

COA Opinion: Purchase of unsecured shares in a private LLC formed to circumvent Medicaid rules constituted a divestment of assets subject to a penalty period

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Petitioner's second application for Medicaid benefits was denied because petitioner, a 93-year-old, had too much money in her bank account to qualify. In Michigan, to be eligible for Medicaid long-term care benefits, an individual must have \$2,000 or less in countable assets. Shortly after the second denial, petitioner received approximately \$100,000 from her husband's death. Before submitting her third application for Medicaid benefits, petitioner's daughter and attorney-in-fact formed an L.L.C., which petitioner admitted was formed for the sole purpose of making her eligible for Medicaid benefits (while arguing that intent was not relevant). Petitioner's daughter assigned, in her own name, 100 investment (non-voting) units of the L.L.C., and all 100 voting units. Petitioner was assigned 111,460 investment units for which she paid the L.L.C. \$111,460. The same day, petitioner's daughter, as the sole voting member of the L.L.C., acted to disallow any transfer of investment units within a two-year holding period, during which petitioner could not sell, transfer, or liquidate her units. After two years from the date of investment, the L.L.C.'s operating agreement would allow the sale of the units and guaranteed compounding two percent interest from the date of purchase to the date of sale on the amount paid for them. During the two-year period, petitioner would not receive any distributions from the L.L.C.

The next month, petitioner again applied for Medicaid benefits, and the Department of Human Services (DHS) found that she was eligible for Medicaid, but applied a divestment penalty, refusing to pay for long-term care services for 18 months and 23 days. Petitioner appealed, and the hearing referee found that she did not receive fair market value for her money, and affirmed the DHS. The circuit court reversed the hearing referee.

In an unanimous opinion in *Estate of Elizabeth A Marden v Dep't of Human Services*, No. 288966, the Court of Appeals reversed the circuit court. The Court of Appeals determined that this was not an asset that a willing buyer would purchase on the open market, in an arm's-length transaction, but rather an arrangement between relatives involving a transaction that the Court of Appeals characterized as "an impermissibly abusive attempt to shelter assets." The Court of Appeals thus concluded that the transaction was for less than fair market value and constituted a divestment of assets that was not subject to an exclusion. A "divestment" is a transfer for less than fair market value during Michigan's five-year "look-back" period that, unless falling under an exclusion, subjects the Medicaid applicant to a penalty period during which payment of long-term care benefits is suspended. As the Court of Appeals explained, Congress imposed the divestment penalty "to maximize the resources for Medicaid for those truly in need."