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GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

SHELLY EDGERTON  
DIRECTOR

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Date Mailed: September 11, 2018  
MAHS Docket No.: 18-005948  
Agency No.: ██████████  
Petitioner: ██████████

**ADMINISTRATIVE LAW JUDGE: Lynn M. Ferris**

**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 August 16, 2018, from Detroit, Michigan. The Petitioner was represented by her Authorized Hearing Representative, ██████████ ██████████. The Department of Health and Human Services (Department) was represented by Nikai Williams, Assistance Payments Worker.

**ISSUE**

Did the Department properly find that a divestment occurred and properly impose a Divestment?

Did the Department properly determine the value of the Divestment when calculating the Divestment 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. The Petitioner's Authorized Representative and AHR applied on his behalf for Medicaid Long Term Care (LTC) on January 30, 2018, and filed a Retro Medicaid for November 2017. (Exhibit B.)
2. The Department issued a Health Care Coverage Determination Notice (HCCDN) on March 14, 2018, which determined that the retro Medicaid application for November 2017 was denied due to excess assets; a divestment penalty period

was imposed from **January 1, 2018, through March 22, 2018, due to two annuitized** [REDACTED] annuities. The Patient Pay amount was determined to be \$ [REDACTED] beginning [REDACTED] 2018. (Exhibit E.)

3. The Petitioner's DOB is [REDACTED]. The Petitioner's date of admission to the LTC nursing facility was April 10, 2017. (Exhibit B.)
4. Petitioner had two annuities issued by [REDACTED] at the time of the Long Term Care application. The first annuity was dated [REDACTED], 2013, in the amount of \$ [REDACTED]. Petitioner was the owner of the annuity, and the primary beneficiary was [REDACTED], his sister. Petitioner began receiving payments on [REDACTED], 2013, in the monthly amount of \$ [REDACTED]. The Payments were to continue until [REDACTED], 2023, and then no further payments would be made. (Exhibit C.)
5. The Petitioner also owned a second annuity dated [REDACTED] 2013, in the amount of \$ [REDACTED]. Petitioner was the owner, and the primary beneficiary was [REDACTED], his sister. The annuity was to pay Petitioner \$ [REDACTED] monthly beginning [REDACTED], 2013. The Petitioner received the annuity payments, which were to continue until [REDACTED], 2023. (Exhibit C.)
6. The Department sent the annuities for review and evaluation by the Office of Legal Services Trust and Annuities Unit, which determined by letter dated February 21, 2018, the following for each annuity owned by the Petitioner: (a) The Petitioner was [REDACTED] years old when he purchased the annuity, and his life expectancy was [REDACTED] years at the time of purchase; (b) the annuity ([REDACTED], 2013, is not actuarially sound because it does not return the principal and interest within the annuitant's life expectancy; and (c) an annuity purchased or amended on or after February 8, 2006, must name the State of Michigan as the remainder beneficiary. An annuity that does not name the State as the remainder beneficiary is a divestment of the total purchase price. The named beneficiary is [REDACTED]. (Exhibit D.)
7. As regards the second annuity examined by the Office of Legal Counsel, it determined that at the time of the second annuity dated September 26, 2013, the Petitioner was [REDACTED] years of age; and his life expectancy was [REDACTED] years. This annuity was also determined not to be actuarially sound as it called for monthly payments of \$ [REDACTED] over 10 years starting October 16, 2013, which was not within the Petitioner's life expectancy. The annuity also did not name the State of Michigan as the remainder beneficiary. The named beneficiary is [REDACTED] [REDACTED] (Exhibit D.)
8. The Petitioner requested a timely hearing on June 11, 2018, raising several objections to the Department's determination of divestment and the period of divestment.

## **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.

In this case, as part of the application process for Medicaid, the Petitioner submitted with his MA application two annuities which he purchased on [REDACTED] 2013, and [REDACTED] 2013. As part of the application, the Department must examine eligibility and determine assets and income. As the annuity was an asset, it was provided to the Department as part of the application process.

The annuities were both purchased by Petitioner, and Petitioner was receiving monthly payments from both the annuities at the time of the application. The annuity dated [REDACTED] 2013, provided a \$63.45 monthly payment to be paid over a period of 10 years starting [REDACTED] 2013. The annuity dated [REDACTED], 2013, provided a monthly payment to be paid over 10 years starting [REDACTED], 2013. The Petitioner was [REDACTED] years of age at the time of the purchase of the [REDACTED], 2013, and [REDACTED] years of age at the time of the purchase of the [REDACTED] 2013, annuity with life expectancies of [REDACTED] and [REDACTED] respectively. The final payout of both annuities was to occur in 2023. In addition, both annuities named the Petitioner's sister, [REDACTED] [REDACTED] as the beneficiary. (Exhibit D.)

The Department sent the Annuities to the Trust/Annuity Evaluation Division of the Department for analysis as required by Department policy, BEM 401, January 1, 2016, p. 2. As to both annuities, the Trust/Annuity Division determined that both the annuities were a divestment because the annuities were not actuarially sound and did not name the State of Michigan as the remainder beneficiary. The determination states in pertinent part the following:

Converting countable resources to income through the purchase of an annuity or the amendment of an existing annuity on or after September 1, 2005, is considered a transfer for less than fair market value unless the annuity meets the conditions listed below:

Is actuarially sound and returns the principal and interest within the annuitant's life expectancy.

The Decision also referenced that:

An annuity purchased or amended on or after February 8, 2006 must name the State of Michigan as the remainder beneficiary, or as the second remainder beneficiary after the community spouse or minor or disabled child, for an amount at least equal to the amount of the Medicaid benefits provided. The naming of the state in the first or second position must be verified at application or redetermination. **An annuity that does not name the state as the remainder beneficiary is a divestment of the total purchase price. The Beneficiary is [REDACTED]. Divestment has occurred.** (Exhibit D, pp. 29 and 30.)

Department policy found in BEM 405 sets forth the definitions and requirements to establish a divestment. If a divestment is determined to have occurred, the 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. BEM 405, (October 2018), p. 1. A Divestment is defined by Department Policy found in BEM 405:

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 in this item 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:

- ☐ Long Term Care (LTC) services.
- ☐ Home and community-based services.
- ☐ Home help.
- ☐ Home health.

MA will pay for other MA-covered services. BEM 405, p.1.

A number of defined terms must be considered when analyzing annuities and divestment issues. The following definitions and explanations must be considered in determining whether there is a divestment regarding the annuity in question.

Initially, the transfer resulting in a divestment must have occurred within 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 405, p. 6. (Emphasis supplied). Once the look-back period is established, all transfers of assets are examined during that period. In this case, the Petitioner was eligible for Medicaid in the month of application which was January 1, 2018, and thus, the annuities in question are within the 60-month look-back period.

In addition, the Department policy excludes certain transfers listed as not a divestment, which include: transferring excluded income, transfers involving a spouse, transfers involving a child, transfers to a funeral plan, transfers to a trust, purchase of a funeral contract, converting an asset from one form to another, transferring a homestead to family, transfers for another purpose other than to qualify or remain eligible for MA are not a divestment. Upon review of the facts presented and the particulars of the transfers excluded as divestment listed above, none of the above exclusions are applicable to the transfers made in this case. See BEM 405, (January 2018), pp. 9-11.

Petitioner was admitted to LTC on April 10, 2017, and applied for LTC Medicaid on January 1, 2018, with a retroactive MA application for November 2017. The Department's denial of the retroactive application due to excess assets is not challenged in this appeal.

BEM 405 also provides that the purchase of an annuity that is not actuarially sound is a transfer for less than fair market value and a divestment. An annuity is **not** actuarially sound if the annuitant is **not** expected to live until the end of the guarantee period of the annuity. BEM 405, p. 4. In this case, the Petitioner was [REDACTED] and [REDACTED] years of age when he purchased the annuities in question. Based upon BEM 405, Exhibit II Life Expectancy Tables, a male person who is [REDACTED] years of age has a life expectancy of [REDACTED] years. BEM 405, (July 2013), p. 22. The Annuity dated [REDACTED], 2013, calls for a payout over 10 years starting [REDACTED], 2013; and thus, the Department correctly found that at the time of purchase, the annuity was not actuarially sound because the payout period was not within the Petitioner's Life expectancy. This same analysis is also true for the annuity purchased [REDACTED] 2013, was also for a 10-year payout starting [REDACTED], 2013, which at the time of purchase, Petitioner had a life expectancy of [REDACTED] years, and thus, was also correctly determined to be not actuarially sound.

Thus, based upon the requirements in BEM 405, the Department demonstrated that all three requirements for a divestment based upon the annuities not being actuarially sound and has demonstrated that it correctly found a divestment on this basis. Although the Petitioner's AHR protested on the basis that the Petitioner did not authorize the

insurance carrier to convert the annuity, this argument, based upon the facts presented, did not support any change to the analysis performed by the Department because the transfers were made and completed and not reversed by the Petitioner.

The second basis that the Department found that the Petitioner's annuity caused a divestment was based upon the fact that the annuity did not name the State of Michigan as the remainder beneficiary, instead it named his sister as such was also correct based upon BEM 401 (January 2018), pp. 5-6. BEM 401 covers transfers to an annuity effective September 1, 2005, and provides in pertinent part:

Converting countable resources to income through the purchase of an annuity or the amendment of an existing annuity by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services on or after September 1, 2005, is considered a transfer for less than fair market value unless the annuity meets the conditions listed below:

If the annuity was purchased or amended by, or on behalf of, the applicant or recipient on or after February 8, 2006, the State of Michigan must be named as the remainder beneficiary in the first position, or as the second remainder beneficiary after the community spouse or minor or disabled child, for an amount at least equal to the amount of the Medicaid benefits paid on behalf of the institutionalized individual. The naming of the state in the first or second position must be verified at application or redetermination. **If the State of Michigan is not named as a beneficiary as required in this paragraph, the total purchase price of the annuity will be considered to be the amount transferred for less than fair market value.** (emphasis supplied).

The Office of Legal Services also found that the annuities in question did not name the State of Michigan as the remainder beneficiary, and thus, determined that a divestment occurred because both annuities name Ghislaine Neptune, the Petitioner's sister, as the remainder beneficiary. (Exhibit D.) Thus, the divestment amount as determined by the Department representing the total purchase price of the annuities was correct and was in conformance with Department policy in BEM 401. The Petitioner's AHR asserted that she attempted to name the State of Michigan as the remainder beneficiary, however, testified that she could not do so because the insurance company required an account number associated with the State of Michigan. Notwithstanding this assertion, no such written designation was received from Petitioner naming the State of Michigan as the remainder beneficiary; thus, the issue as determined by the Department Office of Legal Services Trust and Annuities Unit; and the Department was correct when made. The fact that no account number could be determined by the Department does not reverse its decision regarding the beneficiary.

The last issue to be addressed is whether the divestment penalty was correctly calculated. BEM 405, pp. 12-13, explains how the penalty must be calculated. The penalty period is to be based upon the total uncompensated value of all resources divested and starts on the date the Petitioner is eligible for Medicaid, which in this case is his application date of January 1, 2018. The total uncompensated value is to be divided by the average monthly private LTC Cost in Michigan for the client's Baseline Date which is January 1, 2018. In 2018, the private LTC Cost is \$[REDACTED] BEM 405, p. 13. The total uncompensated value of the annuities is the amount of the annuities' purchase price as required by BEM 401, as discussed above.

In this case, the Department imposed a divestment penalty based upon total value of both annuities which was \$[REDACTED] which it divided by the amount of the average 2018 monthly private care of \$[REDACTED] which results in 2.7535. The 2.7535 represents two months for the penalty period. The remaining fraction (.7535) is then multiplied by 30 to determine the number of days for the penalty period in the remaining month. When this is done, the number of total days in the divestment period  $.7535 \times 30 = 22.60$ , which is 22 days. Thus, the divestment period of two months and 22 days as calculated is correct and in conformance with Department policy referenced herein. BEM 405.

In the hearing request filed by Petitioner's AHR the issue of undue hardship was raised due to the imposition of the divestment penalty. This issue is not decided by the undersigned as the Department, based upon the evidence presented had not been presented with this issue prior to the hearing and has not made a determination of this issue. BEM 405, p. 16, provides:

Waive the penalty if it creates undue hardship. Assume there is no undue hardship unless you have evidence to the contrary.

Undue hardship exists when the client's physician (M.D. or D.O.) says:

- Necessary medical care is **not** being provided, and
- The client needs treatment for an emergency condition.

A medical emergency exists when a delay in treatment may result in the person's death or permanent impairment of the person's health.

A psychiatric emergency exists when immediate treatment is required to prevent serious injury to the person or others.

See BEM 100, Policy Exception Request Procedure.

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 a divestment occurred and the divestment penalty period.

**DECISION AND ORDER**

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

LMF/



**Lynn M. Ferris**

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) 763-0155; 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**

Christine Steen  
MDHHS-Wayne-82-Hearings

**Petitioner**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] AZ [REDACTED]

**Authorized Hearing Rep**

[REDACTED]  
[REDACTED]  
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