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[redacted] **MI** [redacted]

Date Mailed: November 17, 2021
MOAHR Docket No.: 21-002888
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Janice Spodarek

HEARING DECISION

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 42 CFR 438.400 to 438.424; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, an administrative hearing was begun on August 3, 2021, continued on September 21, 2021. On September 21, 2021, the record closed.

Petitioner was represented by Attorney Scott Brogan, of Marquette, Michigan.

Respondent, Michigan Department of Health and Human Services, was represented by Assistant Attorneys General (AAG), Erin Harrington and Geraldine Brown.

Petitioner called the following witness:

[redacted], community spouse.

The Department called the following witnesses:

Kerry Jutila, APW, Houghton County
Ann Marie Massie, FIM.

The following exhibits were offered and admitted into the record:

Department Exhibits A.41, and B.11.

ISSUE

Did the Department correctly determine Petitioner's long-term care (LTC) Medicaid divestment start date?

FINDINGS OF FACT

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

1. On [redacted] 2017, Petitioner entered a long-term care (LTC) nursing facility.

2. On [redacted], 2017, Petitioner applied for LTC Medicaid (MA). Petitioner has a community spouse.

3. At application, Petitioner disclosed and verified with his original application that during the lookback period, he and his spouse made the following transfers: a motor vehicle to their daughter, value [redacted] on an unknown date; on January 21, 2015, [redacted] for a student loan in their son's name; on July 27, 2016, [redacted] on their daughter's student loan debt; on March 7, 2017 [redacted] toward their granddaughter's insurance bill; on May 6, 2016 [redacted] toward their granddaughter's car loan. The transfers totaled [redacted] in gifted/transfers to family members.

4. The Department determined that Petitioner's baseline date was May 1, 2017, at which time LTC cost was [redacted]. In 2021 the LTC cost is [redacted] per month.

5. After multiple verifications and clarifications regarding all assets and transfers, on July 7, 2017, the Department approved MA but failed to apply a divestment penalty.

6. In May 2021 Petitioner's community spouse filed for a Protective Order with the Houghton County Probate Court requesting an increase in spousal support from Petitioner. During a review of that case, the MDHHS discovered that it had failed to apply the divestment penalty in 2017.

7. On May 26, 2021, the Department issued a Health Care Coverage Determination Notice applying a divestment penalty from 7/1/2021 to 12/19/2021.

8. On June 2, 2021, Petitioner filed appealed the divestment action.

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.

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. The MA program was enacted in 1965 by Congress to provide medical care to needy individuals. Atkins v Rivera, 477 US 154, 156 (1986). The Federal Government shares the cost with the States who elect to participate in the program. In return, the States must comply with the requirements imposed by federal statutes and regulations. Id. At 156-157; see also 42 USC Sec. 1396a. Section 1396p specifically deals with transfers of assets. 42 USC Sec. 1396a(a)(18).

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).

The controlling Departmental policy regarding MA Divestments is BEM 405. A divestment is a type of transfer of a resource, within the look-back period, for less than the fair market value (FMV) A transfer means giving an asset away. Resources can be any of the applicant's and their spouse's assets and income. The look-back period is the 60 months prior to the baseline date, which is the date Petitioner first went into a LTC facility. Less than FMV means the compensation received in return for resources less than the FMV of the resource.

The penalty period is computed by gauging the total uncompensated values of all resources divested. Once that figure is determined, the total uncompensated value is divided by the average monthly private LTC cost in Michigan at the client's base line date. The result is 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 MDHHS defines 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)*.

BEM, Item 405 divestment policy 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.

There is no minimum and no maximum limit on the penalty period for divestment. BEM 405, p 12.

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.

Specific Departmental policy states in part:

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.

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 opening 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.

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(c); 42 USC 1396p(c), 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.

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.

In this case, there is no issue regarding the amounts for each of the five transfers the Department identified as divestment at the initial application of [redacted] 2017. As noted, the Department approved Petitioner's LTC application of [redacted] 2017. After multiple

verifications and discussions, [redacted] was identified as the total gifted/transfers to family members triggering divestment. However, the Department failed to apply the penalty in 2017. In 2021 the MDHHS discovered its error during a probate court hearing where Petitioner's community spouse was requesting a hardship increase in her allowance. Following this, on May 26, 2021, the MDHHS issued a divestment penalty notice for five months and 19 days from which Petitioner appeals.
Here, the Department frames the issue here as one solely as to when the penalty should be imposed: whether at the time of the 2017 application, or in 2021 when the department discovered its error in issuing the notice. Petitioner on the other hand, makes five alternative arguments involving whether certain transfers constitute divestments as well as the start date of the divestment.

After a careful review of the multiple facts and arguments herein, the undersigned finds that all the transfers constitute divestment in the amounts as first reported by Petitioner on his 2017 application, and, that the penalty should be calculated as required by policy at application for the reasons set forth below.

Petitioner first argues that all of the divestments should be excluded as divestments on the grounds they constitute MA over-issuances (OI). Petitioner argues that under BAM 700, MA agency error OIs are not pursued.

Here, there is no evidence that the divestments are OIs. Petitioner was eligible for MA. As such, there can be no OI where there is eligibility for welfare benefits. The divestment applies a penalty period to a time period in which the beneficiary is eligible for MA benefits. Thus, the OI argument is without merit.

Next Petitioner argues that any co-signed loan(s) do not constitute divestment, framing this issue as an asset conversion. It is well established law that certain asset conversions are not divestment. 42 USC Sec 1396p such as taking $8,000.00 out of a savings account to purchase a motor vehicle. In such instances, there is no loss of FMV as it is a transfer of one legally owned asset for another legally owned asset in the same person's name.

In this case, at the 2017 application, Petitioner reported paying off the loans that were in family members names. The Department argues that the transfer was not for FMV as it was a gift for family members. Petitioner now argues that further discovery establishes that the payments were on co-signed loans. Specifically, Petitioner argues that Petitioner's community spouse and/or both Petitioner and his spouse were on the granddaughter's auto loan as co-signers. In addition, Petitioner argues that there were possibly other student loans co-signed for that were paid off in part or full. Petitioner offered no federal or state authority that would support finding that paying off a loan as a cosigner does not constitute divestment. Specifically, here, as pointed out by the Department, the Petitioner/community spouse did not receive anything of value in in return for transferring their cash to pay off the granddaughter's automobile. That is, Petitioner and his spouse did not get possession of the vehicle. In fact, the vehicle was totaled, and uninsured. Nor, when the Petitioners' paid off student loans did Petitioner or

his spouse receive anything of value-they did not attend school, they were not granted any educational credits, they did not receive any degree(s). The transfer of cash for something for which the payors did not receive anything in return is not a FMV transfer but rather constitutes a gift. As such, it constitutes divestment under MA law and policy as the money could have been used to pay for LTC before the MA program pays money on behalf of Petitioner for LTC, a program established to assist needy individuals. As to Petitioner's argument that paying off a cosigned loan protects their credit, this court does not disagree that doing so could protect a person's credit, particularly if loan may be in default (which was not established in this case). However, paying off a co-signed loan and receiving the possibility of credible protection is not an arms-length transaction, or a FMV exchange for which the Petitioner paid cash. Petitioner received nothing in return which constitutes FMV under the law. Under 42 USC Sec 1396p, the transfer constitutes divestment.

Petitioner next argues that all or some of the transfers here were for a purpose other than for Petitioner to make himself eligible for MA. That is, that a transfer for less than the FMV is not divestment where it can be shown that Petitioner could not anticipate his need for LTC services. Petitioner cites USC 1396p. The undersigned does not find that this section supports the facts here. That section discusses situations where the individual making the transfer intended to dispose of the assets at the FMV or for other valuable consideration, or where the assets were returned. 42 USC Sec 1396p(i) and (iii). As to (ii), that sections states that the assets were transferred exclusively for a purpose other than to qualify for medical assistance. Nor was there any documentation that would support the other sections. The facts here do not support 42 USC Sec 1396p.

Petitioner next argues that the divestments should be waived under the undue hardship clause found as 42 USC § 1396p(c)(2)(D) and BEM 405 where it statues:

> UNDUE HARDSHIP
>
> 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 (MD or DO) 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….

Petitioner argues that Petitioner may be in a medically compromised position in the future if the community spouse does not pay for his nursing home care because of a divestment penalty. Petitioner misreads the applicable law and policy. The possibility of a future medical emergency is not the type of emergency identified in BEM 405. This policy states that there must be a present medical emergency documented by a client's

physician that medical care is not being provided. That is, an medical emergency. Here, there are no facts to support a medical emergency. Thus, there are no grounds to find undue hardship.

Having established that the five transfers disclosed by Petitioner at his 2017 application were divestments, and, were calculated correctly, the next issue is the timing of the divestment. Petitioner argues that the law and policy require the department to apply the divestment at application, which notice constitutes adequate notice. BAM 220. The department argues that the penalty should be applied when the department discovered its error four years later.

First, it should be noted that this alternative argument by Petitioner is not an argument to delete or waive the divestment. Petitioner agrees to the divestment. The issue when it is applied which in turn triggers a different payment amount as the cost of LTC has increased due to the Department's error.

It is also noted that BAM 220 specifically addresses MA divestment when carving out an exception to timely notice, wherein it states with regard to MA, the Department is to issue adequate notice: "At case opening with a divestment penalty." The Department instead relies on the timely notice section, arguing that because it erred and failed to apply the penalty in 2017, Petitioner should not be viewed as entitled to have the adequate notice as due to the department error.

Here, the Department cites BEM 405, as authority:

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.

Petitioner argues that this section is not applicable as the plain language of this policy states that it applies to past unreported divestment discovered by the Department., which the facts here do not support. The Department argues that the section, in the alternative, separately deals with agency error.

Unrefuted evidence of this case is that Petitioner did not fail to report the divestment and in fact attached the five transfers to his application.

Conventional statutory construction requires the plain reading of the language to control. However, here, the plain reading of the language can be construed as ambiguous, particularly when determining whether the word “or” in the phrase “If a past unreported divestment is discovered or an agency error is made….” Where ambiguity is not resolved with a plain reading of the passage, then conventional grammatical and legal interpretation requires that a reasonable interpretation be given to the text.

Here, the undersigned finds in light of the fact that the divestments were not unreported by Petitioner, were disclosed by Petitioner, were not due to any error by Petitioner, that it is reasonable to read this section as requiring adequate notice. Moreover, BAM 220 states that the Department is to issue adequate notice at application where a divestment policy is applied. To find years later that the Department can now apply a divestment penalty as a result of the Department failing to act for years, would be financially detrimental to Petitioner. Here, the Department’s failed to act diligently, timely, and as required by policy both in BAM 220 and BAM 405. Petitioner is entitled to adequate notice.

Under BEM 405, adequate notice is to be given at the time of the application. Under BAM 220 adequate notice is to be given at application where a divestment penalty is applied.

After a careful review of the credible and substantial evidence of record, the undersigned finds that the Department failed to apply adequate notice at application as required by policy and thus, the Department’s action 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) Delete the 2021 divestment notice from the BRIDGES system, and
2) Re-notice a divestment penalty from the date of LTC eligibility for five months and 19 days, and
3) Request a ticket from the MDHHS IT division if necessary, in order to carry out this order.

JS/ml

Janice Spodarek
Administrative Law Judge

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

Via Email:

MDHHS-906WestHearings
AG-HEFS-MAHS - Erin Harrington &
Geraldine A. Brown
BSC1
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