



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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

C.S.,
PETITIONER,
v.
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES AND
CAPE MAY COUNTY BOARD OF
SOCIAL SERVICES,
RESPONDENTS.
ADMINISTRATIVE ACTION
FINAL AGENCY DECISION AND
ORDER OF RETURN
OAL DKT. NO. HMA 1648-2015
On REMAND HMA 9473-2014

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the OAL case file, documents in evidence and the Initial Decision in this matter. Both parties filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision is February 4, 2016 in accordance with an Order of Extension.

This matter concerns Petitioner's changeable ability to receive income from or have the corpus of trust established in 2004 be used to pay for her expenses.¹ Petitioner had a stroke in 1999 and entered an assisted living facility in 2004. That same year she sold her home and placed the proceeds of \$597,992 into the S. Family Trust, an irrevocable trust to which she had no access.² Her monthly income exceeded 300% of the Federal Benefit Rate (FBR) which precluded her from applying for Medicaid while she lived in an assisted living facility. In 2013 Petitioner entered a nursing home and applied for Medicaid benefits. Cape May County found her otherwise eligible for benefits as of August 1, 2013 but imposed a transfer penalty of three months and five days. Petitioner was also instructed to pay her income, including \$2,472.12 reported to the IRS as taxable income from the trust, to the nursing home. Petitioner appealed the determination claiming that the transfers were for fair market value and that Petitioner did not receive the income from the trust.

The prior Initial Decision found that the \$29,975 transferred to Petitioner's daughter were not for the purpose of qualifying for Medicaid and that Petitioner had demonstrated through the filing of amended tax returns and the trust document that she did not receive the income. That decision was reversed by the Final Agency Decision and reinstated the transfer penalty. However, the matter was remanded to the OAL for further findings regarding the income.

¹ The trust states that Petitioner's son, B.S. is the grantor of the trust, not Petitioner or B.S. in his capacity as Petitioner's POA. He is identified as the person who "delivered, all right, title and interest in the assets described in Schedule 'A'" to the trust. R-1 at 151. The attached Schedule "A" is blank.

² The tax returns for the trust seem to indicate that Petitioner transferred other assets into the trust as the cost basis for \$20,000 of assets by the trust in 2008 show an acquisition date of March 2004 and

The Initial Decision here goes beyond the scope of remand. The prior FAD unequivocally reversed the finding that Petitioner's transfer of \$29,975 was solely or exclusively for some other purpose than Medicaid eligibility. That issue was not remanded and would only be appealable to the Appellate Division, Superior Court of New Jersey upon conclusion of this proceeding. Instead the Initial Decision continues to make finding regarding the transfer as well as to misrepresent the transfers as "inconsequential monthly payments of \$500." ID at 27. The payments to the daughter varied during the five year look back period as there are 15 checks written for \$1,000, one for \$1,500 and two for \$2,500. The remaining checks are for \$500 or less. HMA 9473-2014 R-1 at 172-174. What's more Petitioner, who correctly did not address this issue on remand as it is no longer before the OAL, specifically stated in a submission to the ALJ that she "is not challenging the Directors' decision regarding the penalty period and accepts the penalty period as imposed." See October 18, 2015 letter at page 2. Thus, the transfer penalty of three months and five days stands.

The Initial Decision continues to see this trust arrangement for the benefit of Petitioner as she "received tenfold return of assets" by comparing the \$300,000 paid for her assisted living facility with the \$29,975 she paid to her daughter. ID at 26. This return of assets fails to acknowledge Petitioner's original contributions so that her children received over \$600,000 in assets in return for paying \$300,000 for her care. This type of financial planning is called "half-a-loaf" that was a Medicaid planning device prior to 2006. Under such a plan a Medicaid applicant gifts half of his or her assets while using the remaining

approximately \$10,000 of Freddie Mac notes sold in 2009 were purchased in February 2004; both of which

half to pay for care during the transfer penalty. The Deficit Reduction Act of 2005 (DRA), effective February 8, 2006, specifically sought to put an end to this planning by delaying the transfer penalty until the applicant was otherwise eligible for Medicaid. The trust in this case predates the passage of the DRA by two years.

The trustee's interpretation of the trust document language seems to shift between being immutable that Petitioner cannot receive any payments from the trust when that position assists in Medicaid eligibility and then equivocal so as to reporting to the IRS that Petitioner received income so that the trust's tax burden is eliminated.³ Here, Cape May County relied on multiple tax documents signed under penalty of perjury by Petitioner, through her POA, and filed with the IRS as truthful statements of her income.

Petitioner's allegation that she cannot benefit under the terms of the trust does not ring true. Despite the specific remand, Petitioner, who was in need of care since 2004 and had transferred \$600,000 to a trust to which she was not a beneficiary and to which "[s]he had no right or claim to the income or principal, has repeatedly fail to address how she," was planning on paying for her assisted living care. Her income of \$2,200 "was insufficient to pay the ALF." ID at 3. Rather the Initial Decision determined that Petitioner "does not have to offer an explanation why she could not pay her ALF bill as a matter of law." ID at 15.

predate the sale of her home. R-1 at 292 and 306.

³ As of January 2014, eligibility for Medicaid for many individuals is determined using methodologies that are based on modified adjusted gross income (MAGI), as defined in the Internal Revenue Code of 1986 (IRC). While Petitioner is not subject to these rules, I find it quite dismissive of the Initial Decision to describe the repeated filing of tax returns reporting income that Petitioner did not receive as "an accounting error." ID at 23. Congress determined that the truthfulness of tax returns, filed under penalty of perjury, were sufficient to grant eligibility to certain Medicaid populations.

The question on remand was "how" Petitioner planned to pay for her expenses when it was readily apparent that she had neither monthly income nor resources to do so. ID at 11.

While the transfer in 2004 allegedly rendered her destitute, Petitioner has still not explained what she relied on and caused her AL bill to be kept current from 2008 forward. The Initial Decision opines that "if her children decided to fund her ALF costs with money given to them by the trust, income cannot be imputed back to petitioner, irrespective of her intent in 2004." ID at 14. This is a more cogent theory that her children and her POA agreed to use the corpus of the trust to pay for her care. As mentioned above, the record is silent as to who caused Petitioner's assets to be removed from her control and allegedly prohibit using the assets to pay for her care. Petitioner's son is the grantor as an individual and not as her Power of Attorney. To bar the use of Petitioner's assets to pay for her care when she would have failed to qualify for Medicaid in the assisted living due to being over the income standard, could be considered a breach of her POA's fiduciary duty.

Moreover, this cannot be construed as Medicaid planning as Petitioner was not eligible for Medicaid benefits for nearly 10 years due to her income exceeding the 300% of the FBR and she could not be eligible so long as she remained in an assisted living facility. One explanation may be that the POA agreed to impoverish Petitioner and use the trust to pay for her care. In 2008 the trust sold \$240,000 worth of assets and \$70,000 in 2009. R-1 at 272 and 306. This totals \$310,000 which if they weren't invested is approximately the amount that Petitioner's POA paid for her care from 2008 through 2013. The record does

not reveal distributions made by the trust to the POA or Petitioner's other children but Petitioner's counsel noted in exceptions that her "other children shared in the gift by allowing their brother to take distributions from the trust in excess of his share." Exceptions at 3 fn.4. There is no indication how the children agreed to this or if it was in writing.⁴

Any arrangement, including the 2004 trust, Petitioner entered into with her children was not at arm's length. Courts have recognized that it is not the title of an instrument that determines what the true nature of the instrument. See Johnson v. Guhl 91 F.Supp. 2d, 754, 778 (D.N.J. 2000). Rather it is the facts and circumstances of the transaction that determine what the instrument is.

Where...the transactions occur between related entities rather than at arms' length, they are subject to particular scrutiny because the control element suggests the opportunity to contrive a fictional debt....Thus, a transaction must be measured against an objective test of economic reality and characterized as a bona fide loan only if its intrinsic economic nature is that of a genuine indebtedness.

[Geftman v. Comm'r of IRS, 154 F.3d 61, 68 (3d Cir. 1998)].

N.J.A.C. 10:71-4.11(e)2.iii provides in relevant part "[t]he portion of the [irrevocable trust's] corpus that could be paid to or for the benefit of the individual, shall be treated as a resource available to the individual." This language mirrors the federal statute which provides "if there are any circumstances under which payment for the trust could be made to or for the benefit of the individual, the portion of the corpus from which . . . payment to the

⁴ An agreement to pay for Petitioner's care with the corpus may have been the impetus for her son to ask if her expenses could offset the trust's taxable income.

individual could be made shall be considered resources available to the individual.” 42 U.S.C. § 1396p(d)(3)(B) (emphasis added).

To that end, I RETURN this case to Cape May County for further development of the circumstances wherein the corpus of the trust was used for Petitioner’s care and if any agreement to use the corpus was either oral or reduced to writing so that Petitioner, through her POA, could be an implied or actual beneficiary of the trust. See also State Medicaid Manual § 3215.1 “Because there are no ‘use’ limits on the trust funds in a Medicaid qualifying trust, trusts such as irrevocable burial trusts, educational trusts, and medical trusts could be Medicaid qualifying trusts . . . [even though] payments from the trust are not directly paid to the beneficiary, he is in fact receiving benefits from the payments.”

As the newly sworn documents show that Petitioner did not receive taxable income from the trust, that amount can be removed from the PR-1. The record as supplemented with amended tax returns show that Petitioner did not receive taxable income from the trust as represented on the original Schedule B filed with the IRS.

However, the matter is RETURNED to Cape May to be reopened for further development regarding any decision and ostensible agreement to pay the corpus of the trust to Petitioner’s son as a straw man to cover Petitioner’s AL expenses including those reported on Schedule A of Petitioner’s tax return. That amount is reflected on the tax returns as Petitioner’s medical expenses and was, for all intents and purposes, paid for by the trust.

THEREFORE, it is on this *3rd* day of FEBRUARY 2016,

ORDERED:

That the Initial Decision is hereby ADOPTED in so far as Petitioner's income should not include the amount reported to the IRS as those documents were filed in error; and

That the Initial Decision is hereby REVERSED in so far as it made findings regarding the \$29,975 which was not remanded to OAL but decided in the prior FAD; and

That the matter is RETURNED to Cape May to reopen the Medicaid application based on facts developed in these proceedings related to use of the trust's corpus to reimburse Petitioner's son for payments for her care and to analyze that information in accordance with Medicaid law.



Valerie Harr, Director
Division of Medical Assistance
and Health Services