



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

A.K. :
PETITIONER, : ADMINISTRATIVE ACTION
V. : FINAL AGENCY DECISION
DIVISION OF MEDICAL ASSISTANCE : and ORDER OF RETURN
AND HEALTH SERVICES & : OAL DKT. NO. HMA 475-2016
GLOUCESTER COUNTY BOARD OF :
SOCIAL SERVICES, :
RESPONDENTS. :

As Director of the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the OAL case file, the documents in evidence and the Initial Decision in this matter. Petitioner filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is August 11, 2016, in accordance with an Order of Extension.

This matter arises from Petitioner's application for Medicaid benefits filed in April 2015. Petitioner was 96 years old at the time and had been residing in a nursing home

since June 2014. She engaged in Medicaid planning and sought to transfer assets totaling \$81,100.13 to her son. In order to pay for her nursing home care while she was penalized, she purchased an annuity that would pay her income to cover the nursing home costs. She applied for benefits in August 2014 and was denied in February 2015 for excess income. A second application was filed in April 2015 and eligibility was granted as of April 1, 2015. After providing checks that the son made out to cash or Petitioner's health insurer, Gloucester County reduced the transfer penalty to \$63,296.29 and imposed the transfer penalty.

At the fair hearing Petitioner argued that she should be able to appeal the February 2015 denial of her August 2014 application in the instant case. She needs to have the penalty begin on August 1, 2014 in order to have her Medicaid planning work.<sup>1</sup> This type of financial planning is called "half-a-loaf" that was a Medicaid planning device prior to 2006. Under such a plan a Medicaid applicant gifts half of his or her assets while using the remaining half to pay for care during the transfer penalty. The Deficit Reduction Act of 2005 (DRA), effective February 8, 2006, specifically sought to put an end to this planning by delaying the transfer penalty until the applicant was otherwise eligible for Medicaid. In 2006, the 42 U.S.C.A. § 1396p transfer penalty statute was amended by the Deficit Reduction Act of 2005 ("DRA"). Congress made the penalty for transfers harsher by extending the look back period from thirty-six to sixty months for asset transfers occurring after the date of enactment and making other changes to prevent those with assets from gaining eligibility. See V.S. vs. DMAHS and Gloucester County Board of Social Services, 2010 N.J. Super. Unpub. Lexis 868 at 11 (April 22,

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<sup>1</sup> The record shows Petitioner's attorney received a letter from the annuity broker dated August 4, 2014 with the instructions to have the Delivery Receipt signed. P-6. There is a ten day revocation period that commences upon the signed delivery receipt. As such the annuity value remained available to Petitioner as of August 1, 2014, rendering her ineligible for that month. However, as Petitioner failed to challenge the denial of her August 2014 application, this is not germane to the instant case.

2010), “[w]hile there may be a desire of a parent (or grandparent) to leave or give something to a child, the transfer of those assets cannot ‘be subsidized by public funds.’” It is those rules that govern Petitioner’s application and, for the reasons that follow, I hereby ADOPT the Initial Decision but RETURN the matter to Gloucester County to recalculate the transfer penalty using the full amount of transferred assets.

Petitioner does not contest that she transferred funds to her son. She did it as part of Medicaid planning. Rather she argued that she is entitled have the penalty start in accordance with the date of the first application. However, despite the August 1, 2014 eligibility date being an integral part of her Medicaid planning, when she received the February 9, 2015 denial notice including a calculation of how Gloucester County reached its decision, Petitioner failed to request a fair hearing. Long after the 20 day time period for requesting a hearing had expired, Petitioner, through her counsel’s office, filed a second application on April 10, 2015. P-1. Petitioner does not offer any reason as to why she did not appeal the February 2015 denial notice.

In exceptions, Petitioner goes on at length about the first application. The argument contains factual and legal errors that are not germane to the pending matter as she never challenged that denial through the fair hearing process. The time for appealing that determination expired on February 29, 2015. The first application was not appealed and was not transmitted as a fair hearing. Petitioner’s reliance on an administrative matter before the Division on Civil Rights is puzzling. Exceptions at 12, citing Pressely v. Trenton Psychiatric Hospital, New Jersey Department of Human Services (OAL Docket No. CRT 4869-2001, decided March 1, 2004). In that case the complainant was pro se and the matter was dismissed on a motion for summary decision based on a prior action before the Merit System Board which dealt a reprimand

for her excessive absences from work. The Final Agency Decision of the Director of the Division of Civil Rights determined that the process of appealing the reprimand was not sufficient to address the allegation of discrimination as the complainant did not have “the opportunity to conduct discover and subpoena witnesses and documents” in the disciplinary process. The appeal procedure for a reprimand did not include the ability to request a fair hearing before the OAL. Petitioner argues she was similarly “afforded only the minimum process due a Medicaid applicant” and that “the start date of the Medicaid penalty period was never previously reviewed or litigated with the respondent.” Exceptions at 13. She states that “it is bootstrapping to concluded that because [Petitioner] did not file for a fair hearing to challenge the February, 2015 denial of her first Medicaid application, the Administrative Law Judge was unable to review the correct start date of the Medicaid penalty period imposed in the December 9, 2015 Medicaid eligibility determination.” Exceptions at 13. The April 2015 application was the only issue Petitioner appealed. Moreover, as Petitioner’s income of \$9,436.37 precluded eligibility prior April 1, 2015 except through the establishment of a Qualified Income Trust (QIT), the ALJ correctly set her eligibility date.<sup>2</sup>

The real issue that Petitioner seeks to deflect is that she had the right to a fair hearing at the OAL on the February 2015 denial letter. See P-1 at 17 which sets forth how to request a fair hearing. She failed to make such a request and now seeks to challenge that denial as part of a fair hearing she requested on December 30, 2015 some ten months after the February 2015 letter. Rather this case is analogous to C.W. v. DMAHS and Union County Division of Social Services, A- 2352-13T2, decided

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<sup>2</sup> The annuity payments ceased in March 2015 so that Petitioner’s income was under \$2,199 as of April 2015 and could established income eligibility.

August 31, 2015 where a 2008 notice of a transfer penalty was not appealed. In a second application filed in 2013, C.W. sought to modify the transfer penalty. The Appellate Court held that "C.W. points to no regulation or other authority, nor are we able to locate any, supporting the proposition she should be able to relitigate a previously-adjudicated and finalized penalty through a subsequent and wholly independent reapplication." *Id.* at 13. Petitioner's failure to appeal the February 2015 similarly prevents her from doing so now.

I must note that Gloucester County agreed to reduce the penalty by checks written by Petitioner's son. This reduction is in violation of 42 U.S.C. § 1396p(c)(2)(C) and N.J.A.C. 10:71-4.10(e)(6)(iii). See also Med-Com 10-06. Any reduction of the transferred funds is predicated on whether "[a] satisfactory showing is made to the state (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual." 42 U.S.C. § 1396p(c)(2)(C) (emphasis added). Therefore, partial returns are not permitted to modify the penalty period and, absent a return of all the assets, the penalty continues uninterrupted. See C.W. v. DMAHS and Union County Division of Social Services, *supra*, (finding that arguments for the partial reduction of a ten year, four month and thirteen day penalty "lacked any legal support").

It is clear that Petitioner did not receive the entire \$81,100.13 back from her son. It is also clear that she did not receive the \$17,803.84. The checks that purport to comprise the partial return were dated from July 2014 through March 2015 and written

to her health insurance or written to cash. The statute and regulation are clear that the all the funds must be returned to her. Since all of the assets transferred were not returned to Petitioner, the penalty period for the \$81,100.13 must stand.

Based on my review of the record and for the reasons set forth above, I hereby ADOPT the Initial Decision and uphold the eligibility date of April 1, 2015 and the penalty for the transfer of \$63,296.29 in Petitioner's assets. However, I hereby MODIFY the Initial Decision in that the penalty must remain at the \$81,100.13 amount. The matter is hereby RETURNED to Gloucester County to calculate penalty on the \$81,100.13

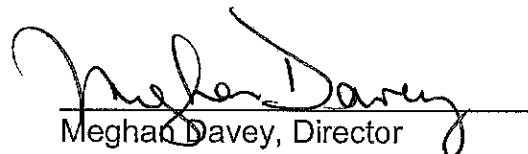
THEREFORE, it is on this *5th* day of AUGUST 2016

ORDERED:

That the Initial Decision is hereby ADOPTED with regard to the eligibility date and the transfer penalty for \$63,296.29; and

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That the matter is RETURNED to Gloucester County to recalculate a transfer penalty on the \$17,803.84 that was improperly excluded from the penalty.

  
Meghan Davey, Director  
Division of Medical Assistance  
and Health Services