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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

[REDACTED], MI [REDACTED]

Date Mailed: May 16, 2022
MOAHR Docket No.: 22-000527
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Amanda M. T. Marler

AMENDED 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 March 23, 2022. Petitioner did not appear for the hearing but was represented by [REDACTED], Petitioner's sister and Authorized Hearings Representative (AHR), and [REDACTED]. The Department of Health and Human Services (Department) was represented by Laurel Palermo, Long Term Care Specialist, and Megan Sterk, Assistance Payments Supervisor.

At the conclusion of the hearing, a Hearing Decision was issued by the undersigned and mailed on April 25, 2022. The "Decision and Order" portion of the Hearing Decision does not capture all of the conclusions made in the "Conclusions of Law," the "Decision and Order" portion of the Hearing Decision is hereby **AMENDED** for the purpose of clarifying the amount which should **not** be considered a divestment; the amendments are highlighted herein. This Amended Hearing Decision replaces but does not substantively change the Hearing Decision issued April 25, 2022.

FINDINGS OF FACT

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

1. All Findings of Fact and Conclusions of Law contained in the original Hearing Decision dated April 25, 2022 remain unchanged and are incorporated herein by reference.
2. On May 9, 2022, the Department requested that the April 25, 2022 Hearing Decision be reviewed, and an Amended Decision be issued to clarify the Decision and Order.

3. A review of the Hearing Decision shows that clarification of the Decision and Order via this Amended Hearing Decision would be beneficial to the parties.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Department of Health and Human Services Bridges Eligibility Manual (BEM), Department of Health and Human Services Reference Tables Manual (RFT), and Department of Health and Human Services Emergency Relief Manual (ERM).

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act, 42 USC 1396-1396w-5; 42 USC 1315; the Affordable Care Act of 2010, the collective term for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152; and 42 CFR 430.10-.25. The Department (formerly known as the Department of Human Services) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

Divestment is a type of transfer of a resource and not an amount of resources transferred. Resource means all the client's assets and income. Transferring a resource means giving up all or partial ownership in the resource. Divestment results in a penalty period, not MA program ineligibility. BEM 405 (April 2021), pp. 1-2; BEM 400 (October 2021). During the penalty period, MA will not pay the client's cost for: LTC services; home and community-based services; home help; or home health. MA will pay for other MA-covered services. BEM 405, p. 1. A divestment is a transfer of a resource by a client that is (i) within a specified time (the look-back period), (ii) for less than FMV, and (iii) not an excluded transfer. BEM 405, p. 1.

In this case, Petitioner disputes that a divestment occurred and the calculation of the divestment penalty. The Department asserts that Petitioner divested \$ [REDACTED] in assets resulting in a penalty of one year, six months, and 20 days from October 1, 2021 through April 20, 2023.

To determine whether a divestment occurred, a baseline date must be established in order to evaluate the lookback period. BEM 405, p. 5. Once the baseline date is established, the look-back period is the 60 months prior to the baseline date. *Id.* The baseline date is the first date that the client was eligible for MA and either in LTC, approved for the waiver, eligible for home health services, or eligible for home help services. BEM 405, p. 6. Petitioner's baseline date of October 1, 2021 was not disputed; Petitioner was eligible for MA effective October 1, 2021 and living in a LTC facility. Therefore, any transactions since October 1, 2016 are evaluated to determine whether a divestment occurred.

Next the evaluation turns to whether there were any transfers for less than FMV. A transfer for less than FMV is a transaction where the amount received for a resource

was less than what would have been received if the resource was offered in the open market in an arm's length transaction. BEM 405, p. 6. Divestments are found when a client gives away an asset, lump sum, or accumulated benefit including cash. BEM 405, p. 2; BEM 400, p. 1. Family can be paid for services rendered, but a presumption exists that the services were provided for free when payment was not made at the time of services. The client may rebut this presumption by providing tangible evidence that a payment obligation existed at the time of service. BEM 405, pp. 6-7. In addition, transfers for less than FMV are assumed to be made for eligibility purposes until the client provides convincing evidence that they had no reason to believe LTC might be needed. BEM 405, p. 11.

At the hearing, AHR argued that she had no reason to believe that Petitioner would need LTC and that the plan had always been for him to live with her until his passing because her family did not have a history of longevity and Petitioner had numerous health concerns. While AHR may not have initially believed that Petitioner would need LTC, the evidence shows that Petitioner's living arrangements slowly evolved and he was now 67 years old. AHR's letters and email communications to the Department also noted that Petitioner's health had been declining, that he could no longer ride his scooter around town, he could no longer keep up at work, used a walker, had decreased mental capabilities, and often told people what he thought they wanted to hear rather than the truth. His inability to keep up pace at work was as early as 2009. The other decline in his abilities was noticeable in 2019, two years prior to his injury which precipitated his stay in LTC. Therefore, although AHR might have once thought that Petitioner would always be in her home, the recent past is evidence that this perspective had to have been changing. Therefore, because there is no convincing evidence that the parties had no reason to believe that LTC might be needed, the transfers seen in Petitioner's account are evaluated to determine whether they are divestments.

As a preliminary matter, AHR argued at the hearing that the Department was in possession of over 200 pages of receipts which were not considered in determining whether a divestment occurred and if so, how much. Only a select few of those receipts were provided by either party at the hearing. Per policy, it is the client's responsibility to rebut the presumption of divestment and the Department is not allowed to use its best judgment or best available information. BEM 405 pp. 6-7. This responsibility carries forward to the hearing to establish eligibility and proof that a divestment has not occurred. Therefore, AHR should have ensured that any missing documents were provided at the hearing. This decision rests upon the available verifications provided in Exhibits A and 1.

Vehicle Purchase

The first item alleged by the Department to be a divestment is a 2013 Toyota purchased on April 26, 2019 and titled in AHR's husband's name which has a total value after taxes, title, license plates, and the purchase price of the vehicle of \$ [REDACTED]. (Exhibit A, p. 80) In reviewing the transactions, AHR indicated that \$ [REDACTED] of a \$ [REDACTED] transfer from Petitioner's account to hers on April 26, 2019 was for the purchase of this

vehicle in addition to a new bike and accessories for \$ [REDACTED]. (Exhibit A, p. 73). The AHR contended that, although the vehicle was put in her husband's name because Petitioner did not have a license, the vehicle was purchased to transport Petitioner. No receipts were provided to verify the purchase of the bike and accessories. In addition, AHR did not identify any other transfers or withdrawals attributable to the purchase of this vehicle. The evidence does not show how the remaining balance on the vehicle was paid. Since this case centers on Petitioner's assets and not AHR's assets, this decision will focus on the identified \$ [REDACTED] transferred for the purchase of the vehicle. Because the vehicle was not purchased and placed in Petitioner's name, it is not legally Petitioner's, and it cannot be considered an asset conversion. Petitioner effectively gave away, transferred, \$ [REDACTED] for the purchase of the vehicle, and it must be considered as a divestment. BEM 405, p. 10.

Windows Purchase

Next, the Department identified a divestment of \$ [REDACTED] for the purchase and installation of windows in AHR's home. (Exhibit A, p. 67) The Master Work Order for the purchase and installation of the windows shows that the final price was \$ [REDACTED]. (Exhibit A, p. 83; Exhibit 1, p. 143). This confirms AHR's statements on the spreadsheet about the cost of the windows but does not confirm that Petitioner only paid \$ [REDACTED] for the windows in his room of her home. (Exhibit A, p. 67) A handwritten note at the top of the work order indicates that the windows were ordered in April of 2019 and installed in July of 2019. (Exhibit A, p. 83) It does not indicate which accounts were used to pay the deposit or remaining balance nor does it show when payments were made. Notations by AHR on the Department's spreadsheet indicate that transfers from Petitioner's account to AHR's account were made on February 27, 2019 for \$ [REDACTED]; March 25, 2019 for \$ [REDACTED]; and April 18, 2019 for \$ [REDACTED]. (Exhibit A, p. 73) The sum of these transfers is consistent with AHR's testimony that Petitioner paid \$ [REDACTED] towards the windows he broke in his bedroom. (Exhibit A, p. 188) Since the \$ [REDACTED] was transferred to AHR to repair items Petitioner broke and were identified both in the spreadsheet and via receipts, these transfers are **not** considered a divestment.

Property Taxes and "Rent"

The third item identified by the Department as being divestments of assets included the payment of property taxes in August 2017, 2018, 2019, 2020, and 2021 as well as rent of \$600.00 per month during the five-year look back period. (Exhibit A, p. 67) The total value of the property taxes due was \$ [REDACTED]. (Exhibit A, pp. 67, 84-88) In reviewing Petitioner's bank statements, which were notated by AHR, transfers were completed from Petitioner to AHR for property taxes as follows:

August 4, 2017	\$ [REDACTED]
August 10, 2018	\$ [REDACTED]
August 6, 2019	\$ [REDACTED]
July 29, 2020	\$ [REDACTED]
August 11, 2021	\$ [REDACTED]

(Exhibit A, pp. 95, 107, 119, 131, 143) A written agreement was not created until after the Department started processing Petitioner's MA application in December 2021. (Exhibit A, p. 154) Policy requires a written instrument to verify personal care contracts and home care contracts, or when the client is rebutting a presumption that services were for free when no payment was made at the time of services. (Exhibit A, pp. 6-7) Personal care contracts are contracts or agreements for providing for the health care monitoring, medical treatment, hospitalization, visitation, entertainment, travel/transportation, financial management, shopping, home help, or other activities of daily living. BEM 406, p. 7. Home care contracts are contracts or agreements which pay for the expenses of a home, cottage, or care repairs, property maintenance, property taxes, homeowner's insurance, and heat and utilities for a homestead or other real property of the client. *Id.* Policy requires that all personal care contracts and home care contracts must have services performed only **after** a written legal contract/agreement has been executed between the client and provider with a notarization date. BEM 405, p. 8. AHR testified that Petitioner's "rent" included \$ [REDACTED] per month plus the annual property taxes and that this covered not only his room and board but also his care. Petitioner also wrote in a letter to the Department "[h]is 'rent' includes room & board (his own bedroom & bathroom), utilities, house cleaning, laundry, meal prep, bathing, transportation, medication pickups and twice daily administration." This agreement is a personal care contract. Since there was no written agreement at the time the payment obligation began, and because Petitioner's rent is more than just rent and includes the costs of his personal care, the transfers for not only property taxes but also monthly rent are considered a divestment totaling \$ [REDACTED] for the five-year look back period.

Lift Chair

AHR also provided a handwritten receipt from a seller on Craigslist for Petitioner's lift chair. (Exhibit A, p. 145; Exhibit 1, p. 142) The receipt is dated September 24, 2021 for \$ [REDACTED]. *Id.* AHR noted on the photocopied page that this purchase was a cash withdrawal from Petitioner's account. *Id.* A review of Petitioner's bank statement for September 2021 verifies a cash withdraw of \$ [REDACTED]. (Exhibit A, p. 144) Since this transaction converted Petitioner's cash asset into another form of asset, a lift chair, it is **not** considered a divestment. BEM 405, p. 10.

Burial/Funeral Policies

AHR provided a copy of a cashier's check dated October 27, 2021 for \$ [REDACTED] to Abbit Management that included a memo which stated that it was a burial policy "[p]urchased by: Mary J Lindsey." (Exhibit A, p. 148) On the October 2021 bank statement, AHR made a notation that a withdrawal for \$ [REDACTED] was for a funeral policy and headstone on October 27, 2021. While it is possible that this funeral policy was intended for Petitioner, there is no verification that it was in fact for Petitioner's burial. The only indication of who this policy might belong to is AHR because she was the purchaser.

A second cashier's check was addressed to National Guardian Life Insurance Company for the same date in the amount of \$ [REDACTED]. (Exhibit A, p. 151) This check included a

memo that it was a burial policy but did not indicate for whom it was intended or who purchased the policy.

Four VCLs were issued to Petitioner and his AHR. (Exhibit A, pp. 23-30) “Funeral contract page 2 \$ [REDACTED]” was listed on at least two of the four VCLs. At the hearing, neither party presented an actual funeral/burial contract, in part or in full, for Abbit Management or for National Guardian Life Insurance Company. The only items provided were the cashier’s check and associated receipts.

Given that the burial policies have not been sufficiently verified, the withdrawal of \$ [REDACTED] on October 27, 2021 must be considered a divestment.

Headstone/Monument

On October 27, 2021, AHR purchased a headstone/monument for Petitioner which cost \$ [REDACTED]. AHR provided this receipt for the hearing and wrote comments on the receipt that the transaction had been completed with AHR’s credit card and then funds were transferred from Petitioner’s account to AHR’s credit card to cover the purchase and referenced the transfer which took place on October 28, 2021. A review of Petitioner’s bank statement from October 2021 shows that a transfer occurred in the amount of \$ [REDACTED] from Petitioner’s account to an account ending in 6603, AHR’s credit card. It is also notable that the inscription for the headstone lists Petitioner’s name. Since this transfer was a conversion of Petitioner’s assets from one form of asset to another, cash to monument, it is **not** considered a divestment. BEM 405, p. 10.

October 27, 2021 Payment to Ely Manor

On October 27, 2021, a cashier’s check was purchased and paid to the order of Ely Manor, Petitioner’s LTC facility, in the amount of \$ [REDACTED]. (Exhibit A, p. 149) A receipt from Ely Manor verifies that the payment was for Petitioner’s rent. (Exhibit A, p. 150) Petitioner’s bank statement from November 2021 verifies the withdrawal of the \$ [REDACTED]. (Exhibit A, p. 152) Since this payment was to Petitioner’s LTC facility for his rent, it is **not** considered a divestment.

Toilet and Flooring Repair

On July 15, 2021, AHR had a toilet repaired for \$ [REDACTED]. (Exhibit A, p. 162; Exhibit 1, p. 141) On September 30, 2021, AHR purchased flooring to repair the floor in her home for \$ [REDACTED]. (Exhibit A, p. 163; Exhibit 1, p. 140) While AHR testified that these repairs and updates were attributable to Petitioner, neither of these transactions corresponds with a transaction in his bank statements nor did AHR make any notations on the bank statements to show which transactions might be attributable to these purchases. (Exhibit A, pp. 142-144) Furthermore, no notation was made about these transactions on the working spreadsheet between the Department and AHR. (Exhibit A, pp. 73-74) Since there is no verification that shows Petitioner’s responsibility to pay, and no corresponding transaction noted in the spreadsheets or bank statements, these receipts are not considered in determining the value of any potential divestment.

Medical Receipts

AHR submitted medically related receipts for Petitioner that she paid through her accounts and reimbursed herself from Petitioner's accounts. The total medical expenses as verified through receipts, explanation of benefits, and pharmacy printouts was \$ [REDACTED] between September 2016 and October 2021. Since each of these transactions was verified as an expense attributable to Petitioner, \$ [REDACTED] of the transfers from Petitioner to AHR are **not** considered a divestment. (Exhibit 1, pp. 20, 32-112, 115-142, 170, 177-210)

Miscellaneous spending

AHR also provided proof of transactions completed through Amazon, Kohl's, Ambucare, and Walmart. (Exhibit 1, pp. 144-158, 160-169, 171-172, 174-176) Each page of the receipts identifies a month and transaction that she wrote at the top of the page. Cross referencing these receipts with her spreadsheet notes and the appropriate bank statements shows inconsistencies. For example, a receipt for a children's picnic table shows that the purchase was made on March 4, 2017 and AHR indicated it should be cross referenced with the transaction on April 6, 2017. However, AHR's own notes indicate that the transaction on April 6, 2017 is attributable to rent. This same inconsistency where one notation does not match another is seen in other areas of transactions. In addition to the inconsistency in the notations, there is also an inconsistency in the dollar value of the transactions. While these transactions may have been purchases for Petitioner's benefit or so that Petitioner could make gifts, but none of these transactions show any relation to Petitioner. Not one Amazon purchase was mailed to Petitioner, but instead all were mailed to AHR. Some of the items purchased include durable medical equipment, but again there is nothing to connect the purchases to Petitioner. None of the items show a prescription or even a suggestion from a doctor that Petitioner needed these items. None of the transactions from the receipts matches a transaction from Petitioner's bank account. Therefore, these items are not considered in determining whether a divestment occurred.

Return of \$ [REDACTED] from AHR to Petitioner

On March 3, 2022, after the request for hearing was received in this case, AHR withdrew \$ [REDACTED] from her account shared with her husband and deposited it into Petitioner's account. The \$ [REDACTED] was then paid to Petitioner's LTC to cover the mounting costs. AHR calculated the \$ [REDACTED] as including the money taken for the vehicle purchased for Petitioner but not titled in his name, plus two additional transactions for which AHR could not identify their purpose on March 20, 2017 and June 21, 2018. The notations made by Petitioner from the spreadsheet indicate that \$ [REDACTED] was transferred for the car, and bank statements show that \$ [REDACTED] was transferred on March 20, 2017 in addition to \$ [REDACTED] on June 21, 2018.

Pursuant to policy a divestment penalty can be recalculated if "all the transferred resources are returned" and "full compensation is paid for the resources." BEM 405, p. 16. At the hearing and in email communications between the parties, the Department asserted that literally every penny of the entire value of the divestment for the entire 5-year look back period must be returned. However, if the Department's assertion were

true, there would be no need to “recalculate” the divestment penalty period. Instead, the penalty would end whenever verification was received showing that the funds had been returned. But policy states that

Once a divestment penalty is in effect, return of, or payment for resources cannot eliminate any portion of the penalty period already past. However, 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 [the department] that the resources were returned or paid for.

Id (emphasis added). Given this language, it would appear that the appropriate interpretation of policy is that, in situations like this case where there are identifiable transactions for lump sums (the car, and the transactions from March 20, 2017, and June 21, 2018), the entire value, all of the transfer, must be returned to Petitioner, before a recalculation of the penalty period can occur. Once the penalty is recalculated the new end date may be the date that verifications were returned or whatever the new calculation requires. Since AHR returned the full value of the money taken for the car (\$ [REDACTED]) as well as the full value of the transaction from March 20, 2017 (\$ [REDACTED]), these transactions are considered returned and warrant a recalculation of the penalty period. The value of the third transaction from June 2018 was not returned in full so it is not considered in the recalculation of the penalty period.

In summary, the Department improperly considered divestments for the following: the windows; the lift chair; the headstone/monument; October 27, 2021 payment to Ely Manor; medical expenses totaling \$ [REDACTED]; and finally, \$ [REDACTED] returned to Petitioner by AHR.

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 Department policy when it calculated a divestment penalty of 1 year, six months, and 20 days.

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. Recalculate the divestment penalty noting the following transactions which are not divestments:

- a. \$ [REDACTED] transfer for window replacement;
 - b. \$ [REDACTED] lift chair purchase;
 - c. \$ [REDACTED] headstone/monument purchase;
 - d. \$ [REDACTED] payment to Ely Manor on October 27, 2021;
 - e. \$ [REDACTED] for medical expenses;
 - f. \$ [REDACTED] returned to Petitioner as of March 3, 2022;
2. Issue supplements to Petitioner or on his behalf for benefits not previously received effective October 1, 2021, ongoing; and,
 3. Notify Petitioner and his AHR in writing of its decision.

AM/mp



Amanda M. T. Marler
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

Email Recipients:

MDHHS-Allegan-Hearings
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