



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: December 15, 2022  
MOAHR Docket No.: 22-004523  
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, a telephone hearing was held on November 16, 2022, from Lansing, Michigan. The Petitioner was represented by her attorney ██████████ ██████████ ██████████ and ██████████ ██████████ testified on behalf of the Petitioner. The Department of Health and Human Services (Department) was represented by Assistant Attorney General Erin Harrington. Melissa Loper appeared and testified for the Department. Department Exhibit 1, pp. 1-59 was received and admitted.

**ISSUE**

Did the Department properly determine that Petitioner divested assets and impose divest 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. Petitioner was admitted to ██████████ ██████████ ██████████ on December 11, 2018, and discharged on June 20, 2022.
2. On June 20, 2022, Petitioner was admitted to ██████████ ██████████ ██████████ ██████████ ██████████
3. On ██████████ ██████████ Petitioner applied for Medicaid- Long Term Care (MA-LTC).
4. With the application, Petitioner presented a Home Care Contract that paid Petitioner’s daughter ██████████ ██████████ \$█████████ per month for services listed in the agreement. The Home Care Contract was entered into on November 17, 2019. (Ex. 1, pp. 22-23)

5. Petitioner submitted a letter from her physician Dr. [REDACTED] [REDACTED] dated August 8, 2022, which states that “Mrs. [REDACTED] [REDACTED] is a resident at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] and I am the resident physician for the facility. Based on my observations of [REDACTED] current mental and physical condition and review of the records from her previous long-term care facility where she resided since 2019, I recommend that she have someone to handle her needs not provided by the care facility.” (Ex. 1, p. 59)
6. On September 6, 2022, a Health Care Coverage Determination Notice was sent to Petitioner informing her that she approved for MA-LTC but due to divesting \$[REDACTED] she would have to serve a 3 month and 17-day divestment penalty period. (Ex.1, pp. 51-54)
7. On [REDACTED] [REDACTED] [REDACTED] Petitioner requested hearing disputing the finding of divestment and imposition of divestment penalty period. (Ex.1, p.3)

### **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**

### **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.

**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 waiver services.
- Home help.
- Home health.

MA will pay for other MA-covered services. BEM 405

## **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 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. BEM 405

In this case, the Home Care Contract entered into by Petitioner and her daughter [REDACTED] on November 17, 2019, does not meet the criteria in BEM 405 for a Home Care Contract or a Personal Care Contract. The contract was not notarized which is specifically required. In addition, a physician statement asserting that the services provided are necessary to prevent the person from entering a nursing home is required. No such statement was made at the time the contract was entered into and in fact Petitioner was already in a care facility in November 2019. It is also required that the person receiving the services in the home care contract not already be residing in a nursing home and in fact Petitioner was residing in a care facility in November 2019. For these reasons, the Department correctly determined that the Home Care Contract entered into between Petitioner and her daughter [REDACTED] on November 17, 2019, did not meet the criteria in BEM 405 for Home Care Contracts and therefore the payments made to [REDACTED] were divestment totaling \$ [REDACTED]


Petitioner's attorney argued that the payments made to [REDACTED] were for services rendered and were made voluntarily and therefore should not be considered a gift and divestment. However, there is a specific statement in policy that "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." BEM 405. Petitioner provided insufficient evidence to overcome that presumption.

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 that divestment occurred in the amount of \$ [REDACTED] and imposed divestment penalty period of 3 months and 17 days.

**DECISION AND ORDER**

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

AM/nr

  
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Aaron McClintic  
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 :**

**Counsel for Respondent**

Erin E. Harrington  
Michigan Department of Attorney  
General, Health, Education & Family  
Services Division  
P.O. Box 30758  
Lansing, MI 48909  
**AG-HEFS-MAHS@michigan.gov**

**Interested Parties**

VanBuren County DHHS  
BSC3  
D. Smith  
EQAD  
AG  
MOAHR

**DHHS**

Jeannene Gatties  
Van Buren County DHS  
57150 Cty. Rd. 681  
Hartford, MI 49051  
**MDHHS-VanBuren-  
Hearings@michigan.gov**

**Via-First Class Mail :**

**Counsel for Petitioner**

██████████  
██████████  
██████████, MI ██████████

**Petitioner**

██████████  
██████████  
██████████, MI ██████████