

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

IN THE MATTER OF:

[REDACTED]

Reg. No.: 2013-67693
Issue No.: 2010
Case No.: [REDACTED]
Hearing Date: May 20, 2014
County: Livingston

ADMINISTRATIVE LAW JUDGE: Landis Y. Lain

HEARING DECISION

Following Claimant's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 45 CFR 99.1 to 99.33; and 45 CFR 205.10. After due notice, an in-person hearing was held on May 20, 2014. Claimant is in Long Term Care (LTC) and did not appear at the hearing. Claimant was represented at the hearing by Authorized Hearings Representative [REDACTED] and Claimant's [REDACTED]. The Department of Human Services was represented by [REDACTED], Eligibility Specialist, and [REDACTED], General Services Program Manager.

ISSUE

Did the Department of Human Services (the Department or DHS) properly determine that Claimant had a divestment penalty?

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 March 20, 2013, the Department received and application for Claimant for long-term care Medical Assistance.
2. On June 4, 2013 the Department caseworker approved Claimant for Medical Assistance benefit eligibility and determined that Claimant had a divestment penalty for the months of December 1, 2012 to January 31, 2013, was ineligible for Medical Assistance based upon excess assets for February 2013 and then a divestment penalty resumed for March 1, 2013 through April 8, 2013.

3. On April 23, 2013 the Department caseworker questioned Claimant's [REDACTED] regarding checks but that were written to the [REDACTED] and other family members totaling \$ [REDACTED]
4. Claimant's [REDACTED] indicated that the amounts were gifts to [REDACTED].
5. On June 4, 2013, the Department caseworker sent Claimant notice that Claimant was approved for medical assistance with the divestment penalty. From December 1, 2012 through January 31, 2013, in eligible for medical assistance for February 2013 for access assets and then eligible again for medical assistance with the development penalty resuming from March 1, 2013 to April 8, 2013.
6. On August 29, 2013, Claimant's representative filed a request for hearing to contest the Department's negative action/divestment for both applications.

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). Claimants 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 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).

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 \$ [REDACTED] for an asset group for one person and \$ [REDACTED] 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.

Claimant's representative argues that the Department's determination that Claimant divested \$ [REDACTED] in assets is incorrect. Claimant's representative indicates that Claimant's [REDACTED] was given to her grandson and that the value of the car was \$ [REDACTED]. Three gifts in the amount of \$ [REDACTED] respectively given to various family members were

also gifts for a total of \$ [REDACTED] in gifts which would equal divestment. Claimant's representative indicates that the remaining monies were monies which Claimant paid for household expenses at her [REDACTED] [REDACTED]. Claimant's representative argued that Claimant was supposed to pay [REDACTED] per month and reimbursement of expenses. Claimant's [REDACTED] stated that Claimant told her that she would pay her when she could and that Claimant owes approximately \$ [REDACTED] in caretaking expenses which she could not pay. Claimant's [REDACTED] did admit on the record that she told the Department caseworker that the amounts paid to her were gifts from her [REDACTED]

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 Claimant 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 Claimant's cost for:

- LTC services.
- Home and community-based services.
- Home Help.
- Home Health. BEM, Item 405, page 1

Resource means all the Claimant'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 Claimant or spouse.
- A person (including a court or administrative body) with legal authority to act in place of or on behalf of the Claimant or the Claimant's spouse.
- Any person (including a court or administrative body) acting at the direction or upon the request of the Claimant 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)BEM, item 405, page 2

Department policy dictates that a home caretaker or personal care contract is 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 Claimant made during the look back period as divestment. The preceding is 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 Claimant 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 Claimant 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 Claimant 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 Claimant's physician as necessary to prevent the transfer of the Claimant 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 Claimant and the provider which must show the type, frequency and duration of such services being provided to the Claimant 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 Claimant 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 Claimant 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.

Policy also states that 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.

When divestment occurs the Department must invoke a penalty period. The transferred amount is used to calculate the penalty period. The Department may only recalculate the penalty period under certain circumstances. Pertinent policy dictates that 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, the caseworker 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 Claimant 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.

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. There has been divestment in this case.

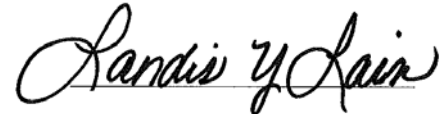
This Administrative Law Judge finds that the Department's determination that Claimant or Claimant's representative has divested \$ [REDACTED] by giving the assets away is correct under the circumstances. Claimant's [REDACTED] was always at liberty to pay the specific household expenses directly, rather than making the checks out to herself, which would not have resulted in divestment. The Claimant's [REDACTED] chose to use the assets for other purposes, which were not exempted under policy. There was no caretaker contract between Claimant and her [REDACTED]. The presumption that Claimant's [REDACTED] was caring for her out of love and affection has not been sufficiently rebutted in this case. In the instant case, the monies were paid directly to Claimant's [REDACTED] with checks signed by Claimant's [REDACTED]. These checks or payments were not arm's length transactions; they were not made to specific household living expenses; nor were they payments made under a specific contractual agreement.

Claimants' representative's testimony on the record is not sufficient to rebut that Department's determination that divestment occurred. The Department's determination that Claimant's penalty period must remain as calculated by the Department. 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 divestment, and properly determined that a divestment penalty period should be instituted under the circumstances.

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



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

Date Signed: 6/11/14

Date Mailed: 6/13/14

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

2013-67693/LYL

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

LYL/tb

cc:

