

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

IN THE MATTER OF:

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Reg. No.: 15-013068
Issue No.: 2008
Case No.: ██████████
Hearing Date: September 10, 2015
County: Wayne-District 82

ADMINISTRATIVE LAW JUDGE: Alice C. Elkin

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; and Mich Admin Code, R 792.11002. After due notice, a telephone hearing was held on September 10, 2015, from Detroit, Michigan. Attorney ██████████ represented Claimant. ██████████, Assistant Attorney General, who participated via telephone conference, represented the Department. Appearing on behalf of the Department were ██████████, Assistance Payment Supervisor; ██████████, Eligibility Specialist; and ██████████, Eligibility Specialist, who participated via telephone conference.

Hearing briefs were provided by both parties and reviewed in connection with this Hearing Decision.

ISSUE

Did the Department properly conclude that Claimant divested assets totaling \$██████████ and apply a divestment penalty to Claimant's receipt of long-term care (LTC) benefits under the Medical Assistance (MA) program?

FINDINGS OF FACT

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

1. Between July 2010 and May 2014, Claimant gave her adult son J a total of \$██████████ (Exhibit A, pp. 21-22).
2. On June 6, 2014, J executed a promissory note (the Note) agreeing to pay Claimant the sum of ██████████, together with interest in the amount of 4.125%, with the first payment due July 15, 2014. The Note provided that (i) it was intended to

be actuarially sound, (ii) all payments were to be in equal amounts, with no deferral of any payments and no balloon payments, and (iii) it was not cancelled upon Claimant's death and would remain in full force and effect until fully repaid notwithstanding Claimant's death. An amortization table with the Note showed that J was required to make monthly payments of [REDACTED] for the five year period from July 15, 2014 to June 15, 2019. (Exhibit A, pp. 19-24).

3. On July 7, 2014, J filed a chapter 7 bankruptcy petition in the United States Bankruptcy Court, [REDACTED].
4. In an order dated October 8, 2014, the Honorable [REDACTED] granted J a discharge of unsecured nonpriority claims, including the \$217,650 under the Note owing to Claimant (Exhibit A, pp. 30-34).
5. On October 14, 2014, Claimant gifted [REDACTED] to her sons D and S (Exhibit A, pp. 17-18).
6. On October 31, 2014, Claimant, an LTC resident, applied for MA (Exhibit A, pp. 1-7).
7. On April 10, 2015, the Department sent Claimant a Health Care Coverage Determination Notice informing her that she was eligible for MA but that a divestment penalty applied from October 1, 2014 to January 23, 2018 during which time she was not eligible for LTC benefits.
8. On July 2, 2015, Claimant's counsel submitted a request for hearing disputing the Department's calculation of the divestment penalty.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Department of Health and Human Services Bridges Eligibility Manual (BEM), Department of Health and Human Services Reference Tables Manual (RFT), and Department of Health and 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 Department of Human Services) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

Medicaid is a federal-state cooperative program established by Title XIX of the Social Security Act of 1965 to assist needy individuals with medical expenses. 42 USC 1396-1396w-5. States are not required to participate in the Medicaid program, but states that do must comply with federal law and regulations in administering the program. *Mackey v Dep't of Human Servs*, 289 Mich App 688, 693; 808 NW2d 484 (2010), citing, in part, *Atkins v Rivera*, 477 US 154, 156-157; 106 S Ct 2456; 91 L Ed 2d 131 (1986). Michigan participates in the Medicaid program, and the Department administers the program, generally referred to as the Medical Assistance (MA) program, under MCL 400.105-.112k and Department policies contained in the Bridges Eligibility Manual (BEM). BEM 105 (October 2014), p. 1.

In Michigan, assistance with LTC costs is available under MA SSI-related categories for eligible individuals who have countable resources of \$2,000 or less and have not disposed of any assets for less than fair market value during the five years prior to application. BEM 105, p. 1; BEM 163 (July 2013), pp. 1-2; BEM 164 (October 2014), pp. 1-2; BEM 166 (July 2013), pp. 1-2. If an applicant is determined asset-eligible for MA, the Department reviews any transfer of assets made by the individual prior to application. BEM 405 (July 2014), pp. 1-9, 12-16. If an applicant for LTC MA benefits has divested assets, the client may be eligible for MA but a divestment penalty will apply to the client's case during which time MA will not pay the client's expenses for LTC services but will pay for other MA-covered services. BEM 405, p. 1.

In this case, Claimant's counsel acknowledges that Claimant gifted [REDACTED] to her sons D and S and that the Department properly considered that [REDACTED] as divested assets. While counsel agrees that the divestment penalty properly included [REDACTED] gifted to D and S, he argues that it improperly included [REDACTED] in funds Claimant transferred to J because those funds were a loan as evidence by the Note. At issue is whether the Department properly included among the funds Claimant divested the [REDACTED] Claimant transferred to her son J in a series of transactions between July 15, 2010 and May 1, 2014.

A divestment occurs when the client transfers a resource (i) within a specified time (the "look-back period"), (ii) for less than fair market value, and (iii) the transfer is not an excluded transfer. BEM 405, p. 1. The look-back period is a transfer within 60 months of the first date that the client was eligible for MA and one of the following: in LTC, approved for the waiver, eligible for Home Health services, or eligible for home help services. BEM 405, pp. 5-6. "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. BEM 405, p. 7. In other words, 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, p. 7. Compensation must have tangible form and intrinsic value. BEM 405, p. 7. Giving an asset away is a transfer that results in a divestment. BEM 405, p. 2. Similarly, shell transactions between relatives that have little or no economic benefit to the applicant are not for fair market value and are a divestment. *Mackey*, 289 Mich App at 706.

In this case, the evidence showed that (1) the transfers at issue involved two relatives, Claimant and her adult son; (2) the Note evidencing that the disbursements by Claimant to J were intended as a loan was not executed until June 2014, four years after Claimant made the first disbursement to J in July 2010 and one month after she made the last disbursement in May 2014; (3) the Note was not secured by J's real or personal property; (4) there was no evidence that Claimant ran a credit check or otherwise investigated J's solvency at the time she received the Note; (5) J petitioned for bankruptcy in July 2014, a month after executing the Note; (6) J did not make any of the monthly payments to Claimant under the Note; (7) J's indebtedness under the Note was discharged by the bankruptcy court on October 8, 2014, four months after J executed the Note and the same month Claimant applied for MA; and (8) Claimant applied for MA on October 31, 2014, when the Note was worthless. These circumstances evidence that the \$[REDACTED] Claimant disbursed to J was a gift and the execution of the Note to Claimant involved a shell transaction between relatives that gave Claimant little or no economic benefit. Therefore, the transaction was properly characterized by the Department as a divestment.

In support of its position, the Department also points to the Social Security Administration's (SSA's) Program Operations Manual System (POMS). While the POMS, the policy and procedure manual used in evaluating Social Security claims, is not binding authority, it is entitled to some consideration even in evaluating Medicaid claims. *Davis v Sec'y of Health and Human Servs*, 867 F2d 336, 340 (CA 6, 1989); *Landy v Velez*, 958 F Supp 2d 545, 553 (D NJ, 2013); 70A Am Jur 2d, Social Security and Medicare § 16. POMS SI 01120.220(D)(2) acknowledges that a loan may be written or oral but provides that it is a bona fide loan only if the loan agreement is in effect at the time that the lender provides the cash to the borrower, explaining that money given to an individual with no contemporaneous obligation to repay cannot become a loan at a later date. One of the circumstances considered in evaluating whether the loan is bona fide is whether the repayment plan is feasible in light of the amount of the loan, the individual's resources and income, and the individual's living expenses. POMS SI 01120.220(D)(5).

In this case, the fact that the Note was not executed contemporaneously with the disbursement of funds but was executed just before the MA application was submitted evidences that the money given to J was not intended as a loan. The fact that J lacked the resources to repay the alleged loan, as evidenced by his filing for bankruptcy one month after executing the Note and one week before the first payment under the Note was due, leads to the conclusion that the repayment plan was not feasible. Thus, under the POMS, the Note does not evidence a bona fide loan. See also *Landy*, 958 F Supp 2d at 556-561 (applying POMS SI 01120.220 to the analysis of the plaintiffs' eligibility for Medicaid where the plaintiffs contend that promissory notes evidence a bona fide loan).

In response to the Department's position that the transfer of funds to J was a divestment, Claimant's counsel argues that the Note, by the express terms of 42 USC

1396p(c)(I) and BEM 400 (October 2014), p. 39, is not a divestment. 42 USC 1396p(c)(1)(I) provides as follows:

For purposes of this paragraph with respect to a transfer of assets, the term “assets” includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage—

(i)

has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(ii)

provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

(iii)

prohibits the cancellation of the balance upon the death of the lender.

In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of clauses (i) through (iii), the value of such note, loan, or mortgage shall be the outstanding balance due as of the date of the individual's application for medical assistance for services described in subparagraph (C).

Consistent with these terms, BEM 400, p. 39 provides that all money used to purchase a promissory note, loan, or mortgage is counted as a divestment unless all of the following are true: (i) the repayment schedule is actuarially sound; and (ii) the payments are made in equal amounts during the term of the agreement with no deferral of payments and no balloon payments; and (iii) the note, loan, or mortgage must prohibit the cancellation of the balance upon the death of the lender.

The Note in this case meets the three criteria outlined in BEM 400 and § 1396p(c)(1)(I).¹ However, a promissory note is evaluated under BEM 400 and § 1396p(c)(1)(I) only when money was used to purchase the promissory note. As indicated above, the circumstances in this case do not evidence that Claimant's funds were used to purchase the Note. Where J executed the Note four years after the first funds were transferred to him, where J did not have any intention of repaying the Note as evidenced by the fact that he filed for bankruptcy the month after he executed it, and where Claimant did not take any steps to ensure that J had the financial means to pay the terms of the Note, Claimant did not use her funds to purchase the Note. Therefore, the Note is properly not evaluated to determine whether it satisfies the criteria in BEM 400 and § 1396p(c)(1)(I) to be an exclusion from divestment.

¹ Contrary to the Department's position at the hearing, the requirement that a promissory note state that it is non-salable and non-transferable is used to determine whether the note is an asset or payments on the note are income and is not relevant to the assessment of whether the funds used to purchase the promissory note are a divestment. BEM 400, p. 40.

It is further noted that Claimant presented no evidence to support her position that the transfer of funds to J was not a divestment. While Department policy provides that transfers exclusively for a purpose other than to qualify or remain eligible for MA are not divestment, transfers for less than fair market value are assumed to be for eligibility purposes "until the client . . . provides convincing evidence" that she had no reason to believe LTC service might be needed. BEM 405, p. 11. In his hearing brief, Claimant's counsel argues that Claimant was in her mid-80s when she made the transfers to J and BEM 405 created a difficult hurdle for an ■■■ year old woman to establish that the transfers were for a purpose other than to qualify for Medicaid. However, Claimant had a hearing to establish her case and presented no evidence to support her position that she had no reason to believe LTC services might be needed when the transfers to J were made. In the absence of such evidence, Claimant has failed to establish that the transfers to J were not divestments.

Based on the evidence in this case, the Department properly concluded that Claimant divested ■■■■ to J. Claimant's counsel does not dispute the mathematical calculation of the divestment penalty when the divestment includes these funds.

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 when it included the ■■■■ Claimant disbursed to J in its calculation of the divestment penalty.

DECISION AND ORDER

Accordingly, the Department's decision is **AFFIRMED**.



Alice C. Elkin
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

Date Signed: **10/8/2015**

Date Mailed: **10/8/2015**

ACE / tlf

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

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