



State of New Jersey

DEPARTMENT OF HUMAN SERVICES  
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

P.O. Box 712  
Trenton, NJ 08625-0712

CHRIS CHRISTIE  
Governor

ELIZABETH CONNOLLY  
Acting Commissioner

KIM GUADAGNO  
Lt. Governor

MEGHAN DAVEY  
Director

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

P.S.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	ORDER OF REMAND
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 3318-2017
	:	
AND HEALTH SERVICES AND	:	
	:	
OCEAN 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. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is November 9, 2017 in accordance with an Order of Extension.

The matter arises regarding the transfer of Petitioner's home to her daughter. She is claiming that the transfer is exempt from penalty under the caregiver exemption.

Petitioner moved into an assisted living facility in March 2014. She applied for benefits in September 2016 under home and community based services.

The Initial Decision found that Petitioner's transfer of the home met the caregiver exemption so that there is no penalty period. Based on the record before me, I hereby REVERSE the Initial Decision as the record does not support the findings and REMAND the matter to OAL for further development of the record.

By way of background, when an individual is seeking benefits which require meeting an institutional level of care, any transfers of resources are scrutinized. N.J.A.C. 10:71-4.10. 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. N.J.A.C. 10:71-4.10 (c). Individuals who transfer or dispose of resources for less than fair market value during or after the start of the sixty-month look-back period before the individual becomes institutionalized or applies for Medicaid as an institutionalized individual, are penalized for making the transfer. 42 U.S.C.A. § 1396p(c)(1); N.J.A.C. 10:71-4.10(m)(1). Such individuals are treated as though they still have the resources they transferred and are personally paying for their medical care as a private patient, rather than receiving services paid for by public funds. In other words, the transfer penalty is meant to penalize individuals by denying them Medicaid benefits during that period when they should have been using the transferred resources for their medical

care. See W.T. v. Div. of Med. Assistance & Health Servs., 391 N.J. Super. 25, 37 (App. Div. 2007).

Limited exemptions to the transfer penalty rules exist. For example, the caregiver exemption provides that an individual will not be subject to a penalty when the individual transfers the "equity interest in a home which serves (or served immediately prior to entry into institutional care) as the individual's principal place of residence" and when "title to the home" is transferred to a son or daughter under certain circumstances. N.J.A.C. 10:71-4.10(d). The son or daughter must have "resid[ed] in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual" and "provided care to such individual which permitted the individual to reside at home rather than in an institution or facility." N.J.A.C. 10:71-4.10(d)(4) (emphasis added). This exemption mirrors the federal Medicaid statute. 42 U.S.C.A. § 1396p(c)(2)(A)(iv).

The federal statute calls for an explicit exemption from the transfer rules and is meant to compensate the child for caring for the parent. The New Jersey regulations regarding this transfer exemption are based on the federal statute. Compare 42 U.S.C. § 1396p(c)(2)(A)(iv) and N.J.A.C. 10:71-4.10(d). The statute provides that if the "equity interest in a home" is transferred by title to a son or daughter who provided such care that prevented institutionalization for at least two years, the transfer is exempt from penalty. The care provided must exceed normal personal support activities and Petitioner's physical or mental condition must be such as to "require special attention and care." N.J.A.C. 10:71-4.10(d). It is Petitioner's burden to prove that she is entitled to the exemption.

The Appellate Division's review of the caregiver exemption noted that the "receipt of Medicaid benefits is not automatic. Understanding the State's need to conserve limited financial resources to assure monies are paid to those who meet the circumscribed eligibility requirements, we will not merely assume the criteria as satisfied. Rather, proof must be forthcoming specifically establishing each requirement of the exception to obtain its application." M.K. v. DMAHS and Burlington County Board of Social Services, Docket No. A-0790-14T3, decided May 13, 2016, slip op. at 17.

The record does not demonstrate that Petitioner's daughter was caring for her during the two years immediately prior to date she became an institutionalized individual. The federal statute defines an "institutional individual" as "an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1902(a)(10)(A)(ii)(VI)." 42 U.S.C. § 1396p(h)(3). The Centers for Medicare and Medicaid Services (CMS) explained further in the State Medicaid Manual (SMM) that with regard to transfer of assets, the term institutionalized individual is someone who is "an inpatient in a nursing facility; and inpatient in a medical institution for whom payment is based on a level of care provided in a nursing facility; or a home and community-based services recipient described in 1902(a)(10)(A)(ii)(VI)." SMM § 3258.1A.4. Petitioner moved to an assisted living facility in 2014. She applied for benefits in 2016. The Initial Decision revolves around the care Petitioner's daughter provided prior to 2014. However, in 2014 Petitioner did not meet the description of an institutionalized individual. She was not an inpatient in a nursing facility nor was she a home and community-based services recipient. An assisted living facility is not a

nursing facility. She was not screened for meeting nursing home level of care until 2016 when she applied for Medicaid.

Thus, I am REMANDING the matter for further findings and to develop the record on when Petitioner met the definition of an institutionalized individual. The statute requires that the daughter provided sufficient care for the two year period immediately before becoming an institutionalized individual. It does not appear that Petitioner entered a nursing facility which would require a Pre-Admission Screen (PAS) to determine the need for institutional level of care. See 42 CFR § 483.106. An assisted living facility is considered a community residence and no PAS is performed until the resident applies for Medicaid benefits. If it is determined that she did not meet the definition of an institutionalized individual until 2016 when she became a home and community based waiver recipient, then the time period cannot have been met as Petitioner did not receive care provided by her daughter during the preceding two years. If it is determined that she met the definition of institutionalized individual at an earlier date, more evidence is required as to the care and support provided by her daughter as well as the other support she received from her husband and paid for from the home health agency.

The facts surrounding Petitioner's level of care are based on Petitioner's daughter's testimony and a brief note from her doctor dated September 18, 2013, which happens to be the same as the date of the deed. I do not find there is sufficient competent evidence to make findings regarding Petitioner's condition. The doctor's note is brief and does not discuss Petitioner's need for care or her daughter's provision of care past September 2013. Petitioner lived with her husband and her daughter moved in with them in 2008. Weeks after her husband's death in 2014, Petitioner entered the

assisted living facility. The finding that her husband's health prevented him from caring for Petitioner is based on hearsay statements from their daughter as there is no medical documentation regarding his medical condition. Petitioner needs to provide competent evidence regarding her husband's ability or inability to care for her.

While her daughter claims she was the primary caregiver, the record show that a home health aide was present and paid for by Petitioner. The Appellate Division has held that an individual, receiving caregiving services paid for by Medicaid, cannot transfer her home to her daughter under the exemption. "Although appellant cared for her mother during the relevant time period, the key factor that permitted G.B. to remain in her home until 2009 was the Medicaid assistance she received through the services provided by the [Medicaid program]." Estate of G.B. (deceased) by M.B.-M., as Executor v. DMAHS and Somerset County Board of Social Services, Docket No. A-5086-12T1, decided September 15, 2015, slip op. at 8. In that case, G.B. received 30 hours of caregiving services a week under a Medicaid waiver program that permitted her to remain at home. Id. at 7. Despite the finding by the ALJ that the daughter "tended her mother in decline for many years, and assisted her mother in avoiding institutionalization," the Appellate Division upheld the Final Agency Decision that overturned that finding and held that G.B. was not entitled to a caregiver exemption. Id. at 5

The record does not show what the home health aide was tasked with doing. Normally, a caregiver agency prepares a plan of care for the patient in conjunction with the physician. Petitioner's plan of care with the agency would shed light on the assistance she needed. If the plan of care was meeting Petitioner's needs, then the caregiver exemption would not apply. As such, the record should be clarified with

competent evidence to determine if it was the care provided through the home health agency that was the factor that permitted her to remain out of a nursing home.

Thus, I FIND that there is insufficient evidence as to when Petitioner became an institutionalized individual and, depending on that date, the record does not support the finding that Petitioner met the caregiver exemption, and hereby REMAND the matter to OAL for further findings regarding Petitioner's diagnosis, her plan of care and the amount and type of services provided by outside agencies.

THEREFORE, it is on this 8<sup>th</sup> day of NOVEMBER 2017,

ORDERED:

That the Initial Decision is hereby REVERSED in that the record does not support the finding that the caregiver exemption was met; and

That the matter is REMANDED to the Office of Administrative Law for clarification and further evidence regarding Petitioner's condition, her husband's ability to care for her and examples of Petitioner's plan of care for home health services.

  
Meghan Davey, Director  
Division of Medical Assistance  
and Health Services