

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:

[REDACTED]

Reg. No. 201142197
Issue No. 2010
Case No. [REDACTED]
Hearing Date: October 17, 2011
Macomb County DHS (12)

ADMINISTRATIVE LAW JUDGE: Christian Gardocki

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 a hearing. After due notice, a telephone hearing was held on October 17, 2011 from Detroit, Michigan. Maria Messina, Claimant's authorized hearing representative (AHR), appeared on behalf of Claimant. On behalf of Department of Human Services (DHS), [REDACTED], Specialist, appeared and testified. [REDACTED] appeared on behalf of DHS as an AHR for DHS.

ISSUE

The issue is whether DHS properly determined that a transfer of assets into a pooled account trust was subject to a divestment penalty from 2/1/11 through 5/12/11.

FINDINGS OF FACT

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

1. On 2/16/11, Claimant applied for MA benefits.
2. Claimant has a birth date of 9/17/25.
3. Claimant has been a resident of a long-term care facility.
4. In 1/2011, an unspecified transfer of assets was made from Claimant into a pooled account trust.

5. On 4/12/11, DHS applied a divestment penalty from 2/1/11 through 5/12/11 based on Claimant's 1/2011 transfer of assets and mailed a Notice of Case Action informing Claimant of the divestment penalty (see Exhibit 3).
6. On 4/20/11, Claimant requested a hearing to dispute the divestment penalty.

CONCLUSIONS OF LAW

The Medical Assistance (MA) program is established by the 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 (formerly known as the Family Independence Agency) administers the MA program pursuant to MCL 400.10, *et seq.*, and MCL 400.105. Department policies are found in the Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM) and the Reference Tables Manual (RFT).

MA provides medical assistance to individuals and families who meet financial and nonfinancial eligibility factors. The goal of the MA program is to ensure that essential health care services are made available to those who otherwise would not have financial resources to purchase them.

The controlling DHS regulations are those that were in effect as of 2/2011, the month in which Claimant's application was submitted to DHS. It should be noted that the month used for which DHS regulations control may be an issue as Claimant's attorney noted that DHS amended their trust regulations in 4/2011.

Clients may qualify under more than one MA category. Federal law gives them the right to the most beneficial category. The most beneficial category is the one that results in eligibility or the least amount of excess income. BEM 105 at 2. At the time of Claimant's application, Claimant was a resident of a long-term care facility, non-pregnant, non-caretaker of minor children. Claimant also was over 65 years of age and alleged having a disability. As a person over the age of sixty five years, Claimant's most beneficial MA program would be through Aged-Disability Care (AD-Care). As a long-term care resident, Claimant could also be eligible for Extended Care (EC) though DHS policy requires that Claimant's eligibility for AD-Care must be evaluated first. BEM 164 at 1.

Eligibility for AD-Care requires asset-eligibility. BEM 163 at 1. Countable assets cannot exceed the asset limit in BEM 400. *Id.* Countable assets are determined based on MA policies in BEM 400, 401 and 402. *Id.*

An asset must be available to be countable. BEM 400 at 6. "Available" means that someone in the asset group has the legal right to use or dispose of the asset. *Id.* Trusts are not subject to the aforementioned rules. Trusts and whether they are a countable asset or a divestment of assets are considered in BEM 401 and BEM 405.

Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405 at 1. Divestment results in a penalty period, not MA program ineligibility. *Id.* During the penalty period, MA will not pay the client's cost for: long-term-care (LTC) services, home and community-based services, home help or home health. MA will pay for other MA-covered services. *Id.*

DHS defines divestment as a transfer of a resource by a client or spouse that:

- is within a specified time; and
- is a transfer for less than fair market value; and
- is not listed below under "TRANSFERS THAT ARE NOT DIVESTMENT". BEM 405 at 1.

In the present case, Claimant transferred an unspecified amount of cash into a trust in 1/2011. In a memorandum dated 2/22/11 (Exhibit 11), DHS conceded that the cash was transferred into an irrevocable trust and should not be considered an asset for purposes of MA eligibility. However, DHS contended that a divestment penalty should be assessed to Claimant's MA eligibility based on the transfer.

The first step in determining whether the asset transfer qualifies as divestment is determining the baseline date. *Id.* A person's baseline date is the first date that the client was eligible for Medicaid and one of the following: in long-term care, approved for the waiver, eligible for home help services or eligible for home health services. *Id.* at 5.

Once the baseline date is determined, the look-back period is determined. *Id.* The look back period is 60 months prior to the baseline date for all transfers made after February 8, 2006. *Id.*

Claimant was eligible for MA benefits beginning 2/1/11. As of 2/1/11, Claimant was a resident of a long-term care facility. It is found that 2/1/11 is the appropriate baseline date for Claimant. Claimant transferred assets into a pooled account trust in 1/2011. 1/2011 is within the 60 month look-back period from the baseline date required for divestment. It is found that Claimant's transfer of assets into a trust was within a time period required to establish divestment.

Skipping the second requirement for divestment for now, the third requirement for divestment is that the transfer of assets not be listed under a DHS regulation section entitled, "Transfers that are not divestment". Transfers that are not divestment under this section are: transferring excluded income, transfers involving spouse, transfers involving child, transfers to funeral plan, transfer to trust, purchase of funeral contract, asset conversion, transferring homestead to family, transfer for another purpose and trustee fees. BEM 405 at 7 and 8.

At first glance, Claimant's transfer of assets into a trust seems to be a transfer that would not be divestment based on the exemption of transfers to trust; a closer evaluation shows that not all trusts are exempt from divestment penalties. The applicable section reads, "Transfers to a trust established solely for the benefit of a disabled (see BEM 260) person under age 65 are not divestment." BEM 405 at 8. At the time the asset transfer, Claimant was over 65 years of age. As a person over 65 years of age, Claimant is not eligible for the "transfer to trust" exception. It is found that Claimant's transfer of assets into a trust was not a transfer that was listed in the DHS regulation section titled, "transfers that are not divestment". Thus, 2 of the three divestment requirements are met; the analysis will proceed to whether the transfer was for less than market value.

Immediately under the divestment requirement that the transfer be for less than fair market value (See BEM 405 at 1) is the following note, "See Annuity Not Actuarially Sound and Joint Owners and Transfers below and BEM 401 about special transactions considered transfers for less than fair market value." Thus, BEM 401, the DHS regulations on trusts, must be considered to determine whether a transfer of assets into a trust was for less than fair market value. This section is not intended to apply only to annuities; the above language is intended to mandate a consideration of trust and annuity policy when determining whether a transfer was for less than market value. The present case only involves a trust analysis.

A Medicaid trust is a trust requiring a divestment analysis and a divestment penalty. BEM 401 at 5 states that a Medicaid trust is one which meets the following conditions:

1. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, an MA post-eligibility patient-pay amount, a divestment penalty or an initial assessment amount. A person's resources include his spouse's resources;
2. The trust was established by the person, person's spouse, person acting with legal authority or on the person's direction
3. The trust was established on or after August 11, 1993.
4. The trust was not established by a will.
5. The trust is not described in "Exception A, Special Needs Trust" or "Exception B, Pooled Trust" below.

An Exception B Pooled Trust, as referenced in #5 above, is a non-Medicaid trust which meets the following conditions:

- The trust must be unchangeable with regard to the provisions that make it an Exception B, Pooled Trust. This is necessary to ensure that a trust initially meeting the other conditions still meets those conditions when the person dies.
- The trust contains the resources of a person who is disabled (not blind) per BEM 260.
- The trust is established and managed by a nonprofit association.

- A separate account is maintained for each beneficiary of the trust, but for purposes of investment and management of funds, the trust pools these accounts.
- Accounts in the trust are established for the benefit of persons who are disabled (not blind) per BEM 260. This means the trust must ensure that none of the principal or income attributable to a person's account can be used for someone else during the person's lifetime, except for "Trustee Fees" per BEM 405.
- Accounts in the trust are established by courts or by disabled persons' parents. Grandparents or legal guardians/conservators.
- The trust provides that to the extent any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust will pay to the State the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan.

DHS relied on a memorandum dated 2/22/11 (Exhibit 11) from the Medicaid Policy Unit which stated that the transfer in question merits a divestment analysis. The basis for this conclusion was that persons over age 65 years of age who make transfers into a pooled account trust are subject to divestment penalties if they are in a penalty situation.

It was not disputed that Claimant's trust met the requirements of an Exception B Pooled Trust and that the present case involves a 1/2011 dated transfer into a pooled trust account. Transfers to an 'Exception B Pooled Trust' by a person age 65 or older might be divestment." (*Emphasis added*). BEM 401 at 8. The use of "might" indicates that a person over 65 creating an Exception B Pooled Trust might be subject to a divestment penalty, but also might not be subject to the divestment penalty. BEM 401 further directs DHS, "Do a complete divestment determination if the person is in a "Penalty Situation" per BEM 405." *Id.*

A divestment determination is not required unless, sometime during the month being tested, the client was in a penalty situation. BEM 405 at 4. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be one of the following: in an LTC facility, approved for the waiver (see BEM 106), eligible for home help or eligible for home health. *Id.*

In the present case, Claimant was eligible for MA benefits and in a penalty situation by being a resident of a long-term care (LTC) facility. Thus, a divestment determination is required as the trust is considered by DHS regulations to be a transfer for less than fair market value. Although BEM 405 goes on to state that transfers to a trust solely for the benefit of a disabled individual are not considered divestment, the exception only applies to transfers made by persons under 65 years of age. *Id.* at 7. This exception is consistent with BEM 401 which states that it could be divestment if a person over 65 years of age transfers funds to an Exception B Pooled Trust.

Claimant's AHR cited four different ALJ decisions (Exhibit 8) which reversed DHS in similar circumstances when DHS applied a divestment penalty. In three of the cited ALJ decisions, the DHS basis for a divestment penalty was that a claimant over 65 years of age could not be disabled; therefore, any transfer to a pooled account trust by a person over 65 years in age was subject to divestment penalties. In such cases, it was appropriate for the ALJ to reverse the DHS actions for the DHS supplied justification for divestment. Without a deeper analysis by the ALJ, the proper remedy would have been to reverse the DHS decision and order DHS to reevaluate the divestment decision based on the finding that the respective claimant could be disabled despite being over 65 years of age.

The DHS basis for divestment in the present case differs from the above cited previous cases. In the present case, DHS properly cited Claimant's age as relevant to a pooled account trust transfer when the claimant is in a penalty situation. Thus, three of the presented decisions are inapplicable to the present case because the DHS basis for divestment is different.

A fourth ALJ decision dated 4/6/11 followed the above regulations but ultimately found that applying DHS policies violated the intent of the MA program which is to help needy individuals. The ALJ cited DHS regulations which state transfers to a pooled trust by a person over 65 years of age might be divestment. In the opinion of the ALJ, DHS failed to indicate when such transfers would not be divestment and therefore the policy indicating that such a transfer might be divestment "flies in the face of the MA program purpose". (See Exhibit 8). The conclusions of this decision are rejected for two reasons.

First, the best interpretation for unambiguous language is the language itself. There is no need to interject the purpose of the MA program when DHS regulation language is unambiguous. Secondly, DHS made clear when transfers to a pooled trust are allowed when a claimant's age exceeds 65 years of age- transfers to a pooled trust are not subject to divestment penalties when the claimant is not in a penalty situation. For these reasons the ALJ decision dated 4/6/11 is rejected.

A fifth decision was also submitted to justify a finding that the DHS application of divestment was improper. Claimant cited *Estate of Raymond Wierzbinski v. State of Michigan, Department of Human Services*, decided July 26, 2011 by Macomb County Circuit Court as a "nearly identical case" to the present. The court in *Wierzbinski* reversed a DHS divestment determination based on a finding that DHS improperly applied annuity policies to a trust case. The present case involves a pooled trust account, not an annuity. Thus, *Wierzbinski* is found to be inapplicable precedent.

Claimant submitted a brief with an in-depth discussion contending that DHS regulations contradicted federal law. Specifically, Claimant contended that DHS policies allowing

divestment are applicable to what Claimant described as third-party trusts while the present case involves a "first party trust" and is not subject to divestment analysis under federal regulations. No analysis shall be made concerning Claimant's contentions other than honoring the precedent of *Center for Special Needs Trust v. North Dakota DHS*, 2011 US Dist Lexis 44437 (2011). The facts of this case are functionally identical to the present case. The Court considered federal statutes and held that a comparable (to the present case) transfer of assets into a pooled trust was not exempt from a transfer of asset penalty (i.e. divestment).

Based on the presented evidence, it is found that DHS properly applied a divestment penalty based on a finding that Claimant made a transfer for less than fair market value. It is further found that the applicable DHS regulations do not violate federal statutes based on binding federal case law.

There was no dispute from Claimant's AHR that the divestment penalty was incorrectly calculated, only that it was improperly assessed. It is found that Claimant's MA benefit eligibility was properly subjected to the DHS calculated divestment penalty.

DECISION AND ORDER

The actions taken by DHS are AFFIRMED. The Administrative Law Judge, based upon the above findings of fact and conclusions of law, finds that DHS properly found Claimant eligible for MA benefits subject to a divestment penalty from 2/1/11 through 5/12/11.



Christian Gardocki
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: November 14, 2011

Date Mailed: November 14, 2011

NOTICE: Michigan Administrative Hearing System (MAHS) 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. MAHS 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. (60 days for FAP cases).

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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.

Claimant may request a rehearing or reconsideration for the following reasons:

- A rehearing **MAY** be granted if there is newly discovered evidence that could affect the outcome of the original hearing decision.
- A reconsideration **MAY** be granted for any of the following reasons:
 - misapplication of manual policy or law in the hearing decision,
 - typographical errors, mathematical error, or other obvious errors in the hearing decision that effect the substantial rights of the claimant:
 - the failure of the ALJ to address other relevant issues in the hearing decision.

Request must be submitted through the local DHS office or directly to MAHS by mail to:

Michigan Administrative hearings
Reconsideration/Rehearing Request
P. O. Box 30639
Lansing, Michigan 48909-07322

CG/hw

cc:

