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

MEGHAN DAVEY
Director

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

N.B.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND SUSSEX COUNTY BOARD OF SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 15719-2018

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. Neither party filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is June 10, 2019 in accordance with an Order of Extension.

The matter arises regarding Petitioner's April 2018 application for Medicaid benefits. Sussex County found Petitioner eligible as of July 1, 2018 but imposed a transfer penalty of 1,089 days or until July 3, 2021. The majority of the penalty stems from the July 2016 transfer of a $333,919 annuity owned by Petitioner. Petitioner had started showing signs of

New Jersey Is An Equal Opportunity Employer • Printed on Recycled Paper and Recyclable

dementia that year and would move into an assisted living facility in September 2016. Petitioner through counsel appealed the transfer penalty claiming that it should only be assessed at $138,000. However, during the pendency of the OAL matter, her attorneys began arguing that the application should have been denied for excess resources. See Letter brief dated January 31, 2019.[1]

The Initial Decision found that Petitioner had demonstrated that transfers were either made for fair market value in the case of the annuity or not in contemplation of Medicaid in the case of the $40,000 gifted to her son and daughter or cash from 2013 through March 2018. For the reasons that follow, I hereby REVERSE the Initial Decision.

The Initial Decision found that because the annuity, notwithstanding "[a]ny communication by or on behalf of [Petitioner] to the contrary," was not transferred to her son and, since she is the sole lifetime beneficiary, the transfer of the annuity to the trust was for an equivalent asset. ID at 2 and 4. I FIND there is insufficient evidence to support either of these findings. Rather the communications from Petitioner and her attorneys clearly state that the annuity was transferred to her son.

There is a presumption that any transfer for less than fair market value during the lookback period was made for the purpose of establishing Medicaid eligibility. N.J.A.C. 10:71-4.10(i). The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility 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). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide that, "if the applicant had some other purpose for transferring the asset, but establishing Medicaid eligibility appears to have been a factor in his or her decision to

[1] It appears that on November 21, 2018 counsel informed the ALJ that he was "filing an amended application seeking the approval on a different legal basis than the first." However, Petitioner's April 2018 application has been approved so the application is duplicative and not subject to agency action.

transfer, the presumption shall not be considered successfully rebutted." N.J.A.C. 10:71-4.10(l)2.

Despite it being Petitioner's burden to rebut the presumption that the transfers were not for the purpose of qualifying for Medicaid, the record she provided is woefully scarce as to the annuity and the trust. She only provided two first pages of two separate trusts. The record contains no further pages of either document. The earlier trust is titled "Supplemental Needs Constructive Trust" and dated November 11, 2016. The later trust titled "Family Supplemental Trust" is dated March 31, 2017. R-1 at Exhibit L and Exhibit M. Both pages only contain "whereas" clauses or the purpose statement of the trust but nothing further about the terms and conditions that govern the trust or why there are two trust documents.

As such I FIND there is no evidence to support the finding that Petitioner is the "sole lifetime beneficiary" of either trust. Id at 4. The term "lifetime beneficiary" is not identified or defined on the 2016 trust's singular page and there is reference to "named members of the family of [Petitioner] (hereafter 'Lifetime Beneficiaries')" in the 2017 trust. R – 1 at Exhibit M. In that 2017 trust, the trustee has sole discretion to distribute assets "for the benefit of the Lifetime Beneficiaries as set forth herein during their lifetime." While Petitioner failed to provide the full and complete trust, the first page clearly indicates that there are multiple lifetime beneficiaries as plural nouns and pronouns are used in the document they have provided.

Additionally, there is no evidence that after Petitioner signed the July 26, 2018 letter gifting the annuity to her son "to use wisely", her son "was told that the terms of the annuity would only permit transfer of it directly into an Irrevocable Trust." Id at 2. The letter that purports to say that is from Prudential Annuities in response to an "inquiry" from Petitioner's attorney. That inquiry is not part of the record. The December 28, 2016 letter from

Prudential merely confirms that the owner of the contract can be changed to an "irrevocable non-grantor trust." Nothing in that letter states that this is the only transfer allowed.

It appears that Petitioner is recasting circumstances surrounding the transfers that are not supported by the documents she has presented. As early as the application filed in April 2018, Petitioner and her counsel sought to have a penalty applied to the transfer of the annuity allegedly worth $150,000 and "gifted to son" on July 26, 2016. This was restated in three separate letters to Sussex County from two attorneys representing Petitioner. Those letters are dated July 5, 2018, October 15, 2018 and October 19, 2018. R-1 at P and Q. The first letter clearly asserts that "[m]oneys are solely withdrawn from the annuity by [Petitioner's son] and deposited to the Trust. The money in the Trust belongs to [Petitioner's son]." The October 15 letter states that counsel is seeking a "'but for' approval with $138,000 subject to a penalty of 11.33 months" and "annuity owned by the applicant was transferred from the company to [Petitioner's son] for the purpose of a spend down on the cost of his mother's care." Finally the October 19, 2018 letter again states "[t]he facts of this application are that the applicant's ownership of the Prudential annuity in question, with a value of approximately $330,000, was transferred to her son."

In November 2018 Petitioner's attorney began to claim that the application should have been denied due to excess resources. In citing the State Medicaid Manual concerning trusts, Petitioner fails to acknowledge that the annuity was transferred to her son on July 26, 2016. The trust section does not apply. After the gift, the son then changed the annuity ownership to a trust in December 2016. The only trust in existence at the time was the "Supplemental Needs Constructive Trust" that sets Petitioner's son as the grantor and trustee. The grantor "has established and funded an account to operate as a constructive trust" and "has no intent to gift the funds to Lifetime Beneficiary" who is not identified. R-1 at L.

Rather 42 U.S.C. § 1396p(c)(2)(C) discusses transferred assets and requires that any reduction of the transferred funds is predicated on whether "[a] satisfactory showing is made to the state (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual." 42 U.S.C. § 1396p(c)(2)(C) (emphasis added). Therefore, partial returns are not permitted to modify the penalty period and, absent a return of all the assets, the penalty continues uninterrupted. Med-Com 10-06. It is clear that at the time of application, Petitioner did not receive the entire $333,919 value of the annuity back from her son.

I find no evidence Petitioner rebutted the presumption that the $40,600 transferred to her son or daughter or to cash from 2013 through March 2018 was done for a purpose other than qualifying for Medicaid. Her son's description of the transfers or Petitioner's health at the time is not supported by any competent evidence. A tax return showing receipt of a real estate commission does not reflect on Petitioner's health at the time of the first transfers in 2013. Moreover, the allegation that she transferred $25,000 to her son for divorce costs is not supported by attorney bills. A September 29, 2016 $1,200 check made out to cash must be supported by receipts to be found as a credible expense for fair market value. The other checks written by the son or daughter likewise have no supporting documentation.

Nor was the $40,000 gifted to her children during the lookback period returned to her as alleged in the July 5, 2018 letter from Petitioner's counsel. That letter states that the "previous gifts made to [Petitioner's son] of approximately $43,600, per your sheet were repaid by virtue of the $181,665 [from the trust] transferred to [Petitioner's account." The letter goes on to reassert "all of these checks were made out to [Petitioner's son] and/or

cash and or [daughter], which total $43,000, return of those funds have been completed." The letter concludes that only $138,000 should be considered a transfer as $43,000 is repayment from the prior transfers.

Thus, I FIND the record does not support the findings of the Initial Decision that the penalty should be reversed. Additionally, the order that Sussex County must calculate "the appropriate spend-down amount still remaining to be satisfied" is confusing. The spend-down is the difference between the total of all resources belonging to Petitioner and the $2,000 resource standard for Medicaid applicants and recipients. The monthly bank balances determine if Petitioner has met spend-down. By virtue of having penalty imposed, Petitioner has met spenddown.

THEREFORE, it is on this 5th day of JUNE 2019,

ORDERED:

That the Initial Decision is hereby REVERSED; and

That Petitioner is subject to a penalty as set forth by Sussex County.

Richard H Hurd Chief of Staff OBO Meghan Davey

Meghan Davey, Director
Division of Medical Assistance
and Health Services