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APPELLANT

v.

████████████████████

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████████████████████

* BEFORE MARY PEZZULLA,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH No.: MDH-██████████-10A-21-27921

* * * * *

DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSION OF LAW
ORDER

STATEMENT OF THE CASE

On October 1, 2021, ██████████ (Appellant) filed an application to receive Medical Assistance Long Term Care (MA-LTC) benefits. On November 12, 2021 the ██████████ (local department),¹ on behalf of the Maryland Department of Health (MDH), found the Appellant ineligible for MA-LTC coverage based upon his alleged transfer of assets for less than fair market value (FMV). On or about December 6, 2021, the Appellant appealed the local department’s action.

On January 6, 2022, I held a remote hearing via the Webex videoconferencing platform. Code of Maryland Regulations (COMAR) 10.01.04.02; COMAR 28.02.01.20B. ██████████,

¹ Applications for MA-LTC benefits filed by residents of ██████████, ██████████, and ██████████ Counties and ██████████ are processed by the Bureau of Long-Term Care Eligibility, located at the ██████████ County Department of Social Services’ offices in ██████████ Maryland. In other counties, such applications are processed by the local departments of social services, or the ██████████, as it is called in ██████████ County. The regulations applicable to MA-LTC use the general term “local department” to refer to the entity that processes an application.

Lead Caseworker, appeared on behalf of the local department. [REDACTED], Esquire, and [REDACTED], Esquire, appeared on behalf of the Appellant. COMAR 10.01.04.12B(3)(f).

The Appellant was not present.

The contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings (OAH), and the procedures for Fair Hearing Appeals under the Maryland State MA Program govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 28.02.01; and COMAR 10.01.04.

ISSUE

Did the local department properly impose a penalty of forty-four months, fourteen days against the Appellant's MA-LTC benefits?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibit on behalf of the local department:

LD Ex. 1 – Summary for Appeal Hearing, dated December 23, 2021, with a table of contents and the following attachments:

- Att. 1 – Long-Term Care/Waiver Medical Assistance Application, October 1, 2021
- Att. 2 – Marital Settlement Agreement and Release, [REDACTED] 2021
- Att. 3 – Judgment of Absolute Divorce, entered [REDACTED], 2021
- Att. 4 – Request for Information from the local department to the Appellant, October 6, 2021
- Att. 5 – Email from [REDACTED] to [REDACTED], October 18, 2021
- Att. 6 – Long Term Care Activity Report, November 10, 2021
- Att. 7 – Policy Clarification Request, October 25, 2021
- Att. 8 – Email from [REDACTED], Government Assistance Eligibility Specialist III, local department, to [REDACTED], October 28, 2021
- Att. 9 – Email from [REDACTED], Government Assistance Eligibility Specialist III, local department, to [REDACTED], November 2, 2021
- Att. 10 – Maryland MA Worksheet for Institutionalized Persons, undated; Spreadsheet of Appellant's assets with values as of July 21, 2021, undated; Maryland MA Transfer/Disposal of Assets Worksheet, undated
- Att. 11 – Notice of Decision Summary from the local department to the Appellant, November 12, 2021

Att. 12 – MA Manual² § 800.17, revised July 2012; MA Manual § 1000.1(f), revised April 2014; MA Manual §800.23, revised July 2012
Att. 13 – COMAR 10.09.24.08-1

I admitted the following exhibits on behalf of the Appellant:

App. Ex. 1 – Deed for real property located at [REDACTED], Maryland, [REDACTED] 2021; Deed for real property located at [REDACTED], Maryland, [REDACTED] 2021

App. Ex. 2 – [Marked by not offered]³

App. Ex. 3 – List of citations used in Appellant’s closing argument, undated

Testimony

Ms. [REDACTED] read the Summary for Appeal Hearing and testified for the local department. [REDACTED], attorney for [REDACTED], who I admitted as an expert in the area of Family Law, testified on behalf of the Appellant.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Appellant and his wife, [REDACTED], were married on [REDACTED], 1968.
2. The Appellant and Mrs. [REDACTED] separated on [REDACTED] 2021.
3. On [REDACTED] 2021, the Appellant entered [REDACTED] [REDACTED], a LTC facility.

² The MA Manual is a policy manual, issued by the Secretary of the Maryland Department of Health (MDH), to provide guidance in making MA eligibility determinations and to provide the Secretary’s interpretation of the MDH’s regulations. It is available to public for review on the Department’s website, <https://mmcp.health.maryland.gov/Medicaid%20Manual/Forms/AllItems.aspx>. As the MA Manual is the settled pre-existing policy of the MDH, I am bound by the MA Manual provisions to the same extent the MDH would be if it heard the case. Md. Code Ann., State Gov’t 10-214(b) (2021). The local department refers to the MA Manual in its exhibits as the MMAM.

³ This document, while not offered into evidence, will be retained with the file.

4. On a date not established in the record, but after [REDACTED] 2021, Mrs. [REDACTED] filed for divorce from the Appellant.

5. On [REDACTED] 2021, the Appellant, through his Financial Agent and son, [REDACTED], and Mrs. [REDACTED] signed a Marital Settlement Agreement and Release (Agreement).

6. The Agreement stated that the joint assets of the Appellant and Mrs. [REDACTED] including real property located at [REDACTED], [REDACTED], and two [REDACTED], Maryland timeshare properties were to become the sole and separate property of Mrs. [REDACTED]. Additionally, pursuant to the Agreement, the Appellant's life insurance policy, various [REDACTED] stock shares, and his [REDACTED] 401(k) Retirement Savings Plan were to be transferred to Mrs. [REDACTED].

7. Pursuant to the Agreement, the Appellant did not to receive any money in exchange for transferring these assets to Mrs. [REDACTED] but the Agreement was made "in consideration of the mutual promises and obligations." (LD Ex. 1, Att. 1).

8. On [REDACTED] 2021, the Appellant, through his Financial Agent, conveyed his interest in the properties located at [REDACTED], and [REDACTED] to Mrs. [REDACTED].

9. On [REDACTED], 2021, Mrs. [REDACTED] was granted an absolute divorce from the Appellant.

10. The Agreement was incorporated, but not merged, into the [REDACTED] 2021 Judgment of Absolute Divorce.

11. On October 1, 2021, the Appellant filed an application for MA-LTC.

12. On November 12, 2021, the local department issued a determination finding that the Appellant had transferred \$453,408.50 of assets for less than FMV and imposed a penalty period of forty-four months, fourteen days.

13. The local department assessed the FMV of the Appellant's interest in the following assets:

██████████ property:	\$193,216.50 ⁴
██████████ property:	\$199,766.00 ⁵
██████████ Insurance Policy:	\$ 18,512.52
██████████ 401K:	\$ 36,147.64
██████████ stock shares:	\$ 555.44
██████████ stock shares:	\$ 5,210.40
Two ██████████ timeshare interests:	\$ 0.00
Total:	\$453,408.50

DISCUSSION

THE LEGAL FRAMEWORK

An individual's eligibility for MA-LTC is based, in part, on the applicant's resources. COMAR 10.09.24.10B(1). Resources are defined as "accumulated personal wealth over which a person has the authority or power to liquidate his interest, including cash savings, savings accounts, certificates of deposit, money market certificates, checking accounts, stocks, bonds, cash value of life insurance, burial plots, prepaid burial plans, real property, personal property, mortgages, and mutual funds." COMAR 10.09.24.02B(53).

Generally, if an applicant for MA-LTC has disposed of resources or assets for less than FMV within sixty months preceding his application for benefits (the look-back period), the local department is required to impose a penalty period during which the applicant is ineligible to receive MA-LTC. COMAR 10.09.24.08K; COMAR 10.09.24.08-1B(1) and (2)(a)(ii); MA Manual, § 800.17(f), revised July 2012. "Disposal" means a transfer or divestiture of an ownership interest in the assets of an applicant. MA Manual, § 800.17(a), revised July 2012.

⁴ This property was held jointly with Mrs. ██████████. The local department assessed the FMV as \$386,433.00. The local department attributed half of that value to the Appellant. $\$386,433.00 \div 2 = \$193,216.50$.

⁵ This property was held jointly between the Appellant, Mrs. ██████████, and ██████████. The local department assessed the FMV as \$599,300.00. The local department attributed one third of that value to the Appellant. $\$599,300.00 \div 3 = \$199,766.67$. The local department did not provide a reason it truncated the decimals, as opposed to rounding the amount.

“Uncompensated value” means the difference between the fair market value of an asset and the amount of compensation received by the applicant for the asset. *Id.* A disposal of assets includes the sale of a home or other real property. *Id.*

The applicant/recipient (A/R) must establish, to the satisfaction of the eligibility case manager, that the individual intended to transfer the asset for FMV or for other valuable consideration. Verbal statements alone are, generally, not sufficient. Instead, the individual should be required to provide written evidence of attempts to dispose of the asset for FMV, as well as evidence to support the value (if any) at which the asset was disposed. MA Manual § 800.20(d), revised July 2012.

Additionally, “It is presumed that any disposal for less than FMV was made to establish or continue [MA] eligibility or to avoid [MA’s] liens or recoveries provisions, unless the [applicant or recipient] successfully rebuts this presumption.” MA Manual § 800.23, revised July 2012.⁶

The regulations establish some exceptions regarding property transfers for less than FMV. COMAR 10.09.24.08K(4)(a) states that “An institutionalized person may not be determined ineligible for Medical Assistance under §K(1) of this regulation if the resource transferred was a home and title to the home was transferred to: (a) The spouse of the person.”

Furthermore, “An individual may not be determined ineligible for Medical Assistance by reason of the transfer of any asset, excluded or countable, if the asset was transferred under one of the following conditions: The asset was transferred to the individual’s spouse or to another for the sole benefit of the individual’s spouse....” COMAR 10.09.24.08-1B(9)(a).

⁶ MA Manual § 800.23 was modified by Manual Release (MR) 159, issued April 30, 2013, effective March 1, 2013, which added further examples of expenditures that may have been made for non-MA eligibility purposes. The list of examples is “intended to be illustrative and does not limit the types of transactions that may be done for a purpose other than to establish Medicaid eligibility.” MR 159, p. 2, issued April 30, 2013.

If it is determined that an A/R made a transfer for less than FMV with the intent of qualifying for Medical Assistance benefits, the case manager will impose a penalty. “The number of months in the penalty period is equal to the total, cumulative, uncompensated value of all assets transferred, divided by the average monthly cost, to a private patient at the time of application for [MA], of nursing facility services in the State.” COMAR 10.09.24.08-1B(5). For transfers on or after February 6, 2006, the penalty period begins with the later of:

- (i) The first day of the month in which the individual is eligible for Medicaid and would be receiving Medicaid nursing facility services but for the application of this penalty; or
- (ii) The month during or after which assets have been transferred for less than fair market value.

COMAR 10.09.24.08-1B(3).

THE BURDEN OF PROOF

As an applicant for MA-LTC benefits, the Appellant, as the moving party, has the burden to prove by a preponderance of the evidence that the local department erred by imposing the forty-four month, fourteen day penalty against his MA-LTC benefits. Md. Code Ann., State Gov’t § 10-217 (2021); *see Garrett v. State of Maryland*, 124 Md. App. 23, 28-29 (1998). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so,” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.*

POSITION OF THE PARTIES

The Appellant advanced several arguments as to why he should not be subject to any penalty. First, he contended that he should not be subject to any penalty as the assets he transferred are subject to exemption because the transfers were pursuant to the Agreement he

entered into with his wife, which was then incorporated into his Judgment of Absolute Divorce, a valid court order. The Appellant further argued that the real property transfers were completed on ██████ 2021, when he was still married, and therefore these transfers are exempt from any penalty as a transfer to his spouse.

The Appellant maintained that even if the transfers were not exempt, they were not made for less than FMV as he received value and consideration for the assets as the Agreement specifically states there was "consideration of mutual promises and obligations." (LD Ex. 1, Att. 2).

He asserted that at the time of the MA-LTC application, October 2021, he no longer had access to any of the assets, as they had been transferred prior to that time pursuant to the Judgment of Absolute Divorce, a valid court order with which the local department must comply. The Appellant argued that it is the jurisdiction of the Circuit Courts to grant divorces and it is violative of his due process rights and public policy for the local department to investigate or challenge a divorce decree.

The local department averred that the Appellant is subject to a penalty of forty-four months, fourteen days against his MA-LTC benefits for transferring \$453,408.50 of assets for less than FMV.⁷ The local department argued that the fact that the Appellant and his wife separated on the same date that he entered into a LTC facility and subsequently signed their Agreement, which transferred all of the Appellant's assets to his wife, indicated that the Appellant had transferred his assets to his now ex-wife for less than FMV in order to qualify for MA-LTC. The local department argued that in this case, the Appellant clearly separated from his wife on ██████ 2021, the same day he entered a LTC facility, transferred his assets to his wife via the Agreement, which was signed on ██████ 2021, and then was divorced from his wife

⁷ Finding of Fact 13 sets out the local department's valuation of the assets.

on [REDACTED] 2021, placing all of his assets outside of his custody and control. The local department argued that the timing of these actions clearly shows that the Appellant transferred his assets for less than FMV for the purpose of qualifying for MA-LTC. Because of this, the Appellant is subject to a penalty.

For the reasons that follow, I find that the Appellant has met his burden with respect to his former home located at [REDACTED], and which was transferred to his spouse via a deed dated [REDACTED], 2021; however, I find the local department properly included the other assets in its calculation of a penalty period.

ANALYSIS

[REDACTED] *Property*

It was undisputed that the [REDACTED] property was the Appellant's residence prior to his separation from his wife on [REDACTED], 2021. It is also undisputed that pursuant to the Agreement, the Appellant and Mrs. [REDACTED] agreed that the [REDACTED] property was to become the sole and separate property of Mrs. [REDACTED]. The Appellant and Mrs. [REDACTED] executed a deed for the [REDACTED] property on [REDACTED] 2021. It is clear that the Appellant and Mrs. [REDACTED] were still married at the time of this transfer. Mrs. [REDACTED]' divorce from the Appellant was finalized on [REDACTED] 2021.⁸

COMAR 10.09.24.08K(4)(a) states that "An institutionalized person may not be determined ineligible for Medical Assistance under §K(1) of this regulation if the resource transferred was a home and title to the home was transferred to: (a) The spouse of the person." The local department provided no explanation or argument as to why the clear language of COMAR 10.09.24.08K(4)(a) should not apply in this case, as the Appellant transferred the title

⁸ It was not established on the record when Mrs. [REDACTED] filed for divorce, however, she is listed as the Plaintiff on the Judgment of Absolute Divorce, indicating she initiated the proceedings. (LD. Ex. 1, Att. 3). Ms. [REDACTED] testified that Mrs. [REDACTED] appeared before Magistrate [REDACTED] on [REDACTED] 2021 for a hearing on her complaint, but the Judgment of Absolute Divorce was not signed by a judge and entered by the Clerk's Office until [REDACTED], 2021.

to the home in which he resided prior to moving to a LTC facility to his then-spouse. COMAR 10.09.24.08K(4)(a) creates a clear exception for such a transfer. On the Transfer/Disposal of Assets Worksheet (LD Ex. 1, Att. 10), in response to the question “Was the Home Property Transferred to the Person’s: Spouse,” the worker completing the worksheet indicated “No” and “DIVORCED.” However, it is clear from the exhibits the Appellant submitted to the local department and that the local department entered into evidence, that the transfer of the [REDACTED] [REDACTED] property was made while the Appellant was still married to Mrs. [REDACTED].

The Appellant offered no testimony or evidence to challenge the local department's valuation of the FMV of the [REDACTED] property. Therefore, I accept the local department's determination that the FMV is \$193,216.50. However, as this transfer is exempt as a transfer of a home to his spouse pursuant to COMAR 10.09.24.08.K(4)(a), the local department improperly included it in its calculation of the penalty in this case.

[REDACTED] *Property*

It is undisputed that pursuant to the Agreement, the Appellant and Mrs. [REDACTED] agreed that the [REDACTED] property was to become the sole and separate property of Mrs. [REDACTED]. The Agreement identifies this property as a “Rental Property.” (LD Ex. 1, Att. 2). The Appellant and Mrs. [REDACTED] executed a deed for the [REDACTED] property on [REDACTED] 2021. It is clear that the Appellant and Mrs. [REDACTED] were still married at the time of this transfer.

The Appellant again argued that this transfer should be exempt from any penalty as it was a transfer of assets between spouses. I disagree. COMAR 10.09.24.08-1B(9)(a) states that “An individual may not be determined ineligible for Medical Assistance by reason of the transfer of any asset, excluded or countable, if the asset was transferred under one of the following conditions: (a) The asset was transferred to the individual’s spouse or to another *for the sole benefit of the individual’s spouse.*” (Emphasis added). The controlling language in the

regulation for this case is “for the sole benefit of the individual’s spouse.” For clarification on that language, I turn to the MA manual.

MA Manual § 800.22 addresses how local departments are to determine if a transfer is “for the sole benefit of the individual’s spouse.” The MA Manual states:

A transfer or trust is considered to be for the sole benefit of the A/R's spouse, the A/R's blind or disabled son or daughter, or a disabled individual under age 65 if the transfer is arranged in such a way that no individual or entity except the spouse, child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future. A transfer or trust that provides for funds or property to pass to a beneficiary other than the spouse, blind or disabled child, or non-elderly disabled individual is not considered to be established for the sole benefit of one of these individuals.

MA Manual § 800.22, revised July 2012 (emphasis in original). In this case, the Appellant has failed to provide any evidence that Mrs. [REDACTED] was not free to transfer her interest in this property at any time upon its transfer to her. The deed for [REDACTED] transfers the property from the Appellant, Mrs. [REDACTED], and [REDACTED] into the sole name of Mrs. [REDACTED] for “consideration of the sum of no consideration...” (App. Ex. 1). No restrictions are placed on Mrs. [REDACTED]’s ability to transfer this property. As such, I find the FMV of the Appellant’s interest in this property to be properly included in the local department’s calculation of the penalty. The Appellant did not contest the local department’s valuation of his interest in this property of \$199,766.00.⁹

[REDACTED] Shares, [REDACTED] 401(k), and [REDACTED] Insurance Policy¹⁰

The exact date of the transfer of these assets to Mrs. [REDACTED] was not established in the record. It is clear that the Appellant intended to transfer these assets solely to Mrs. [REDACTED]. Pursuant to the Agreement, the [REDACTED] 401(k) was to be transferred pursuant to a Qualified Domestic Relations Order (QDRO) incident to the divorce. (LD Ex. 1, Att. 2). A copy of the

⁹ The Appellant contested that any of the assets were transferred for less than FMV. I will address this argument in a separate section below.

¹⁰ As the parties both agree that the timeshare interests have a value of zero, they in no way affect the calculation of the penalty period and need not be addressed.

QDRO was not admitted into evidence, nor was testimony provided as to when or if the QDRO had been signed and entered. However, by the time the Appellant filed his MA-LTC application on October 1, 2021, the Appellant's Judgment of Absolute Divorce had been entered, and as Mr. █████ explained to the local department, "[the Appellant] no longer [had] control of any of the assets, as he is no longer the owner...." (LD. Ex. 1, Att. 5). I find these transfers occurred pursuant to the Judgment of Absolute Divorce, which incorporated the Agreement.

The Appellant argued that as these assets were transferred pursuant to a valid court order, they should not be included in any penalty calculation. He argued that the local department is essentially trying to ignore the Judgment of Absolute Divorce by treating the situation as if the Appellant still had access or control of these assets. By questioning why the Appellant agreed to the terms of the Agreement and agreed to the divorce, the local department is attempting to question the Appellant's reasons for divorcing his wife and is essentially challenging the divorce itself. I disagree.

The local department, perhaps inartfully, stated on cross-examination, that "persons are not allowed to get divorced to qualify for Medical Assistance." The Appellant argued that this somehow means the local department has unilaterally created an "inhouse policy" that seeks to invalidate a valid court order. That is simply not supported by the record.

The Appellant is correct that the local department must comply with court orders and that it is not the function of the local department to look behind the Appellant's reason for getting a divorce. However, the regulations and the MA Manual both permit the local department to look into and determine the reason for the transfer of property, specifically to see if the asset was transferred for less than FMV, either between spouses or other individuals in order to qualify for MA-LTC. This is the basis of the look back period.

As explained above, if an applicant for MA-LTC has disposed of resources or assets for less than FMV within the sixty month look-back period, the local department is required to impose a penalty period during which the applicant is ineligible to receive MA-LTC.¹¹ In such situations, there is a presumption that any disposal or transfer for less than FMV was made in order to establish or continue MA eligibility; the burden to show that the transfers were not for less than FMV rests with the applicant or recipient.

It is presumed that any disposal for less than FMV was made to establish or continue Medicaid eligibility or to avoid Medicaid's liens or recoveries provisions, unless the A/R successfully rebuts this presumption. The A/R or representative has the right to rebuttal by furnishing convincing documentary evidence to the eligibility CM¹² that the disposal was exclusively for a purpose other than establishing or continuing Medicaid eligibility or avoiding Medicaid's liens or recoveries provisions. The burden of proof rests with the A/R. If the A/R or representative wishes to rebut the presumption, the eligibility CM must evaluate the evidence presented and determine the intent of the disposal.

MA Manual § 800.23, revised July 2012 (emphasis in original). Contrary to the Appellant's argument, this does not prevent individuals from obtaining a divorce for any reason or on any grounds, nor does it set aside the terms of any divorce decrees that address marital property. As the Appellant correctly asserted, granting divorces and distributing marital property is not within the jurisdiction of the MDH or the local department. The local department, can, however, look behind the divorce regarding the transfer of property or assets for less than FMV in order to determine MA-LTC eligibility or to calculate a penalty period, which it did.

The Appellant also argued that all of his transfer of assets were pursuant to a valid court order, which placed the assets outside of his control and the assets therefore could not be included in a penalty calculation. This assertion is incorrect. Here, the Appellant entered into an Agreement with his then-wife, which was subsequently incorporated into a court order, in this

¹¹ See COMAR 10.09.24.08K; COMAR 10.09.24.08-1B(1) and (2)(a)(ii); MA Manual, § 800.17(f), revised July 2012.

¹² Case Manager.

case a Judgment of Absolute Divorce. The Appellant, by his own actions, set into action the disposal of these assets “in consideration of the mutual promises and obligations” in the Agreement. (LD. Ex. 1, Att. 2).

The Agreement notes in section 6.1 that the Agreement “shall be submitted in Court in such action for approval, and incorporated, but not merged, in a Judgment of Divorce, should one be granted; but this Agreement shall be independent of, and not dependent for its effectiveness upon approval or incorporation or be otherwise affected thereby.” *Id.* The Agreement further notes in section 7.2 that “The property settlement and spousal support provision of this Agreement are not subject to modification by any Court.” *Id.* This transfer of property was not outside the Appellant’s control, but was at his request and with his agreement.

Moreover, simply because an asset is transferred via a court order, does not mean the transfer cannot be considered by the local department. The MA Manual specifically states that “any action taken by, on behalf of, at the direction of, or upon the request of the [Applicant/Recipient/Spouse], or their representative may result in a penalty...” and that “...disposal may be subject to penalty even if the action was taken by an entity...” such as “administrative agencies; courts; insurers; trustees; joint owners.” MA Manual § 800.17(c), revised July 2012. As such, I find the inclusion of the value of the ██████████ Stocks, ██████████ 401(k), and ██████████ Insurance Policy to have been properly included by the local department in its penalty calculation.

The Appellant did not contest the local department’s valuation of his interest in these assets or provide any evidence that the assets should be valued differently. Based on the record before me, for purposes of calculating any penalty period of the Appellant’s MA-LTC benefits,

the FMV of the [REDACTED] 401(k) is \$36,147.64, the FMV of the [REDACTED] Shares is \$5,765.84,¹³ and the FMV of the [REDACTED] Insurance Policy is \$18,512.52.

The Transfers of the [REDACTED] Property, [REDACTED] Shares, [REDACTED] 401(k), and the [REDACTED] Insurance Policy Were for Less than FMV

The Appellant next argued that none of the assets should be included in the calculation of a penalty period, as none of the transfers were for less than FMV. To support this position, the Appellant presented the testimony of [REDACTED], who served as Mrs. [REDACTED]'s divorce attorney. Ms. [REDACTED] was offered and accepted as an expert in the area of Family Law.

Ms. [REDACTED] testified that she was retained by Mrs. [REDACTED] in [REDACTED] of 2020 to discuss Mrs. [REDACTED]'s options regarding the pursuit of a divorce. Ms. [REDACTED] explained that it was her opinion that Mrs. [REDACTED] had more than one ground of divorce available to her, including extreme cruelty, constructive desertion, and mutual consent. She testified, without expounding on direct conversations that are protected under attorney/client privilege, that she was able to recommend that Mrs. [REDACTED] enter into a settlement agreement to minimize further stress on Mrs. [REDACTED]. Ms. [REDACTED] explained that although the Agreement did not include provisions for the Appellant to receive any financial compensation for the transfers, the language in the Agreement states that the Agreement is made "in consideration of the mutual promises and obligations" within the Agreement. (LD Ex. 1, Att. 2). She opined that while such language is standard in separation agreements, it is not "throw away language" as the Agreement provided for the waiver of her client's claim for alimony and the mutual exchange of releases. It was Ms. [REDACTED]'s opinion that entering into a consent agreement and proceeding on the grounds of mutual consent, as well as a waiver of alimony and exchanging releases, all had value.

¹³ The [REDACTED] Stock Shares were valued at \$555.44. The [REDACTED] Stock Shares were valued at \$5,210.40. $555.44 + 5,210.40 = 5,765.84$.

On cross-examination, Ms. █████ explained that she never communicated with the Appellant directly, as he was represented by counsel, nor did she ever meet the Appellant. Ms. █████ did not testify as to any of the Appellant's reasons for entering into the Agreement, or if the Appellant believed he was receiving any value or benefit by entering into the Agreement.

While I credit Ms. █████'s testimony that such waivers and releases can have great value to an individual and that it was certainly a benefit to Mrs. █████ to not go through a contested divorce, the Appellant presented no evidence that any of these factors had any value to him. No testimony was provided showing that Mrs. █████ would have had a winning claim for alimony, and if so, the value of any such alimony. The Appellant could have provided an expert to testify regarding a potential alimony claim and its value. The Appellant could have provided testimony or attorneys' fees estimates to show the worth of avoiding a contested divorce proceeding. The Appellant himself could have testified regarding the value of the "mutual promises and obligations" in the Agreement to him. However, the Appellant did not provide any valuation for what he received in exchange for the transfer of the assets to Mrs. █████ He did not even establish that he believed he actually received anything of value. The Appellant failed to meet his burden to show that the transfers of his assets were for FMV.

The Total Amount of Assets Disposed of for Less than Fair Market Value

The assets disposed of for less than FMV are the █████ property (\$199,766.00), the █████ 401(k) Retirement Savings Plan (\$36,147.64), the █████ Insurance Policy (\$18,512.52), the █████ Stock Shares (\$5,210.40), and the █████

Stock Shares (\$555.44). The total value of assets disposed of for less than FMV is \$260,192.00,¹⁴ which subjects the Appellant to a penalty of twenty-five months, fifteen days.¹⁵

CONCLUSIONS OF LAW

I conclude as a matter of law that the local department incorrectly determined the Appellant disposed of assets worth \$453,408.50.00 for less than fair market value. COMAR 10.09.24.08K(4)(a).

I further conclude as a matter of law that the Appellant's transfers of assets worth \$260,192.00 constituted a transfer for less than fair market value and is subject to penalty. MA Manual § 800.17; revised July 2012; MA Manual § 800.20(d); revised July 2012; MA Manual § 800.22; revised July 2012; MA Manual § 800.23, revised July 2012. The Appellant is therefore subject to a penalty for those transfers of twenty-five months, fifteen days. COMAR 10.09.24.08K; COMAR 10.09.24.08-1B(1).

ORDER


I hereby **ORDER** that the [REDACTED] [REDACTED] decision to impose a forty-four month, fourteen day penalty upon the Appellant's Medical Assistance Long-Term Care benefits for the disposal of income for less than fair market values is **MODIFIED**.

¹⁴ \$199,766.00 + \$36,147.64 + \$18,512.52 + \$5,210.40 + \$555.44 = \$260,192.00.

¹⁵ The penalty is determined by dividing the amount of the Appellant's assets transferred for less than FMV by the average monthly cost of nursing facility services as of the date of her application; in this case, \$10,190.00. $\$260,192.00 \div \$10,190.00 = 25.53$. To calculate the number of days in excess of twenty-five months, the difference between the average monthly cost of care for 25 months (\$254,750.00) is subtracted from the total amount of assets transferred for less than FMV (\$260,192.00) and then divided by the average daily cost of care, which in this case is \$350.00. $\$260,192.00 - 254,750.00 = \$5,442.00$. $\$5,442.00 \div \$350.00 = 15.54$.


I further **ORDER** that the Appellant is subject to a penalty of twenty-five months, fifteen days.

February 11, 2022
Date Decision Mailed

Signature Appears on Original

Mary Pezzulla
Administrative Law Judge

MP/da
#196139

REVIEW RIGHTS

This is the final decision of the Maryland Department of Health. A party aggrieved by this decision may file a written petition for judicial review with the Circuit Court for Baltimore City, if any party resides in Baltimore City or has a principal place of business there, or with the circuit court for the county where any party resides or has a principal place of business. Md. Code Ann., State Gov't § 10-222(c) (2021). The original petition must be filed in the circuit court within thirty (30) days of the date of this decision, with a copy to , Office of the Attorney General, Suite 302, 300 W. Preston St., Baltimore, MD 21201. Md. Rules 7-201 through 7-210.

The petition for judicial review should identify the Maryland Department of Health, which administers the Medicaid program, as the agency that made the decision for which judicial review is sought. The address of the Maryland Department of Health should be included on the petition: 201 W. Preston St., Room 511C, Baltimore, MD 21201.

A separate petition may be filed with the court to waive filing fees and costs on the ground of indigence. Md. Rule 1-325. No fees may be charged to Medical Assistance Program recipients, applicants, or authorized representatives for transcription costs or for preparation or delivery of the record to the circuit court.

The Office of Administrative Hearings is not a party to the judicial review process.

Copies Mailed To:

[REDACTED]

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████████████████████,

APPELLANT

v.

████████████████████

██

████████████████████

* BEFORE MARY PEZZULLA,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH No.: MDH-██████████-10A-21-27921

* * * * *

FILE EXHIBIT LIST

I admitted the following exhibit on behalf of the local department:

LD Ex. 1 – Summary for Appeal Hearing, dated December 23, 2021, with a table of contents and the following attachments:

- Att. 1 – Long-Term Care/Waiver Medical Assistance Application, October 1, 2021
- Att. 2 – Marital Settlement Agreement and Release, ██████████ 2021
- Att. 3 – Judgment of Absolute Divorce, entered ██████████, 2021
- Att. 4 – Request for Information from the local department to the Appellant, October 6, 2021
- Att. 5 – Email from ██████████ to ██████████, October 18, 2021
- Att. 6 – Long Term Care Activity Report, November 10, 2021
- Att. 7 – Policy Clarification Request, October 25, 2021
- Att. 8 – Email from ██████████, Government Assistance Eligibility Specialist III, local department, to ██████████, October 28, 2021
- Att. 9 – Email from ██████████, Government Assistance Eligibility Specialist III, local department, to ██████████, November 2, 2021
- Att. 10 – Maryland MA Worksheet for Institutionalized Persons, undated; Spreadsheet of Appellant’s assets with values as of July 21, 2021, undated; Maryland MA Transfer/Disposal of Assets Worksheet, undated
- Att. 11 – Notice of Decision Summary from the local department to the Appellant, November 12, 2021
- Att. 12 – MA Manual § 800.17, revised July 2012; MA Manual § 1000.1(f), revised April 2014; MA Manual §800.23, revised July 2012
- Att. 13 – COMAR 10.09.24.08-1

I admitted the following exhibits on behalf of the Appellant:

App. Ex. 1 – Deed for real property located at ██████████, Maryland, ██████████ 2021; Deed for real property located at ██████████, Maryland, ██████████ 2021

App. Ex. 2 – [Marked by not offered]¹

App. Ex. 3 – List of citations used in Appellant’s closing argument, undated

¹ This document, while not offered into evidence, will be retained with the file.