

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: 2009457
Issue No: 2010
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date: June 16, 2009
Kalamazoo County DHS

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 telephone hearing was held on 6/16/09. Claimant and/or claimant's family representatives were represented by the following attorneys: [REDACTED]

ISSUE

Did the DHS properly apply a divestment penalty on claimant's long-term care Medicaid (MA) application of 1/1/08 from 1/18/08 until 2/28/10?

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 3/31/08 claimant applied for Medicaid.
2. On 5/18/08 the DHS received a program policy evaluation and denied claimant's application.
3. On 5/30/08 claimant submitted a new application along with an amendment to a trust.

4. On 7/23/08 program policy decided the asset at issue was an annuity. The hearing summary states in part: "Based on this decision we discovered the first application was improperly denied. Decision showed all annuities were considered to be divestment."
5. On 9/30/08 the Department of Human Services (DHS) issued a Notice of LTC Denial applying a divestment penalty from 1/18/08 to 2/28/10. Claimant was approved Medicaid. The denial states in part: "The divestment is a result of the State of Michigan not being named as the remainder beneficiary for the annuities."
6. The hearing summary states in part: "MA was opened beginning 1/1/08 with divestment beginning the first date of continuous care 1/18/08."
7. Claimant has two contracts established with [REDACTED], [REDACTED]. The contracts are not annuities.
8. Claimant transferred her assets to her spouse triggering an exception to the divestment rules under DHS PEM Item 405, p. 9.
9. The contract was actuarially sound.
10. Claimant owns a [REDACTED] in her personal name and another is held by her [REDACTED]. Claimant's note in her own name is covered by the communal spouse asset allowance. The [REDACTED] is an asset of the trust that is not countable.
11. The individual who made the decision in this case was not at the administrative hearing and not available for testimony and/or cross examination. The individuals testifying on behalf of the DHS at the administrative hearing did not have any personal knowledge of the case with regards to the decision herein.
12. On 9/16/08 claimant filed a hearing request.
13. The record was held open in this matter.

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).

PEM Item 405 lays out the DHS policy and procedure regarding MA divestment. The legal basis found at the Social Security Act, Sections 1902(a)(18), 1917.

Applicable to the case hearing MA asset policy states in part:

DEPARTMENT POLICY

FIP, SDA, LIF, Group 2 Persons Under Age 21, Group 2 Caretaker Relative, SSI-Related MA, and AMP

Assets must be considered in determining eligibility for FIP, SDA, LIF, Group 2 Persons Under Age 21 (G2U), Group 2 Caretaker Relative (G2C), SSI-related MA categories and AMP.

FIP, SDA, RAPC, LIF, G2U, G2C and AMP consider only the following types of assets:

- “CASH” (which includes savings and checking accounts).
- “INVESTMENTS”.
- “RETIREMENT PLANS”.
- “TRUSTS”.

Assets Defined

Assets means cash, any other personal property and real property. **Real property** is land and objects affixed to the land such as buildings, trees and fences. Condominiums are real property. **Personal property** is any item subject to ownership that is **not** real property (examples: currency, savings accounts and vehicles).

Overview of Asset Policy

Countable assets **cannot** exceed the applicable asset limit. Not all assets are counted. Some assets are counted for one program, but not for another program. Some programs do **not** count assets (see “PROGRAMS WITH NO ASSET TEST” below).

You must consider both of the following to determine whether, and how much of, an asset is countable.

- Availability:
 - See “AVAILABLE”.
 - See “JOINTLY OWNED ASSETS”.
 - See “NON-SALABLE ASSETS”
- Exclusions.

An asset is countable if it meets the availability tests and is **not** excluded.

Note: The assets considered by FIP, SDA, LIF, G2U, G2C, and AMP are limited. See below.

You must consider the assets of each person in the asset group. See the program's asset group policy below.

An asset converted from one form to another (example: an item sold for cash) is still an asset.

Exception: See “SALE OF PROPERTY IN INSTALLMENTS” IN PEM 500.

FIP, SDA, LIF, G2U, G2C, and AMP Only

The following types of assets are the only types considered for FIP, SDA, LIF, G2U, G2C, and AMP:

- “CASH” (which includes savings and checking accounts).
- “INVESTMENTS”.
- “RETIREMENT PLANS”.
- “TRUSTS”.

SSI-Related MA

All types of assets are considered for SSI-related MA categories.

The department’s denial notice did not cite PEM Item 401. However, it appears that the department’s argument in part took into account some of the policy regarding PEM Item 401:

REFERRALS TO MEDICAID ELIGIBILITY POLICY SECTION

Send a copy of the trust, including similar legal instruments such as annuities, to the Medicaid Eligibility Policy Section for evaluation.

This does not apply to the following:

- Prepaid funeral contracts.
- Life insurance funded funerals.
- Healthy Kids categories (PEM 125, 129, 131).
- Group 2 Pregnant Women (EM 126).

Once a trust has been evaluated, a reevaluation is not required unless the local office believes a change has occurred affecting availability of the trust principal or income including a change in department policy.

An evaluation of a trust advises local offices on:

- Whether a trust is revocable or irrevocable, and
- Whether any trust income or principal is available.

Advice is only available to local offices for purposes of determining eligibility or an initial assessment when a trust actually exists. Advice is not available for purposes of estate planning including advice on proposed trusts or proposed trust amendments.

Send your referral as soon as possible so that everyone can complete their tasks timely. Your referral must be in writing and include:

- Your name, email address, phone number and local office.
- What advice you are requesting.
- What programs are involved.
- Whether the grantor is living or dead.
- Whether the person is an applicant or recipient.
- Source of the assets used to establish the trust (e.g., money from the grantor's lawsuit settlement).
- The MA client's name and, if applicable, their spouse's name.
- The grantor's relationship to the MA client or spouse.

- The name of the person(s) who contributed to the trust and their relationship to the MA client and spouse.
- Legible copies of the complete trust document, all amendments to the trust, addenda, correspondence and other pertinent information.

Send the referral via ID mail to:

Department of Community Health
Medical Administrative Services
Medicaid Eligibility Policy Section
400 S. Pine St 7th Floor
Lansing, MI 48909

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.”

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.
- A Medicaid trust.

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 action:

- By the person or spouse.
- By someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or spouse.
- 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, 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.

**TRANSFERS TO AN ANNUITY
EFFECTIVE 9/1/05**

Converting countable resources to income through the purchase of an annuity or the amendment of an existing annuity on or after 09/01/05, is considered a transfer for less than fair market value unless the annuity meets the conditions listed below:

- Is commercially issued by a company licensed in the United States and issued by a licensed producer, (a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance), and
- Is irrevocable, and
- Is purchased by an applicant or recipient for Medicaid or their spouse and solely for the benefit of the applicant or recipient or their spouse, and
- Is actuarially sound and returns the principal and interest within the annuitant's life expectancy, and
- Payments must be in substantially equal monthly payments (starting with the first payment) and continue for the term of the payout (no balloon or lump sum payments).

Divestment penalties will apply to the purchase or amendment to any annuity not meeting the conditions listed above that is purchased on or after September 1, 2005.

**Transfers to An Annuity Made on or After
February 8, 2006**

In addition to the above conditions an annuity purchased or amended on or after February 8, 2006 must name the state of Michigan as the remainder beneficiary, or as the second remainder benefits after the community spouse or minor or disabled child, for an amount at least equal to the amount of the Medicaid benefits provided.

General divestment policy and procedure states in part:

DEPARTMENT POLICY

MA ONLY

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

Do **not** apply a divestment penalty period when it creates an undue hardship; see UNDUE HARDSHIP below.

LOA 2 does **not** support this policy. You must manually compute the divestment penalty period and notify the client.

RESOURCE DEFINED

Resource means all the client's and his spouse's assets and income.

It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. It also includes all assets and income that the individual (or their spouse) were entitled to but did **not** receive because of action by one of the following:

- The client or spouse.
- 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.
- Any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse.

TRANSFER OF A 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 PEM 401 (divestment).
- 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 (divestment).
- Giving away a lump sum or accumulated benefit (divestment).
- Buying an annuity that is **not** actuarially sound (divestment).

- Giving away a vehicle (divestment).
- Putting assets or income into a Limited Liability Company (LLC)

Also see Joint Owners and Transfers for examples.

Transfers to a LLC Treat transfers to a LLC as a divestment unless the client retains the rights to the asset or income invested and may withdraw the asset invested on demand. Treat transfers to a LLC that has no discernable product (goods and or services) produced as a divestment.

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.

Value of Transferring Right to 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. Use **EXHIBIT I - LIFE EXPECTANCY TABLE - FEMALE** or **EXHIBIT II - LIFE EXPECTANCY TABLE - MALE** to compute the fair market value of a lifetime income source such as a pension. Base the calculation on the person's sex and age on the date of transfer.

Transferring Noncountable 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 approved for the waiver.
- Assets that were **not** countable because they were unavailable or **not** salable.

TRANSFERS THAT ARE NOT DIVESTMENT

Transferring Excluded Income

Transferring income that is **not** countable income for SSI-related MA according to PEM 500 is **not** divestment.

Transfers Involving Spouse

It is **not** divestment to transfer resources from the client to:

- The client's spouse.
- Another SOLELY FOR THE BENEFIT OF the client's spouse. Transfers from the client's spouse to another SOLELY FOR THE BENEFIT OF the client's spouse are **not** divestment.

Transfer to Trust

Transfers to a trust established SOLELY FOR THE BENEFIT OF a disabled (see PEM 260) person under age 65 are **not** divestment.

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.

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.

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.

Trustee Fees Trusts which designate a business as trustee (for example a bank) usually must compensate the trustee. Reasonable compensation is **not** divestment. Reasonable compensation means compensation within the prevailing rate for the community. For example, banks usually base their fee on a percentage of the value of the principal. There may be a basic charge in addition to the percentage or the percentage may vary based on the value of the trust.

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 an 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.

In this case, as noted in the findings of facts, the individual who evidently made the decision in this case was not available at the hearing for testimony and/or cross examination. The attorneys present in this case along with the financial planner presented copious materials and analyses regarding Medicaid policy with regards to divestment, assets, transfers, SBT's, and annuities. After careful review of the substantial and credible evidence on the whole record, this ALJ finds that the assets in this case do not constitute annuities and meet the requirements of a SBT. Thus, as they were not annuities, there is no reason that claimant would be required or should be required to name the State of Michigan as a remainder beneficiary. An SBT transfer is not divestment under PEM Item 405, p. 9 as it is considered as an exception to the divestment rules. As noted in the 8/4/08 letter from claimant's attorney, where an applicant transfers assets....

to the trustee as an irrevocable trust that is in writing, solely for the benefit of the community spouse, and actuarially sound, the transfer of these funds will not be divestment.

Thus, for these reasons, for the reasons stated above, the undersigned Administrative Law Judge finds that the department erred in finding a divestment penalty. The department's determination is reversed.

It is noted by this Administrative Law Judge that the department failed to present the individual who actually made the decision in this case at the administrative hearing for testimony and/or cross examination. The claimant's argument and evidence as presented in the case herein has met its burden of proof in rebutting the department's case with regards to its decision. There was no one present for the department which

significantly countered the claimant's presentation establishing the transfer herein as meeting the SBT exception.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department's actions were incorrect.

Accordingly, the department's application of the divestment penalty herein is REVERSED.

The department is ORDERED to remove the divestment penalty and to issue any supplemental benefits to claimant to which she may be entitled for long-term care for the closed ended period of time at issue herein—from 1/18/08 until 2/28/10.

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

Date Signed: December 20, 2010

Date Mailed: December 21, 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.

JS/vc

cc: 