



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

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Date Mailed: November 14, 2019
MOAHR Docket No.: 19-010182
Agency No.: ██████████
Petitioner: ██████████

ADMINISTRATIVE LAW JUDGE: Jacquelyn A. McClinton

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 November 4, 2019, from ██████████ Michigan. The Petitioner was represented by Tina Mullins, Esq. Petitioner's son, ██████████ appeared and testified on behalf of Petitioner. The Department of Health and Human Services (Department) was represented by Elizabeth Husa Briggs, Assistant Attorney General. Maureen Curran, Eligibility Specialist, and Bridget Heffron, Supplemental Security Income (SSI)-Related Medicaid Eligibility Specialist, appeared and testified on behalf of the Department.

ISSUE

Did the Department properly conclude that at the time of the processing of the application, Petitioner divested assets totaling \$9,966.74 and apply a divestment penalty to Petitioner's receipt of long-term care (LTC) benefits under the Medical Assistance (MA) program?

FINDINGS OF FACT

The Administrative Law Judge, based on the competent, material, and substantial evidence on the whole record, finds as material fact:

1. A monetary transfer was made between Petitioner and his son between January 18, 2018 and February 23, 2019.

2. On April 29, 2019, Petitioner executed a Non-Negotiable Promissory Note with a loan amount of \$16,467.00 to be repaid in equal monthly installments of \$159.46 between May 29, 2019 and April 29, 2029.
3. On April 29, 2019, the Department received an application for Health Care Coverage Patient of Nursing Facility.
4. On June 7, 2019, the Department received an Affidavit attesting to divestments of \$26,240.40 and partial cure of the divestments in the amount of \$9,773.66.
5. On June 17, 2019, the Department received verification of additional payments in the amount of \$6,500.00 made to cure the divestments.
6. On June 17, 2019, the Department sent Petitioner a Health Care Coverage Determination Notice which notified Petitioner that Medicaid would not pay for his long-term care and home and community-based waiver services from April 1, 2019 through May 5, 2019.
7. On September 10, 2019, Petitioner's counsel filed a Request for Hearing disputing the Department's actions.

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.

Additionally, a divestment occurs when the client transfers a resource (i) within a specified time (the "look-back period"), (ii) for less than fair market value, and (iii) the transfer is not an excluded transfer. BEM 405, p. 1. The look-back period is a transfer within 60 months of the first date that the client was eligible for MA and one of the following: in LTC, approved for the waiver, eligible for Home Health services, or eligible for home help services. BEM 405, pp. 5-6. "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. 7. In other words, the amount received for the resource was less than what would have been received if the resource was offered in

the open market and in an arm's length transaction. BEM 405, p. 7. Compensation must have tangible form and intrinsic value. BEM 405, p. 7. Giving an asset away is a transfer that results in a divestment. BEM 405, p. 2. Similarly, shell transactions between relatives that have little or no economic benefit to the applicant are not for fair market value and are a divestment. *Mackey*, 289 Mich App at 706.

In this case, the evidence showed that (1) the transfers at issue involved two relatives, Petitioner and her adult son; (2) the Note evidencing that the disbursements by Petitioner to her son were intended as a loan was not executed until April 2019, more than one year after the first transfer and two months prior to the last transfer; and (3) Petitioner applied for MA on April 29, 2019, when the Note could not be resold for fair market value. Therefore, the transaction was properly characterized by the Department as a divestment.

Petitioner's counsel asserted that the loan could be oral. However, the first transfer was made in January 2018. The first payment was not made until one month after the Note was executed and one month after the application for MA benefits. The final payment is not due until 10 years after the execution of the Note. MCL 566.132(1) states:

- (1) In the following cases, an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
 - (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.
 - (b) A special promise to answer for the debt, default, or misdoings of another person.
 - (c) An agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry.
 - (d) A special promise made by a personal representative to answer damages out of his or her own estate.
 - (e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.
 - (f) An assignment of things in action, whether intended as a transfer for sale, for security, or otherwise.
 - (g) An agreement, promise, contract, or warranty of cure relating to medical care or treatment. This subdivision does not affect the right to sue for malpractice or negligence.

The first transfer was made in January 2018. The first payment was not made until one month after the Note was executed and one month after the application for MA benefits. The final payment is not due until 10 years after the execution of the Note. Therefore, the promise to pay in this case was required to be in writing.

In support of its position, the Department also points to the Social Security Administration's (SSA's) Program Operations Manual System (POMS). While the POMS (the policy and procedure manual used in evaluating Social Security claims) is not binding authority, it is entitled to some consideration even in evaluating Medicaid claims. *Davis v Sec'y of Health and Human Servs*, 867 F2d 336, 340 (CA 6, 1989); *Landy v Velez*, 958 F Supp 2d 545, 553 (D NJ, 2013); 70A Am Jur 2d, Social Security and Medicare § 16. POMS SI 01120.220(D)(2) acknowledges that a loan may be written or oral but provides that it is a bona fide loan only if the loan agreement is in effect at the time that the lender provides the cash to the borrower, explaining that money given to an individual with no contemporaneous obligation to repay cannot become a loan at a later date. One of the circumstances considered in evaluating whether the loan is bona fide is whether the repayment plan is feasible in light of the amount of the loan, the individual's resources and income, and the individual's living expenses. POMS SI 01120.220(D)(5). In this case, the fact that the Note was not executed contemporaneously with the disbursement of funds but was executed just before the MA application and there is no evidence, other than Petitioner's son's statements, that the transfer was not intended as a gift.

In response to the Department's position that the transfer of funds to Petitioner's son was a divestment, Petitioner's counsel argues that the Note, by the express terms of 42 USC 1396p(c)(1), is not a divestment. 42 USC 1396p(c)(1)(I) provides as follows:

For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage—

(i)

has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(ii)

provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

(iii)

prohibits the cancellation of the balance upon the death of the lender.

In this case, the Non-Negotiable Promissory Note provided by Petitioner's counsel indicated that the loan term was 10 years. Petitioner's birth date is [REDACTED]. As such, he was [REDACTED] years of age at the time the Note was executed. Under Department policy in effect at the time the Note was executed, Petitioners' life expectancy was 10.43 years; and therefore, the Note is actuarially sound.

However, POMS SI 01120.220(D)(1) states that a bona fide loan is an agreement that must be enforceable under the applicable state law. As previously stated, POMS SI

01120.220(D)(2) requires that the loan agreement must be in effect at the time the lender provides the cash to the borrower. Money given to an individual with no contemporaneous obligation to repay cannot become a loan at a later date. At the hearing, Petitioner's son testified that he and Petitioner have borrowed money from one another on many occasions.

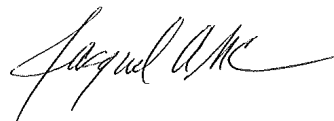
Further, POMS SI 01120.220(D)(4) states that the loan must include a schedule for repayment, and the borrower's express intent to repay by pledging real or personal property or anticipated future income (such as retirement insurance benefits (RIB) benefits starting in a year when they turn 62)... Petitioner's son testified that repayment was always "understood." There was no testimony that prior to the written Promissory Note that there was ever a definitive payment scheduled. There was no real or personal property pledged in the Note. There was no evidence, other than Petitioner's son's statements, that any oral loan existed prior to the Note or that there was a plan or schedule of repayment.

Based on the evidence in this case, the Department properly concluded that Petitioner divested \$9,966.74 to his son. Petitioner's counsel does not dispute the mathematical calculation of the divestment penalty when the divestment includes these funds.

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 included the amount not repaid at the time of application process, \$9,966.74, in its calculation of the divestment penalty.

DECISION AND ORDER

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



JAM/jaf

Jacquelyn A. McClinton
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 Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

DHHS:
(via electronic mail)

MDHHS-██████-Hearings
AG-HEFS-MOAHR
D Smith
EQAD
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Petitioner:
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