



GRETCHEN WHITMER
GOVERNOR

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

MARLON I. BROWN, DPA
ACTING DIRECTOR

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Date Mailed: December 7, 2023
MOAHR Docket No.: 23-004831
Agency No.: ██████████
Petitioner: ██████ ██████

ADMINISTRATIVE LAW JUDGE: Kevin Scully

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; 45 CFR 99.1 to 99.33; and 45 CFR 205.10. After due notice, a telephone hearing was held on October 10, 2023, from Lansing, Michigan. Petitioner was represented by her attorneys Scott J. Brogram and Eryka C. Symington. ██████████ ██████████ also appeared on behalf of Petitioner. The Department was represented by Assistant Attorneys General Kelly A. Carter and Geraldine A. Brown. Natalie Hurdman and Carly Ostlund testified on behalf of the Department. Petitioner agreed to waive timeliness standards for a decision in this case to file a hearing brief in this matter.

ISSUES

Did the Department of Health and Human Services (Department) properly determine that Petitioner had divested available assets in order to become eligible for Medical Assistance (MA)?

Did the Department of Health and Human Services (Department) properly determine the start date for the imposition of a divestment penalty?

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 March ██████ 2023, the Department received Petitioner’s application for long term care (LTC) benefits reported a November ██████ 2022, nursing facility admission date. Resp. Exh. A, pp 9-12.
2. Petitioner’s countable assets are less than \$████████ at times relevant to her application for Medical Assistance (MA). Resp. Exh. A, p 250.

3. From May 29, 2018, through August 25, 2022, Petitioner made cash gifts and payments for personal services not made under a written contract totaling \$██████████ Resp. Exh. A, pp 65-247.
4. On March █████ 2023, Petitioner gifted an additional \$██████████ to her son. Resp. Exh. 15.
5. Petitioner transferred a life insurance policy with a value of \$██████████ to her son. Resp. Exh. A, pp 18-36
6. On May █████ 2021, Petitioner paid \$██████████ to her son for a life estate in his home with a state equalized value of \$██████████ Resp. Exh. A, pp 38-46.
7. On March █████ 2023, Petitioner's son paid her \$██████████ Resp. Exh. A, p 51.
8. On April █████ 2023, the Department notified Petitioner that she was eligible for Medical Assistance (MA) effective March 1, 2023, with a \$██████████ monthly patient pay amount. Resp. Exh. A, 254.
9. Due to a system error, the Department did not notify Petitioner that her LTC benefits would be subject to a divestment penalty when her application for Medical Assistance (MA) was approved.
10. On April █████ 2023, the Department notified Petitioner that she was eligible for Medical Assistance (MA) with a divestment penalty applied against her LTC benefits from June 1, 2023, through November 9, 2023. Resp. Exh. A, pp 262-263.
11. On July █████ 2023, the Department notified Petitioner that she was eligible for Medical Assistance (MA) with a divestment penalty applied against her LTC benefits from June 1, 2023, through January 15, 2026. Resp. Exh. A, pp 270-272.
12. On August █████ 2023, the Department notified Petitioner that she was eligible for Medical Assistance (MA) with a divestment penalty applied against her LTC benefits from June 1, 2023, through June 6, 2025. Resp. Exh. A, pp 274-276.
13. On August █████ 2023, the Department sent Petitioner a Quick Note instructing her that her LTC benefits would be subject to a 2 year and 6-day divestment penalty as a result of a \$██████████ divestment. Resp. Exh. A, p 2.
14. On April 10, 2023, the Department received Petitioner's request for a hearing.

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 through 42 USC 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 through 42 CFR 420.25. The Department administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.103 through MCL 400.112k of the Social Welfare Act, MCL 400.1 *et seq.*

Divestment is a type of transfer of a resource and not an amount of resources transferred. Resource means all the client's assets and income. Transferring a resource means giving up all or partial ownership in the resource. Divestment results in a penalty period, not MA program ineligibility. Department of Health and Human Services Bridges Eligibility Manual (BEM) 405 (January 1, 2023), pp 1-2. During the penalty period, MA will not cover the client's cost for LTC services but other MA services will be covered. BEM 405, p. 1. A divestment is a transfer of a resource by a client that is (i) within a specified time (the look-back period), (ii) for less than fair market value (FMV), and (iii) not an excluded transfer. BEM 405, p. 1.

On March [REDACTED] 2023, Petitioner applied for MA benefits and reported to the Department that she required long term care (LTC) benefits. The Department initiated its review of Petitioner's available assets as well as a review of Petitioner's assets throughout the 60 months prior to her need for LTC as directed by BEM 405. Petitioner provided the Department with verification of her assets, and the Department determined that she was eligible for MA benefits based on her age, and available income and assets.

From May 29, 2018, through August 25, 2022, Petitioner made cash gifts and payments for personal services not made under a written contract totaling \$[REDACTED]. Giving an asset away fits the definition of a resource transfer that is a divestment. Transfers for personal care must be considered and evaluated for divestment, and such transfers can only be excluded when certain conditions are met. It was not disputed that Petitioner's transfers for personal care do not fit the criteria in BEM 405 to be excluded. Petitioner provided the Department with verification that on March 13, 2023, she made an additional gift of cash to her son in the amount of \$[REDACTED].

On May [REDACTED] 2021, Petitioner paid \$[REDACTED] to her son for a life estate in his home. The Department determined the fair market value of the life estate to be \$[REDACTED] by doubling the state equalized value (SEV) for the home and multiplying by a factor of 0.35359 as directed by BEM 400. Since Petitioner paid more than the fair market value of the life estate she received, Petitioner had divested an additional \$[REDACTED].

Petitioner argues that the Department improperly determined the value of the real property, but the Department was acting in accordance with BEM 400 when using the SEV to determine the fair market value, and Petitioner failed to establish a higher fair market value.

The Department determined that Petitioner had divested assets with a value of \$[REDACTED] but reduced this amount to \$[REDACTED] due to the portion of the cash gift her son had returned. The hearing record supports a finding that the Department properly determined that Petitioner's LTC benefits would be subject to a 2 year and 6-day divestment penalty as directed by BEM 405.

On March [REDACTED] 2023, Petitioner applied for MA and LTC benefits. On April [REDACTED] 2023, the Department notified Petitioner that she was eligible for MA benefits, but due to a system error, written notice of a divestment penalty was not issued. If not for this system error, a divestment penalty would have been assessed as of March [REDACTED] 2023, the day Petitioner was eligible for MA benefits.

After being contacted by Petitioner's representatives, the Department sent Petitioner written notice that there would be a divestment penalty on April [REDACTED] 2023. The Department would then revise its calculation of the divestment penalty on July [REDACTED] 2023, August [REDACTED] 2023, and August [REDACTED] 2023. On August [REDACTED] 2023, the Department sent Petitioner Quick Note instructing her that a 2 year and 6-day divestment penalty would be imposed against Petitioner's LTC benefits. This divestment penalty was set to begin on June 1, 2023.

An adequate notice is a written notice sent to the client at the same time an action takes effect (not pended). Department of Health and Human Services Bridges Administrative Manual (BAM) 220 (November 1, 2023), p 3. A timely notice is given for negative case actions and is mailed 11 days before the intended negative action takes effect. The action is pended to provide the client a chance to react to the proposed action. BAM 220, pp. 4-5. Timely notice must be given to LTC recipients before actually applying the penalty, and adequate notice must be given to new applicants. BAM 220, p 14.

The divestment penalty starts on the date which the individual is eligible for MA and would otherwise be receiving LTC benefits. If a past unreported divestment is discovered or an agency error is made which should result in a penalty, a penalty must be determined under the policy in place at the time of discovery. If a penalty is determined for a transfer in the past, apply the penalty from the first day after timely notice is given. Timely notice must be given to LTC recipients before actually applying the penalty. Adequate notice must be given to new applicants. BEM 405, p 14.

The hearing record supports a finding that the divestment was not unreported and was not discovered or determined for a transfer in the past. The Department's revision of the start date to the divestment penalty was not based on information not reported and verified by Petitioner. Therefore, Petitioner is considered a new applicant for LTC benefits and adequate notice of the Department's revised determination is sufficient.

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 the amount of available assets that Petitioner had divested but did not act in accordance with Department policy when it determined that the divestment penalty would start on June 1, 2023.

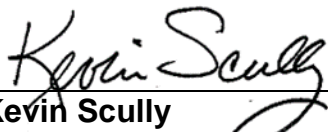
DECISION AND ORDER

Accordingly, the Department's decision is AFFIRMED in part and REVERSED in part.

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:

Correct the divestment penalty period for Petitioner's MA case and apply it from March 1, 2023, to March 6, 2025.

KS/dm



Kevin Scully
Administrative Law Judge
Michigan Office of Administrative Hearings and
Rules (MOAHR)

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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Via-Electronic Mail :

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