



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

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██████████, MI ██████████

Date Mailed: December 28, 2023
MOAHR Docket Nos.: 23-005597; 23-007145;
23-007608
Agency No.: ██████████
Petitioner: ██████████

ADMINISTRATIVE LAW JUDGE: Ellen McLemore

HEARING DECISION

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge of the Michigan Office of Administrative Hearings and Rules (MOAHR) 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 December 14, 2023, via conference line. Petitioner was represented by his attorney, Patrick Simasko. The Department of Health and Human Services (Department) was represented by Geraldine Brown, Assistant Attorney General. The Department solicited testimony from Adam Kresmery, Assistance Payments Worker. Upon the attorneys' stipulation, the matters raised under MOAHR docket nos. 23-005597, 23-007145, and 23-007608 were consolidated and addressed at the hearing.

ISSUE

Did the Department properly determine that Petitioner was subject to a Medical Assistance (MA) divestment penalty period of March 1, 2023, through July 15, 2023, and November 1, 2023, through April 21, 2029?

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 ██████████, 2023, Petitioner entered a Long-Term Care (LTC) facility.
2. On ██████████, 2023, Petitioner submitted an application for MA benefits (Exhibit A, pp. 6-14).

3. Petitioner submitted verification that a promissory note signed on February 20, 2023, wherein an individual by the name of [REDACTED] agreed to pay, for value received, Petitioner's wife the principle sum of \$45,000 with 3% interest (Exhibit A, p. 15).
4. Petitioner submitted verification of the [REDACTED] and [REDACTED] Irrevocable Asset Preservation and Trust (irrevocable trust) that was created on July 8, 2021 (Exhibit A, pp. 18-41). The irrevocable trust irrevocably transferred any and all rights, title and interest in any assets transferred to the trust from the Settlers (Petitioner and Petitioner's wife). The irrevocable trust barred the distribution of any asset to the Settlers.
5. Petitioner submitted verification that during the period of August 1, 2021, through September 30, 2021, the irrevocable trust was funded with \$613,986.28 in securities that were transferred into the account, as well as a cash deposit of \$39,049.53 (Exhibit B, p. 93). The total value of assets transferred into the irrevocable trust at its creation was \$653,035.81.
6. Petitioner submitted verification that the value of the irrevocable trust was \$641,429.88 as of January 1, 2023, and the ending value was \$584,909.27, as of January 31, 2023 (Exhibit B, p. 70).
7. Petitioner submitted verification that the beginning value of the irrevocable trust was \$559,149.36 as of March 1, 2023, and the ending value as of March 31, 2023, was \$168.69, with securities transfers that totaled \$567,880.71 (Exhibit B, pp. 80-83).
8. Petitioner submitted a Consent Judgment of Separate Maintenance (Consent Judgment) entered by the [REDACTED] County [REDACTED] Judicial Circuit Court on May 11, 2023, with a retroactive effective date of February 1, 2023, transferring 100% ownership of the assets/accounts listed in the consent judgment to Petitioner's wife, which included \$584,909.27 in assets that were held by the irrevocable trust (Exhibit A, pp. 45-52).
9. Petitioner submitted verification that the \$567,880.71 in securities was transferred from the irrevocable trust to a transfer on death (TOD) account held solely by Petitioner's wife (Exhibit B, p. 88-90).
10. On August 10, 2023, the Department sent Petitioner a Health Care Coverage Determination Notice informing him that he was eligible for MA benefits effective March 1, 2023, ongoing (Exhibit B, pp. 148-151). The Department notified Petitioner that the \$45,000 promissory note was a divestment, and it assessed a divestment penalty period of March 1, 2023, through July 15, 2023, during which time Petitioner would not be eligible for LTC coverage.

11. On September 7, 2023, Petitioner submitted a request for hearing disputing the Department's conclusion that the loan formalized in the promissory note resulted in a divestment (assigned Michigan Office of Administrative Hearings and Rules (MOAHR) docket number 23-005597).
12. On October 16, 2023, the Department sent Petitioner notice that the transfer of assets to the irrevocable trust was a divestment of \$653,035.81, which was the value of the assets of the trust at its creation in 2021, resulting in a divestment penalty period of March 1, 2023, through January 6, 2029, to run concurrently with the divestment penalty period of March 1, 2023, through July 15, 2023, for the \$45,000 promissory note.
13. On October 17, 2023, Petitioner submitted a request for hearing disputing the Department's actions related to the application of the divestment penalty periods (assigned MOAHR docket number 23-007145).
14. On October 27, 2023, the Department issued a corrected Benefit Notice informing Petitioner that his divestment penalty periods would be applied consecutively during the periods of March 1, 2023, through July 15, 2023, for the divestment penalty resulting from the \$45,000 promissory note, and November 1, 2023, through April 21, 2029, for the divestment penalty resulting from the transfer of assets to the irrevocable trust in the amount of \$653,035.81 (Exhibit A, pp. 53-56).
15. On October 30, 2023, Petitioner submitted a request for hearing disputing the Department's application of the divestment penalty periods (MOAHR docket number (23-007608).

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 concluded that Petitioner was subject to divestment penalties for two transfers: (1) the promissory note Petitioner's wife received in connection with a \$45,000 loan and (2) the securities and cash transferred to the irrevocable trust.

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. The Department will review any transfer of assets by the client or their spouse after or 60 months prior to the client's baseline date. BEM 405, pp. 1-5. 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.

Promissory Note

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.

In this case, the Department concluded that the promissory note Petitioner's wife received for a \$45,000 loan resulted in divestment of \$45,000 because it was a transfer for less than fair market value. 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.

A promissory note is a written promise to pay a certain sum of money to another person at a specified time. BEM 400 (July 2023), p. 43. The purchase of a promissory note or loan is a transfer of assets because the purchaser has transferred cash in exchange for a written promise to be paid back by the borrower. BEM 400, p. 43. This transfer must be reviewed to determine if the purchaser has received fair market value. BEM 400, p. 43. In order for a promissory note to be considered a transfer for fair market value, it must (i) be capable of being sold or transferred to another party, (ii) have a repayment schedule that is actuarially sound; and (iii) require payment made in equal monthly amounts during the term of the agreement with no deferral of payments and no balloon payments; and (iv) prohibit the cancellation of the balance upon the death of the lender. BEM 400, p. 43. A loan is not actuarially sound if the lender is not expected to live until the end of the guaranteed period of the loan. BEM 405, p. 43. Life expectancy tables used to determine

actuarial soundness are in BEM 405. BEM 400, p. 43. The uncompensated value of a promissory note, loan, or mortgage is the outstanding balance due on the date of application. BEM 405, p. 14.

Here, in return for the \$45,000 loan, Petitioner's wife received a promissory note. Petitioner's wife's date of birth was [REDACTED], [REDACTED], and she was [REDACTED] years old at the time of the execution of the promissory note. Petitioner's wife's life expectancy at the time the promissory note was executed was 9.15 years. BEM 405, p. 21. Therefore, to be actuarially sound, the full \$45,000 loan would have to be repaid within that time frame. The promissory note did not dictate a repayment schedule. As the promissory note did not dictate a repayment schedule within the required time frame, it was not actuarially sound. Additionally, the promissory note did not require that the payments be made in equal monthly amounts during the term of the agreement with no deferral of payments and no balloon payments. Because the promissory note Petitioner's wife received was not actuarially sound and did not provide for equal monthly payments, the promissory note is a transfer of assets for less than fair market value and is a divestment. In determining the value of a promissory note that is deemed a transfer for less than fair market value, the Department must consider the outstanding value due on the date of the MA application. BEM 400, p. 44; BEM 405, p. 15. Because Petitioner did not provide evidence that Petitioner's wife had been compensated for any portion of the promissory note, Petitioner is subject to a divestment penalty period for the full value of the promissory note of \$45,000.

Assets Transferred to the Irrevocable Trust

When reviewing Petitioner's case, the Department discovered a second divestment. In 2021, Petitioner and his wife created an irrevocable trust and funded the trust with \$653,035.81 in assets. The Department determined the transfer was a divestment. Petitioner's attorney acknowledged that the transfer was a divestment but argued that the divestment penalty should be cancelled or recalculated because the divestment was cured when the assets from the trust were transferred to Petitioner's wife in 2023.

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 majority of the assets remaining in the irrevocable trust were transferred to Petitioner's wife via the Consent Judgment in March 2023. The application of the divestment penalty period began on November 1, 2023. Thus, for the divestment penalty period to be cancelled, Petitioner would either have to have the resource returned and retained, or receive full compensation paid for the resource. BEM 405, p. 15.

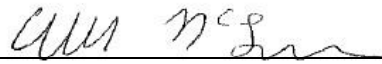
The Department presented evidence that assets in the form of securities with a valuation of \$567,880.71 was transferred from the irrevocable trust to Petitioner's wife's TOD account. Petitioner's attorney argued that the trust was originally funded with 5,546 shares of [REDACTED] stock, and the same stocks were transferred to Petitioner's wife in March 2023. Petitioner's attorney argued that because the assets were returned in full to Petitioner's wife, they were returned to Petitioner, as they are a married couple.

Although Petitioner's attorney argues that the return of the securities to Petitioner's wife cured the divestment, under Department policy, for the divestment penalty to be cancelled, the assets from the irrevocable trust had to have been returned and retained by Petitioner, or Petitioner had to have received fair market value for the resource. The assets from the irrevocable trust were not returned and retained by Petitioner. The assets that were removed from the trust were transferred into an account held solely by Petitioner's wife. Per the Consent Judgment issued on May 11, 2023, 100% interest in all marital property held jointly by Petitioner and Petitioner's wife, including the assets in the irrevocable trust, were transferred solely to Petitioner's wife for her support. Therefore, Petitioner had no interest in the assets that were removed from the irrevocable trust and the assets were not returned or retained by Petitioner. Furthermore, Petitioner also did not receive fair market value of the assets transferred into the irrevocable trust. 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 would be willing to pay, on the open market and in an arm length transaction. BPG Glossary, p. 26. There was no evidence that Petitioner received *any* monetary compensation for the assets transferred into the irrevocable trust. Therefore, Petitioner's divestment penalty period cannot be cancelled as a result of the transfer of the assets from the irrevocable trust to Petitioner's wife. Thus, Petitioner divested \$653,035.81 in assets in 2021 when the securities and cash were transferred into the irrevocable trust, the divestment was not cured by Petitioner's wife's receipt of the assets from the trust, and the Department properly concluded that Petitioner was subject to a divestment penalty period of November 1, 2023, through April 21, 2029. Further, the Department properly calculated the divestment penalty for this divestment separately from that for the promissory note and did not apply the divestment penalties to run concurrently. BEM 405, p. 13.

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 acted in accordance with Department policy when it subjected Petitioner to a divestment penalty period of March 1, 2023, through July 15, 2023, and November 1, 2023, through April 21, 2029. Accordingly, the Department's decision is **AFFIRMED**.

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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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