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

IN THE MATTER OF:

Reg. No: 2013-15626
Issue No: 2010

Hearing Date April 25, 2013
Wexford County DHS

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 April 25, 2013. Claimant di . Claimant was represented at the hearing by (. Witnesses for claimant were and The Department of Human Services was represented by Family Independence Manager and Eligibility Specialist

ISSUE

Did the Department of Human Services (the department or DHS) properly determine that claimant had a divestment penalty from August 17-November 5, 2012?

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 August 17, 2012, claimant (client) entered long term care (LTC) as a patient in a nursing home.
2. On August 29, 2012, a DHS 4574 Nursing Home application was received in the Wexford-Missaukee DHS office.
3. On September 10, 2012 a verification checklist was sent to claimant's daughter.
4. On September 17, 2012 a written response and all requested verification information was received by DHS from Attorney

5. On September 19, 2012 the department caseworker completed the calculation of all verifications and determined that claimant divested $[redacted] by taking an available asset (cash in the bank) and converting it into an asset that is no longer available to her in the form of a 2009 Toyota Prius.

6. On November 15, 2012, the department caseworker sent claimant notice that she was eligible for Medical Assistance with a divestment penalty of two months and twenty days (August 17, 2012-November 5, 2012).

7. On November 26, 2012, claimant's representative filed a request for a hearing to contest the divestment period/negative action.

8. On [redacted], Claimant [redacted] died.

9. On April 23, 2013 claimant's daughter, [redacted] [redacted] was granted Letters of Authority of Personal Representative for the deceased claimant by the Wexford County Probate Court.

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); Hinschberger 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 also45 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. Comm'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)*.

Pertinent department policy dictates:

Assets must be considered in determining eligibility or SSI related categories. Assets mean cash, any other personal property and real property. (BEM, Item 400 Page 1). Countable assets cannot exceed the applicable asset limit. Not all assets are counted. Some assets are counted for one program but not for another program. (BEM Item 400, Page 1). The department is to consider both of the following to determine whether and how much of an asset is countable: An asset is countable if it meets the availability test and is not excluded. The department is to consider the assets of each person in the asset group. (BEM, Item 400, Page 1). Asset eligibility exists when the asset groups countable assets are less than or equal to the applicable asset limit at least one day during the month being tested. (BEM, Item 400, Page 4). An application does not authorize MA for future months if the person has excess assets on the processing date. The SSI related MA asset limit for SSI related MA categories that are not medicare savings program or QDWI is $2000.00 for an asset group for one person and $3000.00 for an asset group of 2 people. BEM, Item 400 Page 5. An asset must be available to be counted. Available means that someone in the asset group has the legal right to use or dispose of the asset. BEM, Item 400, Page 6. The department is to assume an asset is available unless the evidence shows that it is not available. Availability might be affected by joint ownerships and efforts to sell or the possibility of domestic violence. BEM, Item 400, Page 6. Jointly owned assets are assets that have more than one owner. An asset is unavailable if an owner cannot sell or spend his share of an asset:

- without another owner's consent,
- the other owner is not in the asset group,
- the other owner refuses to consent.

BEM, Item 400, Page 7.

In joint cash assets the department is to count the entire amount unless the person claims and verifies the different ownership. Then each owner shares the amount he owns. BEM, Item 400, Page 8.

In the instant case, there is no dispute that the $[redacted] in cash was claimant's sole asset before it was taken from her account and paid on the balance of the purchase price of the 2009 Toyota Prius.

BEM, Item 405, states:

Divestment results in a penalty period in MA, **not** ineligibility. 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;
- Is not listed below under TRANSFERS THAT ARE NOT DIVESTMENT

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. BEM, Item 405, page 1

Resource means all the client's and his spouse's assets and income. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. 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:

- The client or spouse.
- 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.
- Any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse. BEM, Item 405, page 2

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.
- 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)

Treat transfers by any of the following as transfers by the client or spouse.

- Parent for minor.
- Legal guardian.
- Conservator.
- Court or administrative body.
- Anyone acting in place of, on behalf of, at the request of or at the direction of the client or the client's spouse. BEM, item 405, page 2

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.

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**. (Emphasis added)

Example: Using $5,000 from savings to buy a used car priced at $5,000 is conversion for equal value.

Example: 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, Item 405, page 8.

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, Item 405, page 12.

The facts of this case are not in dispute. In the instant case, the records indicate that on August 20, 2012, and her husband were purchasing a 2009 Toyota Prius with the as the lien holder. They owed $ on the car. On August 20, 2012, $ was withdrawn from claimant's bank account and a cashier's check was written to On the same day the check was deposited into account and used to pay off the balance owed on the Prius which was titled to and An application was filed for Michigan Vehicle Title for the Prius, adding claimant's name to the title along with and On September 10, 2012, the department caseworker requested an explanation as to why claimant's money was used to pay off the Prius. On September 17, 2012, claimant's representative responded that claimant purchased the Prius for the purpose of providing transportation for herself, but also for the purpose of converting assets to excluded assets. And that and names were added to the title of the 2009 Prius that claimant purchased for the convenience of avoiding probate. (Department Exhibit #7)

The department determined that claimant had divested herself of $ when the monies in claimant's account was removed and were used to pay off the Prius, a vehicle that was titled to and The Department also determined that claimant had divested herself of a 1992 Ford Tempo for $ when the Fair Market Value of the vehicle was $

Claimant's representative conceded on the record that the sale of the 1992 Tempo was divestment, but disputes the department's determination of divestment of the $ Claimant's representative argues that the asset that the claimant converted from one form to another was equal in value and that the transaction would not be considered divestment because and have not refused to sell the vehicle, and therefore, the vehicle is not an "unavailable" jointly held asset. Claimant's representative argues that only a portion of the asset should be considered available to claimant and that the divestment period should be reduced.
In this case, the transfer does qualify as one made by the client as it was made by the claimant's daughter. There was no evidence submitted on the record by either party that claimant authorized the removal of the funds from the claimant's bank account to be used for the purchase of her daughter's vehicle. Secondly, even if the funds were removed with claimant's approval, BEM 405 directs the department to treat transfers made by anyone acting in place of the client (claimant) as transfers made by the client. Further, this transaction was made after claimant's baseline date. Thus, the transfer was properly scrutinized by the department for purposes of divestment purposes. BEM 405 states that converting an asset from one form to another of equal value is not divestment even if the new asset is exempt. The claimant's attorney argues that this transaction was an asset conversion, because claimant's name was placed upon the title of the vehicle. This argument is correct under the circumstances. The transfer of claimant's cash asset to joint ownership of the 2009 Prius is conversion. The claimant's representative further argues that claimant should only be charged a divestment penalty for 1/3 of the Fair Market Value of the Prius because she is the joint owner of the vehicle, along with her daughter and son-in-law. This argument fails.

On August 17, 2012, claimant entered Long Term Care because she could not care for herself and was terminally ill (illustrated by the fact that claimant died on April 17, 2013). There has been no evidence presented to show that claimant needed or used a vehicle for any purpose when it was purchased and paid off on August 20, 2012. If the $[redacted] in cash had remained in claimant's account on the August 29, 2012 Medical Assistance application date, it would have been considered a countable cash asset. Converting said asset into a useless (to claimant) asset prompts this Administrative Law Judge to scrutinize the transaction further.

This Administrative Law Judge must first determine what "fair market value" means. Department policy in the Bridges Program Glossary (BPG) defines fair market value as the amount of money the owner would receive in the local area for his asset (or his interest in an asset) if the asset (or his interest in the asset) was sold on short notice, possibly without the opportunity to realize the full potential of the investment. That is, what the owner would receive, and what a buyer would be willing to pay on the open market and in an arm length transaction. Arm length transaction is defined as a transaction between two parties who are not related and who are presumed to have roughly equal bargaining power. It consists of all the following three elements:

- it is voluntary
- each party is acting in their own self-interest
- it is on an open market.

By definition a transaction between two relatives is not an arm length transaction. BPG Glossary, page 4.

"Fair market value", per the case of *Mackey v Department of Human Services*, 289 Mich App, 688; 2010 WL 3488988 (Mich. App.) is instructive. The court cites the Black's Law Dictionary definition that states fair market value is the "price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." *Mackey, supra* at 5. An "arm's-length transaction" is defined as "relating to dealings between two parties who are not related…and who are presumed to have roughly equal bargaining power; not involving a confidential relationship." *Mackey, supra* at 6.

In *Mackey,* the court observed that while "no Michigan court has attempted to define the parameters of an arm's-length transaction, several courts in our sister states have indicated 'that an arm's-length transaction is characterized by three elements: it is voluntary, i.e. without compulsion or duress; it generally takes place in an open market; and the parties act in their own self interest." *Mackey, supra* at 6.

In light of the department policy and the court's discussion, it becomes clear that this transaction was not for fair market value and was instead a sham transaction intended to shield assets for the claimant's daughter and make the claimant eligible for MA. This transaction is clearly not an "arm's-length" transaction as the parties are related and do not have even bargaining power as the transaction, arguably, only involved the claimant, claimant's daughter and son-in-law. There is no evidence the claimant even

had knowledge of the transaction. Preservation of an estate for putative heirs or to avoid probate court is **not** acceptable as another purpose to make assets unavailable. This situation is analogous to the claimant simply gifting her daughter and son-in-law with $ in cash. In such a case, divestment would certainly have occurred.

Secondly, when divestment or conversion has occurred, the department must invoke a penalty period. The transferred amount is used to calculate the divestment penalty. The Department may only recalculate the divestment period under certain circumstances. Pertinent policy dictates:

The first step in determining the period of time that transfers can be looked at for divestment is determining the baseline date. Once the baseline date is established, 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. BEM, Item 405, page 2-4.

The department is allowed to 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

The department's position is that the divestment penalty may only be cancelled if "all the transferred resources are returned and retained by the individual" or "fair market value" is paid for the resources. The penalty period may only be recalculated if "all of the transferred resources are returned", or "full compensation is paid for the resource." PEM, Item 405, page 12. Claimant's representative has not established that all of the transferred resources were returned. Claimant's representative has not established that fair market value was paid for the resources. Claimant's representative has not established that full compensation was paid (to claimant/or for claimants benefit) for the resources transferred from claimant's bank account.

This Administrative Law Judge finds that the department policy is explicit. It states that all the transferred resources must be returned, or fair market value must be paid for the resources, or full compensation paid for the resources, before the necessity for either cancellation or recalculation of the divestment period can be triggered. In the instant case, by claimant's representative's own admission, $ in cash of the total converted asset amount was not returned to claimant. Thus, all transferred resources

were not returned. There was no evidence on the record that fair market value was paid for the resources. In the alternative, claimant's representative failed to establish by any evidence on the record that claimant was paid full compensation for the $ in cash. The $ in cash assets remains converted. Thus, the penalty period originally established cannot be recalculated. The entire divestment amount must be counted in the amount of $ The department's determination that claimant's divestment period must remain at two months twenty days is correct under the circumstances. The department has established by the necessary competent, substantial and material evidence on the record that it was acting accordance with department policy when it calculated and instituted the divestment penalty under the circumstances.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the Department of Human Services has established by a preponderance of evidence that there has been asset conversion, and properly determined that a divestment penalty period should be instituted for two months twenty days 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: April 26, 2013

Date Mailed: April 30, 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 90 days of the filing of the original request.

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.

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
Recons ideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-07322

LYL/las

cc: