State of New Jersey
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
PO BOX 712
TRENTON, NJ 08625-0712

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

CAROLE JOHNSON
Commissioner

MEGHAN DAVEY
Director

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

A.S. and E.S., PETITIONERS,	**ADMINISTRATIVE ACTION**
v.	**FINAL AGENCY DCISION**
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND OCEAN COUNTY BOARD OF SOCIAL SERVICES, RESPONDENTS.	**OAL DKT. NO. HMA 1078-2017 and HMA 14243-2017 (CONSOLIDATED)**

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the OAL case file, the documents in evidence and the Initial Decision. Both parties filed exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is August 9, 2018 in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty based on transfers done by one or both members of a married couple. Based on the transfer of $131,062, and since

both husband and wife were applying for Medicaid benefits, Ocean County Board of Social Services assessed a penalty of $65,531.23 to each Petitioner.

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).

There is 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. N.J.A.C. 10:71-4.10(i). 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(l)2.

N.J.A.C. 10:71-10(j) sets forth how an individual can rebut the presumption that a transfer for less than fair market value was made to qualify for Medicaid. Factors which may indicate that the transfer was for some other purpose are set forth in the regulation:

> The presence of one or more of the following factors, while not conclusive, may indicate that resources were transferred exclusively for some purpose other than establishing Medicaid eligibility.
>
> 1. The occurrence after transfer of the resource of:
>
> i. Traumatic onset of disability;
>
> ii. Unexpected loss of other resources which would have precluded Medicaid eligibility;
>
> iii. Unexpected loss of income which would have precluded Medicaid eligibility.
>
> 2. Resources that would have been below the resource limit during each of the preceding 30 months if the transferred resource has been retained.
>
> 3. Court-ordered transfer.
>
> 4. Evidence of good faith effort to transfer the resource at FMV.

The transfers were divided into three groups 1- transfers made to family members; 2- undefined transfers and 3- transfers made to V.G.[1] The Initial Decision found Petitioners did not provide any factors that could presume they transferred the funds solely for a purpose other than qualifying for Medicaid with regard to the transfers to their children and family members. Moreover, there was no evidence provided that the undefined transfers were for Petitioners' benefit. As noted by the ALJ, the undefined transfers, save one, were made in round numbers and ranged between $100 and $5,000. ID at 20. Without any explanation of these transfers, the presumption that the transfers were done to qualify for Medicaid remains.

[1] V.G. is described as a friend and a neighbor. See ID at 4, 13 and 14. However, the documents do not support the description of a neighbor. The listed address for V.G. is on the opposite side of the state, some 50 miles away from Petitioners' address. The bankruptcy documents do not list any ownership of other real property for V.G. P-I.

The Initial Decision did find that the payments made to V.G., except for those made as gifts, were transferred for a purpose other than qualifying for Medicaid. The Initial Decision determined that V.G. and Petitioners had a working relationship "for services they needed and which were intended to keep them in their home." ID at 19. Based on my review, I FIND the evidence in the record does not support that finding.

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." Petitioners have not presented any legally competent evidence that they had a "working relationship with V.G., through which they obtained some degree of assistance." ID at 19.

As evidence of this relationship, Petitioners presented a caregiver agreement dated June 1, 2013 signed by A.S. and V.G. There are no witnesses or notary on the document.[2] P-K. V.G. wrote to Ocean County on December 7, 2016 stating that he "assisted" Petitioners from December 27, 2011 through October 18, 2015. P-L. There is no evidence that services were performed. Petitioners bear the burden to establish the types of care or services provided, the type and terms of compensation, the fair market value of the compensation, and that the amount of compensation or the fair market value of the transferred asset is not greater than the prevailing rates for similar care or services in the community. N.J.A.C. 10:71-4.10(b)(6)(ii) and (j). See E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340 (App. Div. 2010). Based on the record below, I FIND that they failed to meet this burden.

The hourly rate of $35 is not supported by any evidence that this amount was the fair market rate for a friend to run errands and do maintenance. N.J.A.C. 10:71-4.10(b)(6)(ii)

[2] The Initial Decision alludes to Petitioners' son questioning A.S.' signature on the 2013 document. ID at 10.

and (j). See E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340 (App. Div. 2010). There is no evidence of the hours worked or any clear indication of the scope of the services. The agreement from 2013 states that the couple has progressive medical conditions that will require increasing care and assistance. However, V.G.'s statement in 2016 written after the couple's entry into the nursing home is less specific and includes fewer tasks than listed the 2013 agreement. It fails to show hours V.G. worked or how payments were structured. The list of checks shows no regular or consistent payments. Moreover, it must be noted that none of the amounts paid to V.G. are divisible by 35, the alleged rate, without a fractional remainder.

The checks to V.G. follow no pattern that would demonstrate that he was providing services. Rather for several months, Petitioners either paid V.G. nothing for services or just gifted him between $500 and $1,000. For example, during May 2013, December 2013, January 2014 and October 2015, V.G. was paid nothing. See P-A. Then for the months of October, November and December 2014, Petitioners gifted V.G. a total $3,000 with "Happy Holidays" or "Happy New Year" noted on the receipts and the memo line. Petitioners made no payments for "services" to V.G. those months.

In other months, Petitioners wrote an excessive amount of checks to V.G. For example, there are 10 cashed checks totaling $2,900 and made out to V.G. for February 2015. If the memo line is to be believed, Petitioners spent $1,110 on groceries during the shortest month of the year. This does not include an additional check for $300 that contains "groceries meds[sic]" in the memo.

At some point Petitioners employed home aides to care for them 24 hours a day. ID at 9. The record is silent as to when this occurred, however, there was testimony that A.S. fell in April 2015 "and experienced a sudden cognitive decline." ID at 8. There is no explanation why in July 2015, when Petitioners were presumably paying for home health

care, V.G. was paid $9,250. P-A. Indeed, from May 2015 through the first week of September 2015, "when V.G. supplemented [the home care aides'] work by tending to 'quality of life' matters that the aides did not handle, such as grocery shopping", V.G. received $18,300 from Petitioners. ID at 9 and P-A. This is an excessive amount for undefined "quality of life" tasks.

Additionally, the April 13, 2017 hearsay letter from Petitioners' physician cannot lend support to Petitioners' case. See P-M. There is no basis how the physician was aware someone drove them to appointments, picked up medication and shopped for them. It may be that the physician was told this by Petitioners or whoever asked that this letter be written. It is also peculiar that in April 2017 Petitioners' physician would write that "at this time [they] would benefit from a caregiver to assist in daily activities, pick up medications, shop for them." By the time the letter was written, their physician should have been aware that Petitioners had been residing in a nursing home for eighteen months and had their caregiving needs provided by the nursing home.

In the alternative, Petitioners argue that they the transfer penalty should be waived. N.J.A.C. 10:71-4.10q(1) provides that a waiver of the transfer penalty may be granted when:

> i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life; and
>
> ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.

The Initial Decision concluded that Petitioners had not demonstrated that they met either of the two prongs needed for a waiver of the transfer penalty. Since the regulation requires that both conditions be met, failing to meet either is sufficient to deny the waiver request. Petitioners have presented no evidence that they are at risk of deprivation of medical care. The penalty has run its course and Petitioners are currently having their care paid for by Medicaid. Moreover, "action regarding continued residency" ignores the federal law that governs involuntary discharges and requires a safe discharge. 42 U.S.C. § 1396r. See also N.J.A.C. 8:85-1.10(g) and 42 C.F.R. § 483.15. I find no basis to permit another request for an undue hardship waiver regarding the transfers to V.G.

THEREFORE, it is on this 6th day of AUGUST 2018,

ORDERED:

That the Initial Decision ADOPTED with regard to the findings regarding the transfers of assets to Petitioners' children and that Petitioners do not meet the requirements for a undue hardship waiver; and

That the Initial Decision is REVERSED and reinstates the full transfer penalty for the assets transferred to V.G.

Carol Grau OBO Meghan Davey

Meghan Davey, Director
Division of Medical Assistance
and Health Services