



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

ORLENE HAWKS
DIRECTOR

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Date Mailed: May 9, 2019
MAHS Docket No.: 19-000977
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Lynn M. Ferris

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; 42 CFR 438.400 to 438.424; 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 13, 2019, from Detroit, Michigan. The Petitioner was represented by Attorney James Simasko. The Department of Health and Human Services (Department) was represented by Geraldine A. Brown, Assistant Attorney General.

During the hearing, Attorney for Petitioner, James Simasko, waived the time period for the issuance of this decision in order to allow for the submission of a legal brief regarding the issues presented, including divestment. No legal brief as requested was received. The record was closed on April 18, 2019, and the matter is now before the undersigned for a final determination based on the evidence presented.

ISSUE

Did the Department properly determine that the Petitioner divested assets totaling \$37,872.44 and apply a divestment penalty to Petitioner's receipt of long-term care (LTC) benefits under the Medical Assistance (MA) program?

FINDINGS OF FACT

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

1. The Petitioner, [REDACTED], applied for Medicaid (L/H) long term care (LTC) assistance on November 26, 2018. The Petitioner is married to [REDACTED] who is living at home and is not in long term care.

2. In the application for LTC the Petitioner answered “yes” to the question “Have you sold or given away within the past sixty (60) days property, land, vehicles, stocks, bond, savings, cash, checking, income etc., closed any accounts or removed or added a name on any asset within the last 60 months?” Exhibit 1.
3. Between the period August 1, 2015 and February 1, 2016, the Petitioner’s Spouse, [REDACTED], gave his adult son [REDACTED] a total of \$ [REDACTED]
4. The Department issued a Medical Determination Verification Checklist (VCL) on November 29, 2019, and requested that Petitioner provide a copy of the trust, full complete bank statements for IAA, date and months of October 2018 and November 2018, a copy of [REDACTED] household expenses, proof of all gifts and loans for look back, tracking movement of money. Exhibit 2.
5. In response to the VCL the Petitioner provided a [REDACTED] record for [REDACTED] account with a hand-written note money that was loaned to [REDACTED] in the total amount of \$ [REDACTED] for the period August 1, 2015, to August 31, 2015; and another [REDACTED] statement for February 1, 2016, to February 29, 2016. Exhibit 3 and Exhibit 4.
6. In response to the VCL, the Petitioner provided a Promissory Note (Note) dated November 19, 2018, in favor of [REDACTED], promising to pay [REDACTED] the principal sum of \$ [REDACTED] without interest from November 19, 2018. The repayment of the note was to be made in the amount of \$ [REDACTED] on December 31, 2018; and subsequent payments of the same amount shall be made each month on the last day of said month until the entire balance is satisfied. The final payment of the note was to be made on the final day of January in the year 2019. The note was irrevocable and unassignable and cannot be cancelled upon the death of [REDACTED]. Exhibit 5.
7. The Department issued a Health Care Coverage Determination Notice (Notice) on January 2, 2019, finding that Petitioner, [REDACTED], was not eligible for LTC from November 1, 2018, through March 17, 2019, because assets or income was transferred for less than their fair market value.
8. The Petitioner’s attorney filed a timely hearing request on February 1, 2019, protesting the finding of a divestment.

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.

In this case, the Department, after reviewing the transactions which occurred in this matter, found that the Petitioner's spouse, [REDACTED], had made a divestment which occurred when he made payments of cash to his son [REDACTED] in the amount of \$[REDACTED] in two payments made in 2015 and 2016. The Petitioner's spouse transferred funds from his [REDACTED] account in 2015 in the amount of \$[REDACTED] and in 2016, in the amount of \$[REDACTED]. At the time the cash was given to [REDACTED] [REDACTED] there was no evidence that the Petitioner's husband purchased a promissory note with the money he advanced his son. Just one week prior to Petitioner P [REDACTED] application for Medicaid for LTC, the Petitioner's spouse, [REDACTED], executed a Promissory Note with his son, [REDACTED], dated November 19, 2018, requiring that funds in the amount of \$[REDACTED] were to be repaid to [REDACTED] by [REDACTED] [REDACTED]. The terms of the Promissory Note required that \$[REDACTED] be repaid by December 31, 2018, and the balance by the last day of January 2019. Exhibit 5. It was unclear from the record whether at the time of the hearing any repayment of the promissory note had been made.

In Michigan, Medicaid Assistance with LTC is part of the Supplemental Security Income (SSI) Medicaid program and assistance with LTC costs is available under an MA-SSI-related category for eligible individuals who have countable resources of \$2,000 or less and have not disposed of any assets for less than fair market value during the five years prior to the application. BEM 105, BEM 400 and BEM 405. Medicaid eligibility is based upon a needs based test and requires that an applicant be denied if the person's assets exceed the asset limit for Medicaid. In addition, a person applying for Medicaid cannot give away assets in order to qualify for Medicaid. If an asset is transferred, the individual transferring the asset must receive fair market value in return for the asset. If fair market value is not received a divestment occurs and a divestment penalty period must be imposed. During the penalty period, Medicaid will not pay for LTC benefits. BEM 405, p. 1.

BEM 405 defines divestment as:

Divestment results in a penalty period in MA, **not** ineligibility. Divestment policy does **not** apply to Qualified Disabled Working Individuals (QDWI); see Bridges Eligibility Manual 169.

Divestment is a type of transfer of a resource and not an amount of resources transferred.

Divestment means a transfer of a resource (see *resource defined* in this item and in glossary) by a client or his spouse that are all of the following:

- 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 in this item under *transfers that are not divestment*.

During the penalty period, MA will not pay the client's cost for Long Term Care services. BEM 405 (January 2019), p. 1.

Based upon the evidence presented, it is established that the transfer of the \$ [REDACTED] in funds in this matter occurred during a three-year period prior to the execution of a promissory note executed on November 19, 2018, and one week prior to the Petitioner's Medicaid Application in this case. Clearly, at the time the cash was provided to [REDACTED] ([REDACTED] by Petitioner's spouse, no payment by Petitioner's spouse was made in exchange for, or for the purchase of a promissory note as no promissory note for repayment existed. The funds were given to [REDACTED] with no promise or note executed by [REDACTED] to repay the funds. In this case, Counsel for Petitioner argues that the Department improperly included the \$ [REDACTED] in funds Petitioner's spouse transferred to his son because those funds were a loan as evidenced by the November 19, 2018, Promissory Note. At issue is whether the Department properly included as divested funds the \$ [REDACTED] Petitioner's spouse transferred to his son in a series of transactions between August 2015 and February 29, 2016.

A divestment occurs when the client transfers a resource (i) within a specified time (the "look-back period"), (ii) for less than fair market value, and (iii) the transfer is not an excluded transfer. BEM 405, p. 1. The look-back period is a transfer within 60 months of the first date that the client was eligible for MA and one of the following: in LTC, approved for the waiver, eligible for Home Health services, or eligible for home help services. BEM 405, pp. 5-6. "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. 7. In other words, 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. BEM 405, p. 7. Compensation must have tangible form and intrinsic value. BEM 405, p. 7. Giving an asset away is a transfer that results in a divestment. BEM 405, p. 2. Similarly, shell transactions between relatives that have little or no economic benefit to the applicant are not for fair market value and are a divestment. *Mackey v Dep't of Human Servs*, 289 Mich App 688, 693; 808 NW2d 484 (2010), citing, in part, *Atkins v Rivera*, 477 US 154, 156-157; 106 S Ct 2456; 91 L Ed 2d 131 (1986). *Mackey*, 289 Mich App at 706.

In support of its position, the Department also points to the Social Security Administration's (SSA) Program Operations Manual System (POMS). While the POMS,

manual used in evaluation Social Security claims, is not binding authority, it is entitled to some consideration even in evaluating Medicaid claims. *Davis v Sec'y of Health and Human Servs*, 867 F2d 336, 340 (CA 6, 1989); *Landy v Velez*, 958 F Supp 2d 545, 553 (D NJ, 2013); 70A Am Jur 2d, Social Security and Medicare § 16.

POMS S1 01120.220 (D) (2) acknowledges that a loan may be written or oral but provides that it is a bona fide loan only if the loan agreement is in effect at the time that the lender provides the cash to the borrower explaining that money given to an individual with no contemporaneous obligation to repay cannot become a loan at a later date. It further explains that when money or property is given and accepted based on any understanding, other than it is to be repaid by the recipient there is no loan for SSI purposes.

In this case, the fact that the Note was not executed contemporaneously with the two disbursements of funds, but was executed just before the MA application was submitted is evidence that the money given to the son was not intended as a loan and that the Petitioner's Spouse did not purchase a promissory note with the funds when he gave [REDACTED] the money. At the time the funds were given to [REDACTED] there was no enforceable written agreement that the Petitioner's spouse could have used to enforce any repayment of the funds. Thus, under the POMS, the Note does not evidence a bona fide loan. See also *Landy*, 958 F Supp 2d at 556-561 (applying POMS SI 01120.220 to the analysis of the plaintiffs' eligibility for Medicaid where the plaintiffs contend that promissory notes evidence a bona fide loan).

Counsel for Petitioner argues in response to the Department's position that the transfer of funds to [REDACTED] was a divestment, that the Note in this case by the express terms of 42 USC 1396p(c)(1)(I) and BEM 400 is not a divestment as neither 42 USC 1396p(c)(1)(I) nor BEM 400 require that the loan agreement be in effect at the time that the lender provides the cash to the borrower. 42 USC 1396p(c)(1)(I) provides:

For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes **funds used to purchase a promissory note**, loan, or mortgage unless such note, loan, or mortgage—

(i)

has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(ii)

provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

(iii)

prohibits the cancellation of the balance upon the death of the lender. (Emphasis supplied).

In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of clauses (i) through (iii), the value of such note, loan, or mortgage

shall be the outstanding balance due as of the date of the individual's application for medical assistance for services described in subparagraph (C).

Consistent with these terms, BEM 400, p. 42-43 provides that **all money used to purchase a promissory note, loan or mortgage** is counted as a divestment unless all of the following are true: (i) the repayment schedule is actuarially sound; and (ii) the payments are made in equal amounts during the term of the agreement with no deferral of payments and no balloon payments; and (iii) the note, loan, or mortgage must prohibit the cancellation of the balance upon the death of the lender.

The Note in this case meets the three criteria outlined in BEM 400 and 42 USC §1396p(c)(1)(I). However, a promissory note is evaluated under BEM 400 and §1396p(c)(1)(I) **only when money was used to purchase the promissory note.** (emphasis supplied). Purchasing a promissory note for money is a transfer of an asset. It is clear that both the federal law 42 USC §1396p(c)(1)(I) and BEM 400 anticipate a contemporaneous exchange of funds for the purchase of a promissory note as they both clearly express a promissory note is a purchase and anticipate an exchange of money for a promissory note. They both require that money be used to purchase a note and do not include a situation where money is given to a person and then three years later a note is made to commemorate the giving of funds. While such a transaction could be made, it does not satisfy that a transfer of an asset was made to purchase the note at the time of its making. At no time during the period the funds were in [REDACTED] possession, approximately three years, was there any evidence of any repayment of the funds given to him. Common sense, as well as the lack of evidence to the contrary (repayment) would dictate that the funds were given as a gift to [REDACTED] with no repayment anticipated and no enforceable written note to allow recovery of the funds and as such a divestment occurred. The facts in fact suggest that the execution of the Promissory Note was clearly done to avoid a finding of divestment, so that funds advanced without any obligation to be repaid could be converted to a loan to avoid a divestment determination.

As indicated herein, the circumstances in this case do not evidence that any funds of [REDACTED] were used to purchase the Note on November 19, 2018. [REDACTED] executed the Note approximately three years after the funds were transferred to him, and at that time there was no evidence of an express intention to repay the funds and no promissory Note was in existence at the time of the cash transfer so it was not shown that any funds were given by Petitioner's Spouse at the time the Note was created to purchase a promissory note. Under these facts, it is determined that Petitioner's Spouse did not use his funds to purchase the Note. Therefore, the November 19, 2018, Note is properly not evaluated to determine whether it satisfies the criteria in BEM 400 and §1396p(c)(1)(I) to be an exclusion from divestment as it is not.

The evidence presented to support Petitioner's position that the transfer of funds to [REDACTED] was not a divestment, did not satisfy the requirement that the money was used to purchase the promissory Note as no funds were exchanged at the time the

Note was made on November 19, 2018. No evidence was offered to support how and why the money was given, or that at the time the money was given away it was intended to be a loan. This evidence was lacking as no Note was made at the time the two disbursements of cash were given to [REDACTED]. The Petitioner offered no evidence other than the promissory Note to support its contention that the money given to [REDACTED] was a loan and not a gift and that no divestment occurred. While Department policy provides that transfers exclusively for a purpose other than to qualify or remain eligible for MA are not divestment, transfers for less than fair market value are assumed to be for eligibility purposes "until the client ... provides convincing evidence" that she had no reason to believe LTC service might be needed. BEM 405, p. 11. While the Petitioner's attorney alleges that Petitioner was healthy at the time of the funds being given to [REDACTED], no actual testimony by any qualified person was received on this issue. Petitioner requested a hearing to establish her case, and the evidence presented did not establish that the requirements of BEM 400 and 42 USC1396p(c)(1)(I) were met. In the absence of evidence, Petitioner has failed to establish that the cash transfers to [REDACTED] were not divestments.

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 found that a divestment occurred in the amount of \$[REDACTED].

DECISION AND ORDER

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

LMF/jaf



Lynn M. Ferris

Administrative Law Judge
for Robert Gordon, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

Counsel for Respondent

Geraldine A. Brown
AG-HEFS-MOHR

DHHS

Vivian Worden
MDHHS-Macomb-36-Hearings

Counsel for Petitioner

James Simasko
Simasko Law
319 N Gratiot Ave
Mount Clemens MI 48043

Petitioner

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

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