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[redacted], MI [redacted]

Date Mailed: August 13, 2020
MOAHR Docket No.: 20-003768
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 July 8, 2020.

Petitioner was represented by Attorney Andrew Luoma of [redacted], Michigan.

Witness for Petitioner:
[redacted]

Petitioner's Exhibits admitted into evidence:
Exhibit I.26: Petitioner's Supplemental Hearing Brief dated July 1, 2020.
Exhibit II.12 Petitioner's Additional Exhibits and Hearing Brief dated July 7, 2020.

Respondent, Department of Health and Human Services, Department, was represented by AAG Stephanie Service.

Witness for the Department was:
Denise Laessig, ES Worker

Respondent's Exhibits admitted into evidence:
Exhibit A.149 Respondent's Updated Hearing Packet, dated June 25, 2020
Exhibit B.10 Respondent's Hearing Brief dated June 30, 2020.

ISSUE

Did the Department properly determine a Divestment penalty?

FINDINGS OF FACT

The Administrative Law Judge, based on the competent, material, and substantial evidence on the whole record, finds as material fact:

1. Petitioner's homestead address is [redacted] Michigan where Petitioner has resided for over 50 years.

2. In March 1997, Petitioner filed a quick claim deed on her home to her three children as joint tenants with full rights of survivorship retaining a life estate.

3. On January 31, 2020, Petitioner had a new roof placed on her home, paying $13,500.00.

4. On January 31, 2020, Petitioner purchased a lawn tractor for law maintenance, paying $4911.94.

5. On [redacted], 2020, Petitioner applied for LTC Medicaid.

6. On [redacted], 2020, Petitioner was admitted into a long-term care (LTC) facility.

7. On March 3, 2020, Respondent issued a Health Care Coverage Determination Notice, informing Petitioner that Petitioner was eligible for MA-LTC from February 1, 2020, onward with a deductible, but imposed a divestment penalty. Exhibit A.26

8. The divestment penalty reason states: "…{you} transferred assets or income for less than their fair market value…assets divested: Home repair on life estate $10020.92; law tractor $4911.94." Exhibit A.35-38

9. The Respondent determined that $10,021.00 of the $13,500.00 roof cost, and the full $4,911.94 for the lawn tractor, totaling $14,932.94, was divestment, resulting in a one-month and 21-day penalty.

10. On [redacted], 2020, Petitioner filed a hearing request.

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 its appropriateness in accordance to policy and law. BAM 600.

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 to the specific facts herein state in part:

> Assets must be considered in determining eligibility for SSI related categories. Assets mean cash, any other personal property and real property. BEM, 400 p 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, p 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, p 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 is the State of Michigan policy specific to MA Divestment. In pertinent part, that policy 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 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, p 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, p 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, pages 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.

Note: 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, p 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)), page 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 page 16.

The focus of review herein, is the Department's March 3, 2020, Notice of Healthcare Determination, informing Petitioner that she was eligible for MA-LTC, effective February 1, 2020, but had a one-month and 21-day divestment penalty due to a divestment of a new roof on her home, and the purchase of lawn tractor. Both sides here made multiple arguments. As noted in the Findings of Fact, the Department

determined that a transfer for less than fair market value (FMV), occurred on the grounds that a life estate holder's legal obligation for a the costs associated with a homestead, and in this case, life estate, must be shared by the current life estate holder and the remaindermen together. The gist of the Department's position regarding the roof centers on whether a life estate holder only owns a certain percentage of the property. Here, the Department carved out a portion of the cost of the roof as divestment, on the ground that Petitioner only owned a certain percentage of the life estate based on her age, and thus, only liable for a certain percentage of the roof costs. As to the lawn mower, the Department counted the entire cost of the lawn mower as divestment.

Relevant asset policy defines a life estate, assuming a person has lived in the home for at least one year, as the same as a homestead:

> **SSI-Related MA Only**
>
> 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, p.34.

Here, the Department referred to Exhibit II of BEM 400-the Life Estate and Life Lease Factor Table-as a calculator of a life estate holder's percentage interest in a life estate as to the legal liability for costs of upkeep and repair of the property for each year of life, with the remaining costs being equally divided among the remaindermen. The Department argues based on this interpretation that Petitioner's life estate ownership interest for Petitioner based on her age of 92 equals 25.771%. Following, the Department took 25.771% of the total roof repair cost of $13,500 and determined that the remaindermen must equally share in the remainder of the roof repair (or 13,500 less Petitioner's 25.771% share = the divested amount).

The Department's argument here, would reasonably be construed to indicate that with each year of a life estate holder's age, the percentage of the responsibility of the cost of repairs and upkeep changes based each and every year that a person ages based on the life estate factor table.

The Department's position here as to the import of the life estate factor table to a percentage of ownership of a life estate is nowhere to be found within BEM 400, or the BEM 405 Divestment policy, or any other legal dictum. While creative, the Department did not offer any authority.

Petitioner argues that the life estate is exempt under the homestead exemption pursuant to BEM 400, p 23. In addition, Petitioner points out that the life estate homestead has been held by Petitioner since 1997, has lived in this home for over 50 years, and that Petitioner has 100% right to the property for the remainder of her lifetime. Exhibit II, p.2.

Petitioner further indicates that in order for the roof repair to be divestment, there must be a transfer of a resource for less than the FMV. Here, the roof repair was not a transfer of a resource to another person, but rather an asset conversion. BEM 405 states: "Converting an asset from one form to another of equal value is not divestment even if the new asset is exempt." BEM 405, p 22. In short, Petitioner converted her countable cash assets into her exempt homestead. In addition, while the Department argues that the cost for the roof was excessive based on that cost as a percentage of the home's SEV, the Department again offered no legal authority for its analysis; there is no policy that defines divestment as a factor of the cost the SEV of a homestead.

Petitioner further cites a Michigan Supreme Court case which states that a life tenant "at his or her own expense, must make reasonable repairs necessary to prevent waste". In re Ringle's Estate, 259 Mich. 262, 242 NW 908 (1932); Smith v Blindbury, 66 Mich. 319, 33 NW 391 (1887). Petitioner emphasizes the court's use of the word "must"-the duty is not permissive.

In addition, Petitioner cites Curtis v Fowler 66 Mich 696, 33 NW 804 (1894) where the court held that "where the defendant was entitled to hold possession of the whole premises as life tenant, he cannot recover for compensation for improvements as such tenant. This is because the life tenant is bound to keep the premises in repair and is not permitted to commit waste,…"

Under MCL 600.2919 and MCL 554.137, if Petitioner commits waste, Petitioner could be liable to the remaindermen.

Considering that the Department is arguing that the Petitioner's legal interest is her life estate is 25.771% of upkeep and costs, then taking this argument out to its legal conclusion would result in a situation where life estate holds are only responsible to that percentage in taxes, utilities, upkeep and oddly, could be prohibited from occupying any more that 25.771% of the square footage of the property. With each passing year, the life estate holder would only have a legal right to a smaller and smaller percentage of the costs and square footage…However, there is no law or policy that would even suggest or hint that a life estate holder has such restrictions to a life estate interest. Nor did the Respondent cite any such authority.

Regarding the lawn tractor, the Department argued that it was excessive as the value of a lawn tractor was worth almost 10% of the value of the entire home. Again, as with the roof, there is no authority that defines divestment of a purchase based on the percentage of the cost to the SEV of the homestead. Nor did Respondent cite any policy

or authority that defines divestment based on the percentage of the overall asset of a household good to the SEV of the homestead.

The Department also argued that with regards to the ordinance requiring upkeep of the property, the "…existence of the ordinance proves that the lawn must have been upkept before Petitioner spent $4,911.94 on a lawn tractor…" The undersigned finds this argument baffling, and spurious at best. Ordinances requiring certain behaviors are not proof that the behavior did not occur because the law does not allow it.

Nowhere in either BEM 400 with regard to Exhibit II-the Life Estate and Life Lease Factor Table, p 68 or in BEM 405 with regard to Exhibit I-Life Expectancy Table, p 19 do either policy discuss a life estate holder as holding a percentage of the property based on age. Rather, the tables are set up as a means to measure the FMV of a purchase or sale, and/or a stream of income (i.e. whether an annuity is actuarially sound BEM 405, pages 4-5; 7). Or as pointed out by Petitioner, A review of BEM 405 indicates that the life expectancy table is used throughout the divestment policy with regards to income, a stream of income, income producing trust, or payment of income from a trust. See pages 4, 7, and 12. It is not used to divide a percent of remaining years as the percentage of the life estate holder's legal obligation for property costs and/or upkeep. That is, Exhibit I is used to determine if an annuity is actuarily sound, or the value of right to receive trust income is distributed throughout the life expectancy of the individual who has transferred money, or a stream of income. To construe the tables reducing the legal reach of life estate into a percentage of ownership is a legal fiction. As Petitioner points out, nowhere in BEM 400 or 405 is the legal ownership of a life estate construed as a percentage.

It is also noted that there is no evidence regarding Petitioner's medical condition. Respondent's arguments that Petitioner did these transactions on the eve of her nursing home residency from which she will not likely return from is purely speculation.

As to the lawn mower, Petitioner notes that initially at the prehearing conference, the Department had represented that it intended to remove the lawn mower from the divestment penalty. However, by hearing, the Department failed to do so and maintained that the divestment penalty was proper. Petitioner first argues that because the lawn mower was not discussed at the prehearing due to the Department's representations that it was to remove it from divestment penalty was in violation of policy requirement Petitioner to be give a meaningful prehearing conference. While Petitioner is correct, such a right is generally construed as one without a remedy, particularly when Petitioner has been given a full opportunity to discuss the same at a contested case hearing. Moreover, due to the ultimate ruling herein, the undersigned finds that Petitioner's procedural arguments do not need to be addressed.

Petitioner argues that under BEM 400, household goods are exempt personal property. Such includes personal goods used to maintain the home. BEM p 24. Thus, under BEM 400, p 40, a lawn mower is exempt.

As with the roof, under BEM 405, in order for divestment to occur, there must be a transfer of a resource for less than FMV. Divestment policy specifically excludes from divestment penalties where there is a transfer that was merely a form of asset conversion: "Converting an asset from one form to another of equal value is not divestment even if the new asset is exempt." BEM 405, p 22. Here, Petitioner converted her countable cash asset into an exempt household good.

In addition, Petitioner argues that there is no law or policy that states that divestment is defined or characterized by how much someone uses an asset; use of the asset is not controlling factor when determining if a divestment has taken place. Divestments are based on a person's ownership and right to control. Mere allegations that Petitioner is unable to make use of a certain asset while residing in a nursing home is not sufficient.

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 did not act in accordance with Departmental policy when it applied the divestment penalty for the roof and the lawn mower, and thus, the Department is reversed.

DECISION AND ORDER

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

THE DEPARTMENT IS ORDERED TO BEGIN DOING THE FOLLOWING, IN ACCORDANCE WITH DEPARTMENT POLICY AND CONSISTENT WITH THIS HEARING DECISION, WITHIN 10 DAYS OF THE DATE OF MAILING OF THIS DECISION AND ORDER:

1. Remove the divestment penalty in this case from Petitioner's file and the Bridges system, and

2. Issue any supplemental benefits to Petitioner to which she may be entitled.

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	Chrissie Johnston Iron County DHHS – via electronic mail BSC1 – via electronic mail D. Smith – via electronic mail EQAD – via electronic mail
Counsel for Respondent	Geraldine A. Brown – via electronic mail
Counsel for Respondent	Stephanie M. Service – via electronic mail
Counsel for Petitioner	[redacted] – via first class mail [redacted] [redacted] [redacted], MI [redacted]
Petitioner	[redacted] – via first class mail [redacted] [redacted] [redacted] MI [redacted]