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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: February 27, 2017
MAHS Docket No.: 16-018831
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

HEARING DECISION

Following Petitioner'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; and Mich Admin Code, R 792.11002. After due notice, a three-way telephone conference hearing was held on January 31, 2017, from Lansing, Michigan. Attorney, [REDACTED] ([REDACTED]) represented Petitioner as her Authorized Hearing Representative (AHR). The following individuals testified as witness for Petitioner: [REDACTED] and [REDACTED] Assistant Attorney General (AAG) [REDACTED] ([REDACTED]) represented the Department of Health and Human Services (Department). The following individuals testified as witnesses for the Department: [REDACTED] [REDACTED] Long Term Care Specialist, and [REDACTED] [REDACTED] Hearing Facilitator.

The Department offered the following exhibits which were marked and admitted into evidence: **Department's Exhibit 1:** Request for Hearing (pages 1-2), Health Care Coverage Determination Notice dated October 6, 2016 (pages 3-5), Correspondence from Petitioner's attorney requesting a hearing dated December 14, 2016 (pages 6-9), **Department's Exhibit 2:** General Durable Power of Attorney (pages 10-17), **Department's Exhibit 3:** Authorization to Release Information (page 18), **Department's Exhibit 4:** Application form (DHS-4574) received on August 2, 2016 (pages 19-23), **Department's Exhibit 5:** Retroactive Medicaid Application (DHS-3243) received on August 25, 2016 (pages 24-26), **Department's Exhibit 6:** Verification Checklist dated August 17, 2016 (pages 27-28), **Department's Exhibit 7:** Correspondence from Petitioner's attorney dated March 24, 2016 (pages 29-30), **Department's Exhibit 8:** Promissory Note dated April 30, 2015 (pages 31-34), **Department's Exhibit 9:** Petitioner's Property State Equalized Value Assessment Tax Year 2014 (pages 35-36), **Department's Exhibit 10:** Verification Checklist dated September 19, 2016 (pages 37-38), **Department's Exhibit 11:** Correspondence from Petitioner's Attorney dated September 23, 2016 (page 39), **Department's Exhibit 12:** [REDACTED] received September 26, 2016 (pages 40-52),

Department's Exhibit 13: Trust/Annuity Evaluation dated October 12, 2016 (pages 53-54), **Department's Exhibit 14:** Operating Agreement of [REDACTED], received September 26, 2016 (pages 55-69), **Department's Exhibit 15:** Health Care Coverage Determination Notice dated October 6, 2016 (pages 70-72), **Department's Exhibit 16:** Calculating the Divestment Penalty Period (page 73), **Department's Exhibit 17:** Bridges Eligibility Manual (BEM) 405 dated January 1, 2017 (pages 74-79)].

Petitioner offered the following exhibits which were admitted into evidence: [**Petitioner's Exhibit A:** Minutes from [REDACTED] (pages 1-3), **Petitioner's Exhibit B:** Lease (pages 4-6), **Petitioner's Exhibit C:** Warranty Deed (page 7), **Petitioner's Exhibit D:** Email from Petitioner's Attorney to [REDACTED] [REDACTED] dated December 2, 2016 (page 8), **Petitioner's Exhibit E:** Emails between [REDACTED] and Petitioner's Attorney dated December 2-5, 2016 (pages 9-11), **Petitioner's Exhibit F:** [REDACTED] Property Appraisal dated October 26, 2015 (pages 12-31) and **Petitioner's Exhibit G:** Land Contract (pages 32-37)].

The record closed at the conclusion of the hearing.

ISSUES

- I. Did the Department properly determine that Petitioner had divested herself of assets to warrant the imposition of a penalty for purposes of Long-Term Care (LTC) Medical Assistance (MA) or Medicaid?
- II. Did the Department properly determine Petitioner's divestment penalty amount?

FINDINGS OF FACT

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

1. Petitioner, at the relevant time, was a 91 year-old woman who lived alone in her home at [REDACTED].¹ [Department's Exhibit 4, p. 19].
2. Petitioner's mental condition was gradually deteriorating and she eventually required in-home care.² [Hrg. Test.].
3. In January or February 2016, Petitioner fell and fractured her hip. [Hrg. Test.].

¹ Petitioner's husband ([REDACTED]) deceased in or around January 2009. [Hearing Testimony].

² On March 4, 2005, Petitioner executed a General Durable Power of Attorney ("Power of Attorney") and the [REDACTED] ("[REDACTED]"). The Power of Attorney appointed Petitioner's children, [REDACTED] and [REDACTED], as successor attorneys-in-fact or agents. The language of the Power of Attorney included the power to take actions necessary for Medicaid qualification purposes. According to the [REDACTED], [REDACTED] and [REDACTED] were designated as successor trustees. [Dept. Exh. 2, pp. 14-15].

4. On February 24, 2016, Petitioner became a resident of [REDACTED] which is a long-term care (LTC) facility. [Dept. Exh. 4, p. 19].
5. On March 24, 2016, Attorney [REDACTED] mailed a letter to the Department's [REDACTED] County local office regarding Petitioner, which indicated the following:
 - a. The [REDACTED] owned real property located at [REDACTED] ("The Property"), which was occupied by [REDACTED] (" [REDACTED] ") for more than three decades. [REDACTED] was formerly owned by Petitioner and her now deceased husband. [Dept. Exh. 7, p. 29].
 - b. On or about November 1, 2008, the [REDACTED] was formed. Petitioner was not included as a member of the LLC. [Dept. Exh. 14, pp. 55-69].
 - c. On April 30, 2015, the Property was transferred from the [REDACTED] to the LLC via a Warranty Deed. This was recorded on May 4, 2015. [See Dept. Exh. 7, p. 29 and Petitioner's Exhibit C, p. 7].
 - d. [REDACTED] initially leased the property from a partnership owned by the trust, which required [REDACTED] pay \$ [REDACTED] per month for rent, make repairs on the property less than \$ [REDACTED] and pay all property taxes and special assessments. [Dept. Exh. 7, p. 29].
 - e. The parties extended the lease by verbal agreement. [Dept. Exh. 7, p. 29].
 - f. From December 1, 1984, through April 1, 2015, [REDACTED] paid \$ [REDACTED] for rent and [REDACTED] fully complied with the obligation under the lease. [Dept. Exh. 7, p. 29].
 - g. Before the April 30, 2015, transfer of the Property from the Trust to the LLC, each of the beneficiaries consented to the transaction. The 2014 State Equalized Value (SEV) for the Property was \$ [REDACTED] (fair market value (FMV) of property was \$ [REDACTED] and the amount of property taxes assessed and paid by [REDACTED] plus the costs of all additions, improvements, and repairs to the property greatly exceeded the property FMV. [Dept. Exh. 7, p. 30 & Dept. Exh. 9, pp. 35-36].
 - h. A promissory note was executed in the amount of \$ [REDACTED] in order to recover amounts paid by [REDACTED], which were over and above [REDACTED]'s obligation under the lease and assign the note to the LLC. The promissory note was attached to the letter. [Dept. Exh. 7, p. 30].
 - i. The transfer of The Property from the [REDACTED] to the LLC was a transfer for fair market value in satisfaction of a debt which would have exceeded the fair market value of The Property had [REDACTED] sought to recover all of the money it was owed. The transfer of The Property from the [REDACTED] to the LLC was a transfer exclusively for a purpose other than attaining Medicaid eligibility. [Dept. Exh. 7, p. 30].
 - j. The transfer of The Property should not be considered a divestment. [Dept. Exh. 7, p. 30].

6. On August 2, 2016, [REDACTED] sent the Department an application for LTC-MA benefits on behalf of Petitioner. The application indicated that Petitioner was the owner of a “home, life estate or life lease” in the amount of \$ [REDACTED]. The application also indicated that Petitioner had sold, given away, or transferred property within the last 5 years. [Dept. Exh. 4, pp. 19-23].
7. On August 17, 2016, the Department mailed [REDACTED] a Verification Checklist (DHS-3503), which requested the following verifications from Petitioner: (1) home/building (mortgage or deed, current property tax records, bank/financial institution, county records, court records or legal documents, or attorney/legal representative); (2) pre-need/pre-burial fund contract; and (3) checking account. The proofs were due by August 29, 2016. [Dept. Exh. 6, pp. 27-28].
8. On August 25, 2016, the Department received Petitioner’s application for retroactive MA requesting coverage for the months of May, June, and July 2016. [Dept. Exh. 5, pp. 24-26].
9. On September 19, 2016, the Department mailed [REDACTED] a Verification Checklist (DHS-3503), which requested: (1) complete bank statements; (2) a “copy of original trust papers and any changes made;” (3) a “copy of the [REDACTED] operating agreement;” (4) the following verifications from [REDACTED] including verification when the change of ownership occurred, the sale price of the business when it was sold, complete copies of tax returns (including all schedules) for 2 years immediately prior to the time it was sold or the ownership was transferred;” and (5) a complete copy of the [REDACTED]. [Dept. Exh. 10, pp. 37-38].
10. On September 23, 2016, the Department received a letter from Attorney [REDACTED] who indicated that the law firm represents [REDACTED] and [REDACTED] in their role as Co-Trustees of the March 4, 2005, [REDACTED]. The purpose of the letter was to respond to the September 19, 2016, verification requests. In the letter, Attorney [REDACTED] referred to several attachments, including: a copy of the Operating Agreement of [REDACTED], and a copy of the Trust. Attorney [REDACTED] then questioned why the request for information from [REDACTED] is necessary as Petitioner never had an ownership interest in [REDACTED] and therefore no sale of ownership ever occurred. Attorney [REDACTED] indicated that they were unable to provide the requested verifications concerning [REDACTED] and the request must be based on a misunderstanding. [Dept. Exh. 11, p. 39].
11. On September 26, 2016, the Department received a copy of the [REDACTED] dated March 4, 2005 (“the Baker Trust”). [Dept. Exh. 12, pp. 40-52].
12. On September 26, 2016, the Department received a copy of the [REDACTED] Operating Agreement (“LLC Operating Agreement”). [Dept. Exh. 14, pp. 55-69].

13. On October 6, 2016, the Department mailed Petitioner a Health Care Coverage Determination Notice (DHS-1606) which indicated the following:
 - Petitioner is eligible for Medicaid effective May 1, 2016, ongoing.
 - Petitioner had a monthly PPA of \$ [REDACTED] [Dept. Exh. 1, p. 3].
 - Petitioner's baseline date was May 1, 2016. [Dept. Exh. 1, pp. 3-5].
 - Medicaid will not pay for Petitioner's LTC and community-based waiver services from May 1, 2016, through February 29, 2020, due to a transfer of assets or income for less than fair market value. [Dept. Exh. 1, pp. 3-5].
14. On October 12, 2016, the Department's Trust and Annuities Unit completed an evaluation which determined that the [REDACTED] meets all of the criteria of a Medicaid Trust as defined by BEM 401, p. 4. The evaluation also indicated that the transfer of assets into the [REDACTED] was not a divestment. [Dept. Exh. 13, pp. 53-54].
15. On December 16, 2016, the Department received a copy of Petitioner's March 4, 2005, General Durable Power of Attorney ("Power of Attorney") which appointed, [REDACTED] (Petitioner's husband) as her agent or attorney-in-fact. According to the terms of the Power of Attorney, Petitioner's children, [REDACTED] and [REDACTED], were appointed as successor agents. [Dept. Exh. 2, pp. 10-17].
16. On December 16, 2016, Petitioner's attorney requested a hearing to challenge the divestment penalty. [Dept. Exh. 1, pp. 6-9].

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Department of Health and Human Services Bridges Eligibility Manual (BEM), Department of Health and Human Services Reference Tables Manual (RFT), and Department of Health and Human Services Emergency Relief Manual (ERM).

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act, 42 USC 1396-1396w-5; 42 USC 1315; the Affordable Care Act of 2010, the collective term for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152; and 42 CFR 430.10-.25. The Department (formerly known as the Department of Human Services) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

Medical Assistance (MA) is also referred to as "Medicaid." BEM 105 (10-1-2016), p. 1. 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, p. 1.

The Medicaid program was created by Congress with the intent "to provide benefits to the truly needy." *Mackey v Dep't of Human Servs*, 289 Mich App 688, 697; 808 NW2d 484 (2010). "To be eligible for Medicaid long-term-care benefits in Michigan, an individual must meet a number of criteria, including having \$2,000 or less in countable assets." *Mackey* at 698. In some cases, persons with wealth have transferred their assets for less than fair market value in order to become eligible for Medicaid. See *Mackey* at 698-699. The typical purpose of such transfers is to "pass on . . . accumulated wealth" within the family unit. See *Mackey* at 697. To avoid this misuse of the Medicaid system, however, a state examines all transfers of assets within a specified time frame to determine whether the transfers were made "solely to become eligible for Medicaid, which can be established if the transfer was made for less than fair market value." *Mackey* at 696. This time frame is the "look-back period." *Mackey, supra*. "A transfer for less than fair market value during the 'look-back' period is referred to as a 'divestment.'" *Mackey, supra*. A divestment "subjects the applicant to a penalty period during which payment of long-term-care benefits is suspended." *Mackey, supra*.

In the instant matter, the Department contends that Petitioner transferred commercial property valued at \$ [REDACTED] that she solely owned under the [REDACTED] to [REDACTED], which was "apparently" owned and operated by Petitioner and her deceased husband. [Department's Hearing Summary Statement of Facts, p. 1]. The Department contends that Petitioner and her husband were obligated to pay rent and to pay for repairs to themselves from [REDACTED], pursuant to the terms of a lease dated December 1, 2016. [Dept. Hrg. Summ., p. 1]. The Department submits that Petitioner failed to forward a copy of the lease. [Dept. Hrg. Summ., p. 1]. According to the Department, Petitioner and her husband continued to pay themselves for their own property for over 30 years and that eventually [REDACTED] assumed payment for repairs and property taxes without any formal documentation. [Dept. Hrg. Summ., pp. 1-2]. The Department further argues that Petitioner and her husband did not accept any liability or obligation to [REDACTED] for the amounts that were paid. [Dept. Hrg. Summ., p. 1]. Instead, the Department contends that it became the course of the business arrangement between the Trust and [REDACTED] overtime. [Dept. Hrg. Summ., p. 2].

According to the Department, in 2008 Petitioner's children ([REDACTED], [REDACTED], [REDACTED], and [REDACTED] formed [REDACTED], for the business of "rental buildings and land." [Dept. Hrg. Summ., p. 2]. The Department argues that neither Petitioner nor her husband were involved in [REDACTED] [Dept. Hrg. Summ., p. 2].

The Department then argues that [REDACTED] and [REDACTED], in April 2015, as Trustees of the [REDACTED], executed a promissory note which created an obligation on the part of the Trust to pay [REDACTED] \$ [REDACTED] in exchange for "unspecified value received." [Dept. Hrg. Summ., p. 2]. The Department says there is no evidence this obligation has been received. [Dept. Hrg. Summ., p. 1].

The Department also disputes the April 30, 2015, assignment of rights in the amount of \$ [REDACTED] from [REDACTED] to the Promissory Note for “unspecified value received.” [Dept. Hrg. Summ., p. 2]. The Department states there is no evidence to support that any transfer of value occurred. [Dept. Hrg. Summ., p. 2]. The Department also contends that on April 30, 2015, the [REDACTED] [REDACTED] transferred “full ownership of the commercial property” to pay off the promissory note, but that Petitioner did not sign any of the transfer or obligation documentation. [Dept. Hrg. Summ., pp. 2-3].

In short, the Department argues that Petitioner, at the time she applied for LTC Medicaid, did retain ownership or value in the commercial property. First, the Department submits that the transfer of property was a “sham transaction” intended for the sole purpose of qualifying for Medicaid. [Dept. Hrg. Summ., p. 3]. Second, the Department contends that Petitioner did not create a bona fide loan for Medicaid eligibility because there was no loan agreement at the time the money was provided and Petitioner (and her husband) did not acknowledge the obligation to pay. [Dept. Hrg. Summ., p. 3]. The Department takes the position that the property was transferred for less than fair market value and was correctly determined to be divestment for which a penalty was assessed. [Dept. Hrg. Summ., p. 6].

Petitioner, on the other hand, denies that she owned any interest in [REDACTED], which is owned in equal portions by [REDACTED], [REDACTED] and [REDACTED]. [Petitioner’s Brief, p. 2]. Petitioner argues that the lease was extended by verbal agreement of the parties and that under the December 1, 1984, existing lease, [REDACTED] was required to pay \$ [REDACTED] per month for rent and was required to make repairs to the property which cost less than \$ [REDACTED]. [Pet. Brf., p. 2]. Petitioner submits that the Trust (as the owner of the property) paid all taxes assessed against the property and all repairs to the property that exceeded \$ [REDACTED]. Petitioner states that from December 1, 1984, through April 1, 2015, [REDACTED] paid \$ [REDACTED] for the occupancy of the property and [REDACTED] complied with that obligation, but [REDACTED] was not responsible for real property taxes and special assessments against the property. However, according to Petitioner, the Trust ultimately became responsible for these items under the lease, but the Trust failed to do so and [REDACTED] was forced to assume these responsibilities in order to keep the property from being lost. Petitioner contends that [REDACTED] also paid \$ [REDACTED] for taxes and special assessments during the above time period for a total of \$ [REDACTED]. [Pet. Brf., pp. 2-3].

Rather than file a lawsuit against the Trust for repayment, [REDACTED] purportedly decided to have the Trust deliver a promissory note to satisfy the debt. [Pet. Brf., p. 3]. [REDACTED] then assigned the promissory note to [REDACTED]. [Pet. Brf., p. 4]. The Trust transferred the Property to [REDACTED] via a Warranty Deed in full satisfaction of the debt. [Pet. Brf., p. 4]. Then, [REDACTED] signed a Cancellation of Promissory Note, which identified that the debt indicated in the promissory note was cancelled. [Pet. Brf., p. 4]. The property was transferred to [REDACTED], to repay amounts which should have been paid by the Trust for more than 30 years (the Trust should have paid \$ [REDACTED] in taxes and repairs from 1984 to 2015). [Pet. Brf., p. 4].

First, Petitioner argues that the transfer of the property was not a divestment. Second, Petitioner contends that if the transfer of the property is considered a divestment, the actual value of the property should be used to calculate the divestment penalty. Finally, Petitioner challenges the Department's use of the "Transfers for Another Purpose" Provision (BEM 405, p. 11) as improper. [Pet. Brf., pp. 7-8].

Analysis

Divestment

The Department's divestment policies are contained in BEM 405 (10-1-2016).³ According to Department policy, a "divestment" is a transfer of assets that would create a penalty period. BEM 405, p. 1. The "penalty period" is a period of disqualification from Medicaid assistance for Long Term Care (LTC).⁴ BEM 405, p. 1. In other words, the penalty period is the number of months of long term care that will not be covered by Medicaid. Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405, p. 1. Divestment results in a penalty period in Medicaid, not ineligibility. BEM 405, p. 1.

The concept of a divestment means that there was a transfer of a "resource" by a client or his spouse that includes all of the following factors: (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, p. 1. A "resource" is defined as all of the client's and his/her spouse's assets and income. BEM 405, pp. 1-2. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. BEM 405, pp. 1-2. 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, p. 2. [Emphasis in original].

During the penalty period, Medicaid 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, p. 1. However, Medicaid will pay for other MA-covered services. BEM 405, p. 1.

³ Because the Department's action occurred on or about October 6, 2016, the Administrative Law Judge will apply the policy that was in place at that time.

⁴ LTC means being in any of the following: (1) a nursing home that provides nursing care; (2) a county medical care facility that provides nursing care; (3) a hospital long-term care unit; (4) a MDHHS facility that provides active psychiatric treatment; (5) a special MR nursing home; or (6) a MDHHS facility for individuals with intellectual disability that provides ICF/ID (Intermediate Care Facility for Individuals with Intellectual Disability) nursing care. A person may receive hospice care in one of these facilities. He [or she] is still considered in LTC. Bridges Program Glossary (BPG), pages 33, 39.

“Transferring a resource” means giving up all or partial ownership in (or rights to) a resource. BEM 405, p. 2. Not all transfers are divestment. BEM 405, p. 2. 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 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 trust⁵; (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, p. 2.

According to BEM 405, p. 3, transfers by any of the following individuals are considered transfers by the client or spouse: (1) parent for minor; (2) legal guardian; (3) conservator; (4) court or administrative body; (5) anyone acting in place of, on behalf of, at the request of or at the direction of the client or the client’s spouse.

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. BEM 405, p. 3.

The first step in determining the period of time that transfers can be looked at for divestment is determining the baseline date. BEM 405, p. 5. 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, p. 5.

Once the baseline date is established, the Department determines the look-back period. BEM 405, p. 5. The look back period is 60 months prior to the baseline date for all transfers made after February 8, 2006. BEM 405, p. 5.

Transfers that occur on or after a client’s baseline date must be considered for divestment. BEM 405, p. 5. In addition, transfers that occurred within the 60 month look-back period must be considered for divestment. BEM 405, p. 5.

Here, the Department determined that the baseline date is May 1, 2016. [Dept. Exh. 15, p. 71]. Petitioner did not specifically dispute this. Based on a review of the record, Petitioner also does not dispute that there was a transfer of a resource as defined by BEM 405, p. 2. However, the first issue is whether the transfer can fairly be considered a divestment. In order to meet the definition of a divestment, the transfer must be of a resource by a client or his spouse that includes all three 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, p. 1.

⁵ See BEM 401.

This Administrative Law Judge has carefully considered and weighed the testimony and other evidence in the record. The undersigned finds that the first condition is met because the April 30, 2015, transfer of property was easily within the 60 month look-back period. [See Dept. Exh. 7, p. 29]. The next question is whether the transfer was for 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. BEM 405, p. 6. 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, p. 6.

Compensation must have tangible form and intrinsic value. BEM 405, p. 6. 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, p. 6. 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, pp. 6-7. [Emphasis added].

Department policy also covers Home Caretaker & Personal Care Contracts. BEM 405, p. 7. 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. The Department will consider all payments for care and services which the client made during the look back period as divestment. BEM 405, p. 7.

The preceding are examples and should not be considered an all inclusive or exhaustive list. BEM 405, p. 7. Relatives⁶ 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. BEM 405, p. 7.

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:

- (1) 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

⁶ A relative is anyone related to the client by blood, marriage or adoption. BEM 405, p. 7.

- (2) 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
- (3) 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
- (4) 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
- (5) 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.

See BEM 405, p. 8, (With emphasis added).

Here, Petitioner argues that the Property was worth \$ [REDACTED] at the time of transfer and that the Trust owed the LLC much more than the value of the property. Thus, according to Petitioner, the transfer of the Property, which was purportedly worth \$ [REDACTED] from the Trust to the LLC, was in full satisfaction of a debt and; therefore, was a transfer at fair market value. Petitioner says that it was the LLC, not the Trust, who received less than fair market value for the transfer. The undersigned does not find Petitioner's arguments in this regard to be persuasive. First, Petitioner's assertion that the 1984 lease was extended by verbal agreement of the parties is not supported by any objective evidence in the record. Petitioner did not provide any documentation to show an acknowledgment of a debt. Petitioner's assertion that [REDACTED] assumed payment of repairs and property taxes from 1984 to 2015 based on a verbal agreement is somewhat self-serving. The undersigned is not persuaded that Petitioner, or her late husband, formally accepted any liability or financial obligations to [REDACTED] for the moneys that were paid. There is no evidence that Petitioner signed any documentation that demonstrated she had any obligations for expenses incurred by [REDACTED]. This is significant because, as Respondent argued, the transfer gave the appearance that Petitioner and her husband were paying rent to themselves and adding improvements to their own property. Petitioner's contention that the money that [REDACTED] repaid was, in fact, a loan payment is not supported by the record. In addition, Respondent's argument that the loan fails to meet the requirements set forth in SI 01020.2020 (D) is more convincing.

Petitioner's property that was held in the Trust was transferred by Petitioner's children to themselves. Based on this record, the transfer of property more resembles a divestment than repayment of a loan at fair market value. Accordingly, the undersigned finds that the transfer was for less than fair market value.

Transfers exclusively for a purpose other than to qualify or remain eligible for MA are not divestment. 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, p. 11. [Emphasis added]. In this case, Petitioner argues that the debt that was forgiven in exchange for the property was equal to its market value as estimated by the SEV and was more than the appraised value of the property and the value obtained on the open market. However, this Administrative Law Judge disagrees that Petitioner has definitively shown that adequate value was obtained in exchange for the property. This record shows that Petitioner was 90 years old and was mentally deteriorating at the time of the April 30, 2015, transfer. [Pet. Brf. and Hrg. Test.] It cannot fairly be said that there was no reason to believe LTC service might be needed at the time of transfer. At the time, Petitioner had commercial property in Trust that was transferred to the LLC. Accordingly, the undersigned finds that this transfer was, in fact, a divestment.

Divestment Penalty Period

The next question is whether the Department properly calculated the divestment penalty amount. Petitioner contends that if a divestment is found, then the proper calculation of the divestment amount should be determined by the value of the property at the time. The Department indicated that it was not provided with definitive documentation concerning the value of the property at the time of transfer. The Department agreed to accept this documentation, if provided.

Policy requires the Department verify the following to document a divestment: (1) date of transfer; (2) fair market value or cash value; and (3) uncompensated value. BEM 405, p. 17. [Emphasis added].

Here, there is no dispute that the Department did not have objective verification of the fair market value of the property in question at the time of transfer. At the hearing, the Department's LTC worker testified that she used information contained in correspondence from Petitioner's attorney to calculate the value of the property, but she did not independently request or obtain verification of the actual value of the property. In this regard, the Department erred because it did not properly calculate the divestment amount and the corresponding penalty because it did not obtain verification of the fair market value or cash value of the property.

Therefore, the Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds that the Department acted in accordance with Department policy when it determined that a

divestment occurred, but did not act in accordance with Department policy when it calculated the divestment penalty.

DECISION AND ORDER

Accordingly, the Department's decision is **AFFIRMED-IN-PART** and **REVERSED-IN-PART**. For the reasons stated above, the Department's determination that a divestment occurred is **AFFIRMED**, but the Department's calculation of the divestment penalty and amounts is **REVERSED**.

THE DEPARTMENT IS ORDERED TO BEGIN DOING 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. Reprocess, redetermine, and recalculate Petitioner's divestment penalty amount by obtaining verification of the actual value of the property at the relevant time.
2. After recalculating Petitioner's divestment penalty amount, provide Petitioner, and/or Petitioner's attorney, written communication regarding the Department's findings.

IT IS SO ORDERED.

CAP/mc



C. Adam Purnell
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; 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 48909-8139

DHHS

[REDACTED]

Counsel for Respondent

[REDACTED]

Counsel for Petitioner

[REDACTED]

Petitioner

[REDACTED]