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Date Mailed: August 27, 2020
MOAHR Docket No.: [redacted]
Agency No.: 125103918
Petitioner: [redacted] [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 28, 2020.

Petitioner was represented by Robert Manor, Attorney.

Witness for Petitioner:
[redacted]

Petitioner's Exhibits admitted into evidence:

1. Petitioner's Exhibit I July 28, 2020 Brief with Attachments A & B

2. Petitioner's Supplemental Brief

Respondent, Michigan Department of Health and Human Services, was represented by Assistant Attorney General (AAG), Jennifer Walker.

Witnesses for the Department:
Katie Eschtruth, Assistance Payments Worker (APW)
Ashley Kunkel, Assistant Payments Supervisor (APS)

Respondent's Exhibits admitted into evidence:

1. Respondent's Exhibit A.42

2. Respondent's Response to Petitioner's Supplemental Brief

## ISSUE

Did the Department properly apply 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. On August 24, 2017, Petitioner entered a long-term care (LTC) at [redacted] in [redacted] Michigan.

2. In September 2017, Petitioner applied for LTC MA.

3. At the time of Petitioner's application, Petitioner did not disclose that she owned a home with her child(ren) jointly. The home was sold in December 2017 with proceeds split by share of remaining owners.

4. On January 31, 2018, Petitioner notified the Department that she had gifted $6,856.63 from her share of the sale of the home to her son, which gift constituted divestment. Petitioner informed the Department that she had retroactively applied the divestment penalty to the month of January 2018.

5. On March 20, 2018, the Department issued a Health Care Determination Notice informing Petitioner that she had full MA coverage beginning September 1, 2017 and continuing with a monthly patient pay beginning October 1, 2017. No divestment notice was issued.

6. Petitioner had redeterminations in September 2018 and September 2019 without any divestment action.

7. In 2020, the Department discovered that the divestment penalty had not been processed and on January 21, 2020, issued a Health Care coverage Determination Notice informing Petitioner that effective March 1, 2020 through March 25, 2020, a divestment penalty would be applied due to a divestment that took place January 31, 2018 to Petitioner's son in the amount of $6,856.63.

8. On April 15, 2020, Petitioner appealed the March 2020 divestment, stating that it had was Department error and that the 25-day divestment penalty was served in January 2018.

9. On July 28, 2020, an administrative hearing was held. Subsequent to the hearing, Petitioner submitted a Supplemental Brief. Respondent submitted a Brief in Response to Petitioner's Supplemental Brief. The record was held open for 7 days to allow for the submission and response.

## 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, page 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 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).]*

This statutory "look-back" period, noted in *Gillmore* and *Thompson* and contained within 42 USC 1396p(c)(1), requires a state to "look-back" a number of years (in this case five) from the date of an asset transfer to determine if the applicant made the

transfer solely to become eligible for Medicaid, which can be established if the transfer was made for less than fair market value. See 42 USC 1396p(c)(1); DHS Program Eligibility Manual (BEM) 405, pp 1, 4; see also *Gillmore*, 218 Ill 2d at 306.

"Less than fair market value means the compensation received in return for a resource was worth less than the fair market value of the resource." BEM 405, p 6.
A transfer for less than fair market value during the "look-back" period is referred to as a "divestment," and unless falling under one of several exclusions, subjects the applicant to a penalty period during which payment of long-term care benefits is suspended. See, generally BEM 405, pp 1, 5-9. "Congress's imposition of a penalty for the disposal of assets or income for less than fair market value during the look-back period is intended to maximize the resources for Medicaid for those truly in need." *ES*, 412 NJ Super at 344. See also *Mackey v Department of Human Services, Michigan Court of Appeals, Docket No. 288966, decided September 7, 2010*.

Pertinent department policy dictates:

Assets must be considered in determining eligibility or SSI related categories. Assets mean cash, any other personal property and real property. BEM, 400 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 divestment policy which states in pertinent part:

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
- 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 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, 405, pages 15-16.

**Computing Penalty Period**

The penalty period starts on the date which the individual is eligible for Medicaid and would otherwise be receiving institutional level care (LTC, MIChoice waiver, or home help

or home health services), and is not already part of a penalty period. When a medical provider is paid by the individual, or by a third party on behalf of the individual, for medical services received, the individual is not eligible for Medicaid in that month and the month is not a penalty month. That month cannot be counted as part of the penalty period. This does not include payments made by commercial insurance or Medicare.

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

**Recipient Exception**

Timely notice must be given to LTC recipients and (BEM 106) waiver recipients before actually applying the penalty. Adequate notice must be given to new applicants.

BEM 405, pages 14-15.

BAM 220 titled Case Actions discusses adequate and timely notice:

**Adequate Notice**

An adequate notice is a written notice sent to the client at the same time an action takes effect (not pended). Adequate notice is given in the following circumstances:

**All Programs**

- Approval/denial of an application.
- Increase in benefits.

**…MA Only**

- Case opening with a deductible or patient-pay amount.
- Decrease in post-eligibility patient-pay amount.
- Recipient removed due to his eligible status in another case.

- Addition of MA coverage on a deductible case.
- Increase in medical benefits.
- At case open with a divestment penalty.

**Timely Notice**

**All Programs**

Timely notice is given for a **negative action** unless policy specifies adequate notice or no notice. See Adequate Notice and, for FAP only, Actions Not Requiring Notice, in this item. A timely notice is mailed at least 11 days before the intended negative action takes effect. The action is pended to provide the client a chance to react to the proposed action.

BAM 220, pages 3-5.

In this case, unrefuted and undisputed evidence of record is that there was a divestment of $6,856.63 and that the penalty period is 25 days. What is disputed is when the penalty is applied.

Petitioner argues that the penalty was served when the Petitioner notified the Department of the divestment on January 31, 2018, which notice stated that the penalty was served prior to the notification-during the month of January 2018. See Petitioner's Brief, Attachment A. Petitioner further argues that the Department erred in not processing the divestment until 2020 when it discovered that the penalty had not been processed, noticed, or applied. Petitioner argues that she has paid the full divestment penalty. In addition, Petitioner's Supplemental Brief cites BAM 705 recoupment policy as authority for barring the Department from applying a divestment penalty due to agency error.

The Department does not dispute that it erred. However, the Department argues that recoupment policy is not applicable to divestment, as divestment penalties are federally mandated under the Medicaid insurance program. Specifically, In Re Estate of Rasmer, 501 Mich 18, 2 (2017) quoting Schweiker v Gray Panthers, 453 US 34, 36 (1982) "States that choose to participate in Medicaid 'must comply with federal requirements'". Failure to follow federal law can subject the State of Michigan to substantial financial penalties. 42 USC 1396c; 42 CFR 430.30.

One of the rules required by federal law is the requirement that prior to any action to discontinue or eliminate benefits, the Department must give the recipient at least 10 days' notice mandated by the timely notice requirement. 42 CFR 431.211; BEM 405, p15 and BAM 220, pp 4-5, see above. Specifically, federal regulations state:

1) A divestment penalty period will be imposed on anyone who divests assets in order to qualify for Medicaid, 42 USC 1382b©; 42 USC 1396p©, and
2) For anyone receiving benefits, those benefits will not be discontinued without at least 10 days' notice before the termination. 42 CFR 431.211.

The Department emphasized that at application, Petitioner failed to disclose the ownership of the house which was co-owned by her son. Specifically, when Petitioner's son made her MA application in November 2017 and the 2018 MA-LTC applications, who also received the divested gift, the ownership of the home and any gift was not disclosed to the Department. Department Ex A.22-25; 31-34. Policy addresses situations where there is an agency error and the divestment penalty period is not applied at the time eligibility first begins:

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

**Recipient Exception**

> Timely notice must be given to LTC recipients and (BEM 106) waiver recipients before actually applying the penalty. Adequate notice must be given to new applicants.
>
> BEM 405, pages 14-15.
>
> BEMS policy in the Bridges Policy Glossary defines Timely Notice as adequate notice which is mailed at least 11 days prior to the effective date of an intended negative action. BPG Glossary, p 68.

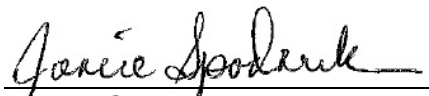
Petitioner's argument that the penalty was served because notice was given in January that there was a divestment with a penalty period already served, is not supported by law or policy. Moreover, the Department at the time was not aware of the home and had not calculated and/or issued adequate or timely notice of divestment. Moreover, when Petitioner's MA-LTC application was approved, Petitioner was approved for the month of January 2018. Nor did Petitioner discuss the federally mandated timely notice requirement; Medicaid law is not contract law. There is no right to prevail in the receipt of Medicaid benefits where there is no eligibility otherwise. The state is required to issue timely notice with exceptions not applicable here. And here, that was done on January 21, 2020, with a March 1, 2020 to March 25, 2020 divestment penalty, as required by federal and state law.

Regarding Petitioner's argument that the action two years later is unfair, it is a well-established principle that Administrative Law Judges have no equitable powers.

After a careful review of the credible and substantial evidence of record, the undersigned finds that the Department's March 2020 determination was correct and supported by federal and state law, and further mandated by 42 USC 1396c, and thus, is upheld.

## DECISION AND ORDER

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



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** | Amber Gibson<br>Ingham County DHHS – via electronic mail<br><br>D. Smith – via electronic mail<br><br>EQAD – via electronic mail |
| **Counsel for Respondent** | Jennifer L.A. Walker – via electronic mail |
| **Counsel for Petitioner** | Robert D. Mannor – via first class mail<br>8226 S. Saginaw St., Ste A<br>Grand Blanc, MI 48439 |
| **Petitioner** | [redacted] – via first class mail<br>[redacted]<br>[redacted]<br>[redacted], MI [redacted] |