



STATE OF MICHIGAN

GRETCHEN WHITMER  
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS

ORLENE HAWKS  
DIRECTOR

[REDACTED]

Date Mailed: May 21, 2019  
MOAHR Docket No.: 19-002454  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**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, a telephone hearing was held on April 25, 2019, from Detroit, Michigan. The Petitioner was represented by Kay Kossen, Esq. [REDACTED] also appeared on behalf of Petitioner. The Department of Health and Human Services (Department) was represented by Kyle Bruckner, Assistant Attorney General, and Geraldine Brown, Assistant Attorney General. Emily Sziede; Hearing Facilitator, Terri Reed; Eligibility Specialist, and Angie John Battiste; Assistant Payments Supervisor, also appeared on behalf of the Department.

**ISSUE**

Did the Department properly determine that Petitioner was eligible for Medical Assistance (MA) program benefits subject to a divestment penalty period from September 1, 2018 through December 11, 2018?

**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 6, 2009, Petitioner executed a durable power of attorney which named [REDACTED] her Attorney-in-Fact.
2. On [REDACTED], 2018, the Department received a long-term care (LTC) MA application on behalf of Petitioner; a copy of Petitioner's home sale closing documents; a copy of a Future Advance Promissory Note; a copy of a Future

Advance Mortgage; and a written list of [REDACTED] Expenses paid toward Petitioner.

3. On October 3, 2018, the Department sent a verification checklist (VCL) with an attached letter listing the required proofs to be returned to the Department.
4. The proofs were not received following the granting of two extensions.
5. On December 4, 2018, the Department sent Petitioner a Health Care Coverage Determination Notice which notified Petitioner that she had been approved for MA benefits subject to a divestment penalty period to begin on September 1, 2018 and end on December 11, 2018.
6. On March 4, 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.

Department policy provides that all personal care contract/agreements, regardless of whether between a client and a relative or a client and a non-relative, must be considered and evaluated for divestment. BEM 405, p. 8. A Personal Care Contract is a contract/agreement that provides for health care monitoring, medical treatment, securing hospitalization, visitation, entertainment, travel and/or transportation, financial management, shopping, home help or other assistance with activities of daily living. BEM 405, p. 7. Home Care and Personal Care contracts/agreements may be between relatives or non-relatives. A relative is anyone related to the client by blood, marriage or adoption. BEM 405, p. 7.

When relatives provide assistance or services, they are presumed to do so for love and affection and compensation for past assistance or services shall create a rebuttable presumption of a transfer for less than fair market value. Fair market value of the services may be determined by consultation with area businesses which provide such services. BEM 405, pp.7-8.

Personal Care contracts/agreements are considered a transfer for less than fair market value unless the agreement meets all of the following criteria: (i) the services are performed after a written and legal contract/agreement has been executed between the client (or legally authorized representative) and provider with signatures notarized; (ii) at the time the services are received, the client is not residing in a nursing facility or inpatient hospital; (iii) at the time services are received, the services were recommended in writing and signed by the client's physician as necessary to prevent the transfer of the client to a residential care or nursing facility; and (iv) the type, frequency and duration of such services being provided to the client and the amount of consideration (money or property) being received by the provider is identified so that it can be determined whether the amount for services was for fair market value. BEM 405, p. 8.

At the hearing, the Department testified that based on information received, Petitioner gave [REDACTED] \$28,567.56 for reimbursement expenses. The Department testified that because the reimbursement was for personal care services which were not the subject of a written, notarized contract, the transfer was considered divestment.

Petitioner's counsel submitted a durable power of attorney which listed Mrs. [REDACTED] as Petitioner's Attorney in Fact. Petitioner's counsel argued that paragraphs 5 & 6 of the power of attorney satisfied the requirements of the personal care agreement. The relevant portions of the power of attorney state as follows:

5. Compensation and Reimbursement of Attorney-In-Fact

My attorney-in-fact shall not be compensated for services, but shall be entitled to reimbursement, from my assets, for reasonable expenses. Reasonable expenses include but are not limited to reasonable fees for information or advice from accountants, lawyers or investment experts relating to my attorney-in-fact's responsibilities under this power of attorney.

6. Personal Benefit to Attorney-in-Fact

my attorney-in-fact may buy any assets of mine or engage in any transaction he or she deems in good faith to be in my interest, no matter what the interest or benefit to my attorney-in-fact. However, if a successor attorney-in-fact is serving under this document, he or she may not benefit personally from any transaction engaged in on my behalf.

The issue turns on whether "reimbursement, from my assets, for reasonable expenses" is sufficient to satisfy the personal care agreement contract requirement. It is found that this language does not satisfy the requirements. The reimbursement described in paragraph five appears to be specific to carrying out the responsibility contained in the document. The examples listed to not include personal care services. Both the examples and the enumerated paragraphs in the document are relating to legal matters.

Further, under the requirements of a personal care agreement, there must be a written and signed document from client's physician stating that the care is necessary to prevent the transfer of the client to a residential care or nursing facility. Further, the agreement must outline the type, frequency and duration of such services being provided to the client and the amount of consideration. In this case, the power of attorney was executed one year prior to the start of the services and eight years before the ending of the services. There was no written and signed statement provided by Petitioner's physician and the agreement did not outline the amount of consideration, the duration of the services, or the type and frequency of the services. As such, it is found that the power of attorney does not meet the personal care contract requirements. Therefore, the Department properly considered money given to Mr. and Mrs. [REDACTED] as a transfer. It should be noted that at the hearing, Mrs. [REDACTED] testified that at the time she performed and/or paid for the services, she did not expect to be reimbursed. Accordingly, there would not have been an adequate personal care agreement executed prior to the services being provided.

On October 3, 2017, Mrs. [REDACTED] signed a Future Advance Promissory Note on behalf of Petitioner. The note transferred \$27,029.98 to Ms. [REDACTED] and her husband. The document allowed for the repayment of any ineptness owing from Petitioner to Mrs. [REDACTED] and her husband. The Future Advance Promissory Note also fails to meet the requirements of the personal care contract agreement for the same reasons that the durable power of attorney fails to meet the requirements.

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 considered the transfer of \$28,567.56 a transfer and assessed a divestment penalty period from September 1, 2018 through December 11, 2018.

### **DECISION AND ORDER**

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



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**Jacquelyn A. McClinton**  
Administrative Law Judge  
for Robert Gordon, Director  
Department of Health and Human Services

JAM/tlf

**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

**Via Email:**

MDHHS-Kalamazoo-Hearings  
BSC3 Hearing Decisions  
AG-HEFS-MAHS Brown/Bruckner  
EQAD  
D. Smith  
MOAHR

**Counsel for Petitioner – Via USPS**

[REDACTED]

**Petitioner – Via USPS**

[REDACTED]