



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

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Date Mailed: October 26, 2020
MOAHR Docket No.: 20-005249
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Lynn M. Ferris

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 three-way telephone hearing was held on September 17, 2020, from Clawson, Michigan. The Petitioner was represented by Attorney Farrah Ramdayal. The Michigan Department of Health and Human Services (Department) was represented by Chantal Fennessey, Assistant Attorney General. Julianne Schultz, Eligibility Specialist, appeared as a witness on behalf of the Department.

At the conclusion of the hearing, an Order of Continuance was issued extending the hearing record for the submission of legal memorandum with respect to the availability of the property due to the appointment of Conservators by the Probate Court due to Petitioner's incapacity.

ISSUE

Did the Department properly deny the Petitioner's application for Medical Assistance Long Term Care (LTC) due to the Petitioner's having excess assets?

Is real property owned by Petitioner not available due to Petitioner being declared by the Probate Court incapacitated requiring the appointment of Conservators who must seek the Probate Court Judge's approval prior to the sale of the property?

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 Petitioner applied for LTC on [REDACTED] 2020 and retro coverage for the months of November 2019 through January 31, 2020. Exhibit A, pp16-42.
2. At the time of the application, the Petitioner also was the owner of real property that was a non-homestead property at [REDACTED] Michigan (Property). The Petitioner's then attorney, maintained that the property was unsaleable due to the condition of the well and violation of the well code. Exhibit A, p. 23
3. In an effort to determine if the property was saleable, the Department contacted the Huron County Health Department regarding the well permit and the unapproved water sample and also contacted the Broker who listed the Property in question for sale.
4. The State Equalized Value of the Property at the time of the application was \$171,900. Two times the SEV resulted in the property fair market value of the Property to be \$343,800. Exhibit A, p. 39. On February 17, 2020, two offers on the Property were submitted by a purchaser one for \$310,000 cash and another offer for \$340,000 with a mortgage. A counter-offer of \$360,000 was made presumably by the Co-Conservators and was not accepted by the purchaser who made the offers.
5. The real estate Broker who listed the Property gave an opinion that the February 17, 2020 offer was a reasonable offer and that the property should sell somewhere in the med \$340' to \$350's. Exhibit A, p. 74.
6. The Department issued a Health Care Coverage Determination Notice on May 1, 2020 denying the Petitioner's LTC application and determined that the property located at [REDACTED] Michigan (Property) did not meet the conditions to be considered a nonsalable Property and determined that the Property was a countable asset. The Department further found that the property was not listed at or below fair market value during the period required and that a reasonable offer was received. The Department determined that the Petitioner countable assets exceeded the \$2,000.00 asset limit for the program. Exhibit A, p. 76
7. The Petitioner's attorney filed a timely hearing request on or about July 29, 2020 protesting the Department's determination that Petitioner was not eligible to receive LTC benefits due to having excess assets.

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 this case, the Petitioner applied for Long Term Care on [REDACTED] 2020 at which time the Petitioner was the owner a non-homestead real property (Property) that it claimed was not a countable asset as the property was non-saleable due to the condition of the property and an unacceptable well water test. In addition, Petitioner's attorney also asserted that the property was not a countable asset because it was not available due to a finding by the Probate Court that the Petitioner was incapacitated and could not manage her affairs. The Probate Court appointed Co-Conservators to manage Petitioner's property and affairs. As part of the Conservatorship, the Probate Court ordered that the Conservators could not sell the Property without prior approval by the Probate Court. In addition, it is also asserted that the Petitioner did not have the legal authority to sell her Property due to the Conservatorship and therefore it was unavailable and thus not countable as an asset.

Ms. Julianne Schultz testified at the hearing on behalf of the Department. Ms. Schultz was the Eligibility Specialist that processed the Petitioner's application for LTC. As part of her responsibilities, Ms. Schultz had to determine the Petitioner's countable assets as the Department policy found in BEM 400 sets an asset limit of \$2,000.00 for a single individual. If the asset limit is exceeded, the applicant is not eligible for Medicaid LTC. Ms. Schultz testified that on April 9, 2020 while she was reviewing the LTC application in an effort to clear up some dates and listing prices of the property, she contacted Ms. Jodi Smith the broker whose company had previously listed the Property and confirmed the listing agreement provided with the LTC application. Ms. Schultz requested that Ms. Smith provide the listing dates and listing prices for the Property. The broker sent a letter in response to Ms. Schultz dated April 22, 2020, received by Ms. Schultz on April 30, 2020. Exhibit A, p.

Ms. Schultz also sent a verification Checklist (VCL) dated April 14, 2020 requesting an explanation of why an offer of \$340,000 made on February 17, 2020 was countered at \$365,000 which counter-offer appeared to be above fair market value using the benchmark to determine value of two time the state equalized value (SEV) of the property. Department policy states that the fair market value determination can be based upon two times the State Equalized Value (SEV) shown on the tax records. The broker Ms. Smith of Real Estate One responded on April 22, 2020 with listing history and offers for the Property. Also disclosed was a September 30, 2019 letter from Huron County requiring that a water sample had to be resampled due to coliform bacteria. Exhibit A, p. 34. In a follow up letter, from the County the Petitioner was requested to resample the water due to an unsatisfactory bacteria sample to correct the deficiency

and meet the well code. Exhibit A, p. 35. The SEV of the Property based upon the 2019 tax bill was \$171,900. Exhibit A, p. 39.

In addition, due to the claim by Petitioner's former attorney asserting that the property was non-saleable due to the well code and a failed water sample, on March 27, 2020 Ms. Schulz also contacted Mr. Robert Kubacki the Manager of the Huron County Health Department to determine the requirements for wells and well process. On March 31, 2020 Ms. Schultz sent an email to Huron County to confirm that Huron County would not prohibit the sale of a property for an unsatisfactory sample of a well. The County responded to Ms. Schultz's inquiry and advised her that the County would not prohibit the sale of the property or deem it unsaleable due to the unsatisfactory well sample. The effect of the unsatisfactory well sample just delayed the County issuing the final well permit.

Ms. Schultz sent a verification checklist on March 30, 2020 to the Petitioner's then attorney requesting additional information on the well and an also email to the Petitioner's then attorney, Ms. Stubbs requesting clarification of the verification received dated March 30, 2020. Petitioner's attorney Ms. Stubbs in a response to Ms. Schultz received on April 9, 2020 maintained that the property was unsaleable pursuant to BEM 400 non-saleable assets with documentation that a request for water sample was submitted on April 8, 2020.

In an attachment to the application, an email from the listing realtor dated February 10, 2020 stated that as of the letter the well and the roof were fixed and that the prior showings had dried up until the well was fixed. The well was not working as of a seller disclosure dated July 16, 2017. Exhibit A, p. 33 Thereafter, the Petitioner's son Mr. ██████ took no steps after the new well installed to submit a new water sample and did not receive well approval as set forth in the September 30, 2019 letter from the County Health Department. Thereafter, based upon Petitioner's then attorney's own admission, the son took no steps to retest the water as he was working to close and winterize the property. In addition, the attorney's letter clearly states that during the winter months there is no interest for potential buyers to look at the property. Thus, the lack of action of the Petitioner's son and his judgment to wait to retest the well did not make the property unsaleable, rather he waited to do so when buyers would be more interested in the property. It was his choice to wait and his free choice to do so, and the claim that the property was unsaleable cannot now be supported under these facts. Exhibit A, p. 60. In addition, the attorney's letter admits that winterizing the property inactivates the well and thus testing is impossible. The retest was delayed by choice until spring of 2020 when the water was turned back on and the well operational. Once the property was reopened after winterization and the water and well were operational, bleach was introduced into the well in accordance with industry standards and a new submission to the County for water analysis was completed. The well water sample was approved.

The fact that the Huron County Health Department sent letters stating they had not received a satisfactory water bacteria sample did not make the property unsaleable, it

merely was delayed, due to the Petitioner's son inaction, the approval of the previously installed new well permit. The County also advised Ms. Schultz that the County finding that the water sample was unsatisfactory did not render the home unsaleable. Exhibit A, p. 59.

On September 30, 2019, the County wrote the Petitioner requesting that a water sampling be provided to complete well approval process and due to the well construction permit expiring. Exhibit A, p. 64. On August 10, 2019, the Petitioner's son and Co-Conservator signed a Listing Agreement with Real Estate One authorizing the sale of the Property for \$407,000. At the time a new well was installed and a new roof and the well permit had not been approved due to a water sampling which was rejected. Exhibit A, p. 69. In March 2020, the Property was Listed for \$389,900. In April 2020, the Property was listed for \$356,000. On February 17, 2020, two offers on the Property were submitted by a prospective purchaser, one offer was for \$310,000 cash and another offer for \$340,000 with a mortgage. A counter-offer of \$360,000 was made presumably by the Co-Conservators. The Broker gave an opinion that based on the current market that the offer of \$340,000 was a reasonable offer and that the Property should sell somewhere in the mid \$340' to \$350's. Exhibit A, p. 74.

Given the evidence as to the Property's value as regards the February 17, 2020 offers to purchase the property and the fact that one of the offers was within \$3,000 of two times the SEV fair market value; the qualified real estate broker's opinion who opined that the February 17, 2020 offer was deemed a reasonable offer, it is determined that the Property was not unsaleable. Department policy states that the asset becomes saleable when a reasonable offer is received. BEM 400, p. 15. The offer was made 10 days before the Petitioner's application for LTC and was deemed a reasonable offer and within the estimated range of what the property should sell for as well as that it was made within 90 days of the application. In addition, the two listings of the property for \$407,000 and \$ \$389,900 were both well above fair market value of 2 times the SEV of \$171,900 or \$343,800 and thus were not at or below fair market value sale attempts. Therefore, it is concluded that the Department correctly determined that the Property asset was not unsaleable and that the Petitioner's assets exceeded the \$2,000 asset limit for an applicant for Medicaid Long Term Care.

Availability of the Property

The Petitioner's attorney has filed a Brief In Support of the Unavailability of the Property and asserted that the Department erred when it denied the Petitioner's application for LTC due to the real property in question being unavailable and thus not a countable asset due to the appointment of a Co-Conservatorship and the requirement that the Conservators seek a court order prior to the sale of the property.

Department policy provides that an asset must be available to be countable. Available means that someone in the asset group has the legal right to use or dispose of the asset. Policy further direct that: Assume an asset is available unless evidence shows it is **not available**. BEM 400 (October 2020), p. 10.

In this case, a Co-Conservatorship was appointed by the Macomb County Probate Court for the Petitioner due to her incapacity to manage her property and affairs. The Issue presented is whether the appointment of a conservator makes the property in question unavailable and the real property not countable due to the Conservatorship and the requirement of Court approval for the sale.

The Petitioner argues that the Macomb County Probate Court's Letters of Conservatorship (Letters) issued March 3, 2017 requiring the Conservator seek prior Court approval in order to sell the Petitioner's real property makes the property unavailable. The Court appointed the Petitioner's two sons Co-Conservators of their mother. The Letters do not remove or alter the Petitioner's ownership interest in the real property. Rather, it is by reason of the fact that she is incapacitated and unable to manage her affairs that the Court placed the Conservator under a duty to seek prior court approval when attempting to sell, assign, transfer and/or mortgage real estate when dealing with the real property asset. The Conservatorship was not to limit the Petitioner's ownership interest in the property, but rather to require the conservator, who has no ownership interest in the property, to seek authority of the Court order to do so on behalf of the Petitioner. In addition, the Court in reviewing a proposed sale or other action regarding the Property must review evidence of the value of the property and determine if the sale, disposal, mortgage, pledge is in the protected individual's best interest. MCL700.5423. Also, it is noteworthy that in September 2020 the Petitioner's real property was sold while the Petitioner was still under a Conservatorship.

Additionally, the requirements regarding what a Petition filed by a Conservator for the sale of property must include for the Court's review evidence that such sale or other action regarding the property is proper and in the Petitioner's best interest. All such requirements go to the protection of and best interest of the Petitioner so that fair market value is based on the evidence presented to the Court, which if insufficient may require a written appraisal.

The Petitioner's counsel cites no law to support that the Conservatorship and the requirement of a Court Order prior to sale affects the Petitioner's ownership of the property or the right to dispose of the property such that it cannot be sold. Counsel's argument that the lack of unilateral authority by Petitioner to sell the property on her own thereby makes the property unavailable. Such right of the Petitioner to act unilaterally was restricted due to the Petitioner's incapacity, not because her legal ownership of the property was changed and was no longer conveyable or saleable under any circumstance. The argument that she had no more legal right to sell her property than she would have to sell her neighbors, is without merit in that no one could sell their neighbor's property because such a sale attempt would fail due to the person attempting to sell the property would have no right title or interest in their neighbor's property. Likewise, the fact that the property is in the name of a conservator as trustee also does not change the Petitioner's ownership of the Property and as such her estate's right to the proceeds from the sale for Petitioner's maintenance and care. The ownership of the Property at all times remains with the Petitioner and as the owner it is an available asset. The legal right to use or dispose of the asset remains the

Petitioner's subject to the Conservator as trustee to properly exercise his or her fiduciary duty to manage the property in the best interest of the Petitioner. Furthermore, 20 CFR416.1201 clearly states that it is only if the property **cannot** be liquidated, the property will not be considered a resource. In this case there is no prohibition that the property cannot be liquidated. The property can be sold and liquidated it merely requires others acting on behalf of the Petitioner due to her incapacity do so on her behalf and in a manner which protects the Petitioner's best interest.

Counsel for the Respondent in her brief, Department's Brief In Opposition to Petitioner's Claim the Property was an Unavailable Asset, cites *Schmidt v Ward County Social Services Bd.*, 634 NW2d 506 (N.D. 2001), which addresses the same issue presented in this matter and which determined that the Conservator's argument in that case that the funds in the conservatorship were not available to be incorrect. The North Dakota court, citing a well-accepted policy, reasoned that a basic social that a welfare recipient must use their own available income and resources before shifting the burden for their support to the public. The North Dakota court held that an asset to which a Medicaid recipient was entitled was not unavailable simply because the applicant needed to initiate a legal proceeding to access the asset. The court focused on the applicant's ability to make an asset available, which is a matter of fact not legal fiction. The court reasoned that an asset is not unavailable simply because the applicant must initiate legal proceedings to access the asset, citing *Linser v Office of AG* 672 NW2d 643, 648 (N.D. 2003).

In conclusion, it is determined that the real estate was not unavailable to the Petitioner due to a Co-Conservatorship requiring a court order for approval of the sale and thus was a countable asset.

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 determined that the Property was not unsaleable and thus was a countable asset which exceeded the \$2,000 asset limit. It is also determined that the Co-Conservatorship did not make the Property unavailable and that the Property was available and thus a countable asset.

Accordingly, the Department's decision is

AFFIRMED.

LF/tm



Lynn M. Ferris
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

Via Email: MDHHS-Macomb-12-Hearings
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