[redacted], MI [redacted]

Date Mailed: April 10, 2020
MOAHR Docket No.: 19-013631
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, a telephone hearing was held on February 26, 2020, from Lansing, Michigan.

Petitioner was represented by Attorney Michael T. VanTubergen, of Grand Haven, Michigan.

Witnesses for Petitioner: [redacted]

Respondent, Department of Health and Human Services (Department or Respondent), was represented by Assistant Attorney General (AAG), H. Daniel Beaton, Jr.

Witnesses for the Department: Alicia Jorgenson, Long Term Care (LTC) Eligibility Office; Paul Bowmaster, General Services Program Manager; Kelly Wager, LTC Eligibility Specialist

Respondent's Exhibits offered and admitted into evidence: Exhibit A.90.

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 May 16, 2019, Petitioner filed a Medicaid (MA) Long Term Care (LTC) application with the Michigan Department of Health and Human Services (DHHS) for an initial asset assessment (IAA) in Kent County.

2. On June 27, 2019, the Department issued an initial asset assessment (IAA), giving Petitioner and his spouse the minimal spousal protected amount of $25,284.00, without counting business assets, with an initial determination date of January 9, 2019.

3. On July 1, 2019, the Department approved MA with a retro back to February 2019 (baseline).

4. On July 16, 2019, Petitioner's case was transferred to Ottawa County with an LTC facility change.

5. On September 30, 2019, Petitioner's attorney contacted the DHHS regarding the sale of [redacted], a business owned by Petitioner, who was the sole stockholder.

6. Pursuant to an inquiry regarding this case, on October 8, 2019, the local DHHS office was instructed by the DHHS Bureau of Legal Affairs (LTC support office) to redo the IAA and include the value of the business, which resulted in an increase in the protected spousal amount to $123,600.00 (based on the 2018 maximum) with a December 24, 2018, IAA date. Exhibit A.54.

7. On October 10, 2019, [redacted] was sold for $280,000.00 on a land contract containing two notes with balloon payments.

8. On November 18, 2019, the Department issued notice approving Petitioner's new protected spousal amount of $123,600.00.

9. On November 26, 2019, the Department issued a Notice of Case Action notifying Petitioner of a divestment penalty beginning January 1, 2020, for $167,147.50 for one year, eight months and six days. The penalty was calculated using a 2018 average cost of care due to the sale of [redacted] on land contract with balloon payments.

10. On December 20, 2019, Petitioner filed a hearing request. At the January 2, 2020 prehearing conference, an error in the calculation was discovered, adjusted by the Department to a 2019 baseline date, resulting in a positive action for Petitioner. On January 3, 2020, the Department issued a new Benefit Notice modifying the penalty period to January 1, 2020, through August 22, 2021, in the amount of $167,147.50 at a monthly cost of care at $8,469.00 with a baseline 2019 date, resulting a one year, seven month and 22-day divestment penalty period. Exhibit A.42-45.

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 60 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)*. While Petitioner's counsel seemed to question Medicaid eligibility despite a divestment penalty, 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 State of Michigan DHHS department policy states in part:

> 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. An application does not authorize MA for future months if the person has excess assets on the processing date. BEM, 400, p 7.
>
> 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 400, which discusses Land Contracts states in part:

> Land Contracts
> SSI-Related MA Only
>
> A land contract is a form of seller financing. It is similar to a mortgage, but the buyer makes payments to the real estate owner (seller) until the purchase price is paid in full. A homeowner might also sell their home via a sale-leaseback agreement; see definition in this item. A land contract does not have to be recorded in Michigan.

The person who sold the property is the holder of the note. The note is the holder's asset.
Example: John sells land to Irma on a land contract. John is the land contract holder. The land contract is John's asset. The land is Irma's asset.

The value of a land contract is the amount it can be sold for in the holder's geographic area on short notice (usually at a commercial discount rate) minus any lien on the property the holder must repay.

A land contract may be treated as a transfer of assets unless all the following are 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 contract must prohibit the cancellation of the balance upon the death of the lender.

See BEM 405, Uncompensated Value, to determine the value of any land contract which does not meet all of the bullets listed in this policy. BEM 400, p 43-44.

Department policy on MA Divestment regarding uncompensated value is found in BEM 405 which states in relevant part:

Uncompensated Value:

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.

BEM, Item 405, further 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). BEM 405, p 2.

Also see Joint Owners and Transfers for examples. BEM 405, p 2.

Specifically, regarding transfers to an LLC, policy requires the Department to treat transfers to an LLC as a divestment unless the client retains the rights to the asset or income invested and may withdraw the asset invested on demand. BEM 405, p.3. In addition, policy indicates that the Department is to treat transfers to an LLC that has no discernible product (goods and or services) produced as a divestment. BEM 405, p 3.

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.

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:
>
> 1) The repayment schedule is actuarially sound; and
>
> 2) The payments are made in equal monthly amounts during the term of the agreement with no deferral of payments and no balloon payments; and
>
> 3) 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.

Here the Department, after a revision, calculated Petitioner's total divestment as follows: The sale of [redacted] based on a land contract for $280,000.00, which contained two separate notes: First, the [redacted] Note for $111,000.00 with the required payments of $550.00 per month, annual payments of $10,000.00 in September 2020, 2021, and 2022, and a balloon payment for the balance, due by September 1, 2023. Second, the $69,000.00 [redacted] Note with allowable offsets that were deducted, totaling $12,852.50 with a resulting final balloon payment of $56,147.50. The total on both notes is 111,000.00 plus 56,147.50 equaling $167,147.50. Using the revised baseline year date of 2019 at a $8,469.00 cost of care, results in a one year, seven month, and 22-day divestment.

The Department's position is simply that under BEM 400, a land contract may be treated as a transfer of an asset, unless it contains balloon payments. Thus, this policy specifically identifies land contracts with balloon payments as those transfers which constitute divestment per BEM 405. Thus, the Department argues, policy requires the two notes in the [redacted] land contract to be counted as divestment (except for the allowable $12,852.50 which was deducted).

Petitioner made multiple arguments. First and foremost, it is correct that not all land contracts are divestment. However, under BEM 405, policy states that certain transfers may be allowed unless excluded. Policy here carves out land contracts with balloon payments as transfers and are not allowed and thus, they are excluded as allowable transfers and as such, are divestment.

Petitioner also presented multiple facts regarding Petitioner's health, marriage, divorce, and liquor license issues. Unfortunately, under federal law and state policy, none of these arguments and related facts are relevant to the issue of a land contract with a balloon payment. In this regard, Petitioner also requested to submit on the day of the telephone hearing, three affidavits: The first was an affidavit from the purchaser of [redacted] involving endless statements regarding the condition of the bar and premises, the terms of the land contract, the American disabilities act, and financing commentaries, among others. The second was from Petitioner's current spouse, with similar representations as in the first. The third is also from Petitioner's current spouse as the holder of the [redacted] promissory note, which reiterates the terms of the land contract and includes a waiver of the holder of the note to waive a right to a trial by jury trial.

First, Petitioner's counsel was given full notice with the Notice of Hearing that any exhibits which Petitioner wished to submit, were required to be submitted "at least seven days prior to the hearing date" to both the Department and to MOAHR. However, since neither the ALJ nor AAG Beaton was given the opportunity to review the documents prior to the contested case hearing, Petitioner was allowed to fax the documents to MOAHR and the Department. The ALJ ruled that subject to her subsequent review, the documents would be given their "due weight" upon a full examination as their relevancy. After a careful review of these documents, the undersigned finds that documents not previously submitted are not admissible, as they are not relevant to the issue herein: none of the statements or arguments change the fact that the land contract contains the prohibitive balloon payments clauses. Thus, the multiple statements and affirmations in the three affidavits are either not relevant to the issue as to the balloon payments clauses in the land contract, or duplicative of documents already in the record.

Here, the Department met its burden of going forward to show that policy mandates that a land contract with balloon payments does not fall under asset transfers that are not divestment and thus, land contracts with balloon payments constitutes divestment. BEM 405. Once the Department has met its burden of going forward, Petitioner then has the burden of proof by a preponderance of evidence. Here, Petitioner has not met that burden and cannot, as long as the land contract contains balloon payments. Policy is clear.

It is noted that AAG Beaton on behalf of the Department pointed out that many of Petitioner's argument deal with factual scenarios wherein a land contract does not contain a balloon payment(s). And in fact, AAG Beaton pointed out that if the land contract here did not contain balloon payment clauses, then it may not be countable. However, such is not a fact herein, and as such, not an issue before this forum. The unrefuted facts here are such that, the land contract contains balloon payment clauses. As such, the land contract constitutes divestment for the reasons cited above and thus, the Department's divestment action was correct and must be upheld.

DECISION AND ORDER

Accordingly, the Department's calculation of the divestment penalty under these facts is hereby, AFFIRMED.

Janice Spodarek

JS/ml

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	Ottawa County DHHS – Via Electronic Mail D. Smith – Via Electronic Mail EQAD – Via Electronic Mail
Counsel for Respondent	H. Daniel Beaton, Jr. – Via Electronic Mail
Counsel for Petitioner	Michael Van Tubergen – Via First Class Mail 114 N. Third St. Grand Haven, MI 49417
Petitioner	[redacted] [redacted], MI [redacted]