



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

PATRICIA LOVE
1455 SUNCREST DR
LAPEER, MI 48446

Date Mailed: November 30, 2023
MOAHR Docket No.: 23-004164
Agency No.: **135311433**
Petitioner: **Patricia Love**

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 hearing was held on November 13, 2023, via Zoom. Petitioner was represented by her attorney, Amir Abu-Aita. Petitioner's attorney solicited testimony from **Mary Jo Johnson**. The Department of Health and Human Services (Department) was represented by Assistant Attorney General, Kelly Carter. The Department solicited testimony from Louann Bexton, Eligibility Specialist. Admitted into evident was the Department's Exhibits A-N (pp. 1-50) and Exhibit O (pp. 1-4), as well as Petitioner's Exhibit 1 (pp. 1-13).

ISSUES

Did the Department properly determine that Petitioner was subject to a Medical Assistance (MA) divestment penalty period of April 1, 2023, through March 22, 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 **March 16**, 2023, Petitioner entered a Long-Term Care (LTC) facility.
2. On **April 30**, 2023, Petitioner submitted an application for MA benefits (Exhibit D).
3. On Oct 20, 2022, Petitioner executed a quitclaim deed, concerning her homestead located at 4470 Lippincott Rd. in Lapeer, Michigan, reserving to herself an unrestricted power to convey the property during her lifetime and transferring the

property to Ms. Johnson, her daughter and Power of Attorney (POA) (Exhibit 1), at her death if not conveyed prior to death (Exhibit E)."

4. With her application, Petitioner submitted an invoice from 3-D Carpentry (hereinafter referred to as 3-D) on January 5, 2023 addressed to Petitioner's daughter, for future work to be performed on the garage located at 4470 Lippencott Rd., including removing paneling, repairing the framing on the garage doors, and installing two garage doors, drywall inside the garage, and steel on the ceiling in the amount of \$7,900 (Exhibit F). The invoice was addressed to Petitioner's daughter.
5. Petitioner submitted verification that a cashier's check was issued to 3-D Carpentry on April 27, 2023, in the amount of \$7,900 paid for by Petitioner (Exhibit G).
6. Petitioner submitted an invoice from Dan's Stamped Concrete (hereinafter referred to as Dan's) dated April 27, 2023, for future work to be performed at 4470 Lippencott St., in the amount of \$6,380 (Exhibit I). The invoice states that a down payment of \$5,000 was received and that \$1,380 was still owed. The invoice was addressed to Harvey Johnson, Petitioner's daughter's husband.
7. Petitioner submitted verification that a cashier's check was issued on April 27, 2023, to Dan's in the amount of \$5,000, paid for by Petitioner (Exhibit J).
8. Petitioner submitted verification of a construction contract between Lincoln Custom Building (hereinafter referred to as Lincoln) and Petitioner's daughter and her husband signed on April 27, 2023, to have the builder construct an 18' by 18' master bedroom and bath addition, along with remodeling to the existing laundry room to be completed at 4470 Lippencott Rd. Petitioner's daughter agreed to pay \$60,000 for the work, which would be paid in progress payments of 10% (Exhibit K).
9. Petitioner submitted verification that a cashier's check was issued on April 27, 2023, to Lincoln in the amount of \$60,000, paid for by Petitioner (Exhibit L).
10. Petitioner submitted verification in the form of a letter from Matthew Lincoln of Lincoln signed on June 9, 2023, indicating that he met with Petitioner and her daughter in January or February 2023, to discuss and plan the improvements to Petitioner's home (Exhibit M).
11. Petitioner submitted verification a cashier's check for \$44,028.77 to Petitioner's daughter (Exhibit H)
12. On June 14, 2023, the Department sent Petitioner a Health Care Coverage Determination Notice informing her that she was approved for MA benefits subject to a divestment penalty period of April 1, 2023, through February 14, 2024, for the transfer of assets for less than fair market value, totaling \$104,029.77 (\$60,000 for

the work completed by Lincoln and \$44,029.77 in monies transferred to her daughter) (Exhibit C).

13. On June 12, 2023, Petitioner submitted a request for hearing disputing the Department's inclusion of the \$60,000 for the work completed by Lincoln in the calculation of Petitioner's divestment penalty period (Exhibit B).
14. On September 12, 2023, the Department sent Petitioner a Benefit Notice informing her that her divestment penalty period was recalculated to be April 1, 2023, through March 22, 2024, based on the inclusion of the monies paid to Dan's and 3-D on April 27, 2023, totaling \$12,900, to the previous divestment penalty calculation in the June 14, 2023 notice based on the \$60,000 paid to Lincoln (Exhibit O).

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.

It should be noted as a preliminary issue that the Department's exhibits were entered at the hearing as they were marked. The Department submitted the Benefit Notice issued on September 12, 2023, following the hearing. At the hearing, the parties were notified that the Benefit Notice would be entered as Exhibit Q. The Benefit Notice is corrected to be entered as Exhibit O. Additionally, the request for hearing submitted on July 12, 2023, disputed the Department's inclusion of the \$60,000 in monies paid to Lincoln in the calculation of the divestment penalty period. Subsequent to the request for hearing, the Department recalculated the divestment penalty period to include the monies paid to Dan's and 3-D, increasing the disputed divestment amount to \$72,900. The parties agreed to address the entirety of the divestment penalty period of April 1, 2023, through March 22, 2024 (based on the Department's conclusion that the \$60,000 paid to Lincoln, the \$7,900 paid to 3-D and \$5,000 paid to Dan's were divestments by Petitioner), as indicated in the September 12, 2023 Benefit Notice. Petitioner did not dispute that the \$44,029.77 paid to Petitioner's daughter was a divestment and properly included in the calculation of the divestment penalty period.

In this case, Petitioner entered into long-term care on March 16, 2023, and submitted an application for benefits on April 30, 2023. The Department discovered that on April 27, 2023, Petitioner issued three cashier's checks for home renovations, including \$5,000 to Dan's, \$7,900 to 3-D, and \$60,000 to Lincoln. The Department considered the transfer of the cash assets for the home renovations to be a divestment, as Petitioner did not submit verification that she received anything in return for the payment, other than contractual obligations, and therefore, received less than fair market value. The Department also contended that Petitioner did not intend to return home and would not realize the benefit of the home improvements.

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.

The Department testified that Petitioner's transfer of cash assets for the home improvements was a divestment, as Petitioner failed to present any documentation to establish that services were rendered, and therefore, had any intrinsic value. The Department testified that Petitioner submitted the invoices for the work to be performed by Dan's and 3-D, the construction contract from Lincoln, and verification of the payments made but nothing to show that any work or services was actually provided. The Department stated that Petitioner did not submit any verification that she realized a benefit from the payments made, such as blueprints/specifications, pictures, permits, etc. Additionally, the Department argued that because it received documentation from the nursing home, which was not provided at the hearing, that Petitioner would likely not return to her home, the transaction was not in Petitioner's self-interest. The Department highlighted that because of the October 20, 2022 quitclaim deed, Petitioner's daughter would likely inherit the home upon Petitioner's death, and realize the benefit of the improvements. The Department also emphasized that Petitioner's daughter, and/or her husband, were the individuals listed as the client for which improvements on the home were to be made.

Fair market value is defined as the amount of money the owner would receive in the local area for her asset (or interest in an asset) if the asset (or her 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's length transaction. BPG Glossary, p. 26. An arm's length transaction is a transaction between

two parties who are not related and who are presumed to have roughly equal bargaining power. BPG Glossary, p. 6. It consists of all the following three elements: (i) it is voluntary; (ii) each party is acting in their own self-interest; and (iii) it is on an open market. BPG Glossary, p. 6. Compensation must have tangible form and intrinsic value. BEM 405, p. 6.

At the hearing, Petitioner's attorney argued that there was no evidence that Petitioner did not intend to return home. Petitioner's attorney disputed that the nursing home indicated that Petitioner could not return home, and that although Petitioner indicated in the application for benefits that she would not return home within six months (Exhibit D, p. 22), the reasoning for why Petitioner answered in that way was in regard to the calculation of her patient pay amount. Petitioner's daughter testified that Petitioner was placed in the nursing home while improvements were made to the home. Petitioner's daughter stated that Petitioner was leaving her home unattended during periods of confusion, as a result of dementia and Alzheimer's. Petitioner's daughter testified that the purpose of the home improvements was to provide Petitioner with a handicap accessible bedroom and bathroom. Petitioner's daughter stated that while Petitioner is able to currently perform her own hygiene without the need of a handicap bathroom, Petitioner's health is in decline, and she will require the use of a handicap-accessible bathroom and bedroom in the near future. Additionally, Petitioner's daughter stated that Petitioner's home is a one-bedroom, one-bathroom home. Petitioner's daughter testified that the purpose of the addition was also to allow her or other family members to stay at the residence, to ensure Petitioner does not leave the home unattended, and to provide the 24-hour care that Petitioner requires. Petitioner's daughter testified that the intent was always to have her mother return to the home once the improvements were completed. Petitioner's daughter stated that while the repairs to the garage have been completed, the construction to the home's addition has not begun. Petitioner's daughter also indicated that her mother was the individual that planned not only the garage repairs, but the addition to the home. Petitioner's daughter stated that she and her mother met with the contractor regarding the addition in January or February of 2023, prior to Petitioner's admission to long-term care, but that the contract was not officially signed until April 2023, after Petitioner's admission to long-term care. Petitioner provided a letter to the Department from the contractor stating, in relevant part, that he met with Petitioner and her daughter in January or February 2023 to discuss and plan improvements to the home for Petitioner (Exhibit M). The contractor indicated that Petitioner's intent for the improvements was for Petitioner to stay at the home safely. The contractor also indicated that there was not an official contract until April 2023, as there was difficulty in obtaining supplies and weather issues.

Additionally, Petitioner's attorney argued that there was no evidence that the services to be rendered were less than fair market value of the cash assets that were transferred by Petitioner. Petitioner's daughter testified that she ensured that the costs of the improvements to the home were fair in relation to the improvements made by checking the cost of labor and materials with other contractors.

Based on the evidence provided, the Department failed to establish that Petitioner's transfer of cash assets for the payment of renovations to her homestead, to be completed at a later date, was a divestment. First, the anticipated improvements were not for less than fair market value. Although Petitioner did not have the home improvements completed to her home prior to her admission to LTC or the submission of her MA application, and thus had tangible value for her assets, the agreements with the contractors had intrinsic value. For the payment made, Petitioner had a legal right to improvements to her home, and if the services and goods were not provided, she had a right to pursue legal remedies, further supporting the conclusion that the transaction was an arm's length transaction and not a divestment. There was no evidence presented that the cash resources transferred by Petitioner for the improvements to her home were not worth the value in kind. Additionally, the Department's argument that the contract with Lincoln was prepaid in full, as opposed to installments, has no bearing on whether the transfer was for fair market value. Second, although the Department argued that Petitioner's true motive was to make improvements to the home to benefit her daughter, who would ultimately inherit the property, it failed to show how this established a divestment. Per the October 20, 2022 quitclaim deed, Petitioner retained ownership of the homestead and an unrestricted power to convey the property. Although Petitioner's daughter and/or her husband were the individuals that signed the contract, the improvements were contracted for Petitioner's home and paid for by Petitioner. Petitioner has full legal right to the property to which home improvements were to be made, and any potential future transfer has no bearing on whether the transaction was for fair market value. Finally, although Petitioner was in an LTC facility at the time the agreements for improvements to her home were entered into, the Department has failed to identify any policy that would preclude her from making any purchases while she was in LTC. The Department cited to policy regarding transfers for another purpose, but that policy only applies when the transfer is for less than fair market value. BEM 405, p. 11. As stated above, the Department failed to establish that the transfer was for fair market value. Thus, the Department failed to establish that Petitioner divested assets in the amount of \$72,900.

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 April 1, 2023, through March 22, 2024.

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 April 1, 2023, through March 22, 2024.

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 \$44,029.77;
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

Via-Electronic Mail :

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