

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

IN THE MATTER OF:

[REDACTED]

Reg. No: 2012-70163

Issue No: 2010

[REDACTED]

ADMINISTRATIVE LAW JUDGE: Landis Y. Lain

**HEARING DECISION**

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon claimant's request for a hearing. After due notice, a telephone hearing was held on [REDACTED]. claimant was represented at the hearing by [REDACTED]

**ISSUE**

Did the Department of Human Services (the department) properly determine that claimant's divestment period for Medical Assistance (MA-Long Term Care)?

**FINDINGS OF FACT**

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

1. On [REDACTED] Medical Assistance was approved for claimant with a divestment total of \$48,317.01 (\$28,128 gift to grandson [REDACTED] \$20,189.01 payment to caretaker and [REDACTED] during a 5 year look back period = \$48,317.01).
2. From [REDACTED], the caretaker was paid \$18,789.01 until the client was admitted to the nursing home.
3. Claimant's physician did not verify that claimant required a caretaker in the home and there was no signed/executed contract for an in-home caretaker.
4. Claimant paid [REDACTED] \$1,400 for mileage from trips to [REDACTED] from [REDACTED] over a seven month period of time to manage claimant's finances.

5. On [REDACTED], the department caseworker sent claimant notice that her application was approved with a divestment period.
6. On [REDACTED] claimant's representative filed a request for a hearing to contest the department's negative action.
7. Claimant's representative concedes on the record that the \$28,128 gift to her grandson [REDACTED] is divestment.

### **CONCLUSIONS OF LAW**

The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An opportunity for a hearing shall be granted to an applicant who requests a hearing because his or her claim for assistance has been denied. MAC R 400.903(1). Clients have the right to contest a department decision affecting eligibility or benefit levels whenever it is believed that the decision is incorrect. The department will provide an administrative hearing to review the decision and determine the appropriateness of that decision. BAM 600.

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). The Department of Human Services (DHS or department) administers the MA program pursuant to MCL 400.10, *et seq.*, and MCL 400.105. Department policies are found in the Program Administrative Manual (BAM), the Program Eligibility Manual (BEM) and the Program Reference Manual (PRM).

Title XIX of the Social Security Act, commonly referred to as "The Medicaid Act," provides for medical assistance services to individuals **who lack the financial means to obtain needed health care**. 42 U.S.C. §1396. (Emphasis added)

The Medicaid program is administered by the federal government through the Centers for Medicaid and Medicare Services (CMS) of the Department of Health and Human Services (HHS). The state and federal governments share financial responsibility for Medicaid services. Each state may choose whether or not to participate in the Medicaid program. Once a state chooses to participate, it must operate its Medicaid program in accordance with mandatory federal requirements, imposed both by the Medicaid Act and by implementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

Participating states must provide at least seven categories of medical services to persons determined to be eligible Medicaid recipients. 42 USC §1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21). One of the seven mandated services is *nursing facility services*. 42 USC §1396d(a)(4)(A).

For medical assistance eligibility, the Department has defined an asset as “any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.” NDAC 75-02-02.1-01(3). Under both federal and state law, an asset must be “actually available” to an applicant to be considered a countable asset for determining medical assistance eligibility. [Hecker, 527 N.W.2d at 237 \(On Petition for Rehearing\); Hirschberger v. Griggs County Social Serv., 499 N.W.2d 876, 882 \(N.D.1993\); 42 U.S.C. § 1396a\(a\)\(17\)\(B\); 1 J. Krauskopf, R. Brown, K. Tokarz, and A. Bogutz, Elderlaw: Advocacy for the Aging § 11.25 \(2d ed. 1993\).](#) Yet, “actually available” resources “are different from those *in hand*.” [Schweiker v. Gray Panthers, 453 U.S. 34, 48, 101 S.Ct. 2633, 2642, 69 L.Ed.2d 460 \(1981\)](#) (emphasis in original). NDAC 75-02-02.1-25(2) explains: Only such assets as are actually available will be considered. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available. Assets will be reasonably evaluated.... See also [45 C.F.R. § 233.20\(a\)\(3\)\(ii\)\(D\)](#).

As noted in *Hecker*, if an applicant has a legal ability to obtain an asset, it is considered an “actually available” resource. The actual-availability principle primarily serves “to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes non-existent resources to recipients.” [Heckler v. Turner, 470 U.S. 184, 200, 105 S.Ct. 1138, 1147, 84 L.Ed.2d 138 \(1985\)](#).

The focus is on an applicant's actual and practical ability to make an asset available as a matter of fact, not legal fiction. See [Schrader v. Idaho Dept. of Health and Welfare, 768 F.2d 1107, 1112 \(9th Cir.1985\)](#). See also [Lewis v. Martin, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 \(1970\)](#) (invalidating California state regulation that presumed contribution of non-AFDC resources by a non-legally responsible and non-adoptive stepfather or common law husband of an AFDC recipient's mother).

Determining whether an asset is “actually available” for purposes of medical assistance eligibility is largely a fact-specific inquiry depending on the circumstances of each case. See, e.g., [Intermountain Health Care v. Bd. of Cty. Com'rs, 107 Idaho 248, 688 P.2d 260, 264 \(Ct.App.1984\)](#); [Radano v. Blum, 89 A.D.2d 858, 453 N.Y.S.2d 38, 39 \(1982\)](#); [Haynes v. Dept. of Human Resources, 121 N.C.App. 513, 470 S.E.2d 56, 58 \(1996\)](#). Interpretation of the “actually available” requirement must be “reasonable and humane in accordance with its manifest intent and purpose....” [Moffett v. Blum, 74 A.D.2d 625, 424 N.Y.S.2d 923, 925 \(1980\)](#). That an applicant must sue to collect an asset the applicant has a legal entitlement to usually does not mean the asset is actually unavailable. See, e.g., [Wagner v. Sheridan County S.S. Bd., 518 N.W.2d 724, 728 \(N.D.1994\)](#); [Frerks v. Shalala, 52 F.3d 412, 414 \(2d Cir.1995\)](#); [Probate of Marcus, 199 Conn. 524, 509 A.2d 1, 5 \(1986\)](#); [Herman v. Ramsey Cty. Community Human Serv., 373 N.W.2d 345, 348 \(Minn.Ct.App.1985\)](#). See also [Ziegler v. Dept. of Health & Rehab.](#)

Serv., 601 So.2d 1280, 1284 (Fla.Ct.App.1992) At issue here is the methodology utilized in determining the availability of an individual's "resources" for purposes of evaluating his or her eligibility. SSI recipients, and thus SSI-related "medically needy" recipients, may not retain resources having a value in excess of \$2,000. 42 U.S.C. § 1382(a)(1)(B).

The regulations governing the determination of eligibility provide that resources mean cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his support and maintenance. If the individual has the right, authority or power to liquidate the property, or his share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse). 20 C.F.R. § 416.1201(a).

Under BEM, Item 400, an eligible Medical Assistance recipient may not possess in excess of \$2000 in assets.

**Assets** mean cash, any other personal property and real property. **Real property** is land and objects affixed to the land such as buildings, trees and fences. Condominiums are real property. **Personal property** is any item subject to ownership that is **not** real property (examples: currency, savings accounts and vehicles). BEM, Item 400, page 1. Countable assets **cannot** exceed the applicable asset limit. Not all assets are counted. An asset is countable if it meets the availability tests and is **not** excluded. Available means that someone in the asset group has the right to use or dispose of the asset. BEM, Item 400, page 5. All types of assets are considered for SSI-related MA. BEM, Item 400, page 2. For Medicare Savings Programs (BEM 165) and QDWI (BEM 169) the asset limit is:

- . \$4,000 for an asset group of one.
- . \$6,000 for an asset group of two.

For all other SSI-related MA categories, the asset limit is:

- . \$2,000 for an asset group of one.
- . \$3,000 for an asset group of two. BEM, Item 400, page 5.

Pursuant to BEM, Item 405, a divestment means a transfer of an asset within the specified look-back period.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. **Not** all transfers are divestment. Examples of transfers include:

- Selling an asset for fair market value (not divestment).
- **Giving an asset away (divestment).**
- Refusing an inheritance (divestment).

- Payments from a **MEDICAID TRUST** that are **not** to, or for the benefit of, the person or his spouse; see BEM 401 (divestment).
- Putting assets or income in a trust; see BEM 401. (emphasis added)
- Giving up the **right** to receive income such as having pension payments made to someone else (divestment).
- Giving away a lump sum or accumulated benefit (divestment).
- Buying an annuity that is **not** actuarially sound (divestment).
- Giving away a vehicle (divestment).
- Putting assets or income into a Limited Liability Company (LLC) (BEM 405, page 2)

Converting an asset from one form to another of equal value is **not** divestment even if the new asset is exempt. Most purchases are conversions.

- Using \$5,000 from savings to buy a used car priced at \$5,000 is conversion for equal value.
- Trading a boat worth about \$8,000 for a car worth about \$8,000 is conversion for equal value.

Payment of expenses such as one's own taxes or utility bills is also **not** divestment. BEM 405, page 8.

The department is to count only the value of assets that are countable for the MA category being tested per BEM, Item 400. Assume the person owns the assets in determining what is countable. The department is to do a complete divestment determination when a person has transferred assets of the trust, the principle is unavailable, and the person is in a penalty situation per BEM, Item 405.

The first step in determining the period of time that transfers can be looked at for divestment is determining the **baseline date**; see Baseline Date below.

Once you have determined the baseline date, you determine the look-back period. The look back period is 60 months prior to the baseline date for all transfers made after February 8, 2006.

### **Entire Period**

Transfers that occur **on** or **after** a client's baseline date must be considered for divestment. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment.

### **Penalty Situation**

A divestment determination is **not** required unless, sometime during the month being tested, the client was in a penalty situation. To be in a penalty situation, the client must be eligible for MA (other than QDWI) and be one of the following:

- In an LTC facility.
- APPROVED FOR THE WAIVER; see BEM 106.
- Eligible for Home Help. BEM, Item 405, page 4.

There is no maximum limit on the penalty period for divestment under this new policy. 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. BEM, Item 405, page 9.

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.
- Fair market value is paid for the resources.

Recalculate the penalty period if either of the following occurs while the penalty is in effect:

- All the transferred resources are returned.
- Full compensation is paid for the resources.

Use the same per diem rate originally used to calculate the penalty period.

Once a divestment penalty is in effect, return of, or payment for, resources **cannot** eliminate any portion of the penalty period already past. However, you must recalculate the penalty period. The divestment penalty ends on the later of the following:

- The end date of the new penalty period.
- The date the client notified you that the resources were returned or paid for.  
BEM, Item 405, pages 12-13

In the instant case, claimant's representative concedes that there has been divestment of claimant's assets in the form of gifts to her grandson in the amount of \$28,128. Claimant's representative argues that the other \$1400 was for mileage reimbursement and the \$18,789.01 made since [REDACTED] was for an in-home caretaker to help keep claimant out of the nursing home and should not be considered divestment.

Pertinent department policy governing Home Caretaker & Personal Care Contracts states as follows:

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. Consider all payments for care and services which the client made during the look back period as divestment.

The preceding are examples and should not be considered an all inclusive or exhaustive list.

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. A relative is anyone related to the client by blood, marriage or adoption.

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:

- 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**
- **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**
- 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**
- 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**

- **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.**

**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, Item 405, pages 6-7.**

In the instant case, no written/executed contract for personal service and mileage exists. There is no recommendation signed by a physician indicating that such personal care services were necessary to prevent transfer of the client to a residential care or nursing facility. The executed agreement for compensation and reimbursement between claimant and [REDACTED] was not completed until [REDACTED], after the services/mileage had been incurred. Therefore, divestment occurred in the amount of \$48,317.01 and the department's assessment of the divestment period must be upheld.

### **DECISION AND ORDER**

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that Department has established by a preponderance of evidence that there has been divestment and properly determined the appropriate penalty period should be instituted under the circumstances.

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

/s/ \_\_\_\_\_  
Landis Y. Lain  
Administrative Law Judge  
for Maura D. Corrigan, Director  
Department of Human Services

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

**NOTICE:** Administrative Hearings 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. Administrative Hearings 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.

2012-70163/LYL

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the mailing 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.

LYL/jk

cc:

A large black rectangular redaction box covers the majority of the text in the 'cc:' field. The redaction is composed of several overlapping black shapes that completely obscure the underlying text.

MAHS