



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]

Date Mailed: April 30, 2019
MAHS Docket No.: 19-002358
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Alice C. Elkin

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 April 11, 2019, from Detroit, Michigan. Petitioner was represented by A [REDACTED], her daughter and authorized hearing representative (AHR). The Department of Health and Human Services (Department) was represented by Rolando Gomez, lead worker and hearing coordinator.

ISSUE

Did the Department properly conclude that Petitioner divested \$7,214.25 and apply a divestment penalty to her receipt of long-term care (LTC) benefits under the Medicaid (MA) program?

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] 2016 and [REDACTED] 2016, Petitioner submitted applications for MA to the Department. Both applications were denied due to excess assets. (Exhibits 1-8.)
2. On [REDACTED] 2017, Petitioner reapplied for MA, seeking LTC benefits (Exhibit 9).
3. During the processing of the [REDACTED], 2017 application, Petitioner disclosed that she and her husband had transferred two life insurance policies, one on Petitioner's life with a cash surrender value of \$3,094.67 and the other on

Petitioner's husband's life with a cash surrender value of \$4,119.58, to the AHR in repayment for expenses the AHR incurred in paying for caregivers for Petitioner and her husband (Exhibits 10 and 12).

4. The Department worker processing the application twice requested advice from the Department's LTC support unit concerning whether the transfer resulted in a divestment by Petitioner (Exhibits 11 and 13).
5. On April 5, 2017, the Department sent Petitioner a Health Care Coverage Determination Notice advising her that she was approved for MA coverage with a deductible for February 1, 2017 ongoing (Exhibit 20).
6. On November 5, 2018, the Department sent Petitioner a redetermination form to assess her ongoing eligibility for MA and LTC services (Exhibit 14).
7. In processing the redetermination, the Department worker again requested advice from the Department's LTC support unit on whether the transfer of the life insurance policies by Petitioner to the AHR resulted in a divestment. Relying on language in Department policy that the Department "[a]ssume transfers for less than fair market value [were] for eligibility purposes until the client or spouse provides convincing evidence that they had no reason to believe LTC . . . might be needed," the LTC support unit advised the worker that a divestment had occurred when the policies were transferred to the AHR and the amount divested was the sum of the cash surrender value of both policies (Exhibits 16 and 17).
8. On February 6, 2019, the Department sent Petitioner a Health Care Coverage Determination Notice notifying her that MA would not pay for any LTC expenses from March 1, 2019 to March 26, 2019 because she had divested \$7,214.25 when she transferred the life insurance policies in 2017 (Exhibit 18).
9. On [REDACTED], 2019, the Department received the AHR's request for hearing disputing the divestment penalty.

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.

In the February 6, 2019 Health Care Coverage Determination Notice, the Department notified Petitioner that a divestment penalty would apply to her case during which time MA would not pay for any LTC expenses from March 1, 2019 to March 26, 2019. The Notice explained that the divestment resulted from the transfer of life insurance policies with cash surrender values totaling \$7,214.25 (Exhibit 18).

A divestment means a transfer of a resource by an individual or his or her spouse that is all the following: (i) within a specified time, (ii) for less than fair market value, and (iii) not expressly identified under BEM 405 (January 2019), p. 9, as not a divestment. BEM 405, p. 1. The Department must assess for divestment any transfer of resources in the sixty months prior to the individual's baseline date and any transfer of resources on and after the individual's baseline date. BEM 405, p. 5. The baseline date is the date the institutionalized individual was eligible for MA and in LTC. BEM 405, p. 6.

In this case, because Petitioner became eligible for MA and was in LTC as of February 1, 2017, her baseline date is February 1, 2017. Thus, the Department must assess for divestment any transfers made within the 60-month look-back period from February 1, 2017 and on and after February 1, 2017. Here, the Department concluded that there was a divestment when Petitioner and her husband transferred their life insurance policies to their daughter, the AHR, effective March 1, 2017 (Exhibit 12, pp. 95-96). Resource means all the client's and spouse's assets and income. BEM 405, p. 1. Thus, the Department properly considered the transfer by both Petitioner and her husband of their respective policies to the AHR for purposes of determining whether there was a divestment.

The transfer of the life insurance policies by Petitioner and her husband to the AHR is not a transfer that is expressly identified under policy as not a divestment. BEM 405, pp. 9-10. Therefore, it must be assessed to determine whether there was a divestment. A divestment is a transfer of a resource for less than fair market value. BEM 405, p. 1. Transferring a resource means giving up all or partial ownership (or rights to) a resource. BEM 405, p. 2. "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. In other words, 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. BEM 405, p. 6. Compensation must have tangible form and intrinsic value. BEM 405, p. 6. Not all transfers are divestments, but giving an asset away is a divestment. BEM 405, p. 2.

When Petitioner and her husband transferred the life insurance policies to the AHR effective March 1, 2017, they did not receive any compensation. The AHR argues that her parents transferred ownership of their life insurance policies to her to repay her for the funds she had sent them over the course of 2016 to pay for their household

expenses and care. In essence, she argues that the over \$60,000 she sent them for expenses and care was the fair market value Petitioner and her husband received for the life insurance policies.

Department policy provides that relatives can be paid for services. BEM 405, p. 6. However, when relatives provide assistance or services, they are presumed to do so for love and affection and compensation for past assistance or services creates a rebuttable presumption of a transfer for less than fair market value. BEM 405, p. 7. The Department must assume that services were provided for free when no payment was made at the time services were provided unless a client rebuts this presumption by providing tangible evidence that a payment obligation existed at the time the service was provided, such as a written agreement signed at the time services were first provided. BEM 405, pp. 6-7. The Department may not rely on the use of best available information or best judgment as verification. BEM 405, p. 7. If the services provided involve personal care or home care as described in policy, payment for such service will involve transfers for less than fair market value unless the client's physician recommended the services in writing and the agreement for services was in writing and notarized prior to the services being performed. See BEM 405, p. 8.

Here, the AHR provided financial assistance to Petitioner and her husband in 2016, paying over \$66,000 towards their expenses and care. Petitioner contended that she and her husband transferred the life insurance policies to the AHR to repay her for the financial contributions. She explained in a January 15, 2017 letter that she and her husband planned to sell to the AHR their life insurance policies with a cash values totaling \$7,214.25 to repay the AHR for her financial assistance in 2016 towards their household and caregiver expenses (Exhibit 10, p. 91). The AHR acknowledged that there was no written agreement executed by her and her parents for repayment of the funds *before* she made the payments. Because there was no repayment agreement in place between the AHR and her parents before the AHR paid for Petitioner's expenses in 2016 and Petitioner and her husband transferred the life insurance policies to the AHR in 2017, the evidence did not rebut the assumption that the AHR provided financial assistance out of love, without expectation of repayment, where there was no evidence that Petitioner had an obligation to repay the AHR.

Department policy also provides that a transfer does not result in a divestment if the transfer is "**exclusively** for a purpose other than to qualify or remain eligible for MA." BEM 405, p. 11 (emphasis added). In making this assessment, the Department assumes that a transfer for less than fair market value was for eligibility purposes until the client or spouse provides convincing evidence that there was no reason to believe MA LTC services might be needed. BEM 405, p. 11.

Because Petitioner was 85 years old at the time of her [REDACTED], 2017 application (Exhibit 9, p. 68) and two previous MA applications submitted by Petitioner to the Department on [REDACTED] 2016 and [REDACTED] 2016 were denied because the value of Petitioner's countable assets exceeded the limit for MA eligibility, the facts in

this case do not support a finding that the transfer of the life insurance policies was made exclusively for reasons other than to qualify for MA. To the contrary, the evidence supported the conclusion that that the transfer was to make Petitioner MA eligible. Because Petitioner has failed to overcome the assumption that she had no reason to believe that LTC services were needed at the time she transferred the policies to the AHR, the transfer of the policies resulted in a divestment.

When there is a divestment, an MA penalty period is applied to the institutionalized client's case during which time MA will pay for MA-covered services but not LTC services. BEM 405, p. 1. The penalty period is computed by dividing (1) the total "uncompensated value" of the divested resource by (2) \$8,018, the average monthly private LTC cost in Michigan for Petitioner's 2017 baseline date. 42 USC 1396p(c)(1)(E)(i); BEM 405, p. 13.

The uncompensated value of a divested resource is the resource's cash or equity value (defined as the resource's fair market value reduced by any outstanding loans, mortgages, or other encumbrances on the asset) less any compensation received. BEM 405, p. 15; 42 USC 1396p(c)(1)(E)(1)(i)(I); State Medicaid Manual § 3258.1(A)(3). For SSI-related MA, the value of a life insurance policy is its cash surrender value (CSV). BEM 400 (February 2019), pp. 46-47. Here, the CSV on the policies totaled \$7,214.25, the sum of the \$3,094.67 CSV for the policy on Petitioner's life and the \$4,119.58 CSV for the policy on Petitioner's husband's life (Exhibit A, pp. 79, 81). The AHR argues that the value of the policies be reduced by expenses incurred by Petitioner in transferring the policies, specifically the sum of \$926 for state taxes, \$983 for federal taxes, and \$150 for preparation of individual income tax returns (Exhibit A). However, Department policy as well as federal law reduces the value of the divestment by *compensation received*, **not** expenses incurred. Therefore, the fact that there were transaction costs did not affect the amount of the divestment. Consequently, the uncompensated value of the transfer is the full \$7,214.25 CVS of the policies.

When the \$7,214.25 uncompensated value of the divested policies is divided by the \$8,018 average monthly private LTC cost in Michigan in 2017, the disqualification period is 0.89 months. The 0.89 portion of a month is multiplied by 30 to determine the 26-day penalty period. BEM 405, p. 13. A penalty is applied even if the total amount of the penalty is for only a partial month. BEM 405, p. 13. Thus, the Department properly concluded that Petitioner was subject to a 26-day divestment penalty. Because Petitioner was an active MA and LTC recipient beginning in February 2017 and the delay in applying the divestment penalty was due to agency error, Petitioner was entitled to timely notice of the 2019 divestment penalty. BEM 405, p. 15. The Department provided timely notice when it advised Petitioner in the February 6, 2019 Health Care Coverage Determination Notice that the 26-day divestment penalty would run from March 1, 2019 to March 26, 2019. See BAM 220 (January 2019), pp. 3-5.

Department policy provides that a penalty period may be waived if it creates undue hardship. BEM 405, p. 16. It is assumed that there is no undue hardship unless there

is evidence from the petitioner's physician that necessary medical care is not being provided and the client needs treatment for an emergency condition where a delay in treatment may result in the person's death or permanent impairment of the person's health. BEM 405, pp. 16-17. In this case, there was no evidence supporting undue hardship.

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 acted in accordance with Department policy when it concluded that Petitioner had divested life insurance policies valued at \$7,214.25 and applied a 26-day divestment penalty.

DECISION AND ORDER

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



AE/tm

Alice C. Elkin
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 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) 763-0155; 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

DHHS

Rolando Gomez
1365 Cleaver Road
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48723

Authorized Hearing Rep.

[REDACTED]
[REDACTED]
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Petitioner

[REDACTED]
[REDACTED]
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cc: ME—D. Smith; EQADHShearings
Tuscola County AP Specialist (2)