

September 18, 2022, Petitioner inherited the property. P-2. Petitioner was admitted to the assisted living facility nine days after his passing, on September 27, 2022. Exhibit A. Petitioner, through her attorney, filed a Medicaid application on January 12, 2023. ID at 3. The cover letter submitted by Rothkoff Law Group stated that Petitioner had been private paying. Exhibit B. It went on to say that after Petitioner was admitted to the facility, she sold her property and received \$206,817.95 on November 25, 2022. Ibid. The cover letter also stated that Petitioner subsequently transferred cash to her nephew, D.S. Ibid. The cover letter concluded by stating, "These cash transfers total \$221,276.64 divided by the Medicaid penalty divisor of \$374.39 results in a penalty of 591 days. The penalty would run from 12/01/2022, when [Petitioner] was otherwise eligible through 07/14/2024." Ibid. By letter dated March 21, 2023, Burlington County issued a notice of denial letter to Petitioner with the stated reason as Petitioner had excess resources. Exhibit C. This denial letter stated, "[Petitioner] entered into an Assisted Living facility in 09/2022 with a 2 year self-pay agreement ... She clearly still either has access to the transferred resources or a third party will be using them, to satisfy her 2 year contractual obligation to the facility." Ibid. On April 6, 2023, counsel for Petitioner requested a fair hearing on the basis that Petitioner was clinically and financially eligible at the time the Medicaid application was filed. Exhibit D. In the months following the denial of Petitioner's application, there was communication between counsel for Petitioner and counsel for Burlington County about Petitioner obtaining a waiver from the facility that stated there was not a 2-year contract obligating Petitioner to private-pay. Exhibit E. On August 3, 2023, counsel for Petitioner provided Burlington County a waiver from the facility that stated there was no required period of private payment. Exhibit F. On August 23, 2023, counsel for Burlington County informed Petitioner that Burlington County was still denying the application. Exhibit I.

In the Initial Decision, the Administrative Law Judge (ALJ) concluded that there were no genuine issues as to any material fact challenged and that the matter was ripe for summary decision. ID at 5. The ALJ went on to conclude that Petitioner still had access to the transferred funds to pay the assisted-living facility during the self-pay agreement and therefore Burlington County properly denied the application with no penalty assessed. ID at 6. To support this conclusion, the ALJ stated that both the cover letter and the admissions record (R-3) stated Petitioner was in a private pay situation and since “both the petitioner and the facility indicated that the applicant would be privately paying during the penalty period, this meant that D.S. – a third party – would be using the funds transferred to him by petitioner to privately pay for assisted living during a Medicaid penalty period.” Ibid. The Initial Decision denied Petitioner’s motion for summary decision and granted Burlington County’s cross-motion for summary decision and affirmed the denial of Medicaid eligibility. ID at 7.

On March 28, 2024, Petitioner filed exceptions to the Initial Decision which stated that:

1. Judge Rabin erred in not acknowledging that Petitioner did not have a two-year private pay requirement for assisted living, nor any private pay requirement, pursuant to the letter from Cambridge Enhanced Senior Living, dated August 2, 2023.
2. Judge Rabin erred, due to his failure to consider the lack of a private pay requirement, the premise of the initial Medicaid denial is faulty. Judge Rabin failed to make reference to this important fact and therefore it is an error of law. Absent the two-year private payment agreement, Medicaid eligibility should be granted “but for” the gifted funds.
3. Judge Rabin erred in his analysis of the assisted living “Face Sheet” referred to by Judge Rabin and provided by respondent as R-3. The Face Sheet simply indicated whether the resident is immediately eligible

for Medicaid or not upon occupancy. Judge Rabin erred in his reliance on the language of the Face Sheet.

4. Judge Rabin states under "Factual Discussion and Findings of Fact" that "S.S. was admitted to Cambridge in or around March 2023...", however S.S. was initially admitted on September 27, 2022, per the above referenced "Face Sheet" provided by respondent as R-3.

Medicaid is a federally-created, state-implemented program designed, in broad terms, to ensure that qualified people who cannot afford necessary medical care are able to obtain it. See 42 U.S.C.A. § 1396, et seq., Title XIX of the Social Security Act ("Medicaid Statute"). The overarching purpose of the Medicaid program is to provide benefits to qualified persons "whose income and resources are insufficient to meet the cost of necessary medical services." 42 U.S.C.A. § 1396-1. It "is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." Atkins v. Rivera, 477 U.S. 154, 156 (1986). Pursuant to N.J.A.C. 10:71-4.1(b) Resources defined: For the purpose of this program a resource shall be defined as any real or personal property which is owned by the applicant (or by those persons whose resources are deemed available to him or her, as described in N.J.A.C. 10:71-4.6) and which could be converted to cash to be used for his or her support and maintenance. Both liquid and non-liquid resources shall be considered in the determination of eligibility, unless such resources are specifically excluded under the provisions of N.J.A.C. 10:71-4.4(b). In order to be considered in the determination of eligibility, a resource must be "available." A resource shall be considered available to an individual when: (1) The person has the right, authority or power to liquidate real or personal property or his or her share of it; (2) Resources have been deemed available to the applicant. N.J.A.C. 10:71-4.4(c).

There is a type of financial planning used by some applicants commonly called "half-a-loaf," where a Medicaid applicant gifts around half of their assets while using the remaining assets to pay for care during the transfer penalty. The Deficit Reduction Act of 2005 specifically sought to put an end to this planning by delaying the transfer penalty until the applicant was otherwise eligible for Medicaid. See N.M. v. Div. of Med. Assist. & Health Servs., 405 N.J. Super. 353, 362-63 (App. Div.), certif. denied, 199 N.J. 517 (2009) (explaining the Congressional intent behind the enactment of the DRA). See also Congressional Record: November 2, 2005 (House), 109th Congress (Representative Eric Cantor stating the DRA will allow us "to root out the asset transfer fraud that is going on ... which essentially allows those who could otherwise afford to pay for their health care services to become wards of the State"). To that end, the penalty commences only when individual becomes Medicaid eligible and would be receiving institutional level of services covered by Medicaid but for the penalty period. See 42 U.S.C.A 1396p(c)(1)(d)(i).

Since the DRA, applicants and their advisors have sought to resurrect the "half-a-loaf" Medicaid scheme. One such scheme was proffered with similar but more formal arrangements where some assets are transferred to family members to start a penalty period. The remaining assets were then transferred to a family member under the guise of a promissory note. The note would pay for the applicant's care when the penalty was imposed. Those notes have been determined to be available resources for purposes of Medicaid. E.g., Sable v. Velez, No. 10-4647 (3rd Cir. July 12, 2011), Wesner v. Velez, 2010 169674 (D.N.J. 2010), F.P. v. DMAHS and Ocean County, OAL DKT. NO. HMA 2081-10, A.W. v. DMAHS and Union County, OAL DKT. NO. HMA 9286-09.

Here, the Initial Decision surmises that Petitioner either has access to the transferred resources, or a third party will be using them, to satisfy the obligation to the facility. While we cannot predict the future to know how, or if, Petitioner's stay is going to

be paid during the penalty period, we can look at how Petitioner's bill had been paid after the funds were transferred to her nephew. It is important to note that the cash transfer to Petitioner's nephew occurred after Petitioner had been residing at the assisted living facility and understood she was in a private-pay situation. It would be against her self-interest for Petitioner to transfer such a large amount of cash that could have been used to pay for her to stay at the facility, unless her nephew had agreed to use those funds to pay until Petitioner was approved by Medicaid. According to Burlington County, if Petitioner transferred the funds to her nephew so that she could qualify for Medicaid and then private-pay during the penalty period, Petitioner/her family would be able to retain \$72,330.56 of the \$241,259.82 in transferred funds. The only indication that such an agreement was made would be evidenced by a formal contract between Petitioner and her nephew, or proof that Petitioner's nephew was paying for Petitioner's stay at the facility.

I FIND that the record does not support the Initial Decision's conclusion that there are no genuine issues as to any material fact. I further FIND that there was no evidence presented to conclude that there was an agreement between Petitioner and her nephew indicating that Petitioner still had access to the transferred funds. The denial letter issued by Burlington County states that there was a two-year private pay agreement with the facility, which Petitioner denied existed. On remand, this issue must be clarified and Burlington County should provide any evidence that such an agreement exists. Additionally, testimony should be taken to determine whether any agreement exists between Petitioner and her nephew. Lastly, a payment ledger should be obtained from Cambridge Assisted Living to determine how Petitioner's bill was paid both prior to and after the transfer of funds to her nephew.

Accordingly, based on the record before me and for the reasons set forth above, 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.

THEREFORE, it is on this 18th day of JUNE, 2024

ORDERED:

That the Initial Decision is hereby REVERSED and REMANDED.



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