

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

IN THE MATTER OF:

[REDACTED]

Reg. No: 2012-34190
Issue No: 2010

[REDACTED]

ADMINISTRATIVE LAW JUDGE: [REDACTED]

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 [REDACTED]. The claimant did not appear, but was represented by attorneys [REDACTED]. The department was represented by [REDACTED]. The department witnesses were [REDACTED].

ISSUE

Did the department properly determine the claimant had divested himself of assets and impose a penalty period?

FINDINGS OF FACT

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

1. The claimant entered a long term care facility on [REDACTED].
2. The claimant applied for Medicaid (MA) on [REDACTED].
3. The department determined the claimant had divested himself of [REDACTED] of assets and mailed the claimant a Notice of Case Action (DHS-1605) dated [REDACTED], informing the claimant that a divestment penalty would apply from [REDACTED] through [REDACTED] r [REDACTED].
4. The claimant submitted a hearing request, through his attorney, on [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 Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM) and the Bridges Reference Manual (RFT).

Department policy (BEM 405) states:

MA DIVESTMENT

Divestment results in a penalty period in MA, **not** ineligibility. Divestment policy does **not** apply to Qualified Working Individuals (BEM 169).

Divestment means a transfer of a resource by a client or his 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.

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.

During the penalty period, MA will **not** pay the client's cost for:

- LTC services, and
- home and community based services.
- Home Help, or
- Home Health.

MA will pay for other MA-covered services.

RESOURCE DEFINED

Resource means all the client's and his spouse's assets and income. It includes all assets and 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 the client's 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 BEM 401 (divestment).
- Putting assets or income in a trust; see BEM 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)

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 the client's 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.

The same policy applies to resources the client's spouse owns jointly with other persons.

Transfer 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.

Exception:

- . Preservation of an estate for heirs or to avoid probate court is **not** acceptable as another purpose.
- . That the asset or income is **not** counted for Medicaid does **not** make its transfer for another purpose.

The facts of this case are not in dispute. On [REDACTED], the claimant's son, [REDACTED], purchased a [REDACTED] and titled the vehicle jointly in his and claimant's name. On [REDACTED], acting as his father's Power of Attorney (POA), conveyed his father's interest (1/3 portion) of land worth [REDACTED] in the vehicle.

The department determined the claimant had divested himself of [REDACTED] of assets when his son, as POA, transferred the property to himself for the ½ interest in the vehicle as it was not for "fair market value" and the claimant would not have legal authority to sell "part" of a vehicle.

The claimant's representative disputes the department's determination of divestment, arguing that the claimant converted an asset from one form to another that was equal in value and that the new asset was exempt and therefore, the transaction would not constitute divestment. The claimant's representative provides an affidavit from the claimant's son that states that he is willing to sell the vehicle if his father asks him to do so and therefore, the vehicle is not an "unavailable" jointly held asset.

Department policy indicates that divestment occurs when a client or their spouse transfers a resource within the "look-back period" and for less than "fair market value". BEM 405. Transferring a resource means giving up all or partial ownership in (or rights to) a resource. BEM 405. Further, 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 is considered a transfer by the client. BEM 405. The "look back period" is 60 months prior to the baseline date (for transfers made after February 8, 2006). BEM 405. Less than "fair market value" means the compensation received in return for a resource was worth less than the fair market value of the resource. That is, the amount received for the resource was less than what would have been received if the resource was offered in the open market and in an arm's length transaction. BEM 405.

First, this transfer does qualify as one made by the client as it was made by the claimant's son, who is the claimant's POA in this case. BEM 405 directs the department to treat transfers made by anyone acting in place of the client as transfers made by the client. Further, this transfer was made after the client's baseline date, thus, this transfer is properly scrutinized by the department for divestment purposes.

Converting an asset from one form to another of equal value is not divestment even if the new asset is exempt. BEM 405. The claimant's attorney argues that this transaction is merely asset conversion. However, this argument falls flat. The claimant entered long term care (LTC) on [REDACTED] and is terminally ill. There has been no evidence presented to show that the claimant needs or uses a vehicle for any purpose. Considering this asset conversion was a countable asset for MA purposes that was converted into an arguably useless exempt asset prompts this Administrative Law Judge to scrutinize the transaction further.

Examining the timeline of the circumstances around the transaction gives us some insight into the purpose of the transfer. For instance, if the transfer occurred prior to the claimant becoming sick or entering LTC, then the argument could certainly be made that the transfer was not for MA eligibility purposes. The claimant entered LTC on [REDACTED]. The claimant's son bought the [REDACTED] and titled it in both his name and his father's name. On [REDACTED] he conveyed the property as payment for the ½ interest in the vehicle. The very next day, [REDACTED], the claimant's application for MA was submitted. The timing of events certainly does not help claimant's argument as it would appear claimant's son was trying to shield assets and make his father eligible for MA with the transaction.

The last analysis has to do with the concept of "fair market value." The department avers the transaction was for less than fair market value. Less than fair market value is defined in policy to mean that the compensation received in return for a resource was worth less than the fair market value of the resource. That is, the amount received for the resource was less than what would have been received if the resource was offered in the open market and in an arm's length transaction.

To further define "fair market value", the case of *Mackey v Department of Human Services*, 289 Mich App, 688; 2010 WL 3488988 (Mich. App.) is instructive. The court cites the Black's Law Dictionary definition that states fair market value is the "price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." *Mackey, supra* at 5. An "arm's-length transaction" is defined as "relating to dealings between two parties who are not related...and who are presumed to have roughly equal bargaining power; not involving a confidential relationship." *Mackey, supra* at 6.

In *Mackey*, the court observed that while "no Michigan court has attempted to define the parameters of an arm's-length transaction, several courts in our sister states have indicated 'that an arm's-length transaction is characterized by three elements: it is

voluntary, i.e. without compulsion or duress; it generally takes place in an open market; and the parties act in their own self interest.” *Mackey, supra* at 6.

In light of the court’s discussion, it becomes clear that this transaction was not for fair market value and was instead a sham transaction intended to shield assets for the claimant’s son and make the claimant eligible for MA. This transaction is clearly not an “arm’s-length” transaction as the parties are related and do not have even bargaining power as the transaction, arguably, only involved the claimant’s son, his POA. There is no evidence the claimant even had knowledge of the transaction. Further, it is not an arm’s-length transaction as there is no market for a ½ interest in a vehicle. No one buys ½ of a vehicle, unless one considers co-signing for a child, spouse, friend, etc. as such. Further, as indicated earlier, it is quite clear the claimant is not using this vehicle at all and has no use for **any** interest in a Chevy Silverado truck. This makes his purchase worthless, which is certainly not fair market value.

For all the foregoing reasons, the transaction in question is found to be divestment as it was to divert assets to the claimant’s son and make the claimant eligible for MA purposes.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department properly determined the claimant had divested himself of assets and imposed a penalty period.

Accordingly, the department’s determination is **UPHELD. SO ORDERED.**

/s/ _____
[Redacted]
Administrative Law Judge
for Maura D. Corrigan, Director
Department of Human Services

Date [Redacted]

Date Mailed: [Redacted]

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.

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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.

SM/jk

cc:

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MAHS