the administrative hearing by

[REDACTED]

[REDACTED]

ISSUE

Did the Department of Human Services (DHS) properly deny claimant's LTC Medicaid due to divestment from 8/1/2008 until 8/16/2014?

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 8/30/2002, claimant granted a POA to her son.
- (2) Claimant became a resident of a long-term care facility on 10/17/07.
- (3) Claimant's home at that time had an SEV of \$756,870, giving the property an approximate market value of \$1,513,740.
- (4) The State of Michigan, pursuant to PEM 400 does not allow payment for LTC when the equity in a client's homestead exceeds \$500,000.
- (5) On 6/24/08, claimant's son established and opened a joint checking account with claimant with [REDACTED] indicating that there were two signatures required for any withdrawals. It is unclear if any deposit was put into the account. There is none listed on the paperwork. Exhibit 39. Claimant's son signed his own name as joint owner and claimant's name under his powers as a POA for his mother.
- (6) On 6/30/2008, claimant's son via his powers as a POA took out a mortgage on the home on behalf of claimant with [REDACTED]. The mortgage is between claimant (and not her son) and [REDACTED]. The mortgage indicates "the lien of this mortgage shall not exceed at any one time \$1,600,000." Exhibit 21. The bank was granted a lien against the real and personal property. See Exhibit 21. The mortgage is a note for cash advances paid to claimant. As of the date of the application at issue herein, the advances deposited into claimant's account totaled \$1,207,802.45. Exhibit 33. The note, dated June 30, 2008, is signed on behalf of claimant by her son acting as POA. Exhibits 21-34.
- (7) On June 30, 2008, claimant's son acting on behalf of claimant under his powers of attorney executed an Assignment of Deposit Account granting [REDACTED] [REDACTED] lender a security interest in the bank account proceeds to "secure the indebtedness ... for valuable consideration." Exhibits 35-38. The note has a space for [REDACTED] authorized signature, which was left blank. See Exhibit 38.

(8) At the administrative hearing, counsel did not know what consideration was given for the Assignment of Deposit Account. Exhibits 35-38.

(9) On 8/28/2008, claimant's son as joint owner on the bank account for which he made himself a joint owner pursuant to his POA on behalf of his mother, signed a statement stating that as a joint owner of this account: "I refuse to allow any withdrawals from this account." Exhibit 40.

(10) On 8/29/08, claimant applied for Medicaid and LTC Medicaid.

(11) On 10/7/2008, the DHS issued a DHS-4598 approving Medicaid beginning 8/1/2008.

(12) On 10/7/2008, the DHS issued a DHS-4598 denying LTC MA from 8/1/2008 through 8/16/2014, stating:

Medicaid will not pay for home health services. Waiver of LTC if the homestead equity is over \$500,000. [Claimant's] son mortgaged the home in [claimant's] name for \$1,204,373.33 to reduce the equity. He then placed it in a joint account and provided a statement that he refuses to allow any withdrawals from the account. [Claimant] cannot not access the money that was originally her asset. PEM Item 405. Exhibit 45.

(13) Counsel stipulated that the transfer was done to make claimant eligible for LTC Medicaid.

(14) There was no evidence or dispute at the administrative hearing regarding the divestment formula, calculation, or length in time. There is no issue herein regarding the calculation.

(15) Claimant gave up control.

(16) The asset limit for claimant is \$2,000.

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).

As noted in the Findings of Fact, on 6/30/08 claimant's homestead which was worth over 1.5 million dollars was transferred to the extent that a mortgage was taken on the equity naming claimant as a borrower. The bank took a lien on the real property. The mortgage was a kind of equity loan in that the bank deposited 1.2 million dollars classified as loan proceeds into a checking account owned by both claimant and her son (pursuant to the son's POA for claimant) which required two signatures for any transaction and/or withdrawal. A second transfer on the same day named claimant as borrower, and, claimant and son as grantors granting [REDACTED] a security interest in the 1.2 million dollar checking account. Counsel in this case argues that the checking account with the 1.2 million dollars should be excluded under the loan exclusion policy found in PEM Item 400. Counsel further argues that the transfer does not constitute divestment under PEM Item 405.

The DHS, on the other hand, agrees with the attorney that the 1.2 million dollars are excluded under the loan exclusion policy in PEM 400. In fact, had the department not excluded these funds, claimant would not have been eligible for MA--the asset limit for claimant is \$2,000. However, the issue is not the exclusion but rather divestment. The department argues that the transfer itself constituted divestment when the son refused to allow any withdrawals on the account which was done on 8/28/08, the month of application. The transfer which constitutes the

refusal of the son to allow the withdrawals in essence is the focus of the transfer in triggering divestment as it resulted in claimant giving up her control over monies that could have been used to pay for LTC.

First, it is important to clarify two different issues herein. Whether an asset is unavailable does not necessarily focus on the issue of divestment. In other words, the assets in this case that are examined were not counted for the eligibility purposes for Medicaid. Claimant was in fact approved Medicaid beginning 8/1/2008. The issue is whether there is a transfer that constitutes divestment under federal law and state policy.

Prior to dealing with the substantive issue herein, counsel argued that policy not in effect at the time of the application should be applied herein. The department applied the policy in effect during the month of application. This is a general practice. Counsel offered no authority, statute, or policy which would apply policy not in effect in the month of application. Counsel did ask to submit an Administrative Law Judge's decision. A different Administrative Law Judge's, or any Administrative Law Judge's prior decisions have no precedent. Moreover, this Administrative Law Judge does not find the other Administrative Law Judge's decision even persuasive--the procedural facts are simply not applicable herein. Absent any contrary authority, this Administrative Law Judge follows the conventional procedures established within the DHS. That is, policy in effect during the month of application is applied.

The applicable policy and procedure in effect in August, 2008, the month of application includes in pertinent part:

Transferring Non-Countable or Excluded Resources

Transfers of resources that are excluded or not countable assets under SSI-related MA policy may be 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 proof of the waiver.
- Assets that were not countable because they were unavailable or not saleable. PEM Item 405, p. 7. Policy in effect 7/1/2008.

DEPARTMENT POLICY

MA ONLY

Divestment results in a penalty period in MA, **not** ineligibility. Divestment policy does **not** apply to Qualified Working Individuals (BEM 169).

Divestment is a type of transfer of a resource and not an amount of resources transferred.

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 BEM 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.
- Home and community-based services.
- Home Help.
- Home Health.

MA will pay for other MA-covered services.

PEM Item 405, p. 1, effective 7/1/2008.

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 for fair market value (not divestment).
- Giving an asset away (divestment).
- Refusing an inheritance (divestment).
- Payments from a “**MEDICAID TRUST**” that are **not** to, or for the benefit of, the person or his spouse. See BEM 401 (divestment).
- Putting assets or income in a trust. See BEM 401.
- Giving up the **right** to receive income such as having pension payments made to someone else (divestment).
- Giving away a lump sum or accumulated benefit (divestment).
- Buying an annuity that is **not** actuarially sound (divestment).
- Giving away a vehicle (divestment).

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.

Example: Mr. Jones is applying for MA. In 2005, 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, 2007, the sister withdrew \$10,000 and deposited the money in her own bank account. Mr. Jones is considered to have transferred \$10,000 on September 1, 2007, the day he no longer had ownership and control of his money.

Jones gave his sister half interest in real estate. His equity value at the time was \$100,000. The ownership arrangement prevents either sibling from selling without the other's permission. Mr. Jones transferred a resource on September 1, 2007, the day he reduced his ownership and control by giving his sister part ownership and the power to prevent sale. ...

In fact, this is the scenario at issue herein. Policy further states:

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

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

PEM Item 405, p. 2, effective July 1, 2008

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.

Compensation must have tangible form and intrinsic value.

VALUE OF RIGHT TO TRANSFERRING 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.

PEM Item 405, p. 5, effective July 1, 2008

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.

PEM Item 405, p. 8, effective July 1, 2008

It is noted that claimant's homestead was not an excluded asset as it exceeded the \$500,000 equity limit.

Other policy states:

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."

PEM Item 405, pp. 8-9, effective July 1, 2008

Social Security Act, Sections 1902(a)(18), 1917.

Under the above-cited authority, a transferring of a resource means giving up all or partial ownership to a resource.

Counsel stipulated at the administrative hearing that the transaction was in fact to make claimant eligible for MA. This, in fact, is the type of situation anticipated by divestment which is a transfer for less than the fair market value to create eligibility where there would otherwise be none:

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

PEM Item 405, p. 8. Effective July 1, 2008.

It is arguable that claimant's son's taking out of the loan on behalf of claimant converted the asset from one form to another resulting in no divestment. However, this was before the son became a joint owner prohibiting withdrawals. When claimant's son by his POA granted himself a joint interest in the account and subsequently refused to allow any of the proceeds to be withdrawn, this transaction resulted in claimant giving up control of her money. The transfer was not an equal conversion and it no longer had the same market value. Social Security Act, Sections 1902(a)(18), 1917.

The actual transfer in this case constitutes the very definition of divestment. While in general there may be situation where converting an asset from one form to another is not divestment, in cases where it is done exclusively for the purpose of being eligible and would otherwise be countable, where the transfers were less than the fair market value, the result is

divestment. Claimant gave up control. Divestment occurred and the DHS's actions must be upheld. Social Security Act, Sections 1902(a)(18), 1917.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department's divestment penalty application determination was correct and,

Accordingly, the department's action is UPHELD.

/s/

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

Date Signed: November 2, 2009

Date Mailed: November 2, 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.

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 mailing date of the rehearing decision.

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