

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

IN THE MATTER OF:

[REDACTED]

Reg. No: 201235876

Issue No: 2021

Case No: [REDACTED]

Hearing Date: [REDACTED]

[REDACTED]

ADMINISTRATIVE LAW JUDGE: Aaron McClintic

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Claimant's request for a hearing. After due notice, an in-person hearing was held on [REDACTED]. Claimant's son, [REDACTED], appeared and testified. Claimant's Attorney, [REDACTED], also appeared. The Department was represented by [REDACTED] Assistant [REDACTED], also appeared for the Department by telephone.

ISSUE

Was the Department correct in determining Claimant's divestment amount and divestment penalty period?

FINDINGS OF FACT

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

1. Claimant applied for Medical Assistance (MA) benefits on [REDACTED]
2. Claimant was approved for Medicaid on [REDACTED] with a divestment penalty running from [REDACTED] through [REDACTED]
3. In [REDACTED] Claimant purchased an annuity contract and placed a parcel of real estate referred to as the [REDACTED] property into an irrevocable trust referred to as the [REDACTED]
4. A payment was made from the irrevocable trust to Claimant, prior to application that consisted of transfer of the [REDACTED] real estate back to [REDACTED] along with a cash payment of [REDACTED]

5. The original annuity y contract outlined a total cash payment of [REDACTED]
6. The Department determined that divestment occurred in the amount of [REDACTED] which represented the difference between the cash payout of \$ [REDACTED] and the original payment amount in the annuity contract of [REDACTED] for the [REDACTED] property.
7. [REDACTED] of the cash payout from the annuity was used to reroof the Lincoln Street rental property. In addition, [REDACTED] was transferred to the Irrevocable Trust from the [REDACTED] that was not returned to the Claimant. The total of these two items was [REDACTED].
8. The Department determined that divestment occurred in the amount of [REDACTED] and imposed a divestment penalty period from [REDACTED]
9. Claimant agreed that divestment occurred in the amount of [REDACTED] and asserted that a penalty period of 2 months and zero days were correct.
10. Claimant requested a hearing on [REDACTED] contesting the determination of \$ [REDACTED] divestment amount and the divestment penalty period.

CONCLUSIONS OF LAW

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 (formerly known as the Family Independence Agency) administers the MA program pursuant to MCL 400.10, *et seq.*, and MCL 400.105. Department policies are found in the Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM) and the Program Reference Manual (PRM). 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 Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM) and the Program Reference Manual (PRM).

DEPARTMENT POLICY MA ONLY

Divestment results in a penalty period in MA, **not** ineligibility. Divestment policy does **not** apply to Qualified Working Individuals; see BEM 169.

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

Divestment means a transfer of a resource (see RESOURCE DEFINED below and in glossary) by a client or his spouse that are all of the following:

- Is within a specified time; see LOOK-BACK PERIOD in this item.
- Is a transfer for LESS THAN FAIR MARKET VALUE; see definition in glossary.
- Is not listed below under TRANSFERS THAT ARE NOT DIVESTMENT

Note: See Annuity Not Actuarially Sound and Joint Owners and Transfers below and BEM 401 about special transactions considered transfers for less than fair market value.

During the penalty period, MA will **not** pay the client's cost for:

- LTC services.
- Home and community-based services.
- Home Help.
- Home Health.

MA will pay for other MA-covered services.

Do **not** apply a divestment penalty period when it creates an undue hardship; see UNDUE HARSHIP in this item. BEM 405.

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.

Computing Penalty Period

The penalty period is computed on the total Uncompensated Value of all resources divested.

Determine the Uncompensated Value for each resource transferred and combine into a total Uncompensated Value.

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. Multiply the fraction remaining by 30 to determine the number of days for the penalty period in the remaining partial month.

Apply the total penalty months and days. Apply a penalty even if the total amount of the penalty is for only a partial month.

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 MI Choice Waiver. 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. Restart the penalty when the individual is again eligible for Medicaid and in LTC, Home Help, Home Health, or MIChoice Waiver. 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. That month cannot be counted as part of the penalty period. This does not include payments made by commercial insurance or Medicare.

Note: An individual is not eligible for MA in a month they have pre-paid for LTC. Because the federal law directs that a resident in a nursing facility must have access to all monies held by the facility for the resident, count the money held by a nursing facility as cash.

A group 2 deductible eligible individual is not eligible for Medicaid until the deductible is met. Apply the penalty only to the days of the month after the deductible is met.

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

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. 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. That month cannot be counted as part of the penalty period. This does not include payments made by commercial insurance or Medicare.

Note: 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. If a penalty is determined for an unreported transfer in the past, apply the penalty from the first day after timely notice is given. BEM 405

LESS THAN FAIR MARKET VALUE

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.

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).

Note: Also see Annuity Not Actuarially Sound above.

Compensation must have tangible form and intrinsic value.

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. 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). The policy in BAM 130 allowing use of best available information or best judgment as verification does **not** apply. BEM 405

Value of Transferring Right to Income

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

NON-SALABLE ASSETS

SSI-Related MA Non-Salable Assets

SSI-Related MA Only

Give the asset a \$0 countable value when it has no current market value as shown by one of the following:

- Two knowledgeable appropriate sources (example: realtor, banker, stockbroker) in the owner's geographic area state that the asset is **not** salable due to a specific condition (for example, the property is contaminated with heavy metals). This applies to any assets listed under:
 - [Investments](#).
 - [Vehicles](#).
 - [Livestock](#).
 - [Burial Space Defined](#).
 - [Employment and Training Assets](#).
 - Homes and Real Property (see below).
- In addition, for homes, life leases, land contracts, mortgages, and any other real property, an actual sale attempt at or below fair market value in the owner's geographic area results in no reasonable offer to purchase. The asset becomes salable when a reasonable offer is received. Count an asset that no longer meets these conditions.

For applicants, an active attempt to sell must have started at least 90 days prior to application and must continue until the property is sold. For recipients, the asset must have been up for sale at least 30 days prior to redetermination and must continue until the property is sold. An active attempt to sell means the seller has a set price for fair market value, is actively advertising the sale in publications such as local newspaper, and is currently listed with a licensed realtor. BEM 400.

In the present case, the Department determined that two separate instances of divestment occurred. In Event #1, the Department determined that divestment of [REDACTED] occurred when the annuity was obligated to pay Claimant [REDACTED] but only paid [REDACTED] in cash. This refusal of a right to receive cash payment is what the Department deemed to be divestment. Pursuant to BEM 405, the Department's interpretation and reading of Department policy is proper and correct. Therefore, the Department's determination of divestment and imposition of divestment penalty period was proper and correct.

Claimant argued that the uncompensated value of the divested resource is [REDACTED] and no penalty period should apply. Claimant argued that the annuity did not expressly require payment to be made exclusively in cash. Claimant argued that the terms of the annuity were fulfilled, and the payment obligations satisfied. These arguments are unpersuasive and not supported by Department policy. Refusing a right to receive income is specifically deemed divestment by Department policy and that is what transpired through these transactions. BEM 405. Claimant was entitled to receive the total cash payments outlined in the annuity and deliberately chose to accept less than that amount. In addition, transferring the property back to the Claimant in lieu of cash payment defeated the stated purpose of the annuity to "assure a fixed and reliable annual income for the remainder of annuitant's natural life".

In Event #2, the Department determined that [REDACTED] divestment occurred when [REDACTED] was used to reroof the rental property and when [REDACTED] was transferred to the irrevocable trust from the revocable trust. Claimant did not dispute this portion of the divestment determination.

Claimant asserted at hearing that the real estate parcel at issue in this matter is non-salable pursuant to the Department's definition of non-salable as outlined in BEM 400. Claimant alleges that the property has been listed for sale for more than 90 days at fair market value and there have been no offers. The Department conceded at hearing that an evaluation with regard to the potential non-salable status of the real estate parcel in question was not made.

As outlined above, the Department's determination of divestment and imposition of divestment penalty period was proper and correct. However, the Department's determination of the amount of divestment amount and length of divestment penalty period should be recalculated to determine the value of the real estate in question and therefore the amount of divestment and length of the divestment penalty period. This Administrative Law Judge finds that an evaluation regarding the non-salable status of the real estate parcel in question and the value of the property as of the date of application should be made pursuant to Department policy to determine the correct amount of the divestment and the length of the divestment penalty period. BEM 400.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law decides that the Department was correct in the determination of Claimant's MA divestment and it is **ORDERED** that the Department's decision in this regard be and is

hereby **AFFIRMED** in part and **REVERSED** in part. The determination of Divestment is **AFFIRMED**. The matter is remanded to the county department to determine the value of the real estate parcel in question at the time of application and the correct amount of divestment and the correct divestment penalty period. The divestment amount of [REDACTED] and penalty period of 2 months and zero days is also **AFFIRMED** as this was agreed to by both parties.

Aaron
Administrative
for
Department

Ann McClintic
McClintic
Law Judge
Maura Corrigan, Director
of Human Services

Date Signed: May 3, 2013

Date Mailed: May 3, 2013

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 60 days of the filing of the original request.

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.

AM/kl

cc:

[REDACTED]