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GOVERNOR

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

ORLENE HAWKS
DIRECTOR

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

Date Mailed: May 17, 2019
MOAHR Docket No.: 19-002074
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Aaron McClintic

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, an in-person hearing was held on April 17, 2019, from Traverse City, Michigan. The Petitioner was represented by Attorney [REDACTED] [REDACTED]. The Department of Health and Human Services (Department) was represented by Assistant Attorney General Kyle Bruckner. Rebecca Ferrill appeared and testified for the Department. Department Exhibit 1, pp. 1-64 was received and admitted. Petitioner Exhibit A, pp. 1-36.

ISSUE

Did the Department properly deny Petitioner's application for Medical Assistance (MA) due to excess assets?

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 29, 2018, Petitioner purchased mausoleums for her adult children totaling \$ [REDACTED] through [REDACTED].
2. On [REDACTED] [REDACTED] 2018, Petitioner applied for MA-Long Term Care (MA-LTC).
3. On November 14, 2018, verification checklists were sent to Petitioner's attorney requesting documents and information regarding burial items purchased from T [REDACTED] on August 29, 2018.
4. On November 26, 2018, an extension was requested and granted regarding the verifications.

5. On December 6, 2018, Petitioner's attorney submitted verifications.
6. On January 10, 2019, a verification checklist was sent to Petitioner's attorney requesting a copy of the contract executed by Petitioner and the specific mausoleum maker and proof of the payment made by Petitioner to [REDACTED]. Information regarding where [REDACTED] was holding the money was also requested.
7. On January 14, 2019, Petitioner's attorney submitted a statement indicating that Petitioner has no contract with a mausoleum maker.
8. On February 20, 2019, Notice of Case Action was sent to Petitioner informing her that her application was denied due to excess assets specifically because the mausoleum purchased by Petitioner's Power of Attorney [REDACTED] [REDACTED] does not meet the definition of "held for" under BEM 400, pp. 52-55).
9. On February 27, 2019, Petitioner requested hearing disputing the denial of MA-LTC.

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.

To be eligible for Medicaid long-term care benefits in Michigan, an individual must meet a number of criteria, including having \$2,000 or less in countable assets. BEM 400, pp.4-5; Ronney v. Dep't of Social Services, 210 Mich App 312, 315; 532 NW2d 910 (1995). Assets are defined as cash, any other personal property, and real property. Countable assets cannot exceed the applicable asset limit, however not all assets are counted. An asset is countable if it meets the availability tests and is not excluded. An asset is "available" is someone in the asset group has to the right to use or dispose of the asset. BEM 400, p.5. All types of assets are considered for SSI-related MA.

SSI-Related MA Burial Space Exclusion

SSI-Related MA Only

Exclude **one** burial space **held for** (see below) each of the following:

- Each qualified fiscal group member.
- Whether by blood, adoption or marriage, the member's:
Parents.
Minor and adult children.
Siblings.
- The spouse of each person listed above.

For a member's relatives only by marriage, apply the exclusion only if the marriage has **not** ended by death or divorce.

Burial space items in a prepaid funeral contract must be identified and valued separately from non-burial space items to be excluded.

If the contract shows the purchase of a specified burial space at a specified price, determine whether such space is **held for** the client or member of the client's immediate family. If the space is held for the individual, determine if the contract is irrevocable or revocable. If irrevocable, it is not a resource. If the contract is revocable, it is an excludable resource. The burial space must continue to meet the **held for** criteria to be excluded. If a space is transferred to another individual (even if listed above) it no longer meets the **held for** criteria and needs to be evaluated for divestment.

Held For. A burial space is held for an individual when someone currently has:

- Title to and/or possesses a burial space intended for the individual's use (example: has title to a burial plot, owns a burial urn stored in the basement for his own use).
- A contract with a funeral service company for specified burial spaces for the individual's burial (that is, an agreement that represents the individual's current right to the use of the items at the amount shown).

A burial space does not meet the definition of **held for** an individual under an installment sales contract or similar device if the purchase price is not paid in full and any of the following are true:

- The individual does **not** currently own the space.
- The individual does **not** currently have the right to use the space.
- The seller is **not** currently obligated to provide the space.

Until all payments are made on the contract, the amounts paid might be considered burial funds; see **Burial Fund Exclusion** in this item. (BEM 400, p.51-52(October 2018))

Burial Space Defined

SSI-Related MA Only

A **burial space** is a(n):

- Burial plot, gravesite.
- Crypt, mausoleum.
- Casket, urn, niche.
- Some other type of repository customarily and traditionally used for the deceased's bodily remains.
- **Necessary** and **reasonable** improvements or additions to or upon such spaces including:

Vaults.

Headstones, markers or plaques.

Burial containers.

Opening and closing of the gravesite.

Contracts for care and maintenance of the gravesite.

Note: Reasonable and **necessary** are those items required by the cemetery.

- Flowers if displayed at gravesite.
- Cleric's honorarium for service at gravesite.

Note: Of the items that serve the same purpose, exclude only one item per person.

Example: Exclude a cemetery lot and casket for the same person, but not a casket and an urn.

In this case, Petitioner through her Power of Attorney purchased revocable burial item contracts on August 29, 2018 for her adult children totaling \$ [REDACTED] from Trusted Burial Space LLC. The purchase of these contracts, if the value is found to be excluded, would allow Petitioner to be under the asset limit for MA-LTC.

Several aspects of the purchase made the Department question the purchases. The cost of the purchases, totaling \$ [REDACTED] was a very large portion of Petitioner's assets and an amount that allowed Petitioner to be under the MA asset limit. The cost of the mausoleums for Petitioner's children far exceeded the costs of Petitioner's own burial contract. The Department discovered that Petitioner's Attorney John Rizzo had an ownership interest in [REDACTED]. (Ex. 1, pp. 48-53) The Department discovered that [REDACTED] was founded three months prior to Petitioner's contract. (Ex. 1, p.48) The terms of the revocable contract require for a 10% fee paid to [REDACTED] in the event that the contract is revoked. The 10% fee, (\$ [REDACTED]) was paid to [REDACTED] on September 11, 2018, prior to the contracts being revoked, according to bank records obtained by the Department. (Ex.1, p.58) The Department attempted to verify that [REDACTED] is a legitimate business that regularly procures burial items but was unable to reach anyone at the telephone number provided and was not able to leave a voicemail message.

The Department contends that that burial items do not meet the "held for" requirements in BEM 400, p.25, because Petitioner's children do not currently own the mausoleums and do not have a title, receipt or other paperwork for a specific mausoleum make or model. There is a specific example in policy of a burial item that meets the held for criteria for a "burial urn stored in basement for own use". BEM 400, pp.51-52 The Department witness acknowledged at hearing that if Petitioner's children had physical possession of their mausoleums then they may be excluded. The Petitioner's children's contracts are not analogous to the example cited in policy because they do not own the physical mausoleums.

In addition, the Department contends that the contracts for mausoleums entered into by Petitioner on behalf of her adult children were a sham transaction and therefore the asset should be countable.

Petitioner's Attorney argued that the burial space mausoleum purchases were legitimate and should be excluded pursuant to Department policy BEM 400. Petitioner's Attorney argued that there was no requirement in Department policy that purchasers of burial

items must have possession of the burial items within a prescribed time frame. Petitioner's Attorney argued that Petitioner contracted for the mausoleums and Trusted Burial is obligated to provide the mausoleums within 30 days after they are requested. Petitioner's Attorney argued that there was nothing to establish that if Petitioner's children were to request the burial items pursuant to their contracts, that [REDACTED] would not be able to provide the items as contracted. Petitioner's Attorney argued that it is common in the funeral industry to contract for caskets or other items that are procured after the death of the contract holder.

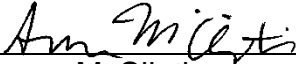
The nature of the burial item contracts and whether those purchases were arm's length transactions must be examined utilizing the applicable case law from Mackey v Dep't of Human Servs, 289 Mich App 688; 808 NW2d 484 (2010). Petitioner provided online listings for Mausoleums with comparable prices to the prices paid by Petitioner. (Ex. 1, pp. 39-44) However, the 10% revocation fee paid to [REDACTED] cannot be explained or justified, especially considering the timing of that payment. Petitioner paid \$[REDACTED] to [REDACTED] on September 11, 2018, and it is unclear what Petitioner received in exchange for that payment. [REDACTED] did not incur any expenses at that time because it appears that no mausoleums were procured or constructed at that time. It is unlikely that Petitioner would have incurred a similar 10% fee if she had purchased the contracts in the open market or with the legitimate monument companies whose price lists were provided by Petitioner's former attorney. On its face, Petitioner's former Attorney's ownership in [REDACTED] constitutes self-dealing and further brings into question whether the transactions were the result of arm's length negotiations. The undersigned Administrative Law Judge finds that Petitioner's purchases of mausoleums for her adult children were not arm's length transactions because they were not made in the open market, were not made in her own self-interest and were made with a company owned by her attorney at his direction and without exploring other contracts in the open market. Because the purchases for burial items were not arm's length transactions and were in fact sham transactions, the value of those contracts are countable assets. BEM 400

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 found that the funeral item contracts for mausoleums did not meet the "held for" criteria contained in BEM 400 and denied Petitioner's MA-LTC application due to excess assets. BEM 400

DECISION AND ORDER

Accordingly, the Department's decision is **AFFIRMED**.

AM/nr



Aaron McClintic
Administrative Law Judge
for Robert Gordon, Director
Department of Health and Human Services

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 Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

DHHS

Eileen Asam
701 S. Elmwood Suite 19
Traverse City, MI 49684

Grand Traverse County DHHS- via
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BSC1- via electronic mail

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