



GRETCHEN WHITMER  
GOVERNOR

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

ORLENE HAWKS  
DIRECTOR

[REDACTED]

Date Mailed: [REDACTED]  
MOAHR Docket No.: 21-005770  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Carmen G. Fahie**

### **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 May 18, 2022, from Lansing, Michigan. The Petitioner, who is deceased, was represented by her Attorney Susan Chalgian, P# 79950, and her husband, [REDACTED]. The Petitioner's daughter, [REDACTED] and caregiver, [REDACTED] also testified on her behalf. The Department of Health and Human Services (Department) was represented by Assistant Attorney General (AAG) LeAnn Scott, P# 84053 and AAG Stephanie Service, P# 73305. Katie Eshtruth, Eligibility Specialist, testified on behalf of the Respondent.

### **ISSUE**

Did the Department properly determine the divestment penalty for the Petitioner's long term care Medicaid (MA) case?

### **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 26, 2021, the Petitioner's treating physician submitted a written and signed letter recommending services necessary since June 2019, to prevent the transfer of the Petitioner to a residential care or nursing facility. Department Exhibit 1, pg. 46.
2. On [REDACTED] 2021, the Petitioner applied for MA and subsequently provided additional required verifications. Department Exhibit 1, pgs. 4-11 and 19-38.

3. On September 27, 2021, the Petitioner's husband and her daughter signed a written Personal Services Agreement for the Petitioner's care that had started on June 1, 2019, but the first payment occurred in May 2019. Department Exhibit 1, pgs. 12-38.
4. According to the records, there was a verbal agreement between the Petitioner's family and [REDACTED] to provide personal services to the Petitioner from June 2019 at \$15 per hour to \$20 an hour around April 2020. Department Exhibit 1, pgs. 19-38.
5. On November 4, 2021, the Department determined the Petitioner's eligibility for MA by reviewing the financial records for the look back period of 60 months and established that there was a \$54,427.39 divestment resulting in a penalty period of 5 months and 20 days. Department Exhibit 1, pgs. 35-40, and 45.
6. On November 4, 2021, the Department sent the Petitioner a Health Care Coverage Determination Notice, DHS 1606, that the Petitioner was denied MA from September 1, 2021, through February 20, 2022, due to a divestment penalty. Department Exhibit 1, pgs. 41-46.
7. On April 19, 2021, the Department received a hearing request from the Petitioner, contesting the Department's negative action.

### **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.

#### **BEM 405, MA DIVESTMENT**

#### **DEPARTMENT POLICY**

#### **Medicaid (MA) ONLY**

Divestment results in a penalty period in MA, not ineligibility. Divestment policy does not apply to Qualified Disabled Working Individuals (QDWI); see Bridges Eligibility Manual (BEM) 169.

Divestment is a type of transfer of a resource and not an amount of resources transferred.

Divestment means the transfer of a resource (see resource defined in this item and in glossary) by a client or his spouse that are all 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 under transfers that are not divestment in this item.

### **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.

Relatives can be paid for providing services; however, assume services were provided for free when no payment was made at the time services were provided. A client can rebut this presumption by providing tangible evidence that a payment obligation existed at the time the service was provided (for example a written agreement signed at the time services were first provided). The policy in Bridges Administrative Manual (BAM) 130 allowing use of best available information or best judgment as verification does not apply.

### **Personal Care & Home Care Contracts**

**Personal Care Contract** means a contract/agreement that provides health care monitoring, medical treatment, securing hospitalization, visitation, entertainment, travel/transportation, financial management, shopping, home help or other assistance with activities of daily living.

**Home Care Contract** means a contract/agreement which pays for expenses such as home/cottage/care repairs, property maintenance, property taxes, homeowner's insurance, heat and utilities for the homestead or other real property of the client.

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.

**Note:** 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. Contracts/agreements that include the provision of companionship are prohibited.

All Personal Care and Home Care contracts/agreements, regardless of whether between a client and a relative or a client and a non-relative, must be considered and evaluated for divestment. Personal Care and Home Care contracts/agreements shall be considered a transfer for less than fair market value unless the agreement meets all of the following:

- The services must be performed after a written legal contract/agreement has been executed between the client and the provider. The contract/agreement must be dated, and the signatures must be notarized. The services are not paid for until the services have been provided (there can be no prospective payment for future expenses or services); **and**
- At the time the services are received, the client cannot be residing in a nursing facility, adult foster care home (licensed or unlicensed), institution for mental diseases, inpatient hospital, intermediate care facility for individuals with intellectual disabilities or be eligible for home and community-based waiver, home health or home help; and
- At the time services are received, the services must have been 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. Such services cannot include the provision of companionship; and
- The contract/agreement must be signed by the client or legally authorized representative, such as an agent under a power of attorney, guardian, or conservator. If the agreement is signed by a representative, that representative cannot be the provider or beneficiary of the contract/agreement.
- MDHHS will verify the contract/agreement by reviewing the written instrument between the client and the provider which must show 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, or in accordance with a service plan approved by MDHHS.

Assets transferred in exchange for a contract/agreement for personal services/assistance or expenses of real property/homestead provided by another person after the date of application are considered available and countable assets.

In this case, the Petitioner applied for MA on [REDACTED] 2021. The look back period for MA eligibility is 60 months from the date of application. The Department determined there was divestment due to personal care services provided to the Petitioner since June 2019 without a physician statement that such care was needed or a written Personal Services Contract before the services were provided as required by Department policy. The divestment penalty was determined to be \$54,427.39, which made the Petitioner ineligible for MA coverage from September 1, 2021, through February 20, 2022.

The Petitioner's Attorney had a persuasive argument that the Petitioner was not trying to qualify for MA but was trying to avoid a residential placement. She stated that the services provided for personal care services were provided at or below fair market value. Petitioner's Attorney did concede that the contested transfers were within the 60 months look back period.

The Assistant Attorney General countered credibly with the contract for the Petitioner's daughter was signed after services were provided. The contract also contained an impermissible companionship clause based on Department policy. There was no separation in the payment of the services provided to the Petitioner and her husband. There was no written contract for [REDACTED]. [REDACTED] also provided services for the Petitioner's husband, which was not differentiated in the payments made. In addition, there was no physician recommendation for personal care services until after the services were provided.

Department policy in BEM 405 requires a written person care contract before services are provided or they are deemed to provided for free by relatives or divestment if services provided was paid for. The contract with the Petitioner's husband and his daughter was signed September 27, 2021, which was after services were provided starting in May 2019. There was no written contract with [REDACTED] as required by Department policy in BEM 405. In addition, the Petitioner has to be in the home and not in a rehab facility or nursing home in order for payment of personal care services. Lastly, a treating physician has to write a letter stating that personal care services were recommended or required to keep the Petitioner in the home and out of residential care or nursing facility before services were provided. The Petitioner's treating physician did not sign a letter recommending personal care services until August 26, 2021, but personal care services were provided from May 2019.

This Administrative Law Judge finds that the Department properly determined MA eligibility and the resulting divestment penalty. Department policy as stated in BEM 405 requires personal care services contracts to be in writing with no companionship clause before services are provided. In addition, a letter from the treating physician is required to verify that these personal care services are needed before services are provided. The contested services and payments were provided to the Petitioner starting in May 2019 and were appropriately counted as divestment by the Department.

**DECISION AND ORDER**

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 determined there was a \$54,427.39 divestment with a penalty period of 5 months and 20 days.

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

CF/cc



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**Carmen G. Fahie**  
Administrative Law Judge

**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-Electronic Mail :**

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**Interested Parties**  
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**Counsel for Petitioner**



**Via-First Class Mail :**

**Petitioner**

