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

V.W., PETITIONER, v. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND MONMOUTH COUNTY BOARD OF SOCIAL SERVICES, RESPONDENTS.	**ADMINISTRATIVE ACTION** **ORDER OF REMAND** **OAL DKT. NO. HMA 8410-2017**

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. No exceptions were filed. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is May 3, 2018 in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty of 737 days. Monmouth County determined that Petitioner was eligible as of October 1, 2016 but had transferred $245,145 for less than fair market value. At issue are transfers relating to household

expenses and the transfer of her share of the home she shared with her daughter and son-in-law. For the reasons that follow, I am ADOPTING in part; MODIFYING in part; REVERSING in part and REMANDING the matter to OAL for further findings.

The Initial Decision identified the penalty as comprising three transactions. The first transaction was the $65,000 mortgage payoff by Petitioner. The ALJ noted that Petitioner's ownership of the home with her daughter and son-in-law did not equate to dividing the property into thirds. As her daughter and son-in-law owned as a married couple, they and Petitioner each owned 50% of the house. ID at 15. Therefore, Petitioner's payoff of half of the balance on the mortgage was correct.

Petitioner also paid for the mortgage expenses from December 2011 through May 2015. In November 2014 Petitioner entered the nursing home and in March 2015, Petitioner transferred the home. Still Petitioner continued to pay the entire mortgage despite no longer living in the house and then no longer owning the house. As much as Petitioner had a legal obligation to service the mortgage, so did her daughter and son-in-law. When Petitioner no longer was living in the home, she no longer received any benefit for the mortgage payments. Thus, I FIND that the payments by Petitioner as of December 204 through May 2015 were a transfer of assets for which she received no fair market value. The Initial Decision is MODIFIED to reflect that these total payments of $10,825.47 are part of the transfer penalty.

The third transaction was the transfer of Petitioner's share of the home to her daughter and son-in-law in March 2015 for which she is seeking an exemption of the transfer penalty. She claims that her daughter's care of her during the two years immediately preceding her institutionalization in November 2014 fits the definition of a caregiver child which would remove the transfer from penalty. For the reasons that follow, I hereby REVERSE the findings that Petitioner demonstrated she met the caregiver

exemption and REMAND the matter for findings regarding her proofs. However, I further FIND that Petitioner cannot utilize the caregiver exemption for the transfer to her son-in-law as spouses are not included in the exemption and that portion of the transfer is upheld.

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 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.

In this case Petitioner transferred her share of the home to her daughter and son-in-law. P-13. The exemption only applies to transfers to a son or daughter and does not extend the exemption to transfers to spouses of the son or daughter. As such, Petitioner cannot claim the transfer to her son-in-law is exempt under any circumstance. The ALJ noted that the ownership interests in the house were divided so that Petitioner owned one half and her daughter and son-in-law, as husband and wife, owned the other half. ID at 15. The house was valued at $475,310 and Petitioner's interest amounts to $237,655. ID at 5. I FIND that Petitioner's transfer of her interest to her son-in-law or $118,827 is subject to transfer penalty regardless of the outcome of the caregiver exemption. Thus, Petitioner can only seek to exclude Petitioner's remaining interest from penalty by invoking the caregiver child exemption.

At the outset, Petitioner had provided little competent evidence to support the finding that her condition was such to require the care needed to prevail on the caregiver exemption. Most troubling is the testimony of Lisa Curtis who is identified as an "expert concerning petitioner's medical condition and her needs prior to her move to a nursing home." ID at 6. Ms. Curtis is a licensed clinical social worker, however, the record does not contain a curriculum vitae or any proof of her credentials. Moreover, there is no evidence that Ms. Curtis has any medical education or training that would permit her to

testify as to Petitioner's medical condition based on a review of Dr. Nicola DiGugliemo's records.[1] See Khan v. Singh, 397 N.J. Super. 184, 2007. When a witness seeks to be an expert, they must demonstrate training, experience or knowledge in the area they are professing expertise. See Ryan v. Renny, 203 N.J. 37(2010). This was not done here.

Additionally, Ms. Curtis' written statement contains conclusions for which there is no proffer that her education and experience permit her to make. She makes conclusory statements such as "it is clear to me that [Petitioner] had dementia dating back to at least 2011" and that she has "no doubt that [Petitioner] was in the 'moderate to mid' state Alzheimer's disease in February of 2012" without evidence of any relevant medical education or training. She also states that the records show Petitioner's doctor progressively treated her Alzheimer's disease "with a variety of memory medications and anti-anxiety as well as anti-psychotic medications" without evidence of any relevant pharmaceutical education or training. As such, I REJECT the findings based on her statement and testimony as they cannot be considered as that of an expert witness.

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." To that end, the medical documents from Petitioner's physician are hearsay and are inconsistent. They are inadequate to support a finding that she needed nursing home level of care beginning in November 2012. Rather the documents raise questions about Petitioner's level of care and the timing of her condition. In February 2015, Petitioner's doctor wrote that she had been deteriorating for the past three years and "about two years ago became completely dependent on total care." P-11.

[1] Dr. DiGuglielmo is identified as a woman in Ms. Curtis's October 21, 2017 letter. This is incorrect. See P-17 and https://physicians.meridianhealth.com/?FreeText%3AFirst+name=Nicola.

Two years prior to that letter would be February 2013 which does not encompass the November 2012 start date Petitioner must meet for the caregiver exemption.

There are also no assessments of Petitioner's neurological condition much less her orientation to person, place and time in any of her physician's records. His records show that the diagnosis of Alzheimer's disease was listed as a "new problem" on June 2012. R-18. The extent of the disease is not noted. Additionally, when Petitioner was discharged in March 22, 2012 she needed "moderate assist with transfer/ambulation/ADLS" but "there is no willing or able caregiver to provide for hygiene needs." P-18. This is at odds with Petitioner's claim that her daughter was taking care of her.

The records also show Petitioner took a serious fall in June 2013. It is also the first time noted that Petitioner was seen by her doctor in the presence of her daughter. P-18. In December 2013, Petitioner's exam was "in presence of family since getting more agitated and difficult to handle at home with a homemaker." It is unclear who was providing homemaker services as Petitioner has disavowed anyone helping her but her daughter. Thus, I FIND that Petitioner has not presented any legally competent evidence of her medical condition to meet the caregiver exemption. On remand, these inconsistencies should be clarified as well as the extent to which the 2013 fall exacerbated Petitioner's condition.[2]

Petitioner also paid a relative "$13 per hour, for three to five hours each day, to be [her] companion." ID at 11. It appears Monmouth County had believed the relative was providing care, however, her clear denial of caregiving renders the hourly rate suspect as to fair market value. At the hearing the relative averred that she is "not a health care aide and had no training or experience as a health care provider." ID at 11. There is no basis for the hourly rate paid to this relative. I hereby instruct Monmouth County to review these

[2]As Petitioner signed an eight page Power of Attorney in favor of her daughter in March 2015, it is presumed she was not cognitively impaired at that time.

payments for additional transfers for less than fair market value and issue a new penalty letter if warranted.

THEREFORE, it is on this 3rd day of MAY 2018,

ORDERED:

That the Initial Decision ADOPTED with regard to the finding that the payoff of the mortgage was not subject to penalty;

That the Initial Decision MODIFED with regard to the imposition of a $10,825.47 penalty for the mortgage payments Petitioner made after she entered the nursing facility;

That the Initial Decision is REVERSED and reinstates the penalty of $118,827 or the portion of the home that she transferred to her son-in-law that cannot be exempted.

That the Initial Decision is REVERSED and REMANDED with regard to the caregiver exemption for further findings on the issues described above.

Meghan Davey, Director
Division of Medical Assistance
and Health Services