



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

V.V.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE

AND HEALTH SERVICES AND

BERGEN COUNTY BOARD OF

SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 3183-2016

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 in this matter. No exceptions were filed. Procedurally, the time period for the Agency Head to file a Final Agency Decision is March 16, 2017 in accordance with an Order of Extension.

This matter concerns the imposition of a transfer penalty. Petitioner applied in August 2015 and was found otherwise eligible as of August 1, 2015. Bergen County imposed a transfer penalty of 37 months and 5 days due to her transfer of her home to her daughter in January 2014. Petitioner's representative at the time requested a fair hearing claiming that the transfer was exempt.

At the hearing, the record was developed to show that Petitioner, with assistance of counsel, had transferred the home to her daughter on January 7, 2010. At that time, Petitioner lived alone although her daughter would move in later that year. That deed was recorded on January 21, 2010.

In November 2013, Petitioner entered a nursing home and sought counsel of another elder care attorney. It is estimated that she had assets worth \$200,000. On January 9, 2014, Petitioner's daughter transferred the home back to Petitioner. After filing that deed on January 14, 2014, Petitioner's daughter, acting through her authority as Power of Attorney, transferred the home back to herself.

In addition to arguing that the 2014 transfer was exempt under the caregiver exemption, Petitioner also claimed that the 2010 transfer should be recognized as the only legitimate transfer of the property. The Initial Decision considered both arguments and found that the 2010 deed was controlling in this matter and since it was outside the lookback period was not a transfer. In the alternative, the Initial Decision found that Petitioner had met her burden to demonstrate that the transfer met the caregiver exemption. For the reasons that follow, I hereby ADOPT in part and REVERSE in part the Initial Decision.

By way of background, the transfer penalty statute was amended by the Deficit Reduction Act of 2005 ("DRA"). See 42 U.S.C.A. § 1396p(c). Congress made the

penalty for transfers harsher by extending the look back period from thirty-six to sixty months for asset transfers occurring after the date of enactment and making other changes to prevent those with assets from gaining eligibility. In addition, Congress modified the statute so that the transfer penalty begins the later of the first day of the month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance and would be receiving institutional level of services but for the penalty period. 42 U.S.C.A. § 1396p(c)(1)(D)(ii).

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). See also 42 U.S.C.A. § 1396p(c)(2)(A)(iv). 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). 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.

First of all, I do not find that the record supports the finding that Petitioner met the burden to demonstrate caregiver exemption. The two year time period at issue is November 2011 through November 2013, whereupon Petitioner entered the nursing

facility. As the ALJ pointed out, the only medical documentation in the record is suspect. ID at 12. The dates next to the physician's signature on the two documents reflect December 1, 2009 and December 21, 2013. R-1 at 28-30. The documents appear to have been drafted at the same time but no cogent explanation was given for the difference in dates on the documents. The Initial Decision also questioned the signatures on the documents as they did not seem to match the typed name. Additionally, the document dated December 21, 2013 was purportedly faxed by her prior lawyer on December 12, 2013, nine days before it was signed. Neither Petitioner's daughter nor her current attorney offered an explanation as to the discrepancies in the dates or identified the signature.

Had Petitioner only argued the caregiver exemption, the record simply does not contain any competent medical evidence of Petitioner's condition from November 2011 to November 2013 and the penalty would be upheld. However, Petitioner also presented a deed from January 2010 that stands outside of the five year look back period. The daughter testified that she made the 2014 transfers based on advice from an attorney. ID at 14. The total time that Petitioner owned the home in 2014 was 18 days. Nothing in the record explains why the 2014 transfer occurred. With around \$200,000 in savings as of November 2013, Petitioner could pay privately beyond the fourteen months needed to overcome the five year lookback. ID at 7.

The ALJ found that "the circumstances specific to this case" concerning the "inexplicable transfer [in 2014] back and forth" were sufficient to conclude that those transfers should be voided. ID at 14. When viewed in the light of problems with the medical documentation as well as the daughter's testimony surrounding the creation of the deeds, I agree that these deeds were unnecessary. The 2010 deed should be

considered as the only valid transfer and, since it is outside the lookback period, would not create a penalty period.


THEREFORE, it is on this 15<sup>th</sup> day of MARCH 2017,

ORDERED:

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

That the Initial Decision is hereby ADOPTED with regard to the 2010 deed.

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Meghan Davey, Director  
Division of Medical Assistance  
and Health Services