



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: April 13, 2017
MAHS Docket No.: 16-018925
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Vicki Armstrong

HEARING DECISION

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge (ALJ) 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 March 16, 2017, from [REDACTED], Michigan. Petitioner was represented by Attorney, [REDACTED]. Witnesses for Petitioner included Petitioner's wife, [REDACTED]; Petitioner's son, [REDACTED]; and Petitioner's daughter, [REDACTED]. [REDACTED], [REDACTED] and [REDACTED] testified on behalf of Petitioner.

The Department of Health and Human Services (Department) was represented by Assistant Attorney General, [REDACTED]; Assistance Payment Supervisor, [REDACTED]; Eligibility Specialist, [REDACTED]; Eligibility Specialist, [REDACTED]; Program Manager, [REDACTED]; Intern, [REDACTED]; and Department Specialist, [REDACTED]. [REDACTED] and [REDACTED] testified on behalf of the Department. The Department submitted three exhibits which were admitted into evidence. The record was kept open until March 20, 2017, when Petitioner submitted four exhibits which were admitted into evidence, and the record was closed.

ISSUE

Whether the Department properly imposed a divestment penalty from January 1, 2017, through August 22, 2017, based on the transfer of property?

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 July 15, 2015, Petitioner and his wife transferred \$ [REDACTED] into the [REDACTED] Trust account at [REDACTED]. [ALJ Exh. 14].
2. The [REDACTED] Trust is an Irrevocable Trust that does not allow for distributions and/or principal to either Petitioner or his wife. [ALJ Exh. 14].
3. On July 23, 2015, the trustee of the Irrevocable Trust entered into a Promissory Note with Petitioner's wife for repayment of the \$ [REDACTED]. [ALJ Exh. 14].
4. On June 28, 2016, Petitioner applied for Medicaid (MA). [ALJ Exh. 14].
5. Prior to Petitioner applying for MA, Petitioner's wife received payments from the trust totaling \$ [REDACTED]. Because part of the funds were returned to Petitioner's wife prior to the application, the divestment was calculated as follows: \$ [REDACTED] - \$ [REDACTED] = \$ [REDACTED]. The \$ [REDACTED] resulted in a divestment penalty of 7.96 months, January 1, 2017, through August 22, 2017. [ALJ Exh. 14].
6. On November 23, 2016, the Department issued Petitioner a Health Care Coverage Determination Notice indicating that Petitioner was approved for MA from [Dept. Exh. A 44-45].
7. On December 8, 2016, Petitioner submitted a timely written request for hearing to the Department. [ALJ Exh. 3-4].

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), and Department of Health and Human Services Reference Tables Manual (RFT).

The Medical Assistance (Medicaid) 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 Medicaid program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

Divestment results in a penalty period in MA, not ineligibility. BEM 405, p 1 (4/1/2016). During the penalty period, MA will not pay for long-term care services. *Id.* Divestment means a transfer of a resource by a client (or spouse) that is within the look-back period and is transferred for less than fair market value ("FMV"). *Id.* Transferring a resource means giving up all or partial ownership in, or rights to, a resource. *Id.* Resource means all the client's (and spouse's) assets and income. *Id.*; 20 CFR 416.1201. Less than FMV means the compensation received in return for a resource was worth less

than the FMV 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. *Id.*

The first step in determining the period of time that transfers can be looked at for divestment is to determine the baseline date. BEM 405, p 6. The baseline date (applicable in this case) is the date which the client was an MA applicant and in a long-term care facility. *Id.* After the baseline date is established, the look-back period is established. BEM 405, p 5. The look-back period is 60 months for all transfers made after February 8, 2006. *Id.* Transfers made by anyone acting in place of, on behalf of, at the request of, or at the direction of the client/spouse during the look-back period are considered. *Id.* Transfers that occur on or after a client's baseline date must be considered for divestment. *Id.*

The baseline date in this case is the date of application, June 28, 2016. The look-back period is 60 months for all transfers made after February 8, 2006. Transfers made during the look-back period are considered. On July 15, 2015, Petitioner and his wife transferred \$ [REDACTED] into the [REDACTED] Trust which is an Irrevocable Trust that does not allow for distributions and/or principal to either Petitioner or his wife. On July 23, 2015, Petitioner entered into a promissory note which Petitioner contends, cures the divestment. The promissory note was for \$ [REDACTED] to be paid to Petitioner's wife in monthly payments of \$ [REDACTED] beginning August 1, 2015, with the entire principal due and payable no later than July 31, 2022.

Petitioner contends that the promissory note cured the divestment in accord with Department Policy BEM 400, pp 40-41.

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 monthly 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. BEM 400, p 41.

However, BEM 400 does not apply to this case because the \$ [REDACTED] transferred into the [REDACTED] Trust was not used to purchase the promissory note. BEM 400 is very clear, "all money used to purchase a promissory note, loan, or mortgage must be treated as a transfer of assets" In this instance, the \$ [REDACTED] was transferred into the [REDACTED] Trust on July 15, 2015. The promissory note was made by the

Trust on July 23, 2015. Therefore, Petitioner's \$ was not used to purchase the promissory note, and BEM 400 does not apply to this case.

A divestment is a transfer of a resource by a client (or spouse) that is within the look-back period and is transferred for less than fair market value ("FMV"). On July 15, 2015, Petitioner transferred \$. This transfer occurred in the look-back period. Petitioner received nothing in return making it a gift.

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. *Id.*

Here, Petitioner's wife received payments totaling \$ before the penalty went into effect. Because part of the funds were returned to Petitioner's wife prior to the application, the divestment was calculated as follows: \$ - \$ = \$. The \$ resulted in a divestment penalty of 7.96 months, January 1, 2017, through August 22, 2017.

Petitioner contends in this case that the transfer of the \$ into the trust was a loan, as shown by the promissory note. However, the transfer of the \$ was into an irrevocable trust on July 15, 2015, and the promissory note was not made until July 23, 2015 from the trust.

In addition, during Petitioner's son's testimony, he was asked on cross-examination what the purpose of the transfer of funds into the trust was for. Petitioner's son stated, "to move some of my father's assets." When asked again if that was for the purpose of qualifying for Medicaid, Petitioner's son said, "yes." Asked again if "this was all entered into for the general purpose of qualifying for Medicaid," Petitioner's son responded, "yes."

Further, on direct examination, Petitioner's daughter was asked the purpose of the transfer of the \$ into the Trust. Petitioner's daughter stated, "to pay for my Dad's care." When asked a second time what the purpose was, she responded, "to apply for Medicaid." When she was asked on cross-examination what the purpose of the loan was, Petitioner's daughter stated, "to pay for my Dad's care."

Petitioner's wife also testified in the above captioned matter. On direct examination, Petitioner's wife testified that the purpose for transferring the funds into the trust and into the promissory note was so she would receive "a monthly payment." On cross-examination, Petitioner's wife was asked what she had to do to qualify her husband for Medicaid. Petitioner stated, "outside of selling that property . . . I didn't know this was a problem, but this trust."

Petitioner's wife and daughter submitted affidavits in support of Petitioner's contention that the transfer of the \$ [REDACTED] was a loan and that the promissory note cured the divestment. (See Petitioner's Exh. 1, pp 6, 8). However, the testimony of Petitioner's wife, son, and daughter directly contradicted the affidavits and the purpose of the transfer. According to Petitioner's families' testimony, the transfer of the \$ [REDACTED] into the trust was to "move assets" "to qualify" for Medicaid.

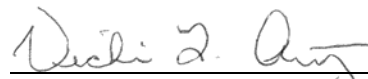
Testimony and other evidence must be weighed and considered according to its reasonableness. *Gardiner v Courtright*, 165 Mich 54, 62; 130 NW 322 (1911); *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). The weight and credibility of this evidence is generally for the fact-finder 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. Further, the transferred resources were not returned in full to Petitioner before the penalty was in effect. Based on the above Findings of Fact and Conclusions of Law, the Administrative Law Judge finds that the Department acted in accordance with Department policy when it determined that a divestment occurred.

DECISION AND ORDER

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

VLA/bb



Vicki Armstrong
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; 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

DHHS

[REDACTED]

[REDACTED] via electronic mail

[REDACTED] via electronic mail

[REDACTED] via electronic mail

Counsel for Respondent

[REDACTED]

DHHS

[REDACTED]

Counsel for Petitioner

[REDACTED]

Petitioner

[REDACTED]