ELDRS FALL 2020 CONFERENCE

MEDICAID UN-PROGRAM:
Hot Topics for Elder Law Attorneys, Advocates and Ombudsmen

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This information is accurate as of October 6, 2020.

I. Key Changes in MDHHS Medicaid Policy Since Last Year's Fall ELDRS Conference

The 2020 Medicaid Numbers: *See* Attachment 1.

December 2019 Policy Change:

<u>Revisions to MIChoice Waiver Chapter of the Medicaid Provider Manual</u>

Medical Services Administration Bulletin MSA 19-17 announced numerous changes to the MIChoice Waiver chapter of the *Medicaid Provider Manual*. *See* Attachment 2. This manual is an essential resource for elder law attorneys and legal assistants who work with clients needing MIChoice waiver program services. The URL address for the *Medicaid Provider Manual* is shown in Attachment 7 of these materials.

January 2020 Policy Change:

<u>Lock-Out Policy for Persons Convicted of Medicaid Fraud</u>

"MDHHS may limit, restrict or suspend, for a period not exceeding one year, the Medicaid eligibility of any beneficiary who is convicted of an offense related to false statements or representations in connection with the Medicaid program, as described in Section 1128B of the Social Security Act." *See* BEM 105, pages 5-6, "MA-Only Lock-Out" and Medicaid Services Administration Bulletin MSA 19-36.

March 2020 Policy Change:

"COVID-19 Response" Bulletins

Starting in March 2020 the MDHHS Medical Services Administration began issuing Bulletins and Medicaid Provider L Letters on the agency's website that describe how Medicaid eligibility and covered services are modified during the Governor's Declaration of a State of Emergency[1]. Examples include suspension of all Medicaid closures (*see* Attachment 3), the extension of level of care (LOC) determination due dates for nursing homes, MIChoice waiver, PACE and MIHealth Link recipients (L 20-19) and rate increases for Medicaid Home Help providers (L 20-26). The URL address for Medical Services Administration Bulletins and Medicaid Provider L Letters is shown in Attachment 7 of these materials.

April 2020 Policy Changes:

Promissory Notes As Divestment

BEM 400, page 42 was changed to include the following language:

> "A note that cannot be sold or transferred to another party does not meet the definition of fair market value and must be reviewed as a divestment."

MDHHS policy has always treated promissory notes that are transferable as countable assets for Medicaid eligibility purposes. Now a promissory note that is nontransferable will trigger a divestment penalty period for clients seeking to qualify for Medicaid to help pay for long term care services.

HMP Work Requirements Rescinded

The work requirements for the Healthy Michigan Plan were rescinded on March 4, 2020. This change was implemented to comply with the order of the federal district court for the District of Columbia in *Young, et al. v Azar et al*. *See* Medicaid Services Administration Bulletin MSA 20-10 dated April 28, 2020.

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[1] On September 29, 2020, Governor Whitmer extended the State of Emergency through October 27, 2020. However, on October 2, 2020, the Michigan Supreme Court ruled that the Governor has no authority to continue the state of emergency. That decision is not effective for twenty one days through October 23, 2020. It is likely that MDHHS will soon issue new Medical Services Administration Bulletins that address this development.

July 2020 Policy Changes:

Change in BPG Definition of Home

Prior BPG definition of "Homestead"	July 1, 2020 Change in BPG Definition of "Homestead/Home"
The residence that a person owns (or is buying) where they usually live. The homestead includes all adjoining property, any other buildings on the property, but does not include other residences on the property.	The shelter a person owns (or is buying) where they usually live and which is their principal place of residence. The homestead includes the shelter, the land on which the shelter is located, and related buildings on such land, but does not include other shelters on the property.

The BPG Glossary does not define the terms "shelter" or "related buildings." The language in BEM 400 that describes the homestead exclusion is unchanged.

In BPB 2020-021, page 3, MDHHS said the reason for this revision is to "reflect current Social Security Administration (SSA) terminology." This suggests that the POMS for the SSI program should be consulted when the status of real property as a person's homestead is at issue.

A Tweak to Policy on Promissory Notes

Prior Policy at BEM 400, Page 42	New Policy at BEM 400, Page 42
"The note is an asset of the lender. The value of the note is the outstanding balance due as of the date of application for long term care, home help, waiver services, or home health services."	"The note is an asset of the lender. For eligibility the value of the note is the outstanding balance due as of the date of application for long term care, home help, waiver services, or home health services."

The insertion in the new policy of the words "For eligibility" appears to be a direction that **all** promissory notes are **always** treated as countable assets using the balance due as of the date of the Medicaid application.

BEM 400, page 10 says that assets that are not “available” are not countable. Promissory notes that are non-transferable are not “available” because the owner does not have the legal right to dispose of them. However, neither the July 1 change to promissory note policy nor the one that was implemented on April 1 acknowledges that a promissory note that is not “available” is not a countable asset.

Elaboration of Divestment Policy on Transfer of a Homestead

MDHHS added new language to the verification requirements in BEM 405, page 17 for situations in which a child provides care in the home before the parent’s admission to a nursing home or approval for the MIChoice waiver program:

> “Obtain a statement from the LTC or waiver client’s physician (M.D. or D.O.) to verify:
>
> - The client’s non-disabled child (age 21 or over) provided the care that would otherwise have required LTC or waiver services and
>
> - A doctor’s statement or other medical records indicating the medical need for the services **at the time the services were initiated**.” (Emphasis added).

If these conditions are met, the transfer of a homestead to such a child is not divestment.

Employer-Sponsored Annuities

Prior policy in BEM 401 said that local MDHHS staff must send all trusts and annuities to the Trusts and Annuities Unit of the MDHHS Legal Affairs Administration for evaluation. Starting July 1, 2020 this requirement no longer applies to “Employer-sponsored annuities”.

MAGI and Pre-Tax Deductions

New policy in BEM 500, page 6 clarifies that pre-tax deductions should not be counted toward an individual’s Modified Adjusted Gross Income (MAGI) for purposes of Medicaid eligibility for the Healthy Michigan Plan. The example given is a person who has gross income of $2,000 per month who makes a $400 pre-tax contribution to a 401K account. The monthly countable MAGI would be $1,600.

The Intersection of Medicaid and Medicare Part B

The following language was removed from the policy on “Pursuit of Benefits” in BEM 270, page 1:

> “Medicare Part B is not mandatory to pursue as a potential resource. However, when an individual refuses Medicare Part B, Medicaid does not pay for any Medicare Part B covered services received.”

This policy change was announced in BPB 2020-021. That bulletin provides no explanation for the change.

August 2020 Policy Change:

All Medicaid Redeterminations Are Suspended Until the State Of Emergency Is Lifted

Attachment 4 is Medical Services Administration Bulletin MSA 20-37 which explains this development. Because this change is time-limited the BEMs and the BAMs are not changed to reflect this temporary policy. Many MDHHS eligibility specialists are nevertheless requesting that clients submit redetermination documents during this moratorium to mitigate the backlog of renewals that will need to be processed when the Governor’s Declaration of State of Emergency ends.

September 2020 Policy Change:

MDHHS Suspends Decision to Treat VA Aid and Attendance and Housebound Allowances As Countable Income for MIChoice Waiver Program and PACE Eligibility

On July 1, 2020, MDHHS revised BEM 503 to make VA Aid and Attendance and Housebound allowances countable income for purposes of eligibility for the MI Choice waiver program and PACE. The following sentence was added to BEM 503, page 40:

> "**Note:** Aid and attendance is not excluded from the . . . PACE (BEM 167) or MIChoice (BEM 106) waiver income eligibility calculations.”

On September 1, 2020, MDHHS issued new policy that removed this sentence from BEM 503.

It is unclear whether MDHHS has abandoned the July 1, 2020 policy change or whether it will implement it later. Attachment 5 contains comments by the ELDRS

submitted to MDHHS that explain why the Department's proposal to treat VA Aid and Attendance and Housebound allowances as countable income for determining eligibility for the MIChoice waiver program and PACE is unlawful.

October 2020 Policy Change:

The Definition of Excluded "Household Goods"

The definition of excluded "household goods" for persons residing in nursing homes is limited to items that "were previously used by the person in his or her own residence". Household goods purchased by an institutionalized person for her or his home *after* moving to a nursing home will be treated as countable assets. BEM 400, page 39. No information was provided by MDHHS that explains how the agency will place a value on countable household goods.

MA Trust Policy

Bridges Policy Bulletin (BPB) 2020-029 dated October 1, 2020 states:

"**BEM 405**

> Transfers by the applicant or the applicant's spouse to a trust will be evaluated as a divestment. This does not apply to transfers to a special needs trust for a spouse.
>
> *Reason: To align policy with federal regulations.*"

However, there were no changes made to BEM 405 on October 1 and DHHS has not issued an MSA Bulletin to implement this new policy.

The stated rationale for the new policy is dubious because there are no "federal regulations" that govern the treatment of trusts in the Medicaid program with which BEM policy can be aligned.

November 2020 Policy Change:

Divestment Applies to PACE

MDHHS issued *Corrected* Medical Services Administration Bulletin MSA 20-63 on October 6, 2020. *See* Attachment 6. The Department will apply divestment

policy to persons who apply for PACE on or after April 1, 2021. For PACE participants, divestment policy will only apply to transfers made on or after April 1, 2021. This MSA Bulletin is the agency's official policy until BEM 405 can be revised to reflect this change.

A NOTE ABOUT MEDICAID POLICY CHANGES

There were other minor policy changes in the Medicaid program over the past year that are not described in these materials. **ALWAYS** check the BEMs, the BAMs, the BPB Glossary and the Medicaid Policy Bulletins and Medicaid Provider L Letters for current policy. **NEVER** assume that Medicaid policy is unchanged.

II. Resources You Should Know

Attachment 7 is a compilation of "Useful Resources for Analyzing Medicaid Issues". This list is not exhaustive but it does identify a wealth of information that will help inform an analysis of the issues presented by clients seeking health care coverage under Michigan's Medicaid program.

III. HOT TOPICS in Michigan Medicaid Practice

A. MDHHS Once Again Pushes Back on SBO Trusts. Last year's Michigan Supreme Court decision in *Hegadorn v Dep't of Human Services,* MSC Docket Nos. 156132-156134 (decided May 9, 2019*)* held that resources used to fund a trust solely for the benefit of (SBO) a community spouse are not countable assets for determining the Medicaid eligibility of the nursing home spouse. After the *Hegadorn* decision Michigan elder law attorneys resumed using SBO trusts for community spouses with success[2]. The Trusts and Annuities Unit of the MDHHS Legal Affairs Administration has evaluated these trusts and found that:

- if the trust is irrevocable,
- it the trust satisfies the criteria in BEM 405 for being solely for the benefit of the community spouse, and

[2] For an exposition of the *Hegadorn* decision and the use of SBO trusts in its aftermath see Angela M. Hentkowski's fine presentation, "SBO Trusts - A Time Warp?" for the ICLE Medicaid and Health Care Planning Update 2020.

- there is no circumstance in which any trust resources can be distributed in the month MDHHS determines the nursing home spouse's Medicaid eligibility,

the principal and income of the trust are not countable assets for determining the nursing home spouse's eligibility.

On July 30, 2020, MDHHS announced a proposed policy that will treat transfers to an SBO trust for a community as divestment. Attachment 8 contains the Notice of Proposed Policy, the Proposed Policy Draft and pages 10 and 13 of BEM 405 that show the policy changes.

The first proposed change is in BEM 405, page 10. The new language is shown in bold:

"Transfers
Involving Spouse

It is not divestment to transfer resources from the client to:

- The client's spouse.
- Another SOLELY FOR THE BENEFIT OF the client's spouse.

Transfers from the client's spouse to another SOLELY FOR THE BENEFIT OF the client's spouse are not divestment. **This does not apply to trusts established SOLELY FOR THE BENEFIT OF the client's spouse.**"

The second proposed change is in BEM 405, page 13 in the definition of "solely for the benefit of". The old language is shown in the sentence that is struck. The new language is shown in bold:

"~~All of the following conditions must be met for a transfer or for a trust to be solely for the benefit of a person~~. **All of the following conditions must be met for a transfer to be solely for the benefit of a blind or disabled child, or a spouse; or for a trust to be solely for the benefit of a blind or disabled child, or a disabled individual under age 65."**

Attachment 9 contains comments submitted to MDHHS that explain the legal infirmities of the proposed policy.

On September 1, 2020, Bridges Policy Bulletin 2020-029 was released. Page 2 of the bulletin contains the following description of the new policy MDHHS intends to implement:

"Transfers by the applicant or the applicant's spouse to a trust will be evaluated as a divestment. This does not apply to transfers to a special needs trust for a spouse."

On September 24, 2020, the ELDRS submitted additional comments to MDHHS on the new policy. *See* Attachment 10.

As of October 1, 2020, BEM 405 has not been modified to reflect this policy change. No MSA Bulletin has been issued to implement the policy change.

It is an open question whether and when MDHHS will revise BEM 405 to incorporate the proposed changes to BEM 405. That could happen as early as November 1. The effect of the new policy is to define transfers to an SBO trust for the benefit of a community spouse as divestment. The Trusts and Annuities Unit of the MDHHS Legal Affairs Administration will now find that all SBO trusts are divestment because that is the result BEM 405 requires. Bridges will assign a divestment penalty period to all SBO trusts.

Among the important questions this presents for practitioners are:

- Is it reasonable and prudent to continue offering SBO trusts for a community spouse as a Medicaid planning option for married couples?

- Will MDHHS attempt to penalize SBO trusts implemented in the wake of the *Hegadorn* decision at the annual renewal of the nursing home spouses' Medicaid eligibility?

- How should the new policy be stopped?

B. Promissory Notes As Divestment. Another example of MDHHS using policy to define divestment in a way that is at odds with the law is the April 1 change to BEM 400. The following sentence was added to page 42:

"A note that cannot be sold or transferred to another party does not meet the definition of fair market value and must be reviewed as a divestment."

This new language forces MDHHS to treat a nontransferable promissory note as divestment regardless of the evidence and the law that show otherwise.

The new policy is unlawful because: (1) it is more restrictive than SSI regulations at 42 CFR 416.1246(c) and SSI policy in POMS SI 01150.005 that recognize the compensation a lender receives in exchange for the resource transferred to a borrower includes all the payments promised over the life of a note, not just its current fair market value, and (2) it violates 42 USC 1396p(c)(1)(I) by subjecting promissory notes that satisfy all the requirements of that federal law to a transfer of assets penalty.

In March 2020, before MDHHS implemented the new policy, an MOAHR administrative law judge issued a hearing decision that reversed the agency's attempt to treat a nontransferable promissory note as divestment. A copy of that decision is Attachment 11.

Until this policy is stopped or changed, the use of nontransferable promissory notes as a Medicaid planning device is a risky proposition.

C. **Wrong Start Date for Divestment Penalty.** Over the past year there have been many reports on the ELDRS ListServ of MDHHS starting a divestment penalty on the wrong date. The typical scenario is:

- The client applies for Medicaid and fully reports assets that were transferred within the 5-year look back period that should trigger a divestment penalty.

- MDHHS approves the Medicaid application without applying the divestment penalty.

- The client notifies MDHHS that it failed to apply the divestment penalty or the agency discovers its error.

- The MDHHS issues a Health Care Coverage Determination Notice that imposes a divestment penalty period that starts on a date after the notice is issued.

MDHHS relies on its policy in BEM 405, page 15 which says:

"If . . . 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. If a penalty is determined for a transfer in the past, apply the penalty from the first day after timely notice is given;"

Federal Medicaid law at 42 USC 1396p(c)(1)(D)(ii) and Michigan's Medicaid State Plan, Supplement 9b to Attachment 2.6-A both specify that the beginning date for a penalty period imposed for an uncompensated transfer of assets is *the later of*:

- the first day of a month during which assets were transferred, or

- the date on which the individual is eligible for Medicaid and is receiving long term care services that would be covered by Medicaid was it not for the imposition of the penalty.

There is no legal authority for starting a divestment penalty period on any other date. Moreover, imposition of a divestment penalty period when MDHHS discovers its error violates the policy in BAM 705 and BAM 701 that clients are

not subject to recoupment of Medicaid benefit overissuances caused by agency error. In these instances the overissuance occurs when MDHHS pays for long term care services in the period the divestment penalty should have been in place.

The failure to start a divestment penalty on the correct date wreaks havoc on half-a-loaf Medicaid plans. Practitioners should make extra effort to highlight the transfer of assets information in Medicaid applications and verification documents with persistent follow up with MDHHS staff to make sure they get it right the first time.

D. A New Land Mine for Protective Orders in Medicaid Planning. The Department of Attorney General often appears in probate court proceedings in which a community spouse is petitioning for a protective order that will affect the Medicaid community spouse income allowance (CSIA) and community spouse resource allowance (CSRA)[3]. In late 2019 and in 2020 it began seeking stays of probate court protective orders in the Court of Appeals as part of its appeals of those orders that result in higher asset and income allowances for the community spouse than would otherwise result from application of the policies in BEM 402 and BEM 456. When those stays are granted the result is disastrous for these clients. During the pendency of these appeals MDHHS sets the CSIA and CSRA at levels that are unsustainable for these clients because of the time it takes for these cases to be resolved by the Court of Appeals.

IV. The Medicaid Un-Program Free-For-All Session

This is your time to raise other issues, pose questions, share your experiences and brainstorm with your colleagues on all those thorny issues in your Medicaid practice.

When it comes to Medicaid, there are no dumb questions!

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[3] The use of probate court protective orders is the subject of Susan L. Chalgian's excellent materials on "Evolving Issues Surrounding Protective Orders" for the ICLE Medicaid and Health Care Planning Update 2020.

MICHIGAN'S MEDICAID PROGRAM: The 2020 Numbers

This attachment describes updates to a variety of factors that affect eligibility for Michigan's Medicaid program. The MDHHS policy manuals referenced in this material are available online at *www.dhhs.michigan.gov/olmweb/ex/html.* This information is accurate as of October 1, 2020.

Healthy Michigan Plan (BEM 157)

- For persons age 19-64 who are not otherwise eligible for Medicaid or Medicare.
- Income Limit: 133% of the Federal Poverty Level (FPL) – $16,970 for a single person in 2020. 5% of the highest applicable income threshold is disregarded. The resulting income limit is 138% of the FPL, **$17,608** in 2020.
- Modified Adjusted Gross Income (MAGI) is used to measure income. *See* BEM 500 for MAGI policy and the *Modified Adjusted Gross Income (MAGI) Related Eligibility Manual* at: *www.michigan.gov/documents/mdch/MAGI_Manual_457706_7.pdf*
- THERE IS NO ASSET LIMIT

AD Care Income Limits:

1 Person - **$1,084** Couple - **$1,457** (RFT 242)

Medicare Savings Program Numbers:

Asset Limits:	One Person	**$7,860**	
	Couple	**$11,800**	(BEM 400, page 8)

Income Limits:	1 Person	Couple
QMB[1]	**$1,084**	**$1,457**
SLMB[2]	**$1,084.01-$1,296.00**	**$1,457.01-$1,744**
ALMB[3]	**$1,296.01-$1,456**	**$1,744.01-$1,960**

[1] 100% of the Federal Poverty Level + $20 disregard
[2] 120% of the FPL + $20 disregard
[3] 135% of the FPL + $20 disregard (RFT 242)

Medicaid Asset Exclusion Numbers:

- **Equity Limit for Homestead Exclusion**: **$595,000**. Applies only to persons with no spouse, no blind or disabled child or no minor child living in the home. If the homestead equity limit is exceeded Medicaid will not pay for the person's nursing home services, MI Choice Waiver services, PACE, home health services or home help services. (BEM 400, pages 35-36.)

- **Asset Limit for Principal Value of an Irrevocable Funeral Contract**: **$13,160.** (BAM 805, page 5).

- **Asset Limit for Life Insurance-Funded Funerals: $11,160**. (Michigan Department of Insurance and Financial Services Bulletin 2020-06-INS).

Medicaid Long-Term Care Numbers:

- **Community Spouse Income Allowance** (CSIA) deduction from the Patient Pay Amount (PPA):

	Sum of all the community spouse's shelter expenses
plus	**$547.00** Heat/Utility Allowance
equals	Total Shelter Expenses
minus	**$646.50** Shelter Standard
equals	Excess Shelter Allowance
plus	**$2,155.00** Basic Allowance
equals	Total Allowance (up to a maximum **of $3,216.00**)
minus	Community spouse's countable income
equals	Community Spouse Income Allowance

OR BAM 600, pages 40-42, contains a procedure for obtaining a higher CSIA due to "exceptional circumstances resulting in financial duress" through an administrative hearing. However, no relief is available through that process if the community spouse needs more income to pay for "goods and services purchased for day-to-day living".

OR A higher amount ordered by a court for support of the community spouse. (BEM 546, pages 4-6)

- **Family Allowance Deduction** from the PPA: The monthly amount in the basic allowance is **$2,155. (**BEM 546, pages 7-8)

  The basic allowance for each dependent living with the community spouse (married and unmarried children under age 21, married and unmarried children age 21 and over and siblings and parents if they are claimed as dependents on either spouse's federal tax return) is:

	$2,155
minus	The dependent's countable income
divided by	3

  The Family Allowance deduction from the PPA is the sum of the basic allowances of all the dependents.

- Income eligibility deduction and PPA deduction for **guardianship and conservatorship expenses**: **$83 .** (BEM 546, page 9).

- **Protected Spousal Amount** of the couple's assets owned on the initial asset assessment (IAA) date protected for use by the community spouse:

  The *greatest of* **$25,728** *or* ½ of the Initial Asset Assessment Amount up to a maximum of **$128,640** (*or* the amount transferred to a community spouse pursuant to court order). (BEM 402, page 9)

- **Divestment divisor** for persons with a Baseline Date in 2020: **$8,618** (BEM 405, page 13).

- **Gross Income Limit for the MI Choice Waiver and PACE Programs**: **$2,349.** (BEM 106, page 4; BEM 164, page 2; BEM 167, page 2; RFT 248).

Freedom To Work (FTW) Numbers:

Initial Eligibility

Asset Limit: **$7,860**

Income Limit: Countable income cannot exceed **$2,602** per month.

Ongoing Eligibility

Asset Limit: **$75,000**

Income Limit: Unearned income cannot exceed **$2,602** per month.

FTW Premium Payments (*See* the FTW Calculator at *mi.db101.org*):

MAGI income less than 138% of the FPL	**$0**
MAGI income between 138% of the FPL and $75,000	**2.5% of income**
MAGI Income over $75,000	**100% of the average FTW participant cost**

(BEM 174)

# # #

Medical Services Administration
BULLETIN
MSA

Bulletin Number: MSA 19-17

Distribution: MI Choice Waiver Agencies

Issued: November 1, 2019

Subject: Revisions to the MI Choice Waiver Chapter of the Medicaid Provider Manual

Effective: December 1, 2019

Programs Affected: MI Choice Waiver

The attached draft of the MI Choice Waiver chapter (part of the Michigan Department of Health and Human Services Medicaid Provider Manual) reflects policy changes for the MI Choice Waiver program. Many changes are the result of changes approved by the Centers for Medicare & Medicaid Services (CMS) during the MI Choice Waiver renewal process. Additional changes were made to provide clarification on certain topics.

Updates include:

- Removal of Community Transition Services and addition of language relating to other requirements for individuals transitioning from a nursing facility to a community setting;
- Addition of new services:
  - Community Health Worker
  - Community Transportation
- Addition to existing services:
  - Respiratory Care to Private Duty Nursing (PDN) (to allow Respiratory Therapists as PDN providers for respiratory care)
  - Nursing facilities as Respite settings
- Changes to frequency of reassessment, care plan development/updates, and contact/communication with participants;
- Removal of language related to Nursing Facility Level of Care Determination and Retrospective Review;
- Clarification regarding institutional stays and MI Choice enrollment;
- Clarification on enrollment capacity;
- Clarification regarding home and community-based settings (revised language related to the person-centered service plan and what it must include);
- Additional language related to self-determination;
- Clarification regarding provider networks;
- Reporting and audit requirements to comply with federal managed care regulations;

- Addition of language requiring the waiver agencies to check the List of Sanctioned Providers when doing background checks for providers;
- Updates to three critical incidents; and
- Updates to requirements for grievances and appeals to comply with federal requirements.

The Nursing Facility Level of Care Determination requirements are outlined in the Nursing Facility Level of Care Determination chapter of the Medicaid Provider Manual. The Medicaid Provider Manual can be accessed on the Michigan Department of Health and Human Services (MDHHS) website at www.michigan.gov/medicaidproviders >> Policy, Letters & Forms.

Manual Maintenance

Retain this bulletin until the information is incorporated into the Medicaid Provider Manual.

Questions

Any questions regarding this bulletin should be directed to Provider Inquiry, Department of Health and Human Services, P.O. Box 30731, Lansing, Michigan 48909-8231, or e-mailed to ProviderSupport@michigan.gov. When you submit an e-mail, be sure to include your name, affiliation, NPI number, and phone number so you may be contacted if necessary. Providers may phone toll-free 1-800-292-2550.

Approved

Kate Massey, Director
Medical Services Administration

Medical Services Administration

BULLETIN

MSA

Bulletin Number: MSA 20-19

Correction to date within bulletin-April 6, 2020

Distribution: Bridges Eligibility Manual (BEM) Holders

Issued: April 6, 2020

Subject: COVID-19 Response: Suspending all Medicaid Closures

Effective: Immediately

Programs Affected: Medicaid, MIChild

Per Centers for Disease Control and Prevention (CDC) and State recommendations, social distancing is encouraged to slow the spread of COVID-19 and thus preserve the health system capacity for the duration of this pandemic. As a result of the federal emergency health declaration, the Michigan Department of Health and Human Services (MDHHS) is suspending program coverage closures for all Medicaid programs beginning March 18, 2020 and will be in effect through the month of April 2020 or until the first of the month following the termination of the Governor's Declaration of a State of Emergency Order (2020-04, COVID-19), whichever is later. Medicaid coverage will only be closed if the individual moves out of state, requests that their benefits close, or they become deceased.

This temporary suspension of closures applies to Medicaid, MIChild, Healthy Michigan Plan (HMP), and individuals who have active coverage through a met deductible (i.e., spend down). Individuals who meet their deductible during the declared health emergency period will remain open until the end of the health emergency. Temporary closure restrictions do not apply to the MOMS program as this is not a Medicaid group. While closures will not take place except for the reasons stated above, individuals may (in limited cases) move to other Medicaid groups. These individuals will not see a decrease in their benefit amount and their case will stay open during the health emergency. These temporary policy changes offer flexibility for providers to meet the needs of beneficiaries through alternative means while protecting the health and welfare of both parties.

Public Comment

The public comment portion of the policy promulgation process is being conducted concurrently with the implementation of the change noted in this bulletin. Any interested party wishing to comment on the change may do so by submitting comments to Kayla Lowers, Policy Specialist, via e-mail at:

E-mail: LowersK@michigan.gov

Please include "COVID-19 Response: Suspending all Medicaid Closures" in the subject line.

Comments received will be considered for revisions to the change implemented by this bulletin.

Manual Maintenance

Information is time-limited and will not be incorporated into any policy or procedure manuals.

Questions

Any questions regarding this bulletin should be directed to Provider Inquiry, Department of Health and Human Services, P.O. Box 30731, Lansing, Michigan 48909-8231, or e-mailed to ProviderSupport@michigan.gov. When you submit an e-mail, be sure to include your name, affiliation, NPI number, and phone number so you may be contacted if necessary. Providers may phone toll-free 1-800-292-2550.

Approved

Kate Massey, Director
Medical Services Administration

ATTACHMENT 4

Medical Services Administration

BULLETIN MSA

Bulletin Number: MSA 20-37

Distribution: Bridges Eligibility Manual (BEM) Holders

Issued: August 7, 2020

Subject: COVID-19 Response: Suspending All Medicaid Renewals

Effective: As Indicated

Programs Affected: Medicaid

Consistent with public health emergency conditions at both the state and federal levels related to COVID-19, the Michigan Department of Health and Human Services (MDHHS) is issuing this policy effective as indicated below. Given the circumstances, this policy is intended to be time-limited, and MDHHS will notify providers of its termination. MDHHS is suspending renewals for all Medicaid programs beginning June 1, 2020. Passive renewals will be processed for June 2020. Paper renewals will be suppressed beginning June 1, 2020. All renewals will be suspended or suppressed as of July 1, 2020.

The renewal process is a periodic re-evaluation of all eligibility factors to determine if the group continues to be eligible for the program benefits. This is currently completed by submitting a paper renewal form, going to the online portal MiBridges to complete the renewal, or through the use of an automated passive renewal that the recipient has agreed to.

Public Comment

The public comment portion of the policy promulgation process is being conducted concurrently with the implementation of the change noted in this bulletin. Any interested party wishing to comment on the change may do so by submitting comments to Shannon David via e-mail at:

E-mail: DavidS1@michigan.gov.

Please include "COVID-19 Response: Suspending All Medicaid Renewals" in the subject line.

Comments received will be considered for revisions to the change implemented by this bulletin.

Manual Maintenance

Information is time-limited and will not be incorporated into any policy or procedure manuals.

Questions

Any questions regarding this bulletin should be directed to Provider Inquiry, Department of Health and Human Services, P.O. Box 30731, Lansing, Michigan 48909-8231, or e-mailed to ProviderSupport@michigan.gov. When you submit an e-mail, be sure to include your name, affiliation, NPI number, and phone number so you may be contacted if necessary. Providers may phone toll-free 800-292-2550.

Approved

Kate Massey, Director
Medical Services Administration

ATTACHMENT 5

AC – 1

2014-VA WAIVER/PACE p 1 of 4

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In order to comply fully with Michigan Supreme Court Administrative Order 2004-01, the following revised disclaimer has additional voting information and has been moved in larger font to the beginning of the letter. All other aspects in the body of the letter remain unchanged.

The Elder Law & Disability Rights Section is a voluntary membership section of the State Bar of Michigan, comprised of approximately 1,064 members. The Elder Law & Disability Rights Section is not the State Bar of Michigan and positions/opinions expressed herein are that of the Elder Law & Disability Rights Section only and not the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this item.

The Elder Law & Disability Rights Section has a public policy decision-making body with 20 members. On July 29, 2020, the Section adopted its position after an e-mail discussion and electronic vote. Nineteen (19) members voted in favor of the Section's position on submitting an opposing comments letter regarding proposed policy in Medicaid eligibility policy (MI Choice Waiver and PACE income). No members voted against this position, no members abstained, and one (1) member was absent and did not vote.

July 29, 2020

Bridgett Heffron,
Michigan Department of Health and Human Services
Capitol Commons Center, 7th Floor
400 South Pine Street
Lansing, MI 48933

Re: Program Number#2014- eligibility
MI Choice and Program for All-Inclusive Care for the Elderly (PACE) Income Policy

Dear Ms. Heffron:

On July 1, 2020, the Department implemented changes to Bridges Eligibility Manual (BEM) policy affecting Michigan's Medicaid program. In describing the change to BEM 106, Bridges Policy Bulletin (BPB) 2020-021 says that the MA policy in BEM 503 should be applied to determine gross income and that "income excluded for Medicaid eligibility may be countable for waiver eligibility."

AC - 2

#2014 - VA WAIVER / PACE

p2 of 4

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The July 1, 2020 change to BEM 503, page 41, says VA "Aid and Attendance is not excluded from . . . PACE (BEM 167) or MI Choice (BEM 106) waiver income eligibility calculations."

The quoted language suggests that the Department will now count VA Aid and Attendance benefits as income in determining whether an applicant for the MI Choice waiver program or PACE has gross income that exceeds 300 percent of the federal benefit rate of the Supplemental Security Income (SSI) program, i.e., the income eligibility threshold for these programs.

The Elder Law and Disability Rights Section (ELDRS) of the State Bar of Michigan believes this proposed change to the income counting rules for the MI Choice waiver program and PACE is unlawful. Moreover, it is bad public policy because it will harm many of our older and disabled clients by depriving them of access to home care as an alternative to institutional care.

The following is our analysis of the applicable law, regulations and policy that govern this issue.

Applicable Law

Section 1902(a)(10)(C)(i)(III) of the Social Security Act, 42 USC 1396a(a)(10)(C)(i)(III), says that the methodology to be employed in determining income eligibility for medical assistance included in a state's Medicaid state plan shall be no more restrictive than the methodology used in the SSI program for aged blind or disabled individuals.

The part of Michigan's Medicaid State Plan (MSP) that describes the MI Choice waiver program says, "The state does not elect to disregard the requirements at section 1902(a)(10)(C)(i)(III) of the Social Security Act." MSP Attachment 3.1-i.1:, Page 5.
See also Michigan's Application for 1915(c) HCBS Waiver: MI.0233.R05.01 in which Michigan did **not** request a waiver of Section 1902(a)(10)(C)(i)(III) of the Social Security Act of the institutional income rules for the medically needy.

The part of Michigan's MSP that describes PACE says, "The state determines eligibility for PACE enrollees under rules applying to institutional groups." *See* MSP Supplement 2, ATTACHMENT 3.1-A, Page 2. The rules applying to institutional groups include the requirement that the methodology used to determine income eligibility for medical assistance is no more restrictive than that used in the SSI program.

AC-3

II 2014/VA WAIVER/PACE p. 3 of 4

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In addition, the MI Choice waiver program and PACE use the same financial eligibility criteria as the Extended Care category described in BEM 164 to determine an applicant's financial eligibility. 42 CFR 435.1005 says that federal Medicaid funds are available to cover services to individuals in the Extended Care category only if their income before deductions "as determined by SSI budget methodology" does not exceed 300 percent of the SSI federal benefit amount.

How does the SSI program treat VA Aid and Attendance benefits? The Social Security Administration's Program Operations Manual System (POMS) says that "VA aid and attendance and housebound allowances are not income for SSI purposes." See POMS SI 00830.308.B. This agency policy is based on a federal regulation at 20 CFR 416.1103(b)(1) that says assistance provided in cash under a federal government program whose purpose is to provide social services is not income in the SSI program

Analysis

Current policy in BEM 503, page 39 says that VA Aid and Attendance and Housebound allowances are excluded as income, i.e., those allowances are not counted in determining a person's eligibility for Medicaid. This is consistent with SSI rules and policy that say these allowances are not income. The July 1, 2020 change to BEM 503 says that these allowances are counted in the eligibility calculations for the MI Choice waiver program and PACE, i.e., they are included in an applicant's countable gross income. This change in how VA Aid and Attendance and Housebound Allowances are treated is a more restrictive method for determining income eligibility than that used in the SSI program. For that reason it violates 42 USC 1396a(a)(10)(C)(i)(III) and the parts of Michigan's MSP described above. We could find no independent legal basis that would authorize this new policy.

We are writing to ask that you provide an explanation of the justification for this change in policy. We note that the legal base for the policy in the current version of BEM 503 is not changed in the July 1, 2020 version. We also ask that this new policy be rescinded until it can be noticed and the public is given an opportunity to comment on it. Both MI Choice and PACE are vital programs to the clients the ELDRS serves. It is bad public policy to add additional restrictions to eligibility for programs like MI Choice and PACE, which provide home and community-based alternatives to nursing home admission, at precisely the time when our population of medically needy Michigan seniors is faced with the added risk of COVID-19 in addition to the other disadvantages of nursing home admission.

AC-4

#2014-VA WAIVER/PACE p.4 of 4

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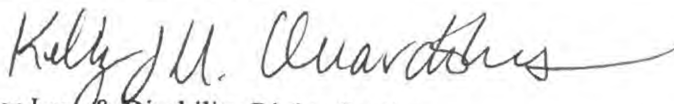
Thank you for your consideration of these comments and this request.

Respectfully submitted,



Elder Law & Disability Rights Section
Kelly J. McNerney Quardokus- Chair

Cc: Kate Massey, Jackie Prokop,
Gene Coffey, Center for Medicare and Medicaid Services
(Gene.Coffey@cms.hhs.gov)

ATTACHMENT 6

Medical Services Administration

BULLETIN

MSA

Effective Date Corrected on October 6, 2020

Bulletin Number: MSA 20-63

Distribution: Bridges Eligibility Manual (BEM) Holders and Program of All-Inclusive Care for the Elderly (PACE) Providers

Issued: October 1, 2020

Subject: Financial Eligibility for PACE Program

Effective: April 1, 2021

Programs Affected: PACE Program

Effective April 1, 2021, the PACE program will apply Medicaid divestment policy to applicants and participants in the PACE program as permitted under section 1917(c)(1)(A) of the Social Security Act. Medicaid divestment policy is found in the Bridges Eligibility Manual (BEM) 405, MA Divestment.

As defined in BEM 405, divestment is the transfer of resources within a specific timeframe (called the lookback period) and the transfer is for less than fair market value. Under Medicaid divestment policy, the Medicaid program will not pay for long term care (LTC) services, home and community-based services, home help, or home health during a divestment penalty period.

The PACE divestment policy applies to all new PACE applicants as of April 1, 2021 and any transfers made by current PACE participants on or after April 1, 2021.

Manual Maintenance

Retain this bulletin until the information is incorporated into the Bridges Eligibility Manual Manual.

Questions

Any questions regarding this bulletin should be directed to Provider Inquiry, Department of Health and Human Services, P.O. Box 30731, Lansing, Michigan 48909-8231, or e-mailed to ProviderSupport@michigan.gov. Communications should include your name, affiliation, NPI number, and phone number so you may be contacted if necessary. Providers may phone toll-free 1-800-292-2550.

Approved

Kate Massey, Director
Medical Services Administration

USEFUL RESOURCES FOR ANALYZING MEDICAID ISSUES

PRACTICE TIP: As you use the resources in the web page addresses shown below bookmark them on your computer for easy future access.

Laws, Rules, Policies & Agency Materials

- Subchapter XIX of the Social Security Act, 42 USC 1396 et seq.

- Centers for Medicare & Medicaid Services (CMS) federal regulations at 42 CFR Parts 430-456

- Center for Medicare and Medicaid Services (CMS) *State Medicaid Manual*:

  Step 1: Do a Google search for CMS State Medicaid Manual CMS 021927
  Step 2: Click the download for Chapter 3 -- Eligibility (ZIP)

- CMS State Medicaid Directors Letters at:

  www.medicaid.gov/federal-policy-guidance/index.html

- Social Security Administration Program Operations Manual System (POMS) for the Supplemental Security Income (SSI) Program:

  Step 1: Do a Google search for SSI POMS
  Step 2: Click on SSA's Policy Information Site - POMS - About POMS
  Step 3: Click on POMS Table of Contents
  Step 4: Click on SI-Supplemental Security Income

  Note: In its *State Medicaid Plan* filed with CMS Michigan elected to impose eligibility requirements that are no more restrictive than those used in the SSI program. The POMS is a useful resource for testing whether Michigan's Medicaid policies meet this standard.

- Michigan *Medicaid State Plan* at:

  www.mdch.state.mi.us/dch-medicaid/manuals/MichiganStatePlan/MichiganStatePlan.pdf

- Medicaid State Plan amendments:

  michigan.gov/mdhhs/0,5885,7-339-73970_5080-108153--,00.html

and

www.medicaid.gov/state-resource-center/medicaid-state-plan-amendments/index.html

- The Michigan Social Welfare Act, MCL 400.1 et seq. with Medicaid provisions starting at MCL 400.105.

- Michigan Administrative Rules issued by MDHHS: Mich Admin Code R 400.501-.515, R 400.1101-.1107, R 400.3351 and R 400.7171-.7173.

- MDHHS policy and procedure manuals at:

  www.dhhs.michigan.gov/olmweb/ex/html

  - Bridges Eligibility Manual (BEM)
  - Bridges Administrative Manual (BAM)
  - Bridges Policy Bulletin Logs (BPB)
  - Bridges Policy Glossary (BPG)
  - Reference Manuals: Schedules (RFS) and Tables (RFT)

- DHS Policy with a **future** effective date is also available at:

  https://dhhs.michigan.gov/OLMWeb/exF/html

- All the application forms used by MDHHS in the Medicaid program are available online at:

  www.michigan.gov/dhs-forms

- MDHHS Medical Services Administration *Medicaid Policy Bulletins* and Provider "L" Letters at:

  www.michigan.gov/mdhhs/0,5885,7-339-71551_2945_42542_42543_42546_42552-173142--,00.html

- *Medicaid Provider Manual* at:

  www.mdch.state.mi.us/dch-medicaid/manuals/MedicaidProviderManual.pdf

- MDHHS *Modified Adjusted Gross Income (MAGI) Related Eligibility Manual* at:

  www.michigan.gov/documents/mdch/MAGI_Manual_457706_7.pdf

- Michigan Office of Administrative Hearings and Rules (MOAHR) hearing rules:

  Michigan Administrative Code R 400.904, R 400.951, R 792.10101-10137 &
  R 792.11001-11027

- MOAHR Administrative Hearing Decisions:

  michigan.gov/lara/0,4601,7-154-89334_10576_61718_96229-511396--,00.html

Publications

- *Michigan Medicaid Planning Handbook*, Douglas G. Chalgian, ICLE
- *Advising Clients on Elder and Disability Law*, Edited by Lauretta K. Murphy and Alison E. Hirschel, ICLE
- *The ElderLaw Report: Including Special Needs Planning,* Edited by Jane M. Fearn-Zimmer, Wolters Kluwer
- *Michigan Administrative Law*, Don LeDuc, Thomson Reuters
- *Tax, Estate & Financial Planning for the Elderly*, David M. English, John J. Regan and Rebecca C. Morgan, LexisNexis
- *The Elder Law Portfolio Series*, Harry S. Margolis, Wolters Kluwer

Other

- Annual *Medicaid & Health Care Planning Update* seminars, ICLE
- State Bar of Michigan Elder Law and Disability Rights Section - Spring and Fall Conferences and Member ListServ
- National Academy of Elder Law Attorneys. Member ListServ, *NAELA Journal* and *NAELA News,* Conferences, Training Programs and Training Materials and the Michigan NAELA Chapter.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES

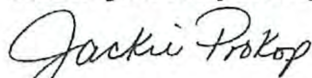
NOTICE OF PROPOSED POLICY

Public Act 280 of 1939, as amended, and consultation guidelines for Medicaid policy provide an opportunity to review proposed changes in Medicaid policies and procedures.

Please review the policy summary and the attached materials that describe the specific changes being proposed. Let us know why you support the change or oppose the change.

Submit your comments to the analyst by the due date specified. Your comments must be received by the due date to be considered for the final policy bulletin.

Thank you for participating in the consultation process.



Director, Program Policy Division
Bureau of Medicaid Policy, Operations, and Actuarial Services

Project Number:	2011-Eligibility	**Comments Due:**	September 3, 2020	**Proposed Effective Date:**	November 1, 2020

Mail Comments to: Bridget Heffron

Telephone Number: 517-284-1210 **Fax Number:**
E-mail Address: HeffronB@michigan.gov

Policy Subject: Supplemental Security Income (SSI)-Related Medicaid Asset Policy Trusts

Affected Programs: SSI-Related Medicaid Programs

Distribution: Bridges Eligibility Manual (BEM) Holders

Policy Summary: A transfer of assets by the Medicaid applicant or the applicant's spouse to an irrevocable trust "solely for the benefit of" should be evaluated as a divestment.

Purpose: To bring into alignment the Michigan Department of Health and Human Services (MDHHS) BEM policy and the United States Code (42 USC 1396p[c][2]).

Proposed Policy Draft

Michigan Department of Health and Human Services
Medical Services Administration

Distribution: Bridges Eligibility Manual (BEM) Holders

Issued: October 1, 2020 (Proposed)

Subject: Supplemental Security Income (SSI)-Related Medicaid Asset Policy Trusts

Effective: November 1, 2020 (Proposed)

Programs Affected: SSI-Related Medicaid Programs

This bulletin will align the Michigan Department of Health and Human Services (MDHHS) BEM with the United States Code (42 USC 1396p[c][2]). Current MDHHS policy does not distinguish between a trust established "solely for the benefit of" a spouse and a trust established "solely for the benefit of" a blind or disabled child, or a disabled individual under age 65.

All SSI-related Medicaid categories incorporate an asset limit into the needs test for eligibility. When an applicant gives away assets in order to become eligible for Medicaid it is called divestment or divesting of resources. When the applicant has given away the resources within the 60 months prior to applying for and being found eligible for home help, home health, waiver services, or long-term care, the divestment triggers a period of time during which the Medicaid program will not pay for the covered services (i.e., a divestment penalty period). Certain transfers involving the client's spouse, blind or disabled child, or disabled individual under age 65 are not divestment. It is not a divestment to transfer resources directly to a blind or disabled child, to a trust solely for the benefit of a child who is blind or disabled, or to a trust solely for the benefit of a disabled person under age 65. Transfers from the client directly to the client's spouse, or to another solely for the benefit of the client's spouse, are also not divestment.

Transfers to a trust that are not for the sole benefit of a child who is blind or disabled, or for the benefit of a disabled person under age 65 will be evaluated for a divestment.

Effective November 1, 2020, all transfers by the applicant or the applicant's spouse to a trust established solely for the benefit of the client's spouse will be evaluated for divestment, which will bring the MDHHS BEM 405 policy in alignment with 42 USC 1396p(c)(2).

TRANSFERS THAT ARE NOT DIVESTMENT

Transferring Excluded Income

Transferring income that is not countable income for SSI-related MA according to BEM 500 is not divestment.

Transfers Involving Spouse

It is not divestment to transfer resources from the client to:

- The client's spouse.
- Another SOLELY FOR THE BENEFIT OF the client's spouse.

Transfers from the client's spouse to another SOLELY FOR THE BENEFIT OF the client's spouse are not divestment. This does not apply to trusts established SOLELY FOR THE BENEFIT OF the client's spouse.

Transfers Involving Child

A transfer to the client's blind or disabled (see BEM 260) child, regardless of the child's age or marital status, are not divestment. This includes transfers to a trust established SOLELY FOR THE BENEFIT OF the child.

Transfer to Funeral Plan

See Life Insurance Funded Funeral in BEM 400 when a person has irrevocably transferred ownership in life insurance or a similar device designated for funeral expenses.

Transfer to Trust

Transfers to a trust established SOLELY FOR THE BENEFIT OF a disabled (see BEM 260) person under age 65 are not divestment.

SOLELY FOR THE BENEFIT OF

All of the following conditions must be met for a transfer or for a trust to be solely for the benefit of a person.All of the following conditions must be met for a transfer to be solely for the benefit of a blind or disabled child, or a spouse; or for a trust to be solely for the benefit of a blind or disabled child, or a disabled individual under age 65:

- The arrangement must be in writing and legally binding on the parties.
- The arrangement must ensure that none of the resources can be used for someone else during the person's lifetime, except for trustee fees.
- The arrangement must require that the resources be spent for the person on an actuarially sound basis. This means that spending must be at a rate that will use up all the resources during the person's lifetime. Life expectancies are in Exhibit I in this item.

PENALTY PERIOD

No Maximum Penalty

There is no maximum limit on the penalty period for divestment. 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. Divestment is a type of transfer not an amount of transfer.

Any penalty period established under previous policy continues until it ends.

Apply the penalty policy in place at the time of transfer for any transfers made before February 8, 2006.

ATTACHMENT 9

AC-9

Initial #2011 SBO p. 1/4

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The Elder Law & Disability Rights Section has a public policy decision-making body with 20 members. On July 29, 2020, the Section adopted its position after an e-mail discussion and electronic vote. Nineteen (19) members voted in favor of the Section's position on submitting an opposing comments letter to DHHS regarding proposed changes in Medicaid eligibility policy, no members voted against this position, no members abstained, and one (1) member was absent and did not vote.

July 29, 2020

Bridgett Heffron,
Michigan Department of Health and Human Services
Capitol Commons Center, 7th Floor
400 South Pine Street
Lansing, MI 48933

RE: Comments on Project Number 2011- Eligibility

Dear Ms. Heffron;

The Elderlaw and Disability Rights Section of the State Bar of Michigan hereby submits the following comments on the proposed policy attached to this letter regarding Project Number 2011 on Supplemental Security Income (SSI) Related Medicaid Asset Policy Trusts ("Proposed Policy").

AC-10

Initial #2011 SBO p. 2/4

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We have the following comments at this time:

1) Please correct the Policy Summary section of the Notice. The Policy Summary states:

> A transfer of assets by the Medicaid Applicant or the applicant's spouse to an irrevocable trust "solely for the benefit of" should be evaluated **as** divestment. [emphasis added]

This statement is incorrect and violates 42 USC 1396p(c)(2)(B)(i). As stated in that federal statute (which Michigan must follow):

> "An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that ... (B) the assets [ ](i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse[.]" *Id.*

In other words, § 1396p(c)(2)(B)(i) excepts transfers to a third party for the sole benefit of the individual's spouse from the penalty provisions of 42 USC 1396p(c)(1); that is, such a transfer is permitted and **cannot** be penalized under Paragraph (1) of § 1396p(c). The exception created under § 1396p(c)(2)(B)(i) for transfers "to another for the sole benefit of the individual's spouse", applies to any such transfer, whether it be in the form of a trust, annuity or some other structure. The federal statute does not prohibit the use of a trust for the transfer to be "for the sole benefit of the individual's spouse". The federal statute also does not require or prohibit any particular provisions for such a trust beyond the requirement that it be "for the sole benefit of the individual's spouse".

2) The stated "Purpose" of the proposed policy change is: "To bring into alignment the Michigan Department of Health and Human Services (MDHHS) BEM policy and the United States Code (42 USC 1396p[c][2])".

However, the current wording of BEM 405 accurately reflects (i.e. is "aligned" with) the wording and requirements of the applicable federal statute [42 USC 1396p(c)(2)(B)(i)] where it states:

TRANSFERS THAT ARE NOT DIVESTMENT

AC-11 Initial SBO #2011 p.3/4

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Transfers
Involving Spouse

It is not divestment to transfer resources from the client to:

- The client's spouse.
- Another SOLELY FOR THE BENEFIT OF the client's spouse.

Transfers from the client's spouse to another SOLELY FOR THE BENEFIT OF the client's spouse are not divestment.

Any change to this wording of BEM 405 would be a departure from the requirements of the federal statute and is not permitted.

Transfers involving a child, or for the benefit of a disabled person under age 65, are completely separate provisions and do not pertain to transfers to or for the benefit of a spouse.

3) The first paragraph of the Proposed Policy Draft states: "Current MDHHS policy does not distinguish between a trust established 'solely for the benefit of' a spouse and a trust established 'solely for the benefit of' a blind or disabled child, or a disabled individual under 65."

This is an inaccurate statement. BEM 405 at page 9-10 describe three distinct transfers: transfers involving a spouse, transfers involving a child, and transfers to a trust (for disabled individuals under 65). The Proposed Policy gives no indication, detail, or language of how the policy language will be changed to "better" distinguish between these three types of transfers, and exactly what federal law provision requires such a distinction different than that currently stated in BEM 405. That is, what specific language will be included in the BEMs to further distinguish between these types of trusts, and what federal law requires such a "distinction"?

From our review, the applicable federal statutes cited above do not require any such "distinction" and do not include any special requirements for a trust established "solely for the benefit of" a spouse versus a trust established "solely for the benefit of" a blind or disabled child, or a disabled individual under age 65.

AC-12 Initial #2011 SBO p. 4/4

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Further, under BEM 401, these types of trusts are already being sent to DHHS' Trusts and Annuities Department. What specific direction is to be given regarding submitting these trusts for evaluation? What specific language will be included in the BEMs regarding the submission of the Trusts? Will the policy changes include changes to the analysis of these trusts?

The Policy Summary lacks any specificity for the public to understand DHHS' proposed changes, let alone evaluate or comment on any proposed changed, particularly in light of the requirements of the federal law.

4) Please provide further information as to the specifics of the proposed policy to evaluate "solely for the benefit" trusts.

As outlined above, the present Proposed Policy Draft does not provide any specific information as to the proposed changes to the BEMS regarding solely for the benefit transfers and/or trusts, to allow for informed comments from the public. We request that more precise information and language regarding any policy changes (including changes in interpretation) be provided to the public well in advance of the adoption of any such policy change to allow ample time for review and comment. Additionally, please specifically advise as to what wording of the present BEM policy does not meet federal law requirements under 42 USC 1396p(c)(2) and what specific language is being proposed to "correct" the perceived problem.

5) Lastly, please note a typo in paragraph 3 regarding 42 CFR 1396p(c)(2) which should be 42 USC 1396p(c)(2).

We look forward to receiving additional information or a re-write of this policy so that public comments may be made in a meaningful way with proper notice regarding this matter.

Sincerely,

Kelly J. M. Quardokus

Elder Law & Disability Rights Section
Kelly J. McNerney Quardokus- Chair

CC: Kate Massey, Jackie Prokop

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MEMORANDUM

August 3, 2020

To: Bridget Heffron
Michigan Department of Health and Human Services

From: David L. Shaltz

Re: Comments on Project Number 2011-Eligibility

I am responding to the Notice of Proposed Policy and Proposed Policy Draft issued on July 30, 2020 that are attached to this memo. I commend the Department for including drafts of the new BEM policy that show the changes to current policy. This helps the public understand what the Department is proposing. It enables informed commentary on those changes. I urge the Department to continue providing draft BEM and BAM pages with future notices of proposed policy changes.

The proposed change to BEM 405, page 10 is wrong because it violates the plain language in 42 USC 1396p(c)(2)(B)(i) and (ii) and CMS's interpretation of that federal Medicaid law.

The proposed change to BEM 405, page 10 appears in the last paragraph of the section labeled "TRANSFERS INVOLVING SPOUSE". The first sentence in that paragraph states:

> "Transfers from the client's spouse to another SOLELY FOR THE BENEFIT OF the client's spouse are not divestment."

This is current policy. It accurately restates the language in federal Medicaid law at 42 USC 1396p(c)(2)(B)(ii).

The second sentence in that paragraph is the proposed new policy. It states:

> "This does not apply to trusts established SOLELY FOR THE BENEFIT OF the client's spouse."

The new second sentence makes no sense. It deviates from the plain language in the federal Medicaid law. A transfer to a trust established solely for the benefit of the client's spouse is a transfer "to another". The transfer is made to a trustee who is another person. The trust is another legal entity. Neither the Notice of Proposed Policy nor the Proposed Policy Draft explain why a transfer to a trust is not a transfer "to another" nor do they cite any legal authority that supports that conclusion. If a transfer to a trust is not a transfer "to another", why not? The new policy creates a distinction between a transfer "to another" and a transfer to a trust that is baseless.

The federal Medicaid law makes no such distinction. 42 USC 1396p(c)(2)(B)(ii) says that assets that "were transferred from the individual's spouse to another for the sole benefit of the individual's spouse" are not subject to a divestment penalty. There is no extra sentence that says this does not apply to trusts established solely for the benefit of the individual's spouse.

The Center for Medicare and Medicaid Services (CMS) has interpreted the meaning of 42 USC 1396p(c)(2)(B)(i) and (ii). As the federal agency responsible for the administration of the Medicaid program deference is accorded to its interpretation of this law. Section 3258.10.B.1. of the CMS *State Medicaid Manual* makes it clear that transfers "to another" solely for the benefit of a spouse includes transfers to trusts:

> "In determining whether an asset was transferred for the sole benefit of a spouse . . . ensure that the transfer was accomplished via a written instrument of transfer (**e.g., a trust document**) which legally binds the parties to a specific course of action which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer." (Emphasis added.)[1]

Why do 42 USC 1396p(c)(2)(b)(iii) and (iv) state that transfers "to a trust" for the sole benefit of a blind or disabled child or a disabled person under age 65 are not divestment whereas 42 USC 1396p(c)(2)(b)(i) and (ii) state that transfers "to another" for the sole benefit of

---

[1] The Social Security Administration's policies for the Supplementary Security Income (SSI) program on which Medicaid's financial eligibility requirements are based say the same thing. The Program Operations Manual System (POMS) sections SI 01150.120 and SI 01150.123 explain that documents that are legally binding agreements that show a transfer to another solely for the benefit of a spouse include ". . . a trust, a deed that establishes that the person getting the resource is the sole owner, or a legally enforceable contract that shows that the transfer is for the sole benefit of the individual." If a person verifies the transfer by producing a trust that satisfies the "solely for the benefit of" criteria, SSA grants an exception to a period of ineligibility that is otherwise imposed for a transfer of a resource.

a spouse are not divestment? The federal law's exception from the transfer of assets rules for transfers to a spouse ***is broader than*** the exception for transfers to blind and disabled children and persons under age 65 who are disabled. It includes not only trusts but other legally binding arrangements such as annuities. In contrast, the new sentence the Department proposes to add to BEM 405, page 10 ***narrows*** the exception for transfers to a spouse prescribed in federal Medicaid law. It breaks the promise the Department made to CMS in Attachment 2.6-A, page 26 of the Medicaid State Plan that Michigan's policies comply with Section 1917 of the Social Security (42 USC 1396p(c)) with respect to transfers of resources.

It is apparent that the Department's goal is to define transfers to a trust solely for the benefit of a client's spouse as divestment so that no analysis is necessary of whether the transfer to these trusts is for fair market value. If the new sentence is added to BEM 405, page 10, the Trust and Annuities Unit of the Office of Legal Services will simply conclude that any transfer to a trust solely for the benefit of a spouse is divestment because that is what BEM policy says. There will be no evaluation of whether these trusts satisfy all the "solely for the benefit of " criteria that assure these transfers are for fair market value. This is an arbitrary and capricious action to secure a policy goal that is at odds with the governing federal Medicaid law. If the Department wants transfers to trusts that are solely for the benefit of spouses to be treated as divestment, its proper remedy is to seek a change in the law from Congress. It should not instead choose to knowingly violate the law.

The Notice of Proposed Policy and the Proposed Policy Draft say that the purpose of the new policy is to align BEM policy with 42 USC 1396p(c)(2). As these comments show the addition of the new sentence to BEM 405, page 10 makes the Department's policy deviate from that federal law.

The Notice of Proposed Policy and the Proposed Policy Draft also say the reason for the new policy is to require that these transfers are evaluated for divestment. This is a solution in search of a problem. The MDHHS Trust and Annuities Unit in the Office of Legal Services already routinely reviews all trusts for divestment.

For all these reasons I recommend that the Department cancel its plans to add the new sentence to BEM 405, page 10 discussed in these comments. If the Department decides to press on and add the new sentence to BEM 405, page 10 it owes it to the public and to CMS to provide an explanation why transfers to a trust solely for the benefit of a spouse are not transfers "to another" as described in 42 USC 1396p(c)(2)(B)(i) and (ii).

The proposed change to BEM 405, page 13 is unlawful because it arbitrarily omits the exceptions to divestment in 42 USC 1396p(c)(2)(B)(i) & (ii).

The proposed change to BEM 405, page 13 is an extension of the proposed change to BEM 405, page 10 discussed above. It circumscribes application of the "solely for the benefit of" test that must be met to qualify for an exception to divestment. The new language limits application of these criteria to:

- transfers to a blind or disabled child
- transfers to a spouse
- transfers to a trust for a blind or disabled child, and
- transfers a trust for a disabled individual under 65.

The new policy omits the exception in 42 USC 1396p(c)(2)(B)(i) and (ii) for transfers "to another" that are solely for the benefit of a spouse. For all the reasons described in the preceding section of these comments that omission is unlawful. The apparent goal is to prevent MDHHS staff from accurately applying the law to trusts that are solely for the benefit of a spouse and forcing a determination that transfers to those trusts are divestment -- without regard to whether they satisfy all the "solely for the benefit of" criteria specified in the law.

I recommend that the Department cancel its plan to change BEM 405, page 13. The current policy is fully aligned with 42 USC 1396p(2)(B)(i) and (ii). The new proposed policy deviates from the federal law. The proposed change is a breach of the Medicaid State Plan the Department has filed with CMS because the new policy does not comply with 42 USC 1396p(c)(2)(B)(i) and (ii) and CMS's interpretation of that federal law.

Thank you for your consideration of these comments.

ATTACHMENT 10

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In order to comply fully with Michigan Supreme Court Administrative Order 2004-01, the following revised disclaimer has additional voting information and has been moved in larger font to the beginning of the letter. All other aspects in the body of the letter remain unchanged.

The Elder Law & Disability Rights Section is a voluntary membership section of the State Bar of Michigan, comprised of approximately 1,129 members. The Elder Law & Disability Rights Section is not the State Bar of Michigan and positions/opinions expressed herein are that of the Elder Law & Disability Rights Section only and not the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this item.

The Elder Law & Disability Rights Section has a public policy decision-making body with 20 members. On September 8, 2020, the Section adopted its position after a discussion and vote at a scheduled meeting. Fourteen (14) members voted in favor of the Section's position on submitting a letter to DHHS / Medical Services Administration and Centers for Medicare and Medicaid regarding opposition and comments on proposed Trust interpretation policy, no members voted against this position, no members abstained and six (6) members were absent from the meeting and did not vote.

Kate Massey, Director
Medical Services Administration
Michigan Department of Health and Human Services
Capitol Commons Center
400 South Pine Street
Lansing, MI 48933

September 24, 2020

Dear Ms. Massey:

Earlier this month the Department released Bridges Policy Bulletin 2020-029. It announced upcoming changes to the Bridges Eligibility Manual. Among them is new policy in BEM 405 described as "*[T]ransfers by the applicant or the applicant's spouse to a trust will be evaluated as a divestment*". Starting November 1, 2020 such transfers will trigger a penalty period in which Medicaid will not pay for long-term care services. This new policy is unlawful.

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As explained in our July 29, 2020 comments on this proposed policy (copy attached), federal Medicaid law at 42 USC 1396(c)(2)(B)(i) and (ii) state that a transfer to another solely for the benefit of a spouse is **not** divestment. The Centers for Medicare and Medicaid Services (CMS) has interpreted this to mean that transfers "to another" solely for the benefit of a spouse includes transfers to trusts:

> *"In determining whether an asset was transferred for the sole benefit of a spouse . . . ensure that the transfer was accomplished via a written instrument of transfer **(e.g., a trust document)** which legally binds the parties to a specific course of action which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer." (Emphasis added.)*
> *CMS State Medicaid Manual, Section 3528.10.B.1.*

The Department has no authority to make Medicaid policy that contradicts this federal law. To do so violates Michigan's assurance to CMS in Attachment 2.6-A, page 26 of the Medicaid State Plan that the Department's policies comply with section 1917(c) of the Social Security Act.

The Elder Law and Disability Rights Section of the State Bar of Michigan asks that you stop the implementation of this new policy. Otherwise, scores of Medicaid recipients who have funded trusts solely for the benefit of a spouse will wrongfully suffer a divestment penalty at the annual renewal of their Medicaid eligibility despite the fact that the trusts funded by these individuals have all been evaluated by the Department's Legal Affairs Administration with no finding of divestment. There is no sound reason or authority for the Department's new BEM 405 policy. The federal statute governing transfers of assets solely for the benefit of spouses has remained unchanged for many years. Moreover, it does not sanction state Medicaid agency action that uses policy to change the meaning of the law as does the new language in BEM 405.

Thank you for your consideration of this request. If you would like to discuss this matter with us we welcome the opportunity to do that at your convenience. If you decide to implement the new policy on November 1, please provide an explanation of why our analysis of this issue is wrong.

Sincerely,

Kelly J. M. Quardokus, 2019-2020 Chair
Elderlaw and Disability Rights Section of the State Bar of Michigan

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

C/O BIDDINGER & ESTELLE PC
4415 S SEEGER ST
CASS CITY MI 48726

Date Mailed: March 10, 2020
MOAHR Docket No.: 19-009659
Agency No.: 128130298
Petitioner:

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, an in-person hearing was held on February 3, 2020, from Port Huron, Michigan. The Petitioner was represented by Attorney David Shaltz and Attorney Michelle Biddinger. The Department of Health and Human Services (Department) was represented by Geraldine A. Brown, Assistant Attorney General, and Kyle A. Bruckner, Assistant Attorney General.

ISSUE

Did the Department properly impose a Divestment?

FINDINGS OF FACT

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

1. At the time of the application filed on June 20, 2019, and at the time of the hearing, Petitioner was a resident of a long-term care facility as a nursing home patient and did not attend the hearing.
2. The Petitioner is married to who also did not attend the hearing.
3. On or about June 20, 2019, the Petitioner's Power of Attorney submitted an application for Medicaid on behalf of . Petitioner Exhibit 1.
4. The application contained an asset declaration indicating a checking account consisting of $3,720.35. The application also noted income from a promissory note in the amount of $1,019.85 as income of Petitioner's spouse, .

5. On June 14, 2019, [redacted], as Borrower, executed a promissory note "Note" payable to [redacted], as the Lender, in the amount of $19,000.00. The terms of the Note provided:

> Borrower promises to pay the Lender $19,000.00 in equal monthly installments of $1,019.85 per month so that the loan is paid in full within nineteen (19) months; payable on the 14th of each month beginning July 14, 2019 and each month thereafter, until January 14, 2021, on which date any remaining principal is due and payable. Interest at an annual rate of 2.35% shall be compounded monthly. The attached repayment schedule is intended to be actuarially sound according to Department of Human Services Bridges Eligibility Manual Item, 400(23). The life expectancy table per BEM 405 is attached.
>
> The Note is irrevocable and unassignable and not subject to cancellation for any reason, including death of the Lender. Borrower may make no payments in addition to the monthly payments.
>
> Failure to pay any monthly payment when due, or any material breach of the Note shall be considered a default. If Borrower is in default, Lender may demand a penalty of $100 plus the monthly payment to be paid forth with. On default by Borrower, lender may recover actual damages and costs, including late payment penalties.
>
> Each signatory to this Note assumes personal liability for all sums payable under the Note. Each signatory waives rights of presentment and notice of dishonor.
>
> Any forbearance by Lender in exercising any right or remedy shall not waive that or any other right or remedy. Respondent's Exhibit A, pp. 15-17.

6. The total paid by the borrower to the lender is $19,377.15. [redacted] was 79 years of age at the time the promissory note was executed on June 14, 2019. Petitioner's Exhibit 1.

7. [redacted] life expectancy at the time he made the Note was 8.73 years. The note was actuarily sound as it was scheduled to be repaid before the end of the lender's life expectancy or on or about January 14, 2021. Petitioner's Exhibit 1.

8. The terms of the Note state that the Borrower shall make 19 equal monthly payments of $1,019.85 to [redacted]. The Note does not allow deferral of payments, and no balloon payments, and failure to make a payment is a default.

9. The Note is not subject to cancellation for any reason including death of the Lender.

10. On August 16, 2019, the Department issued a Health Care Coverage Determination Notice which imposed a divestment penalty commencing June 1, 2019, through August 7, 2019, and noted eligibility begins August 8, 2019, with the patient pay amount of $428 monthly. The notice stated that "Per BEM 405 Promissory Notes are Divestment. The reasons stated by the Department for its intended action stated:

> "June 1, 2019-June 30, 2019-[redacted] is not eligible. You or your spouse transferred assets or income for less than fair market value. Notify your specialist if you are denied emergency care because of this penalty." Respondent's Exhibit A, pp. 18-22.

11. On September 10, 2019, the Department issued a Health Care Coverage Determination Notice finding Petitioner [redacted] not eligible June 1, 2019 to June 30, 2019 stating:

> "You or your spouse transferred assets or income for less than fair market value. ...". BEM 405. Petitioner's Exhibit 3.

13. On September 13, 2019, the Department received the Petitioner's attorney's timely hearing request protesting the imposition of a divestment penalty period. Petitioner's Exhibit 2.

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.

Divestment is a type of transfer of a resource and not an amount of resources transferred. Resource means all the client's assets and income. Transferring a resource means giving up all or partial ownership in the resource. Divestment results in a penalty period, not MA program ineligibility. BEM 405 (January 2019), pp. 1-2; BEM 400 (February 2019), pp.1-3. During the penalty period, MA will not pay the client's cost

for: LTC services; home and community-based services; home help; or home health. MA will pay for other MA-covered services. BEM 405, p. 1. A divestment is a transfer of a resource by a client that is (i) within a specified time (the look-back period), (ii) for less than fair market value (FMV), and (iii) not an excluded transfer. BEM 405, p. 1.

In this case, the Petitioner disputes the Department's imposition of a divestment penalty alleging that the imposition violates the Department's Medicaid program policy and federal law that governs the treatment of promissory notes. The Petitioner asserts that the making of a promissory note in this case was not a divestment of an asset. The Department contends that because the Note in question was unassignable or transferable, it had a value of $ on the open market and thus, was a transfer for less than fair market value.

BEM 400 requires that the Department consider assets when determining eligibility for Medicaid as countable assets of an applicant cannot exceed the asset limit for the group or individual. BEM 400 (April 2019), pp. 2-3. An asset converted from one form to another (example: an item sold for cash is still an asset.

BEM 400 also specifically addresses Promissory Notes/Loans when evaluating assets and provides:

> A promissory **note** is a written promise to pay a certain sum of money to another person at a specified time. The promissory note may call for installment payments over a period of time (installment note) or a single payment on a specified date. The note is an asset to the lender. The value of the note is the outstanding balance due as of the date of application for long term care, home help, waiver services, or home health services.
>
> All money used to purchase a promissory note or loan, **are** transfers of assets. They are a transfer of assets for less than fair market value <u>unless</u> the following are also 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.
> - The note must prohibit the cancellation of the balance upon the death of the lender. BEM 400, pp. 44-45. See 42 USC 1396p9c)(I) which states the same requirements.

> See *BEM 405, Uncompensated Value*, to determine the value of any promissory note or loan as a transfer for less than fair market value. BEM 400, p. 45.[1]

The federal law which BEM 400 is based upon provides the same three requirements for making a determination as to whether a promissory note, loan or mortgage are transfers for less than fair market value. 42 USC 1396p(c)(1)(I). Based upon this provision, the Congress in making this law did not include any provision requiring that a promissory note which was unassignable be deemed a condition making a such a note a transfer for less than fair market value.

As stated in its Case Summary the Department acknowledges that these conditions were promulgated in order to prevent improper use of promissory notes, loans or mortgages... by adding new subparagraph I containing the additional rules related to the purchase of these instruments. This section concludes with the statement:

> If the above criteria are not met, the purchase of the promissory note, loan or mortgage must be treated as a transfer of assets. In determining the amount of the asset transfer, the value of the note is the outstanding balance due as of the date of the individual's application for Medicaid coverage for services...See New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005, Centers for Medicare & Medicaid Services Center for Medicaid and State Operations July 27, 2006, See DHHS Promissory Note Exhibit D, p. 13.

In addition, BEM 400 also included a further definition in the section regarding Promissory Notes/Loans which defines elements of a bona fide loan:[2]

Bona Fide Loans

> A loan is bona fide if it meets all the following requirements:
> - It is enforceable under state law.
> - The loan agreement is in effect at the time of the transaction.
> - The borrower acknowledges an obligation to repay
> - The loan document includes a plan for repayment
> - The repayment plan is feasible.

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[1] The Department took its action when it issued the Health Care Coverage Determination Notice on August 16, 2019 in this matter; and thus, the policy in effect at the time is applicable which is the version of BEM 400 in effect in July of 2019.

In this case, the June 14, 2019 promissory note satisfied all three of the conditions to exclude the promissory note in question as a transfer of an asset for less than fair market value.

In addition, the June 14, 2019 promissory note, based upon the definition of a bona fide loan in BEM 400, meets all the requirements of a bona fide loan in that it is enforceable under state law; the note was in effect at the time of the transaction; the borrower acknowledges the responsibility to repay the loan; and the repayment plan is feasible.

The Petitioner has asserted that the Note, is not a transfer for less than fair market value as it meets the three conditions set forth as required to remove it from consideration as a transfer of an asset transferred for less than fair market value. Because it is not a transfer for less than fair market value, the Note cannot be deemed a divested resource; and thus, the divestment penalty was improperly imposed.

BEM 400 as regards promissory notes that do not meet the three conditions concludes with the following:

For promissory notes that **do not** meet the three criteria, policy directs "See BEM 405, Uncompensated Value to determine the value of any promissory note or loan as a transfer for less than fair market value."

BEM 405 provides:

> The uncompensated value of a divested resource is
> - The resource's cash or equity value.
> - Minus any compensation received.
> - The uncompensated value of a promissory note, loan or mortgage is the outstanding balance due on the baseline date. BEM 405 (January 2020), p. 15.

In order for BEM 405 to be applied, **there must be a divestment**; once there is a divestment, the provision above is used to determine the penalty amount to be applied. 42 USC1382(c)(1) provides: If an individual or the spouse of an individual disposes of resources for less than fair market value on or after the look-back date described in clause (ii) (I), the individual is ineligible for benefits under this subchapter for months during the period beginning on the date described in clause (iii) and equal to the number of months calculated as provided in clause (iv). 42 USC 1382(c)(1)(A)(i)

The Respondent Department found that because the Note was unassignable by its terms, it was non-saleable; and thus, it had a fair market value of $0. The Department further asserts that the Note was made to evade the Medicaid asset limits, and the loan was made by the Petitioner's spouse to lower their assets for Medicaid eligibility purposes. The Department essentially argues that all the Petitioner received for the Note was the Note itself, which was worth $0. The Department does not acknowledge that the future compensation of $19,377.15 to be received from the Note repayment is

of any value. In fact, it essentially argues but for the fact the loan is unassignable, the money received by way of monthly payments received from the borrower would have equal value to the money given for it, but in this instance, does not count. The Department also states in its response to the Petitioner's Brief that "the Department would give the Note an asset value of $19,000.00 or $19,377.15 (per the Claimant), for the purpose of the Medicaid application, except for the non-assignable provision deliberately included by the claimant." Respondent's Reply to Petitioner's Brief, p. 3. The Department's position does not address the provisions found in BEM 400 and in federal law 42 USC 1396p(1)(I) that state that if three conditions are met, namely the repayment schedule is actuarily sound, payments are in equal monthly amounts with no deferral or balloon payments and the note provision must prohibit cancellation of the balance upon death of the lender that the note is not a transfer for less than fair market value.

The Department cites no provision in federal law which requires that if a promissory note is unassignable, the note is a transfer for less than fair market value. The Department also cites no other legal authority in support of its contention that an unassignable note has no value. The Department in its case summary reasons that a note, because of stream of assets that "will be received" has equal asset value to the money given in exchange for it. (emphasis supplied). "If however, the note is unassignable it has a $0 FMV and is not an equitable exchange for the money given. The claimant has attempted to turn an asset into a stream of income with no value as an asset." See Department Case Summary, p. 2.

Based upon Department policy found on BEM 400 in effect at the time the Department issued its Health Care Coverage Determination Notice in August 2019 the Note does meet the requirements to be excluded as a transfer of resource for less than fair market value and also meets the requirements of a bona fide loan as it is enforceable under state law, the evidence would indicate that loan was in effect at the time of the transaction, the borrower acknowledges an obligation to repay the note and the repayment plan is feasible. In addition, the Department's analysis ignores other relevant enforceable provisions in the promissory note in question which include that it is fully enforceable against the borrower to recoup recovery of the payments (debt), it cannot be cancelled for any reason including the death of the lender, the promissory note bears interest at the rate of 2.35% compounded monthly, failure to pay when due or any other material breach shall be considered a default with a $100.00 penalty to be paid plus the monthly payment, and the lender is entitled to recover his reasonable attorney fees on default as well as actual damages and costs and the borrower assumes personal liability.

The Department also asserts that unlike an annuity which requires payback provisions to the State for Medicaid benefits the promissory note does not. However, Department policy in effect at the time of the Department's action in August 2019 indicates that the estate recovery program needs to know about a promissory note for the state to recover Medicaid expenses and a copy of the promissory note is to be sent to the estate recovery unit. See BEM 400, p. 46.

Finally, the definition of less that fair market value means:

> The **compensation** received in return for a resource is worth less than fair market value of the resource. 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.
>
> Compensation must have tangible form and intrinsic value.
> BEM 405 (July 2019, p. 6.

In this case, the compensation received for the $19,000.00 cash asset was a legally binding promissory note that secures payment of $19,377.15 in compensation to [redacted] which is tangible and intrinsic value to him. In addition, 20 CFR 416.1246 included in the section regarding disposal of resources at less than fair market value defines compensation as follows:

> (C) The compensation for a resource includes all money, real or personal property, food, shelter or services received by the individual (or eligible spouse) at or **after** the time of transfer in exchange for the resource if the compensation was provided pursuant to a binding (legally enforceable) agreement in effect at the time of the transfer. (Emphasis supplied).

In this case the compensation received by [redacted], the lender, under the terms of the Note is equal to and more than the amount of $19,000.00 used to purchase the Note and make the loan, and is provided subject to a legally binding and enforceable agreement; thus, it is determined the transfer was not a transfer for less than fair market value; and in addition, the Note met all three requirements found in BEM 400 to have it be considered not a transfer for less than fair market value and thus, is not a divested resource.

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 did not act in accordance with Department policy when it imposed a divestment penalty.

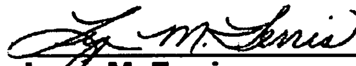
DECISION AND ORDER

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

THE DEPARTMENT IS ORDERED TO BEGIN DOING THE FOLLOWING, IN ACCORDANCE WITH DEPARTMENT POLICY AND CONSISTENT WITH THIS HEARING DECISION, WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

1. The Department shall remove the divestment penalty and issue a supplement for benefits the Petitioner is otherwise eligible to receive.

2. The Department shall provide the Petitioner and Petitioner's counsel written notice of its reprocessing determination.



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

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