



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: September 6, 2017
MAHS Docket No.: 17-007295
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

HEARING DECISION

Following Geraldine Derusha's (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 August 8, 2017, from Lansing, Michigan. Attorney [REDACTED] represented Petitioner. The following persons testified as witnesses on behalf of Petitioner at the hearing: [REDACTED], Medicaid Consultant, Petitioner and [REDACTED], Petitioner's husband. Assistant Attorney General (AAG) [REDACTED] represented the Department of Health and Human Services (Department). The Department called [REDACTED], Long-Term Care (LTC) Eligibility Specialist (ES), to testify as a witness.

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. Petitioner and her husband owned a home at [REDACTED] [REDACTED] ("the property"). [Department's Exhibit 1, p. 15].
2. On May 24, 2012, Petitioner and her husband conveyed the property, via quit-claim deed, to their children in exchange for "\$ [REDACTED] Dollar and other valuable considerations less than [REDACTED] (\$ [REDACTED] Dollars" and reserved a life estate. [Dept. Exh. 1, p. 15].

3. The deed to the property was recorded with the Register of Deeds in [REDACTED] on May 25, 2012. [Dept. Exh. 1, p. 15].
4. The state equalized value (SEV) of the property was \$ [REDACTED] [Dept. Exh. 1, p. 42].
5. Sometime in March 2017, Petitioner entered a nursing home and/or long-term care (LTC) facility. [Petitioner's hearing testimony].
6. On March 27, 2017, Petitioner and her husband, via a quit-claim deed, attempted to convey the same property, while reserving an enhanced life estate. The quit-claim deed did not specifically indicate that it was a 'lady bird deed.' [Resp. Exh. 1, p. 18].
7. Petitioner applied for Medicaid-LTC benefits on March 30, 2017. [Dept. Exh. 1, pp. 3-13].
8. Petitioner was 83 years-old at the time of application. [Dept. Exh. 1, p. 3].
9. On April 12, 2017, the Department mailed Petitioner a Health Care Coverage Determination Notice (DHS-1606), which determined the following: (1) Petitioner was eligible for Medicaid with a \$ [REDACTED] monthly patient pay amount effective March 1, 2017; (2) Petitioner was eligible for Medicare Savings Program (MSP) full coverage effective April 1, 2017; and (3) Petitioner was not eligible for Medicare Cost Sharing programs effective March 1, 2017, because she has full Medicaid coverage. [Dept. Exh. 1, pp. 21-24].
10. On May 4, 2017, the Department mailed Petitioner a Health Care Coverage Determination Notice (DHS-1606) which indicated the following:
 - Petitioner was still approved for Medicaid and Medicare Cost Share benefits. [Dept. Exh. 1, p. 27].
 - The Department reviewed the March 27, 2017, quit-claim deed and it was determined that it was a life estate, which was considered to be a divestment. [Dept. Exh. 1, p. 27].
 - The Department would impose the following divestment penalty: the life estate property had a fair market value of \$ [REDACTED] (SEV \$ [REDACTED] x 2 = \$ [REDACTED] x .36998 (LE factor) = \$ [REDACTED]. Thus, the \$ [REDACTED] (fair market value) - \$ [REDACTED] (life estate value) = \$ [REDACTED] (divested amount). The baseline date is March 1, 2017. The divestment penalty period is from June 1, 2017 through January 2, 2018. [Dept. Exh. 1, p. 27].
 - Petitioner was not eligible for MSP (QMB) category. [Dept. Exh. 1, p. 28].

11. On June 1, 2017, Petitioner's attorney requested a hearing to dispute the Department's determination that a divestment occurred. [Dept. Exh. 1, pp. 44-45].
12. On June 8, 2017, Petitioner's attorney prepared and signed a "Scrivener's Affidavit" which indicated that he drew the March 27, 2017, deed, but that an error occurred because the property was previously deeded to Petitioner's children on May 25, 2012. According to the affidavit, the property was no longer able to be granted by Petitioner and her husband and, therefore, the March 27, 2017, deed was null and void. [Dept. Exh. 1, pp. 52].

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 (4-1-2017), 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).¹ 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.

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 trust²; (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.

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

¹ 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.

² 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.

"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.

Converting an asset from one form to another of equal value is **not** divestment even if the new asset is exempt. Most purchases are conversions. Example: Using \$5,000 from savings to buy a used car priced at \$5,000 is conversion for equal value. Example: Trading a boat worth about \$8,000 for a car worth about \$8,000 is conversion for equal value. Payment of expenses such as one's own taxes or utility bills is also **not** divestment. BEM 405, p. 10. [Emphasis in original].

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. [With emphasis]. Example: Mr. Smith, age 40, was in good health when he gave his vacation cottage to his nephew. The next day Mr. Smith was in an automobile accident. His injuries require long-term care. The transfer was not divestment because Mr. Smith could not anticipate his need for LTC services. However, there is an exception. Preservation of an estate for heirs or to avoid probate court is not acceptable as another

purpose. That the asset or income is not counted for Medicaid does not make its transfer for another purpose. BEM 405, p. 11.

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 1st day the client is eligible to receive MA coverage for LTC, MIChoice, home help, or home health services are the 1st day after the penalty period ends. BEM 405, p. 13. [See table on BEM 405 at pages 13-14].

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.

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.

The sources used by the Department to verify the length of residence in a homestead, include, but are not limited to: (1) driver's license or State I.D.; (2) income tax returns; (3) voter registration; (4) cancelled mail; (5) other type of I.D. which has both name and address; and (6) written statement from one of the following who has knowledge of length of residence in the homestead: physician, clergy or other professional. BEM 405, p. 18.

In this matter, the Department determined that Petitioner's transfer of the property was for less than fair market value, was within the lookback period and; therefore, was a divestment. The Department argued that the March 27, 2017, deed was ineffective and did not affect the property that was purportedly transferred via the May 24, 2012, deed because Petitioner had no ownership interest in the property at the time. Finally, the Department contends that Petitioner's "Scrivener's Affidavit" dated June 8, 2017, was not relevant and was legally invalid. Petitioner, on the other hand, contends that Petitioner is a layperson and that she was provided with bad legal advice. Petitioner argues that she did not intend to lose control of her property until she passed away or sold it to a third party.

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. Petitioner did not offer any exhibits into evidence and did not provide this Administrative Law Judge with any arguments to refute the Department's decision that a divestment occurred. The Department's witness, [REDACTED], the LTC-ES, provided credible testimony that was consistent with the admitted exhibits in the record. Petitioner and her witness did not provide any testimony that was more persuasive than [REDACTED] credible testimony which was supported by the contemporaneous documentation in this record.

Here, the Department has shown that it correctly determined that Petitioner, on May 24, 2012, divested herself of assets when she transferred her property to her children in exchange for \$ [REDACTED] with a life estate reserved. There is no dispute that this transfer was for less than fair market value (\$ [REDACTED] and was within the five year look back period. This meets the definition of a divestment. Petitioner has not shown that any exceptions are applicable.

Based on the above Findings of Fact, the Department has shown that it acted properly with regard to the divestment determination and penalty calculations. Here, because Petitioner is an 84 (eighty-four) year-old female, the life expectancy table indicates that the Department should multiply the fair market value by .36998. See BEM 405, p. 65, Exhibit II and Dept. Exh. 1, p. 34. The Department correctly determined the \$ [REDACTED] fair

market value of the property, which was the \$ [REDACTED] SEV multiplied by two. The Department also correctly determined the baseline date of March 1, 2017, which was the first date that Petitioner was eligible for Medicaid and was in LTC. Finally, the Department's determination that the divestment amount was \$ [REDACTED] was correct and was within the policy guidelines. Therefore, the divestment penalty period of June 1, 2017, through January 2, 2018, was also correct as it was supported by the record. [Dept. Exh. 1, p. 27]. Again, Petitioner did not specifically dispute the Department's contentions nor did she directly attack the calculations.

Petitioner's argument that the Scrivener's Affidavit is explanatory is not persuasive or dispositive. If anything, the affidavit reinforces the Department's position. There is no dispute that the second attempt to convey the property on March 27, 2017, was ineffective as Petitioner did not have any interest in the property at the time due to effectuate the May 2012 conveyance.

It appears as though Petitioner, based on the post-hearing brief, asks the undersigned ALJ to consider her specific situation and provide her with some sort of equitable relief. Petitioner requests the ALJ find there was no divestment and that she be provided with an opportunity to correct any defects or provide additional documentation. [See Pet. Brf. p. 2]. "In the absence of an express legislative conferral of authority, an administrative agency generally lacks the powers of a court of equity." *Delke v Scheuren*, 185 Mich App 326, 332; 460 NW2d 324 (1990). Because the Legislature has not conferred equitable authority to MAHS with respect to hearings relating to Department actions, this ALJ is precluded from addressing Petitioner's purported equitable request. Furthermore, administrative law judges presiding over Department hearings "have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulations, or overrule or make exceptions to Department policy." See Delegation of Hearing Authority executed by [REDACTED], former Department Director, July 13, 2011, and adopted by present Department Director [REDACTED]. Accordingly, this ALJ cannot find that there was no divestment in this case "as long as any defects in documentation has or will be clarified." [Pet. Brf, p. 2].

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 when it determined the presence of a divestment and the resulting divestment calculation.

DECISION AND ORDER

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

IT IS SO ORDERED.

CAP/md



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

Counsel for Respondent

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DHHS

[REDACTED]

Petitioner

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