State of New Jersey
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
PO BOX 712
TRENTON, NJ 08625-0712

PHILIP D. MURPHY
*Governor*

SHEILA Y. OLIVER
*Lt. Governor*

CAROLE JOHNSON
*Commissioner*

CAROL GRANT
*Acting Director*

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

M.M.,

PETITIONER,

v.

MONMOUTH COUNTY BOARD OF SOCIAL SERVICES,

RESPONDENTS.

**ADMINISTRATIVE ACTION**

**FINAL AGENCY DECISION**

**OAL DKT. NO. HMA 12202-18**

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 in evidence. Petitioner filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is June 17, 2019 in accordance with N.J.S.A. 52:14B-10 which requires an Agency Head to adopt, reject, or modify the Initial Decision within 45 days of receipt. The Initial Decision in this matter was received on May 2, 2019.

This matter arises from the Monmouth County Board of Social Services' (MCBSS)

imposition of a 1,170 day transfer penalty in connection with Petitioner's transfer of her one-third ownership interest in her home to her son, and power of attorney (POA), A.M during the look back period. Based upon my review of the record, I hereby ADOPT in part and REVERSE in part the findings of the Administrative Law Judge.

Petitioner is eighty-four years old and has Alzheimer's disease. In October 2014, she moved into a long-term-care facility. Prior to this, Petitioner resided in her home with her son. Petitioner was the sole owner of the home until August 2003 when she transferred one-third interest in the home to her son, A.M. and one third interest to her daughter, C.F. Petitioner retained a one-third interest and a life estate in the property until September 2014. On September 30, 2014, Petitioner transferred her remaining one-third interest in the home to her son, A.M. On April 3, 2018, A.M., as POA, applied for Medicaid benefits on Petitioner's behalf.[1]

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). 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.[2] N.J.A.C. 10:71-4.10 (c). 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 overcome the presumption that the transfer was done – even in part – to establish Medicaid.

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[1] This is Petitioner's second Medicaid application. No appeal was taken regarding the first application which was filed on October 2, 2017.

[2] Congress understands that applicants and their families contemplate positioning assets to achieve Medicaid benefits long before ever applying. To that end, Congress extended the lookback period from three years to five years. Deficit Reduction Act of 2005, P.L. 109-171, § 6011 (Feb. 8, 2006).

Petitioner's July 30, 2018 request for an undue hardship exception calls into question Petitioner's motivations for the transfer at issue. N.J.A.C. 10:71-4.10q(1)(i) provides that undue hardship exists when a transfer penalty "would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered" and when "the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred." Not only does Petitioner's request not meet these requirements, but it suggests that the transfer was done in order to qualify for Medicaid with A.M.'s statement that "because this was done under attorney guidance, your mother cannot sue me for the return of the house." (R-3).

Nevertheless, A.M. alleges that the transfer was made under the caregiver exemption which permits transfers when a son or daughter has cared for an applicant. N.J.A.C. 10:71-4.1(d)4. 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." Id. The New Jersey regulations regarding the caregiver exemption are based on the federal statute. Compare 42 U.S.C. § 1396p(c)(2)(A)(iv), N.J.A.C. 10:71-4.7(d) 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. It is Petitioner's burden to prove that she is entitled to the exemption.

In order to demonstrate that the care rendered by A.M. exceeded the normal personal support activities, Petitioner provided medical documentation that she suffered from Alzheimer's disease, a letter from Petitioner's doctor (dated February 21, 2018) stating that A.M. was her primary caregiver, notarized statements from A.M. regarding the aides that took care of his mother and their rate of pay, and A.M.'s testimony regarding his daily routine and adjusted work schedule. MCBSS found that the information presented did not

reach the level of qualifying the transfer under the caregiver exemption. I agree.

During the time in question, A.M. worked as gym teacher at a school located forty minutes from home. While employment itself may not prohibit someone from benefiting from the caregiver exemption, A.M. must still demonstrate that he was his mother's primary caregiver and the care he provided exceeded normal personal support activities. Here, A.M. asserts that he reduced his work day from ten to twelve hours each day to four and a half hours each day. He provides no evidence that he reduced his hours so significantly. The Individual Tax Returns for 2012 and 2013 showed a $949 decrease in income from $67,482 to $66,533. This seems an insignificant decrease for such a drastic reduction in hours. Furthermore, the increases in 2014 and 2015 of $9,005 and $23,276 cannot be assumed to be the difference in full-time and part-time work without further explanation. A.M. may have become employed elsewhere or he may be receiving rental income.[3] It is interesting that A.M. would choose to rely on these tax returns rather than documentation from his employer's human resources office memorializing their agreement to change his employment status from full-time to part-time.

There is nothing in the record to support a finding that A.M. provided the type of care that prevented Petitioner's institutionalization. The February 2018 letter from Petitioner's doctor states only that Petitioner had been suffering from Alzheimer's disease since 2011 and that A.M. was her primary caregiver. It does not state when he became Petitioner's primary caregiver or what type of caregiving services he provided. Moreover, even if we assume that A.M. reduced his work hours to care for Petitioner, aides were hired to provide her with assistance during the work day from 10:00 a.m. to 4:00 or 5:00 p.m. Doctor's notes show that the Petitioner was sleeping for ten to twelve hours per day, leaving only five or six hours each day for A.M. to care for Petitioner. The aides provided approximately seven to eight hours of care each day and were paid for with Petitioner's funds. In effect, Petitioner provided for her own care in order to remain at home and out of

[3] Schedule E was not included with A.M.'s tax returns.

the nursing facility.

Additionally, we must assume that aides were hired to care for Petitioner during the two years prior to her institutionalization. In an attempt to show that he hired aides on behalf of the Petitioner, A.M. presented only notes and his notarized statements that he hired aides at a rate of $20 per hour to care for his mother. None of the aides testified, and there are no contracts, time sheets or cancelled checks to corroborate the services performed. Furthermore, if we accept A.M.'s testimony that he woke up at 5:30 a.m. to help his mother out of bed and assist her with toileting, washing, dressing, grooming and made her breakfast, what services were the aides paid $20 per hour to perform? Petitioner must show that $20 per hour is fair market value for the home health services of an unlicensed or non-certified home health aide. N.J.A.C. 10:71-4.10(j).

I am not convinced that Petitioner met her burden to establish that these transfers were not made for the purpose of qualifying for Medicaid. After hearing the testimony of witnesses, the ALJ found all to be credible but gave more weight to A.M.'s testimony. The fact-finder's assessment of the credibility of witnesses is entitled to deference by the reviewing agency head. Clowes v. Terminix, 109 N.J. 577 (1988). However, N.J.A.C. 1:1-15.5(b), the residuum rule, requires "some legally competent evidence" to exist "to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." No such evidence was presented in this matter. A.M. could have presented very clear documentation regarding his work schedule, as well as, the type of services provided by Petitioner's aides, their rate of pay and proof of payment. He did not. I am not convinced, by the evidence presented, that A.M. met the requirements necessary to exempt the Petitioner from a transfer penalty pursuant to the caregiver exemption. On this point, I REVERSE the Administrative Law Judge's (ALJ) conclusion in the Initial Decision.

Finally, it is a long-standing principle that life estates have value. See, e.g., In re Estate of Romnes, 79 N.J. 139, 150 n.4 (1979); In re Estate of Lichtenstein, 52 N.J. 553, 563 (1968); Neiman v. Hurff, 11 N.J. 55, 62-63 (1952); Camden v. Williams, 61 N.J.L. 646,

647 (N.J. 1898). However, Petitioner received no compensation when she extinguished her life estate.

The Appellate Division has ruled on this issue and found that when the Medicaid applicant retains a life estate, there must be compensation to the life tenant when the property is sold. The failure to compensate the life tenant is a transfer of assets for Medicaid purposes. E.S. v. DMAHS, 2016 N.J. Super. Unpub. LEXIS 2389.

> Like any other interest in real estate, a life estate is created by deed, N.J.S.A. 46:3-13; see also H.K., supra, 184 N.J. at 382-83, can be freely alienated, N.J.S.A. 46:3-5, is taxable, and has value. See In re Estate of Romnes, 79 N.J. 139, 150 n.4 (1979) ("Life estates are taxable under N.J.S.A. 54:34-1 and the method of valuation is set forth in N.J.S.A. 54:36-2."). For that reason, the uncompensated transfer of a life estate warrants a transfer penalty under the law.[footnote omitted]. See In re Peterson v. Daines, 77 A.D.3d 1391, 1392 (N.Y. App. Div. 4th Dep't 2010).

The transfer of Petitioner's remaining interest in the home in September 2014 required the extinguishment of Petitioner's life estate in the entire property in order to transfer clear title to A.M. A life estate has a value based on the life tenant's age at the time of sale to a third party and results in a transfer if the life tenant is not compensated from the proceeds. See L.M. v. DMAHS and ACBSS, OAL DKT. NO. HMA 12300-06, decided March 2, 2007 (upholding the transfer penalty where the Medicaid applicant received less than the value of life estate at time of sale). Other cases have reached the same conclusion and imposed a transfer penalty when the value of the life estate is not received. See Matter of Giordano (Richard O.M.), 28 Misc. 3d 519, 2010 NY Slip Op 20190 (calculated the life estate value due a Medicaid recipient when the property is sold) and Matter of Peterson v Daines, 77 A.D.3d 1391 (N.Y. App. Div. 4th Dep't 2010) (Medicaid applicant's failure to receive life estate value when the property was sold by daughter/remainderman constitutes a transfer of assets for Medicaid purposes). For these reasons, I ADOPT the ALJ's conclusions with regard to Petitioner's life estate in the property at issue.

THEREFORE, it is on this 14th day of JUNE 2019,

ORDERED:

That the Initial Decision is hereby REVERSED with regard to the caregiver exemption as Petitioner has not established that she qualifies for the exemption; and

That the penalty imposed by MCBSS in the amount of $496,333.33 for her one third interest in the property transferred to A.M. is upheld; and

That the Initial Decision is hereby ADOPTED with regard to whether a transfer penalty applies as a result of petitioner extinguishing her life estate; and

That the matter is returned to MCBSS to determine the transfer penalty in accordance with said life estate; and

That the matter is returned to MCBSS to determine whether or not Petitioner received fair market value for the services performed by the aides that assisted her during the five year look-back period.

Carol Grant, Acting Director
Division of Medical Assistance
and Health Services