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

IN THE MATTER OF:

[redacted]

Reg. No.: 14-008049
Reg. No. 14-005261
Issue No.: 2008
Case No.: [redacted]
Hearing Date: September 3, 2014
County: ALLEGAN

ADMINISTRATIVE LAW JUDGE: Darryl Johnson

HEARING DECISION

Following Claimant's request for a hearing, these matters are 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 September 03,2014, from Lansing , Michigan. Participants on behalf of Claimant included Claimant's attorney, [redacted] Participants on behalf of the Department of Human Services (Department) included Family Independence Manager [redacted], Long Term Care Specialist [redacted] and Department of Community Health Specialist [redacted]. Assistant Attorney Genera[redacted] represented the Department.

Case 14-008049 was scheduled to be held consecutively with Case 14-005261. The cases were consolidated for purposes of this Decision.

ISSUE

Did the Department properly determine the divestment penalty for Claimant's Medical Assistance (MA) benefits?

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 applied for long-term care Medicaid on July 31, 2013.

2. Prior to her application, Claimant had gifted $158,569 without compensation.

3. Claimant had also loaned $127,213 to an irrevocable family trust, prior to the application, but the promissory note did not include a provision that prohibited cancellation of the balance upon her death.

4. Because the promissory note did not include the cancellation clause, the Department counted the $158,569 as well as the $127,213 as divestment.

5. The Department approved Claimant's application for MA, with a divestment penalty from July 1, 2013, through August 13, 2016. (Exhibit F - Pages 14-15.)

6. The funds associated with the promissory note were returned to the Claimant.

7. On March 31, 2014, Claimant submitted a new application for MA, requesting a recalculation of the divestment penalty period, and stating the funds were "regifted to a new trust."

8. The Department referred the application to the Medicaid Eligibility Unit at the Department of Community Health (DCH).

9. The DCH determined that the resources were not returned, but instead were just a regift of the same resource, and concluded the penalty period should not be recalculated.

10. The Department received Claimant's hearing request on June 16, 2014.

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 Title XIX of the Social Security Act, 42 USC 1396-1396w-5; 42 USC 1315; the Affordable Care Act of 2010, the collective term for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152; and 42 CFR 430.10-.25. The Department (formerly known as the Family Independence Agency) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

BEM 405 (7/1/14) sets forth the policy the Department is to follow when there is a "divestment". At page 1,

> Divestment results in a penalty period in MA, **not** ineligibility. Divestment policy does **not** apply to Qualified Working Individuals; see BEM 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 and in glossary) by a client or his spouse that are all of the following:

Is within a specified time; see LOOK-BACK PERIOD in this item.

Is a transfer for LESS THAN FAIR MARKET VALUE; see definition in glossary.

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.
Home and community-based services.
Home Help.
Home Health.

MA will pay for other MA-covered services.

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. BEM 405 p 1.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. **Not** all transfers are divestment.

Selling an asset for fair market value is not a divestment. Conversely, selling an asset for less than fair market value IS a divestment.

At pages 5 and 6 additional direction is found.

The first step in determining the period of time that transfers can be looked at for divestment is determining the **baseline date;** see Baseline Date in this item.

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

Entire Period

Transfers that occur **on** or **after** a client's baseline date must be considered for divestment. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment.

Penalty Situation

A divestment determination is **not** required unless, sometime during the month being tested, the client was in a penalty situation. 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.
- Eligible for Home Health.

Baseline Date

A person's baseline date is the **first** date that the client was eligible for Medicaid and one of the following:

- In LTC.
- APPROVED FOR THE WAIVER; see BEM 106.
- Eligible for Home Health services.
- Eligible for Home Help services

The parties provided extensive briefs regarding this case. Claimant's attorney has argued that BEM 405 at page 15 supports a recalculation of the penalty when resources are returned.

> Cancel a divestment penalty if either of the following occur before the penalty is in effect:
>
> - All the transferred resources are returned and retained by the individual.
> - Fair market value is paid for the resources.
>
> Recalculate the penalty period if either of the following occurs while the penalty is in effect:
>
> - All the transferred resources are returned.
> - Full compensation is paid for the resources.
>
> Use the same per diem rate originally used to calculate the penalty period.
>
> Once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. However, recalculate the penalty period. The divestment penalty ends on the later of the following:
>
> - The end date of the new penalty period.
> - The date the client notified you that the resources were returned or paid for.

The Department argues that the actions taken on Claimant's behalf were "a series of behind-the-scenes made by [Claimant's] representatives", the inference being that there was something underhanded about the process. They go on to state that Claimant was put on notice that the Department determined there was a divestment of $285,782.29 on November 5, 2013, and that determination was not challenged.

The Department correctly states that the divestment penalty can only be canceled if the penalty period is not in effect and (a) **all** of the transferred resources are returned, or (b) full compensation is paid for the resources. In this case the Claimant divested $285,785.29 to the Lugten Irrevocable Family Trust. Approximately half of that divestment was in the form of a loan ($127,213.23) to the trust, but because the loan did not contain a provision barring it from being canceled upon her death, it was considered a gift.

Claimant was approved for benefits, subject to a divestment penalty period. After the Claimant understood there was a divestment penalty caused by the faulty promissory note, Claimant's family "determined that the mistake could be corrected by having the resources returned and reapplying. Therefore, a new application was submitted on March 31, 2014." *Petitioner's Hearing Summary,* p 3, August 27, 2014. Payments were made to Claimant for $6,526 on July 31, 2013, August 28, 2013, September 18, 2013, and October 17, 2013. *Petitioner's Hearing Summary* pp 66-72. Then, $102,348.36 was returned on March 4, 2014, and $28,091.64 on March 18, 2014. *Id,* p 73. The total amount returned was $128,452.36. As discussed below, other assets were returned as well.

The Lugten Irrevocable Family Trust is attached to *Petitioner's Hearing Summary,* beginning at page 42. It states in Article III, paragraph A, "Under no circumstances shall any of the trust property be paid to me or used for my benefit." The original promissory note is attached to that brief beginning at page 39. It calls for payments to be made to Claimant in the amount of $6,526 per month, beginning July 31, 2013, for 20 months. Interest accrued at 3.25% per annum. Total payments would be $130,520. The original plan was that the funds loaned from Claimant to the trust would not be considered a divestment, and those funds would pay for Claimant's care during her divestment penalty period. But, when the Department determined the loan had a fatal flaw which made it a divestment, Claimant was then subject to a longer penalty period of 33 months.

This asset was a cash asset. See BEM 400 (7/1/13) p 14. It was converted into a promissory note. Promissory notes are discussed at pages 38-29 of BEM 400:

> All money used to purchase a promissory note, loan, or mortgage is counted as a divestment unless all of the following are true:
> - The repayment schedule is actuarially sound; and
> - The payments are made in equal amounts during the term of the agreement with no deferral of payments and no balloon payments; and
> - The note, loan, or mortgage must prohibit the cancellation of the balance upon the death of the lender; see Uncompensated Value in **BEM 405** to determine the value.

> **Note:** The payments from a note that meets these requirements are countable unearned income.

The parties agree that the original promissory note did not prohibit its cancellation upon the Claimant's death. Claimant did not only transfer the promissory note; she transferred other assets as well. She made a number of gifts which are listed at page 14 of *Petitioner's Hearing Summary*. Five gifts were made to the Lugten Irrevocable Family Trust, totaling $159,295.10. On February 18, 2014, Claimant's attorney sent a letter on Claimant's behalf (*Id,* P 27) requesting payment in full of the outstanding balance on the promissory note.

The divestment penalty can only be canceled if all the transferred resources are returned and retained by the individual and they are returned prior to the penalty period. BEM 405 at 15. The Claimant demanded return of the assets and, based upon documents provided in *Petitioner's Supplemental Brief* (sub-exhibits C-1 through C-6) it appears all of the assets were returned to Claimant. For purposes of this decision it is assumed that the total value – principal and interest – was paid back to the Claimant under the terms of the loan, and the other assets were returned in full. Claimant states in *Petitioner's Supplemental Brief* at page 2 that all of the assets were returned to Claimant, and directs the reader's attention to sub-exhibits C-1 through C-6. In the table found at Exhibit C it lists the five assets that were transferred, as well as the Promissory Note. The five other assets are shown as having transaction dates between December 24, 2013, and March 19, 2014, with all assets being owned by Claimant once again.

The language used is BEM 405 is important. As stated above, once the penalty is in effect, the penalty periods that have already passed cannot be eliminated. When the assets are returned, the Department is to recalculate the penalty period. It is to "Use the same per diem rate originally used to calculate the penalty period." BEM 405 at 15. Claimant's family returned the assets, and at that point, the Department should have recalculated the penalty period. BAM 110 (7/1/13) states at p. 7, "An application or filing form, with the minimum information, must be registered on Bridges **unless** the client is already active for that program(s); see REGISTERING APPLICATIONS in this item." (Emphasis in original.) Claimant was an on-going recipient of MA benefits.

Claimant had returned all of the assets as of March 19, 2014. (*Petitioner's Supplemental Brief*, Exhibit C.) A new application was submitted on March 31, 2014, and at that point the Department became aware at least some of the assets had been returned. A portion of the application was included as Exhibit 1, pages 29-32 during the hearing. A letter from Claimant's attorney, dated April 7, 2014 (Exhibit 1 Page 28) affirmatively states there was a "complete reversal of the gifting from her previous application." It also indicates there was "new gifting done to a new trust . . ." On November 5, 2013, the Department calculated her divestment using a patient pay amount of $7,499. (Hearing Exhibit F, Notice of Case Action.) Her penalty period was to begin on July 1, 2013 and end on August 22, 2016, (Hearing Exhibit D, Notice of Case Action.) The Department modified that in the November Notice of Case Action to

end on August 13, 2016. By the time the assets were returned on March 19, 2014, she had been through eight months and 19 days of her penalty period. The long-term care cost for 2013 had a base line of $7,631 per month.

To put this case in the simplest terms, assets were divested. Claimant applied. Claimant was approved, but an unexpectedly long penalty period was imposed. The assets were returned, and then some were divested again. Claimant reapplied for MA, even though she was already found eligible for MA, and without telling the Department that her assets had exceeded the $2,000 asset limit for a group of one. BEM 400 (7/1/13) p 7.

In *Mackey* v *Department of Human Services*, 289 Mich App 688, 693-694; 808 NW2d 484 (2010), the Court of Appeals discusses some of the history surrounding Medicaid Estate Planning.

> In 1965, Congress enacted Title XIX of the Social Security Act, commonly known as the Medicaid act. See 42 USC 1396 *et seq.* This statute created a cooperative program in which the federal government reimburses state governments for a portion of the costs to provide medical assistance to low-income individuals. *Cook v. Dep't of Social Servs.,* 225 Mich.App. 318, 320, 570 N.W.2d 684 (1997). Participation in Medicaid is essentially need-based, with states setting specific eligibility requirements in compliance with broad mandates imposed by federal statutes and regulations.[6] *Id.;* see also *Atkins v. Rivera,* 477 U.S. 154, 156-157, 106 S.Ct. 2456, 91 L.Ed.2d 131 (1986), *Nat'l Bank of Detroit v. Dep't of Social Servs.,* 240 Mich.App. 348, 354-355, 614 N.W.2d 655 (2000), and *Gillmore v. Illinois Dep't of Human Servs.,* 218 Ill.2d 302, 305, 300 Ill.Dec. 78, 843 N.E.2d 336 (2006).
>
> Like many federal programs, since its inception the cost of providing Medicaid benefits has continued to skyrocket. The act, with all of its complicated rules and regulations, has also become a legal quagmire that has resulted in the use of several " loopholes" taken advantage of by wealthier individuals to obtain government-paid long-term care they otherwise could afford. The Florida District Court of Appeal accurately described this situation, and Congress's attempt to curb such practices:
>
> > After the Medicaid program was enacted, a field of legal counseling arose involving asset protection for future disability. The practice of "Medicaid Estate Planning," whereby" individuals shelter or divest their assets to qualify for Medicaid without first depleting their life savings," is a legal practice that involves utilization of the complex rules of Medicaid eligibility, arguably comparable to the way one uses the Internal Revenue Code to his or her advantage in preparing taxes. See generally Kristin A. Reich, Note, Long-Term Care Financing Crisis— Recent Federal and State Efforts to Deter Asset Transfers as a Means to Gain Medicaid Eligibility, 74 N.D. L.Rev. 383 (1998). Serious concern then arose over the

> widespread divestiture of assets by mostly wealthy individuals so that those persons could become eligible for Medicaid benefits. Id.; see also Rainey v. Guardianship of Mackey, 773 So.2d 118 (Fla. 4th DCA 2000). As a result, Congress enacted several laws to discourage the transfer of assets for Medicaid qualification purposes. See generally Laura Herpers Zeman, Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly, 13 Quinnipiac Prob. L.J. 187 (1988). Recent attempts by Congress imposed periods of ineligibility for certain Medicaid benefits where the applicant divested himself or herself of assets for less than fair market value. 42 U.S.C. § 1396p(c)(1)(A); 42 U.S.C. § 1396p(c)(1)(B)(i); Fla. Admin. Code R. 65A-1.712(3). More specifically, if a transfer of assets for less than fair market value is found within 36 months of an individual's application for Medicaid, the state must withhold payment for various long-term care services, i.e., payment for nursing home room and board, for a period of time referred to as the penalty period. Fla. Admin. Code R. 65A-1.712(3). Medicaid does not, however, prohibit eligibility altogether. It merely penalizes the asset transfer for a certain period of time. *See generally* Omar N. Ahmad, *Medicaid Eligibility Rules for the Elderly Long-Term Care Applicant,* 20 J. Legal Med. 251 (1999). [*Thompson v. Dep't of Children & Families,* 835 So.2d 357, 359-360 (Fla.App., 2003).]

In *Gillmore* the Illinois Supreme Court recognized this same history, noting that over the years (and particularly in 1993), Congress enacted certain measures to prevent persons who were not actually "needy" from making themselves eligible for Medicaid:

> In 1993, Congress sought to combat the rapidly increasing costs of Medicaid by enacting statutory provisions to ensure that persons who could pay for their own care did not receive assistance. Congress mandated that, in determining Medicaid eligibility, a state must "look-back" into a three or five-year period, depending on the asset, before a person applied for assistance to determine if the person made any transfers solely to become eligible for Medicaid. See 42 U.S.C. § 1396p(c)(1)(B) (2000). If the person disposed of assets for less than fair market value during the look-back period, the person is ineligible for medical assistance for a statutory penalty period based on the value of the assets transferred. See 42 U.S.C. § 1396p(c)(1)(A) (2000). [Gillmore, 218 Ill.2d at 306, 300 Ill.Dec. 78, 843 N.E.2d 336 (emphasis added).]

See, also, E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J.Super. 340, 344, 990 A.2d 701 (2010) (Noting that the purpose of this close

> scrutiny while looking back is "to determine if [the asset transfers] were made for the sole purpose of Medicaid qualification"
>
> This statutory look-back period, noted in Gillmore and Thompson and contained within 42 USC 1396p(c)(1), requires a state to look-back a number of years (in this case five) from the date of an asset transfer to determine if the applicant made the transfer solely to become eligible for Medicaid, which can be established if the transfer was made for less than fair market value. See Family Independence Agency, Program Eligibility Manual (PEM) 405 (April 1, 2004), pp. 1, 4; see also Gillmore, 218 Ill.2d at 306, 300 Ill.Dec. 78, 843 N.E.2d 336. "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." PEM 405, p. 6.
>
> A transfer for less than fair market value during the " look-back" period is referred to as a "divestment," and unless falling under one of several exclusions, subjects the applicant to a penalty period during which payment of long-term-care benefits is suspended. See, generally PEM 405, pp. 1, 4-9. "Congress's imposition of a penalty for the disposal of assets or income for less than fair market value during the look-back period is intended to maximize the resources for Medicaid for those truly in need." E.S., 412 N.J.Super. at 344, 990 A.2d 701.

Clearly the Congressional intent is to maximize the resources available through the Medicaid program for those truly in need. It is hard to see someone as “truly in need” if they can give away more than a quarter of a million dollars. However, the policy directs the Department to recalculate the divestment penalty after the assets have been returned to the applicant. If the Department is to impose a new divestment penalty, the implication is that they are once again found to be eligible to receive Medicaid. To put it another way, if the return of the assets made the applicant ineligible, there would be no point in recalculating the divestment penalty period.

The Claimant was in the midst of a penalty period when the assets were returned. That penalty period has passed. When the new application was submitted, she was subject to a new penalty period, based upon the assets that were returned and then again divested. The past months are not to be offset against the new period; the new period, based upon the assets that were divested, begins at the time of the new application.

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 failed to satisfy its burden of showing that it acted in accordance with Department policy when it did not recalculate Claimant’s MA penalty period after the assets were returned.

DECISION AND ORDER

Accordingly, the Department’s decision is **REVERSED**.

THE DEPARTMENT IS ORDERED TO BEGIN DOING THE FOLLOWING, IN ACCORDANCE WITH DEPARTMENT POLICY AND CONSISTENT WITH THIS HEARING DECISION, WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

1. Redetermine Claimant's MA divestment penalty based upon the returned assets she divested prior to her March 31, 2014, application. Once the Department has made a determination of eligibility or lack thereof for MA benefits, the Department shall notify Claimant in writing of the determination.

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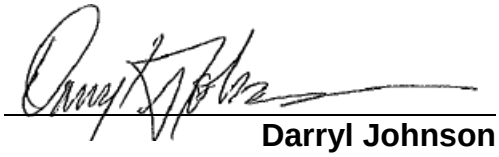

Darryl Johnson
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: **10/7/2014**

Date Mailed: **10/7/2014**

DJ/jaf

NOTICE OF APPEAL: A party may appeal this Hearing Decision in the circuit court in the county in which he/she resides, or the circuit court in Ingham County, within 30 days of the receipt date.

A party may request a rehearing or reconsideration of this Hearing Decision from the Michigan Administrative Hearing System (MAHS) within 30 days of the mailing date of this Hearing Decision, or MAHS may order a rehearing or reconsideration on its own motion.

MAHS may grant a party's Request for Rehearing or Reconsideration 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 party requesting a rehearing or reconsideration 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 this Hearing Decision is mailed.

A written request may be faxed or mailed to MAHS. If submitted by fax, 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

cc: [redacted]