

**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.: 15-016734
Issue No.: 2008
Agency Case No.: [REDACTED]
Hearing Date: November 12, 2015
County: Chippewa

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 12, 2015, from Lansing, Michigan. Claimant's attorney [REDACTED] represented Claimant as his Authorized Hearing Representative (AHR). Assistant Attorney General (AAG) [REDACTED] represented the Department of Health and Human Services (Department). [REDACTED] (Eligibility Specialist) testified as a witness for the Department.

ISSUES

Did the Department properly determine that Claimant had divested herself of assets to warrant the imposition of a penalty?

Did the Department properly determine that Claimant failed to properly cure the divestment?

FINDINGS OF FACT

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

1. On November 12, 2009, Claimant sold her home via land contract for \$ [REDACTED] [Exhibit 1, pp. 37-38].
2. Claimant used the proceeds from the sale of her home and gave cash gifts to [REDACTED] (Claimant's son) and to [REDACTED] (Claimant's daughter-in-law) under the following terms:
 - a. \$ [REDACTED] (December, 2010). [Exh. 1, p. 40].

- b. \$ [REDACTED] (January, 2011). [Exh. 1, p. 40].
- c. \$ [REDACTED] (January, 2012). [Exh. 1, p. 40].
3. Claimant entered a long-term care (LTC) facility on or about February 3, 2015. [Exh. 1, p. 44].
4. On April 10, 2015, Claimant's son and daughter-in-law entered into a purchase agreement with Claimant concerning the home which contained the following conditions:
 - a. Claimant purchased the home from Claimant's son and daughter-in-law.
 - b. The purchase price was \$ [REDACTED]
 - c. Claimant's son and daughter-in-law shall deliver a quit claim deed for 99% interest to Claimant (Claimant's son and daughter-in-law retain 1% interest).
 - d. The sale shall be completed within 60 days. [Exh. 1, pp. 29-33].
5. On April 10, 2015, Claimant via quit claim deed gifted real property ("camp property") to her son. The property had a fair market value of \$ [REDACTED] at the time. [Exh. 1, pp. 35-36].
6. On April 10, 2015, Claimant's daughter-in-law, via quit claim deed, conveyed the home with a 99% interest to Claimant and a combined 1% interest to Claimant's son and to herself, as tenants by the entireties and to [REDACTED] as joint tenants. [Exh. 1, p. 34].
7. Claimant received a 99% interest in the equity value of the property. [Exh. 1, p. 26].
8. On April 14, 2015, Claimant liquidated two life insurance policies and received \$ [REDACTED] [Exh. 1, p. 40].
9. Claimant applied for MA-LTC benefits on April 29, 2015. [Exh. 1, pp. 41-44].
10. At the time of application, Claimant was 97 years old. [Exh. 1, p. 44].
11. On June 23, 2015, the Department mailed Claimant a Health Care Coverage Determination Notice (DHS-1606) which indicated the following:
 - a. Claimant was not eligible for MA from April 1, 2015 through April 30, 2015 due to excess assets.

¹Claimant argued that the 2015 SEV was lower than the 2014 winter tax bill used by the Department, which explains the \$ [REDACTED] discrepancy between the \$ [REDACTED] purchase price and the Department's \$ [REDACTED] calculation. The 2015 winter tax bill for the property was not contained in the record.

- b. Claimant was eligible for MA effective May 1, 2015 with a \$ [REDACTED] monthly patient pay amount.
 - c. Claimant's annual income was \$ [REDACTED]
 - d. The base line date was May 1, 2015.
 - e. Medicaid will not pay for LTC, home and community-based waiver services from May 1, 2015 through April 13, 2016 because Claimant or her spouse transferred assets or income for less than fair market value. [Exh. 1, pp. 14-15].
12. The Department mailed Claimant's attorney a second DHS-1606 which indicated the following:
- a. Claimant was eligible for MA-LTC from May 1, 2015 through June 30, 2015.
 - b. The monthly patient pay amount was \$ [REDACTED]
 - c. The base line date is May 1, 2015.
 - d. Medicaid will not pay for LTC, home and community-based waiver services from May 1, 2015 through April 13, 2016 because Claimant or her spouse transferred assets or income for less than fair market value. [Exh. 1, pp. 14-15].
13. The Department's DHS-1606 mailed on June 23, 2015 (and the subsequent DHS-1606) contained Bridges computer system errors. The DHS-1606s should properly indicate the following:
- a. The base line date should be **April 1, 2015**.
 - b. The penalty period should be 11 months, 13 days (**April 1, 2015 through March 13, 2016**).
 - c. The divestment amount is \$ [REDACTED] (cash of \$ [REDACTED] + \$ [REDACTED] + \$ [REDACTED] = \$ [REDACTED] + \$ [REDACTED] (camp property = \$ [REDACTED]).
 - d. The cost of care \$ [REDACTED] [See Exh. 1, pp. 11, 13 and 16].
14. On September 21, 2015, Claimant's attorney requested a hearing on Claimant's behalf to challenge the Department's divestment decision.

² See Footnote #1.

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.

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 (4-1-2015), p. 1. The "penalty period" is a period of disqualification from Medicaid assistance for Long Term Care (LTC).³ 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,

³ 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.

p. 1. Divestment results in a penalty period in Medicaid, not ineligibility. BEM 405, p.1. The divestment policy does not apply to “Qualified Working Individuals.”⁴ 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 trust⁵; (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) 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.

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. BEM 405, p. 3. BEM 405, pp. 3-4 provides the following example:

Mr. Jones is applying for MA. On September 1, 2007, Mr. Jones gave his sister half interest in real estate. His equity value at the time was \$100,000. The ownership arrangement prevents either sibling from selling

⁴ See BEM 169.

⁵ See BEM 401.

without the other's permission. Mr. Jones transferred a resource on September 1, 2007, the day he reduced his ownership and control by giving his sister part ownership and the power to prevent sale. The amount transferred depends on whether his sister is refusing to sell. The transferred amount is \$100,000 if she now refuses to sell. The transferred amount is used to calculate the divestment penalty. It is not used towards the countable asset limit for Mr. Jones' eligibility. \$50,000 if she now agrees to sell. Unless otherwise excluded, one-half the equity for the month being tested is a countable asset for purposes of Mr. Jones' asset eligibility and the other half is used to calculate the divestment penalty.

The same policy applies to resources the client's spouse owns jointly with other persons. **Exception:** No penalty is imposed if the parties involved verify that the resource transferred actually belonged solely to the person to whom it was transferred. BEM 405, p. 4.

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

Once the baseline date is established, the Department determines the look-back period. BEM 405, p. 5. The look back period is 60 months prior to the baseline date for all transfers made after February 8, 2006. 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.

Transfers of resources that are excluded or not countable assets under SSI-related MA policy may be divestment. BEM 405, p. 8. Transfer of the following may be divestment: (1) homestead of L/H and waiver client (see BEM 106) or the L/H and waiver client's spouse even if the transfer occurred before the client was institutionalized or approved for the waiver; or (2) assets that were not countable because they were unavailable or not salable. BEM 405, p. 9.

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.

The Department will cancel a divestment penalty if either of the following occurs before the penalty is in effect: all the transferred resources are returned and retained by the individual or fair market value is paid for the resources. BEM 405, p. 16. The Department will then recalculate the penalty period if either of the following occurs while the penalty is in effect: (1) all the transferred resources are returned; or (2) full compensation is paid for the resources. BEM 405, p. 16. [With emphasis].

The Department uses the same per diem rate originally used to calculate the penalty period. BEM 405, p. 16. Once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. However, the Department should recalculate the penalty period. BEM 405, p. 16. The divestment penalty ends on the later of the following: (1) the end date of the new penalty period; or (2) the date the client notified the Department that the resources were returned or paid for. BEM 405, p. 16.

The Department will waive the penalty if it creates undue hardship. BEM 405, p. 16. The Department will assume there is no hardship unless there is evidence to the contrary. BEM 405, p. 16.

The Department must verify the following to document divestment: (1) date of transfer; (2) fair market value or cash value; (3) uncompensated value. BEM 405, p. 17. The Department must also obtain a statement from the LTC or waiver client's physician (M.D. or D.O.) to verify undue hardship, or the client's non-disabled child age 21 or older provided care that would otherwise have required LTC or waiver services. BEM 405, p. 17.

According to BEM 405, p. 17, the Department shall use the following sources to verify transfers and the reasons for them including, but are *not* limited to: (1) legal documents; (2) payment or tax records; (3) bills of sale; (4) court or attorney records; (5) correspondence regarding the transaction; and (6) bank books or statements.

In order to verify ownership interest in a homestead, the Department includes, but is not limited to the following: (1) deeds; (2) mortgages; (3) purchase agreements; (4) contracts; and (5) other court or county records. BEM 405, p. 18.

BEM 400 (4-1-2015) governs how the Department considers assets when determining eligibility for certain programs. The Department defines "jointly owned assets" as assets that have more than one owner. BEM 400, p. 10.

An asset is unavailable if all of the following are true and an owner **cannot** sell or spend his share of an asset: (1) without another owner's consent; (2) the other owner is not in the asset group; and (3) the other owner refuses consent. BEM 400, pp. 10-11.

Jointly owned real property is only excludable if it creates a hardship for the other owners. Joint Tenancy means that no owner can sell unless all owners agree. BEM 400, p. 11. For jointly owned real property, the Department will count the individual's share unless sale of the property would cause undue hardship. Undue hardship for this item is defined as: a co-owner uses the property as his or her principal place of residence **and** they would have to move if the property were sold **and** there is no other readily available housing. BEM 400, p. 11.

Here, Claimant argues that the divestment was cured after she purchased a 99% interest in the value of the property on April 10, 2015. Claimant submits that the property at issue was jointly owned and was available to Claimant. According to Claimant, all the conditions required under BEM 400, page 10 for jointly owned assets are not met. This policy, Claimant argues, deals with jointly owned property differently than it does other jointly-owned assets. Claimant submits that BEM 400, page 3 (joint owners and transfers) does not apply. But even if it does apply, Claimant contends that the "other owner" (Claimant's son, daughter-in-law and/or [REDACTED]) has not refused consent. Rather, Claimant argues that BEM 400, page 11 controls because it specifically refers to jointly owned real property and indicates that "[j]ointly owned real property is only excludable if it creates a hardship for the other owners." Then, BEM 400, page 11 contains a note which provides that for jointly owned real property the Department should count the individuals share unless the sale of the property would cause undue hardship. Claimant argues that the Department has failed to show undue hardship in this case and is required to count the individual shares. Here, Claimant argues that the Department must calculate her 99% interest under BEM 400. According to Claimant, she received more value than she gave which cures the divestment.

The Department, on the other hand, argues that BEM 400, page 11 does not apply as that BEM concerns the Department's determination of assets for purposes of eligibility rather than for divestment purposes. The Department argues that the three individuals (Claimant's son, daughter-in-law and [REDACTED]) all have joint ownership with full rights of survivorship in the property but the transaction was not exchanged for any consideration and was executed pursuant to a purchase agreement that purportedly cured the divestment. The purchase agreement, the Department contends, did not cure the divestment because Claimant was not left with 100% control of the property.

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).

The Department's eligibility specialist testified that used the information provided by Claimant's attorney to determine the divestment amount. The eligibility specialist, during the hearing, stated that Claimant did not cure the divestment because she did not have 100% control over the property after the April, 2015 transaction and that the other joint tenants would have to agree to sell the property. She further testified that she forwarded Claimant's case to the Department's legal office concerning whether the divestment was properly cured after she purchased the property back with a 99% interest. According to the eligibility specialist, the Department's legal office found that the divestment was not cured for the same reason.

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. First, the undersigned finds that the Department properly determined that Claimant divested herself of assets when she transferred the cash assets to her son and daughter-in-law between 2010 and 2012. [Exh. 1, pp. 39-40]. However, the more salient concern is whether the purchase agreement transaction which provided Claimant with 99% interest in her home was sufficient to cure the divestment as defined by policy.

The Department's divestment policy is controlled by BEM 405. This policy clearly provides that the Department will cancel a divestment penalty if either (1) all the transferred resources are returned and retained by the individual or (2) fair market value is paid for the resources. BEM 405, p. 16 [Emphasis added]. In this matter, the proper penalty period began on April 1, 2015. [Exh. 1, pp. 11, 13 & 16]. When Claimant purchased a 99% interest in the equity of the property, she did not receive a return of, nor did she retain, all of the transferred resources (the real property) because 1% was retained by the other three individuals. Claimant also argues that she paid fair market value for the property in April, 2015. However, Claimant, her son, daughter-in-law and [REDACTED] are joint tenants. The record in this matter shows that Claimant did not receive full compensation for the value of the property when she purchased her 99% interest. In order to receive full compensation for the value of the property, this Administrative Law Judge finds that Claimant should have received 100% interest in the real property. Claimant was not left with full control over the property. The undersigned does not agree that the Department should simply determine the dollar value of 99% interest in the \$ [REDACTED] real property. This ignores the fact that Claimant does not possess the ability to sell or devise the property without the consent of the other individuals.

The Administrative Law Judge does not find that BEM 400, page 11 can be read to determine the Department's obligation to count Claimant's 99% interest in the real property. As previously indicated, BEM 405, page 16 determines that the Department will cancel the divestment penalty when fair market value is paid for the resources. However, this record shows that Claimant did not pay fair market value for the property in question. The Department is not required to show undue hardship in this

circumstance. Accordingly, this Administrative Law Judge finds that the transfer of the 99% interest in the property through a purchase agreement and quit claim deed did not cure the divestment in this case. Claimant, as a joint tenant, was unable to liquidate the property without involvement of the other individuals. There is no dispute that Claimant did not have full control of the property asset.

The Department has established this case by the necessary competent, substantial and material evidence on the whole record. The Department properly determined that Claimant failed to return the divested assets and/or that she did not pay fair market value for the divested resources.

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 MA application was subject to a divestment and that Claimant subsequently failed to cure the divestment.

DECISION AND ORDER

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

IT IS SO ORDERED.



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

Date Mailed: 12/1/2015

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:

