



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: July 6, 2017
MAHS Docket No.: 17-005431
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

HEARING DECISION

Following Petitioner'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 June 8, 2017, from Lansing, Michigan. [REDACTED] [REDACTED] represented Petitioner as her Authorized Hearing Representative (AHR). The following individuals testified as a witness on behalf of Petitioner: [REDACTED] [REDACTED] (Business Office Manager at [REDACTED]). [REDACTED] [REDACTED] Eligibility Specialist, represented the Department of Health and Human Services (Department).

ISSUE

Did the Department properly determine that Petitioner had divested herself of assets to warrant the imposition of a penalty for purposes of Long-Term Care (LTC) Medical Assistance (MA) or Medicaid?

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 or about February 1, 2014, the Department determined that Petitioner was eligible for MA and was approved for LTC benefits on February 11, 2014. [REDACTED] [REDACTED] Hearing Testimony].
2. At the time of application, Petitioner, [REDACTED] (Petitioner's son), and [REDACTED] [REDACTED] (Petitioner's daughter-in-law) each owned a 1/3 interest in real property¹ as

¹ The property in question was a manufactured home.

tenants in common, located at [REDACTED].
[REDACTED] Hrg. Test. & Department Exhibit 1, p. 8].

3. On March 31, 2014, Petitioner, via Quit Claim Deed, transferred her interest in the property to her son and daughter-in-law for the sum of \$ [REDACTED]. The Quit Claim Deed was recorded on April 1, 2014. [Dept. Exh. 1, p. 8].
4. From February 11, 2014, Petitioner resided in a LTC facility and the costs were covered by Medicaid. [REDACTED] Hrg. Test.].
5. In or around March 2017, the Department discovered the March 31, 2014, transfer of property. [REDACTED] Hrg. Test.].
6. The Department conducted a redetermination of Petitioner's MA eligibility and indicated the following:
 - a. The March 31, 2014, conveyance was a transfer of a resource. [REDACTED] Hrg. Test.]
 - b. The baseline date is February 11, 2014. [REDACTED] Hrg. Test.]
 - c. The average monthly LTC cost in 2014 was \$ [REDACTED] [REDACTED] Hrg. Test.]
 - d. The real property had an assessed value in 2014 was \$ [REDACTED] divided by three owners equaled \$ [REDACTED] each. [REDACTED] Hrg. Test.]
 - e. The divestment penalty period is 1 month, 22 days from May 1, 2017, through June 22, 2017. [REDACTED] Hrg. Test.]
 - f. The total divestment amount is \$ [REDACTED] [REDACTED] Hrg. Test.]
7. On March 28, 2017, the Department mailed Petitioner a Health Care Coverage Determination Notice (DHS-1606) which indicated the following:
 - Petitioner was approved for MA for April 1, 2017, ongoing. [Dept. Exh. 1, pp. 9-11].
 - Petitioner had a monthly PPA of \$ [REDACTED] [Dept. Exh. 1, pp. 9-11].
 - Petitioner has a divestment penalty for the period of May 1, 2017, through June 22, 2017, due to the 2014 transfer of property. [Dept. Exh. 1, pp. 9-11].
 - Petitioner's baseline date is February 11, 2014. [Dept. Exh. 1, pp. 9-11].
5. On April 13, 2017, Petitioner's AR requested a hearing to dispute the divestment. [Request for Hearing].

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.

Medical Assistance (MA) is also referred to as "Medicaid." BEM 105 (10-1-2016), p. 1. The goal of the Medicaid program is to ensure that essential health care services are made available to those who otherwise could not afford them. BEM 105, p. 1.

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*.

The Department's divestment policies are contained in BEM 405 (1-1-2017). A "divestment" is a transfer of assets that would create a penalty period. BEM 405, 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

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

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.

The concept of a divestment means that there was a transfer of a “resource” by a client or his spouse that includes all of the following factors: (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. A “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. [Emphasis in original].

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) 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. [Emphasis added].

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

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.

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. BEM 405, p. 5.

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.

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).

Policy requires the Department follow the BEM 405 gender-specific life expectancy tables to compute the fair market value of a lifetime income source such as a pension. BEM 405, p. 7. The calculations are based on the person's sex and age on the date of transfer. BEM 405, p. 7.

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. [With emphasis].

There is no maximum limit on the penalty period for divestment under BEM 405, p. 11. There is no minimum amount of resource transfer before incurring a penalty, determine a penalty on any amount of resources that are transferred and meet the definition of a divestment even if the penalty is for one day. BEM 405, p. 12. Divestment is a type of transfer not an amount of transfer. BEM 405, p. 12.

Any penalty period established under previous policy continues until it ends. BEM 405, p. 12. Apply the penalty policy in place at the time of transfer for any transfers made before February 8, 2006. BEM 405, p. 12.

The penalty period is computed on the total Uncompensated Value of all resources divested. BEM 405, p. 12. The Department shall determine the Uncompensated Value for each resource transferred and combine into a total Uncompensated Value. BEM 405, p. 12. The Department must then divide the total Uncompensated Value by the average monthly private LTC Cost in Michigan for the client's Baseline Date. This gives the number of full months for the penalty period. Then the Department will multiply the fraction remaining by 30 to determine the number of days for the penalty period in the remaining partial month. BEM 405, p. 13.

The Department will apply the total penalty months and days. BEM 405, p. 13. Then it will apply a penalty even if the total amount of the penalty is for only a partial month. BEM 405, p. 13. The penalty is applied to the months (or days) an individual is eligible for Medicaid and actually in LTC, Home Health, Home Help, or the MIChoice Waiver. BEM 405, p. 13. The divestment penalty period cannot be applied to a period when the individual is not eligible for Medicaid for any reason (that is the case closes for any reason or is eligible for Medicaid but is not in LTC, Home Help, Home Health, or the MIChoice Waiver. BEM 405, p. 13. The Department will restart the penalty when the individual is again eligible for Medicaid and in LTC, Home Help, Home Health, or MIChoice Waiver. BEM 405, p. 13. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. BEM 405, p. 13. That month cannot be counted as part of the penalty period. BEM 405, p. 13.

The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care (LTC, MIChoice waiver, or home help or home health services), and is not already part of a penalty period. BEM 405, p. 14. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. BEM 405, p. 14. That month cannot be counted as part of the penalty period. BEM 405, p. 14.

If a past unreported divestment is discovered or an agency error is made which should result in a penalty, a penalty must be determined under the policy in place at the time of discovery. BEM 405, p. 14. If a penalty is determined for an unreported transfer in the past, apply the penalty from the first day after timely notice is given. BEM 405, p. 14.

The uncompensated value of a divested resource is: (1) the resource's cash or equity value; (2) minus any compensation received; or (3) the uncompensated value of a promissory note, loan or mortgage is the outstanding balance due on the "Baseline Date." BEM 405, p 15.

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. Example: Mr. and Mrs. Brown divested themselves of assets prior to Mr. Brown entering a LTC facility and applying for Medicaid. Mr. Brown is in LTC and under a divestment penalty for 24 months. When Mrs. Brown enters the facility 6 months later, the remaining 18 months of Mr. Brown's penalty are divided between them, giving Mr. and Mrs. Brown each 9 months of the penalty still to complete. If either Mr. or Mrs. Brown dies before they complete their penalty the remainder of their penalty is transferred to their spouse. BEM 405, p. 15.

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: all the transferred resources are returned and (2) full compensation is paid for the resources. BEM 405, p. 16.

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 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.

In this matter, the Department representative who attended the hearing testified that she was assigned Petitioner's MA case during redetermination in March 2017 and she discovered that an error occurred on the case. She stated that a divestment occurred in

2014, but the previous caseworkers from [REDACTED] [REDACTED] [REDACTED] missed the error. Petitioner's AHR, on the other hand, contends that he was advised by his mother's previous caseworker to remove his mother's name from the deed in order to qualify for MA benefits. He stated that he was unaware that it would result in a divestment.

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. The parties do not dispute the salient facts in this matter. Petitioner's AHR did not contest the determination that it was a divestment nor did he challenge the Department's calculations. Rather, Petitioner's AHR was upset because he was apparently provided with misinformation that resulted in a divestment for his mother.

There is no dispute that Petitioner, prior to the 2014 transfer, jointly owned the property with her son and daughter-in-law. BEM 405, p. 3. As a result, Petitioner had a 1/3 interest in the real property. The Department has shown on this record that the March 31, 2014, transfer of property by Quit Claim Deed and then April 1, 2014, recording of the deed in exchange for \$ [REDACTED] was a transfer of a resource for less than fair market value. The Department has shown on this record that this transfer was a divestment as defined by BEM 405, p. 1, because there was a transfer of a "resource" by Petitioner which was: (1) within the five year look-back period; (2) is a transfer for less than fair market value (\$ [REDACTED] and the value of the property was apparently (\$ [REDACTED] divided by three owners) \$ [REDACTED] approximately; and (3) is not considered by policy as a "transfer that is not divestment." 1.

The Department did not provide documentation in the record which established the value of the property, i.e., property tax records to show the state equalized value of the property. Rather, the Department representative provided this information by sworn testimony. Petitioner's AHR, however, did not object to the Department representative's statements. Accordingly, the only issue Petitioner's AHR raised concerned the fact that it was unfair to require Petitioner to pay the divestment penalty after she was acting under the direction of the Department at the time of transfer. In any event, the undisputed and credible testimony in this record shows that Petitioner divested herself of \$ [REDACTED] when she transferred her 1/3 interest in the property to her son and daughter-in-law.

The record also shows, and Petitioner's AHR did not dispute, the Department's calculation of the divestment amount and the corresponding penalty. There is no dispute that the baseline date is February 11, 2014, which is the date that Petitioner entered the nursing home and first became eligible for MA-LTC benefits. The look-back period is 5 years or 60 months, which would correspond to transfers that took place on or after February 8, 2006. The Department properly indicated that the level of care code (LC) code 56 indicates a divestment penalty. BEM 405, p. 31. The Department has properly calculated the penalty period from May 1, 2017, through June 22, 2017. Accordingly, the Department has established this case by the necessary competent, substantial, and material evidence on the whole record.

Therefore, 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.

DECISION AND ORDER

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

IT IS SO ORDERED.

CAP/mc



C. Adam Purnell
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]

Authorized Hearing Rep.

[REDACTED]

Petitioner

[REDACTED]