State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 13911-08

THE ESTATE OF M.M.,

Petitioner,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND UNION COUNTY DIVISION OF SOCIAL SERVICES,

Respondents.

Linda Ershow-Levenberg, Esq., for petitioner (Fink, Rosner, Ershow-Levenberg, attorneys)

Valerie Thomas, Human Service Specialist, appearing pursuant to N.J.A.C. 1:1-5.4(a)3, for respondent Union County Division of Social Services

Record Closed: March 2, 2009 Decided: May 27, 2009

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from a determination by the Union County Division of Social Services (UCDSS) denying petitioner's application for institutional level Medicaid benefits

effective July 1, 2008. The UCDSS issued a notice dated October 31, 2008, memorializing its determination denying benefits predicated on three grounds: (1) the applicant had excess resources; (2) the applicant had transferred resources that resulted in a penalty period; and (3) the applicant "did not meet the residency requirement." The Division of Medical Assistance and Health Services transmitted the matter to the Office of Administrative Law, where it was filed on December 8, 2008. The hearing was held on January 16, 2009, after which the record remained opened for the receipt of post-hearing submissions. The record closed following receipt of a brief on petitioner's behalf and no submission on behalf of the UCDSS by the required deadline.

FINDINGS OF FACT

At the hearing, Valerie Thomas testified concerning the basis for the UCDSS' determination, and M.M.'s husband (Mr. M.) and two daughters (V.M. and A.B.) testified for petitioner. The parties subsequently submitted a stipulation as to certain facts surrounding this matter (Stip.). See J-1. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following **FACTS**:

M.M., the applicant, died on September 16, 2008. Stip. at ¶1. On October 2, 2008, M.M.'s estate applied for retroactive institutional level Medicaid benefits as of July 1, 2008. Ibid.; R-3.

M.M. was married to Mr. M. and had two daughters; V.M. and A.B. In May 2006, M.M. and Mr. M. sold their home located in Elizabeth, New Jersey. See P-1. With the proceeds from the sale, they purchased a $100,000 annuity earning a five percent (5%) return (see P-15); gave $25,000 to each of their two daughters; paid other expenses/debts; and deposited the remaining proceeds in the bank.

After the sale of the home, M.M. and Mr. M. moved in with their daughter V.M. at her apartment in Clark, New Jersey. Mr. M.'s New Jersey driver's license listed that

Clark address. See P-4. The address was also listed on the 2006 tax returns for M.M. and Mr. M. that were filed in April 2007. See P-7.

Until approximately May 2006, M.M. worked in a factory. M.M. stopped working at the factory because it was closing. Mr. M. was then retired. Mr. M. credibly testified that he and M.M. flew to Uruguay in September 2006, for a six-month vacation, intending to return to New Jersey in the Spring, at which time they intended to purchase a home in a retirement community and M.M. would look for a job. The couple spoke with their daughter A.B. when they were in Uruguay regarding this intended plan and the daughter started looking for a new home for them. During the period that they were in Uruguay, Mr. M and M.M. received mail at V.M.'s address; maintained New Jersey bank accounts; filed income tax returns that listed V.M.'s address as their address; and Mr. M. maintained a New Jersey driver's license and enrolled in the Medicare program. See P-4; P-7; P-8; P-12; P-13. M.M. and Mr. M. stayed at the home of Mr. M.'s brother in Uruguay. Prior to this trip, M.M. and Mr. M. had periodically visited their family in Uruguay and had previously stayed for approximately one month.

In January 2007, Mr. M. had a sudden heart attack in Uruguay. Mr. M. was hospitalized and underwent heart surgery in April 2007 in Uruguay. See P-6. Mr. M. came under the care of Dr. Gabriel Lorier at Universidad De La Republica Hospital De Clinicas. Mr. M. enrolled in an experimental treatment program consisting of the implantation of stem cells into the heart, which required him to remain in Uruguay until the end of the treatment program. Ibid. As a result, M.M. and Mr. M. could not return to New Jersey in the Spring of 2007 as planned. After the heart attack, M.M. took care of Mr. M. at the brother's home and did their chores, such as cooking and shopping.

Shortly after Mr. M. received clearance from his doctor to leave Uruguay, Mr. M. and M.M. flew to New Jersey on July 18, 2008. See P-11. Upon their return to New Jersey, Mr. M. and M.M. moved in with their daughter V.M. at her new apartment in Elizabeth, New Jersey. Mr. M. still resides in that apartment. A few days after returning to New Jersey, M.M. obtained a new New Jersey driver's license reflecting the address of the apartment in Elizabeth where he and M.M. were living. See P-5. That address is

also reflected on the couple's bank statements. See P-13. The daughter used a P.O. Box for the mail due to mail problems experienced with the apartment's mail boxes, which is also listed on various documents for M.M. and Mr. M., including their 2007 tax returns. See P-8; P-13.

On July 29, 2008, M.M. sought medical treatment at MultiCare Urgent Care due to leg pain and fatigue. During that visit, the doctor ordered blood work to be conducted that day and, immediately upon receiving the test results, the doctor instructed the family to bring M.M. to the emergency room. The family brought M.M. to Overlook Hospital, where she was admitted that night. See P-9; P-10. M.M.'s illness became progressively worse; it necessitated the collaboration of multiple specialists; and it ultimately resulted in her death in the hospital on September 16, 2008. Ibid. M.M. had not experienced similar symptoms nor was M.M. under a doctor's care when she was in Uruguay.

It was disclosed on the application for Medicaid that in May 2006, M.M. gifted $25,000 to each of her daughters. Stip at ¶ 2. M.M. was fifty-six years of age on the date of the gift, and Mr. M. was sixty-four years of age. Id. at ¶ 3; R-1. At the time of the gift, M.M. was in good health and neither she nor her husband had any imminent need for nursing home care or for health care funded by Medicaid. M.M. had been working full-time until May 2006, and the couple went to Uruguay shortly thereafter with a plan to return and look for a new job for M.M.

As of July 2008, M.M. had no income of her own and had no income for a "spousal deduction." Stip. at ¶ 4. Mr. M.'s monthly income included $894.40 (gross) in Social Security and $415.24 in annuity income, for a total of $1,309.64. Id. at ¶ 5. The 2008 minimum monthly maintenance needs allowance (MMMNA) was $1,750 per month. Id. at ¶ 6. Mr. M.'s income fell $440.36 below the $1,750 MMMNA. Id. at ¶ 7. M.M. and her husband then had three assets totaling $139,284.25: a checking account ($3,105.87), a money market account ($36,138.38), and an annuity ($100,040). Id. at ¶ 8. See P-15 to P-18; R-3. The annuity earns an annual five percent (5%) interest rate of return. Id. at ¶ 9. See P-15.

By notice dated October 31, 2008, the UCDSS denied the Medicaid application on behalf of M.M. seeking benefits effective July 1, 2008, on the basis of "excess of resources, transfer of resources, and she did not meet the residency requirement." R-2. Specifically, the UCDSS determined that the applicant had not spent down the required spend down amount and that the distribution of $25,000 to each of the two daughters after the sale of the home in May 2006, resulted in a transfer of resource penalty period of ineligibility for seven months and seventeen days commencing July 1, 2008. See R-3. The UCDSS further concluded that M.M. was visiting her family in the United States when she became ill, she did not maintain a permanent residence in New Jersey and she did not meet the residency requirement. Ibid.

ANALYSIS AND CONCLUSIONS

The Medicaid program is a cooperative federal-state venture established by Title XIX of the Social Security Act. 42 U.S.C.A. §§1396, et seq. (the "Medicaid Act"). It "'is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services.'" L.M. v. Division of Medical Assistance & Health Services, 140 N.J. 480, 484 (1995) (quoting Atkins v. Rivera, 477 U.S. 154, 156, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986).) See Mistrick v. Division of Medical Assistance & Health Services, 154 N.J. 158, 165 (1998). Although a State's participation in the Medicaid program is optional, those that elect to participate must comply with the requirements imposed by the Medicaid Act and the regulations adopted by the Secretary of the United States Department of Health and Human Services. Harris v. McRae, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980); Mistrick, supra, 154 N.J. at 166. In exchange for administering a Medicaid program developed in accordance with the parameters dictated by the federal law and regulations, the federal government contributes financial assistance to defray part of the costs of providing certain medical services. Bergen Pines Hosp. v. Dept. of Human Services, 96 N.J. 456, 462 (1984). New Jersey has elected to participate in the Medicaid program through the enactment of the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 et seq.

The Residency Requirement

Pursuant to N.J.A.C. 10:71-3.4, "[a]n applicant for or beneficiary of Medicaid Only shall be a resident of the State of New Jersey." The regulations define the term "resident" to mean "a person who is living in the State voluntarily and not for a temporary purpose, that is, with no intention of presently removing therefrom." N.J.A.C. 10:71-3.5(a). In its notice denying eligibility for failure to meet the residency requirement, the UCDSS cites N.J.A.C. 10:71-3.7(b), which states: "It shall be the policy of this State that if a beneficiary leaves New Jersey with intent to establish a permanent residence elsewhere, or for an indefinite period for purposes other than a temporary visit, or if he or she decides to remain indefinitely in the place outside New Jersey to which he or she had gone for a temporary visit, he or she ceases to be eligible to receive Medicaid."

Apart from the above Findings of Fact, Mr. M. and his daughters presented credible testimony that M.M. and Mr. M. never intended to leave the United States permanently, they always intended to reside in New Jersey, and they did not come to New Jersey in July 2008, for the purpose of a temporary visit or to obtain medical treatment. The documentary evidence further corroborates the testimony that, although the couple's intended six month vacation was extended due to Mr. M.'s sudden medical condition and treatment, the couple intended to return to and live in New Jersey. The couple's ongoing intent to maintain their status as residents of New Jersey is evidenced by their filing and payment of Federal and State income taxes; the maintenance of a New Jersey driver's license; the enrollment in the Medicare program; and the maintenance of bank accounts with New Jersey addresses.

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional **FACTS**: M.M. and Mr. M. did not leave New Jersey with the intent to establish a permanent residence in Uruguay. Rather, the couple left New Jersey for a temporary visit or vacation in Uruguay, which was unexpectedly elongated due to Mr. M.'s sudden illness and treatment. M.M. and Mr. M. at all times intended to return to and reside in New Jersey. M.M. and Mr. M. did not

come to New Jersey in July 2008, for the purpose of a temporary visit or to procure medical care paid for by Medicaid. In short, I agree with petitioner's stance that the convergence of the couple's return from Uruguay and the need to apply for Medicaid was due to a coincidence of calamity, and the record is bereft of any evidence that they flew to New Jersey for a temporary visit or to secure health care funded by Medicaid.

I **CONCLUDE** that from July 2008, through the date of her death, M.M. was a "resident" of New Jersey as defined by N.J.A.C. 10:71-3.5(a). I **CONCLUDE** that M.M. was a "resident" of New Jersey at the time of her medical treatment and the requested Medicaid effective date. I further **CONCLUDE** that M.M. satisfied the residency requirement embodied in N.J.A.C. 10:71-3.4. Accordingly, I **CONCLUDE** that petitioner's application should not be denied for failure to meet the residency requirement.

The Resource Requirements

An applicant for Medicaid must meet designated resource eligibility standards. N.J.A.C. 10:71-4.1 et seq. Resource eligibility is determined as of the first moment of the first day of each month. N.J.A.C. 10:71-4.1(e); N.J.A.C. 10:71-4.5(a)1. A "resource" is broadly defined as "any real or personal property which is owned by the applicant (or by those persons whose resources are deemed available to him/her, as described in N.J.A.C. 10:71-4.6) and which could be converted to cash to be used for his/her support and maintenance." N.J.A.C. 10:71-4.1(b). Unless specifically excluded, all liquid and nonliquid "available" resources are considered countable in the determination of Medicaid Only eligibility. See N.J.A.C. 10:71-4.1; N.J.A.C. 10:71-4.2.

Special rules apply where, as here, one member of a married couple applies for institutional level Medicaid while the other spouse remains in the community. N.J.A.C. 10:71-4.8. The regulations provide for the allocation and distribution of income and resources between the spouses for purposes of ascertaining whether the institutionalized spouse is eligible for Medicaid. A share of the couple's resources is protected for the community spouse's benefit to ensure that he/she "has 'sufficient income and resources to live with independence and dignity.'" Mistrick, supra, 154 N.J. at 169 (citation omitted).

In this regard, the County Board of Social Services must establish the combined countable resources of the couple, which shall include all resources owned by either spouse, individually or together, as of the first period of continuous institutionalization for purposes of allocating a share of the resources to each spouse. N.J.A.C. 10:71-4.8(a). To prevent the impoverishment of the community spouse, a portion of the couple's resources, known as a Community Spouse Resource Allowance (CSRA), is protected for the community spouse and is not included when determining the institutionalized spouse's eligibility for Medicaid. In general, the CSRA is equal to one-half of the couple's combined countable resources. See N.J.A.C. 10:71-4.8(a)1. To ascertain whether the institutionalized applicant meets the resource eligibility standard, the community spouse's permitted share of the resources is subtracted from the couple's combined total resources. N.J.A.C. 10:71-4.8(a)2. The institutionalized individual is resource eligible if the non-excluded resources in excess of the CSRA are less than or equal to $2,000. Ibid. Resources in excess of the permitted amount must be "spent down" to the specified limit.

N.J.A.C. 10:71-4.8(a)5 provides that, "[i]f in accordance with N.J.A.C. 10:71-5.7(d), additional resources have been authorized to be set aside for the community spouse in order to provide for a sufficient income maintenance level, such additional resources are not subject to the limitation in this section on the community spouse's share of the couple's combined resources." In turn, N.J.A.C. 10:71-5.7(d) states:

> When the institutionalized individual's income is insufficient to provide the maximum authorized deduction for the community spouse, either the institutionalized spouse or the community spouse can request a fair hearing in accordance with N.J.A.C. 10:71-8.4. If either member can establish at the fair hearing that the income generated from the community spouse's share of the couple's resources is inadequate to raise the community spouse's income (together with the community spouse maintenance deduction) to the maximum authorized level, additional resources (beyond the community spouse's share as established at N.J.A.C. 10:71-4.8) may be set aside for the community spouse. The amount of resources to be set aside shall be that amount that is determined sufficient to generate sufficient income to raise the community spouse's gross income to the maximum authorized level.

See N.E. v. New Jersey Division of Medical Assistance and Health Serv., 399 N.J. Super. 566 (App. Div. 2008). Petitioner urges that Mr. M.'s CSRA should be increased, effective July 1, 2008, because the couple's monthly income is insufficient to provide Mr. M. with the guaranteed MMMNA and, once that is done, the denial of eligibility for excess resources must be reversed.

In 2008, Mr. M. was entitled to receive a combined spousal maintenance amount of $1,750 per month. Mr. M.'s total gross monthly income was $1,309.64 and, thus, his monthly income fell $440.36 below the MMMNA. Since M.M. had no available income for the spousal deduction, there is a remaining shortfall of $440.36. Pursuant to N.J.A.C. 10:71-5.7(d), when the institutionalized spouse's income and the income generated from the community spouse's share of the couple resources is insufficient to provide the maximum authorized level, additional resources may be set aside for the community spouse. The amount of resources to be set aside shall be the amount that is determined sufficient to generate sufficient income to raise the community spouse's gross income to the maximum authorized level.

I **CONCLUDE** that additional resources should be set aside for Mr. M. in order to provide for a sufficient income maintenance level. I **CONCLUDE** that, by allowing Mr. M. to keep $69,642.13 (i.e., the other half of the combined resources as of July 1, 2008), at a five percent (5%) annual rate of return (i.e., the rate produced by the annuity), he will have an additional $290.18 per month in interest, which will still not bring him up to the maximum authorized MMMNA. I **CONCLUDE** that the couple's remaining resources should be set aside for Mr. M. to generate sufficient income to meet the deficit in his MMMNA and, thus, petitioner did not have any "excess resources" as of July 1, 2008.

The Transfer of Assets

The regulations address the transfer of resources by individuals seeking or receiving an institutional level of services. See N.J.A.C. 10:71-4.7 and N.J.A.C. 10:71-4.10. In general, a penalty period of Medicaid ineligibility is imposed if the applicant or

his/her spouse has disposed of assets at less than fair market value during the prescribed "look-back" period.

The transfer of assets during the "look-back" period raises a rebuttable presumption that the transfer was made to establish Medicaid eligibility. N.J.A.C. 10:71-4.7(i); N.J.A.C. 10:71-4.10(j). An applicant may rebut this presumption. In such case, the applicant bears the burden of proof and must present "convincing evidence" that the assets were "transferred exclusively (that is, solely) for some other purpose." Ibid. The regulations provide guidance concerning factors that may indicate that the assets were transferred for some other purpose. N.J.A.C. 10:71-4.7(j); N.J.A.C. 10:71-4.10(k). Specifically, N.J.A.C. 10:71-4.10(k) instructs in pertinent part: "The presence of one or more of the following factors, while not conclusive, may indicate that the assets were transferred exclusively for some purpose other than establishing Medicaid eligibility for long term care services: 1. The occurrence after transfer of the asset of: i. Traumatic onset of disability . . . ." See also N.J.A.C. 10:71-4.7(j).

There is no debate that M.M. and her husband gifted $50,000 to their daughters in 2006 or during the "look-back" period. Petitioner does not challenge that the transfer penalty would start to run as of July 1, 2008 and the UCDSS' calculation of the length of the penalty period. Rather, the crux of petitioner's position is that the penalty should be reversed because the gifts were not made for the purpose of establishing Medicaid eligibility.

Succinctly stated, I **CONCLUDE** that petitioner has presented convincing evidence that the gifts in 2006 were made exclusively for a purpose other than establishing Medicaid eligibility. The credible testimony establishes that from the sale proceeds of the house M.M. and her husband gifted $25,000 to the daughter they resided with, and another $25,000 to their other daughter as a wedding gift. The evidence further establishes that, at the time of the gifts, M.M. was fifty-six years old, in good health, and was not being treated for any major illnesses for which she might some day need Medicaid payments. And, the record is bereft of any evidence suggesting that there were any major medical problems in M.M.'s foreseeable future. Rather, the record reveals that

M.M. sustained a traumatic onset of disability approximately two years after giving the gifts to her two daughters.

Based on the foregoing, I **CONCLUDE** that M.M. is eligible for Medicaid benefits effective July 1, 2008.

ORDER

I **ORDER** that the determination of the Union County Division of Social Services denying petitioner's application for Medicaid benefits effective July 1, 2008, be and hereby is **REVERSED**.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 27, 2009
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: May 27, 2009

Date Mailed to Parties: MAY 29 2009

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

APPENDIX

LIST OF WITNESSES

For Petitioner:

Mr. M.

A.B.

V.M.

For Respondent:

Valerie Thomas

LIST OF EXHIBITS

Joint Exhibits:

J-1 Stipulated Facts (2 pp)

For Petitioner:

P-1 Settlement Statement (3 pp)

P-2 No exhibit admitted

P-3 No exhibit admitted

P-4 2004 New Jersey Driver License (2 pp)

P-5 2008 New Jersey Driver License

P-6 Letter from Dr. Gabriel Lorier dated October 9, 2008, and translated letter (2 pp)

P-7 2006 income tax forms (12 pp)

P-8 2007 income tax forms (12 pp)

P-9 Hospital records (10 pp)

P-10 Letter from Dr. Lynne Todd dated October 7, 2008

P-11 Airline tickets

P-12 Medicare card

P-13 Packet of documents (25 pp)

P-14 No exhibit admitted

P-15 New York Life Insurance & Annuity Corp. statement and correspondence (2 pp)

P-16 Bank Statement

P-17 Bank Account Activity

P-18 Bank Statement (2 pp)

For Respondent:

R-1 Affidavit (15 pp)

R-2 Notice from Union County Division of Social Services dated October 31, 2008 (2 pp)

R-3 Summary Report

R-4 Correspondence from NYL Annuity Service Center (5 pp)

R-5 Correspondence from the Social Security Administration dated August 28, 2008