



RICK SNYDER
GOVERNOR

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

SHELLY EDGERTON
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Date Mailed: March 20, 2018
MAHS Docket No.: 18-000287
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Christian Gardocki

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 March 8, 2018, from Detroit, Michigan. Petitioner was represented by her son, [REDACTED] (hereinafter "Son"). [REDACTED] as Petitioner's attorney. The Michigan Department of Health and Human Services (MDHHS) was represented by [REDACTED] specialist. [REDACTED], assistant attorney general, appeared as legal counsel for MDHHS.

ISSUE

The issue is whether MDHHS properly imposed a divestment penalty from September 1, 2017, through October 4, 2018, in determining Petitioner's Long-Term-Care (LTC) eligibility.

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 has a birthdate of March 3, 1930.
2. Son has power of attorney over Petitioner
3. In addition to Son, Petitioner also had another son who was also Son's brother (hereinafter "Brother").
4. On June 28, 1976, and May 28, 1981, Brother purchased separate life insurance policies and named Petitioner as a beneficiary on each policy.

5. After May 28, 1981, Brother married and had five children.
6. In November 2016, Brother unexpectedly died.
7. On March 6, 2017, a probate county circuit court judge issued an Order Regarding Petition for Protective Order; the document, in part, ordered that an unspecified “disclaimer/assignment... shall not be deemed to be a divestment...”
8. MDHHS was not a party to the probate proceedings from March 6, 2017, in part, because Petitioner did not have an active or pending case with MDHHS.
9. On or near March 28, 2017, Son, as Petitioner’s representative, received Brother’s insurance proceeds which were valued at \$ [REDACTED] (see Exhibit A, p. 11) and \$ [REDACTED]
10. On an unspecified date after March 28, 2017, Son transferred the insurance policy proceeds from Petitioner to Brother’s wife.
11. On June 30, 2017, Petitioner applied for LTC benefits.
12. On October 9, 2017, MDHHS determined Petitioner was subject to a divestment penalty from September 1, 2017, through August 31, 2017, due to the transfer of insurance policy proceeds to Brother’s spouse.
13. On January 8, 2018, Petitioner requested a hearing to dispute the divestment penalty from September 1, 2017, through August 31, 2017,

CONCLUSIONS OF LAW

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. MDHHS (formerly known as the Family Independence Agency) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k. MDHHS policies are contained in the Bridges Administrative Manual (BAM), Bridges Eligibility Manual (BEM), and Reference Tables Manual (RFT).

MDHHS presented a Health Care Coverage Determination Notice (Exhibit A, pp. 1-7). The notice included MA eligibility determinations for Petitioner and a second person; Petitioner’s attorney conceded that only Petitioner’s MA eligibility was disputed. Listed MA determinations concerned Petitioner’s Medicare Savings Program eligibility, monthly patient pays, and a divestment penalty from June 1, 2017, through October 4, 2018.

Petitioner's attorney conceded all eligibility determinations except for the portion of the divestment penalty that ran from September 1, 2017, through October 4, 2018.

Divestment is a type of transfer of a resource and not an amount of resources transferred.¹ Divestment means a transfer of a resource...by a client or his spouse that are all of the following²:

- Is within a specified time; see LOOK-BACK PERIOD in this item.
- Is a transfer for LESS THAN FAIR MARKET VALUE; see definition in glossary.
- Is not listed below under TRANSFERS THAT ARE NOT DIVESTMENT

Divestment results in a penalty period in MA, not ineligibility. ³During the penalty period, MA will not pay the client's cost for... Long Term Care (LTC) services... [among other expenses].⁴

MDHHS presented undisputed testimony that the divestment penalty period in dispute was caused by transfers of two insurance policies with values totaling \$ [REDACTED]. Some of the details of the insurance policies were not disputed.

It was not disputed that Son and Brother were Petitioner's sons. It was not disputed that Brother took out the insurance policies on June 28, 1976, and May 28, 1981. It was not disputed that at the time the latter policy was issued, Brother was [REDACTED] years old. It was not disputed that Brother made his mother (Petitioner) the beneficiary of both policies. It was not disputed that Brother died unexpectedly in November 2016 which triggered payment of the insurance policies to Petitioner. It was not disputed that Son held power of attorney over Petitioner.

It was disputed whether the policy funds were issued to Petitioner or disclaimed by Petitioner. The dispute is of no matter as Petitioner's attorney conceded that either scenario is a potential divestment penalty. Petitioner's attorney, in part, contended that a probate court order precludes MDHHS from applying a divestment penalty.

An Order Regarding Petitioner for Protective Order (Exhibit B, p. 2) was presented. The order was signed by a county probate judge on March 6, 2017. It was ordered, in part, that Petitioner was in need of a protective order due to physical disability and mental deficiency. The order also stated that Petitioner's "disclaimer/assignment" of insurance proceeds "shall not be deemed to be a divestment, pursuant to Bridges Eligibility Manual 405".

Collateral estoppel bars the re-litigation of an issue in a subsequent, different cause of action where (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair

¹ BEM 405 (January 2017), p. 1

² *Id.*

³ *Id.*

⁴ *Id.*

opportunity to litigate the issue, and (3) there was mutuality of estoppel. *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). In order for collateral estoppel to apply, the issues in the two actions must be identical, not merely similar. *Bd of County Road Comm'rs for Eaton County v Schultz*, 205 Mich App 371, 376-377; 521 NW2d 847 (1994).

It was not disputed that MDHHS was not a party to the probate court proceeding which ordered that Petitioner's transfer of assets was not divestment. This consideration strongly supports finding that collateral estoppel does not apply.

Internal MDHHS correspondence concerning the probate proceedings was presented (see Exhibit A, pp. 6-10). The correspondence was consistent with hearing statements by Petitioner's attorney that MDHHS was fully aware of the probate proceedings. Petitioner's attorney contended that MDHHS' awareness of the proceedings allowed them to participate and dispute the probate proceedings thereby rendering MDHHS bound by the probate court's order due to collateral estoppel.

MDHHS contended that awareness of the proceedings did not equate to being a party. MDHHS also noted that as of the probate proceedings, there was no pending MA application for Petitioner. MDHHS was aware of the possibility of a later application from Petitioner but such a possibility did not obligate MDHHS' court participation. At the time of Petitioner's proceeding, MDHHS had no stake in the outcome. The possibility of a future interest is insufficient to establish mutuality of estoppel. Thus, the probate court's findings are not found to be binding on MDHHS.

Petitioner's attorney also contended that the transfer was not divestment because it was among the "transfers that are not divestment". Specifically, Petitioner's attorney contended that the transfer of proceeds from Petitioner to Brother's spouse was a "transfer for another purpose".

[Transfers] exclusively for a purpose other than to qualify or remain eligible for MA are not divestment.⁵ [MDHHS is to] 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.⁶

Preservation of an estate for heirs or to avoid probate court is not acceptable as another purpose.⁷ That the asset or income is not counted for Medicaid does not make its transfer for another purpose.⁸

Son testified that he never spoke to Brother about the insurance policies. Son testified that the insurance policies were vested after so many years and required no premium.

⁵ *Id.*, p. 11

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Son's testimony implied that Brother may have forgotten about the insurance policies, including who he left as beneficiary.

Son testified that after Brother started the insurance policies, he married and had five children. Son testified that one of Brother's children has celiac disease and requires a degree of medical attention. Son testified that Brother was a caring individual who took care of the members of his family. Son's testimony implied that Brother, had he remembered the insurance policies, would have updated the beneficiaries to his spouse and/or his children. Son testified that it was "mere oversight" that Brother did not update the beneficiary on his life insurance policies. Son testified that the insurance proceeds were transferred from Petitioner to Brother's family because "it was the right thing to do" and not purposeful avoidance of divestment.

Most persons with life insurance policies would probably want the proceeds to be paid to their spouse and/or kids. Brother's use of his mother as a beneficiary would be consistent with someone who did not have a family, which is consistent with when Brother started the policies. These considerations were supportive in finding that Son's transfer of insurance proceeds from Petitioner to Brother's spouse were done for a purpose other than divestment.

Son's testimony conceded that he was unaware of the insurance policies until Brother died. Thus, Son did not have any firsthand knowledge about Brother's intent of the insurance policy proceeds. Son's lack of knowledge detracts from Son's contention that his intent was to honor what Brother wanted.

MDHHS provides a specific example of a transfer for another purpose. The example is one where LTC was not anticipated or expected at the time of a transfer; it is as follows:

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.⁹

Son testified, at the time of insurance proceed transfer, he believed that his mother could reside in assisted living rather than in a LTC facility. Despite what Son believed, Petitioner's age and the timing of her LTC residency are very indicative of a likelihood of LTC need.

It was not disputed that Petitioner applied for LTC benefits after approximately 3 months before a probate court found the transfer to not be divestment. At the time that Petitioner applied for LTC assistance, she was ■-years-old. These considerations strongly support finding that Son was aware that Petitioner needed or would need LTC

⁹ *Id.*

benefits and that the insurance proceeds would need to be transferred in order to avoid a divestment penalty. These considerations support finding that LTC for Petitioner was expected, and therefore, Petitioner's son's motive in transferring the insurance proceeds was not a transfer for a purpose other than divestment.

Based on presented evidence, it is found that the \$ [REDACTED] transfer of insurance policy proceeds from Petitioner to Brother's wife was not for a purpose other than divestment. As no other basis existed to find the transfer was not divestment and there was not dispute about the penalty calculation, it is found that MDHHS properly imposed a divestment penalty against Petitioner.

DECISION AND ORDER

The administrative law judge, based upon the above findings of fact and conclusions of law, finds that MDHHS properly imposed a divestment penalty against Petitioner for the period from September 1, 2017, through October 4, 2018. The actions taken by MDHHS are **AFFIRMED**.

CG/



Christian Gardocki

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

Via Email

Counsel for Respondent

[REDACTED]
[REDACTED]
[REDACTED]

Counsel for Respondent

[REDACTED]
[REDACTED]
[REDACTED]

DHHS

[REDACTED]
[REDACTED]

Counsel for Petitioner

[REDACTED]
[REDACTED]
[REDACTED]

Via USPS

Petitioner

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]