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

G.K. PETITIONER, v. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND OCEAN COUNTY BOARD OF SOCIAL SERVICES, RESPONDENTS.	**ADMINISTRATIVE ACTION** **FINAL AGENCY DECISION** **OAL DKT. NO. HMA 07759-2016**

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this matter, consisting of the Initial Decision, the documents in evidence and the entire contents of the OAL case file. Neither Party filed exceptions. Procedurally, the time period for the Agency Head to file a

Final Agency Decision is September 8, 2016 in accordance with an Order of Extension.

This matter arises from the imposition of a 590 day transfer penalty in connection with Petitioner's November 2014 Medicaid application. An application filed in July 2014 by his ex-wife and Power of Attorney had been denied. The couple divorced in June 2014 after a twenty-four year marriage. Ocean County Board of Social Services found Petitioner eligible for Medicaid benefits as of December 1, 2014 but instituted a penalty due to the transfer of all of the couple's assets to his ex-wife. Petitioner appealed the denial and the matter was transmitted to the Office of Administrative Law (OAL).

In determining Medicaid eligibility for someone seeking institutionalized benefits, the counties must review five years of financial history. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period" a transfer penalty of ineligibility is assessed.[1] N.J.A.C. 10:71-4.10 (c). It is Petitioner's burden to overcome the presumption that the transfer was done – even in part – to establish Medicaid eligibility. The presumption that the transfer of assets was done to qualify for Medicaid benefits may be rebutted "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).

[1] Congress understands that applicants and their families contemplate positioning assets to achieve Medicaid benefits long before ever applying. To that end, Congress extended the look back period from three years to five years. Deficit Reduction Act of 2005, P.L. 109-171, § 6011 (Feb. 8, 2006).

Petitioner's wife filed for divorce on January 17, 2014. At the time Petitioner was residing in Bayville Manor, a boarding home. His health was deteriorating and "his physician recommended that he relocate to a more secure facility." ID at 4. Petitioner's wife, who had and continues to pay for his bills, could not afford "to pay the new facility's fees and [would] not relocate [Petitioner] unless and until he qualifies for Medicaid." Ibid.

The couple entered a property settlement agreement the same day the wife filed for divorce. In that document, Petitioner's wife acknowledged that while she had paid privately in the past that she will no longer pay for his medical expenses. As a result Petitioner "shall need to apply for Medicaid and Pharmacitical [sic] Assistance . . .[and Petitioner] may need to relocate to a Medicaid accepting facility." P-5 at Article I.

The final judgment of divorce was entered on June 19, 2014 and states that no one appeared on behalf of Petitioner. The judgement incorporates the property agreement and acknowledges that the agreement was entered into "freely and voluntarily" and "no testimony with respect to the reasonableness nor fairness of the agreement" was taken by the judge. P-4.

The property settlement agreement entered into by the Petitioner and his wife clearly acknowledges the need for Petitioner's long term care, which Petitioner anticipates will be funded by the Medicaid program. As noted in the Initial Decision, this case is distinguishable from. W.T. v. Div. of Med. Assistance and Health Servs., 391 N.J. Super. 25 (App. Div. 2007) in that Petitioner has been left destitute. The ALJ stated:

> However, this case is distinguishable from W.T. because in W.T., even though the spouse applying for Medicaid received fewer than

> 50 percent of the assets in the PSA, he still received $250,000, which was contemplated to cover his medical expenses. In this matter, G.K. is left with only his Social Security payments, and the PSA contemplates that he will have to apply for Medicaid. Thus, unlike W.T., the PSA in this case left G.K. "a public charge, or close to it." Marschall, supra, 195 N.J. Super. at 30–31. Both W.T. and H.K. state that a PSA that would leave a spouse a public charge, or that would provide a standard of living far below that which was enjoyed both before and during the marriage, would probably not be enforced by any court. Thus, even though S.K. is entitled to a larger share of the property, the PSA would likely be deemed inequitable by a court, because leaving G.K. with only his Social Security income renders him destitute. Without the prospect of Medicaid, it is unlikely that G.K. would have voluntarily entered a PSA that leaves him destitute, especially if a court likely would have granted him a larger share of the property. Therefore, the presumption that the PSA was entered into for the purpose of qualifying for Medicaid is not rebutted and a transfer penalty must be imposed.
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> [ID at 12.]

Consequently, the Initial Decision found that Petitioner is unable to establish that the transfer, pursuant to the property settlement agreement, was done exclusively for a purpose other than to qualify for Medicaid. Petitioner's decision to agree to receive nothing from the marital assets raises policy concerns similar to those occurring when a spouse refuses to elect against a deceased spouse's estate. The practical effect of the Petitioner's acquiescence to the agreement is the same; taxpayers will bear the burden of supporting Petitioner while he resides in the nursing home and receives medical assistance. If Petitioner had pursued his share of the assets, then those assets would have been available to provide for his maintenance and healthcare without burdening taxpayers. See Tannler v. DHSS, 211 Wis. 2d 179, 190-191, 564 N.W.2d 735 (1997); Estate of Michael DeMartino v. DMAHS, 373 N.J. Super. 210, 220, 224 (App. Div. 2004) (Testamentary trust created by will, equal to widower's elective share,

viewed as a means to limit widower's ownership of his elective share and a transfer of resources); I.G. v. DMAHS, 386 N.J. Super. 282 (App. Div. 2006) (Widow's waiver of spousal share effectively transferred one-third of estate to a trust without compensation).

The evidence indicates that the financial division of assets was based on Petitioner's institutionalization and the need Medicaid benefits. The courts have held that when spouses use or fail to use statutes that are designed to prevent impoverishment so as to qualify for Medicaid, a transfer penalty should occur. Accordingly, when examining the division of property, an applicant's failure to assert their right to equitable distribution is subject to a transfer penalty. 42 U.S.C. § 1396p(c)(3) and N.J.A.C. 10:71-4.10(b)3.

Petitioner argued that the penalty should be less than the amount calculated by Ocean County due to payments made by Petitioner's wife to pay for his business and personal debt that was not attributable to her. These expenses would have been an offset and are germane to a determination of the reasonableness or fairness of the divorce settlement. Petitioner proffered that the transfer penalty should be $100,191.61 or 320 days. After review of the unique facts and circumstances of this record, I concur with the findings of the ALJ and ADOPT the Initial Decision in its entirety.

THEREFORE, it is on this 7th day of SEPTEMBER 2016,

ORDERED:

That the Initial Decision affirming the transfer penalty is hereby ADOPTED.

Meghan Davey, Director
Division of Medical Assistance
and Health Services