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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

E.S.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
V.	:	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE	:	**OAL DKT. NO. HMA 9477-2014**
AND HEALTH SERVICES &	:	
BERGEN COUNTY BOARD OF	:	
SOCIAL SERVICES,	:	
RESPONDENTS.	:	

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this matter, consisting of the Initial Decision, the documents in evidence and the contents of the OAL case file. Both parties filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is January 8, 2015, in accordance with an Order of Extension.

This matter concerns the transfer of Petitioner's home in 2006 to her daughter while she retained a life estate as well as funds taken out of a jointly held bank account. Petitioner entered the nursing home in February 2013 and applied for benefits in February 2014. While Bergen County determined that she was financially eligible as of March 1, 2014, they imposed a transfer penalty of twenty-three months and one day due to transfers totaling $216,643.95.

For the reasons that follow I hereby REVERSE the Initial Decision and FIND that Petitioner failure to be compensated for the value of her life estate and that its value and the transfers out of the jointly held bank account were properly determined to be subject to penalty. However, I do modify the transfer value of Petitioner's life estate to $144,770.21 as based on the net profit of $391,292.

At the hearing the ALJ determined that Petitioner's house "and life estate were sold in one transaction to a third party at arms length" and that "there is no 'transfer' within the meaning of the regulations." ID at 4. While the sale may have been at arm's length and for fair market value, Petitioner's life estate has a value for which she received no compensation. It is that amount that is subject to transfer.

Any transfer for less than fair market value during the look-back period is presumed to have been made for the purpose of establishing Medicaid eligibility. E.S. v. Division of Medical Assistance & Health Services, 412 N.J. Super. 340, 353 (App. Div. 2010); N.J.A.C. 10:71-4.10(i). 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). 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 rebut this presumption.

Here, Petitioner did not argue that the transfers were made exclusively for some purpose other than to qualify for Medicaid. Rather she argued that the transfers either weren't a transfer since the sale price was fair market value in the case of the house or that the bank accounts were funded with assets that belonged to her daughter. However, case law and the facts of this case belie both arguments.

The sale of Petitioner's home in July 2013 required the extinguishment of Petitioner's life estate in the property in order to transfer clear title to the new owner. Her daughter, as her attorney in fact, is listed on the deed for the sale of the property in July 2013 and a copy of the Power of Attorney was recorded with the deed. (P-2 and P-4). A life estate has a value based on the 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). Petitioner admits that she received nothing from the sale of the property and was assessed a transfer penalty for its calculated value of $153,911.38. Rather she voluntarily gave up her right to the life estate and, through her POA, executed the deed.

I FIND that the value of the life estate transfer should be $144,770.21 based on the net profit from the sale. Based on the HUD form Petitioner and her daughter stood to receive $391,292 (line 201 and line 603). P-9. Petitioner was 84 years old at the time of the sale in July 2013 and her life estate value is the calculated by multiplying .36998, the life estate value for an 84 year old as set forth in the Social Security Program Operations Manual (POMS), by the proceeds. POMS 01140.120. [1] See also State Medicaid Manual § 3258.9.A. Thus, I modified the transfer penalty for the life estate to be $144,770.21.

The other transfers stem from withdrawals from a checking and a savings account Petitioner owned with her daughter. Over the course of the look back period, Petitioner's daughter used checks and cash withdrawals totaling $62,732.27 to purchase items such as a car for herself and expenses for her children, Petitioner's grandchildren. Petitioner also wrote checks that paid for her own living expenses including her utilities, home health care that began in December 2011 and eventually her nursing home. Petitioner's daughter claimed that the accounts were funded with assets she received from her father's estate

[1] Although Social Security does not provide long term care benefits nor impose transfer penalties similar to the Medicaid program, the POMS manual is instructive on this point. See https://secure.ssa.gov/poms.nsf/home!readform . The POMS is only intended to provide guidance to Social Security employees processing cases and does not have the force of law However, courts have held that such guidance can be relevant in Medicaid matters. See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003).

and that "she changed the accounts so the funds could be jointly owned by her and her mother for convenience." ID at 3. Petitioner's husband will was admitted to probate in August 2003. P-6.

The record before me contains no evidence that the funds inherited in 2003 were the same funds in December 2010 when the savings account ending in #2801 was opened. There is no documentation as to when the checking account ending in #4890 was opened or the source of funds for either account.

However, the record does show that both accounts list Petitioner's name first. Petitioner's address is listed both on the financial statements for the #2801 account and on the earliest check on account #4890 from 2009.[2] R-2 and R-4. Internal Revenue Service Publication 17 instructs that:

> If the funds in a joint account belong to one person, list that person's name first on the account and give that person's SSN to the payer. (For information on who owns the funds in a joint account, see *Joint accounts*, later.) If the joint account contains combined funds, give the SSN of the person whose name is listed first on the account. This is because only one name and SSN can be shown on Form 1099.
>
> These rules apply both to joint ownership by a married couple and to joint ownership by other individuals. **For example, if you open a joint savings account with your child using funds belonging to the child, list the child's name first on the account and give the child's SSN.**" (emphasis added).

http://www.irs.gov/publications/p17/ch07.html#en_US_2013_publink1000171410.

If the funds in these two accounts belonged to Petitioner's daughter, the daughter's name should appear first and would be the reporting Social Security number for tax purposes. However, when the #2801 account was opened in

[2] The 2008 deed identifies the daughter by her married name and at a different address than Petitioner. Other documents show the daughter using her married and maiden name and two different addresses in New Jersey during this time period. Compare P-1, P-2, P-3, R-1, R-3 and R-4.

December 2010 Petitioner's name and address was used as the primary owner. Petitioner has failed to show any competent documentation regarding the origin of those funds. As Petitioner has unrestricted access to the funds, any transfers out of the account to her daughter are considered transfers for less than fair market value. N.J.A.C. 10:71-4.1(a)2 . See also POMS SI 01140.205 "When a claimant or recipient co-owns an account with someone who is not eligible for SSI benefits, we assume that all the funds in the account belong to the SSI claimant or recipient." Petitioner's testimony is not sufficient to overcome the fact that Petitioner and her POA had unrestricted access to the funds or the residuum rule. A finding of fact based on hearsay must be supported by competent evidence. 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. Petitioner presented no competent evidence regard the source of the accounts and appears to have established herself as owner of both accounts for tax purposes.

It is more common to add an adult child to the parent's bank account to allow the child to monitor finances or take over bill paying if the parent becomes infirmed. It is also used to have the parent's assets transfer to the child outside of the estate and probate. The record and the description of the testimony in the Initial Decision shed no light as to why it was convenient to add Petitioner to her daughter's bank accounts and make Petitioner the primary account holder.

Thus, I conclude that the law and the facts of this case do not support a finding that the transfers should be reversed. Petitioner's life estate had a value that was not compensated at the time of the sale of the property. Moreover, Petitioner did not argue that the transfers from the bank accounts were "not for

the purposes of having Petitioner qualify for Medicaid." ID at 5. Rather Petitioner claimed that the funds in the accounts belonged to her daughter; a finding that is not supported by the documents in this case.

THEREFORE, it is on this 11th day of DECEMBER 2014

ORDERED:

That the Initial Decision in this matter is hereby REVERSED;

That Petitioner's penalty shall be set at $207,502.48 based on the modifications set forth above.

Valerie Harr, Director
Division of Medical Assistance
and Health Services