

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

IN THE MATTER OF:



New Reg. No.: 2014-36085
Old Reg. No.: 2014-2491-RECON
Issue No.: 2008
Case No.: [REDACTED]
Hearing Date: December 3, 2013
County: Marquette County DHS

ADMINISTRATIVE LAW JUDGE: Darryl Johnson

DECISION AND ORDER OF RECONSIDERATION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; and Mich Admin Code 400.919 upon the Department of Human Services' (Department's) timely request for a reconsideration of the hearing decision rendered at the conclusion of the December 3, 2013, hearing conducted by the assigned Administrative Law Judge. The hearing decision was mailed on December 30, 2013. An order granting the request for reconsideration was mailed on August 7, 2013.

ISSUE

Did the assigned Administrative Law Judge err when she applied Bridges Eligibility Manual (BEM) 405 in reversing the Department's decision to deny Claimant's application for retroactive Medical Assistance (MA) or "Medicaid" benefits?

FINDINGS OF FACT

The undersigned Administrative Law Judge, upon a review of the entire hearing record, including the recorded testimony and evidence admitted, and based upon competent, material, and substantial evidence on the whole record, finds as material fact:

1. On January 31, 2013, the Claimant applied for Medicaid.
2. The Claimant passed away on April 12, 2013.
3. On July 23, 2013, the Department mailed the Claimant a Notice of Case Action that indicated the following: (1) Medicaid (Ad Care) approved for January 2013, through April 2013; (2) Medicaid denied May 2013 and ongoing; and (3) Medicaid (Ad Care) was denied effective June 1, 2013, and ongoing. The notice also indicated that there was a divestment penalty "for the [REDACTED] that was given to the client's daughter over the last 4 years."

4. On September 30, 2013, a request for hearing was filed on the Claimant's behalf.
5. On December 3, 2013, a hearing was conducted from Lansing, Michigan. Participants on behalf of Claimant included [REDACTED], Attorney, and [REDACTED], son. Participants on behalf of the Department of Human Services (Department) included [REDACTED], Assistant Attorney General, Pamela Ehnis, Assistance Payments Supervisor, and [REDACTED], Eligibility Specialist.
6. On December 30, 2013, the assigned Administrative Law Judge issued a hearing decision that reversed the Department and ordered the Department to redetermine Claimant's Medicaid eligibility retroactive to January, 2013.
7. On January 28, 2014, the Department requested a reconsideration of the hearing decision.
8. On August 7, 2014, an Order Granting Request for Reconsideration was entered.

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.

In her Decision and Order, the assigned ALJ set forth a thorough recitation of the facts as well as the applicable policies. Much of what she stated under the heading "Conclusions of Law" is incorporated herein.

BEM 405 addresses Medicaid Divestment. Divestment means a transfer of a resource by a client or his spouse that are all of the following: (1) is within a specified look back period; (2) is a transfer for less than fair market value; and (3) is not listed in the policy addressing transfers that are not divestment. 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. It is not divestment to transfer resources from the client to: (1) the client's spouse, or (2) another solely for the benefit of the client's spouse. 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 Department is to cancel a divestment penalty if either of the following occur before the penalty is in effect: (1) all the transferred resources are returned and retained by the individual, or (2) fair market value is paid for the resources. BEM 400 (1/1/2013) pages 1-12.

The Department determined that a divestment penalty would be applied for the [REDACTED] that was given to family, mostly to the Claimant's daughter, over the last four years. The Department asserted that the one fifth interest in a home in Wisconsin the Claimant's spouse received in return was less than fair market value and did not meet an exception for the transfer to not be considered a divestment. The Eligibility Specialist even sought policy clarification regarding cash being exchanged for another type of asset, specifically real property that is jointly owned. However, the Eligibility Specialist's testimony indicated she never verified the specifics of what name the one fifth interest in the home was put under on the deed. Additionally, there was no evidence that the Department attempted to verify if there was any willingness to sell by the joint owner(s) of the property.

The Claimant asserted that the transfer was not divestment because the one fifth interest in the home in Wisconsin was for more than fair market value of the [REDACTED] that was given to the Claimant's daughter and other family members. Specifically, that the one fifth interest in the home in Wisconsin had a value of [REDACTED]. Further, the Claimant's spouse's one fifth interest in the home in Wisconsin was put into a trust solely for the benefit of the Claimant's spouse. The Claimant's son testified that the Claimant spouse was 88 years old when the trust was established. The Claimant's son also stated that if it was in the best interest of the Claimant's spouse, she would be given the money for her share of the property or the property would be sold. Accordingly, it was asserted that the Claimant's spouse has not lost any control over the resource, which was returned at more than fair market value.

It was not contested that the Claimant's spouse was given the one fifth interest in the property in Wisconsin in January 2013 as a repayment for the funds totaling [REDACTED] given to the Claimant's daughter and other family members within the past 60 months. The December 22, 2012 Real Estate Payment Receipt documents an estimated fair market value of the home in Wisconsin of [REDACTED]. (Exhibit A page 27) Accordingly, the Claimant's spouse's one fifth interest in this property would have a fair market value of [REDACTED]. This is greater than the [REDACTED] given to the Claimant's daughter and other family members. BEM 405 is clear that divestment is a transfer of a resource by a client or his spouse for less

than fair market value, but also that the Department is to cancel a divestment penalty if fair market value is paid for the before the penalty is in effect. Further, BEM 405 also specifies that is it not divestment to transfer resources from the client to the client's spouse or another solely for the benefit of the client's spouse. On February 8, 2013, the Department determined that the trust is solely for the benefit of the Claimant's spouse, therefore the trust principal and income are non-countable for the purposes of determining the Claimant's eligibility. (Exhibit A, page 66)

In reviewing the email seeking policy clarification, the question asked did not indicate all of the relevant circumstances in this case. For example, the email indicated that the one fifth interest in the property was given to the Claimant and his spouse, rather than to the Claimant's spouse or to the trust solely for the benefit of the Claimant's spouse. Further, the information given with the question did not address whether or not there was a willingness to sell the property. It is noted that the emailed question cited an example from the BEM 405 policy that has a significantly different outcome when there is agreement to sell. In the example, when there was a willingness to sell, only the portion of the property given away was considered transferred. Additionally, the circumstances in the BEM 405 policy example were a bit different than what occurred in this case. In the example, the entire property was the resource and a portion of the equity was given away by the client. (Exhibit A, page 60; BEM 405) In this case, the resource was funds previously given away to the Claimant's daughter and other family members, which was repaid with an interest in a property to the Claimant's spouse that was for more than fair market value of the original resource and there is a willingness to sell if it is in the best interest of the Claimant's spouse.

The assigned ALJ found that the interest in the real estate was returned to the Claimant's spouse. That was not correct. As stated in her Decision and Order, "The Department is to cancel a divestment penalty if either of the following occur before the penalty is in effect: (1) all the transferred resources are returned and retained by the individual, or (2) fair market value is paid for the resources. BEM 400 (1/1/2013) pages 1-12." The Claimant's children attempted to return the assets to avoid the penalty period. However, instead of returning the assets (or their equivalent) to the individual, the assets were placed into a trust for the sole benefit of his spouse.

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

BEM 401 (7/1/14) provides the policy governing trusts in the context of MA. "Medicaid Trust" is defined at pages 5-6. The parties have agreed that this is a Medicaid Trust, so this Decision will not focus on that issue. At page 11, the Department is instructed to:

"Count as the person's countable asset the value of the countable assets in the trust principal if there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust. Real property (land) left to children in equal shares have no estate tax on the transfer of property,

"Count as the person's countable asset the value of the trust's countable income if there is any condition under which the income could be paid to or on behalf of the person. Individuals can keep income made off of property and the money goes to the individual not the trust. Property cannot be taken out of the trust."

Michigan has little case law that provides guidance for interpreting this policy. 42 USC 1382b defines “resources” and provides instructions for how resources are to be evaluated in determining eligibility for MA.

42 USC 1382b(e) instructs the Department to examine trusts to determine the individual’s resources.

(e) Trusts

(1) In determining the resources of an individual, paragraph (3) shall apply to a trust (other than a trust described in paragraph (5)) established by the individual.

(2)

(A) For purposes of this subsection, an individual shall be considered to have established a trust if any assets of the individual (or of the individual’s spouse) are transferred to the trust other than by will.

(B) In the case of an irrevocable trust to which are transferred the assets of an individual (or of the individual’s spouse) and the assets of any other person, this subsection shall apply to the portion of the trust attributable to the assets of the individual (or of the individual’s spouse).

(C) This subsection shall apply to a trust without regard to –

- (i) The purposes for which the trust is established;
- (ii) Whether the trustees have or exercise any discretion under the trust;
- (iii) Any restrictions on when or whether distributions may be made from the trust; or
- (iv) Any restrictions on the use of distributions from the trust.

(3)

(A) In the case of a revocable trust established by an individual, the corpus of the trust shall be considered a resource available to the individual.

(B) In the case of an irrevocable trust established by an individual, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual (or of the individual’s spouse), the portion of the corpus from which payment to or for the benefit of the individual (or of the individual’s spouse)

could be made shall be considered a resource available to the individual.

The trust was established for the benefit of the Claimant's spouse. As stated in page 2 of the Sole Benefit Trust for Irene E. Raisanen (Exhibit A, Page 26), "During each fiscal year of the Trust, Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime whatever part of the net income and principal (the "Resources") of the Trust that Trustee determines is necessary to distribute the resources on an *actuarially sound basis*."

The couple's children can place assets into the trust, and, as stated in paragraph (e)(2)(b) above, only the assets of the Claimant and his spouse are considered available assets. The 1/5 interest in the home therefore is not an available asset.

The Department, in its Motion for Reconsideration or Rehearing, states at page 10 that any transaction is required to be an "arm's length" transaction. This argument is without merit. While a transaction between family members is not an "arm's length" transaction, there can be a transaction between family members if fair market value is given. BEM 405 states at page 6: "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 (see glossary)." To offer an example, if an individual has a home with a fair market value of \$100,000, and the individual sells it to his son for \$100,000, that would not be an arm's length transaction, but the individual received an amount for the home equal to what would have been received if the home had been offered in the open market in an arm's length transaction. Therefore, in this example the individual did not receive "less than fair market value."

Perhaps most critical to deciding this case is the language found in BEM 405 at page 15 where it defines the policy regarding returned assets. That policy provides:

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. (BEM 405, p 15)

The policy requires the assets to be returned and retained by the individual. The parties all agreed that the gifts from the Claimant to his child(ren) constituted a divestment. The Claimant attempted to rectify the divestment – and avoid a penalty period – by having assets placed into a trust for the benefit of his wife. The steps they took were insufficient to avoid the penalty. To avoid the penalty, the assets had to be either returned and retained by the Claimant, or the children had to pay fair market value for

the resources. The evidence does not support a finding that the resources were returned and retained by the Claimant, because they went to a trust for his wife's benefit. The next step is to determine whether fair market value was paid for the resources. While the paragraph referencing "returned and retained" imposes the imperative that they be "returned and retained by the individual", the "fair market value" paragraph does not impose a mandate that the fair market value be paid to the individual. Implicit though, is that fair market value must be paid to the transferor, which in this case would be the Claimant and his spouse. Also implicit is that the fair market value is paid either contemporaneously with, or sometime after, the asset transfer. In other words, if an asset transfer occurred that would have resulted in a divestment penalty, and the transferee pays fair market value in return, the penalty could be avoided because the transferor is in the same net position financially.

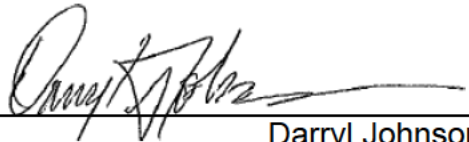
The Claimant bears the burden of proving an entitlement – or eligibility – for benefits. Rutherford v Dep't of Social Services, 193 Mich App 326; 483 NW2d 410 (1991). Claimant alleges that his ownership of a 1/5 interest in real estate valued at [REDACTED] is worth \$54,302. Because the Claimant only gave away [REDACTED], the argument is that the Claimant received fair market value in return for the gifts. There was testimony that the property could be sold if it would be in the spouse's best interest and she would be given the money. The evidence does not include a copy of the document by which the spouse's trust acquired title to the property. In any case, it is understood that the spouse's trust has a 20% interest in the real estate. Neither Claimant, nor his spouse, received consideration in return for the [REDACTED] that was given away during the look back period. Furthermore, there is no evidence in the record that a one-fifth interest in the property has a value of [REDACTED] or more. Perhaps if the property were sold it would prove to be fair market value, but there is no evidence that a co-owner of 20% of a parcel of real estate could sell his or her interest in the property for 20% of the presumed value of that real estate.

This Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, finds that the Department acted in accordance with Department policy when it determined that Claimant was subject to a divestment penalty period as a result of the gifts.

DECISION AND ORDER

The undersigned Administrative Law Judge, based upon the above findings of fact and conclusions of law, VACATES the ALJ Hearing Decision under Registration Number 2014-2491, and affirms the Department's July 23, 2013, MA Notice of Case Action.

Accordingly, ALJ Lack's decision is reversed. The Department's decision is **AFFIRMED**.



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

Date Signed: **12/9/2014**

Date Mailed: **12/10/2014**

DJ/sw

NOTICE: The law provides that within 30 days of receipt of the this Decision, the Claimant may appeal it to the circuit court for the county in which he/she lives or the circuit court in Ingham County.

cc:

