

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES**

IN THE MATTER OF:

[REDACTED]

Reg. No.: 2012-44422
Issue No.: 2010
Case No.: [REDACTED]
Hearing Date: May 31, 2012
County: Wexford-Missaukee

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 following Claimant's request for a hearing. After due notice, a telephone hearing was held on May 31, 2012, from Lansing, Michigan. Participants on behalf of Claimant included [REDACTED] (Authorized Hearing Representative [REDACTED]) and Claimant's nephew). Participants on behalf of Department of Human Services (Department) included [REDACTED] (Long Term Care Eligibility Specialist) and [REDACTED] (Family Independence Manager).

ISSUE

Did the Department properly determine that Claimant had divested herself of assets to warrant the imposition of a penalty?

FINDINGS OF FACT

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

1. Claimant was active for Medical Assistance (MA) or "Medicaid."
2. Claimant entered a long-term care facility on November 4, 2010.
3. Claimant had an annuity through [REDACTED] in the amount of [REDACTED] but the annuity was not disclosed on the Claimant's initial application for assistance.
4. On December 3, 2010, [REDACTED] issued a check to Claimant in the amount of [REDACTED]

5. The Prudential Annuity check was deposited into Claimant's bank account and cash was withdrawn in the amount of [REDACTED] on December 13, 2012.
6. The [REDACTED] cash was spent in the following manner: (1) [REDACTED] was provided to Claimant's nephew for expenses incurred related to moving Claimant's personal property from her apartment; (2) [REDACTED] was used toward the purchase of a [REDACTED] which costs [REDACTED] and (3) [REDACTED] was used to purchase an auto insurance policy for the 2006 Buick Allure issued to [REDACTED]
7. On November 15, 2011, the Department mailed Claimant a Long-Term Care Medicaid Redetermination Notice (DHS-0035), Verification Checklist (DHS-3503) and other documents requesting verifications.
8. On November 23, 2011, the Department, for the first time, received verification that Claimant had an annuity that had been cashed out. The Department received verification regarding the proceeds of the annuity that had been liquidated at this time.
9. On December 13, 2011, the Department sent correspondence to Claimant with the following determinations: (1) the [REDACTED] was a divestment because actual receipts to prove expenses incurred were not provided; (2) the [REDACTED] was a divestment because the money was paid to [REDACTED] for an auto insurance policy; (3) the [REDACTED] toward the purchase price of the 2006 Buick Allure while Claimant was in a long-term care facility; and (4) that the total divestment penalty is [REDACTED].
10. On December 13, 2011, the Department mailed Claimant a Notice of Case Action (DHS-1605) which indicated that a divestment penalty of 66 (sixty-six) days will be imposed effective January 1, 2012 and ending on March 6, 2012 during which time Claimant will be responsible for her own long-term care costs.
11. Claimant requested a hearing challenging the Department's divestment determination and penalty on January 6, 2012.

CONCLUSIONS OF LAW

The Medical Assistance (MA) program was established by Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). The department administers the MA program pursuant to MCL 400.10, et seq., and MCL 400.105. Department policies for the MA programs are contained in the Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM), the Bridges Reference Manual (BRM), and the Reference Tables Manual (RFT). The MA program is also referred to as "Medicaid." BEM 105. The goal of the Medicaid program is to ensure that essential health care services are made available to those who otherwise could not afford them. BEM 105.

The Medicaid program was created by Congress with the intent "to provide benefits to the truly needy." *Mackey v Dep't of Human Servs*, 289 Mich App 688, 697; 808 NW2d 484 (2010). "To be eligible for Medicaid long-term-care benefits in Michigan, an individual must meet a number of criteria, including having \$2,000 or less in countable assets." *Mackey* at 698. In some cases, persons with wealth have transferred their assets for less than fair market value in order to become eligible for Medicaid. See *Mackey* at 698-699. The typical purpose of such transfers is to "pass on . . . accumulated wealth" within the family unit. See *Mackey* at 697. To avoid this misuse of the Medicaid system, however, a state examines all transfers of assets within a specified time frame to determine whether the transfers were made "solely to become eligible for Medicaid, which can be established if the transfer was made for less than fair market value." *Mackey* at 696. This time frame is the "look-back period." *Mackey, supra*. "A transfer for less than fair market value during the 'look-back' period is referred to as a 'divestment.'" *Mackey, supra*. A divestment "subjects the applicant to a penalty period during which payment of long-term-care benefits is suspended." *Mackey, supra*.

A "divestment" is a transfer of assets that would create a penalty period. BEM 405. The "penalty period" is a period of disqualification from Medicaid assistance for Long Term Care (LTC). BEM 405. In other words, the penalty period is the number of months of long term care that will not be covered by Medicaid. BEM 405. Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405. Divestment results in a penalty period in Medicaid, not ineligibility. BEM 405. The divestment policy does not apply to "Qualified Working Individuals."¹ BEM 405.

Divestment means a transfer of a "resource" by a client or his spouse that are all of the following: (1) is within a specified time (look-back period); (2) is a transfer for less than fair market value; (3) is not considered by policy as a "transfer that is not divestment." BEM 405. "Resource" is defined as all of the client's and his/her spouse's assets and income. BEM 405. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. BEM 405. It also includes all assets and income that the individual (or their spouse) were entitled to but did **not** receive because of action by one of the following: (1) the client or spouse; (2) a person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or the client's spouse; (3) any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse. BEM 405.

During the penalty period, Medicaid will not pay the client's cost for: (1) LTC services; (2) home and community-based services; (3) home help; and (4) home health. BEM 405. However, Medicaid will pay for other MA-covered services. BEM 405.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. BEM 405. Not all transfers are divestment. BEM 405. Examples of transfers include: (1) selling an asset for fair market value (not divestment); (2) giving an asset away (divestment); (3) refusing an inheritance (divestment); (4) payments from a Medicaid Trust that are not to, or for the benefit of, the person or his spouse; see BEM

¹ See BEM 169.

401 (divestment); (5) putting assets or income in a trust²; (6) giving up the right to receive income such as having pension payments made to someone else (divestment); (7) giving away a lump sum or accumulated benefit (divestment); (8) buying an annuity that is not actuarially sound (divestment); (9) giving away a vehicle (divestment); and (10) putting assets or income into a Limited Liability Company (LLC). BEM 405.

According to BEM 405, transfers by any of the following individuals are considered transfers by the client or spouse: (1) parent for minor; (2) legal guardian; (3) conservator; (4) court or administrative body; (5) anyone acting in place of, on behalf of, at the request of or at the direction of the client or the client's spouse.

When a client jointly owns a resource with another person(s), any action by the client or by another owner that reduces or eliminates the client's ownership or control is considered a transfer by the client. BEM 405.

The purchase of an annuity that is not actuarially sound is a transfer for less than fair market value. BEM 405. The transfer was made by the annuity's owner. BEM 405. Owner means the person who pays the premium for the annuity. BEM 405. Annuitant means the person to whom the annuity payments are made during the guarantee period of the annuity. BEM 405. An annuity is not actuarially sound if the annuitant is not expected to live until the end of the guarantee period of the annuity. BEM 405. The Department uses the Life Expectancy Tables contained in BEM 405.

The amount transferred for less than fair market value for an annuity that is not actuarially sound is the amount that would be paid after the end of the person's life expectancy. BEM 405. The amount transferred for less than fair market value is the value of the payments due in the last 5.5 years of the annuity (25 minus 19.50 = 5.50). BEM 405.

The first step in determining the period of time that transfers can be looked at for divestment is determining the baseline date. BEM 405. A person's baseline date is the first date that the client was eligible for Medicaid and one of the following: (1) in LTC; (2) approved for the waiver under BEM 106; (3) eligible for Home Health services; or (4) eligible for Home Help services. BEM 405.

A client's baseline date does not change even if one of the following happens: (1) the client leaves LTC; (2) the client is no longer "approved for the waiver" under BEM 106; (3) the client no longer needs Home Help; or (4) the client no longer needs Home Health. BEM 405. Once the baseline date is established, the Department determines the look-back period. BEM 405. The look back period is 60 months prior to the baseline date for all transfers made after February 8, 2006. BEM 405.

Transfers that occur on or after a client's baseline date must be considered for divestment. BEM 405. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment. BEM 405. A divestment determination is not

² See BEM 401.

required unless, sometime during the month being tested, the client was in a penalty situation. BEM 405. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be one of the following: (1) in an LTC facility; (2) "approved for the waiver" under BEM 106; (3) eligible for Home Help; (4) eligible for Home Health. BEM 405.

"Less than fair market value" means the compensation received in return for a resource was worth less than the fair market value of the resource. BEM 405. That is, the amount received for the resource was less than what would have been received if the resource was offered in the open market and in an arm's length transaction (see glossary). BEM 405.

Compensation must have tangible form and intrinsic value. BEM 405. Relatives can be paid for providing services; however, assume services were provided for free when no payment was made at the time services were provided. BEM 405. A client can rebut this presumption by providing tangible evidence that a payment obligation existed at the time the service was provided (for example a written agreement signed at the time services were first provided). It should be noted that the policy in BAM 130 which allows the Department to use "the best available information" or "the best judgment" as verification does **not** apply. BEM 405.

When a person gives up his right to receive income, the fair market value is the total amount of income the person could have expected to receive. BEM 405.

Policy requires the Department follow the BEM 405 gender-specific life expectancy tables to compute the fair market value of a lifetime income source such as a pension. BEM 405. The calculations are based on the person's sex and age on the date of transfer. BEM 405.

Policy also covers Home Caretaker & Personal Care Contracts. BEM 405. A contract/agreement that pays prospectively for expenses such as repairs, maintenance, property taxes, homeowner's insurance, heat and utilities for real property/homestead or that provides for monitoring health care, securing hospitalization, medical treatment, visitation, entertainment, travel and/or transportation, financial management or shopping, etc. would be considered a divestment. The Department will consider all payments for care and services which the client made during the look back period as divestment. BEM 405.

The preceding are examples and should not be considered an all inclusive or exhaustive list. BEM 405. Relatives who provide assistance or services are presumed to do so for love and affection, and compensation for past assistance or services shall create a rebuttable presumption of a transfer for less than fair market value. BEM 405. A relative is anyone related to the client by blood, marriage or adoption. BEM 405.

Such contracts/agreements shall be considered a transfer for less than fair market value unless the compensation is in accordance with **all** of the following:

- (1) The services must be performed after a written legal contract/ agreement has been executed between the client and provider. The services are not paid for until the services have been provided. The contract/agreement must be dated and the signatures must be notarized; and
- (2) At the time of the receipt of the services, the client is not residing in a nursing facility, adult foster care home, institution for mental diseases, inpatient hospital, intermediate care facility for mentally retarded or eligible for home and community based waiver, home health or home help; and
- (3) At the time services are received, the services must have been recommended in writing and signed by the client's physician as necessary to prevent the transfer of the client to a residential care or nursing facility. Such services cannot include the provision of companionship; and
- (4) DHS will verify the contract/agreement by reviewing the written instrument between the client and the provider which must show the type, frequency and duration of such services being provided to the client and the amount of consideration (money or property) being received by the provider, or In accordance with a service plan approved by DHS. If the amount paid for services is above fair market value, then the client will be considered to have transferred the asset for less than fair market value. If in question, fair market value of the services may be determined by consultation with an area business which provides such services; and
- (5) The contract/agreement must be signed by the client or legally authorized representative, such as an agent under a power of attorney, guardian, or conservator. If the agreement is signed by a representative, that representative cannot be the provider or beneficiary of the contract/agreement. BEM 405.

Assets transferred in exchange for a contract/agreement for personal services/assistance or expenses of real property/homestead provided by another person after the date of application are considered available and countable assets. BEM 405.

Transfers of resources that are excluded or not countable assets under SSI-related MA policy may be divestment. BEM 405.

Transfer of the following may be divestment: (1) homestead of L/H and waiver client (see BEM 106) or the L/H and waiver client's spouse even if the transfer occurred before the client was institutionalized or approved for the waiver; or (2) assets that were not countable because they were unavailable or not salable. BEM 405.

The following are transfers that are not divestment. BEM 405. Transferring income that is not countable income for SSI-related MA according to BEM 500 is not divestment. BEM 405. It is not divestment to transfer resources from the client to the client's spouse or to another solely for the benefit of the client's spouse. BEM 405.

Transfers from the client's spouse to another solely for the benefit of the client's spouse are not divestment. BEM 405. Transfers to the client's blind or disabled (see BEM 260) child, regardless of the child's age or marital status, are not divestment. BEM 405. This includes transfers to a trust established solely for the benefit of the child. BEM 405.

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

Transfers exclusively for a purpose other than to qualify or remain eligible for MA are not divestment. BEM 405.

The Department will assume transfers for less than fair market value were for eligibility purposes until the client or spouse provides convincing evidence that they had no reason to believe LTC or waiver services might be needed. BEM 405. Example: ██████████ age 40, was in good health when he gave his vacation cottage to his nephew. The next day ██████████ was in an automobile accident. His injuries require long-term care. The transfer was not divestment because ██████████ could not anticipate his need for LTC services. However, there is an exception. Preservation of an estate for heirs or to avoid probate court is not acceptable as another purpose. That the asset or income is not counted for Medicaid does not make its transfer for another purpose. BEM 405.

There is no maximum limit on the penalty period for divestment under BEM 405. There is no minimum amount of resource transfer before incurring a penalty, determine a penalty on any amount of resources that are transferred and meet the definition of a divestment even if the penalty is for one day. BEM 405. Divestment is a type of transfer not an amount of transfer. BEM 405.

Any penalty period established under previous policy continues until it ends. BEM 405. Apply the penalty policy in place at the time of transfer for any transfers made before February 8, 2006. BEM 405.

The penalty period is computed on the total Uncompensated Value of all resources divested. BEM 405. The Department shall determine the Uncompensated Value for each resource transferred and combine into a total Uncompensated Value. BEM 405. The Department must then divide the total Uncompensated Value by the average monthly private LTC Cost in Michigan for the client's Baseline Date. This gives the number of full months for the penalty period. Then the Department will multiply the fraction remaining by 30 to determine the number of days for the penalty period in the remaining partial month. BEM 405.

The Department will apply the total penalty months and days. BEM 405. Then it will apply a penalty even if the total amount of the penalty is for only a partial month. BEM

405. The penalty is applied to the months (or days) an individual is eligible for Medicaid and actually in LTC, Home Health, Home Help, or the MIChoice Waiver. BEM 405. The divestment penalty period cannot be applied to a period when the individual is not eligible for Medicaid for any reason (that is the case closes for any reason or is eligible for Medicaid but is not in LTC, Home Help, Home Health, or the MIChoice Waiver. BEM 405. The Department will restart the penalty when the individual is again eligible for Medicaid and in LTC, Home Help, Home Health, or MIChoice Waiver. BEM 405. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. BEM 405. That month cannot be counted as part of the penalty period. BEM 405.

Note: An individual is not eligible for MA in a month they have pre-paid for LTC. BEM 405. A group 2 deductible eligible individual is not eligible for Medicaid until the deductible is met. BEM 405. The Department will apply the penalty only to the days of the month after the deductible is met. BEM 405.

The 1st day the client is eligible to receive MA coverage for LTC, MIChoice, home help, or home health services are the 1st day after the penalty period ends. BEM 405.

The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care (LTC, MIChoice waiver, or home help or home health services), and is not already part of a penalty period. BEM 405. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. BEM 405. That month cannot be counted as part of the penalty period. BEM 405.

If a past unreported divestment is discovered or 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. BEM 405. If a penalty is determined for an unreported transfer in the past, apply the penalty from the first day after timely notice is given; see Recipient Exception in this item. BEM 405.

Timely notice must be given to LTC recipients and (BEM 106) waiver recipients before actually applying the penalty. BEM 405. Adequate notice must be given to new applicants. BEM 405.

A client can be penalized if he or his spouse divests. BEM 405. The penalty is imposed on whichever spouse is in a Penalty Situation; see BEM 211, MA Group Composition. BEM 405. If both spouses are in a penalty situation, the penalty period (or any remaining part) must be divided between them. BEM 405. Example: [REDACTED] divested themselves of assets prior to [REDACTED] entering a LTC facility and applying for Medicaid. [REDACTED] is in LTC and under a divestment penalty for 24 months. When [REDACTED] enters the facility 6 months later, the remaining 18 months of [REDACTED] penalty are divided between them, giving [REDACTED] each 9 months of the

penalty still to complete. If either [REDACTED] dies before they complete their penalty the remainder of their penalty is transferred to their spouse.

Example: [REDACTED] enters a LTC facility and applies for Medicaid. He is found eligible for Medicaid. During the presumed asset eligibility period [REDACTED] transfers [REDACTED] assets to herself and then transfers the assets to her children (the first transaction is permitted the second transaction is divestment). [REDACTED] then enters the LTC facility. [REDACTED] incurs the investment penalty. BEM 405.

The Department will cancel a divestment penalty if either of the following occurs before the penalty is in effect: all the transferred resources are returned and retained by the individual or fair market value is paid for the resources. BEM 405. The Department will then recalculate the penalty period if either of the following occurs while the penalty is in effect: all the transferred resources are returned and (2) full compensation is paid for the resources. BEM 405.

The Department uses the same per diem rate originally used to calculate the penalty period. BEM 405. Once a divestment penalty is in effect, return of, or payment for, resources cannot eliminate any portion of the penalty period already past. However, the Department should recalculate the penalty period. BEM 405. The divestment penalty ends on the later of the following: (1) the end date of the new penalty period; or (2) the date the client notified the Department that the resources were returned or paid for. BEM 405.

Verification is not required when the client states he and his spouse have not transferred resources unless: (1) the client's statement is unclear, inconsistent or conflicts with known facts, or (2) existing information in the case record indicates divestment may have occurred. BEM 405.

The Department must verify the following to document divestment: (1) date of transfer; (2) fair market value or cash value; (3) uncompensated value. BEM 405. The Department must also obtain a statement from the LTC or waiver client's physician (M.D. or D.O.) to verify undue hardship, or the client's non-disabled child age 21 or older provided care that would otherwise have required LTC or waiver services. BEM 405.

According to BEM 405, the Department shall use the following sources to verify transfers and the reasons for them including, but are *not* limited to: (1) legal documents; (2) payment or tax records; (3) bills of sale; (4) court or attorney records; (5) correspondence regarding the transaction; and (6) bank books or statements.

In the instant matter, the Department asserts that Claimant divested herself of assets when she cashed out an unreported annuity in the amount of [REDACTED] and then used the money to purchase a vehicle while in a nursing home. The Department claims that Claimant's total divestment amount ([REDACTED]) includes the entire purchase price of the vehicle ([REDACTED]). The Administrative Law Judge (ALJ) reviewed the entire

record in this matter and has reached the following conclusions. First, the record shows that Claimant divested herself of [REDACTED] when the annuity was liquidated. Thus, the ALJ finds that the [REDACTED] is divestment. Second, the ALJ was unable to find any document evidence that Claimant divested herself of the entire [REDACTED] for the purchase of the vehicle. There is certainly evidence in the record to show that only a portion of the annuity ([REDACTED]) was used toward the purchase of the vehicle. But, there was no evidence in this record that the full [REDACTED] was Claimant's money used to purchase the vehicle. In this regard, the Department erred because it did not properly calculate the divestment amount and the corresponding penalty.

The Department has not established this case by the necessary competent, substantial and material evidence on the record.

DECISION AND ORDER

The Administrative Law Judge, based upon the above Findings of Fact and Conclusions of Law finds that the Department did not act properly when it determined that Claimant had divested herself of assets in the amount of [REDACTED] and imposed a penalty period of 66.88 days.

Accordingly, the Department's determination is REVERSED and REMANDED back to the Department to recalculate Claimant's divestment amount by locating all transfers of assets properly belonging to Claimant as defined by BEM 405.

IT IS SO ORDERED.

/s/ _____
C. Adam Purnell
Administrative Law Judge
for Maura Corrigan, Director
Department of Human Services

Date Signed: 6/27/12

Date Mailed: 6/28/12

NOTICE: Michigan Administrative Hearing System (MAHS) may order a rehearing or reconsideration on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. MAHS will not order a rehearing or reconsideration on the Department's motion where the final decision cannot be implemented within 90 days of the filing of the original request. (60 days for FAP cases)

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt date of the rehearing decision.

Claimant may request a rehearing or reconsideration for the following reasons:

- A rehearing **MAY** be granted if there is newly discovered evidence that could affect the outcome of the original hearing decision.
- A reconsideration **MAY** be granted for any of the following reasons:
 - misapplication of manual policy or law in the hearing decision,
 - typographical errors, mathematical error, or other obvious errors in the hearing decision that effect the substantial rights of the claimant:
 - the failure of the ALJ to address other relevant issues in the hearing decision.

Request must be submitted through the local DHS office or directly to MAHS by mail at
Michigan Administrative Hearings
Reconsideration/Rehearing Request
P. O. Box 30639
Lansing, Michigan 48909-07322

CAP/ds

