

This matter arises from the Monmouth County Board of Social Services (MCBSS) October 26, 2017 denial of Petitioner's Medicaid application for failure to provide information necessary to determine eligibility. On May 14, 2016, Petitioner was admitted to Neptune Gardens Rehabilitation and Healthcare Center (Neptune Gardens). On January 11, 2017, Petitioner appointed Neptune Gardens' Financial Coordinator Kathy Durney as his Medicaid Designated Authorized Representative (DAR). On July 21, 2017, Petitioner, through Durney, filed a Medicaid application with MCBSS. On July 26, August 16, August 23, September 11 and October 12, 2017, MCBSS sent requests for information to Durney. Durney fulfilled MCBSS' request with the exception of the request for information regarding Petitioner's ex-wife's 401K.¹ On October 20, 2017, Petitioner passed away. On October 23, 2017, Cowart Dizzia, asserting their authority as representative of "Neptune Gardens with regard to its Medicaid reimbursement needs and in its capacity as DAR for Petitioner," requested a spousal waiver.² On October 26, 2019, MCBSS denied Petitioner's Medicaid application for failure to provide information necessary to determine Medicaid eligibility. On November 13, 2017, Durney, not Cowart Dizzia, requested a fair hearing by providing a copy of the denial letter and the January 11, 2017 DAR. On November 14, 2017, the matter was transmitted to the Office of Administrative Law (OAL). The transmittal does not reflect that Petitioner had died a month prior.

On January 22, 2018, Lycette Nelson of Cowart Dizzia wrote to the OAL to address a procedural issue. She identified her clients as "Kathy Durney and the Neptune Gardens in relation to Medicaid reimbursement matters." Thereafter, the matter was reopened. On April 5, 2018, Nelson again wrote to the OAL, identifying her clients as "Kathy Durney and the Neptune Gardens Nursing Home." She disclosed to the OAL that Petitioner was deceased and requested an adjournment because the family was considering opening an

¹ The Final Judgment of Divorce states that the parties have "candidly and fully disclosed to the other all of their income, assets and liabilities..."

² The ALJ accepted a handwritten notation on the undated letter which suggests that the letter was dated prior to Petitioner's passing. However, Exhibit G shows that an unfinished version of the letter was faxed to MCBSS on October 23, 2019. It is hard to imagine a situation where an unfinished letter would be sent after a completed version of the same letter.

estate for Petitioner. MCBSS objected to the adjournment and raised the issue of standing. The adjournment was granted and the issue of standing went unaddressed.

On July 3, 2018, eight months after Petitioner's passing, Nelson requested a 90 day adjournment to allow for sufficient time to obtain Petitioner's death certificate. In this communication, she identified her client as "the Plaintiff, Neptune Gardens."

On or about October 19, 2018, a year after Petitioner's death, Nelson requested another adjournment. MCBSS again pointed out to the OAL that the Petitioner was deceased. On October 22, 2018, Neptune Gardens sought to compel Neptune City to provide them with a death certificate so an estate could be opened. In support of their motion, the verified complaint states that "Neptune Gardens has standing as the creditor of Petitioner, who was a resident of Neptune Gardens from July 7, 2017 until his death, October 20, 2017."

On January 24, 2019, Cowart Dizzia, representing "Neptune Gardens...with respect to its Medical Assistance eligibility and reimbursement needs and, specifically, in connection with Gregory Campbell...", requested another three month adjournment stating that they were in the process of opening an estate.³ On May 7, 2019, Cowart Dizzia, representing "Deptford Center for Rehabilitation and Nursing with regards to its reimbursement rights...", requested another adjournment as they were in the final stages of opening an estate. On May 8, 2019, MCBSS again objected to the adjournment.⁴

On June 19, 2019, Cowart Dizzia, "representing Neptune Gardens," requested another adjournment as they were in the "final stages of the process of opening an estate for Petitioner..." On July 9, 2019, Cowart Dizzia, "representing Neptune Gardens," requested another adjournment as they were in the "final stages of the process of opening an estate for Petitioner..." On August 23, 2019, nearly two years after Petitioner's death and MCBSS' denial, a hearing was held at the OAL wherein the ALJ decided whether or not Petitioner was entitled to a spousal waiver. The issue of standing was not addressed.

³ At this time representation changed from Nelson to Carrie Ann Levine, Esq.

⁴ Respondent's letter to the ALJ notes that this was Petitioner's 7th request for adjournment.

There are several issues stemming from Petitioner's death that need to be addressed before determining whether or not MCBSS' denial of Petitioner's Medicaid application was appropriate; namely, whether or not the DAR expired upon the death of Petitioner? In the past eight months, the Appellate Division has remanded two cases to the OAL for a determination with regard to a DAR's standing after a Medicaid applicant has passed away. Additionally, there is an unreported Appellate Division case decided chronologically in between the cases. In that case, the Medicaid applicant had also died and the court analogized the DAR with a limited power of attorney which expires on death. See N.J.S.A. 46:2B-8.5(a). M.F. v. Division of Med. Assistance & Health Servs., Dkt No. A-2254-17T2, 2019 N.J. Super. Unpub. LEXIS 733, April 1, 2019.

The federal rules on appointing an authorized representative acknowledge that changes in legal authority will invalidate such appointment. 42 C.F.R. § 435.923(c) states: "[t]he power to act as an authorized representative is valid until the applicant or beneficiary modifies the authorization or notifies the agency that the representative is no longer authorized to act on his or her behalf, or the authorized representative informs the agency that he or she no longer is acting in such capacity, or there is a change in the legal authority upon which the individual or organization's authority was based." Petitioner's death changes the legal authority upon which the DAR's authority is based and raises questions about whether the DAR had standing to request a fair hearing or represent Petitioner much less retain an attorney to represent him, an authority that is not contained in the DAR form.

Moreover, by the clear terms of the Federal regulation and the express language of the form, DAR appointments must be voluntary and revocable. Petitioner's death would render Durney's appointment irrevocable, a position rejected by the Appellate Division in and the federal regulations. See E.B. v. Div. of Med. Assistance & Health Servs., 431 N.J. Super. 183 (App. Div. 2013) and 42 C.F.R. § 435.923(c). The change in legal authority requires that Petitioner's executor or administrator now grant authority to permit Durney or

some other representative to continue representation. See E.B. supra at fn. 16. To this end, I hereby REVERSE the Initial Decision and REMAND the matter to OAL for further findings consistent with the discussion above which must be determined prior to any decision on the denial of benefits.

Should the ALJ determine that a DAR did not expire upon the death of Petitioner, there is the issue of representation. Does Petitioner's designation of Kathy Durney as DAR extend to Neptune Gardens as a corporation? Further, although not specified in the DAR form, does Petitioner's designation of Kathy Durney permit her to hire counsel on his behalf, and did she retain Cowart Dizzia on behalf of Petitioner, personally as the applicant? If not, who retained Cowart Dizzia's services with regard to this matter? If so, was there a conflict of interest in hiring counsel that represented both the creditor (Durney's employer Neptune Gardens) and the creditor's debtor, Petitioner? Cowart Dizzia clearly and repeatedly states that it represents the financial interests of Neptune Gardens with regard to Petitioner. It is not clear that they represent Petitioner.

Finally, if the DAR survives Petitioner's death and it is suitable to delay the fair hearing pending the possible appointment of an Administrator of Petitioner's estate, does representation extend to Cowart Dizzia? Here, the Monmouth County Surrogate appointed Carol Goloff as Administrator of Petitioner's estate two years after the case was transmitted to the OAL. In turn, she appointed Vivian Toro of Neptune Garden's as Petitioner's DAR. There is no indication that Goloff authorized the hiring of Cowart Dizzia to represent Petitioner. Yet, Cowart Dizzia, who from the beginning represented Neptune Gardens' financial interests in the matter, appeared at the hearing as Petitioner's representative. If Goloff did not retain Cowart Dizzia in this matter, is their representation of Petitioner, however attenuated, appropriate?

To this end, I hereby REVERSE the Initial Decision and REMAND the matter to OAL for further findings consistent with the discussion above which must be determined prior to any decision on the denial of benefits.

THEREFORE, it is on this ^{13th} day of NOVEMBER 2019,

ORDERED:

That the Initial Decision is hereby REVERSED; and

That the matter is REMANDED to OAL for further findings as set forth above.

A handwritten signature in black ink, appearing to read "Jennifer Langer Jacobs", written in a cursive style.

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