

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: 2009-2027

Issue No: 2010

Case No: [REDACTED]

Load No: [REDACTED]

Hearing Date:

June 17, 2009

Lapeer County DHS

ADMINISTRATIVE LAW JUDGE: Robert J. Chavez

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 hearing was held on June 17, 2009.

ISSUE

Was the claimant's Medicaid LTC application given a proper divestment penalty, rendering claimant ineligible for payment of nursing home LTC costs?

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 was a resident in Lapeer County.
- (2) Claimant resided at [REDACTED]

(3) [REDACTED] is claimant [REDACTED] surviving spouse.

(4) [REDACTED] transferred assets, including his own tax-deferred [REDACTED] annuity (owned solely by him) into a Solely for the Benefit of (SBO) Irrevocable Trust.

(5) On May 2, 2008, [REDACTED] applied for Nursing Home Medicaid on behalf of [REDACTED], asking for benefits retroactive to March 1, 2008.

(6) On July 10, 2008, DHS determined that [REDACTED] was ineligible for Medicaid payment of nursing home Long Term Care costs from March 1, 2008 to March 1, 2009, due to the imposition of a divestment penalty.

(7) The stated reason for imposing a period of ineligibility against claimant was that the State of Michigan was not named as a beneficiary of [REDACTED] annuity that he had transferred to the SBO trust.

(8) Claimant died on [REDACTED].

(9) The eligibility dates in dispute are from March 1, 2008, to the date of death, [REDACTED].

(10) On October 2, 2008, claimant's representatives appealed the DHS determination of ineligibility for Medicaid payment of nursing home long-term costs, arguing that the Department's reasoning in the case was against policy and state and federal law, because the transfer was not a divestment.

(11) On June 17, 2009, a hearing was held in the above matter before Administrative Law Judge Robert J. Chavez.

(12) Claimant was represented by [REDACTED]

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) and Reference Tables (RFT).

Divestment means a transfer of a resource by a claimant or their spouse that is within a specified period of time and is a transfer for less than fair market value. PEM 405. Divestment results in a penalty period in MA, not ineligibility. Only Long Term Care (LTC) and waiver claimants are penalized. During a penalty period, MA will not pay the claimant's cost for LTC services, home and community help based services, and home help or home health based services. PEM 405.

However, while transferring a resource means giving up all or partial ownership in rights to a resource, not all transfers count as divestment. Examples of divestment include selling an asset, giving an asset away, refusing inheritance, putting assets in certain types of trusts, or buying annuities that are not actuarially sound. PEM 405.

Department regulations specifically exclude certain types of transfers from divestment penalties. Transfers to a trust established "Solely for the Benefit of" (SBO) are not divestment. PEM 405. There are several conditions that must be met for a trust to be considered an SBO trust: the arrangement must be in writing and legally binding; the arrangement must ensure that none of the resources can be used for someone else during the person's lifetime; and the arrangement must require that resources be spent for the person on an actuarially sound basis. In

the current case, the Department determined that the SBO trust at issue was in fact, an SBO trust, and therefore, exempt from divestment. PEM 405.

Regarding annuities, the purchase of an annuity or the amendment of an existing annuity on or after 2-8-06 is considered a transfer for less than fair market value unless the annuity names the State of Michigan as the remainder beneficiary for an amount at least equal to the amount of the Medicaid benefits provided. PEM 401. This clause is at issue in the current case.

The Department exclusively relied on a memo dated 6-30-08, entered as Department Exhibit 2, in support of its case. In that memo, the Department specifically excluded the SBO trust from divestment, acknowledging that the trust met all the qualifications for exemption under PEM 405. The memo acknowledges that the transfer of assets into the SBO trust is not divestment:

The remainder of the trust income and principal cannot be paid to [REDACTED] at the present time and would be considered divestment if the trust were not solely established for his benefit. PEM 405, page 6 states that transfers of assets or income from the client to the client's spouse, or to another solely for the benefit of the client's spouse are not divestment. PEM 405, page 8 lists the conditions that must be satisfied in order for a transfer to be solely for the benefit of a person and this trust appears to meet these conditions.

According to divestment policy in PEM 405, and as stated in the memo itself, the transfer into an SBO trust of the claimant's spouse is an exception to the divestment penalty rules. Furthermore, PEM 405 is very clear that a transfer of any asset to an SBO trust is not a divestment.

With regard to the annuity at issue however, the Department took a very different analysis. There, [REDACTED] took an annuity that he had held since 2002 and transferred it into the SBO trust. The Department decided that was a divestment, because PEM 401 (which covers

annuities) states that an annuity *purchased or amended* after 2-8-06 must name the State of Michigan as the remainder beneficiary. The State of Michigan was not named as a beneficiary on the transferred trust, and therefore, the Department decided that this annuity transfer must count as a divestment. The Administrative Law Judge must respectfully disagree.

There is no language limiting the types of resources that can be transferred into an SBO trust, and no language in the regulation provides exceptions for annuities. Furthermore, an examination of PEM 401 clearly indicates that the situation contemplated does not apply in the current situation.

PEM 401 specifically states that an annuity purchased or amended after the 2006 date must name the State of Michigan as a beneficiary. The Department extends this policy beyond its scope by determining that ██████████ transfer of his annuity to the SBO trust is a divestment. In the present case, ██████████ did not purchase or amend an annuity. He transferred a countable resource, owned solely by him, to an SBO trust, an action that is specifically allowed under PEM 405. At no time did ██████████ “purchase” or “amend”. Had the Department intended to include transfers in this divestment penalty, it would have used the word “transfer” (as is used frequently through PEM 401) instead of the word “amend”. Because ██████████ did not purchase or amend his annuity, the Department’s application of PEM 401 cannot apply.

Rather, this is a transfer of a resource, and the general divestment rules of PEM 405 should apply. According to policy set forth in PEM 405, the transfer of the annuity to the SBO trust triggers a divestment determination. The memo properly set forth the divestment analysis and determined that the creation of the SBO trust and the transfers of assets into the trust are not considered divestment.

Additionally, PEM 405 states that transfers from the claimant's spouse to another "Solely for the Benefit of" the client's spouse are not divestment. There is no cross reference or discussion of annuities in this policy. If the Department had intended to link the SBO policy with the annuity policy, there would have been an explicit reference to PEM 401. Therefore, we can only conclude that a plain reading of the SBO policy in PEM 405 does not create any additional requirements regarding specific types of assets. Rather, if the transfer meets the three prongs of the SBO test, stated above, that transfer cannot be considered a divestment. The Department erred by adding an additional condition—adding the State of Michigan as a beneficiary—which was not contemplated by the plain language of PEM 405.

Since [REDACTED] transferred his interest in his annuity to the SBO trust, and since the SBO trust meets the requirements of PEM 405, the transfer cannot be considered a divestment. Therefore, the Department was incorrect in its conclusion that claimant should be under a divestment penalty.

#### DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, finds that the Medicaid Policy Unit Memorandum dated June 30, 2008 incorrectly concludes that the failure to name the State of Michigan as beneficiary on an annuity transferred to an SBO was a divestment. The failure to name the State of Michigan as a beneficiary on an annuity transferred to an SBO is not a divestment.

Accordingly, the Department's decision in the above-stated matter is, hereby,  
REVERSED.

The Department is ORDERED to remove claimant's divestment penalty. The Department is FURTHER ORDERED to pay all Medicaid Long Term Care nursing home costs incurred by the claimant retroactive to March 1, 2008.

/s/  
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Robert J. Chavez  
Administrative Law Judge  
for Ismael Ahmed, Director  
Department of Human Services

Date Signed: June 22, 2009

Date Mailed: June 22, 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 receipt date of the rehearing decision.

RJC/cv

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