



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Date Mailed: April 21, 2020
MOAHR Docket No.: 19-013319
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Zainab A. Baydoun

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, a telephone hearing was held on February 6, 2020, from Detroit, Michigan. Petitioner is deceased. [REDACTED], Petitioner's Personal Representative, was present for the hearing on Petitioner's behalf and was represented by his attorney, [REDACTED]. Petitioner's attorney called [REDACTED], Funeral Director, as a witness. Assistant Attorney General (AAG), Kyle Bruckner, appeared on behalf of the Department of Health and Human Services (Department) and solicited testimony from Family Independence Manager, Robert Villas. Family Independence Manager, Mark Kwarcianny, was present for the hearing but was not called as a witness. Exhibit A, pp. 1-5 and Exhibit B, pp. 1-81 were admitted into the record.

ISSUE

Did the Department properly deny Petitioner's [REDACTED], 2019 and [REDACTED], 2019 applications for Medical Assistance (MA) benefits on the basis that the value of his countable assets exceeded the asset limit?

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 or around April 9, 1991, Petitioner entered into a Prepaid Funeral and Escrow Agreement with [REDACTED]. At the top of the agreement is box that indicates the document signed is a Non-Guaranteed Price Agreement. (Exhibit B, pp. 49-51)

2. In or around May 2018, [REDACTED] acquired the funeral home and assumed Petitioner's April 9, 1991 prepaid funeral contract.
3. On [REDACTED], 2019, [REDACTED] was appointed Petitioner's personal representative, as Petitioner was deceased as of [REDACTED], 2019. (Exhibit B, pp. 3,64)
4. On or around [REDACTED], 2019, a Long-Term Care (LTC) Application for Health Care Coverage Patient of Nursing Facility (DHS-4574) (August 2019 Application) was submitted to the Department on Petitioner's behalf, also requesting retroactive MA coverage for the months of May 2019, June 2019 and July 2019. (Exhibit B, pp. 11-18)
5. On the Application, a funeral contract with a value of \$4,000 was disclosed as an asset. (Exhibit B, pp. 11-18)
6. In connection with the Application, Petitioner's representatives submitted a DHS-8A Irrevocable Funeral Contract Certification, signed by Petitioner's representative (Power of Attorney) and [REDACTED], the funeral home owner, on [REDACTED], 2019, prior to Petitioner's death. The DHS-8A was received by the Department on August 28, 2019.
 - a. In the August 2019 DHS-8A, [REDACTED], acting on behalf of the funeral home, certified that Petitioner's \$4,000 April 9, 1991 prepaid funeral contract was a guaranteed price contract. The parties requested that the Department certify contract as irrevocable. (Exhibit B, pp. 52-54)
 - b. With the DHS-8A, Petitioner's representatives included the original April 9, 1991 Non-Guaranteed Price Prepaid Funeral and Escrow Agreement and a Funeral Purchase Contract dated August 3, 2019. (Exhibit B, pp. 52-54)
7. The Department did not certify the August 2019 DHS-8A and the April 9, 1991 funeral contract as irrevocable because it concluded the contract was a non-guaranteed price contract. (Exhibit B, p. 52)
8. The Department counted the \$4,000 value of the prepaid funeral contract as an asset.
9. On September 10, 2019, the Department sent Petitioner a Health Care Coverage Determination Notice (Notice) advising him he was ineligible for MA on the basis that the value of his countable assets was higher than allowed. (Exhibit B, pp 32-34)
10. On September 27, 2019, Petitioner's attorney sent the Department correspondence indicating that the DHS-8A signed on August 3, 2019 by Petitioner's representative and the funeral home representative was considered an

agreement, certifying that the original April 1991 funeral contract was a fully paid guaranteed price contract. The correspondence further indicated that despite the 1991 documentation saying it was non-guaranteed, by signing and certifying the DHS-8A, the parties intended for the contract to be treated as a guaranteed price contract. (Exhibit B, p. 55)

- a. Petitioner's attorney advised the Department that as further verification that the intent was for the funeral contract to be treated as guaranteed, a new DHS-8A would be filed, along with an amended guaranteed price agreement reflecting the original agreement date of April 9, 1991. (Exhibit B, p. 55)
11. On or around September 27, 2019, Petitioner's attorney filed a new DHS-8A Irrevocable Funeral Contract Certification with the Department, signed by Petitioner's Personal Representative, [REDACTED] and [REDACTED] on [REDACTED], 2019, after Petitioner's death.
 - a. The September 2019 DHS-8A requests that Petitioner's \$4,000 April 9, 1991 prepaid funeral contract be certified irrevocable. [REDACTED], acting on behalf of the funeral home certified that the funeral contract was a guaranteed price contract. (Exhibit B, pp. 60-62)
12. With the September 2019 DHS-8A, Petitioner's representatives included a newly created Prepaid Funeral Agreement, signed by Petitioner's Personal Representative [REDACTED] and [REDACTED] on [REDACTED], 2019, after Petitioner's death. The new agreement is identified at the top of the document to be a Guaranteed Price Agreement. (Exhibit B, pp. 60-62)
13. On or around [REDACTED], 2019, an LTC Application for Health Care Coverage Patient of Nursing Facility (DHS-4574) ([REDACTED] 2019 Application) was submitted to the Department on Petitioner's behalf, also requesting retroactive MA coverage for the months of June 2019, July 2019, and August 2019. (Exhibit B, pp. 19-22)
14. The Department did not certify the September 2019 DHS-8A and the newly submitted Prepaid Funeral Contract as irrevocable because it concluded that they were created after the client's death and per BAM 805, the beneficiary must be alive. (Exhibit B, at p. 60)
15. The Department counted the \$4,000 value of the prepaid funeral contract as an asset.
16. On November 14, 2019 the Department sent Petitioner of a Health Care Coverage Determination Notice (Notice) advising him that his [REDACTED], 2019 application was denied, and he was ineligible for MA on the basis that the value of his countable assets was higher than allowed. (Exhibit B, pp 35-37)

17. On December 2, 2019, Petitioner, through his attorney, filed a hearing request disputing the Department's denial of the two MA applications. (Exhibit B, pp. 1-2)

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 the September 10, 2019 and November 14, 2019 Notices, the Department concluded that Petitioner was ineligible for MA from May 1, 2019, ongoing, because the value of his countable assets exceeded the limit for MA eligibility. As a result, the Department denied Petitioner's [REDACTED], 2019 and [REDACTED], 2019 MA Applications. At issue in this case is Petitioner's prepaid funeral contract and the Department's finding that it was a countable asset, rather than an excluded irrevocable guaranteed price funeral contract. There did not appear to be a dispute that Petitioner would have otherwise been asset eligible for MA but for the \$4,000 value of the prepaid funeral contract.

Asset eligibility is required for MA coverage under SSI-related MA categories, which are categories providing MA coverage to individuals who are aged, blind or disabled. BEM 400 (July 2019), p. 1, 6; BEM 105 (April 2017), p.1. Asset eligibility will exist when the asset group's countable assets are less than, or equal to, the applicable asset limit at least one day during the month being tested. BEM 400, p.6. The asset limit for Petitioner's MA asset group size of one is \$2,000. BEM 400, pp.7-8; BEM 211 (July 2019), pp. 1-8. Funeral plans refer to the prearrangement for cemetery and/or funeral goods and services. Funeral plans, including burial funds, purchasing of burial spaces, and prepaid funeral contracts are assets, some of which are countable and others, excluded. BEM 400, pp. 49-56.

A prepaid funeral contract requires payment in advance for funeral goods or services and contracts may be revocable or irrevocable. Funds in a revocable prepaid funeral contract might be excludable if clearly designated in accordance with the burial fund or burial space exclusions outlined in BEM 400. Funds in irrevocable prepaid funeral contracts are unavailable to the client and thus, are not countable for MA asset eligibility. Funds in a Michigan prepaid funeral contract that is certified irrevocable under

a DHS-8A, Irrevocable Funeral Contract Certification are also excluded. BEM 400, pp. 55-56. A statement of funeral home or contract seller, or a copy of the contract can be used to verify a prepaid funeral contract. BEM 400, p. 65.

Department policy, relying on applicable sections of the Prepaid Funeral and Cemetery Sales Act (MCL 328.111 *et seq*) provides the following relevant general provisions:

- The contract seller is the person/establishment providing the prepaid funeral contract. The seller may be the funeral provider.
- The funeral provider is the person/establishment shown in the prepaid funeral contract as agreeing to furnish specified funeral goods and/or services. The provider need not be a party to the contract.
- The purchaser, beneficiary, funeral provider and/or contract seller decide what funeral goods and services are contracted for.
- Only a **guaranteed price contract** may be certified **irrevocable**.
- Only the Michigan Department of Health and Human Services (MDHHS) may certify a funeral contract irrevocable by completing a DHS 8-A, Irrevocable Funeral Contract Certification.
- Interest or dividends earned on an irrevocable contract fund are considered part of that fund and may not be given to the purchaser/beneficiary.

BAM 805 (July 2019), pp. 1-2. Additionally, Department policy outlines the different types of Michigan funeral contracts. A **guaranteed price contract** fixes the price to be charged for funeral goods and services listed in the contract. A **non-guaranteed price contract** states clearly that the price of listed goods and services might fluctuate and actual costs at delivery might be more or less than the amount in the contract fund. A **revocable contract** can be terminated by the purchaser and the money refunded. The refund might be less than the contract's total value. A contract is revocable **unless** certified irrevocable by the Department using the DHS-8A. For program eligibility purposes, an **irrevocable contract** means that money in the contract fund, including interest or dividends, is permanently unavailable to the purchaser/beneficiary; see *conditions to certify contracts a revocable in this item*. BAM 805, p.2.

There are various conditions outlined in BAM 805, all of which must be met in order for the Department to certify a prepaid funeral contract as irrevocable. Among other required conditions, (1) the contract purchaser must request via the DHS-8A that the contract be certified irrevocable, and (2) the contract purchaser is the beneficiary, **and** is alive, **and** is an MA applicant or recipient. BAM 805, pp. 3-5.

██████████, 2019 MA Application

At the hearing, the Department's witness testified that in connection with the ██████████ 2019 Application, Petitioner's representative submitted a DHS-8A, requesting that the Department certify the April 9, 1991 Prepaid Funeral and Escrow Agreement as an irrevocable funeral contract. The Department witness testified that upon review of the DHS-8A and the original funeral contract provided, specifically, the language in the April 1991 agreement, the terms, and the stamp at the top of the contract indicating that the agreement was non-guaranteed, it determined that Petitioner's prepaid funeral contract was a non-guaranteed price agreement and thus, could not be certified as irrevocable. The Department asserted that Petitioner's prepaid funeral contract was thus determined to be revocable, and because there was no other clear designation of burial funds or burial space that would otherwise make its value an excluded asset, the \$4,000 value of the contract was countable for MA asset purposes. As a result, the ██████████ 2019 MA Application seeking retroactive coverage to May 2019 was denied because the value of Petitioner's assets exceeded the \$2,000 limit.

Petitioner's attorney acknowledged that the original April 9, 1991 Prepaid Funeral and Escrow Agreement was initially entered into as a non-guaranteed price funeral contract. However, Petitioner's attorney argued that through signing and certifying the DHS-8A on August 3, 2019, Petitioner's representative and the funeral home director, ██████████, who in 2018 acquired the funeral home identified in the April 1991 contract and thus became the assignee of the contract, agreed to treat the original contract as a guaranteed price agreement. Petitioner's attorney asserted that using the DHS-8A, the parties stipulated their common intention to treat the original contract as a guaranteed price agreement. He argued that the DHS-8A was considered an agreement between Petitioner's representative and the funeral home, whereby the parties stipulated that the original non-guaranteed price agreement was now a guaranteed price agreement. ██████████ provided credible testimony consistent with Petitioner's attorney's argument and stated that when he signed the DHS-8A, his intention was to treat the original prepaid funeral contract as a guaranteed price agreement. ██████████ testified that non-guaranteed price agreements are rarely, if ever used in current prepaid funeral contracts and that at his funeral home, all prepaid funeral contracts are guaranteed price agreements.

Conversely, the AAG asserted that there is no language in the DHS-8A to indicate that the parties were intending to modify their existing April 1991 contract. He further argued that the Department is not required to consider the intent behind the parties signing the DHS-8A because there was a clear and unambiguous non-guaranteed written prepaid funeral contract. The Department argued that ██████████ assumed a non-guaranteed

price agreement when he acquired the funeral home, and since there was no written amendment or modification to the original written agreement subsequent to April 1991, the intention of Petitioner's representative and [REDACTED] in August 2019 in signing and certifying the prepaid funeral contract as guaranteed on the DHS-8A was insufficient and irrelevant. The Department argued that even if [REDACTED] and the current funeral home intended for the contract to be guaranteed, it could not be interpreted as such because the parties clearly executed a non-guaranteed price agreement in April 1991, and no evidence of its amendment or modification was presented.

The Department's argument however, fails to consider that "[w]hile the freedom to contract principle is served by requiring courts to enforce unambiguous contracts according to their terms, the freedom to contract also permits parties to enter into new contracts or modify their existing agreements." *Quality Products and Concepts Company v Nagel Precision, Inc*, 469 Mich 362, 370-371, 666 NW2d 251 (2003).

It was unclear whether the April 1991 Prepaid Funeral and Escrow Agreement contained an express provision detailing a written requirement to amend, modify, or waive the contract terms, as only the front page of the document was admitted into evidence and Terms and Conditions were identified on the back page of the document which was not presented for review. (Exhibit B, p. 54). However, even if the original contract had such a provision, the Court has held that parties to a contract "are free to mutually waive or modify their contract notwithstanding a written modification or anti-waiver clause. . ." *Id.* at 364-365. Additionally, the Court has found that "[a] departure from stipulated performance can be predicated upon acts as well as upon an express agreement to that effect." *Turner v Williams*, 311 Mich 563, 566 (1945) (quoting *Jacob v Cummings*, 213 Mich 373, 378-379 (1921)). Thus, just as parties have the freedom to enter into contracts, the conduct and intent of the parties in performing their duties under such contracts can be sufficient evidence of a contract's amendment or modification, provided that there is mutuality. *Quality Products*, 469 Mich 362, at 364-365.

In this case, while the original contract was clearly intended to be non-guaranteed, in performing their duties under the agreement, the parties mutually assented to waive enforcement of and/or modify those previous terms by certifying in writing on the DHS-8A that the April 1991 prepaid funeral contract in the amount of \$4,000 was to be treated as a fully paid guaranteed price contract and certified as irrevocable. Furthermore, the evidence showed that upon Petitioner's death and the handling of the funeral, the parties did in fact treat the prepaid funeral contract as a guaranteed fixed price agreement. A Statement of Goods and Services-Funeral Purchase Contract dated August 7, 2019 and presented for review showed that the full price of the funeral was \$8,917.51. However, because the amount of funds in Petitioner's prepaid funeral fund account was \$8,810.99, the funeral home discounted the price of the funeral by \$106.52 to equal the balance in the prepaid funeral fund. Had the contract been treated as non-

guaranteed, [REDACTED] testified that the funeral home would have sought the additional funds from Petitioner's estate to cover the remaining costs of the funeral.

Therefore, the parties to the prepaid funeral contract both in writing through the DHS-8A and later through their course of conduct/performance, knowingly and mutually agreed to treat the contract as a guaranteed price agreement, rather than a non-guaranteed price agreement as originally planned. At the hearing, the Department failed to offer any legal support for its argument that the parties were not authorized to mutually amend or modify their existing prepaid funeral contract using the DHS-8A. It is noted that the Department did not choose to disapprove the certification of the prepaid funeral contract as irrevocable due to Petitioner's death and at the time the documents were signed/certified, Petitioner was living. There was also no legal support for its position that the Department was not required to consider the mutual intent or conduct of the parties prior to disapproving the prepaid funeral contract and not certifying it as irrevocable. Additionally, as Petitioner's attorney argued, the Department failed to provide Petitioner the opportunity to better explain or resolve the discrepancy in the original contract and the attestations made by the funeral home in the DHS-8A, as both are acceptable verification sources, prior to denying the Application as required by BAM 130 (April 2017), pp. 3-9.

Therefore, upon thorough review, the Department failed to establish that it acted in accordance with Department policy when it determined that the April 1991 prepaid funeral contract was a non-guaranteed price agreement and thus, could not be certified as irrevocable. The evidence presented showed that the prepaid funeral contract should have been certified by the Department as irrevocable, and thus its value excluded for MA asset purposes. As such, the Department failed to establish that Petitioner was ineligible for MA from May 2019, ongoing, on the basis that the value of his countable assets was higher than allowed.

[REDACTED], 2019 MA Application

The evidence established that on September 25, 2019, after Petitioner's death and upon learning that the Department disapproved the original funeral contract as non-guaranteed and revocable, [REDACTED], Petitioner's Personal Representative, and [REDACTED] acting on behalf of the funeral home, executed a guaranteed price Prepaid Funeral Agreement. Petitioner's attorney asserted this was not a new contract but rather, meant to serve as an amendment or a novation that relates back to the original agreement date of April 9, 1991. (Exhibit B, p. 55, 60-65). A new DHS-8A signed by the parties was filed with the Department on September 27, 2019, requesting that Petitioner's April 9, 1991 prepaid funeral contract be certified irrevocable, based on the newly filed agreement, reflecting the guaranteed price contract. (Exhibit B, pp. 60-62). [REDACTED] testified that the parties rewrote the price contract on paper as a guaranteed price agreement, reflecting their intention to treat the original contract as guaranteed and as attested to in the DHS-8A.

An application for MA benefits was subsequently filed by Petitioner's representative on [REDACTED], 2019. The Department's witness testified that upon review of the new documentation submitted in connection with the [REDACTED] 2019 MA Application, specifically the DHS-8A and the September 25, 2019 Prepaid Funeral Agreement (Guaranteed Price Agreement), it determined that it could not certify the prepaid contract as irrevocable because the contract purchaser/beneficiary was deceased at the time the guaranteed price agreement was made and at the time the DHS-8A was submitted by the parties, and per BAM 805, a condition of irrevocability is that the beneficiary be alive. Therefore, like the [REDACTED] 2019 MA Application, the Department determined that the value of the prepaid funeral contract was countable for MA asset purposes, and as a result, the [REDACTED] 2019 MA Application seeking retroactive coverage to June 2019 was denied because the value of Petitioner's assets exceeded the \$2,000 limit.

A review of the September 2019 DHS-8A signed by the Petitioner's representative and the funeral director, as well as the amended guaranteed price agreement executed between them shows that these documents were created after Petitioner's [REDACTED], 2019 death. Petitioner's funeral had already been completed and his estate had already paid the funeral home \$8,810.99 through a cashier's check to cover the costs of the funeral. Although the funeral home may have only taken payment in an amount equivalent to what would have been the price for a guaranteed funeral contract, at the time of the September 2019 DHS-8A and new agreement, each party had already fully performed its obligations under the prior version of the contract. Petitioner's attorney did not provide any legal support for his position that a contract can be amended after its terms had already been fully performed by each party and their duties discharged.

Therefore, it was unclear how Petitioner's representative and the funeral director could enter into a new agreement in September 2019 amending the original funeral contract to a guaranteed if the contract terms had already been fully performed and Petitioner deceased. As such, because Petitioner, as the contract beneficiary, was already deceased at the time of the DHS-8A and at the time of the parties signed the September 2019 guaranteed price agreement, and because the terms of the prepaid funeral contract had already been fully performed by the parties, the Department followed policy when it did not certify the new funeral contract as irrevocable.

Although the Department properly determined that the new agreement and prepaid funeral contract could not be irrevocable, the issue with respect to the denial of the [REDACTED], 2019 MA Application is moot, as the Department will be required to reprocess Petitioner's [REDACTED], 2019 based on the above discussion.

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 did not act in accordance with Department policy when it denied Petitioner's [REDACTED], 2019 MA Application and determined that he was ineligible for MA on the basis that the value of his countable assets was higher than allowed.

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. Register and reprocess Petitioner's [REDACTED], 2019 MA application to determine his MA eligibility under the most beneficial program from the retroactive period of May 1, 2019, ongoing;
2. Provide Petitioner with MA coverage under the most beneficial category, if eligible, from May 1, 2019, ongoing, in accordance with Department policy; and
3. Notify Petitioner and his AHR in writing of its decision.

ZB/tm



Zainab A. Baydoun

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
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cc: ME—D. Smith; EQADHShearings
AP Specialist (1)