

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

IN THE MATTER OF:

[REDACTED]

Reg. No.: 14-012547
Issue No.: 2010
Case No.: [REDACTED]
Hearing Date: January 22, 2015
County: Oakland (03)

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, a telephone hearing was held on January 22, 2015. Claimant is deceased as of December 14, 2014 and did not appear at the hearing. Claimant was represented at the hearing by her daughter, [REDACTED] and her two sons [REDACTED] and [REDACTED]. The Department of Human Services was represented by [REDACTED], Eligibility Specialist, acting as Hearings Facilitator.

ISSUE

- I. Whether Claimant's Daughter is an Authorized Hearings Representative who is entitled to represent claimant at this hearing?
- II. 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. Claimant was in Long Term Care with a baseline date of April 17, 2008.
2. On August 1, 2004, claimant created and duly executed a [REDACTED] [REDACTED] Revocable Living Trust' which indicated that the trust assets shall be distributed in equal shares to her children after her death.

3. On May 13, 2014, claimant filed an application for Medical Assistance and retroactive Medical Assistance.
4. On July 23, 2014, the department sent claimant notice that her application for Medical Assistance was approved with a divestment penalty starting April 1, 2014 through August 6, 2015.
8. The divestment penalty was imposed because claimant gave monies to [REDACTED] ([REDACTED], [REDACTED], [REDACTED], [REDACTED]) and [REDACTED] ([REDACTED]) from the proceeds of the sale of claimant's home, prior to claimant's death.
9. On September 15, 2014, claimant's representative filed a request for hearing to contest the Department's negative action/imposition of a divestment penalty.
10. On December 14, 2014, claimant died.
11. On January 22, 2015, the hearing was held.
12. At the hearing, claimant's representative waived the time periods and requested to submit additional information.
13. On February 3, 2015, additional evidence was received and considered in making this determination.

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 first issue that must be addressed in this hearing is whether or not claimant is an Authorized Hearings Representative for claimant. Claimant is deceased. She passed away December 14, 2014.

Claimant's request for a hearing is hereby DISMISSED because claimant's daughter does not have authorization to act on behalf of the deceased. An authorization to represent a person may be revoked at any time by the person who gave the

authorization. When the person who gave the authorization dies, the authorization ends at the time of the death. A dead person can neither give nor revoke, nor affirm authorization. There is no such thing as authorization to act for a dead person. After death, the person does not exist as a legal entity so no one can represent the person. This is Michigan law, MCL 700.497 and MCL 700.5504.

An estate of a dead person may be created to handle the remaining business or financial concerns that were outstanding at the time of the person's death. Only a probate court can create a decedent's estate. The court will also appoint someone to act as a personal representative of the estate. For the Medicaid program only, a widow or widower may act as a representative on the Medicaid plan without probate court authorization. Claimant's daughter did not provide a probate court order or court-issued letter of authority naming her or another person as a personal representative of the estate. Therefore, a request for an administrative hearing must be **DISMISSED**.

An authorized hearings representative is the person who stands in for or represents the client in the hearings process and has the legal right to do so. This right comes from one of the following sources:

- . written authorization, signed by the client, giving the person authority to act for the client in the hearings process.
- . court appointment as a guardian or conservator
- . the representative status as a legal parent of a minor child
- . the representative status of an attorney at law for the client, and

For MA only:

- . the representative status as the client's spouse or the deceased client's widow or widower, only when no one else has authority to represent the client's interests in the hearings process. An authorized hearing representative has no right to a hearing, but rather exercises the client's right. Someone who assists, but does not stand in for or represent the client in the hearings process need not be an authorized hearing representative. Stands in for means the authorized hearing representative does whatever the client could

do if the client were not represented. (BPG Glossary, p. 4)

In the instant case, claimant's daughter is not an authorized hearing representative of claimant. Therefore, based upon the fact that the claimant is deceased and was deceased as of December 14, 2014, the hearing request must be dismissed.

Claimant's daughter argues that had the hearing been held in a timely manner then her mother would have still been alive and would have been able to represent herself. This Administrative Law Judge concedes that that may have been true. However, an authorization to represent is a form of a Power of Attorney. When a person who gave the authorization dies, the Power of Attorney ends. After death, the person does not exist as a legal entity so no one can represent the person. However, if a person dies while the application is pending, the application should be processed. An estate may be created to handle the remaining business and financial issues that were outstanding at the time of death. Only a probate court can create a decedent's estate. The court must appoint someone to act as a representative of the estate. A court, agency or guardian legally responsible for a client must be identified as an authorized representative. BAM, Item 110, pp. 9-10.

In the alternative, even if claimant's daughter was considered an Authorized Hearings Representative (which she is not), this Administrative Law Judge will address the substantive issue brought before MAHS for the sake of a complete record.

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 \$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.

A Home Caretaker and Personal Care Contract is defined in BEM 400, page 28, as a contract that prospectively pays for expenses such as repairs, maintenance, property taxes, homeowner’s insurance, heat and utilities for real property/homestead, or that

provide 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; refer to BEM 405, MA DIVESTMENT. Assets transferred in exchange for a contract/agreement for a personal services/assistance or expenses of real property/homestead provided by another person **after** the date of application are considered an available and countable asset even if the contract is irrevocable.

In the instant case, claimant was in a Medicaid long-term nursing facility since 2007. Per her children's testimony, the home was her only asset. The Department determined that claimant's home was subject to the Homestead exemption.

Claimant's home was sold for [REDACTED]. Claimant distributed a total of [REDACTED] to her four children before her death. [REDACTED] was used to purchase a pre-paid funeral services, headstone, casket, and burial plot. [REDACTED] was paid to Westlake Nursing Home for services received from September 2013 through May 2014.

[REDACTED] argues that in 2004 at the age of 86, claimant told her children that she had depleted her savings but wanted to remain in her home. She placed her home in a living trust with her children as beneficiaries so that they could be reimbursed for their support issues. Claimant's son [REDACTED] paid for an assisted living aide to help claimant five days per week and her children took care of her on the weekends. In 2008, claimant was moved to an assisted living facility. Claimant's home remained vacant for six years but [REDACTED] continued to pay property taxes and maintenance repairs. The home was sold in September 2013. [REDACTED] submitted 130 pages of admitted exhibits which included receipts for claimant's property taxes, utilities, insurance and living expenses.

The Department representative argues that there is no mechanism in Medical Assistance policy which allows adult children to recover expenses paid for home care and maintenance costs to the parents' home. On the date of sale of the home, claimant retained [REDACTED] in countable, available assets, which is in excess of the \$2,000 allowed by Medicaid.

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)BEM, item 405, page 2

Department policy states that it is **not** divestment to transfer a homestead to the client's:

- Spouse; see Transfers Involving Spouse above.
- Blind or disabled child; see Transfers Involving Child above.
- Child under age 21.
- Child age 21 or over who:
 - Lived in the homestead for at least 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. BEM Item 405, page 8.

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 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.

Medicaid is the joint state/federal program that provides payment for covered health care services for eligible **indigent** individuals. MCL 400.105, *et seq*; 42 USC 1396a, *et seq*. Medicaid is a means tested program. If Medicaid applicants have sufficient assets, income or insurance to pay for health care they do not qualify for the Medical Assistance program.

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.

In this case, claimant's trust was revocable, which means that at all times relevant to this application, the proceeds and property of the trust were countable, available assets to claimant, no matter what form the assets were in. In addition, even if claimant's home was considered exempt under the Homestead exemption, once she sold the property, the proceeds became countable, available assets.

This Administrative Law Judge finds that claimant/claimant's children have divested \$100,447.85 of claimant's assets. The penalty period is correct based upon the evidence which shows that claimant distributed the countable, available assets to her children. Giving the assets away is divestment. Claimant's children were always at liberty to pay the nursing home the assets, which would not have resulted in divestment. The claimant's children chose to use the assets for other purposes, which were not exempted under policy.

Claimants' representative's testimony on the record is not sufficient to rebut the department's determination that divestment occurred. Evidence on the record establishes that the department's determination that claimant's penalty period must remain from April 1, 2014 through August 6, 2015 and is correct. 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.

Even if Claimant's daughter would be considered an Authorized Hearings Representative, the Department's determination that assets were divested and a divestment penalty imposed, is correct. Under the circumstances, the claimant's request for hearing must be dismissed and the Department's actions must be upheld.

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 for 18 months and one day under the circumstances.

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



Landis Y. Lain
Administrative Law Judge
for Nick Lyon, Interim Director
Department of Human Services

Date Signed: 02/17/2015

Date Mailed: 02/18/2015

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
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

LYL/sw

cc:

