

as of September 1, 2020. However, a penalty of 849 days was assessed resulting from the transfer of assets, totaling \$303,820.96, for less than fair market value during the five-year look-back period. The transfer of assets stem from gifts to family members, totaling \$18,730.12,¹ and the transfer of Petitioner's home to her son, P.M., for \$285,090.84 less than the home's fair market value.

In determining Medicaid eligibility for someone seeking institutionalized benefits, 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. N.J.A.C. 10:71-4.10(c). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

Limited exemptions to the transfer penalty rules exist. In particular, 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

¹ Petitioner is not contesting the penalty imposed as a result of the gifts in this matter. She is only contesting the imposition of the penalty related the transfer of her home to her son, P.M.

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. 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. See 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 to a parent while “residing in such [parent’s] home” that prevented institutionalization for at least two years, the transfer is exempt from penalty. 42 U.S.C. § 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).

In reviewing the caregiver exemption, the Appellate Division 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.

In the present matter, Petitioner’s son, P.M., resided with Petitioner for more than fifty years in a home that was owned by Petitioner. *Id.* at 2. In December 2019, Petitioner was admitted into a nursing facility and since that time, has no longer resided at her former home. Ibid. P.M. and Petitioner’s daughter, R.K., petitioned for legal guardianship of Petitioner after she was admitted into the nursing facility.² Id. at 3. On May 7, 2020, P.M. and R.K.

² It appears that the guardianship filing was filed with the Superior Court of New Jersey, Chancery Division, Probate Part on or about February 10, 2020. P-4.

transferred title of Petitioner's home to P.M. for consideration of \$1.00. Ibid. MCDSS estimated the value of Petitioner's home to be \$285,090.84. Ibid. Petitioner does not dispute this valuation. Ibid. Petitioner, however, argues that the transfer of the home to P.M. should be exempt from the imposition of a penalty on Petitioner's receipt of Medicaid benefits as a result of P.M. being Petitioner's caregiver for the two-year period prior to Petitioner being admitted into the nursing facility, pursuant to N.J.A.C. 10:71-4.10(d). In support of this contention, Petitioner's treating physician, John Swidrick, Sr., M.D., testified regarding Petitioner's medical history. Petitioner also supplied a January 30, 2020 letter/certification by Dr. Angelo A. Chinnici, M.D., P.A., that was used in support of P.M. and R.K.'s petition for legal guardianship of Petitioner. P-2. A subsequent letter by Dr. Chinnici, dated February 22, 2022, was also submitted by Petitioner.³ P-3. In that letter, Dr. Chinnici stated that Petitioner suffers from severe dementia and was asked at Petitioner's attorney's request to evaluate a brain computerized tomography (CT) scan from the date of November 29, 2019. Ibid. A copy of the November 29, 2019 CT scan was attached the report. Ibid. Lastly, a December 20, 2019 letter/certification from Dr. Mark David Pass, M.D. that was used in support of P.M. and R.K.'s petition for legal guardianship of Petitioner was presented by Petitioner, indicating that Petitioner suffers from dementia. P-4.

P.M. testified that he provided regular care to Petitioner, including managing her medications, doing all of her shopping, making her meals, doing her laundry, assisting her in toileting, regularly changing her clothes including incontinence underwear when soiled, changing bed sheets when soiled, and assisting her with showering, which included undressing Petitioner, holding her up in the shower, drying her off, and re-dressing her. ID at 5.

The Initial Decision found that Petitioner had proven that P.M. provided care to

³ It is unclear from the record whether this letter was in relation to Petitioner's annual guardianship filing or if this letter was requested for the purposes of the present matter.

Petitioner beyond normal support and that Petitioner required an institutional level of care for the two years immediately preceding institutionalization. I agree that the record demonstrates that P.M. provided care to the Petitioner beyond normal support during the two years immediately preceding institutionalization. However, I find that the documentation provided by Petitioner is insufficient to determine that Petitioner required an institutional level of care for the entire two-year period, i.e. December 2017 through December 2019. While the petitioner's personal physician, Dr. Swidrick, testified at the hearing that Petitioner required assistance with many daily tasks during the time period in question, no contemporaneous medical records or other supporting documentation showing Petitioner's care needs during the applicable period was presented. The certifications from other physicians that were provided as evidence post-dated Petitioner's institutionalization, and the only medical records provided during the applicable period were the results of a CT scan and follow up exam that took place at the end of November 2019, the month prior to Petitioner being admitted to her nursing facility. Dr. Chinnici then reviewed the results of the CT scan over two years after the test occurred and made findings related to Petitioner's medical needs up to five years preceding the test. P-3. Dr. Chinnici did not testify to explain these findings. While Dr. Chinnici stated that he "performed a detailed review of her previous admission, hospital notes, consults and home care planning," none of these documents were provided to show what they indicated about Petitioner's care needs, and it is unclear when these records were made or if they covered the period at issue. No other contemporaneous documentation was provided to show Petitioner's level of care needs to confirm that she needed an institutional level of care for the two years preceding institutionalization. I note that Petitioner's care needs at or post-institutionalization are not germane to the exemption.

Accordingly, I hereby REVERSE the Initial Decision, and I FIND the record does not support a finding that the level of care spanned the full two-year period as required by the law. As such, the matter is REMANDED to allow for further development of the record and

findings related to Petitioner's care needs. On remand, Petitioner should provide additional documentation demonstrating her care needs during the period of December 2017 through December 2019. In particular, Petitioner should, if possible, produce contemporaneous medical records that support Dr. Swidrick's testimony and Dr. Chinnici's review. As an alternative or supplement to contemporaneous medical records, additional testimony from Petitioner's physicians and/or from other health care providers with first-hand knowledge of Petitioner's specific care needs during the applicable period of time may also be explored. Testimony from other individuals with first-hand knowledge of the petitioner's condition during December 2017 to December 2019 may also be relevant. Based upon the additional documentation and testimony provided, findings should be made regarding whether Petitioner met the level of care for institutionalization for the full two-year period.

Thus, based on the record before me and for the reasons enumerated above, I hereby REVERSE the Initial Decision and REMAND the matter to OAL for further development of the record.

THEREFORE, it is on this 28th day of DECEMBER 2022

ORDERED:

That the Initial Decision is hereby REVERSED; and

That the matter is REMANDED as set forth herein.

Gregory Woods

OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services