



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

SHELLY EDGERTON
DIRECTOR

[REDACTED]
[REDACTED]
MI [REDACTED]

Date Mailed: October 24, 2018
MAHS Docket No.: 18-009790
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 October 18, 2018, from Lansing, Michigan. Petitioner was represented by [REDACTED], Conservator and Authorized Hearings Representative. The Department of Health and Human Services (Department) was represented by Rolando Gomez, Hearings Coordinator and Jeff Welch, Assistance Payments Supervisor.

Petitioner's Exhibit 1 and Respondent's Exhibits A-J were admitted as evidence.

ISSUE

Did the Department properly impose a 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. Petitioner is a Medical Assistance (MA) beneficiary who is in Long Term Care (MA-LTC).
2. On November 2, 2017, Petitioner's attorney reported that Petitioner's homestead had been sold in October of 2017.

3. The attorney reported that the funds from the homestead sale had been spent down and provided appropriate documentation of how the funds were spent.
4. Among the items purchased from the spend-down list was a 2017 Dodge Caravan. Respondent's Exhibit A
5. On December 27, 2017, an extended care re-determination was processed. During the review of the case, the specialist noted a 2017 Dodge Caravan listed as an asset for Petitioner.
6. On December 27, 2017, a verification checklist was mailed to Petitioner requesting proof of title and registration for the new vehicle. Respondent's Exhibit B.
7. On January 19, 2018, a registration for a 2017 Dodge Caravan was provided as verification by Petitioner's Conservator.
8. The Department caseworker noted that Petitioner's vehicle was registered to Petitioner and to [REDACTED] as a co-owner.
9. The Department determined that per BEM 405, page 2, Medicaid Divestment Policy, a divestment penalty was applied because Petitioner had transferred partial ownership of the vehicle to [REDACTED].
10. The divestment was applied for the month of February of 2018 using half of the value of vehicle as determined by the Kelley Blue Book.
11. On January 19, 2018, a Healthcare Coverage Determination Notice was sent to Petitioner indicating that the divestment had been applied was sent to Petitioner. Respondent's Exhibit F.
12. The Notice indicated that the re-determination had been completed. Based on the information provided it has been determined that Petitioner was in divestment and would be given a divestment penalty period from February 1, 2018, to February 26, 2018. This is due to the use of funds to purchase a vehicle that is not a jointly owned per client statement in vehicle registration. The divestment penalty was calculated using the Kelley Blue Book value of \$13,944 for the vehicle.
13. The Notice also contained appeal information which indicated that the Department must receive the request for appeal within 90 days of the mailing date of the Notice. The request must be received on or before April 19, 2018, or Petitioner would not be granted a hearing. Respondent's Exhibit F.
14. On February 7, 2018, the Department specialist received a voicemail inquiry from [REDACTED] regarding the divestment penalty.
15. On February 14, 2018, after several missed telephone connections, the specialist left a voicemail message with [REDACTED] attempting to explain the divestment policy.

16. On March 7, 2018, [REDACTED] provided verification that she was Conservator for Petitioner and stated that she was required to be listed on the title of the 2017 Dodge Caravan because Petitioner is incapacitated.
17. On March 13, 2018, the specialist contacted Long Term Care Support for clarification as to the appropriateness of the divestment penalty and whether a divestment should be removed.
18. The Department could find no information contradicting that [REDACTED] was the co-owner of the vehicle.
19. At that point the specialist made a determination pursuant to BEM 405, page 16, which states: once a divestment penalty is in effect, return of or payments for resources **cannot** eliminate any portion of the penalty period already past. Respondent's Exhibit H.
20. On May 25, 2018, Long-Term Care Support replied to the specialist's inquiry. The LTC Support stated that the divestment was properly determined and that penalties could only be removed by work order if the penalty had been in error.
21. Based on the information available at the time, the specialist determined that the divestment was appropriate.
22. On June 20, 2018, the Certificate of Title was amended to indicate ownership in the vehicle as Petitioner and [REDACTED], Conservatorship.
23. On July 19, 2018, Petitioner's Authorized Hearings Representative contacted the Tuscola County Director stating that she was getting conflicting information about the divestment or an inaccurate divestment response.
24. On July 26, 2018, the Department of Health and Human Services Family Independence Manager, after several conversations attempting to explain divestment, instructed Petitioner's Conservator to file a hearing, as the Department determined the divestment could not appropriately be removed.
25. On September 6, 2018, a request for hearing was received by the Department disputing the divestment. In addition, Petitioner's Conservator and Authorized Hearings Representative communicated that she is a disabled child of Petitioner.
26. At hearing, Petitioner's Authorized Hearings Representative provided documentation that she is a Social Security benefit recipient, but not that such income is as a result of a disability. Petitioner's Representative did not provide evidence that [REDACTED] is a Disabled Adult Child.

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.

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.

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. The Department sent Petitioner Notice of Case Action (Divestment) on January 19, 2018. Petitioner's Representative filed a request for hearing on September 6, 2018, well beyond the 90-day time period. As such, this Administrative Law Judge lacks jurisdiction to even hold this hearing. The request for hearing must be **DISMISSED**.

In the alternative, because Petitioner was in contact with the Department on a continuous basis and continuously contesting the Divestment penalty, this Administrative Law Judge will address the substantive issue.

Pertinent Department policy states:

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.

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.

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 penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care (LTC, MIChoice waiver, or home help or home health services), and is not already part of a penalty period. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. That month cannot be counted as part of the penalty period. This does not include payments made by commercial insurance or Medicare. (Emphasis Added)

Note: If a past unreported divestment is discovered or an agency error is made which should result in a penalty, a penalty must be determined under the policy in place at the time of discovery. If a penalty is determined for an unreported transfer in the past, apply the penalty from the first day after timely notice is given; see Recipient Exception in this item. (Emphasis Added)

Timely notice must be given to LTC recipients and (BEM 106) waiver recipients before actually applying the penalty. Adequate notice must be given to new applicants. Ridges Eligibility Manual (BEM) 405, pages 14-15. (Emphasis Added)

This Administrative Law Judge finds that the 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. Policy dictates that an arm’s length transaction is one between two parties who are not related and who are assumed to have roughly the same bargaining power. By definition, a transaction between two relatives is not an arm’s length transaction. (Bridges Policy Glossary (BPG)), page 25. The divestment penalty must stand and was properly imposed. Petitioner divested assets that must be counted for Petitioner under Medical Assistance policy.

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.

Petitioners' Representative's statements on the record are not sufficient to rebut the Department's determination that divestment occurred. 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, during redetermination, it calculated and instituted the divestment penalty under the circumstances. The penalty period ended February 26, 2018, before the June 20, 2018 date that Petitioner returned the resources to Petitioner's sole ownership.

Petitioner's allegation that she was always the Conservator is a compelling equitable argument to be excused from the Department's program policy requirements.

Equity powers are not within the scope of authority delegated to this Administrative Law Judge pursuant to a written directive signed by the Department of Health and Human Services Director, which states:

Administrative Law Judges have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulations or overrule or make exceptions to the Department policy set out in the program manuals.

Furthermore, administrative adjudication is an exercise of executive power rather than judicial power and restricts the granting of equitable remedies. *Michigan Mutual Liability Co. v Baker*, 295 Mich 237; 294 NW 168 (1940).

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 under the circumstances. The Department's actions must stand as appropriate.

Accordingly, **Petitioner's Request for Hearing is DISMISSED for lack of timely filing of the Request for Hearing.** In the alternative, the Department's decision is **AFFIRMED.**

LL/dh

A handwritten signature in cursive script, reading "Randi Y. Fair", is written over a horizontal line.

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

Rolando Gomez
1365 Cleaver Road
Caro, MI 48723

Tuscola County, DHHS

BSC2 via electronic mail

D. Smith via electronic mail

EQAD via electronic mail

Petitioner

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Authorized Hearing Rep.

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