

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

IN THE MATTER OF:

[REDACTED]

MAHS Reg. No.: 15-012980 & 15-015519
Issue No.: 2004, 2008
Agency Case No.: [REDACTED]
Hearing Date: November 05, 2015
County: Allegan

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; and Mich Admin Code, R 792.11002. After due notice, a telephone conference hearing was held on November 5, 2015, from Lansing, Michigan. [REDACTED] ([REDACTED] appeared on behalf of Claimant as his Authorized Hearing Representative (AHR). [REDACTED] (Claimant's spouse) testified as a witness for Claimant. Assistant Attorney General (AAG) [REDACTED] ([REDACTED] represented the Department of Health and Human Services (Department). The following individuals testified as witnesses for the Department: [REDACTED] (Long Term Care Specialist), [REDACTED] (Assistance Payments Specialist) and [REDACTED] (Medicaid Eligibility Policy Specialist).

ISSUE(S)

- I. Did the Department comply with the standard of promptness concerning Claimant's application for Long Term Care (LTC) Medical Assistance (MA)/Medicaid benefits?
- II. Did the Department properly determine that Claimant had divested himself of assets to warrant the imposition of a penalty?

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 entered a LTC nursing facility on or about July 29, 2013. (Exhibit A-4).
2. On or about November 20, 2014, Claimant's spouse loaned funds to [REDACTED] (Claimant's daughter) in the form of a promissory note, which set forth the following:

- a. The principal sum amount is \$ [REDACTED] together with interest at the rate of one and nine-tenths percent ([REDACTED] per annum. (Exhibit E-40).
 - b. Three equal payments of \$ [REDACTED] to be paid on December 20, 2015, January 20, 2017 and February 20, 2018 (when all unpaid principal and interest shall be paid in full). (Exhibit E-40).
 - c. "Holder has no right to any payment under this Note until such payment comes due." (Exhibit E-40).
 - d. The promissory note is represented by the transfer of several assets. (Exhibit E-45).
3. On November 25, 2014, Claimant's spouse submitted an application seeking LTC Medicaid benefits on Claimant's behalf. (Exhibit A-4, A-5).
 4. From December 4, 2014 through February 6, 2015, [REDACTED] (Department LTC Specialist) sent emails to the Department's Legal Office and to the Department's Trust and Annuities Unit inquiring about the effect of several promissory notes contained in the file relative to Claimant's MA eligibility. (Exhibit D-26 through D-32).
 5. On February 11, 2015, the Department's Legal Office informed the LTC Specialist that the current promissory note (\$ [REDACTED] should be treated as a divestment due to the deferral of payments and that payments are to begin within 1 year from the installation of the Note. (Exhibit F-57).
 6. On February 12, 2015, the LTC Specialist discovered that the Department's computer system ("Bridges") used the 2015 divestment factor of \$ [REDACTED] rather than the 2014 divestment factor of \$ [REDACTED]. The Department requested a ticket to correct the error. (Exhibit F-57 & MAHS Reg. #15-012980; Exhibit 1, A-4).
 7. On June 19, 2015, the Department received a letter from Claimant's attorney (dated June 8, 2015) which inquired about the status of the pending ticket and the November 25, 2015 application. (MAHS Reg. #15-012980; Exhibit 1, C-12).
 8. On June 22, 2015, the LTC Specialist was informed that the ticket had been resolved. (MAHS Reg. #15-012980; Exhibit 1, A-5, A-6).
 9. On June 24, 2015, the LTC Specialist discovered that the ticket was not correct as the Department incorrectly calculated the divestment determination end date. The end date should be March 16, 2019. As a result, another ticket was requested. (MAHS Reg. #15-012980; Exhibit 1, 1-6).
 10. On June 24, 2015, the LTC Specialist sent an email to an employee of Claimant's attorney's office that the ticket had not yet been resolved. (MAHS Reg. #15-012980; Exhibit 1, B-8).

11. On July 13, 2015, the Department received a request for hearing filed by Claimant's attorney which protested the Department's delay in processing the application. (MAHS Reg. #15-012980; Exhibit 1, pp. 1-2).
12. On July 27, 2015, the Department reopened the ticket. (Exhibit 1, F-57).
13. On or about August 18, 2015, the Department resolved the ticket. (Exhibit 1, F-57).
14. On August 18, 2015, the Department mailed Claimant's attorney a Health Care Coverage Determination Notice (DHS-1606) which indicated the following:
 - a. Claimant's application for LTC Medicaid was approved. (Exhibit C-19).
 - b. Claimant had a monthly patient pay amount (PPA) of \$ [REDACTED] effective November 1, 2014 through December 31, 2014. (Exhibit C-19).
 - c. Claimant's monthly PPA was \$ [REDACTED] effective November 1, 2015 ongoing. (Exhibit C-19).
 - d. Claimant's spouse had a baseline date of November 1, 2014. (Exhibit C-19).
 - e. Medicaid will not pay for LTC and community-based waiver services from August 1, 2015 through January 16, 2020 because Claimant or his spouse transferred assets or income for less than fair market value. (Exhibit C-19).
 - f. Claimant divested a total of \$ [REDACTED] (\$ [REDACTED] from promissory note) and \$ [REDACTED] which was gifted to [REDACTED] and [REDACTED]. (Exhibit E-34, E-37, E-41, and Exhibit E-56). The divestment penalty period is 4 years, 5 months and 16 days. (Exhibit F-57).
15. The Michigan Administrative Hearing System (MAHS) assigned Claimant's July 13, 2015 request for hearing as Registration Number 15-012980.
16. On August 19, 2015, the Michigan Administrative Hearing System (MAHS) mailed a Notice of Hearing to all interested parties which scheduled a hearing for September 17, 2015. (See Notice of Hearing, MAHS Reg # 15-012980).
17. On August 28, 2015, Claimant's attorney requested a hearing to dispute the Department's decision to apply a penalty period from November 1, 2014 through March 16, 2019 and to dispute the Department's determination of the \$ [REDACTED] penalty amount. (Exhibit A, pp. 2-3).
18. On or about September 2, 2015, the MAHS received a Motion to Consolidate filed by Claimant's attorney. Claimant's motion requested the MAHS consolidate the July 13, 2015 request for hearing and Claimant's August 28, 2015 request for hearing into one hearing. (Motion to Consolidate).

19. On or about September 3, 2015, the MAHS assigned Claimant's August 28, 2015 request for hearing as Registration Number 15-015519.
20. On September 3, 2015, the MAHS issued an Order Converting Hearing to Telephone Pre-Hearing Conference. The September 17, 2015 hearing was converted to a formal telephone prehearing conference. (Order; Reg #15-015519).
21. On September 15, 2015, the MAHS received an Appearance of Counsel and Request to Participate in Administrative Hearings by Telephone filed by AAG [REDACTED]. (Appearance; Reg #15-015519).
22. On September 18, 2015, the MAHS issued a Pre-Hearing Conference Summary and Order; Notice of Telephone Conference Hearing, which, among other things: (1) ordered consolidation of both matters (Reg #15-012980 and Reg #15-015519); (2) indicated case deadlines; and (3) scheduled the hearing in this matter for November 5, 2015. (PHC Summary and Order; Notice of Telephone Conference Hearing).
23. The hearing on both matters took place on November 5, 2015.

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).

As indicated above, Claimant submitted two separate requests for hearing. In the first request for hearing (Reg #15-012980), Claimant contends that the Department violated the standard of promptness when it failed to timely process his November 25, 2014 application for LTC Medicaid benefits. In the second request for hearing (Reg #15-015519), Claimant disputes the Department's determination that his LTC Medicaid eligibility, based on a promissory note, should be considered a divestment. These issues will be addressed separately.

Standard of Promptness

The Department defines the standard of promptness (SOP) as, "[T]he number of days (as prescribed in each program's policy) which a local office is allowed for completing a determination of eligibility and/or other case action. Bridges Program Glossary (BPG) (7-1-2015), p. 62. The SOP begins the date the department receives an application/filing form, with minimum required information. BAM 115 (7-1-2015), p. 15.

Policy requires the Department process applications and requests for member adds as quickly as possible, with priority to the earliest application date. BAM 115, p. 15. With regard to the Medical Assistance (MA) program, the Department must "[c]ertify program

approval or denial of the application within 45 days.” BAM 115, p. 15. The SOP for an **initial asset assessment** begins the date the local office receives a signed DHS-4574-B, Assets Declaration. Complete the assessment and mail the client and spouse a notice within 45 days. BAM 115, p. 16.

For all programs, Department policy provides that as soon as possible, the Department employee must document and correct benefits approved or denied in error by changing Data Collection, running Eligibility Determination Benefit Calculation (EDBC) and certifying the results. Bridges¹ sends the client a timely or adequate notice as appropriate for department error corrections resulting in: (1) program eligibility or ineligibility; (2) increased or decreased need; or (3) higher or lower patient-pay amount. BAM 115, p. 31.

For the MA program, the period of erroneous coverage **cannot** be removed from or reduced in Bridges. BAM 115, p. 31. For all programs, if an application is **not** processed by the standard of promptness (SOP) date, [the Department employee must] document the reason(s) in the case record. Then, the Department worker must document further delays at 30-day intervals. BAM 115, p. 32.

Here, Claimant argues that the Department violated the 45 day SOP because it failed to properly process his November 25, 2014 application until August 18, 2015. Claimant also argues that the Department’s delay of 259 days deprived Claimant of his state and federal due process rights. The Department does not dispute that it failed to process the application within the standard of promptness. However, the Department contends that the delays were due to a Bridges computer error and that it acted reasonably under the circumstances. The Department further argues that the ALJ only has the power to order the Department to process a pending application under these circumstances.

Administrative law judges have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulations or overrule or make exceptions to the department policy set out in the program manuals. See Delegation of Hearing Authority, August 9, 2002, per PA 1939, Section 9, Act 280. Rather, the ALJ determines the facts based only on evidence introduced at the hearing, draws a conclusion of law, and determines whether DHS policy was appropriately applied. The ALJ issues a final decision unless the ALJ believes that the applicable law does not support DHS policy or DHS policy is silent on the issue being considered. BAM 600 (4-1-2015), p. 38.

It is well-settled law that an administrative adjudicator does not have authority to decide constitutional issues. *Dation v Ford Motor Co*, 314 Mich 152 (1946); *Flanigan v Reo*

¹ The goal of Bridges is to improve service delivery and workload reduction by replacing the separate automated systems (ASSIST, CIMS and LOA2) with a single integrated service delivery system. Bridges provides a modern technology platform that will support eligibility and benefit determinations for cash, medical and food assistance programs, child care services and the state emergency relief program. Bridges enables MDHHS staff to provide more timely, accurate and comprehensive delivery of services to the citizens of Michigan. See BPG at p. 9.

Motors, Inc, 300 Mich 359 (1942); *Mackin v Detroit Timkin Axle Co*, 187 Mich 8 (1915). Furthermore, established Michigan case law provides that administrative adjudication is an exercise of executive power rather than judicial power, and restricts the granting of equitable remedies. *Michigan Mutual Liability Co, v Baker*, 295 Mich 237; 294 NW 168 (1940).

This Administrative Law Judge finds that the Department did violate the SOP under BAM 115 when it failed to process Claimant's application for LTC Medicaid. However, the Department is correct that the undersigned lacks the requisite authority to declare that the delay violated Claimant's constitutional due process rights. In addition, the record shows that the Department, after considerable delay, eventually processed Claimant's application. Once that occurred, the ALJ is without any authority to provide Claimant with a remedy. As indicated above, Administrative Law Judges generally do not have the power to decide constitutional issues nor can ALJs provide equitable relief.

An issue is moot when the occurrence of an event renders it impossible for the court to fashion a remedy. *Menominee County Taxpayers Alliance, Inc v Menominee County Clerk*, 139 Mich App 814, 362 NW2d 871 (1984). See also *Michigan Chiropractic Council v Comm'r of Insurance*, 475 Mich 363, 372; 716 NW2d 561 (2006). Because the undersigned cannot take further action concerning this issue, the issue is moot.

Divestment

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.

The Medicaid program was created by Congress with the intent "to provide benefits to the truly needy." *Mackey v Dep't of Human Servs*, 289 Mich App 688, 697; 808 NW2d 484 (2010). "To be eligible for Medicaid long-term-care benefits in Michigan, an individual must meet a number of criteria, including having \$2,000 or less in countable assets." *Mackey* at 698. In some cases, persons with wealth have transferred their assets for less than fair market value in order to become eligible for Medicaid. See *Mackey* at 698-699. The typical purpose of such transfers is to "pass on . . . accumulated wealth" within the family unit. See *Mackey* at 697. To avoid this misuse of the Medicaid system, however, a state examines all transfers of assets within a specified time frame to determine whether the transfers were made "solely to become eligible for Medicaid, which can be established if the transfer was made for less than fair market value." *Mackey* at 696. This time frame is the "look-back period." *Mackey, supra*. "A transfer for less than fair market value during the 'look-back' period is referred to as a 'divestment.'" *Mackey, supra*. A divestment "subjects the applicant to a penalty period during which payment of long-term-care benefits is suspended." *Mackey, supra*.

A “divestment” is a transfer of assets that would create a penalty period. BEM 405 (7-1-2015), p. 1. The “penalty period” is a period of disqualification from Medicaid assistance for Long Term Care (LTC).² 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. 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, p. 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, p. 2. Not all transfers are divestment. BEM 405, p. 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 trust³; (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, p. 2.

According to BEM 405, p. 3, transfers by any of the following individuals are considered transfers by the client or spouse: (1) parent for minor; (2) legal guardian; (3)

² LTC means being in any of the following: (1) a nursing home that provides nursing care; (2) a county medical care facility that provides nursing care; (3) a hospital long-term care unit; (4) a MDHHS facility that provides active psychiatric treatment; (5) a special MR nursing home; or (6) a MDHHS facility for individuals with intellectual disability that provides ICF/ID (Intermediate Care Facility for Individuals with Intellectual Disability) nursing care. A person may receive hospice care in one of these facilities. He [or she] is still considered in LTC. Bridges Program Glossary (BPG), pages 33, 39.

³ See BEM 401.

conservator; (4) court or administrative body; (5) anyone acting in place of, on behalf of, at the request of or at the direction of the client or the client's spouse.

Transfers that occur on or after a client's baseline date must be considered for divestment. BEM 405, p. 5. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment. BEM 405, p. 5. A divestment determination is not required unless, sometime during the month being tested, the client was in a penalty situation. BEM 405, p. 5. 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, p. 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. 6. 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). BEM 405, p. 6.

Compensation must have tangible form and intrinsic value. BEM 405, p. 6. Relatives can be paid for providing services; however, assume services were provided for free when no payment was made at the time services were provided. BEM 405, p. 6. A client can rebut this presumption by providing tangible evidence that a payment obligation existed at the time the service was provided (for example a written agreement signed at the time services were first provided). It should be noted that the policy in BAM 130 which allows the Department to use "the best available information" or "the best judgment" as verification does **not** apply. BEM 405, pp. 6-7.

When a person gives up his (or her) right to receive income, the fair market value is the total amount of income the person could have expected to receive. BEM 405, p. 7 (Emphasis added).

Transfers exclusively for a purpose other than to qualify or remain eligible for MA are not divestment. BEM 405, p. 11.

The Department will 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. BEM 405, p. 11.

A client can be penalized if he or his spouse divests. BEM 405, p. 15. The penalty is imposed on whichever spouse is in a Penalty Situation; see BEM 211, MA Group Composition. BEM 405, p. 15. If both spouses are in a penalty situation, the penalty period (or any remaining part) must be divided between them. BEM 405, p. 15.

According to Department policy, for SSI-Related MA only, a [promissory] note is a written promise to pay a certain sum of money to another person at a specified time. The note may call for installment payments over a period of time (installment note) or a

single payment on a specified date. The most common type of note involves the sale of real property and is called a land contract or a mortgage. A homeowner might also sell their home via a sale-leaseback agreement. The person who sold the property is holder of the note. The note is the holder's asset. See BEM 400 (7-1-2015), p. 40.

This policy further provides:

All money used to purchase a promissory note, loan, or mortgage must be treated as a transfer of assets 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 **BEM 405 Uncompensated Value** to determine the value.

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

See BEM 400, p. 40.

In the instant matter, Claimant contends that the Department incorrectly determined that the promissory note in question was a divestment and erroneously found the penalty period end date of January 16, 2020. Claimant explains that the Department's error arose from an improper interpretation of BEM 400 at page 40. Specifically, Claimant argues that all the money used to purchase the promissory note in question, should not have considered a divestment because: (1) the payments were made in equal installments; (2) there was no deferral of payments; and (3) there were no balloon payments.

The Department, on the other hand, argues that the divestment decision was proper because Claimant's use of a promissory note was merely a method to reclassify the transfer of assets as a loan rather than a gift in order to procure Medicaid eligibility. The Department contends that the terms of the promissory note in question which includes a deferral of the first payment after 15 months is not a transaction for fair market value and is considered a transfer of assets. The Department interprets BEM 400, page 40 through the lens of a commercial loan and/or contract. The Department argues that the terms of the promissory note in question contain a deferral of the first payment of more than a year, and, therefore, constitutes a transfer of assets for purposes of divestment.

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 parties sharply disagree about the interpretation of BEM 400, page 40 with regard to the promissory note in question. (See Exhibit 1, E-40). The promissory note allows repayment to begin 13 months later. The Department interprets this as a deferral which is a transfer of assets as defined by BEM 400, p 40. While, Claimant, on the other hand, contends that the note meets the exceptions in BEM 400, p. 40 and does not meet the definition of a deferral. In other words, Claimant argues that the terms of this promissory note does not allow the borrower to skip a payment, rather the terms merely allow the borrower to make annual installments, which is not prohibited.

The Deficit Reduction Act of 2005 ("DRA") 42 U.S.C. §1396 et seq., was enacted in order to control national spending. A portion of the DRA included changes to Medicaid eligibility requirements, including the use of promissory notes. Congress required states to comply with DRA provision in order to receive federal Medicaid funding. With regard to promissory notes, DRA directed that a promissory note entered into on, or after, February 8, 2006, requires the following: (1) the repayment term of the promissory note must be actuarially sound; (2) payments must be made in equal amounts during the term of the promissory note; and (3) the promissory note must prohibit the cancellation of the balance upon the death of the lender.

Before the DRA, a Medicaid applicant could show that a transaction was a loan to a third party (uncountable asset) rather than gift (countable asset) by presenting promissory notes, loans, or mortgages at the time of the Medicaid application. However, Congress considered this planning strategy to be abusive, so it enacted the DRA to impose restrictions on the use of promissory notes, loans, and mortgages. The promissory note requirements are contained in BEM 40, page 40.

In the instant matter, there is no dispute that the promissory note requires three equal payments of \$ [REDACTED] to be paid on [REDACTED], [REDACTED] and [REDACTED], respectively. (Exhibit E-40). However, the central question is whether the note contains a payment deferral.

This Administrative Law Judge finds that the [REDACTED] promissory note which did not require the first principal payment of \$ [REDACTED] until 15 months later on [REDACTED] is not a transaction for fair market value. The Department's interpretation that a promissory note with terms that allow repayment to be delayed for more than 1 year is not an arm's length transaction and is less than fair market value is reasonable. "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. 6. 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, p. 6.

The Department defines "fair market value" as "[t]he amount of money the owner would receive in the local area for his asset (or his interest in an asset) if the asset (or his interest in the asset) was sold on short notice, possibly without the opportunity to realize the full potential of the investment. That is, what the owner would receive and a buyer be willing to pay on the open market and in an arm length transaction." See Bridges Program Glossary (BPG) (7-1-2015), p. 25. An "arm's length transaction" is "a transaction between two parties who are not related and who are presumed to have roughly equal bargaining power. It consists of all the following three elements: (1) it is voluntary; (2) each party is acting in their own self-interest; and (3) it is on an open market. By definition a transaction between two relatives is not an arm length transaction. BPG, p. 6.

Here, the Administrative Law Judge agrees that the promissory note in question does not reflect a voluntary arm's length transaction between two parties with equal bargaining power. In fact, this promissory note from Claimant's spouse to her daughter that does not require repayment of a loan until 13 months later should be viewed under the totality of the circumstances rather than in a vacuum. Here, Claimant's spouse, in an attempt to obtain Medicaid eligibility to pay for LTC expenses, decided to loan more than \$ [REDACTED] in funds to her daughter but did not allow repayment of the loan to begin until 13 months and applied for Medicaid only a few days later. This is not consistent with the intent of the Medicaid program which is to provide benefits to the truly needy. See *Mackey, supra*.

This is a matter of substance over form. The promissory note at issue, which permits Claimant's daughter to delay her first payment of this loan for 1 year, functions as a deferral of payment for purposes of the requirements of BEM 400, p. 40. In this regard, the Department's interpretation of BEM 400, p. 40 that a promissory note that delays repayment for a period in excess of 30 days constitutes a deferral, is a reasonable construction under these circumstances and is consistent with the Department's authority to adopt and interpret its rules. *Clonlara, Inc v State Bd of Education*, 442 Mich 230; 501 NW2d 88 (1993).

The Administrative Law Judge (ALJ) reviewed the entire record in this matter and concludes that there was a divestment of assets when Claimant's spouse transferred \$ [REDACTED] to Claimant's daughter in the form of a promissory note. (Exhibit E-40). The promissory note contains a deferral of payment and is a transfer of assets. In addition, the Department also correctly determined the divestment amount of \$ [REDACTED] based upon the \$ [REDACTED] promissory note and the gifts of \$ [REDACTED]. Accordingly, the Department has established this case by the necessary competent, substantial and material evidence on the whole record.

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 determined that Claimant's Medicaid eligibility was subject to a divestment.

DECISION AND ORDER

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



C. Adam Purnell
Administrative Law Judge
for Nick Lyon, Director
Department of Health & Human Services

Date Mailed: 11/16/2015

CAP/las

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 copy of the claim or application for appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Hearing Decision from 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 48909-8139

cc:

