

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: 2009-16259
Issue No: 2010
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
May 27, 2009
Montcalm County DHS

ADMINISTRATIVE LAW JUDGE: Carmen G. Fahie

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 Wednesday, May 27, 2009. The claimant was not present, but was represented by his attorney, [REDACTED], his wife, [REDACTED], guardian and conservator, and daughter, [REDACTED] as witnesses.

ISSUE

Whether the department was acting in compliance with department policy when it determined that divestment had occurred and that the claimant was not eligible for Medical Assistance (MA) benefits for long-term care from September 1, 2008 through November 2013 with a baseline date of September 1, 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) On September 8, 2008, the claimant's spouse and guardian applied for MA on his behalf.

(2) Subsequently, the department determined that the claimant was MA eligible effective September 1, 2008, but that divestment of land worth [REDACTED] took place approximately on March 19, 2007 when the claimant's son [REDACTED], was quit claim deeded the property at less than fair market value. (Department Exhibits 1-9, 10-16, and 17-20)

(3) On December 26, 2008, the department caseworker sent the claimant and his wife and guardian, a notice stating that the claimant was eligible for MA effective September 1, 2008, but as a result of divestment that the claimant would not be eligible for benefits on September 1, 2008 through November 2013.

(4) On January 20, 2009, the claimant's attorney filed a request for a hearing.

(5) On June 2, 2009, the claimant's attorney submitted a letter to this Administrative Law Judge (ALJ) with a copy to the department and the claimant's wife and guardian including a legal description of the property and stating that the property was later quit claimed back to the claimant and his wife in lieu of forfeiture and as part of a settlement agreement from a previous land contract. In addition, a protective order was implemented following a pre-trial conference on June 1, 2009. (Claimant Exhibit A-B)

(6) On May 12, 2010, the claimant's attorney submitted a letter to this ALJ, the claimant's wife, and the Family Independence Manager (FIM) stating that the [REDACTED] County Probate Court granted the claimant's petition for a protective order, which ordered the re-titling

of the homestead in the name of the claimant and the claimant's wife effective March 19, 2007 to the [REDACTED] Revocable Trust. (Claimant Exhibit A- F)

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).

The department's program eligibility manuals provide the following relevant policy statement and instructions for caseworkers:

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.

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.

The same policy applies to resources that 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, pp. 2-3.

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.

TRANSFERS THAT ARE NOT DIVESTMENT

The following transfers are **not** divestment.

Transferring Excluded Assets

Transfers of assets that are **not** countable assets for SSI-related MA policy are **not** divestment. PEM, Item 405, p. 6.

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. PEM, Item 405, pp. 6-7.

Transferring Excluded Income

Transferring income that is **not** countable income for SSI-related MA according to PEM 500 is **not** divestment. PEM, Item 405, p. 7.

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.

Payment of expenses such as one's own taxes or utility bills is also not divestment. PEM, Item 405, p. 7.

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. PEM, Item 405, pp. 7-8.

Transfer 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.

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, p. 8.

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.

TRUSTS - MA

DEPARTMENT POLICY

MA Only

This item contains Medicaid policy for trusts. The item is divided into three parts:

- . Medicaid trusts
- . Medicaid Qualifying Trusts (MQTs)
- . Other trusts

Which policy applies depends on the terms of the trust and when the trust was established.

Use policy in PEM 400 and PAM 805 for prepaid funeral contracts and life insurance funded funerals. PEM, Item 401, p. 1.

Resources Returned

Cancel a divestment penalty if either of the following occurs before the penalty is in effect:

- . All the transferred resources are returned.
- . Fair market value is paid for the resources.

Recalculate the penalty period if either of the following occurs while the penalty is in effect:

- . Some or all the transferred resources are returned.
- . Full or partial compensation is paid for the resources.

Use the same per diem rate originally used to calculate the penalty period.

Once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. However, you must recalculate the penalty period. The divestment penalty ends on the later of the following:

- . The end date of the new penalty period.
- . The date the client notified you that the resources were returned or paid for. PEM, Item 405, p. 11.

UNDUE HARDSHIP

Waive the penalty if it creates undue hardship. Assume there is no undue hardship unless you have evidence to the contrary.

Undue hardship exists when the client's physician (M.D. or D.O.) says:

- . necessary medical care is **not** being provided, and
- . the client needs treatment for an emergency condition.

A medical emergency exists when a delay in treatment may result in the person's death or permanent impairment of the person's health.

A psychiatric emergency exists when immediate treatment is required to prevent serious injury to the person or others. PEM, Item 405, p. 11.

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 II - 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. PEM, Item 405, p. 9.

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.

GENERAL DEFINITIONS

MA Only

These definitions apply to all trust policy. There are special definitions for Medicaid trusts. PEM, Item 401, p. 1.

EVALUATING TRUSTS

Determine if a trust established on or after August 11, 1993, is a Medicaid trust using:

- . **“MEDICAID TRUST DEFINITIONS”** and
- . **“MEDICAID TRUST CRITERIA”** and

Use the following policies if the trust is a Medicaid trust:

- . **"COUNTABLE ASSETS FROM MEDICAID TRUSTS"**
- . **"COUNTABLE INCOME FROM MEDICAID TRUSTS"**
- . **"TRANSFERS FOR LESS THAN FMV"**

Determine if a trust established before August 11, 1993, is a **"MEDICAID QUALIFYING TRUST"** (MQT). Use the following policies if the trust is an MQT.

- . **"Countable MQT Assets"**
- . **"Countable MQT Income"**

Use "**OTHER TRUST**" policy when a trust is not:

- . an MQT, or
- . a Medicaid trust. PEM, Item 401, p. 3.

MEDICAID TRUST DEFINITIONS

Use the "**GENERAL DEFINITIONS**" and these definitions when determining:

- . whether a trust is a Medicaid trust, and
- . what is available from and transferred for a Medicaid trust.

Irrevocable Trust - a trust that is not a revocable trust. See revocable trust below.

Resources - all income and assets of a person and the person's spouse. It includes any income and assets the person or spouse is entitled to but does not receive because of any action:

- . by the person or spouse; or
- . by someone else (including a court administrative body) with legal authority to act in place of or on behalf of the person or spouse; or
- . by someone else (including a court or administrative body) acting at the direction or upon the request of the person or spouse.

Revocable trust - a trust which can be revoked or modified by:

- . the grantor
- . a court
- . the trustee
- . any other person or entity.

This includes a trust which allows for revocation or modification only when a change occurs such as the grantor leaves the LTC facility or the beneficiary becomes competent.

Modify means changing the beneficiaries or the availability of principal or income.

Annuity - A written contract, usually with a commercial insurance company, establishing a right to receive specified, periodic

payments for life or for a term of years. They are usually designed to be a source of retirement income. Only certain types of annuities are excluded as resources. PEM, Item 401, pp. 3-4.

MEDICAID TRUST CRITERIA

A Medicaid trust is a trust that meets conditions 1 through 5 below:

1. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, an MA post-eligibility patient-pay amount, a divestment penalty or an initial assessment amount. A person's resources include his spouse's resources (see definition).
2. The trust was established by:
 - . the person, or
 - . the person's spouse, or
 - . someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or the person's spouse, or an attorney, or adult child.
 - . someone else (including a court or administrative body) acting at the direction or upon the request of the person or the person's spouse or an attorney ordered by the court.
3. The trust was established on or after August 11, 1993.
4. The trust was not established by a will.
5. The trust is not described in "**Exception A, Special Needs Trust**" or "**Exception B, Pooled Trust**" below. PEM, Item 401, p. 5.

In the present case, the claimant and his wife had sold the contested property for [REDACTED], but the property was subsequently quit claimed back to the claimant and his wife in lieu of forfeiture as part of a settlement agreement. On [REDACTED], the claimant quit claimed the property to his son, [REDACTED], for less than fair market value. As a result, the

department caseworker determined that divestment had occurred and the divestment period would make the claimant ineligible for MA for long-term care would extend from September 1, 2009 through November 2013.

Subsequently, the claimant's attorney filed a hearing request stating that the property was quit claimed to the claimant's son in error and that she was filing a petition to get the property back. On May 18, 2010, this ALJ received a letter from the claimant's attorney regarding the petition for a protective order where the property was reconvened to the [REDACTED] [REDACTED] Revocable Trust. As a result, the department is ordered to redetermine the claimant's eligibility for MA on behalf of his September 8, 2008 application and make a determination of whether the assets in the trust would affect his ability to be MA eligible.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department was acting in compliance with department policy when it determined divestment had occurred, but the department is ordered to redetermine the claimant's eligibility for MA based on his September 8, 2008 application since the property has been returned to the claimant and his spouse, but in a trust, and determine if the claimant is eligible for MA and if the assets in the trust would make him eligible.

/s/ _____
Carmen G. Fahie
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: June 18, 2010

Date Mailed: June 18, 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 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.

CGF/vc

cc:

