



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
SUZANNE SONNEBORN
EXECUTIVE DIRECTOR

MARLON I. BROWN, DPA
ACTING DIRECTOR

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

Date Mailed: September 19, 2023
MOAHR Docket No.: 23-003357
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 August 21, 2023, via conference line. Petitioner was represented by her attorney, Ashley Kagey. The Department of Health and Human Services (Department) was represented by Assistant Attorney General, Robert Boyd. The Department solicited testimony from Jennifer Depoy, Eligibility Specialist, and Sindra McGlade, Eligibility Specialist. Admitted into evidence was the Department's Exhibit A, pages 1 to 102, and Petitioner's Exhibit 1, pages 1 to 182.

ISSUE

Did the Department properly determine that Petitioner was subject to a Medical Assistance (MA) divestment penalty period of January 1, 2023, through November 18, 2023?

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 August 2, 2022, Petitioner entered a Long-Term Care (LTC) facility.
2. On January 30, 2023, Petitioner submitted an application for MA benefits.

3. Petitioner submitted verification that a property located at [REDACTED] in [REDACTED], Michigan (hereinafter referred to as [REDACTED]), that was previously deeded in her name had been transferred.
 - a. On August 29, 2022, Petitioner's husband and Petitioner transferred [REDACTED] to [REDACTED] and Petitioner's husband, as joint tenants with the right of survivorship (Exhibit A, pp. 27-28).
 - b. On December 28, 2022, Petitioner's husband and [REDACTED] transferred [REDACTED] to Petitioner's husband (Exhibit A, pp. 29-30).
 - c. On December 28, 2022, Petitioner's husband transferred [REDACTED] into his own solely for the benefit of (SBO) irrevocable trust (Exhibit A, pp. 31-32).
4. [REDACTED]
 - d. in [REDACTED], Michigan (hereinafter referred to as [REDACTED]).
 - a. On February 15, 2022, Petitioner and her husband transferred [REDACTED] to [REDACTED], Petitioner's husband and Petitioner, as joint tenants (Exhibit A, pp. 34-35).
 - b. On December 22, 2022, Petitioner, Petitioner's husband and [REDACTED] transferred [REDACTED] to Petitioner's husband.
 - c. On December 28, 2022, Petitioner's husband transferred [REDACTED] via a Ladybird Deed, reserving to himself an unrestricted power to convey the property during his lifetime and transferring the property to a third party at his death if not conveyed prior to death (Exhibit A, p. 40).
 - d. On March 15, 2023, Petitioner's husband transferred [REDACTED] to himself and Petitioner (Exhibit A, pp. 86-87).
5. On March 28, 2023, the Department sent Petitioner a Health Care Coverage Determination Notice informing her that she was eligible for MA benefits but was subject to a divestment penalty period of January 1, 2023, through November 18, 2023, for the divestment of the full value of [REDACTED] (\$105,600), pursuant to its transfer that occurred on August 29, 2022 (Exhibit A, pp. 95-97).
6. On June 12, 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, before she submitted her January 30, 2023 MA application, Petitioner had been the co-owner of two residential properties. The first residence, the [REDACTED] property, was transferred by Petitioner and her husband out of their trust on August 29, 2022, to Petitioner's husband and [REDACTED]. The Department considered the transfer of the property to be a divestment, as Petitioner forfeited her interest in the property without compensation.

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. A resource means all the client's and spouse's assets and income. BEM 405, p. 1. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. BEM 405, p. 1. It also includes all assets and income that the individual (or spouse) were entitled to but did not receive because of action by the client or spouse. BEM 405, p. 2. 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. BEM405, p. 3. The Department determined that when Petitioner transferred the Lowell property on August 29, 2022, without compensation, she divested her interest in the property.

At the hearing, Petitioner's representative acknowledged that Petitioner's transfer of [REDACTED] on August 29, 2022, to Petitioner's husband and [REDACTED] was a divestment, but argued that the penalty should be cancelled or at least reduced.

First, Petitioner's attorney argued that the divestment penalty should be cancelled or recalculated and deleted in its entirety either because (i) when [REDACTED] was transferred back to Petitioner's husband, the asset had returned to Petitioner's MA fiscal group or (ii) Petitioner was compensated for her interest in [REDACTED] when Petitioner's husband

transferred to Petitioner a one-half interest in [REDACTED], the value of which far exceeded the value of [REDACTED].

The Department will cancel a divestment penalty if either of the following occurs before the penalty is in effect: (i) all the transferred resources are returned and retained by the individual or (ii) fair market value is paid for the resources. BEM 405, p. 15. The Department will recalculate the penalty period if either of the following occurs while the penalty is in effect: (i) all the transferred resources are returned or (ii) full compensation is paid for the resources. BEM 405, p. 15.

The Department issued its decision calculating Petitioner's divestment penalty period on March 28, 2023, with an effective date of January 1, 2023. Petitioner's first argument for cancelling and deleting the divestment penalty is that [REDACTED] was returned to Petitioner. The final transfer of [REDACTED] before the penalty period arose occurred on December 28, 2022, before the penalty period was assessed, when it was transferred to Petitioner's husband's SBO trust. Thus, for the divestment penalty to be cancelled per policy, [REDACTED] must have been returned and retained by Petitioner or Petitioner must have received fair market value for the resource. [REDACTED] was not returned and retained by Petitioner. Petitioner's husband alone received the [REDACTED] property and transferred it into his SBO trust. Because [REDACTED] was transferred to husband's SBO trust, which by its very term's benefits only Petitioner's husband, Petitioner had no interest in the [REDACTED] property when the divestment penalty period took effect on January 1, 2023. BEM 405, p. 12. Furthermore, Petitioner also did not receive fair market value of the [REDACTED] property. Fair market value is defined as 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. BPG Glossary (January 2022), p. 26. That is, what the owner would receive, and a buyer be willing to pay, on the open market and in an arm length transaction. BPG Glossary, p. 26. There was no evidence Petitioner received any monetary compensation for [REDACTED]. As it follows, Petitioner's divestment penalty period cannot be cancelled as a result of the transfer of the [REDACTED] property.

Petitioner's counsel's second argument is that Petitioner was compensated for [REDACTED] with an interest in [REDACTED], which interest exceeded the value of [REDACTED]. [REDACTED] was transferred by Petitioner's husband to himself and Petitioner on March 15, 2023. Because the [REDACTED] transaction happened after the January 1, 2023 effective date of the divestment penalty, the issue is whether it requires that the divestment penalty be recalculated. For the divestment penalty period to be recalculated, Petitioner would either have to have the resource returned, or receive full compensation paid for the resource. BEM 405, p. 15.

Although converting an asset from one form to another of equal value is not a divestment, even if the new asset is exempt (BEM 405, p. 10), policy expressly states that recalculating a divestment penalty requires that "all the *transferred resources* are returned." (Emphasis added.) [REDACTED] is the resource that was transferred and resulted in Petitioner's divestment penalty. Because [REDACTED] was not the original resource that was divested, the transfer of [REDACTED] to Petitioner does not constitute the resource being returned. Alternatively, a divestment penalty can be recalculated if the client receives full

compensation paid at equal to or more than fair market value. As stated above, fair market value is defined as the amount of *money* an owner would receive. BPG Glossary, p. 26 (emphasis added). The transfer of McCain to Petitioner to compensate her for Lowell was not a monetary transaction. Because Petitioner did not receive ██████ back and was not paid cash for ██████ the Department acted in accordance with policy when it did not recalculate Petitioner's divestment penalty period based on the ██████ transfer.

Assuming that the entire penalty period was not removed entirely, Petitioner's counsel argued in the alternative that the Department erred when it calculated the value of ██████ in calculating the divestment penalty period. Petitioner argued that when the ██████ property was divested, Petitioner only divested her one-half interest in the property, as it was co-owned by her husband and, accordingly, the divestment penalty should be based on \$52,800 rather than the full \$105,600 that ██████ was assessed at.

When a client jointly owns a resource with another person, 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 405, p. 3. Policy provides that when an individual divests partial ownership or control of real estate, the amount divested depends on whether the co-owner is willing to sell the property. BEM 405, pp. 3-4 (see example). This policy applies to resources the client's spouse owns jointly with other persons. BEM 405, p. 4. Additionally, policy states that for jointly owned real property, the Department counts the individual's share unless the sale of the property would cause undue hardship. BEM 400, p. 12.

At the hearing, the Department did not cite any law or policy to support its decision to count the entirety of the value of ██████ when determining Petitioner's divestment penalty period. At the time ██████ was divested, the asset was transferred from Petitioner and her husband's trust to Petitioner's husband and ██████. Petitioner's husband retained an interest in ██████ throughout the entirety of the transactions, and ultimately retained full value of the property. Therefore, only a half interest was divested by Petitioner. Thus, the Department did not properly follow policy when it determined Petitioner's divestment penalty period based on the full value of ██████. As it follows, the Department did not act in accordance with policy when it calculated Petitioner's divestment penalty period.

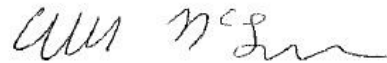
DECISION AND ORDER

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 imposed a divestment penalty period to Petitioner's MA case from January 1, 2023, through November 18, 2023.

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. Recalculate Petitioner's MA divestment penalty period based on divestment of \$52,800;
2. Supplement Petitioner and/or her provider for any eligible missed MA LTC benefits; and
3. Notify Petitioner and her attorney in writing of its decision.



EM/tm

Ellen McLemore
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
Lansing, Michigan 48909-8139

