



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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██████████, MI ██████████

Date Mailed: February 28, 2020
MOAHR Docket No.: 19-013091
Agency No.: ██████████
Petitioner: ██████ ██████

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 January 29, 2020, from Traverse City, Michigan. The Petitioner was represented by Attorney, Todd Millar. The Department of Health and Human Services (Department) was represented by Assistant Attorney General, Geraldine Brown who participated by telephone. Assistant Attorney General, Dan Beaton was also on the call. Tom Jessmore, Eligibility Specialist, and Rebecca Ferrell appeared and testified for the Department. Department Exhibit 1, pp. 1-34 was received and admitted.

ISSUE

Did the Department properly determine that Petitioner divested assets and impose divestment penalty period?

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 23, 2019, Petitioner executed a promissory note loaning her son ██████████ \$██████████. The promissory note required that ██████████ ██████████ repay his mother in equal monthly installments of \$5,848.64 including 4% annual interest. (Ex. 1, pp. 19-20)
2. On ██████████ ██████████ 2019, Petitioner applied for MA-LTC benefits.

3. On November 25, 2019, a Health Care Coverage Determination Notice was sent to Petitioner informing her that she was eligible for MA with a divestment penalty period from September 1, 2019, through December 3, 2020. (Ex. 1, pp.9-12)
4. On December 10, 2019, Petitioner requested hearing disputing the finding of divestment and imposition of divestment penalty period.

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.

Promissory Notes/Loans

A promissory **note** is a written promise to pay a certain sum of money to another person at a specified time. Promissory notes are loans. The promissory note may call for installment payments over a period of time (installment note) or a single payment on a specified date. The note is an asset to the lender. The value of the note is the outstanding balance due as of the date of application for long term care, home help, waiver services, or home health services.

All money used to purchase a promissory note or loan, **are** transfers of assets. They are a transfer of assets for less than fair market value unless the following are also true:

- The repayment schedule is actuarially sound; and
- The payments are made in equal monthly amounts during the term of the agreement with no deferral of payments and no balloon payments; and
- The note must prohibit the cancellation of the balance upon the death of the lender.

See *BEM 405, Uncompensated Value* to determine the value of any promissory note or loan as a transfer for less than fair market value.

Bona Fide Loans

A loan is bona fide if it meets all the following requirements:

- It is enforceable under state law.
- The loan agreement is in effect at the time of the transaction.
- The borrower acknowledges an obligation to repay.
- The loan document includes a plan for repayment.
- The repayment plan is feasible.

Note: Count principal payments from a bona fide loan or promissory note are the return of the principal as an asset in the month received. Payment of interest on a bona fide

loan and all payments from a loan or promissory note which is not bona fide is countable unearned income. BEM 400 pp.44-45 (July 2019)

Divestment means a transfer of a resource (see *resource defined* in this item and in glossary) by a client or his spouse that are all of the following:

- Is within a specified time; see *look back period* in this item.
- Is a transfer for *less than fair market value*; see definition in glossary.
- Is not listed in this item under *transfers that are not divestment*.

Note: See *annuity not actuarially sound* and *joint owners and transfers* in this item and BEM 401 about special transactions considered transfers for less than *fair market value*.

During the penalty period, MA will **not** pay the client's cost for:

- Long Term Care (LTC) services.
- Home and community-based services.
- Home help.
- Home health.

MA will pay for other MA-covered services.

Do **not** apply a divestment penalty period when it creates an undue hardship; see *undue hardship* in this item.

RESOURCE DEFINED

Resource means all the client's and spouse's assets and income. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. It also includes all assets and income that the individual (or spouse) were entitled to but did **not** receive because of action by one of the following:

- The client or spouse.
- A person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or the client's spouse.
- Any person (including a court or administrative body) acting at the direction or upon the request of the client or his/her spouse.

TRANSFER OF A RESOURCE

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. **Not** all transfers are divestment. Examples of transfers include:

- Selling an asset for fair market value (not divestment).
- Giving an asset away (divestment).
- Refusing an inheritance (divestment).
- Payments from a **MEDICAID TRUST** that are **not** to, or for the benefit of, the person or his spouse; see BEM 401 (divestment).
- Putting assets or income in a trust; see BEM 401.
- Giving up the **right** to receive income such as having pension payments made to someone else (divestment).
- Giving away a lump sum or accumulated benefit (divestment).
- Buying an annuity that is **not** actuarially sound (divestment).
- Giving away a vehicle (divestment).
- Putting assets or income into a Limited Liability Company (LLC)
- Purchasing an asset which decreases the group's net worth and is not in the group's financial interest (divestment). BEM 405, pp.1-2

Uncompensated Value

The uncompensated value of a divested resource is

- The resource's cash or equity value.
- Minus any compensation received.
- The uncompensated value of a promissory note, loan, or mortgage is the outstanding balance due on the baseline date. BEM 405 p. 15

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. That is, 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* (see glossary).

Note: Also see *annuity not actuarially sound* in this item.

Compensation must have tangible form and intrinsic value. BEM 405, p.6

ARM LENGTH TRANSACTION

A transaction between two parties who are not related and who are presumed to have roughly equal bargaining power. It consists of all the following three elements:

- It is voluntary.
- Each party is acting in their own self-interest.
- It is on an open market.

By definition, a transaction between two relatives is not an arm length transaction. BPG Glossary, p.6

FAIR MARKET VALUE

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. That is, what the owner would receive and a buyer be willing to pay on the open market and in an arm length transaction. See definition in this glossary. BPG Glossary, p.27

In this case, the only issue in dispute was how to treat the promissory note Petitioner executed with her son [REDACTED] [REDACTED] on August 23, 2019 in the amount of \$[REDACTED]. The promissory note required equal monthly installments of \$5,848.64 due the 30th of the month from September 30, 2019, through May 30, 2020, including 4% annual interest. The promissory note has a non-assignability clause, a non-cancellation clause and a preclusion of prepayment. (Ex. 1, pp. 19-20)

The Department's position is that the execution of the promissory note is divestment because the transaction was not an arm's length transaction and that the fair market value of the promissory note is zero because it cannot be sold on the open market. The Department opined that policy supported assigning a countable asset value of \$0 because the promissory note could not be sold on the open market. Further, the Department position is that because this was an exchange of cash owned by Petitioner and transferred to her son, then it is divestment. The Department view was that either

the promissory note is salable with a countable value or it is divestment. The Department cited 42 USC 1396p(c)(4) in support of their position.

Petitioner's position is that the promissory note meets all the eligibility requirements outlined in BEM 400, p.44-45 because the repayment schedule was actuarially sound, the payments are made in equal monthly amounts during the term of the agreement with no deferral payments and no balloon payments and the note prohibits the cancellation of the balance upon the death of the lender and therefore is permissible and not divestment. Petitioner cited the principle of contract and statutory interpretation that specific provisions always trump general provisions and pointed to settled case law in *Defrain v. State Farm Mut Auto Ins Co*, 491 Mich 359, 367 n 22: 817 NW 2d 504 (2012); *Miller v Allstate Ins Co*, 481 Mich 601, 613; NW2d 463(2008).

Petitioner complied with Department policy and the federal regulations when she executed a promissory note with her son prior to applying for Medicaid. The promissory note was actuarially sound, the payments were equal monthly payments and the note has a non-cancellation clause in the event the lender died. Department policy under BEM 400 has very specific provisions regarding promissory notes and how they may be utilized. Petitioner met all those provisions. The Department attempts to impose other requirements but failed to establish the basis to do so.

The promissory note paid a reasonable interest rate based on market conditions at the time the note was executed. A certificate of deposit at a financial institution over the same length of time would pay much less. Petitioner did not give away cash to her son without compensation. Petitioner loaned her son money over a short period time at an interest rate that arguably was over the market rate. The Department attempts to complicate how to value the promissory note by pointing out that the promissory note is non-salable. However, there is a specific provision in BEM 400 that instructs how to value a promissory note. "The note is an asset to the lender. The value of the note is the outstanding balance due as of the date of application for long term care, home help, waiver services, or home health services." BEM 400, p.45. Because this is a specific provision, it trumps the general policy outlined elsewhere in policy. The Department also attempts to impose a broad requirement that all transactions must be an arm's length transaction. The provisions in BEM 400 regarding promissory notes contain specific requirements, if policy makers intended to impose additional requirements then policy should clearly instruct what those requirements are.

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 failed to satisfy its burden of showing that it acted in accordance with Department policy when it when it found divestment and imposed divestment penalty period.

DECISION AND ORDER

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. Lift the divestment finding and cancel the divestment penalty period imposed due to the execution of the promissory note in the amount of \$51,770.80.
2. Activate MA-LTC coverage when Petitioner's penalty period related to the gifts to her children has run.

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

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