

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: 2010-37334
Issue No: 2023
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
August 17, 2010
Kent County DHS

ADMINISTRATIVE LAW JUDGE: Landis Y. Lain

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, an in-person hearing was held on August 17, 2010 before Administrative Law Judge Jana Bachman. Administrative Law Judge Bachman is no longer affiliated with the State Office of Administrative Hearings and Rules. This case was completed by Administrative Law Judge Landis Y. Lain by listening to the spoken record and reading the written record and exhibits contained in the file. Claimant was represented at the hearing by

[REDACTED]

ISSUE

Did the Department of Human Services (the department) properly deny claimant's application for Medical Assistance (MA-Long Term Care) based upon its' determination that claimant had excess assets and divestment?

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 January 7, 2010, claimant filed an application for Medical Assistance benefits based upon her entry into long-term care.
- (2) On January 7, 2010, the department caseworker sent claimant a tentative patient pay amount.

- (3) On January 7, 2010, an irrevocable trust agreement was mailed to the Medicaid Policy Unit in Lansing.
- (4) On January 19, 2010, the Medicaid Policy Unit provided the department caseworker with the evaluation of the trust and indicated that divestment had occurred and that the trust is a countable asset.
- (5) On February 18, 2010, the department caseworker completed a budget and determined that claimant had excess assets and divestment for purposes of Medicaid eligibility.
- (6) On February 18, 2010, the department caseworker sent claimant notice that she had failed the asset test and that eligibility for Medical Assistance benefits was denied based upon divestment.
- (7) On February 25, 2010, claimant's representative filed a request for a hearing to contest the department's negative action.

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 (BAM), the Program Eligibility Manual (BEM) and the Program Reference Manual (PRM).

BEM, Item 401, controls Medical Assistance Trust. Policy defines trust as a right of property created by one person for the benefit of himself or another. It includes any legal instrument or device that exhibits the general characteristics of a trust but is not called a trust or does not qualify as a trust under state law. Examples of such devices might be annuities, escrow accounts, pension funds and investment accounts managed by someone with fiduciary obligations. A trustee is defined by policy as the person who has the legal title to the assets and income of a trust and the duty to manage the trust with the benefit of the beneficiary. BEM, Item 401, p. 1.

The department caseworker is then to refer a copy of the trust to the Medicaid eligibility policy section for evaluation. An evaluation of the trust advises local offices on whether the trust is revocable or irrevocable and whether any trust income or principle is available. Advice is only available to local offices for purposes of determining eligibility or for an initial assessment when a trust actually exists. Advice is not available for purposes of estate planning including advice on proposed trust or proposed trust limits. BEM, Item 401, p. 2.

The Medicaid trust unit/eligibility policy section must determine if a trust established on or after August 11, 1993, is a Medicaid trust using: Medicaid trust definitions and

Medicaid trust criteria. The policy unit also has to determine if the trust is a Medicaid trust and whether there are countable assets for Medicaid trusts and whether there is countable income for Medicaid trusts and whether there is transfers of assets for less than fair market value. BEM, Item 401, p. 3.

In the instant case, the trust was established on April 10, 1997, according to the dates on the trust agreement. The grantor of the trust was claimant [REDACTED]. The trust was named as an irrevocable trust agreement. The initial sole trustee was named as S. G. [REDACTED] and the successor was [REDACTED] claimant's son. The named beneficiary for the trust was [REDACTED] claimant's adult disabled child. Claimant, the grantor, did not retain legal rights to administer the trust or to revoke the trust. (Claimant exhibit C)

As of January 13, 2010, the trust had an accumulated value of \$ [REDACTED]. The owner of the trust was claimant and the annuitant or recipient of the benefit was claimant's son [REDACTED]. There appears to have been a withdrawal every three months in the amount of \$ [REDACTED] and the withdrawal type is a fixed amount (Exhibit 24 or Claimant's exhibit F).

The Medicaid Policy Unit on January 19, 2010, indicated that this is a Medicaid trust as defined in BEM, Item 401, p. 3. According to article 10 of the trust agreement the trust cannot be amended or revoked. Article 4.1 states "I direct that the net income shall be distributed to my beneficiary in quarterly or more frequent periodic installments." The Medicaid Policy Unit determined that divestment has occurred per BEM 405, p. 5., value of transfer and right to income, it states, "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. To determine the divestment period please refer to BEM 405. The countable asset for claimant is the value of all the countable net income in the countable assets in the principle of the trust. The trustee will have to provide you (one you have it already it) all the items and their value that are contained in claimant's trust. Count any payments made by the trust to claimant and her legal representative as unearned income (BEM, Item 401, p. 9, countable income for Medicaid trust). (Department Exhibit 26 and claimant's exhibit G).

Pursuant to BEM, Item 405, a divestment means a transfer of an asset within the specified look-back period. Claimant argues that in 1997 claimant transferred a particular asset and did not retain any on-going rights to any income contained in the trust. The divestment was completed in 1997. Claimant agrees that there was a divestment upon the funding of the trust in 1997. Claimant argues that since the 1997 funding of the trust there have been circumstances under which claimant could receive income or principle from the trust. Claimant also argues that the funding of the trust was in 1997 and that this is far past the post DRA 5 year look-back and even further past the pre-DRA look-back. Lastly, claimant argues that any penalty related to this divestment has long since expired and if this is treated as an on-going divestment of the income from the asset it is not a divestment due to the specific exception for transfers to a disabled child. The Medical Policy Unit has determined that this irrevocable trust is a Medicaid trust. The Medicaid Policy Unit has also determined that the trust is irrevocable. The department is to count as the person's countable asset, the value of

the countable assets in the trust principle, If there is any condition under which the principle could be paid to or on behalf of the person from an irrevocable trust. BEM, Item 401, p. 9.

In the instant case, it does not appear to be any circumstance under which the income could be paid to or on behalf of claimant. Claimant is the grantor of the trust and the funder of the trust asset, but she is not the trustee nor is she the beneficiary or the alternative trustee. Claimant does not have any further legal involvement with the trust beyond the establishment of the trust and the funding of the assets for the trust. Any portion of the principle or income that could never be paid to or on behalf of the person (claimant) is transferred for less than fair market value. The look-back period is 60 months. The department is to reduce the transferred amount so it counts for multiple contributors and assets and income that are not countable assets or countable income. BEM, Item 401, p. 10.

The date of transfer is the date payment is prohibited. The amount transferred is the amount which cannot be used as of that date plus any countable resources added by the person after that date. The trust principle is considered an available asset of the person who is legally able to:

- Direct use of the trust principle for his needs.
- Direct that ownership of the principle revert to himself.

The department is to count only the value of assets that are countable for the MA category being tested per BEM, Item 400. Assume the person owns the assets in determining what is countable. The department is to do a complete divestment determination when a person has transferred assets of the trust, the principle is unavailable, and the person is in a penalty situation per BEM, Item 405.

In the instant case, although the Medicaid Policy Unit did determine that divestment had occurred because the person gave up the right to receive income the fair market value is the total amount of income the person is expected to receive, the Medicaid Policy Unit does not explain why the 60 month divestment period has not already expired. The trust was established in 1997. It appears from the bank statement contained in the file at claimant's exhibit F, that the policy date for an annuity, established by claimant with her son as beneficiary, was placed in an irrevocable trust/annuity, the policy initiation date for a trust/annuity was June 30, 2004. The application for Medical Assistance benefits was January 7, 2010. There are 12 months in 2005, 2006, 2007, 2008 and 2009, which would equal 60 months. The assets were placed in the trust in 2004, approximately 65 months before the Medical Assistance application was filed. Therefore, this Administrative Law Judge finds that assets in the trust are unavailable to claimant because they had been placed in an irrevocable trust for the benefit of her disabled adult son. In addition, claimant does not have to serve a divestment penalty if the funds in the annuity are placed there irrevocably, because she divested herself of her assets approximately 65 months before she filed an application for Medical Assistance benefits in January 2010. The department has not established by the

necessary competent, material and substantial evidence on the record that it was acting in compliance with department policy when it determined that claimant had divested her assets within the penalty period and therefore had excess assets for purposes of Medical Assistance benefit eligibility.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, determines that the department has not established that claimant improperly divested her assets into an irrevocable trust/annuity in June 30, 2004. There appear to be no circumstances under which distributions from the trust/annuity may be made to claimant. The department must determine whether or not the annuity/trust established June 30, 2004 is irrevocable and whether or not claimant retains any rights to the income in the trust/annuity. Claimant's representative is ORDERED to provide the department with the actual annuity contract for the June 30, 2004 trust/annuity to establish whether or not the trust/annuity is irrevocable and whether or not claimant retains any legal rights to the proceeds.

Accordingly, the department's decision is REVERSED. The department is ORDERED to reinstate claimant's January 7, 2010, application for Medical Assistance benefits and to make an assessment of claimant's eligibility for Medical Assistance benefits (long-term care). If claimant is otherwise eligible for said benefits, the department shall open a Medical Assistance case for claimant from the January 7, 2010 application date forward as long as claimant remains eligible for said benefits.

Landis

Y. Lain
Administrative Law Judge
for Maura D. Corrigan, Director
Department of Human Services

Date Signed: _____

Date Mailed: _____

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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