

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: 2009-18442
Issue No: 2010

[REDACTED]

ADMINISTRATIVE LAW JUDGE: Suzanne L. Morris

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 August 20, 2009. The claimant did not appear, but was represented by attorney [REDACTED]. This hearing was originally held by Administrative Law Judge [REDACTED]. She has since left the employment of the State Office of Hearings and Rules. This Administrative Law Judge has reviewed the written and oral record and issues this decision in her stead.

ISSUE

Did the department properly determine the claimant had divested himself of assets and impose a penalty period?

FINDINGS OF FACT

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

1. The claimant applied for Medicaid on October 29, 2008.
2. The claimant and his spouse added their three children to the deed as joint tenants with full rights of survivorship on June 26, 2008. (Department Exhibit 1)
3. On December 18, 2008, the department issued the claimant a Medical Program Eligibility Notice (DHS-4598) that approved the claimant for Medicaid as of October 1, 2008, but determined a divestment penalty

applied from October 1, 2008 through August 14, 2010. The notice indicated that if the transferred resources were returned to the client and/or his wife, the penalty period may be recalculated, but that return of the resources would not eliminate any portion of the penalty already past. (Department Exhibit 2)

4. On February 26, 2009, the department received a letter from the claimant's attorney and a quitclaim deed, showing the homestead was conveyed back to the claimant/spouse. (Department Exhibit 10 – 12)
5. The department issued a notice to the claimant on February 27, 2009 that indicated the divestment penalty had been removed as of February 26, 2009, but that the penalty served would not be eliminated. (Department Exhibit 13)
6. The claimant submitted a request for hearing on February 26, 2009 and March 5, 2009.

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).

Department 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.

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.

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.

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 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.

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.

The department found the claimant to have divested of assets when the claimant/spouse added their three children to the homestead deed. The department determined that the claimant was approved for Medicaid effective October 1, 2008, but that the divestment penalty would sanction the client from October 1, 2008 through August 14, 2010.

The claimant's representative disputes the department's determination of divestment, arguing that the claimant's intent in placing the three children on the deed was to create a life estate, so the daughters did not have a present interest. The claimant's representative also disputes the penalty period that had already been served by the claimant prior to the asset being returned to the claimant/spouse.

Department policy indicates that divestment occurs when a client or their spouse transfers a resource within the "look-back period" and for less than "fair market value". BEM 405. Transferring a resource means giving up all or partial ownership in (or rights to) a resource. BEM 405. Further, 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 is considered a transfer by the client. BEM 405. The "look back period" is 60 months prior to the baseline date (for transfers made after February 8, 2006). BEM 405. 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. BEM 405.

Some transfers are not divestment. BEM 405. However, this transfer does not qualify under any of the exceptions listed in department policy. The homestead was not transferred to the client's spouse, a blind or disabled child, a child under age 21 or a child over age 21 who has lived in the homestead for at least two years before the client's admission to long-term care (LTC) and provided care that would otherwise have made the client need LTC or waiver services. BEM 405. The department properly determined divestment applied in this case as the claimant's ownership was reduced for less than fair market value.

The claimant's representative also disagrees with the penalty period that was already served by the claimant prior to the asset being returned to the client/spouse. Department policy indicates that the department will cancel a divestment penalty if the transferred resources are returned and retained by the individual before the penalty is in effect. BEM 405. The department will recalculate the penalty period if the transferred resource is returned while the penalty is in effect. BEM 405. However, once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. The penalty period ends on the later of the end date of the new penalty period or the date the client notified the department that the resources were returned. BEM 405.

In this case, the divestment penalty took effect on October 1, 2008. The department was not notified that the resources were returned to the client/spouse until February 26,

2009. Therefore, this is the date that the penalty period ends, which was accurately determined by the department.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department properly determined the claimant had divested himself of assets and imposed a penalty period.

Accordingly, the department's determination is UPHELD. SO ORDERED.

_____/s/_____
Suzanne L. Morris
Administrative Law Judge
On behalf of Jana Bachman
for Maura D. Corrigan, Director
Department of Human Services

Date Signed: 2/22/11

Date Mailed: 2/22/11

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.

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