



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
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Director

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

F.P., :
PETITIONER, : ADMINISTRATIVE ACTION
V. : FINAL AGENCY DECISION
DIVISION OF MEDICAL ASSISTANCE : OAL DKT. NO. HMA 17211-2014
AND HEALTH SERVICES & :
ATLANTIC COUNTY BOARD OF :
SOCIAL SERVICES, :
RESPONDENTS. :

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the OAL case file and the documents filed below. Respondent filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision is July 30, 2015, in accordance with an Order of Extension.

Based on a Medicaid application filed in May 2014, Petitioner was found eligible as of July 1, 2014 but subject to a penalty due to transfers in the amount of \$41,775.97. The transfers began on October 2009 and ended in January 2012. The transfers, in the form of checks signed by Petitioner's daughter and Power of Attorney, began when Petitioner was 92 years old.

Medicaid law contains a presumption that any transfer for less than fair market value during the look-back period was made for the purpose of establishing Medicaid eligibility. See E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340 (App. Div. 2010); N.J.A.C. 10:71-4.10(i). In enacting the Deficit Reduction Act of 2005 (DRA) (109 P.L. 171), § 6012, Congress sought to close loopholes that allowed Medicaid eligibility for those who had sufficient assets to pay for their own medical care. See N.M., supra, 405 N.J. Super. at 362-63 (explaining the Congressional intent behind the enactment of the DRA); see also Congressional Record: November 2, 2005 (House), 109<sup>th</sup> Congress (Representative Eric Cantor stating the DRA will allow us "to root out the asset transfer fraud that is going on ... which essentially allows those who could otherwise afford to pay for their health care services to become wards of the State"); Opening Statement of Senator Grassley, Chairman, Senate Finance Committee, Budget Hearing with Secretary Michael Leavitt, February 9, 2005 (stating "the DRA will ensure that ... elder law attorneys no longer exploit loopholes to get people with means onto Medicaid.")

Congress, seeking to penalize and limit the legal maneuvering to gain nursing home benefits under Medicaid, mandated in the DRA that the transfer penalty period start later and that the look-back period be extended. 42 U.S.C.A. § 1396p(c). The statute clearly states that "if an institutionalized individual or the spouse of such an

individual ... disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i)." 42 U.S.C. 1396p(c)(1)(A).

The applicant, "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide that, "if the applicant had some other purpose for transferring the asset, but establishing Medicaid eligibility appears to have been a factor in his or her decision to transfer, the presumption shall not be considered successfully rebutted." N.J.A.C. 10:71-4.10(i)2.

The Initial Decision turned the presumption and the burden of rebuttal around and sought to have Atlantic County Board of Social Services prove that Petitioner transferred the funds to qualify for Medicaid. That is not the standard and cannot be the basis to overturn the penalty. It is Petitioner's burden which she failed to meet.

Instead the Initial Decision questions "who goes to a wedding without bringing a gift?" ID at 8. Putting aside the fact that Petitioner did not attended either of her granddaughter's weddings despite paying a huge portion of the expenses and gifting \$1,000 to each, the Initial Decision then hangs on the testimony of a witness from Atlantic County as proof of the propriety and etiquette to grant such largess. To that end, the Initial Decision finds "[i]f the agency's witness can contribute to her daughter's wedding, and if she can tender wedding and housewarming gifts, then so can petitioner." ID at 8. There is no basis to equate the Medicaid agency's witness's

conduct, who has not applied for Medicaid benefits and whose motivations are not at issue, with Petitioner's conduct.

In this case Petitioner gave away nearly 60% of her assets in less than two years. Her checking account balance, which was \$63,036 in September 2009, had plummeted to \$26,648 to June 2011 as she gave gifts to her children and grandchildren. P-1 at Exhibit C and D. The ALJ's concern of age discrimination is confounding since the federal law mandates that the transfer penalty provision apply to institutionalized individuals who by definition must need nursing home care. While younger individuals are also affected, the vast majority of individuals needing nursing home care are what the ALJ would consider "senior citizens." Indeed, governing bodies have enacted laws premised that the human condition of aging causes individuals to contemplate final illnesses and death. The New Jersey courts, in discussing the tax implications of inter vivos transfers, noted "it is human nature that people do not generally divest themselves of a major portion of their estates except as a substitute for testamentary disposition and in contemplation of death." Schweiner v. Martin, 117 N.J. Eq. 67, 82 (1934), *aff'd*, 13 N.J. Misc. 772 (Sup. Ct. 1935). Similarly, when determining a decedent's taxable estate, the courts have consistently ruled that transfers made within three years of death by persons over the age of eighty are made in contemplation of death. See Meyerson v. Director, Div. of Taxation, 15 N.J. Tax 128, (Tax 1995) (trusts created within two weeks of decedent's ninety-first birthday held to be made in contemplation of death); Swain v. Neeld, 28 N.J. 60 at 71 (1958). (stock transfers made by an eighty-seven year old woman held to be made in contemplation of death); Cairns v. Martin, 130 N.J. Eq. 313 (1941) (cash transfers made by an eighty-three year old man were held to be made in contemplation of death).

The Appellate Division of the Superior Court of New Jersey has upheld numerous Medicaid penalty cases that were either gifts or transfers for no fair market value. See V.S. vs. DMAHS and Gloucester County Board of Social Services, 2010 N.J. Super. Unpub. Lexis 868 (April 22, 2010); S.L. v. DMAHS and Essex County Board of Social Services, 2014 N.J. Super. Unpub. Lexis 2152 (September 2, 2014) and E.A. vs. DMAHS and Hunterdon County Board of Social Services, A-2669-13, Decided July 20, 2015. In upholding the transfer penalty the Court recognized that the desire of a parent to leave or give something to a child cannot "be subsidized by public funds." V.S. vs. DMAHS and Gloucester County Board of Social Services, 2010 N.J. Super. Unpub. Lexis 868 at 11 (April 22, 2010).

Petitioner provided no evidence to support the hearsay statements regarding her health at the time of the transfers. A finding of fact based on hearsay must be supported by competent evidence. N.J.A.C. 1:1-15.5(b), the **residuum rule**, requires "some legally competent evidence" to exist "to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. Thus, Petitioner's argument that she had no reason to plan for nursing home care is unsupported by the record.<sup>1</sup>

For the reasons set for above, I REVERSE the Initial Decision with regard to the checks made out to Petitioner's family as gifts whether for the weddings or otherwise.

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<sup>1</sup> Petitioner's entry into the nursing home in November 2013 was caused by her daughter's need to leave their home to care for her own daughter. The testimony from her daughter that Petitioner didn't want to live along and agreed to enter the facility fails to acknowledge that entering a nursing facility is not like checking into a hotel. Entry into a nursing home is governed by N.J.S.A. 30:4D-17.10 et seq., which requires the establishment of a preadmission screening program to determine the needs of Medicaid-eligible and other individuals prior to placement in that facility. N.J.S.A. 30:4D-17.11 defines "preadmission screening" to include: an initial evaluation to determine eligibility for the preadmission screening program; preparation of an assessment of the individual's need for care in a skilled nursing or intermediate care facility and of the individual's formal and informal support systems; and preparation of an initial care plan and arrangement of, or referral to, needed services. Thus, Petitioner's entry into a nursing home in November 2013 had to be predicated on a finding that she needed that level of care.


However, I do FIND that the discreet payments she made to third parties for expenses relating to the home she shared to have been form fair market value and should not be included in the penalty. Atlantic County did permit for monthly payments from Petitioner to her daughter for living expenses. I recognize those checks made out to insurance or the municipality were related to Petitioner's housing costs and can be considered to have been made for fair market value.<sup>2</sup> Thus, I FIND that Petitioner's penalty should be based on \$36,160 in transfers.

THEREFORE, it is on this <sup>23<sup>rd</sup></sup> day of JULY 2015

ORDERED:

That the Initial Decision is hereby REVERSED in part as set forth above; and

That the Initial Decision is hereby ADOPTED in part with regard to the payments made to third parties for Petitioner's housing expenses.



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Valerie Harr, Director  
Division of Medical Assistance  
and Health Services

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<sup>2</sup> Those checks are set forth on page 3 of the Initial Decision and include Check #2403 for \$781.07 made out to Merrimac Hotel Fire Insurance and Check #2385 for \$1,182; Check #2393 for \$1,149; Check # 2453 for \$800; Check #2466 for \$936 and Check # 2427 for \$777 which are all made out to the City of Somers Point.