State of New Jersey
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
P.O. Box 712
Trenton, NJ 08625-0712

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

ELIZABETH CONNOLLY
Acting Commissioner

MEGHAN DAVEY
Director

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

E.W., PETITIONER, v. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND CAPE MAY COUNTY BOARD OF SOCIAL SERVICES, RESPONDENTS.	**ADMINISTRATIVE ACTION** **FINAL AGENCY DECISION** **OAL DKT. NO. HMA 14667-2015**

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. Petitioner and Respondent filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is June 30, 2016 in accordance with an Order of Extension.

The matter arises regarding Petitioner's transfer of assets during the lookback period. Petitioner applied for Medicaid benefits in March 2015. She was residing in a

nursing home at that time. She disclosed that she had transferred a house in Ocean View to her son in December 2014. Cape May County assessed a transfer penalty of assets totaling $405,218.38 and found that Petitioner was otherwise eligible as of March 1, 2015 to start the 1,219 day penalty.

The Initial Decision upheld $26,196.38 of the transfer penalty finding that Petitioner had not met her burden to demonstrate that the assets were transferred for a purpose other than qualifying for Medicaid. However, the ALJ found that Petitioner's 2014 transfer a home which she purchased for $379,122 in 2012 from her son met the caregiver exemption. Based on the record before me, I hereby ADOPT in part and REVERSE in part the Initial Decision.

The transfers that were upheld in the Initial Decision comprise a CD that Petitioner's son transferred to himself and a payment of $10,000 to Petitioner's granddaughter. The ALJ determined that Petitioner's argument that the $10,000 was part of the purchase price of the home but for some reason was made to the granddaughter instead of her son was "unconvincing." ID at 12. Petitioner's claim that the transfer of the CD in March 2011 was not done in anticipation of Medicaid eligibility was likewise unconvincing. Petitioner's own documents indicate that she was suffering from dementia in 2011. P-1 at 8. I concur with these findings.

However, I do not find that the record or the law supports the finding that the December 2014 transfer of the home back to her son meets the requirements of a caregiver exemption. The purpose of the caregiver exemption is to compensate a son or daughter who has provided care to such an extent that the applicant remained out of the community and not on Medicaid for at least two years. Petitioner's son first received $379,122 from his mother in 2012 to purchase the house he already owned

and discharging his mortgage.[1] R-1 at 325. Then two years later the deed to the home was returned to him in the guise of a deed for $1.00 in order to effectuate what the ALJ described as "sophisticated Medicaid planning." ID at 19. I find that the circumstances of this case do not permit the second transfer of the home to be exempt from a transfer penalty.

By way of background, when an individual is seeking benefits which require meeting an institutional level of care, any transfers of resources are scrutinized. N.J.A.C. 10:71-4.10. 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. N.J.A.C. 10:71-4.10 (c). Individuals who transfer or dispose of resources for less than fair market value during or after the start of the sixty-month look-back period before the individual becomes institutionalized or applies for Medicaid as an institutionalized individual, are penalized for making the transfer. 42 U.S.C.A. § 1396p(c)(1); N.J.A.C. 10:71-4.10(m)(1). Such individuals are treated as though they still have the resources they transferred and are personally paying for their medical care as a private patient, rather than receiving services paid for by public funds. In other words, the transfer penalty is meant to penalize individuals by denying them Medicaid benefits during that period when they should have been using the transferred resources for their medical

[1] Petitioner's son states that the mortgage for the Ocean View property was taken out by him and his wife in 2007 and "was never attached to any of [Petitioner's] accounts." R-1 at 325. However, a December 2010 statement from Bank of America lists a $296,224.73 Mortgage/Home Equity loan using the same number that the son identified as the 2007 mortgage. That Bank of America account is titled to Petitioner, her late husband, and her son. R-1 at 327. Petitioner's husband died in 2005. It is unclear how or why the son's 2007 purchase money mortgage wound up on Petitioner's Bank of America statement.

care. See W.T. v. Div. of Med. Assistance & Health Servs., 391 N.J. Super. 25, 37 (App. Div. 2007).

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). 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). This exemption mirrors the federal Medicaid statute. 42 U.S.C.A. § 1396p(c)(2)(A)(iv).

The federal statute calls for an explicit exemption from the transfer rules and is meant to compensate the child for caring for the parent. The New Jersey regulations regarding this transfer exemption are based on the federal statute. Compare 42 U.S.C. § 1396p(c)(2)(A)(iv) 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. 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.

Recently the Appellate Division reviewed the caregiver exemption and noted that the "receipt of Medicaid benefits is not automatic. Understanding the State's need to conserve limited financial resources to assure monies are paid to those who meet the circumscribed eligibility requirements, we will not merely assume the criteria was satisfied. Rather, proof must be forthcoming specifically establishing each requirement of the exception to obtain its application." M.K. v. DMAHS and Burlington County Board of Social Services, Docket No. A-0790-14T3, decided May 13, 2016, slip op. at 17.

In M.K., the court had "no doubt [the daughter] extended love and care to her mother that added to M.K.'s comfort, welfare and happiness during those years when she was living in her own home, despite significant medical challenges". M.K., Slip op. at 17. However, during the two years prior to entering a nursing home, M.K. moved in with her son for a period of five months. The court found that as ""Medicaid is an intensely regulated program' H.K., supra, 184 N.J. at 380, and its requirements are strictly enforced;" a five month break in "the mandated two-year time period for care" meant that the caregiver exemption had not been met. M.K., Slip op. at 15.

In another case, the Appellate Division also determined that an individual, receiving caregiving services paid for by Medicaid, cannot transfer her home to her daughter under the exemption. "Although appellant cared for her mother during the relevant time period, the key factor that permitted G.B. to remain in her home until 2009 was the Medicaid assistance she received through the services provided by the [Medicaid program]." Estate of G.B. (deceased) by M.B.-M., as Executor v. DMAHS and Somerset County Board of Social Services, Docket No. A-5086-12T1, decided September 15, 2015, slip op. at 8. In that case, G.B. received 30 hours of caregiving services a week under a Medicaid waiver program that permitted her to remain at home.

Id. at 7. Despite the finding by the ALJ that the daughter "tended her mother in decline for many years, and assisted her mother in avoiding institutionalization," the Appellate Division upheld the Final Agency Decision that overturned that finding and held that G.B. was not entitled to a caregiver exemption. Id. at 5

The purpose of the caregiver exemption is to compensate a child who kept her parent out of a nursing facility for at least two years, but in this case, Petitioner paid for aides to care for her for four hours during the day, and her granddaughter to say with her for another three hours. Like the daughter in G.B., Petitioner's son did tend to her. However, it was the use of Petitioner's assets to purchase caregiving services through both a licensed agency and her granddaughter that permitted Petitioner to remain in her recently purchased house. This granddaughter also cared for Petitioner when her son and daughter-in-law were away and her son withdrew cash from Petitioner's bank account to pay the granddaughter for these services. R-1 at 262.[2] At minimum, Petitioner paid for 35 hours of care a week through the licensed service and her granddaughter.

The Schedule A for Petitioner's 2012 tax returns reported that she paid $15,800 for caregiving that year. R-1 at 226. That amount increased to $19,058 in 2014. R-1 at 226. The record does not contain Schedule A for 2013 and that year is omitted in the worksheet for her itemized deductions. See R-1 at 226. Simply put, Petitioner cannot

[2] The record also raises questions about the finding that Petitioner's son and daughter-in-law provided "almost 'round the clock' care". ID at 19. It is established that Petitioner paid for 35 hours a week of her own care. While they did indeed care for Petitioner, her son owned a construction business that used the Ocean View home as its business address and her daughter-in-law owned and operated two ice cream parlors in Ocean City "which required her full attention" in the summer months. See R-1at 234 and ID at 5. In addition, in the course of applying, Petitioner's daughter-in-law produced a Florida driver's license issued in 2011. When questioned about this, Petitioner's son and daughter-in-law stated that they owned property in Florida. That property received a Homestead Exemption from 2004 through 2014. R-1 at 114-122. In order to claim and take advantage of this reduction in property taxes, the homeowner would have to "in good faith make . . . [the Florida property his or her] permanent home." Florida Statute 196.031. It is unclear how Florida could be their permanent home as it would impact the couple's ability to care for Petitioner, who appears to have remained in New Jersey.

be the funding source of the care that kept her from entering a nursing facility during the time that her son is claiming he was the provider of such care. As the Appellate Division has found that the 30 hours of caregiving a week G.B. received precluded the caregiver exemption, Petitioner's payment of 35 hours a week must do the same.

Additionally, the extent to which Petitioner did receive fair market value for the purchase of the Ocean View home in 2012 is debatable. When she purchased her son's home it was already occupied by her son, her daughter-in-law and great-grandson. While an individual may pay fair market value for an asset, when the asset is of little or no use to Petitioner or she gives away the value of the asset, another transfer has occurred. See M.G v. DMAHS & Ocean County Board of Social Services, Docket No. A-5161-02T5, decided April 27, 2004, where the Appellate Division upheld the transfer penalty related to the fair market purchase of a computer that was kept by the applicant's daughter to handle the applicant's appointments. Petitioner's purchase of her son's home may have been at the market rate but Petitioner then granted use and access to the house to her son, daughter-in-law and great-grandson. There is no indication that they ever relinquished occupancy of the house or, according to line 17 of Petitioner's tax returns, paid rent. Her son used the home as his business address for many years and continued to use it rent free after the purchase by his mother. Petitioner paid off her son's mortgage, at minimum paid the real estate taxes as she claimed them on her federal tax returns, and then permitted his family to remain in the home. However, since the 2014 transfer is subject to penalty and since the house was assessed at the same amount, the penalty calculation would be the same if the transfer was based on the 2012 purchase.

THEREFORE, it is on this 28th day of JUNE 2016,

ORDERED:

That the Initial Decision is hereby ADOPTED in part with regard to the transfer of $26,196.38;

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

That Petitioner's penalty for transferring assets totaling $405,218.38 is hereby AFFIRMED.

Carol Grant for Meghan Davey

Meghan Davey, Director
Division of Medical Assistance
and Health Services