



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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Director

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

T.W.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES AND
PASSAIC COUNTY BOARD OF
SOCIAL SERVICES,
RESPONDENTS.

ADMINISTRATIVE ACTION

ORDER OF REMAND

OAL DKT. NO. HMA 6752-2016

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. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is February 17, 2017 in accordance with an Order of Extension.

The matter arises regarding Petitioner's transfer of assets during the lookback period. Petitioner applied for Medicaid benefits in January 2016. By notice dated April

13, 2016, Petitioner was assessed a transfer penalty of \$14,863 which Petitioner does not contest. It appears the Petitioner also requested to be pre-approved for an exemption from the transfer penalty for transferring his house to his son. At the time of the notice, Petitioner was not residing in a nursing home. He would only enter the Preakness Health Care Center sometime in May 2016. The deed, signed by his Power of Attorney, was not executed until June 27, 2016. P-1.

The Initial Decision found that Petitioner's June 2016 transfer of his home met the caregiver exemption. Based on the record before me, I hereby REVERSE and REMAND the Initial Decision.

I do not find that the record or the law supports the finding that the June 2016 transfer of the home his son meets the requirements of a caregiver exemption. The purpose of the caregiver exemption is to compensate a son or daughter who has provided care to such an extent that the applicant remained in the community and not receiving institutionalized based services from Medicaid for at least two years.

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 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. Compare 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 that prevented institutionalization for at least two years, the transfer is exempt from

penalty. 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 he is entitled to the exemption.

Recently the Appellate Division reviewed the caregiver exemption and 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 was 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 M.K., the court had "no doubt [the daughter] extended love and care to her mother that added to M.K.'s comfort, welfare and happiness during those years when she was living in her own home, despite significant medical challenges". M.K., Slip op. at 17. However, during the two years prior to entering a nursing home, M.K. moved in with her son for a period of five months. The court found that as "'Medicaid is an intensely regulated program' H.K., supra, 184 N.J. at 380, and its requirements are strictly enforced;" a five month break in "the mandated two-year time period for care" meant that the caregiver exemption had not been met. M.K., Slip op. at 15.

In another case, the Appellate Division also determined that an individual, receiving caregiving services paid for by Medicaid, cannot transfer her home to her daughter under the exemption. "Although appellant cared for her mother during the relevant time period, the key factor that permitted G.B. to remain in her home until 2009 was the Medicaid assistance she received through the services provided by the

[Medicaid program].” Estate of G.B. (deceased) by M.B.-M., as Executor v. DMAHS and Somerset County Board of Social Services, Docket No. A-5086-12T1, decided September 15, 2015, slip op. at 8. In that case, G.B. received 30 hours of caregiving services a week under a Medicaid waiver program that permitted her to remain at home. Id. at 7. Despite the finding by the ALJ that the daughter “tended her mother in decline for many years, and assisted her mother in avoiding institutionalization,” the Appellate Division upheld the Final Agency Decision that overturned that finding and held that G.B. was not entitled to a caregiver exemption. Id. at 5

The purpose of the caregiver exemption is to compensate a child who kept her parent out of a nursing facility for at least two years, but in this case, someone paid for aides to care for Petitioner for eight hours during the day. Like the daughter in G.B., Petitioner’s son did tend to him. However, it appears that the purchase of caregiving services through a licensed agency permitted Petitioner to remain in his house. This record is silent on who paid for these services. However, Petitioner’s son testified that he made \$12,793 in 2015 so paying \$900 a week for Petitioner’s care would be nearly impossible. P-1. Thus, the matter shall be remanded for further findings on the payment source of these services.

Additionally, the record contains no explanation as to why Petitioner sought out his doctor to complete a form letter and a PA-4 form a year before he entered the nursing home. The form letter is dated May 8, 2015 and was prepared to request a caregiver exemption to the transfer penalty. R-1. The PA-4 is used “by the attending physician for individuals seeking long term care services including Medicaid home and community based program.” See http://www.state.nj.us/humanservices/doas/forms/pa-4_instr.pdf. As such, the doctor’s note does not address the services provided by

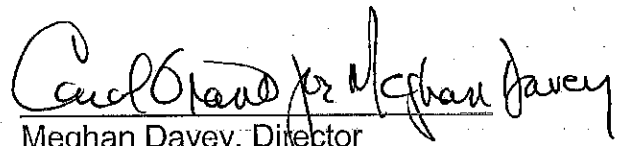
Assisting Hands in Wayne to Petitioner beginning in July 2015. Normally, a caregiver service provides a plan of care for the patient in conjunction with his or her physician. I am troubled by the son's statement that the "all the nurses [did was] babysit him." P-1 at 5. Paying the agency over \$900 a week should entail more than babysitting and if Petitioner was sleeping during the day, it would have made sense to provide the care when he was awake in the evening. To that end, the agency services raise questions regarding the extent to which Petitioner's son provided the care for the full two years prior to institutionalization and if Petitioner himself paid for the care necessary to keep him out of the nursing home. Those issues should be addressed through the remand.

THEREFORE, it is on this ^{17th} day of FEBRUARY 2017,

ORDERED:

That the Initial Decision is hereby REVERSED with regard to caregiver exemption; and

That the matter is REMANDED to OAL for further findings and testimony regarding the home health aide services provided to Petitioner as well as the source of payments for that care.


Meghan Davey, Director
Division of Medical Assistance
and Health Services