

improvements were done for his benefit and not for the purpose of qualifying for Medicaid eligibility. Hudson County Board of Social Services (HCBSS) determined otherwise and included the amount in its calculation of a transfer penalty against Petitioner.

For the reasons that follow I hereby ADOPT IN PART and REVERSE IN PART the Initial Decision and RETURN the matter to Hudson County for further findings regarding the issues surrounding the record.

In 1997, Petitioner and his wife became joint tenants with their son, C.B., in the Property. Petitioner resided in the second floor apartment and his son resided on the first floor. In 2007, Petitioner's wife passed away leaving Petitioner and his son as co-owners of the Property. As his health declined, the decision was made to move Petitioner to the first floor. (ID at 4; Exhibit L). Beginning in May 2012, Petitioner contracted for more than \$100,000 worth of improvements to be made to the entire property. By deed dated July 16, 2012, Petitioner and his son extinguished the joint tenancy (the Deed). The Property was conveyed to C.B. with Petitioner retaining a life estate. Petitioner was institutionalized on December 19, 2012. Petitioner applied for Medicaid assistance under the Medically Needy Long Term Care Program requesting an effective date of February 1, 2013. On August 23, 2013, Petitioner's application was denied.

Just prior to the execution of the Deed and during the eight months before being institutionalized, Petitioner entered into several contracts, through his son as Power of Attorney, for major improvements to the Property. (ID at 5). In determining Medicaid eligibility for someone seeking institutionalized benefits, the counties must review five years of financial history. During that time period, a resource cannot be transferred or disposed of for less than fair market value. 42 U.S.C.A. § 1396p(c)(1); see also

N.J.A.C. 10:71-4.10(a). If such a transfer occurs, the applicant will be subject to a period of Medicaid ineligibility to be imposed once the person is otherwise eligible for Medicaid benefits. N.J.S.A. 30:4D-3(i)(15)(b). 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). It is Petitioner's burden to rebut this presumption.

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. A traumatic onset of disability may indicate that the transfer was for some other purpose. N.J.A.C. 10:71-10(j)1.i. Petitioner asserts that his fall in December 2012 was a traumatic injury that he did not anticipate precluding his return to the Property.

There is no evidence of traumatic onset in this matter. Petitioner had a history of illness dating back to the 1990's, and had fallen several times since 2008. In September 2009, Petitioner and his son felt it necessary to enter into a caregiver agreement whereby C.B. agreed to provide daily care for Petitioner and Petitioner agreed to compensate C.B. at a rate of \$18.00 per hour. On or about June 15, 2012, Petitioner was diagnosed with spinal stenosis complicated by arthritis, rendering him unable to walk and requiring twenty-four hour care. Petitioner's medical history and the existence of the caregiver agreement belie the proposition that Petitioner's December 2012 fall was unexpected or traumatic.

Furthermore, the record includes a copy of the caregiver agreement, caregiver certification and health care provider certifications presumably to establish a caregiver exemption with regard to the transfer of the Property pursuant to N.J.A.C. 10:71-4.7(d)(4). Yet, the recorded deed identifies C.B. as holding only a future interest, with no

right of enjoyment or possession, subject to Petitioner's life estate. It appears that C.B. is seeking triple compensation for the same conduct under the Medicaid transfer rules. He seeks an hourly rate for the care he rendered to Petitioner pursuant to the caregiver agreement. He seeks to avoid penalty on the remainderman value by claiming a caregiver exemption; and he seeks to avoid any penalty levied for improvements to the home, otherwise assessed in a caregiver transfer, by claiming Petitioner, as life tenant, was solely responsible for improvements to the Property, including those that began prior to the life tenancy.

The record before me is silent as to the facts surrounding the caregiver agreement. While such an agreement is a device to transfer excess resources from parent to child, it may not require a penalty if the terms reflect fair market value for services provided. There is no supporting documentation that \$18.00 per hour constituted fair market value for the services provided. Additionally, it seems contradictory that Petitioner, as co-owner of the Property, would have to contract for a private bedroom in his own house. Most concerning, however, is Section 11 which allows C.B. to unilaterally change the rate of the compensation agreed upon by the parties. The record contains no support as to how the caregiver rate was calculated or that Petitioner received services commensurate in scope and prevailing market rate for the caregiver services.

Petitioner also claims that he is entitled to a caregiver exemption with regard to the transfer of the Property. N.J.A.C.10:71-4.10(d). This would require proof that Petitioner needed a nursing home level of care for two years prior to the transfer of the Property. As the Deed was recorded in July 2012, he would have needed a nursing home level of care since 2010 to qualify for the exemption. That said, Petitioner's son cannot receive compensation for caring for his father pursuant to the caregiver

agreement and then again be compensated for the same services through the transfer of the Property pursuant to caregiver exemption.

The clearest manifestation of Petitioner's intent to convey the Property is the Deed recorded with the Hudson County Register's Office that conveys the Property to C.B. with a life estate retained for Petitioner. Petitioner is a life tenant and responsible for maintaining the property in the condition in which the property was in when the life estate began. Bergen County Trust Co. v. Kingsland, 18 N.J. Super. 223 (1952). Petitioner is not responsible for major repairs to the property. Savings Investment & Trust Co. v. Little, 135 N.J. Eq. 546 (1944). A life tenant must make such ordinary repairs as are necessary to preserve the property from decay. He is not bound to expend extraordinary sums for that purpose. Id. at 550 and 551. The need for these repairs did not happen overnight. By C.B.'s own admission, nothing had been done to the Property since 1960, and the roof had been leaking since 2007. (ID at 5). As co-owners of the Property since 1997, Petitioner and C.B. must have contemplated the need for repairs prior to July 2012 and the recording of the Deed.

Furthermore, as the ALJ correctly noted, a life estate owner is permitted to maintain their premises, but that right does not supersede the Medicaid eligibility requirements. Burlington County Trust Co. v. Kingsland, supra at 233. I am not convinced that Petitioner met his burden to establish that these transfers were not made for the purpose of qualifying for Medicaid. In addition, a life estate may result in a transfer penalty for the remainder interest in the property. State Medicaid Manual §3258.9. As there is evidence of a life estate here, the value of the home would be needed in order to determine the value of the remainder interest in the Property.

THEREFORE, it is on this 9th day of AUGUST 2014

ORDERED:

That the Initial Decision in this matter is hereby ADOPTED in so much as Petitioner failed to rebut the presumption regarding \$17,322 of the transferred assets;

That the Initial Decision is hereby REVERSED in that record does not support that Petitioner rebutted the presumption that the remaining \$112,291.90 transfers were done to qualify for Medicaid; and

Since Petitioner cannot be compensated twice for the same services under both the caregiver agreement and the caregiver exemption, the matter is RETURNED to Hudson County for investigation regarding the issues surrounding the Deed; specifically, proofs that expenditures were necessary to maintain the Property in the condition it was in when the life estate began on July 16, 2012 and to assess the value of the remainder interest in accordance with State Medicaid Manual § 3258.9.



Valerie Harr, Director
Division of Medical Assistance
and Health Services