



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], MI [REDACTED]

Date Mailed: June 22, 2023  
MOAHR Docket No.: 23-002621  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Ellen McLemore**

### **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 June 1, 2023, via conference line. Petitioner was represented by attorney, Marc Nakisher. The Department of Health and Human Services (Department) was represented by Assistant Attorney General Ticara Hendley. The Department solicited testimony from Ann Durkee, Eligibility Specialist, and Bridget Heffron, Medicaid Eligibility Policy Specialist.

### **ISSUE**

Did the Department properly determine that Petitioner was subject to a Medical Assistance (MA) divestment penalty period of January 1, 2023, through March 10, 2024?

### **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 October 1, 2022, Petitioner entered a Long-Term Care (LTC) facility.
2. On December 30, 2022, Petitioner submitted an application for MA benefits.
3. Petitioner submitted verification that a property that was deeded in his name had sold for \$131,568.44. The proceeds of the sale were deposited into an account owned by [REDACTED] (hereinafter referred to as LLC). Petitioner also provided verification that he had a 10% interest in the LLC, and his son had a 90% interest in the LLC.

4. On January 20, 2022, the LLC bank account with an outstanding balance of \$111,646.44 was closed, and the cash asset was transferred in its entirety to Petitioner's son.
5. On February 13, 2023, the Department sent Petitioner a Health Care Coverage Determination Notice informing him that he was eligible for MA benefits but was subject to a divestment penalty period of January 1, 2023, through March 10, 2024, for the divestment of (1) \$131,568.44 from the proceeds of the sale of Petitioner's property and (2) \$111,646.44, which the Department concluded was Petitioner's 10% value in the LLC.
6. On May 4, 2023, Petitioner's representative submitted a request for hearing disputing the Department's actions.

### **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 Department discovered that Petitioner owned two residential properties, only one of which was his homestead. A home located at [REDACTED] in [REDACTED] [REDACTED] was sold by Petitioner on December 15, 2022, and was not his homestead. The property sold for \$131,568.44, and the proceeds were deposited into the bank account of the LLC. The Department considered the sale of the property to be a divestment. Additionally, the bank account of the LLC was closed on January 20, 2022, with an outstanding balance of \$111,646.44. All of the funds from the bank account for the LLC were transferred to Petitioner's son. The Department also considered 10% of the cash asset transfer of the LLC bank account proceeds, or \$11,164.64, to be a divestment based on Petitioner's 10% ownership in the LLC.

Divestment means a transfer of a resource by a client or their spouse that is: (i) within a specified time; (ii) for less than fair market value; and (iii) not excluded by policy as a divestment. BEM 405 (January 2019), p. 1. Divestment results in a penalty period in MA, not ineligibility. BEM 405, p. 1. During this penalty period, the Department will not pay for the client's LTC services, home and community-based services, home help or home health. BEM 405, p. 1. 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. The Department will review any transfers after or 60 months

prior to the client's baseline date. BEM 405, p. 5. A client's baseline date is the first date that the client was eligible for MA and one of the following: (i) in LTC; (ii) approved for the waiver; (iii) eligible for home health services; or (iv) is eligible for home help services. BEM 405, p. 6.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. BEM 504, p. 2. Giving an asset away is considered a divestment. BEM 504, p. 2. One homestead where a person lives that they own is excluded for an asset group. BEM 400, p. 36. The Department argued that when Petitioner sold the [REDACTED] property, and gave the proceeds to the LLC, he divested the proceeds.

Petitioner's attorney argued that, even though the real property was deeded to Petitioner, it belonged to the LLC, and the property was not available to Petitioner. Petitioner's representative alleged that the asset was mistakenly deeded in Petitioner's name, as opposed to the LLC. An asset must be available to be countable. BEM 400, p. 10. Available means someone in the asset group has the legal right to use or dispose of the asset. BEM 400, p. 10. An asset is assumed to be available unless evidence shows it is not available. BEM 400, p. 10. The residence located at [REDACTED] was solely deeded to Petitioner. Petitioner was the only individual with a legal right to the property. Therefore, the property was available to Petitioner and is a countable asset for availability purposes. The Department calculated a divestment penalty period of 1 year, 1 month and 7 days based on the sale of the property for \$131,568.44.

At the hearing, Petitioner's attorney also argued that [REDACTED] was an excluded employment-related asset. Employment-related assets are those assets commonly used in a business, a trade or other employment, including a building in which a business is located. BEM 400, pp. 57-58. An employment asset can be excluded if they: (i) are required by a person's employer; or (ii) produce income directly through their use. BEM 400, p. 58. During the application process, Petitioner submitted evidence to support the argument that the [REDACTED] property was business asset, including a tax return for the LLC, Articles of Organization for [REDACTED]; an Operating Agreement; bank account activity, and a commercial insurance policy for the property (Exhibit 1, pp. 19-54).

Per policy, an employment asset is an asset commonly used in a business, a trade or other employment and can only be excluded if it is required by the client's employer or produces income directly from its use. BEM 400, pp. 38, 57. At the hearing, there was evidence presented that the LLC was engaged in wholesale real estate investing. Petitioner and his son, through the LLC, would purchase properties, make improvements, and sell the property for profit. A residential property that is purchased as an investment would produce income directly through its use, and therefore, is an employment-related asset and could be an excluded asset.

However, per policy, an employment-related asset remains excluded when a person is unemployed, *only if* that person intends to return to that type of work. BEM 400, p. 59 (emphasis added). When Petitioner sold the [REDACTED] property, he was already in LTC. There was no evidence presented by Petitioner that he intended, or had the capacity, to return to real estate investing. As there was no evidence that Petitioner

intended to return to the business of flipping homes, the [REDACTED] residence is not an excluded employment-related asset. Accordingly, when Petitioner sold the asset and the funds were deposited into the LLC bank account, there was a divestment. As such, the Department established that Petitioner was properly subjected to a divestment penalty period of 1 year, 1 month and 7 days due to the sale of the [REDACTED] property.

The Department also concluded that Petitioner had divested himself of his 10% interest in the LLC, or \$11,164.64, and applied an additional 1 month, and 3-day divestment penalty to his LTC eligibility. Petitioner presented the Operating Agreement for the LLC (Exhibit 1, pp. 20-42). Per the Operating Agreement, when the LLC is dissolved, the Members would receive all remaining company assets according to their shares. Petitioner had a 10% membership interest in the LLC. The Department presented evidence that shortly after the [REDACTED] property was sold, the LLC bank account was closed, and all the funds were transferred to Petitioner's son. The funds totaled \$111,646.44. As Petitioner did not realize his 10% share of the liquid assets of the LLC, the Department argued that Petitioner's 10% portion was gifted to his son. Transferring a resource means giving up all or partial ownership in (or rights to) a resource. BEM 504, p. 2. Giving an asset away is considered a divestment. BEM 504, p. 2.

At the hearing, the Department conceded that when Petitioner sold the [REDACTED] property, the funds totaling \$131,568.44 were deposited in the LLC bank account. As stated above, the Department properly determined that the sale of the property was a divestment. However, the Department failed to establish that the asset in the LLC bank account upon its closure was anything other than the funds from the sale of the [REDACTED] property. If Petitioner was subject to a divestment penalty period for his 10% interest in the LLC, in addition to the divestment penalty period for the sale of the property, he would be penalized twice for the same divestment. Therefore, the Department failed to establish that Petitioner is subject to a divestment penalty period of 1 month and 3 days.

### **DECISION AND ORDER**

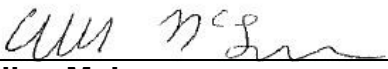
The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, and for the reasons stated on the record, if any, finds that the Department did not act in accordance with Department policy when it determined Petitioner's divestment penalty period.

Therefore, the Department's decision is **AFFIRMED IN PART** with respect to the divestment penalty period of 1 year, 1 month and 7 days and **REVERSED IN PART** with respect to the divestment penalty period of 1 month and 3 days.

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. Redetermine Petitioner's divestment penalty period in accordance with this decision;
2. Provide Petitioner with LTC benefits when eligible based on the revised divestment penalty period; and
3. Notify Petitioner of its decision in writing.

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**Ellen McLemore**  
Administrative Hearing 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

**Via-Electronic Mail :**

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