



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**

M.P.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE

AND HEALTH SERVICES AND

ATLANTIC COUNTY BOARD OF

SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 11246-2017

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 in this matter is May 17, 2018 in accordance with an Order of Extension.

The matter arises regarding Petitioner's April 2017 application for Medicaid benefits. Petitioner was found eligible as of July 1, 2017 but subject to a transfer penalty of 198 days

due to the transfer of \$84,140.35. Atlantic County subsequently modified the penalty to \$80,410.37 after finding some of the transfers were for fair market value. This reduced the penalty to 189 days. Petitioner contends that the transfers were for fair market value and were not done so as to qualify for Medicaid. The Initial Decision determined that Petitioner had received compensation for the transfers and that she was not subject to penalty. For the reasons that follow, I hereby REJECT the Initial Decision and reinstate the penalty.

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). The regulations also caution that “care and services provided for free at the time they were delivered shall be presumed to have been intended to be delivered without compensation.” N.J.A.C. 10:71-4.10.

As Petitioner is claiming that she received fair market value, she bears 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.

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).

Assistance & Health Servs., 412 N.J. Super. 340 (App. Div. 2010). Based on the record below, I FIND that she failed to meet this burden.

The transfers at issue occurred in August through September 2013 and in December 2014 through February 2015. R-1 at 18. Petitioner claims that the transfers were done to compensate her sons for work they did on her house from June 2014 through October 2014. ID at 4 – 5. No transfers occurred during this time period and there was no pre-existing contract for the services. Rather the scope and estimate of the work done in 2014 first appears in an email dated November 3, 2017 from Petitioner's daughter and Power of Attorney sent to Atlantic County during the Medicaid application process.²

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." Here, there is no legally competent evidence to support the testimony that \$40 an hour paid to Petitioner's sons was "very reasonable" or that she would have paid an "unrelated contractor significantly more". ID at 5 and 10. Petitioner's daughter veered towards being treated as expert in the Initial Decision with none of the hallmarks required to treat testimony as expert. There are just vague generalities about her employment as an accountant and a comptroller for a "large development company." ID at 4. There is nothing in the record to qualify her as an expert in renovating Petitioner's home "cost effectively and for the best value." ID at 4. On the contrary some of the individuals including a grandson and an "extended family member. . . and his crew" donated their labor. The daughter testified she paid a cousin "who was qualified and willing to work for

² Petitioner's daughter included this 2017 email in a February 6, 2018 response to the ALJ and Atlantic County.

little compensation” considerably less than her brothers. ID at 6.³ There is also no competent basis to support the \$550 paid to this cousin in February of 2015.

Rather the work Petitioner’s sons did on her house was not compensated at the time it was rendered and there is no pre-existing contract. There is no basis for the hourly rate or the scope of services for the work done in 2014. Rather in February 2015, Petitioner’s family reconstructs renovations using EZ Pass and estimates to come up with justification for the transfer. There is also no doubt that Medicaid was contemplated during this transfer of funds. In the February 17, 2015 document setting forth the after-the-fact basis for paying Petitioner’s sons \$21,300, Petitioner’s daughter gave her brothers instructions to deposit the new checks “ASAP INTO AN ACCOUNT THAT IS SOLELY YOURS OR YOU HAVE THAT JOINT ACCOUNT WHERE EITHER HAS ACCESS AS WE MAY NEED FOR MOMS [SIC] CARE IF MEDICAID DENIES THIS.” P-3. It appears that Petitioner and her family were putting in a contingency plan if the transfers affected her Medicaid eligibility.

I also note that \$45,000 was transferred between August and December 2013 which was four months before Petitioner moved to an assisted living facility and six months before the work begun. The attempt to return some of these funds in August and October of 2014 was done by checks that all contained the memo “Loan to Mom.” R-1 at 34-37. This does not constitute a return of the transferred assets. See 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

³ I note that Petitioner’s daughter’s reconciliation of the transfers that \$400 was returned to the cousin on September 4, 2013 for “demo of bathroom main floor and assist with install.” P-1. This is puzzling as the renovations did not begin until June 2014. Other items also identified as return of funds in 2013 are for renovations that had not yet occurred.

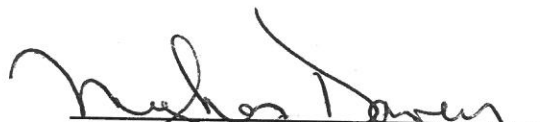
individual." 42 U.S.C. § 1396p(c)(2)(C) (emphasis added). Therefore, even if these loans were found to be partial returns, they do not modify the penalty period and, absent a return of all the assets, the penalty for the full amount stands.

THEREFORE, it is on this 17th day of MAY 2018,

ORDERED:

That the Initial Decision is hereby REVERSED; and

That the transfer penalty of \$80,410.37 is upheld.


Meghan Davey, Director
Division of Medical Assistance
and Health Services