

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

**IN THE MATTER OF:**

[REDACTED]

Reg. No.: 201368261  
Issue No.: 2010  
Case No.: [REDACTED]  
Hearing Date: November 19, 2013  
County: Presque Isle

**ADMINISTRATIVE LAW JUDGE:** Darryl T. Johnson

**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 November 19, 2013 from Lansing, Michigan. Participants on behalf of Claimant included [REDACTED] (Claimant's spouse), [REDACTED] (Claimant's son), [REDACTED], (Financial Advisor from [REDACTED]), and [REDACTED] (attorney). Participants on behalf of the Department of Human Services (Department) included [REDACTED] (Eligibility Specialist).

**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 applied for Medical Assistance (MA) or "Medicaid" on April 30, 2013.
2. An Initial Asset Assessment was completed on July 30, 2013 and Medicaid was approved on August 14, 2013.
3. On August 14, 2013, the Department mailed Claimant a Notice of Case Action (DHS-1605) informing her that Medicaid would not pay for long-term care and home and community based waiver services from April 1, 2013 through March 15, 2014 because of a divestment of assets.

4. On September 9, 2013, Claimant's attorney requested a hearing.

### **CONCLUSIONS OF LAW**

Department policies are contained in the Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM), and the Reference Tables Manual (RFT).

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.

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."<sup>1</sup> 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 (or MA) 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

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<sup>1</sup> See BEM 169.

Medicaid Trust that are not to, or for the benefit of, the person or his spouse; see BEM 401 (divestment); (5) putting assets or income in a trust<sup>2</sup>; (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.

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 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.

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<sup>2</sup> See BEM 401.

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.

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.

It is not divestment to transfer a homestead to the client's: (1) spouse; (2) blind or disabled child; (3) child under age 21; (4) child age 21 or over who lived in the homestead for at least 2 (two) years immediately before the client's admission to LTC or BEM 106 waiver approval, and provided care that would otherwise have required LTC or BEM 106 waiver services, as documented by a physician's (M.D. or D.O.) statement; (5) brother or sister who is part owner of the homestead, and lived in the homestead for at least one year immediately before the client's admission to LTC or BEM 106 waiver approval. 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: Mr. Smith, age 40, was in good health when he gave his vacation cottage to his nephew. The next day Mr. Smith was in an automobile accident. His injuries require long-term care. The transfer was not divestment because Mr. Smith 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 is 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.

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.

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. 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 case at hand, Claimant's spouse had an Individual Retirement Account (IRA) with [REDACTED], with a value in excess of [REDACTED], purchased on September 25, 2007. Withdrawals from that IRA were limited to 10% of the account value for each of the first seven years. Excess withdrawals were subject to a surrender charge. In December 2011, Claimant's spouse purchased a car and wanted to use funds from his IRA to make the monthly payments. Through consultation with his Financial Advisor at [REDACTED], Claimant's spouse had the account converted to an annuity which provided monthly payments to him of approximately [REDACTED].

Claimant had a stroke in [REDACTED] and has been in a nursing home since [REDACTED]. In the August 14, 2013 Notice of Case Action (DHS 1605) the Department indicated that the annuity purchased by Claimant's spouse was "considered a divestment per our legal department in Lansing because it is not irrevocable and is not actuarially sound because it will not return the principal and interest within [Claimant's spouse's] lifetime and the annuity does not name the State of Michigan as the remainder beneficiary." It established Claimant's Medicaid Extended Care patient pay amount at [REDACTED] effective April 1, 2013 through ongoing. The DHS-1605 indicated that the baseline date was "04/01/2013" along with the following: "Medicaid will not pay for your long-term care and home and community-based waiver services from 04/01/2013 through 03/15/2014 because you or your spouse transferred assets or

income for less than their fair market value. Notify your specialist if you are denied emergency care because of this penalty.” (Notice of Case Action, Exhibit 1 pp. 31-33.)

In a memo to the Department from the Office of Legal Services/Trust and Annuities Unit, (pages 26-27 of Exhibit 1) it is stated, “the purchase of the annuity was considered a transfer for less than fair market value because:

1. The annuity is not irrevocable;
2. The annuity is not actuarially sound because it will not return the principal and interest within [Claimant’s spouse’s] life expectancy of 7.41 years;
3. The State of Michigan is not named as the remainder beneficiary for an amount at least equal to the amount of Medicaid benefits provided.”

According to the Department, the transfer was a divestment which triggered the divestment penalty beginning on June 1, 2013 and for 14 months thereafter until August 5, 2014. Claimant’s attorney, on the other hand, challenges the Department’s conclusion that the transfer was a divestment. Claimant’s attorney contends that Claimant’s spouse purchased the IRA originally on September 27, 2007, that the baseline date for determining Medicaid eligibility was December 29, 2012, and that the conversion of the IRA to an annuity was not a transfer for less than fair market value.

Testimony from [REDACTED], Claimant’s spouse’s financial advisor, established that the annuity has a commuted (cash) value of [REDACTED] as of the hearing date. When Claimant’s spouse purchased the annuity, he signed a disclosure (page 48 of Exhibit 1) acknowledging that he “was not purchasing a new product” and that “a settlement option **does not** contain a ‘free look’ provision. Once I have elected this payment option, the transaction **cannot** be reversed.”

Testimony and other evidence must be weighed and considered according to its reasonableness. *Gardiner v Courtright*, 165 Mich 54, 62; 130 NW 322 (1911); *Dep’t of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). The weight and credibility of this evidence is generally for the fact-finder to determine. *Dep’t of Community Health*, 274 Mich App at 372; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, it is for the fact-finder to gauge the demeanor and veracity of the witnesses who appear before him, as best he is able. See, e.g., *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. In the instant matter, the evidence shows that the Claimant’s spouse originally purchased the investment on September 25, 2007. When that account was converted into an annuity in December 2012, he did not purchase a new account. Claimant’s baseline date was in January 2013. The 60-month look-back period goes back to January 2008. Because the investment was originally purchased before the look-back period, there was no divestment. Because there was no

divestment, it is not necessary that the annuity be irrevocable, that it be actuarially sound, or that it name the State of Michigan as the remainder beneficiary

Based on the competent, material, and substantial evidence presented during the hearing, this Administrative Law Judge finds that the Department improperly imposed the divestment penalty on the Claimant and her spouse.

**DECISION AND ORDER**

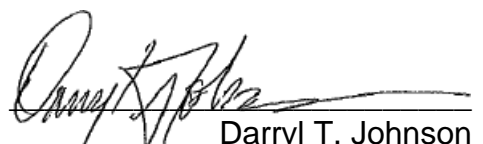
The Administrative Law Judge, based upon the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, finds that the Department did not act properly when it determined that Claimant's spouse had divested himself of assets and imposed a penalty period.

Accordingly, the Department's determination is **REVERSED**.

THE DEPARTMENT IS ORDERED TO INITIATE THE FOLLOWING, IN ACCORDANCE WITH DEPARTMENT POLICY AND CONSISTENT WITH THIS HEARING DECISION, WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

1. Redetermine Claimant's eligibility for Medicaid (MA) benefits in accordance with Department policy, without the imposition of a divestment penalty.
2. Provide the Claimant with a Notice of Case Action (DHS-1605) describing the Department's revised eligibility determination.
3. Issue Claimant any retroactive benefits she may be eligible to receive.

IT IS SO ORDERED.

  
Darryl T. Johnson  
Administrative Law Judge  
for Maura Corrigan, Director  
Department of Human Services

Date Signed: November 26, 2013

Date Mailed: November 26, 2013

**NOTICE OF APPEAL:** 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 or Reconsideration was made, within 30 days of the receipt date of the Decision and Order of Reconsideration or Rehearing Decision.

A Request for Rehearing or Reconsideration may be granted when one of the following exists:

- Newly discovered evidence that existed at the time of the original hearing that could affect the outcome of the original hearing decision;
- Misapplication of manual policy or law in the hearing decision which led to a wrong conclusion;
- Typographical, mathematical or other obvious error in the hearing decision that affects the rights of the client;
- Failure of the ALJ to address in the hearing decision relevant issues raised in the hearing request.

The Department, AHR or the claimant must specify all reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration. A request must be *received* in MAHS within 30 days of the date the hearing decision is mailed.

The written request must be faxed to (517) 335-6088 and be labeled as follows:

Attention: MAHS Rehearing/Reconsideration Request

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings  
Reconsideration/Rehearing Request  
P.O. Box 30639  
Lansing, Michigan 48909-07322

cc:

