

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

IN THE MATTER OF:

[REDACTED]

Reg. No.: 2014-32959
Issue No.: 2008
Case No.: [REDACTED]
Hearing Date: April 17, 2014
County: Ingham

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

HEARING DECISION

Following Claimant's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 45 CFR 99.1 to 99.33; and 45 CFR 205.10. After due notice, a telephone hearing was held on April 17, 2014 from Lansing, Michigan. Participants on behalf of Claimant included [REDACTED] (Claimant's daughter, attorney-in-fact and Authorized Hearing Representative (AHR)). Participants on behalf of the Department of Human Services (Department) included [REDACTED] (Assistance Payments Worker) and [REDACTED] (Assistance Payments Supervisor).

ISSUE

Did the Department properly determine that Claimant had divested herself of assets to warrant the imposition of a penalty for purposes of Medical Assistance (MA) or "Medicaid"?

FINDINGS OF FACT

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

1. Claimant was admitted to a long term care/nursing home on April 15, 2008.
2. In April, 2008, Claimant executed a Durable Power of Attorney, which designated her daughter ([REDACTED] [REDACTED]) as attorney-in-fact over her financial and business affairs.

¹ Claimant's daughter is referred to as Claimant's AHR or Claimant's attorney-in-fact.

3. At all relevant times, Claimant owned a home at [REDACTED], [REDACTED] [REDACTED].
4. Claimant was active for MA under the Extended Care category during the relevant time period.
5. On September 13, 2013, Claimant's attorney-in-fact sold the home for a net profit of \$ [REDACTED].
6. Claimant's attorney-in-fact reported the sale to the Department in October, 2013.
7. On November 6, 2013, the Department mailed Claimant a Notice of Case Action (DHS-1605) which closed her MA-Extended Care case effective December 1, 2013 due to excess assets. The notice also indicated, "Sale of the home has created excess [sic] liquid assets for [REDACTED] to continue being eligible for Medicaid. Once the balance has been spent down please reapply."
8. On November 15, 2013, Claimant's attorney-in-fact sent a letter to the Department requesting reimbursement for expenditures that she incurred for Claimant's benefit.
9. On November 20, 2013, Claimant's attorney-in-fact met with a Department representative to discuss the matter further. Claimant's attorney-in-fact requested a policy exception from the Department for permission to retain the proceeds of the sale of the home to reimburse her for funds she had paid for providing services to Claimant including travel expenses, management of affairs and property maintenance.
10. The Department, on November 26, 2013, forwarded the matter to the Department's Medicaid Policy Unit (MPU) and requested an exception to BEM 405's Medicaid divestment policy. The request indicated that Claimant's attorney-in-fact sought reimbursement of expenditures she had made for Claimant's benefit prior to the sale of the home.
11. On December 5, 2013, the MPU issued a memorandum which denied the policy exception because the policy exception process does not allow for the elimination of a divestment penalty and Medicaid cannot reimburse individuals for assisting an elderly parent.
12. On March 10, 2014, the Department mailed Claimant a Notice of Case Action (DHS-1605) which indicated that Claimant's MA application was approved for MA Extended Care effective February 1, 2014 with a patient pay amount of \$ [REDACTED]. However, the notice further indicated that the Department had calculated a divestment penalty in the amount of \$ [REDACTED] for a gift to [REDACTED] [REDACTED] between November 16, 2013 through November 21, 2013. The notice also indicated that Claimant was over the asset limit in January, 2014. The notice also provided, "Medicaid will not pay for your long-term care and home and community-

based waiver services from 02/01/2014 through 08/12/2014 because you or your spouse transferred assets or income for less than their fair market value. Notify your specialist if you are denied emergency care because of this penalty.” The baseline date was February 1, 2009.

13. On March 17, 2014, the Department received Claimant’s request for hearing to challenge the Department’s determination of a divestment and divestment penalty.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Human Services Bridges Administrative Manual (BAM), Department of Human Services Bridges Eligibility Manual (BEM), Department of Human Services Reference Tables Manual (RFT), and Department of Human Services Emergency Relief Manual (ERM).

The Medical Assistance (MA) program is established by the Title XIX of the Social Security Act, 42 USC 1396-1396w-5, and is implemented by 42 CFR 400.200 to 1008.59. The Department of Human Services (formerly known as the Family Independence Agency) administers the MA program pursuant to MCL 400.10 and MCL 400.105.

The Medicaid program is administered by the federal government through the Centers for Medicaid and Medicare Services (CMS) of the Department of Health and Human Services (HHS). The state and federal governments share financial responsibility for Medicaid services. Each state may choose whether or not to participate in the Medicaid program. Once a state chooses to participate, it must operate its Medicaid program in accordance with mandatory federal requirements, imposed both by the Medicaid Act and by implementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

Participating states must provide at least seven categories of medical services to persons determined to be eligible Medicaid recipients. 42 USC §1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21). One of the seven mandated services is *nursing facility services*. 42 USC §1396d(a)(4)(A).

A “divestment” is a transfer of assets that would create a penalty period. BEM 405, p 1 (10-1-2013). The “penalty period” is a period of disqualification from Medicaid assistance for Long Term Care (LTC). BEM 405, p 1. In other words, the penalty period is the number of months of long term care that will not be covered by Medicaid. BEM 405, p 1. Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405, p 1. Divestment results in a penalty period in Medicaid, not ineligibility. BEM 405, p 1.

Divestment means a transfer of a “resource” by a client or his spouse that are all of the following: (1) is within a specified time (look-back period); (2) is a transfer for less than fair market value; (3) is not considered by policy as a “transfer that is not divestment.” BEM 405, p 1. Resource is defined as all of the client’s and his/her spouse's assets and income. BEM 405, pp 1-2. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. BEM 405, pp 1-2. 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: (1) the client or spouse; (2) 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; (3) any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse. BEM 405, pp 1-2.

During the penalty period, Medicaid will not pay the client’s cost for: (1) LTC services; (2) home and community-based services; (3) home help; and (4) home health. BEM 405, p 1. However, Medicaid will pay for other MA-covered services. BEM 405, p 1.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. BEM 405, pp 1-2. Not all transfers are divestment. BEM 405, p 1-2. Examples of transfers include: (1) selling an asset for fair market value (not divestment); (2) giving an asset away (divestment); (3) refusing an inheritance (divestment); (4) payments from a Medicaid Trust that are not to, or for the benefit of, the person or his spouse; see BEM 401 (divestment); (5) putting assets or income in a trust²; (6) giving up the right to receive income such as having pension payments made to someone else (divestment); (7) giving away a lump sum or accumulated benefit (divestment); (8) buying an annuity that is not actuarially sound (divestment); (9) giving away a vehicle (divestment); and (10) putting assets or income into a Limited Liability Company (LLC). BEM 405.

The first step in determining the period of time that transfers can be looked at for divestment is determining the baseline date. BEM 405, p 5. A person’s baseline date is the first date that the client was eligible for Medicaid and one of the following: (1) in LTC; (2) approved for the waiver under BEM 106; (3) eligible for Home Health services; or (4) eligible for Home Help services. BEM 405, p 5.

A client’s baseline date does not change even if one of the following happens: (1) the client leaves LTC; (2) the client is no longer “approved for the waiver” under BEM 106; (3) the client no longer needs Home Help; or (4) the client no longer needs Home Health. BEM 405, p 5. Once the baseline date is established, the Department determines the look-back period. BEM 405, p 5. The look back period is 60 months prior to the baseline date for all transfers made after February 8, 2006. BEM 405, p 5.

Transfers that occur on or after a client’s baseline date must be considered for divestment. BEM 405, p 4-6. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment. BEM 405, pp 4-6. A divestment

² See BEM 401.

determination is not required unless, sometime during the month being tested, the client was in a penalty situation. BEM 405, pp 4-6. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be one of the following: (1) in an LTC facility; (2) "approved for the waiver" under BEM 106; (3) eligible for Home Help; (4) eligible for Home Health. BEM 405, pp 4-6. However, transfers exclusively for a purpose other than to qualify or remain eligible for MA are not divestment. BEM 405, p 11.

A contract/agreement that pays prospectively for expenses such as repairs, maintenance, property taxes, homeowner's insurance, heat and utilities for real property/homestead or that provides for monitoring health care, securing hospitalization, medical treatment, visitation, entertainment, travel and/or transportation, financial management or shopping, etc. would be considered a divestment.³ Consider all payments for care and services which the client made during the look back period as divestment. BEM 405, p 7.

Relatives who provide assistance or services are presumed to do so for love and affection, and compensation for past assistance or services shall create a rebuttable presumption of a transfer for less than fair market value. A relative is anyone related to the client by blood, marriage or adoption. BEM 405, p 7.

Such contracts/agreements shall be considered 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; **and**
- 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 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

³ **Note:** The preceding are examples and should not be considered an all-inclusive or exhaustive list. See BEM 405, p 7.

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. See BEM 405, pp 7-8.

Assets transferred in exchange for a contract/agreement for personal services/assistance or expenses of real property/homestead provided by another person after the date of application are considered available and countable assets. BEM 405, p 8.

In the instant matter, Claimant's AHR requests a hearing because she disputes the Department determination that the sale of Claimant's home was a divestment for purposes of Medicaid. Claimant's AHR testified that when her mother (Claimant) was admitted to a nursing home in August, 2008, Claimant's AHR, who was newly appointed to serve as attorney-in-fact, was overwhelmed by Claimant's debt and poor physical condition of the home. Claimant's AHR stated that she was forced to act swiftly and sacrificed her financial well-being for Claimant's benefit. As a result, Claimant's AHR states that she was forced to sell Claimant's house. Claimant's AHR kept copies of all receipts and related verifications to show that the expenditures were legitimate. The Department, on the other hand, simply takes the position that BEM 405, p 7 that any transfer of liquid assets from Claimant to Claimant's AHR is considered a divestment because there was no pre-arranged contract or other written agreement between the parties.

Testimony and other evidence must be weighed and considered according to its reasonableness. *Gardiner v Courtright*, 165 Mich 54, 62; 130 NW 322 (1911); *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). The weight and credibility of this evidence is generally for the fact-finder to determine. *Dep't of Community Health*, 274 Mich App at 372; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, it is for the fact-finder to gauge the demeanor and veracity of the witnesses who appear before him, as best he is able. See, e.g., *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. The facts are not in dispute and this issue essentially concerns policy interpretation. Here, there is no dispute that the sale of the home took place within the look-back period and was less than fair market value. As indicated above BEM 405, p 7 specifically provides that, "[r]elatives who provide assistance or

services are presumed to do so for love and affection, and compensation for past assistance or services shall create a rebuttable presumption of a transfer for less than fair market value.” This type of transaction is not considered by policy as a “transfer that is not divestment.” In addition, there was no contract between the parties to provide an exception. This Administrative Law Judge finds that the Department is correct.

Accordingly, this Administrative Law Judge concludes that the Department correctly applied policy when it determined that Claimant’s \$ [REDACTED] was considered a divestment. BEM 405, p 1 clearly provides that a transfer of assets which would otherwise be available to pay long-term care costs within the look-back period must be considered when determining MA long-term care eligibility. The nature of Claimant’s sale of her home is a transfer of an asset as defined by BEM 405. The Department also properly imposed the penalty period due to divestment.

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds that the Department acted in accordance with Department policy.

DECISION AND ORDER

Accordingly, the Department properly determined that Claimant had divested herself of assets and the imposition of the 6 month, 12 day penalty period from February 1, 2014 through August 12, 2014 is **AFFIRMED**.

IT IS SO ORDERED.



C. Adam Purnell
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: May 5, 2014

Date Mailed: May 5, 2014

NOTICE OF APPEAL: 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 or Reconsideration was made, within 30 days of the receipt date of the Decision and Order of Reconsideration or Rehearing Decision.

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).

A Request for Rehearing or Reconsideration may be granted when one of the following exists:

- Newly discovered evidence that existed at the time of the original hearing that could affect the outcome of the original hearing decision;
- Misapplication of manual policy or law in the hearing decision which led to a wrong conclusion;
- Typographical, mathematical or other obvious error in the hearing decision that affects the rights of the client;
- Failure of the ALJ to address in the hearing decision relevant issues raised in the hearing request.

The Department, AHR or the claimant must specify all reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration. A request must be *received* in MAHS within 30 days of the date the hearing decision is mailed.

The written request must be faxed to (517) 335-6088 and be labeled as follows:

Attention: MAHS Rehearing/Reconsideration Request

If submitted by mail, the written request must be addressed as follows:

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

CAP/las

cc:

