

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

**IN THE MATTER OF:**



Reg. No.: 14-003903-RECON  
Issue No.: 2008  
Case No.: [REDACTED]  
Hearing Date: August 13, 2014  
County: MARQUETTE

**ADMINISTRATIVE LAW JUDGE:** Vicki Armstrong

**DECISION AND ORDER OF RECONSIDERATION**

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to the Claimant's Authorized Hearing Representative's (AHR) timely Request for Rehearing/Reconsideration of the Hearing Decision generated by the assigned Administrative Law Judge (ALJ) at the conclusion of the hearing conducted on August 13, 2014, and mailed on August 28, 2014, in the above-captioned matter.

The Rehearing and Reconsideration process is governed by the Michigan Administrative Code, Rule 400.919, *et seq.*, and applicable policy provisions articulated in the Bridges Administrative Manual (BAM), specifically BAM 600, which provide that a rehearing or reconsideration must be filed in a timely manner consistent with the statutory requirements of the particular program or programs that is the basis for the claimant's benefits application, and **may** be granted so long as the reasons for which the request is made comply with the policy and statutory requirements.

This matter having been reviewed, an Order Granting Reconsideration was mailed on December 5, 2014.

**ISSUE**

Whether the Department properly determined that Claimant had divested herself of assets and imposed a penalty period?

**FINDINGS OF FACT**

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

1. Findings of Fact No. 1 through 9 under Registration Number 14-003903 are incorporated by reference.
2. On August 13, 2014, a hearing was held resulting in a Hearing Decision mailed on August 28, 2014, which found the disputed amount of \$6,986.67, was not subject to divestment.

3. On September 25, 2014, the Department's authorized representative requested reconsideration/rehearing.
4. The Request for Rehearing/Reconsideration was GRANTED.

### **CONCLUSIONS OF LAW**

In the instant case, the Department requested rehearing/reconsideration asserting misapplication of policy that would impact the outcome of the original hearing decision.

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 Bridges Reference Manual (RFT).

Department policy states, "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. BEM 405, p 1 (7/1/14).

### **RESOURCE DEFINED**

**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.

## **TRANSFER OF A RESOURCE**

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

- 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)

Also see Joint Owners and Transfers for examples. BEM 405, p 2 (7/1/14).

## **Transfers by Representatives**

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 405, p 3 (7/1/14).

## LOOK-BACK PERIOD

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 in this item. 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.

### 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. BEM 405, p 5 (7/1/14).

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.
- Eligible for Home Health.

### Baseline Date

A person's baseline date is the **first** date that the client was eligible for Medicaid and one of the following:

- In LTC.
- APPROVED FOR THE WAIVER; see BEM 106. BEM 405, p 6 (7/1/14).
- Eligible for Home Health services.
- Eligible for Home Help services. BEM 405, p 6 (7/1/14).

A client's baseline date does **not** change even if one of the following happens:

- The client leaves LTC.
- The client is no longer APPROVED FOR THE WAIVER; see BEM 106.
- The client no longer needs Home Help.
- The client no longer needs Home Health.

## 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, p 6 (7/1/14).

### Home Caretaker & Personal Care Contracts

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. BEM 405, p 7 (7/1/14).

**Note:** 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 405, p 8 (7/1/14).

### **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. BEM 405, p 12 (7/1/14).

In this case, the only amounts in dispute are \$ [REDACTED] for home maintenance and care, \$ [REDACTED] in attorney fees for Medicaid Planning, and \$ [REDACTED] as repayment to Claimant's son, the Durable Power of Attorney (DPOA), for travel and expenses to assist with Claimant's Medicaid application.

As indicated, 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 divestment.

There was and is no written agreement/contract between [REDACTED] and [REDACTED] [REDACTED] to provide any compensation or equivalent for providing expenses or paying bills. Furthermore, expenses such as repairs, maintenance and home owner's

insurance are defined as divestment even with a contract/agreement, therefore, they are also divestment without a contract/agreement. The same can be said for securing hospitalization and medical treatment, as well as visitation, entertainment, travel and/or transportation.

While relatives can be paid for providing services, the policy is to assume services were provided for free when no payment was made at the time services were provided. Claimant was allowed to 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), during the hearing, but Claimant failed to do so.

Therefore, the presumption is that Claimant's son provided this assistance for love and affection. Claimant has presented no evidence to rebut this presumption. For that reason, it is found the Department properly determined Claimant had divested herself of assets and imposed a penalty period.

As a result, the ALJ's determination which found Claimant was not subject to a divestment penalty on the disputed amount of \$[REDACTED] is VACATED and the Department's determination which found Claimant is subject to a divestment penalty is UPHELD.

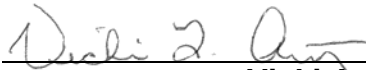
### **DECISION AND ORDER**

Based on the above findings of fact and conclusions of law, it is determined that the Administrative Law Judge erred in reversing the Department's determination which found Claimant had a divestment penalty.

Accordingly, it is ORDERED:

1. The ALJ's Hearing Decision mailed on August 28, 2014, under registration Number 14-003903 which found Claimant did not have a divestment penalty is **VACATED**.
2. The Department's determination which found Claimant had a divestment penalty is **UPHELD**.
3. The Department shall initiate processing of the divestment penalty period in accordance with Department policy.

IT IS SO ORDERED.

  
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**Vicki Armstrong**  
Administrative Law Judge  
for Maura Corrigan, Director  
Department of Human Services

Date Signed: **1/6/2015**

Date Mailed: **1/6/2015**

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**NOTICE OF APPEAL:** A party may appeal this Hearing Decision in the circuit court in the county in which he/she resides, or the circuit court in Ingham County, within 30 days of the receipt date.

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