



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

Date Mailed: July 9, 2021
MOAHR Docket No.: 21-000895
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Colleen Lack

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 25, 2021. The Petitioner was represented by David Carrier, Attorney. Greg VanDeusen, Attorney, and Sara Alabrese, Paralegal, were also present. The Department of Health and Human Services (Department) was represented by Brian McLaughlin, Assistant Attorney General. Dawn Berridge, Eligibility Specialist (ES), appeared as a witness for the Department. Paul Bowmaster, General Services Program Manager, was also present.

During the hearing proceeding, the Department's Hearing Summary packet was admitted as Exhibit A, pp. 1-62.

ISSUE

Did the Department properly determine Petitioner's eligibility for Medical Assistance (MA)?

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 or about [REDACTED] 2020¹, an Application for Health Care Coverage Patient of Nursing Facility and an Assets Declaration Patient and Spouse were submitted requesting MA coverage retroactive to August 2020. (Exhibit A, pp. 2 and 12-18)
2. There is a land contract for [REDACTED] on a property at [REDACTED] [REDACTED] in [REDACTED] MI that was owned by Lakeland Enterprises LLC. There was a [REDACTED] down payment, monthly payments were to be made of [REDACTED] beginning May 5, 2019, and the entire purchase money and interest were to be fully paid within 5 years. It was also stated that the Purchaser and Seller understood that the regular monthly payments may not pay the land contract amount in full by the end of the term and there may be a substantial lump sum payment due at the end of the term. Petitioner's wife signed as a Member of the seller, Lakeland Enterprises LLC. (Exhibit A, pp. 28-33)
3. Petitioner and his wife are members of the LLC and, as such, the sellers of the [REDACTED] [REDACTED] property. (Exhibit A, p. 40)
4. On June 1, 2020, Judge Timothy Hicks signed a Protection Order Valuing and Authorizing Sale of Real Property stating for the [REDACTED] [REDACTED] property the fair market value of the remaining land contract balance for sale purposes is [REDACTED] (Exhibit A, pp. 34-36)
5. On December 9, 2020, the Department received a document addressing several properties. For the [REDACTED] [REDACTED] property, it was stated that this was sold on land contract on April 5, 2019 but payments are still being made until the balloon comes due. Payments of [REDACTED] are made each month and the payoff date is not expected until 2022. (Exhibit A, p. 39)
6. On January 14, 2021, an email was sent to the Department from Petitioner's attorney's office addressing a checklist. Regarding the land contract for the [REDACTED] [REDACTED] property, it was stated that the balance of the land contract is [REDACTED]. (Exhibit A, pp. 44-45)
7. On February 5, 2021, a Health Care Coverage Determination Notice was issued to Petitioner stating MA was approved but indicating there would be a divestment penalty from August 1, 2020 to October 31, 2020. (Exhibit A, pp. 6-11)

¹ The hearing summary states that the application was submitted on [REDACTED] 2020. However, the date stamp on the application documents indicates the Department received them on [REDACTED] 2020. (Exhibit A, pp. 2 and 12-18) The [REDACTED] 2020 application date would be consistent with a request for retroactive MA coverage to August 2020.

8. On February 17, 2021, a hearing request was filed on Petitioner's behalf contesting the Department's determination. (Exhibit A, pp. 4-11)

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 Department's hearing summary packet included the January 1, 2021 versions of BEM policies. (Exhibit A, pp. 47-62) The Health Care Coverage Determination Notice was issued on February 5, 2021. However, an older version of policy was in effect at the time of the November 30, 2020 application and during the months at issue in this case. Accordingly, the Department's determination will be reviewed under the older version of the applicable policies.

BEM 405 addresses MA Divestment. In part, this policy states:

Divestment results in a penalty period in MA, **not** ineligibility.

Divestment means a transfer of a resource (see *resource defined* in this item 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 in this item under *transfers* that are not divestment.

Note: See *annuity not actuarially sound and joint owners and transfers* in this item and BEM 401 about special transactions considered transfers for less than *fair market value*.

BEM 405, July 1, 2020, p. 1.

When a client jointly owns a resource with another person(s), any action by the client or by another owner that reduces or eliminates the client's ownership or control is considered a transfer by the client. BEM 205, p. 3.

Regarding less than fair market value and verification sources, the BEM 405 policy states:

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).

Sources to verify transfers and the reasons for them include, but are not limited to, the following:

- Legal documents.
- Payment or tax records.
- Bills of sale.
- Court or attorney records.
- Correspondence regarding the transaction.
- Bankbooks or statements.

BEM 405, July 1, 2020, pp. 6 and 18.

The Department is to compute the penalty period on the total Uncompensated Value of all resources divested. BEM 405, July 1, 2020, p. 12.

On February 5, 2021, a Health Care Coverage Determination Notice was issued to Petitioner stating MA was approved but indicating there would be a divestment penalty from August 1, 2020 to October 31, 2020. (Exhibit A, pp. 6-11) It appears that the Department based the divestment penalty on the full value of the land contract, \$26,000.00. (Exhibit A, p. 43; ES Testimony) Petitioner contests the February 5, 2021 determination. Petitioner asserts that the asset should be excluded in its entirety if the land contract is treated as a rental agreement, or alternatively, that the divestment penalty should be based on \$4,000.00, the value as determined by the June 1, 2020, Protection Order Valuing and Authorizing Sale of Real Property.

BEM 400 addresses land contracts:

Land Contracts

SSI-Related MA Only

A land contract is a form of seller financing. It is similar to a mortgage, but the buyer makes payments to the real estate owner (seller) until the purchase price is paid in full. A homeowner might also sell their home via a sale-leaseback agreement; see definition

in this item. A land contract does not have to be recorded in Michigan.

The person who sold the property is the holder of the note. The note is the holder's asset.

Example: John sells land to Irma on a land contract. John is the land contract holder. The land contract is John's asset. The land is Irma's asset.

The value of a land contract is the amount it can be sold for in the holder's geographic area on short notice (usually at a commercial discount rate) minus any lien on the property the holder must repay.

A land contract may be treated as a transfer of assets unless all the following are true:

- The repayment schedule is actuarially sound; and
- The payments are made in equal monthly amounts during the term of the agreement with no deferral of payments and no balloon payments; and
- The contract must prohibit the cancellation of the balance upon the death of the lender.

See **BEM 405, Uncompensated Value**, to determine the value of any land contract which does not meet all of the bullets listed in this policy.

BEM 400, October 1, 2020, p. 41
(Underline added by ALJ)

Uncompensated Value

The uncompensated value of a divested resource is

- The resource's cash or equity value.
- Minus any compensation received.
- The uncompensated value of a promissory note, loan, or mortgage is the outstanding balance due on the date of application.

BEM 405, July 1, 2020, p. 15.
(Underline added by ALJ)

Pursuant to the BEM 400 policy, because Petitioner and his wife are Members of the LLC that is the seller of the 2828 7th Street property, the land contract is Petitioner's

asset. (Exhibit A, p. 40) A land contract may be treated as a transfer of assets unless all three of the criteria set forth in BEM 400 are true. The land contract at issue in this case did not meet all of the listed criteria because there would be a balloon payment due at the end of the five year the land contract term. (Exhibit A, pp. 28-33 and 45; ES Testimony) The land contract resulted in a divestment because it did not meet all of the BEM 400 criteria.

It appears that the Department based the divestment penalty on the full value of the land contract, [REDACTED]. (Exhibit A, p. 43; ES Testimony) Pursuant to the BEM 405 policy, the Department is to compute the divestment penalty period based on the total uncompensated value of all resources divested. Further, BEM 405 specifies that the uncompensated value of a promissory note, loan, or mortgage is the outstanding balance due on the date of application. Accordingly, the Department should have computed the divestment penalty based on the outstanding balance due on the land contract as of the date of application. On January 14, 2021, an email was sent to the Department from Petitioner's attorney's office addressing a checklist. Regarding the land contract for the [REDACTED] [REDACTED] property, it was stated that the balance of the land contract is [REDACTED]. (Exhibit A, pp. 44-45) However, it is not clear if this was the outstanding balance as of that date, January 14, 2021, or as of the date of application, [REDACTED] 2020. Therefore, it is not clear whether this is the correct amount that should have been used as the uncompensated value of the land contract.

Petitioner asserts that if there is to be a divestment penalty it should be based on [REDACTED], the value as determined by the June 1, 2020, Protection Order Valuing and Authorizing Sale of Real Property. However, the policy indicates that the divestment is to be based on the uncompensated value of a divested resource, not the current value of a land contract or the property itself. Further, the BEM 405 policy specifies that the uncompensated value of a promissory note, loan, or mortgage is the outstanding balance due on the date of application.

Petitioner also asserted that the document that purports to be a land contract was actually more of a long-term lease. It was asserted that the payment amount was equivalent to what a property would rent for in that area. It was argued that if the land contract was instead treated as a rental agreement, the property would be excluded. The BEM 400 policy addressing income producing real property states that the Department is to exclude up to \$6,000 of equity in income-producing real property if it produces annual countable income equal to at least 6 percent of the asset group's equity in the asset. BEM 400, October 1, 2020, p. 38. This argument is found to be without merit as the documentation submitted to the Department clearly states that it is a land contract for the property at [REDACTED] [REDACTED] in [REDACTED], rather than a rental agreement.

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 satisfy its burden of showing that it acted in accordance with Department policy when it determined Petitioner's eligibility for MA because the divestment penalty should have

been computed based on the outstanding balance due on the land contract as of the date of application.

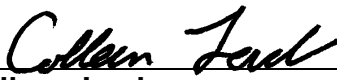
DECISION AND ORDER

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. Re-determine Petitioner's eligibility for MA and applicable divestment penalty in accordance with Department policy.
2. Issue written notice of the determination in accordance with Department policy.

CL/ml



Colleen Lack
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
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