STATE OF MICHIGAN
GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

ORLENE HAWKS
DIRECTOR

[redacted]

Date Mailed: March 18, 2019
MAHS Docket No.: 19-000171
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, an in-person hearing was held on March 7, 2019, from Allegan, Michigan. Petitioner [redacted] (Petitioner) is in Long Term Care (LTC) and did not attend the hearing.

Petitioner was represented by Attorney Lindsey Gorsline (P81753). Petitioner called [redacted] (Petitioner's daughter and Durable Power of Attorney) and Attorney Haans Mulder (P61844) as witnesses.

The Department of Health and Human Services (Department or Respondent) was represented by Assistant Attorney General Kyle Bruckner (P82625) and Assistant Attorney General Geraldine Brown (P367601). The Department called Deborah Vist, Eligibility Specialist, as a witness. Bridgette Heffron, Eligibility Specialist, also appeared at the hearing.

Petitioner's Exhibits A-F (Pages 1-112) were admitted as evidence.

Respondent's Exhibit 1 pages 1-119 were admitted as evidence

ISSUE

Did the Department properly deny Petitioner's application for Medical Assistance (MA-LTC)?

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 currently a single woman, currently residing at [redacted] ([redacted]) as a long-term resident, in Holland, Michigan due to her mobility and cognitive issues. She is 87 years old and requires 24-hour care.

2. Until August 2016, Petitioner resided in her own home located at [redacted] in Holland, Michigan.

3. At some time in August 2016, Petitioner moved in with her daughter at [redacted].

4. On September 16, 2016, per Ottawa County property tax records, Petitioner sold her home at [redacted] for $170,000.00.

5. Petitioner's Representative alleges that the proceeds from the sale of the home were transferred to an Irrevocable Trust.

6. On October 26, 2016, a Warranty Deed indicated that the property at [redacted] was transferred from Petitioner to Steve Crosley for $201,900.00.

7. On October 30, 2016, Petitioner's daughter alleges that the guest house at [redacted] was completed.

8. Petitioner's daughter alleges that Petitioner moved in to [redacted], where Petitioner resided until November 4, 2017.

9. On November 2, 2016, a warranty deed indicates that the property at [redacted] was transferred from Hansen Trust to Steve Crosley for $0.

10. On November 4, 2017, Petitioner fell and sustained injuries.

11. On November 10, 2017, Petitioner had surgery and entered rehabilitation on November 13, 2017, until her Medicare ran out.

12. Petitioner then transferred to Long Term Care.

13. On [redacted], 2018, Cunningham-Dalman, P.C., submitted a 167-page application for Long Term Care Medical Assistance for Petitioner, requesting eligibility effective February 1, 2018.

14. At Page 20 of the documents attached to the application, Petitioner's Representative alleged that Petitioner owned the following non-countable assets: life lease at [redacted] – ($72,660.12) – [redacted] checking account – ($835.07) & [redacted] – ($1,000.00), an actuarially sound promissory note – ($27,720); a vehicle – ($24,641.00) and a funeral contract – ($14,092.92).

15. On August 17, 2018, the Department Caseworker sent Petitioner's Representative an e-mail verification checklist of items to be provided to the Department by August 27, 2018. (Respondent's Exhibit 1 pages 17-20)

16. On August 23, 2018, a second verification checklist was provided to Petitioner's Representative with verifications due on September 4, 2018.

17. On December 5, 2018, a third verification checklist was provided to Petitioner's Representative with a due date of December 17, 2018.

18. On December 18, 2018, one hundred thirty-seven pages (137) of documents were received by the Department from Petitioner's Representative.

19. On December 21, 2018, the Department sent Petitioner a Health Care Coverage Determination Notice indicating: Your Long-Term Care Medicaid application dated [redacted], 2018, has been denied because the Department is unable to verify the value of a resource that has been used to pay for Petitioner's expenses. This resource includes: providing the funds ($65,000) to Petitioner on February 22, 2017, to allow her to pay for the residential life lease on February 23, 2017; providing ($34,000) to purchase a 2013 Lexis on December 22, 2016; several miscellaneous transfers to and from account X8388 (daughter's personal account), an X4819 (unknown account) and an ($89,392.16) deposit into the X1790 from (unknown account) on February 7, 2018, as a means of returning gifted funds.

20. The Department also has not received acceptable documentation to verify that Petitioner actually resided at [redacted], Fennville for one year following the purchase of the residential Life Lease, to qualify [redacted] for the homestead exclusion.

21. On December 26, 2018, the Department received an asset detection notice that revealed the balance in Petitioner's [redacted] Bank account x1790 was: March 1, 2018 ($7,781.57); April 1, 2018 ($8,543.69); May 1, 2018 ($14, 452.94); and June 1, 2018 ($13,257.23).

22. Petitioner appeared to be over asset limit of $2,000 for the months of March 2018-June 2018.

23. On January 2, 2019, the Department received a Request for Hearing to contest the denial of Medical Assistance benefits.

24. On January 14, 2019, a pre-hearing conference was held.

25. On January 16, 2019, the Michigan Administrative Hearing System received a copy of the hearing summary and attached documents from the Department.

26. On January 26, 2019, Petitioner filed a Request for an In-Person Hearing.

27. The Department conceded on the record that the application was not initiated or processed timely.

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.

Title XIX of the Social Security Act, commonly referred to as "The Medicaid Act," provides for Medical Assistance services to individuals **who lack the financial means to obtain needed health care**. 42 U.S.C. §1396. (Emphasis added)

The Medicaid program is administered by the federal government through the Centers for Medicaid and Medicare Services (CMS) of the Department of Health and Human Services (DHHS). The state and federal governments share financial responsibility for Medicaid services. Each state may choose whether or not to participate in the Medicaid program. Once a state chooses to participate, it must operate its Medicaid program in accordance with mandatory federal requirements, imposed both by the Medicaid Act and by implementing federal regulations authorized under the Medicaid Act and promulgated by HHS.

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*.

In this case, Petitioner is a single woman. She is a group size of one person for purposes of Medical Assistance benefit eligibility determination. Under BEM, Item 400, an eligible Medical Assistance recipient may not possess in excess of $2000 in assets.

Department policy indicates:

Assets mean cash, any other personal property and real property. **Real property** is land and objects affixed to the land such as buildings, trees and fences. Condominiums are real property. **Personal property** is any item subject to ownership that is **not** real property (examples: currency, savings accounts and vehicles). BEM, Item 400, page 1. Countable assets **cannot** exceed the applicable asset limit. Not all assets are counted. An asset is countable if it meets the availability tests and is **not** excluded. Available means that someone in the asset group has the right to use or dispose of the asset. BEM, Item 400, page 5. All types of assets are considered for SSI-related MA. BEM, Item 400, page 2. For Medicare Savings Programs (BEM 165) and QDWI (BEM 169) the asset limit is:

- $4,000 for an asset group of one.
- $6,000 for an asset group of two.

For all other SSI-related MA categories, the asset limit is:

- $2,000 for an asset group of one.
- $3,000 for an asset group of two. BEM, Item 400, page 5.

BEM, Item 401, addresses Medical Assistance Trusts. Policy defines trust as a right of property created by one person for the benefit of himself or another. It includes any legal instrument or device that exhibits the general characteristics of a trust but is not called a trust or does not qualify as a trust under state law. Examples of such devices might be annuities, escrow accounts, pension funds and investment accounts managed by someone with fiduciary obligations. A trustee is defined by policy as the person who has the legal title to the assets and income of a trust and the duty to manage the trust with the benefit of the beneficiary. BEM, Item 401, p. 1.

The Department caseworker is to refer a copy of the trust to the Medicaid Eligibility Policy Section for evaluation. An evaluation of the trust advises local offices on whether the trust is revocable or irrevocable and whether any trust income or principle is available. Advice is only available to local offices for purposes of determining eligibility or for an initial assessment when a trust actually exists. Advice is not available for purposes of estate planning including advice on proposed trust or proposed trust limits. BEM, Item 401, p. 2.

The TRUST

The Medicaid Trust Unit/eligibility policy section must determine if a trust established on or after August 11, 1993, is a Medicaid trust using Medicaid trust definitions and Medicaid trust criteria. The policy unit also must determine if the trust is a Medicaid trust and whether there are countable assets for Medicaid trusts; whether there is countable income for Medicaid trusts; and whether there is transfers of assets for less than fair market value. BEM, Item 401, p. 3.

A Medicaid trust is a trust that meets conditions 1 through 5 below:

1. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, an MA post-eligibility patient-pay amount, a divestment penalty or an initial assessment amount. A person's resources include his spouse's resources (see definition).

2. The trust was established by:

   - The person.
   - The person's spouse.
   - Someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or the person's spouse, or an attorney, or adult child.

- Someone else (including a court or administrative body) acting at the direction or upon the request of the person or the person's spouse or an attorney ordered by the court.

3. The trust was established on or after August 11, 1993.

4. The trust was not established by a will.

5. The trust is **not** described in Exception A, Special Needs Trust, or Exception B, Pooled Trust in this item. BEM, Item 401, pages 5-6.

In this case, the Department has determined that the Arlene Hansen Irrevocable Trust meets all the criteria of a Medicaid Trust. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, and MA post-eligibility patient pay amount, a divestment penalty or an initial asset amount.

The trust was established by the Petitioner in June 27, 2008, and Amended July 22, 2011, and July 8, 2014. The trust was established/amended on or after August 11, 1993. The trust was not established by will. The trust does not meet the condition of an exception A, special needs trust; or exception B, pooled trust as described in BEM, Item 401.

In this case, the Trust/Annuity Evaluation determined that the trust does not provide for distributions of income or principal to Petitioner. Since there is no condition under which the principal and/or income could be paid to or on behalf of Petitioner, the trust principal and income are non-countable for purposes of determining her eligibility.

However, divestment may have occurred. Divestment is defined in BEM 405, p.1 as a transfer of a resource by the client or spouse that is within a specified time, is a transfer for less than fair market value, and is not listed under “Transfers That Are Not Divestment” in BEM 405.

BEM 401, page 5 states: “Any portion of the principal or income that could never be paid to or on behalf of the person is transferred for less than fair market value.” Furthermore, BEM 405, page 7, Value of Transferring Right to Income, states: “When a person gives up his right to receive income, the fair market value is the total amount of income the person could have expected to receive.” Therefore, the transfer of assets, income, or right to receive income to the trust was for less than fair market value. In addition, this transfer is not listed under “Transfer That Are Not Divestment.” **Accordingly, this transfer is a divestment if it occurred during the look-back period**. (Emphasis Added)(Respondent’s Exhibit 1 pages 117-119)

Petitioner’s Representative alleges the following:

The [redacted] Trust was funded and defunded within the look-back period

and as of February 2018, the Trust no longer had any assets. The funds in the Trust had been spent to cover Petitioner's costs for care and expenses. The transfer of the asset to the Trust was divestment and the Department should have approved Petitioner for Medical Assistance with a divestment penalty rather than finding that Petitioner was ineligible for Medical Assistance benefits.

Petitioner moved to her daughter's property in August 2016, has a life lease with her daughter at [redacted]. Petitioner's daughter resided at [redacted] and became Petitioner's landlord on September 1, 2016.

On November 2, 2016, Petitioner moved out of her daughter's home and into her new home. (Petitioner's Exhibit Page 27)

Petitioner had surgery on November 10, 2017 and was transferred to [redacted] until her Medicare ran out. She was transferred to the [redacted] as a long-term resident, where she remains. Based on two times the current state equalized value (SEV) ($215,000) and the life lease factor (0.33764) the life lease has a current value of $72,660.12. This life lease is Petitioner's homestead, where she has resided for more than one year following the purchase, and therefore an exempt asset as outlined in BEM 400. (Respondent's Exhibit 1 pages 22-24)

On October 2, 2018, Petitioner's daughter created an Amendment to Residential Life Lease indicating that it was the intention of the Landlord that the tenant have life lease rights over he entire [redacted] property which is comprised of 3 adjoining parcels and amended paragraph 1 of the Residential Life Lease as follows: Leased Premises. Landlord leases to Tenant and Tenant leases from Landlord those premises……commonly known as: [redacted] and [redacted]. (Respondent's Exhibit 1 pages 39-40)

This Administrative Law Judge finds that it is unclear, even after viewing the exhibits in this case, exactly where the proceeds from the sale of Petitioner's home on [redacted] went. Petitioner alleges that the funds went into the trust but there is no documentation evidence that the funds were placed into the trust. Nor is there documentation evidence which establishes how or when the trust was defunded.

The HOMESTEAD

The **statute of frauds** is a law enacted in all states that requires that certain agreements be in writing and signed by persons against whom enforcement of the contract may be sought. The **statute** will apply to any transfer of an interest in **real estate** and to **leases** with a duration longer than one year. **Michigan's** version of the **statute of frauds**, **MCL** 566.132(1), provides that "an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged."

A life estate or life lease gives the person who holds it certain rights to property during the person's lifetime. Usually, the right is the right to live on the property. The person holding the life estate or life lease can sell it but does not own the actual property and normally cannot sell the actual property.

Use the value of the life estate to determine if the purchase price was for fair market value when a person purchases a life estate in another individual's home. When a person purchases a life estate in another individual's home, **they must actually reside there for at least one year after the date of purchase to qualify for the homestead exclusion**. If the person resides in the home for less than one year, treat the transaction as a transfer of assets. The amount of the transfer is the entire amount used to purchase the life estate. See BEM 405, MA DIVESTMENT to determine the penalty period. BEM 400, pages 33-34 (Emphasis added)

The original life lease, dated September 10, 2016, submitted by Petitioner's Representative, does not indicate that Petitioner was to reside or hold a life lease on all three (3) properties owned by her daughter (which includes three different legal parcel numbers). The life lease indicated that Petitioner was to retain a life lease at [redacted], while Petitioner's daughter resided at [redacted]. Thus, Petitioner did not retain a life lease in the entire (three parcels) property that was owned by Petitioner's daughter at the time of the creation of the lease, nor at the date of application.

The Amendment to the Residential Life Lease was entered into on the 2nd Day of October 2018, some months after the application date and is not retroactive to the original 2016 date, especially in light of the fact that Petitioner has not resided at her daughter's property since November 2017. The Department also indicates that there is some confusion as to whether Petitioner resided at [redacted] for at least a year in accordance with Department policy. Testimony on the record indicates that Petitioner resided with her daughter at [redacted] from August 2016 until she was moved to the granny flat at [redacted] in October 2016. Petitioner's Representative alleges as scrivener's error for not including all three properties in the original life lease.

This Administrative Law Judge finds that there was contradictory information provided to the Department involving the residential life lease agreement; parcel # and value of the property where the "guest" or "granny" premises was built (specifically for Petitioner), purchase/occupancy dates, and where the funds came from for Petitioner to pay the Life Lease in February 2017. In addition, the Department cannot be expected to deduce when an applicant has made a scrivener's error in a legal document that the applicant submitted for eligibility determination. The Department can only rely upon Petitioner to provide accurate documentation for eligibility determination. Petitioner's allegation of a scrivener's error is an equitable argument to be excused for the Department's program policy requirements. This Administrative Law Judge has no equity powers. A review of Petitioner's case reveals that the Department budgeted the correct amount of income earned by Petitioner. Petitioner's protected income level and amounts are set by

Medicaid policy and cannot be changed by the Department or this Administrative Law Judge.

The TRANSACTIONS

Department policy also establishes that none of the transactions between Petitioner and her Durable Power of Attorney, (her daughter) were Arm's length transactions. An Arm's Length Transaction is defined as a transaction between two parties who are not related and who are presumed to have roughly equal bargaining power. It consists of all the following three elements:

- it is voluntary
- each party is acting in their own self-interest
- it is on an open market.

By definition a transaction between two relatives is not an arm length transaction.

(Bridges Policy Glossary (BPG), page 25)

Thus, each transaction is afforded appropriate scrutiny under the Departmental policy.

Verification means documentation or other evidence to establish the accuracy of the client's verbal or written statements.

Obtain verification when:

- Required by policy. Bridges Eligibility Manual (BEM) items specify which factors and under what circumstances verification is required.
- Required as a local office option. The requirement must be applied the same for every client. Local requirements may not be imposed for Medicaid Assistance (MA).
- Information regarding an eligibility factor is unclear, inconsistent, incomplete or contradictory. The questionable information might be from the client or a third party.

Verification is usually required at application/redetermination and for a reported change affecting eligibility or benefit level. (Bridges Administrative Manual (BAM) 130, page 1)

Medicaid

Allow the client 10 calendar days (or other time limit specified in policy) to provide the verification requested. Refer to policy in this item for citizenship verifications. If the client cannot provide the verification despite a reasonable effort, extend the time limit up to two times.

At renewal if an individual is required to return a pre-populated renewal form, allow 30 calendar days for the form to be returned.

At application, renewal, ex parte review, or other change, explain to the client/authorized representative the availability of your assistance in obtaining needed information. Extension may be granted when the following exists:

- The customer/authorized representative need to make the request. An extension should not automatically be given.

- The need for the extension and the reasonable efforts taken to obtain the verifications are documented.

- Every effort by the department was made to assist the client in obtaining verifications. (BEM 130, page 8)

Petitioner has not established good cause for her failure to return sufficient information to the Department that would have allowed the Department to determine Petitioner's eligibility or lack thereof. Though Petitioner submitted hundreds of pages of documents, it is still unclear to this Administrative Law Judge (who does not conduct eligibility determinations) what funds belonged to whom at any given time during the application processing period.

There has been no clear accounting of the source and/or value of liquid assets that were available to Petitioner even after months of discussions and submission of several hundred pages of paperwork. It is unclear when the trust was funded, with what funds it was funded and when the trust was unfunded. Though the legal Department made a determination that the trust account was not accessible to Petitioner, there was insufficient accounting of the funds that were alleged to be in the trust account. Also, Petitioner had a separate address from Petitioner's daughter. She resided on a separate legal parcel of land. She cannot legally claim three separate parcels as land which she resided on. She certainly cannot legally claim to have simultaneously resided at two separate addresses for her principal domicile so that she can increase the amount she is allowed for a homestead exemption. Though Petitioner is allowed to exempt a homestead, she is at most limited to the $65,000.00 life lease amount at the time of application. Though BEM 400, page 35 provides that any other related buildings on adjoining land be included in the homestead exemption, there are three distinct legal parcels, of which Petitioner has a life lease at [redacted], only. Petitioner's argument that all the lands are 'adjoining' and somehow are one for purposes of homestead determination is not the legal reality in this case.

On February 7, 2018, Petitioner's daughter alleges that she returned gift to Petitioner a cashier's check in the amount of $89,392.16, which was deposited into Petitioner's checking account. On only one day, February 27, 2018, did Petitioner's balance fall below $2,000 ($835.07) in this one account. The origin of the 'gift' or return of gift is unclear.

A Bank Statement from February 6, 2018-March 5, 2018, indicates that beginning balance was $5,017.19. Deposits were made into the account in the amount of $100,375.17. $94,672.98 was withdrawn. The ending balance was $10,509.56. There is no explanation as to the origin of the monies. (In excess of the $2,000 allowable assets).

The Department's case is established by a preponderance of the evidence presented. A preponderance of evidence is evidence which is of a greater weight or more convincing than evidence offered in opposition to it. It is simply that evidence which outweighs the evidence offered to oppose it *Martucci v Detroit Commissioner of Police*, 322 Mich 270; 33 NW2d 789 (1948).

In the alternative, on December 26, 2018, the Department received an asset detection notice that revealed the balance in Petitioner's [redacted] Bank account x1790 was: March 1, 2018 ($7,781.57); April 1, 2018 ($8,543.69); May 1, 2018 ($14,452.94); and June 1, 2018 ($13,257.23). This Administrative Law Judge finds that Petitioner appears to be over the asset limit of $2,000 for these months, and had Petitioner disclosed the bank account amounts in a timely manner, the Department would have denied Petitioner's application because Petitioner retained in excess of $2,000.00 in countable, available assets.

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

Petitioner’s position is that Petitioner is eligible for Medical Assistance and that divestment occurred. Petitioner also alleges that Petitioner’s daughter returned at least some previously divested funds to Petitioner and that Petitioner should be subject to a divestment penalty instead of denial of eligibility.

The Department’s position is that the divestment penalty may only be cancelled if “all the transferred (given away) resources are returned and retained by the individual” or “fair market value” is paid for the resources. The penalty period may only be recalculated if “all of the transferred resources are returned”, or “full compensation is paid for the resource.” PEM, Item 405, page 12.

This Administrative Law Judge finds that the Department policy is explicit. Policy 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 a determined divestment period can be triggered. In this case, there is no established eligibility for Medical Assistance. Thus, the issue of divestment or whether or not there has been return of assets cannot be reached. Even if it were reached in this case, it is still unclear that all "divested" or "gifted" assets are returned to Petitioner. The Department's decision must be upheld.

DECISION AND ORDER

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 has established by the necessary competent, material and substantial evidence on the record that it acted in accordance with Department policy when it denied Petitioner's application for Medical Assistance (Long Term Care) because Petitioner failed to provide sufficient eligibility determination documentation. The documentation was confusing and appeared incomplete. This Administrative Law Judge also finds that the evidence on the record indicates that Petitioner possessed in excess of $2,000.00 in countable available assets for the months of March 2018 through June 2018, evidence of which, Petitioner failed to disclose to the Department.

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

LL/hb

Landis Lain
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 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:

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