[redacted], MI [redacted]

Date Mailed: July 23, 2019
MOAHR Docket No.: 19-005169
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Janice Spodarek

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, an administrative hearing was held on July 17, 2019, from Lansing, Michigan.

Petitioner was represented by attorney [redacted] of [redacted] Michigan.
Witnesses for Petitioner were: None.
Petitioner's Exhibits admitted into evidence were: None.

Respondent Department of Health and Human Services (Department or Respondent) was represented by AAG Tonya Jeter.
Witnesses for the Department were: Donald Schlagatck, LTC Specialist, Bridget Heffron, Policy Specialist.
Respondent's Exhibits admitted into evidence: Exhibit A.85.

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] 2017, Petitioner filed an LTC MA application. Petitioner was approved for LTC Medicaid. Petitioner's baseline date is February 23, 2018.

2. Petitioner entered Long Term Care, suffering from Alzheimer's.

3. Petitioner's first date in LTC is not in the evidentiary record. On March 5, 2018, Petitioner's case was transferred to Monroe County with an unprocessed redetermination.

4. Since 2014, Petitioner has had a guardian/conservator, [redacted] Petitioner's daughter.

5. In 2009 Petitioner transferred her homestead property to herself and [redacted], her son, "with sole rights of survivorship…" creating joint ownership.

6. In December of 2017, Petitioner sold her life estate interest in the joint property that she owned with her son to her son, [redacted] At the time Petitioner sold her life estate, Petitioner was 83. The SEV was $270,800. Petitioner failed to inform the Department within 10 days.

7. Petitioner has a guardian who petitioned the Probate court to approve the sale of the life estate interest on behalf of Petitioner. On December 13, 2017, Probate Judge Conlon approved the sale of the life estate for $30,000 based on a Michigan Department of Treasury actuarial table for calculation of inheritance tax computation of present clear market value, Revenue Administrative Bulletin 1989-44. The Department of Health and Human Services was not notified of the court action.

8. On December 14, 2017, a warranty deed was issued by Petitioner's conservator to Petitioner's son, Daniel Hawk, for the remainder of the life estate for $30,000.

9. After the sale of the home and costs, Petitioner received $28,500. On May 14, 2019, the Department first became aware that Petitioner's conservator used the money to purchase a Ford F450 Super Duty horse truck and listed her name along with Petitioner on the title of the vehicle, with "full rights to survivor." Petitioner's conservator represented that Petitioner always had pickup trucks and wanted another horse truck. Petitioner will permanently reside in the nursing home and will never be able to use the truck.

10. The application of the life estate factors in BEM 400, p. 69, Exhibit II, determine that Petitioner's life estate factor at the time of the transfer was .38642, which would result in a larger FMV of the life estate depending on the amount of interest in the real property. The Department determined that the FMV based on the Medicaid table was $74,642.00, and that Petitioner divested $74,642.00. Exhibit A.1.

11. On May 20, 2019, the Department issued a Health Care Coverage Determination Notice informing Petitioner that Petitioner was not eligible for LTC Medicaid from April 1, 2019, through April 14, 2020, due to a transfer of assets for less than their FMV.

12. The Department policy witness testified that the Department failed to send proper Notice of Case Action in this matter.

13. At the administrative hearing the Department testified that subsequent to submission of the hearing summary and Notice of Health Care Determination notice in this matter, the Department modified its calculation and determined that Petitioner divested ½ of her property interest as it was jointly owned, resulting in a calculation of ½ of the SEV-- $135.400 (2017 SEV) x .38642 = 52,321.27 less the $30,000 amount sold for = a divestment on the real estate of $22,321.27. In addition, the Department calculated that Petitioner divested the money spent on the truck jointly owned with her daughter — the purchase price of the vehicle = $28,500.000 totaling $50,821.27 for a total divestment amount.

14. After Petitioner's case was transferred to Monroe county, due to a failure to timely verify assets, Petitioner's case closed on April 1, 2019. Petitioner reapplied on [redacted], 2019, with 1-month retro. Petitioner's case was reopened on May 20, 2019, and the Department's testimony was that it was reopened with a divestment penalty for which to date, the Department has not issued correct notice. At the administrative hearing, the Department testified that it was amending its initial divestment amount and penalty period to the amount and dates on Exhibit A.39, for which to date, no notice has been issued on the new calculation. The Department also failed to present evidence as to which LTC amount was applied to which dates as applied to each divested asset.

15. On May 21, 2019, Petitioner filed a hearing request. The determination notice states that if Petitioner filed a request by June 30, 2019, she would continue to receive benefits; the hearing summaries state that benefits were not restored; the Department witness testified that benefits were restored.

16. On July 17, 2019 the hearing was held.

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, p. 1.

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 also45 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 (BEM) 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. 6.
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, 400 pp. 1-2. 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 400, pp. 1-3.

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, 400, pp. 1-3.

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, 400, p. 7. An application does not authorize MA for future months if the person has excess assets on the processing date.

The SSI related MA asset limit for SSI related MA categories that are not Medicare savings program or QDWI is $2000.00 for an asset group for one person and $3000.00 for an asset group of 2 people. BEM, 400 p. 8.

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, 400, p. 10. 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. BEM 405, p. 1.

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. BEM 405, p. 1.

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, 405, p. 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, 405, pp. 1-2.

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).
- Purchasing an asset which decreases the group's net worth and is not in the group's financial interest (divestment).

Also see Joint Owners and Transfers for examples. BEM 405, p. 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.

    - Brother or sister who:

        Is part owner of the homestead, and

        Lived in the homestead for at least one year immediately before the client's admission to LTC or BEM 106 waiver approval. BEM 405, pp. 10-11.

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, 405, p. 15.

Policy states that there is no minimum and no maximum limit on the penalty period for divestment. BEM 405, p. 12.

As to computing the penalty period, policy states that the Department is to compute the penalty period on the total uncompensated value of all resources divested. When totaled, the Department is to then divide the total uncompensated value by the average monthly private LTC cost in Michigan for the client's baseline date. This result gives the number of full months for the penalty period. The fraction remaining is multiplied by 30 to determine the number of days for the penalty period in the remaining partial month. BEM 405, pp. 12-13.

The Department is not to apply the penalty period to any month that an individual is not eligible for Medicaid and actually in LTC (or home health, home help, or the MIChoice Waiver program). BEM 405, p 13. LTC Costs are listed in BEM 405 pp. 13-14 for each calendar year.

Policy states that the department can cancel a divestment penalty if either of the following occurs before the penalty is in effect:

- All the transferred resources are returned and retained by the individual.

- Fair market value is paid for the resources.

Policy further states that the Department can recalculate the penalty period of 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, 405, pp. 15-16.

With regards to promissory notes/loans and divestment policy, applicable asset policy is found in BEM 400 which states:

> A promissory **note** is a written promise to pay a certain sum of money to another person at a specified time. Promissory notes are loans. The promissory note may call for installment payments over a period of time (installment note) or a single payment on a specified date. The note is an asset to the lender. The value of the note is the outstanding balance due as of the date of application for long term care, home help, waiver services, or home health services.
>
> All money used to purchase a promissory note or loan, **are** transfers of assets. They are a transfer of assets for less than fair market value unless the following are also true:
>
> The repayment schedule is actuarially sound; and
>
> The payments are made in equal monthly amounts during the term of the agreement with no deferral of payments and no balloon payments; and
>
> The note must prohibit the cancellation of the balance upon the death of the lender.
>
> See *BEM 405, Uncompensated Value* to determine the value of any promissory note or loan as a transfer for less than fair market value.
>
> **Bona Fide Loans**: A loan is bona fide if it meets all the following requirements:

It is enforceable under state law.
The loan agreement is in effect at the time of the transaction.
The borrower acknowledges an obligation to repay.
The loan document includes a plan for repayment.
The repayment plan is feasible.

Count principal payments from a bona fide loan or promissory note are the return of the principal as an asset in the month received. Payment of interest on a bona fide loan and all payments from a loan or promissory note which is not bona fide is countable unearned income.

The estate recovery program needs to know about a promissory note for the state to recover Medicaid expenses. Please send a copy of the promissory note to the estate recovery unit at: MDHHS-EstateRecovery@michigan.gov. BEM 400, p 46.

Jointly owned assets are assets that have more than one owner. For joint cash and retirement plans the Department must count the ***entire*** amount unless the person claims and verifies a different ownership. Then, each owner's share is the amount they own. BEM 400, page 11. An asset is unavailable if all the following are true, and an owner **cannot** sell or spend his share of an asset:

Without another owner's consent.
The other owner is not in the asset group.
The other owner refuses consent.

BEM 400, pp. 11-12.

Department 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 length transaction. (Bridges Policy Glossary (BPG)), p. 25.

Last, under certain circumstances hardship may be an issue where a divestment penalty incurs.

Department policy defines UNDUE HARDSHIP as:

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. BEM 405, p. 16.

Here, the parties essentially do not disagree as to the facts: While Petitioner was a beneficiary of the federal Medicaid welfare program which was paying for her LTC in a nursing home, Petitioner initially had an excluded interest in a property owned jointly with her son. Petitioner then sold her remaining interest in the property, her life estate, using a Department of Treasury inheritance actuarial table valuing the life estate as $30,000. The Medicaid life estate actuarial tables valued Petitioner's life estate at $52,000. In addition, Petitioner took the proceeds of the sale and purchased a horse truck for $28,500 placing the title in her conservator and her name, with right of survivorship. The crux of the argument is that Petitioner argues that the transfers were at arm's length and not divestment; the Department argues that the transfers constitute divestment triggering a penalty required by the federal Medicaid program the State of Michigan administers. The correct amount of proposed divestment by testimony of the Department as the administrative hearing, and not statutory notice, is $52,000 for both transfers.

The undersigned finds the transfers herein to be transfers for less than FMV in both instances for the reasons set forth below.

First, federal Medicaid law mandates that the life estate actuarial tables be used in evaluating a life estate which results in an FMV of $52,000 here. Petitioner offered no legal authority that would allow the use of the Michigan tax inheritance tax table to supersede the federal mandate required by the Social Security Act, Sections 1902(a)(18), 1917. Michigan can be subject to substantial financial penalties for failing to carry out its mandates in following federal law and regulations while administering the federal Medicaid program. These regulations require the use of Exhibit II actuarial table to establish the value of a life estate. Petitioner failed to meet her burden of proof and thus, the difference between the value of $52,000 and the 30,000 received, $22,000 is the correct amount Petitioner divested in the sale of her real estate. As noted, Petitioner did not disclose the transaction and did not use the money to pay for her LTC.

Regarding the horse truck, while Medicaid law allows an individual one vehicle, here, Petitioner purchased a vehicle with monies that could have gone toward the payment for her LTC. In addition, Petitioner does not have full legal rights to the vehicle. Rather, Petitioner's money was sued to purchase and title the vehicle in joint ownership. Petitioner gave up her right to ownership of the truck, which resulted in a transfer for less than the FMV. The truck is also a divested asset, totaling $28,500.

While the Department made this argument at hearing, the Department to date has not properly issued notice as to the amount divested as argued at hearing (as it previously calculated and noticed a different amount). Nor has the Department issued proper notice to Petitioner specifically indicating the calculation of the divestment penalty. The only notice issued—the [redacted] 2019 Health Care Coverage Determination Notice had no divestment amount, and an incorrect penalty period. Moreover, the Department stipulated at hearing that it was not the correct notice.

For these reasons and for the reasons state above, the unsigned upholds the Department's decision to find that Petitioner divested a total of $52,000.00. The Department is reversed with regards to the [redacted] 2019 notice and ordered to recalculate and issue proper notice as required under federal and state law.

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 not established by a preponderance of evidence that it correctly calculated the Divestment amount and correctly calculated the Divestment penalty period.

Accordingly, the department's decision is **AFFIRMED IN PART** with regard to the determination that Petitioner divested the assets with regard to the life estate transfer and the purchase of a horse truck.

The department Is **REVERSED IN PART** with regard to the divestment penalty period and the total calculated amount, which the Department verbally amended at hearing to be $52,000.

Within 10 days of this Decision and Order, the Department is **ORDERED** to reissue proper notice stating:

1) the correct divestment penalty based on the $52,000 amount in compliance with Department policy, and

2) containing the corrected penalty period, as required under federal and state law.

Janice Spodarek

JS/dh

Janice Spodarek
Administrative Law Judge
for Robert Gordon, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

DHHS

Pam Farnsworth
903 Telegraph
Monroe, MI 48161

BSC4 via electronic mail

EQAD via electronic mail

D. Smith via electronic mail

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