



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

SHELLY EDGERTON
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Date Mailed: July 31, 2017
MAHS Docket No.: [REDACTED] 17-006051
Agency No.: [REDACTED]
Petitioner: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

MAHS Docket No.: [REDACTED] 17-006057
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Lynn M. Ferris

HEARING DECISION

Following Petitioners 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; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, a three-way telephone hearing was held on [REDACTED], from Detroit, Michigan. The Petitioners were represented by Attorney Robert Mannor. Also appearing as witnesses for the Petitioner were [REDACTED] and [REDACTED]. Neither Petitioners appeared at the hearing. The Department of Health and Human Services (Department) was represented by Assistant Attorney General [REDACTED]. Also appearing on behalf of the Department as witnesses were [REDACTED], Eligibility Specialist and [REDACTED], Eligibility Specialist.

ISSUE

Did the Department properly determine that a divestment occurred when Petitioners sold their real property (home)?

Did the Department correctly calculate the 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. The Petitioners, [REDACTED], are married and were both in Long Term Care (LTC) at the time of the application.
2. The Petitioners applied for Medicaid on [REDACTED]. The Department determined that Petitioners were eligible for Long Term Care (LTC) Medicaid for [REDACTED]. Exhibit C
3. The Department sought verification of Petitioner's assets and valuation of the home sold by Petitioners by Verification Checklist (VCL) dated [REDACTED] due [REDACTED]. The VCL requested "documents needed to process your application and requested: 1. Property value from [REDACTED] [REDACTED] [REDACTED]. (Appraisal of property from sale or current tax statement showing taxable and assessed value)." Exhibit I
4. The Department issued a Benefit Notice on [REDACTED]. The Benefit Notice advised Petitioners that cost for long term care starting [REDACTED] would be [REDACTED] for each Petitioner. "Medicaid will not pay for long term care from [REDACTED]. The Patient Pay Amount (PPA) for [REDACTED] is [REDACTED] and [REDACTED] ongoing is [REDACTED]". Exhibit C
5. The Department conceded that the calculation it used to determine the divestment penalty was incorrect and must be recalculated if divestment is determined to have occurred. Exhibit E
6. The Petitioners sold a summer home they owned located at [REDACTED], [REDACTED], Michigan on [REDACTED] cash. Exhibit A and Exhibit H
7. The Petitioner's also transferred a vehicle title to a car two years prior to the application. The Department determined the value of the car was [REDACTED]. The amount of the vehicle value is not in dispute.
8. The State Equalized Value based upon the [REDACTED] tax bill provided to the Department for the home sold by the Petitioner's was [REDACTED]. The Department used 2 times the SEV to determine the value of the property when sold, which it determined was [REDACTED]. Exhibit G
9. An appraisal dated [REDACTED] was performed on the property for an appraisal of the property as of [REDACTED]. The Appraisal Report found the property market value to be [REDACTED]. Exhibit A, p. 153-131.
10. On [REDACTED], the Petitioners' attorney requested a timely hearing protesting the Department's actions. Exhibit A.

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.

The Petitioners are husband and wife and are in the same MA fiscal group. BEM 211 (January 1, 2016), p. 8. The cases for Petitioner [REDACTED] were consolidated and heard together at the hearing.

In this case the Department found that a divestment occurred due to the transfer of two resources in this case, a home which the Department contends was sold for less than fair market value and a car which was given away. As a result of the finding of divestment by the Department, a penalty period was imposed for the period [REDACTED]. During this penalty period Medicaid will not pay the client's cost for long term care (LTC). BEM 405, p. 1. The parties agree that the valuation placed on the car is not in dispute. BEM 405 (January 2017), p. 1.

Department policy defines transfers which are divestments as follows:

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; see definition in glossary.
- Is not listed below under TRANSFERS THAT ARE NOT DIVESTMENT BEM 405, p.

1

Resource means all the client's and 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 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/her spouse. BEM 405, p. 1-2.

Ultimately transferring of a resource means giving up all or partial ownership in (or rights to) a resource. Examples of a divestment that are relevant to this matter include: giving away a vehicle, (car) and selling an asset for less than fair market value. See BEM 405, p. 2.

Department policy also discusses the meaning of the term less than fair market value:

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. That is, the amount received for the resource was less than what would have been received if the resource was offered in the open market and in an arm's length transaction (see glossary). BEM 405, p 6

The Department Glossary defines the term Arm Length Transaction as follows:

ARM LENGTH TRANSACTION

A transaction between two parties who are not related and who are presumed to have roughly equal bargaining power. It consists of all the following three elements:

- it is voluntary
- each party is acting in their own self-interest
- it is on an open market.

By definition a transaction between two relatives is not an arm length transaction. BPG Glossary, (October 1, 2015), p. 6.

The Glossary also defines the term Fair Market Value as follows:

The amount of money the owner would receive in the local area for his asset (or his interest in an asset) if the asset (or his interest in the asset) was sold on short notice, possibly without the opportunity to realize the full potential of the investment. That is, what the owner would receive and a buyer be willing to pay **on the open market** and in an arm length transaction. See definition in this glossary. (emphasis supplied).

When a transfer occurs the Department must verify the following to document the divestment:

Date of Transfer.

Fair market value or cash value.
Uncompensated value. BEM 405, p. 17.

In this case, the Department imposed a Divestment penalty due to its finding that the sale of the Petitioners' home in ██████, Michigan was sold for less than fair market value causing a divestment to occur and also due to the Petitioner's giving the car away. The Petitioners dispute the finding of divestment as regards the sale of the home and contend that the sale of the ██████ property was not a divestment because it was an arm length transaction, and was sold for fair market value.

Once the Department determined that the sale of the home was a divestment it set about determining the fair market value of the home. In this case the home asset value is to be determined.

The Petitioners sold the summer home for ██████ cash to a general contractor familiar with the property. The Petitioner's daughter who appeared as a witness testified that her father had attempted to sell the property for at least 5 years for ██████ and had no takers. The Petitioner, ██████, had contacted the general contractor (also the purchaser of the home), to obtain a quote for insulating the home as he planned to move back to Michigan. The contractor inquired of the Petitioner whether he was interested in selling the house and the Petitioner said he was, and offered the home to the contractor originally asking ██████ for the property. The contractor declined to purchase the home for ██████ and offered ██████ cash which offer the Petitioner accepted.

The Department did not use the purchase price of ██████ when determining the value of the transfer and in calculating the divestment amount. The Department witness who determined the divestment and value of the home expressed doubt that the sale price was the actual price paid, however, there is no factual dispute that the sale was consummated for ██████ cash based upon a record of the sale, the Closing Statement. The warranty deed provided by Petitioner's counsel as part of its hearing request also indicated that the sale amount was for ██████. Exhibit A. The Department sent a Verification Checklist to Petitioner requesting information to determine Property value from ██████. The verification requested that Petitioner provide an appraisal in connection with the sale of the property or the ██████ tax bill. Exhibit I. A closing statement of the sale was provided by Petitioner on ██████, and the ██████ tax bill was provided pursuant to the verification request. The Department based its valuation and determination of fair market value of the property on the SEV of ██████ times 2 which totaled ██████. The Department determined that using the SEV to be more accurate and reliable valuation of the property than the closing statement. The Petitioners and their son jointly owned the property, however the son, ██████ did not take his 1/3 share of the ██████ proceeds.

The Petitioners' son, ██████ provided a ██████ property tax bill to the Department as requested because the ██████ tax bill was deemed to be less accurate. On ██████, the Petitioners also provided an approximation of comparable

sales from an undisclosed real estate agent showing a range of values from [REDACTED] Exhibit D. At the hearing, and as part of the Hearing Request filed on behalf of Petitioners, the Petitioners' counsel also offered a professional appraisal of the property by a Certified Residential Appraiser. Exhibit A, p.133-153. The certified appraiser found the market value as of [REDACTED].

The Petitioners' daughter (who testified as a witness) established that the home was built in [REDACTED] and that no repairs had been made, except for a roof. The house had asbestos siding, old wood windows, old plumbing, and the home was not insulated. The appraisal report confirms this testimony. The house sits on a parcel considered to be a city lot. At the time of the sale, the Petitioner [REDACTED] was 89 years of age. The home was not listed with a realtor and there was no for sale sign posted on the property.

Because the Department conceded that when originally calculating the divestment penalty it did not consider and remove the Petitioners' son's interest as a 1/3 owner of the property, the Department must recalculate the divestment divisor and redetermine the divestment amount.

At the hearing, the Petitioners submitted a certified appraisal of the property obtained after the divestment amount had been determined by the Department and after the issuance of the [REDACTED] Benefit Notice. Exhibit C. The Department did not have this information available at the time of its determination of the property value. The appraisal was prepared after the sale of the property was completed and is a valuation of the property as of [REDACTED].

When determining eligibility for SSI-related MA categories assets must be considered. Assets are defined as Cash, Personal Property (vehicles) and Real Property which is land and objects affixed to the land such as buildings. BEM 400, (January 2017) p. 1.

To determine the fair market value of real property and mobile homes use:

Deed, mortgage, purchase agreement or contract

State Equalized Value (SEV) on current property tax records multiplied by two.

Statement of real estate agent or financial institution.

Attorney or court records.

County records. BEM 400, p. 30-31.

The following prove ownership and/or value of assets.

Real Property

Deed, mortgage, purchase agreement or contract.

- State Equalized Value (SEV) on current property tax records multiplied by two.
- Attorney or court records.
- County records.
- Statement of real estate agent or financial institution. BEM 400, p. 60-61.

The Department's witness, Ashley Roth, who determined the divestment amount and the fair market value of the property, testified that she used two times the State Equalized Value (SEV) shown on the [REDACTED] tax statement for the property provided by Petitioner rather than the closing statement provided by Petitioner. She further testified in support of her decision because she felt the closing statement could have just been an agreement written up by any attorney. At the time the fair market value was determined, the Department had available the closing statement for the sale of the property and the [REDACTED] tax statement as well as the comparables which demonstrated a range for the property of [REDACTED]. The Department used the SEV times 2 formulate and relied on BAM 130 which advises to use a particular source if it is the most reliable (public record, data matches) when it relied on the [REDACTED] tax statement and the SEV for the property. Based upon the information that was available, it was not unreasonable for the Department to use the method it did to determine the value, two times SEV. The closing statement is reliable to establish what the property was sold for, but does not in and of itself establish that the sale price of [REDACTED] was fair market value.

The Petitioner's counsel in his proposed findings of fact asserts that the sale in question fits the definition of an arm length transaction in that it was between two parties who are not related and who are presumed to have roughly equal bargaining power; it was voluntary; each party is acting in their own self-interest, and it is on an open market. At the time of the sale the property was not listed with a realtor and there was no for sale sign posted on the property. Petitioners' daughter (witness [REDACTED]) testified that Petitioner had made prior attempts to sell the house over the last 5 years for [REDACTED] by asking individuals he knew if they were interested in purchasing the house- with no offers. At the time Petitioner's husband accepted the [REDACTED] cash offer for the home, there had been no discussion with a realtor, the house was not listed for sale, there was no for sale sign posted at the house. In addition, no evidence was presented that the property had been advertised for sale on the newspaper or online. See also BEM 400, p. 14 which also describes conditions to describe an action sale attempt of an unsaleable home.¹.

Based upon the evidence presented it is determined that the sale of the house by the Petitioners was not an arm length transaction because it was not a sale on an open market. The purchaser and the seller were the only individuals involved in the sale and

¹ An actual sale attempt to sell means the seller has a set price for fair market value, is actively advertising the sale in publications such as local newspaper, and is currently listed with a licensed realtor.

there was no other party offered the property. It is also not considered a sale on the open market because it was not listed for sale, no realtor was involved in the sale and no for sale sign was posted on the property. The facts in evidence establish that the sale of the home was a private sale to one interested buyer. No other person was offered the home at the [REDACTED] original asking price. Therefore, it is concluded that there has been a divestment because the property was sold for less than fair market value as the transaction was not an arm length transaction for the reasons stated above.

The Department's determination at the time it determined the value of the home is also appropriate as it determined the market value based upon a tax record SEV for 2016, which is one of the methods authorized by Department policy found in BEM 400. Based upon what was available to the Department at the time of its determination the Department's determination was in conformance with Department policy and was a reliable and accurate valuation at the property.

In conclusion, the Department must recalculate the divestment penalty because it conceded it used the wrong divestment divisor because the Petitioners' son's interest in the property was not considered.

DECISION AND ORDER

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 the divestment penalty and divestment divisor.

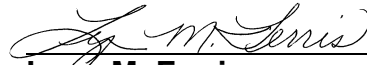
Accordingly, the Department's decision is

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. The Department shall recalculate the Petitioner's divestment penalty and re determine the divestment divisor.
2. The Department shall provide written notice to the Petitioner of its determination.

LF/



Lynn M. Ferris
Administrative Law Judge
for Nick Lyon, 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 Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS 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. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

Counsel for Respondent

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DHHS

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED])

Petitioners

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Counsel for Petitioners

[REDACTED]
[REDACTED]
[REDACTED]