



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
LANSING

SHELLY EDGERTON  
DIRECTOR

[REDACTED]

Date Mailed: October 4, 2017  
MAHS Docket No.: 17-011074  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Landis Lain**

**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; 42 CFR 438.400 to 438.424; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, a telephone hearing was held on September 26, 2017, from [REDACTED], Michigan. The Petitioner was represented by [REDACTED], Power of Attorney; [REDACTED] and [REDACTED], Co-guardians appeared as witnesses for Petitioner. The Department of Health and Human Services (Department or Respondent or State) was represented by [REDACTED], Lead Worker.

Petitioner's Exhibits A-H and Respondent's Exhibits A-K were admitted as evidence.

**ISSUE**

Did the Department properly determine Petitioner's divestment penalty?

**FINDINGS OF FACT**

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

1. On [REDACTED], Petitioner's bank balance was \$ [REDACTED] which represents liquidation of her assets.
2. \$ [REDACTED] of Petitioner's assets were gifted to her relatives.
3. On [REDACTED], the Department received a Long Term Care (LTC) Medical Assistance (MA) application for Petitioner.

4. On [REDACTED], a MSA 2565 Facility Admission Notice was received by the Department.
5. On [REDACTED] [REDACTED] [REDACTED], the Department received Petitioner's Annuity documentation.
6. On [REDACTED], the MEA case was certified and Petitioner was approved for MA with a remaining deductible.
7. On [REDACTED], the Department sent Petitioner a Health Care Coverage Determination Notice stating that Petitioner a patient pay amount of \$ [REDACTED] per month and a remaining deductible of \$ [REDACTED]. When a Medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, that month is not a penalty month. That month cannot be counted as part of the penalty period.
8. Petitioner did not meet the \$ [REDACTED] monthly deductible.
9. On [REDACTED], a case update showed that Petitioner was no longer receiving annuity payments.
10. Petitioner was approved for MA with no deductible and a divestment penalty for the time period of [REDACTED], through [REDACTED].
11. On [REDACTED], the Department sent Petitioner Notice of the Divestment Period.
12. On [REDACTED], Petitioner's Representative filed a Request for Hearing to contest the Divestment period.

### **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.

Clients have the right to contest a department decision affecting eligibility or benefit levels whenever they believe the decision is incorrect. The department provides an administrative hearing to review the decision and determine its appropriateness in accordance to policy. This item includes procedures to meet the minimum requirements for a fair hearing. BAM 600, page 1

The application forms and each written notice of case action must inform clients of their right to a hearing. These include an explanation of how and where to file a hearing request, and the right to be assisted by and represented by anyone the client chooses. The client must receive a written notice of all case actions affecting eligibility or amount of benefits. When a case action is completed it must specify:

- The action being taken by the department.
- The reason(s) for the action.
- The specific manual item(s) that cites the legal base for an action, or the regulation, or law itself; see Bridges Administrative Manual (BAM) 220. BAM 600, page 1

The client or AHR has **90 calendar days from the date of the written notice of case action to request a hearing**. The request must be received in the local office within the 90 days; see Where to File a Hearing Request, found in this item. Note: Unless otherwise stated elsewhere, computation of time for the purposes of administrative hearings is determined as follows:

- Time is measured in calendar days.
- The computation of time begins on the day after the act, event, or action occurs. (The day on which the act, event, or action occurred is not included.)
- The last day of the time period is included, unless it is a Saturday, Sunday, State of Michigan holiday, or day on which the State of Michigan offices are closed. (In such instances, the last day of the time period is the next business day.) BAM 600, page 6

In this case, Petitioner's request for hearing was untimely. As such, this Administrative Law Judge lacks jurisdiction to even hold this hearing. The request for hearing must be **DISMISSED**.

In the alternative, even if the request for hearing had been timely:

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.

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).

After the Medicaid program was enacted, a field of legal counseling arose involving asset protection for future disability. The practice of "Medicaid Estate Planning," whereby "individuals shelter or divest their assets to qualify for Medicaid without first depleting their life savings," is a legal practice that involves utilization of the complex rules of Medicaid eligibility, arguably comparable to the way one uses the Internal Revenue Code to his or her advantage in preparing taxes. See generally *Kristin A. Reich, Note, Long-Term Care Financing Crisis-Recent Federal and State Efforts to Deter Asset Transfers as a Means to Gain Medicaid Eligibility*, 74 N.D. L.Rev. 383 (1998). Serious concern then arose over the widespread divestiture of assets by mostly wealthy individuals so that those persons could become eligible for Medicaid benefits. *Id.*; see also *Rainey v. Guardianship of Mackey*, 773 So.2d 118 (Fla. 4th DCA 2000). As a result, Congress enacted several laws to discourage the transfer of assets for Medicaid qualification purposes. See generally *Laura Herpers Zeman, Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly*, 13 *Quinnipiac Prob. L.J.* 187 (1988). Recent attempts by Congress imposed periods of ineligibility for certain Medicaid benefits where the applicant divested himself or herself of assets for less than fair market value. 42 U.S.C. § 1396p(c)(1)(A); 42 U.S.C. § 1396p(c)(1)(B)(i); *Fla. Admin. Code R. 65A-1.712(3)*. More specifically, if a transfer of assets for less than fair market value is found within 36 months of an individual's application for Medicaid, the state must withhold payment for various long-term care services, i.e., payment for nursing home room and board, for a period of time referred to as the penalty period. *Fla. Admin. Code R. 65A-1.712(3)*. Medicaid does not, however, prohibit eligibility altogether. It merely penalizes the asset transfer for a certain period of time. See generally *Omar N. Ahmad, Medicaid Eligibility Rules for the Elderly Long-Term Care Applicant*, 20 *J. Legal Med.* 251 (1999). [*Thompson v. Dep't of Children & Families*, 835 So.2d 357, 359-360 (Fla App, 2003).]

In *Gillmore* the Illinois Supreme Court recognized this same history, noting that over the years (and particularly in 1993), Congress enacted certain measures to prevent persons who were not actually "needy" from making themselves eligible for Medicaid: In 1993, Congress sought to combat the rapidly increasing costs of Medicaid by enacting statutory provisions to ensure that persons who could pay for their own care did not receive assistance. Congress mandated that, in determining Medicaid eligibility, a state must "look-back" into a three- or five-year period, depending on the

asset, before a person applied for assistance to determine if the person made any transfers solely to become eligible for Medicaid. See 42 U.S.C. § 1396p(c)(1)(B) (2000). If the person disposed of assets for less than fair market value during the look-back period, the person is ineligible for medical assistance for a statutory penalty period based on the value of the assets transferred. See 42 U.S.C. § 1396p(c)(1)(A) (2000). [*Gillmore*, 218 Ill 2d at 306 (emphasis added).]

See, also, *ES v. Div. of Med. Assistance and Health Servs.*, 412 NJ Super 340, 344; 990 A.2d 701 (2010) (Noting that the purpose of this close scrutiny while “looking back” is “to determine if [the asset transfers] were made for the sole purpose of Medicaid qualification.”).

This statutory “look-back” period, noted in *Gillmore* and *Thompson* and contained within 42 USC 1396p(c)(1), requires a state to “look-back” a number of years (in this case five) from the date of an asset transfer to determine if the applicant made the transfer solely to become eligible for Medicaid, which can be established if the transfer was made for less than fair market value. See 42 USC 1396p(c)(1); DHS Program Eligibility Manual (PEM) 405, pp 1, 4; see also *Gillmore*, 218 Ill 2d at 306.

“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 5. A transfer for less than fair market value during the “look-back” period is referred to as a “divestment,” and unless falling under one of several exclusions, subjects the applicant to a penalty period during which payment of long-term care benefits is suspended. See, generally BEM 405, pp 1, 5-9. “Congress’s imposition of a penalty for the disposal of assets or income for less than fair market value during the look-back period is intended to maximize the resources for Medicaid for those truly in need.” *ES*, 412 NJ Super at 344. See also *Mackey v Department of Human Services, Michigan Court of Appeals, Docket No. 288966, decided September 7, 2010*.

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 \$2,000.00 for an asset group for one person and \$3,000.00 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.

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

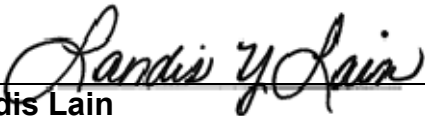
In this case, there is no dispute of material fact. Petitioner had divested assets. The Divestment period was for 3.8 months. Petitioner also had a monthly Medicaid Deductible. The divestment period could not be counted until the Medicaid Deductible was met for Petitioner. Petitioner didn't meet the Medicaid Deductible. Petitioner's Representative argues that the amount used to determine the deductible was incorrect and if the correct amount had been provided to the Department by the facility, then Petitioner would not have had a deductible and would not be in this predicament. The facts indicate that the Department relied upon the facility Admission document when making the calculations. Notice of the Medicaid Deductible amount was sent to Petitioner on [REDACTED]. No request for a hearing was received within 90 days to contest the determination.

Petitioner's Representative's statements on the record are not sufficient to rebut the Department's determination that divestment occurred. The Department's determination that Petitioner's penalty period must remain at 3.8 months is correct under the circumstances. The Department has established by the necessary competent, substantial and material evidence on the record that it was acting in accordance with Department policy when it calculated and instituted the divestment penalty under the circumstances. The Department's actions must be upheld.

**DECISION AND ORDER**

In this case, Petitioner's request for hearing was untimely. As such, this Administrative Law Judge lacks jurisdiction to hold this hearing. The request for hearing must be **DISMISSED**.

LL/hb

  
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**Landis Lain**  
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]

**Petitioner**

[REDACTED]

**Authorized Hearing Rep.**

[REDACTED]