

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.: 2009-27839

Issue No.: 2010

Case No.: [REDACTED]

Load No.: [REDACTED]

Hearing Date:

March 10, 2010

Wayne County DHS (82)

ADMINISTRATIVE LAW JUDGE: Colleen M. Mamelka

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Claimant's request for hearing. After due notice, a telephone hearing was conducted from Detroit, Michigan on Wednesday, March 10, 2010. The Claimant's niece, [REDACTED], appeared and testified, along with attorney [REDACTED]. [REDACTED] and [REDACTED] appeared on behalf of the Department.

ISSUE

Whether the Department properly imposed the Divestment penalty for the months of January 2009 through June 2009?

FINDINGS OF FACT

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

1. The Claimant is a MA recipient and resides in a long-term care facility.
2. On January 23, 2009, the Department received an MA application, submitted by the Claimant's niece.

3. During the look-back period, payments were made made to both relatives and non-relatives for various services and reimbursements.
4. The Department considered these transfers a divestment resulting in the imposition of a divestment penalty period based on a divestment of \$42,656.32.
5. The Claimant was approved for Medicaid effective January 1, 2009 however long-term care would not be paid during the six-month divestment penalty period.
6. On April 27, 2009, the Department sent an Eligibility Notice to the Claimant/Representative which included notification of the divestment penalty.
7. On May 29, 2009, the Department received the Claimant/Representative's timely written request for hearing.

CONCLUSIONS OF LAW

The Medical Assistance ("MA") program is established by Subchapter XIX of Chapter 7 of The Public Health & Welfare Act. 42 USC 1397 and is administered by the Department of Human Services, formerly known as the Family Independence Agency, 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 goal of the Medicaid program is to ensure that essential health care services are made available to those who otherwise could not afford them. PEM 105 Medicaid is also known as Medical Assistance ("MA"). *Id.* The Medicaid program is comprised of several categories; one category is for FIP recipients while another is for Supplemental Security Income ("SSI") recipients. *Id.* Programs for individuals not receiving FIP or SSI are based on eligibility factors in either the FIP or SSI program thus are categorized as either FIP-related or SSI-related. *Id.* To

receive MA under an SSI-related category, the person must be aged (65 or older), blind, disabled, entitled to Medicare or formally blind or disabled. *Id.* FIP- and SSI-related Group 2 eligibility is possible even when net income exceeds the income limit because incurred medical expenses are considered. *Id.* Eligibility is determined on a calendar month basis. PEM 105 MA income eligibility exists for the calendar month tested when there is no excess income or allowable medical expenses that equal or exceed the excess income. PEM 545

Divestment results in a penalty period in MA, not ineligibility. PEM 405 During the penalty period, MA will not pay for long-term care services. *Id.* Divestment means a transfer of a resource by a client (or spouse) that is within the look-back period and is transferred for less than fair market value (“FMV”). *Id.* Transferring a resource means giving up all or partial ownership in, or rights to, a resource. *Id.* Resource means all the client’s (and spouse’s) assets and income. *Id.*; 20 CFR 416.1201 Less than FMV means the compensation received in return for a resource was worth less than the FMV of the resource. PEM 405 When a person gives up the right to receive income, the FMV is the total amount of income the person could have expected to receive. *Id.*

The first step in determining the period of time that transfers can be looked at for divestment is to determine the baseline date. PEM 405 The baseline date (applicable in this case) is the date which the client was an MA applicant and in a long-term care facility. *Id.* After the baseline date is established, the look-back period is established. PEM 405 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. *Id.* Transfers made by anyone acting in place of, on behalf of, at the request of, or at the direction of the client/spouse during the look-back period are considered. *Id.*

Relatives can be paid for providing services however if payment was not made at the time services were rendered, it is presumed the care was done for free. PEM 405 A client may rebut this presumption by providing tangible evidence that a payment obligation existed at the time the service was provided such as a signed written agreement. *Id.*; 20 CFR 416.1246(e) Such agreements, according to PEM 405, are considered to be 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.
- 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; **and**
- At the time the 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.

Pursuant to PEM 405, 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 an actuarially sound basis. This means that spending must be at the rate that will use up all the resources during the person’s lifetime.

Transfers for less than fair market value are presumed to be for eligibility purposes unless/until the client provides convincing evidence that they had no reason to believe long-term care (or waiver services) might be needed. *Id.* Converting an asset from one form to another of equal value is not divestment even if the new asset is exempt. *Id.* Payment of expenses such as one’s own taxes or utility bills is not divestment. *Id.*

In this case, payments were made to both relatives and non-relatives for various services and reimbursements. The parties agreed that the correct baseline date and look-back period were used. In reviewing the various asset transfers, the Department found \$42,656.32 as divestment. Due to a miscalculation, the actual divestment amount was \$46,661.75. Each group of transfers will be discussed separately:

Group 1

Payee	Date of Transfer	Amount of Transfer	Purpose
Relative	02/28/06	\$2,150.00	Reimbursement: Caregiver Costs
Relative	03/21/06	1,680.00	Reimbursement: Caregiver Costs
Relative	04/11/06	1,680.00	Reimbursement: Caregiver Costs
Relative	04/26/06	1,680.00	Reimbursement: Caregiver Costs
Relative	05/16/06	1,680.00	Reimbursement: Caregiver Costs
Relative	06/06/06	1,680.00	Reimbursement: Caregiver Costs
Relative	07/24/06	1,680.00	Reimbursement: Caregiver Costs
		\$12,230.00	

The above transfers were to a relative who purportedly, at the request of the non-relative care provider, paid the provider in cash. The Claimant/Representative asserts that the above transfers should be considered Asset Conversions. Asset Conversion applies when an asset is converted from one asset to another of equal value. Examples provided for in policy are:

- Using \$5,000 from savings to buy a used car priced at \$5,000
- Trading a boat worth about \$8,000 for a car worth about \$8,000

Here, checks were written for *services*, not for another asset for equal value. Accordingly, the Asset Conversion provision is not applicable.

The Claimant/Representative also contends that the Home Caretaker/Personal Care Contract policy is not applicable because this particular provision was not in effect at the time of the 2006 transfers. Department determinations are based on policy that was in effect at the time of the application, which in this case, was January 23, 2009. Regardless, in 2006, as well as January 2009, policy provides that divestment does not result when transfers are made solely for the benefit of the client provided (in part) that the arrangement is in writing and legally binding on the parties. [See PEM 405, p. 8, July 1, 2006] Here, there was no evidence of a written legally binding arrangement. Instead, the relative testified that the non-relative care provider requested to be paid in cash without a written agreement of any sort. Ultimately, the fact that the Home Caretaker/Personal Care Contract provision was not in effect in 2006, other policy as discussed, supports a finding of divestment.

The Claimant/Representative also relies on PEM 405, p. 8 [eff. July 1, 2006] regarding Transfers for Another Purpose.” This provision provides in relevant part that transfers for less than full market value were for eligibility purposes until the client (or spouse) provides convincing evidence that there was no reason to believe long-term care (or waiver services)

would be needed. The example provided for in policy relates to a 40-year old individual, in good health, who transfers a vacation cottage to his nephew. The following day, the individual is involved in a motor vehicle accident necessitating the need for long-term care. This transfer is not a divestment because the individual could not have anticipated his need for long-term care at the time of transfer. Conversely, in this case, the Claimant, at the time of the 2006 payments, was 87 years old and living in an assisted living facility. The relatives purportedly paid for additional care believing that the care provided by the staff was not sufficient in light of the Claimant's Alzheimer's disease. The need for long-term care was reasonably foreseeable at the time of the transfers.

Ultimately, as detailed above, because there was no written agreement or other convincing tangible evidence to establish that a payment obligation existed at the time the *services* were rendered between the Claimant and relative and/or care provider, the \$12,230.00 transfers are divestments.

Group 2

Payee	Date of Transfer	Amount of Transfer	Purpose
Relative	02/07/06	\$ 150.00	Reimbursement: Unknown
Relative	04/14/06	197.00	Reimbursement for Clothing
Relative	04/23/06	150.00	Reimbursement: Unknown
Relative	07/24/06	85.00	Reimbursement for Toiletries
Relative	08/04/06	27.00	Reimbursement: Unknown
Relative	08/11/06	65.00	Reimbursement: Unknown
Relative	08/28/06	280.00	Reimbursement: Unknown
Relative	10/25/06	196.00	Reimbursement: Unknown
Relative	11/28/06	52.00	Reimbursement: Unknown
		<u>\$1,202.00</u>	

With the exception of two transfers, it is not known what the payments were for or whether the transfers were for the sole benefit of the Claimant. In light of the foregoing, it is found that the "unknown" transfers totaling \$920.00 are divestments while the \$282.00 reimbursements for the Claimant's toiletries and clothing are not.

Group 3

Payee	Date of Transfer	Amount of Transfer	Purpose
Relative	05/15/06	\$ 455.00	Reimbursement: Healthcare
Relative	05/17/06	100.00	Reimbursement: Manicure
Relative	05/22/06	60.00	Reimbursement: Manicure
Non-Relative	06/01/06	400.00	Wound Care
Relative	07/03/06	143.93	Reimbursement: Pharmacy
Relative	07/05/06	560.00	Reimbursement: Caregiver Costs
Relative	06/12/06	103.00	Reimbursement: Hair
Relative	06/22/06	2,240.00	Reimbursement: Caregiver Costs/Groceries
Non-Relative	06/22/06	400.00	Wound Care
Relative	07/03/06	150.00	Reimbursement: Manicure/Pedicure
Relative	07/07/06	310.00	Reimbursement: Healthcare
Relative	07/10/06	68.00	Reimbursement: Hair
Relative	07/10/06	202.50	Reimbursement: Unknown
		<u>\$5,192.43</u>	

The above transfers that were for the Claimant's healthcare, manicures, pharmacy, hair, pedicures were for the sole benefit of the Claimant thus are not divestments. The "unknown" reimbursement in the amount of \$202.50 is a divestment because it was not established that the transfer was indeed for the benefit of the Claimant. Additionally, payments for wound care and caregiver costs are divestments in that there was no tangible evidence to establish that a payment obligation existed at the time the services (caregiver costs and wound care) were rendered. Once again, for the same reasons discussed above, Asset Conversion is not applicable. Regarding the \$2,240.00; the Claimant's niece testified that "groceries" were included in this amount however she was unable to provide further detail regarding how much was used for groceries, nor were there any other transfers for groceries. Ultimately, it is found that \$3,600.00 (caregiver and wound care) reimbursements and the \$202.50 "unknown" reimbursement are divestments. The remaining \$1,389.93 transfers are not divestments.

Group 4

Payee	Date of Transfer	Amount of Transfer	Purpose
Relative	10/10/06	\$ 150.00	Reimbursement: Care
Relative	10/23/06	20.00	Reimbursement: Care
		<u>\$ 170.00</u>	

The above transfers were to a relative who stayed with the Claimant on two evenings. There was no written agreement or other convincing tangible evidence to establish that a payment obligation existed at the time the *services* were rendered between the Claimant and relative, thus the presumption that the care was provided for “free” remains unrebutted. Accordingly, the \$170.00 transfers are divestments.

Group 5

Payee	Date of Transfer	Amount of Transfer	Purpose
Non-Relative	01/31/2006	\$ 370.00	Wound Care
Non-Relative	04/04/2006	400.00	Wound Care
Non-Relative	04/04/2006	50.00	Wound Care
Non-Relative	05/02/2006	350.00	Wound Care
Non-Relative	07/13/2006	350.00	Wound Care
Non-Relative	08/07/2006	200.00	Wound Care
Non-Relative	11/08/2006	200.00	Wound Care
Non-Relative	12/26/2006	150.00	Wound Care
		<u>\$2,070.00</u>	

The above transfers were to a non-relative who purportedly provided wound care for the Claimant. In order for a transfer to not be a divestment, the transfer must be solely for the benefit of the person and the following must apply:

- 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 resources spent for the person on an actuarially sound basis. This means that spending must be at the rate that will use up all the resources during the person’s lifetime.

Again, there is no written agreement thus no convincing tangible evidence to establish that a payment obligation existed between the Claimant and non-relative. Accordingly, it is found that the \$2,070.00 transfers are divestments.

Group 6

Payee	Date of Transfer	Amount of Transfer	Purpose
Relative	02/10/07	\$ 94.00	Reimbursement: Unknown
Relative	04/03/07	147.00	Reimbursement: Unknown
Relative	06/12/07	32.00	Reimbursement: Clothing
Relative	11/20/07	62.00	Reimbursement: Clothing
		<u>\$ 335.00</u>	

In this group, it is not known what the \$94.00 and \$147.00 payments were for or whether the transfers were for the sole benefit of the Claimant. In light of the foregoing, it is found that the “unknown” transfers totaling \$241.00 are divestments while the \$94.00 reimbursements for the Claimant’s clothing are not.

Group 7

Payee	Date of Transfer	Amount of Transfer	Purpose
Relative	02/16/07	\$ 200.00	Reimbursement: Unknown
Relative	06/12/07	150.00	Reimbursement: Hair/Dinner
Relative	12/25/07	200.00	Christmas Gift
Relative	12/25/07	200.00	Christmas Gift
Relative	12/25/07	200.00	Christmas Gift
		<u>\$ 950.00</u>	

In this group, it is not known what the February 16, 2007 \$200.00 transfer was for and whether the payment was for the sole benefit of the Claimant. In light of the foregoing, it is found that the “unknown” transfer totaling \$200.00 is a divestment while the \$750.00 in transfers are not.

Group 8

Payee	Date of Transfer	Amount of Transfer	Purpose
Relative	01/30/2008	\$ 167.00	Reimbursement: New Clothing
Relative	06/29/2008	960.00	Reimbursement: Services
Relative	06/29/2008	77.00	Reimbursement: New Clothing
		<u>\$1,204.00</u>	

For reasons previously stated, the \$167.00 and \$77.00 clothing reimbursements are not divestments. The \$960.00 transfer was to a relative for purported past services rendered. Relatives may be paid for providing services however a presumption exists that the services were for love and affection, thus “free” when payment is not made at the time services were provided. Again, this presumption may be rebutted when tangible evidence is presented, such as a signed written agreement. No such evidence exists. Accordingly, the \$960.00 transfer is a divestment.

Group 9

The final group consists of two transfers from the Claimant’s money market account to the Claimant’s checking account. The checking account was used for all the above transfers (Groups 1 through 8). The first transfer was in the amount of \$15,000 and is not a divestment as it is the conversion of one asset to another of equal value. The second transfer involves a withdrawal in the amount of \$8,303.32 from the Claimant’s money market account of which \$7,851.32 was deposited in to the Claimant’s checking account. This amount (\$7,851.32) is not a divestment as it is a conversion from one asset to another of equal value. The difference, \$452.00, was reportedly paid to the non-relative care provider. As discussed above, there was no evidence to establish any payment obligation whatsoever. Ultimately, it is found that the \$452.00 transfer to the non-relative was a divestment.

Conclusion

In this case, transfers were made to relatives and non-relatives for various reimbursements and services. As set forth above, some of the transfers are divestments while others are not. Ultimately, the Department established it acted in accordance with Department policy when it determined a divestment existed however because some transfers were improperly included, the amount of the divestment penalty is not correct.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, AFFIRMS in part/REVERSES in part, the Department's determination.

Accordingly, it is ORDERED:

1. The Department's determination that a divestment occurred is AFFIRMED.
2. The Department's divestment calculation and resulting divestment penalty period is REVERSED.
3. The Department shall impose the proper divestment penalty due to divestment transfers totaling \$21,045.50.
4. The Department shall notify the parties in writing of the divestment penalty.
5. The Department shall supplement for any lost benefits that the Claimant was entitled to receive if otherwise eligible and qualified to receive in accordance with Department policy.

Colleen M. Mamelka

Colleen M. Mamelka
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: 3/30/2010

Date Mailed: 3/30/2010

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 receipt 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.

CMM/jlg

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