Commonwealth of Massachusetts
County of Middlesex
The Superior Court

Civil Docket **MICV2008-02427**

RE: Clark, By His Duly Authorized Attorney In Fact & Spouse, Susan A v Dehner, Medicaid Director Of The Office Of Medicaid

TO: David J Correira, Esquire
Correira & Iacono, LLP
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Boston, MA 02116

Oral Argument:
David J. Correira, Esq.
for George E. Clark, Plaintiff
John L. Hodge, Esq.
Deputy General Counsel
for Office of Medicaid, Defendant

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on **07/30/2009**:

RE: Plaintiff George E. Clark, By His Duly Authorized Attorney In Fact & Spouse, Susan A's MOTION for Judgment on pleadings (Rule 12); Memorandum of Law in support of; Deft's opposition to plff's motion; Deft's Memorandum in opposition to plff's motion for Judgment on the Pleadings and in support of the Agency Decision; Plff's Request for Hearing.

is as follows:

Motion (P#4) ALLOWED. Dated 7/23/09 (Thomas R. Murtagh, Justice) Notices mailed 7/30/2009

Dated at Woburn, Massachusetts this 30th day of July, 2009.

Michael A. Sullivan,
Clerk of the Courts

BY:

Wayne Emerson
Assistant Clerk

Telephone: 781-939-2772

Copies mailed 07/30/2009

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 08-02427-H

GEORGE CLARK

vs.

THOMAS DEHNER, Medicaid Director of the Office of Medicaid

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON PLEADINGS

This case arises out of the denial of the application of the plaintiff, George E. Clark ("George"), for Medicaid benefits. George has filed this motion for judgment on the pleadings, arguing that MassHealth wrongly characterized an allowable sale of assets by his community spouse, Susan A. Clark ("Susan"), for fair market value as a disqualifying asset transfer. For the reasons set forth below, this motion is **ALLOWED**.

BACKGROUND

George, suffering from Pick's disease, has been a resident of Walden Nursing Home, a long-term care facility, since August 1, 2006. He applied for Medicaid benefits on October 31, 2007. He is married to Susan, who is serving as his attorney in fact, pursuant to a Durable Power of Attorney.

On May 4, 2005, Susan established the Susan A. Clark Irrevocable Income Trust and designated herself as both Grantor and Trustee.[1]

[1]Article III states that Susan has no right to alter, amend, modify, or revoke the Income Trust. Article IV states that during the life of Susan, the Trustee is to distribute the net income but not

Susan also established the Susan A. Clark Revocable Trust designating Susan as both Grantor and Trustee.[2]

The same day, George and Susan established the George E. & Susan A. Clark Irrevocable Trust ("Trust") and designated themselves as the Grantors and Trustees of the Trust. George and Susan transferred their real estate located at 31 Porter Street, Marshfield, Massachusetts ("Property") into the Trust. The value of the Property in 2005 was $412,359.00. The 2007 tax assessed value of the Property was $522,400.00.

Article III of the Trust states that George and Susan have no right to alter, amend, modify, or revoke the Trust. Article IV states that during George and Susan's life, the Trustees are to hold the Trust property for the benefit of their children, Michelle Dionne ("Michelle") and Kerri A. Poole ("Kerri"), and may use the income but not the principal for their children's benefit. Under Article XV, Susan and George reserved life estates in the Property.

Based on the Medicaid law and regulations, this May 4, 2005 transfer disqualified George from receiving Medicaid benefits for approximately fifty-two (52) months from the time of the transfer.

On June 27, 2007, approximately twenty-seven months remained in the penalty period. On that day, Susan, as Trustee of the Trust, transferred a forty-four percent interest in the Property for no consideration. Then Michelle, for no consideration, executed a deed transferring her forty-four percent in the Property to Susan, individually. Next, Susan executed a deed selling the forty-four percent interest in the Property to Michelle individually for $230,000. In addition, on June 27, 2007, Michelle executed a promissory note ("original promissory note") and

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the principal of the Income Trust to Susan. Article V provides for the distribution of the Trust after Susan's death.

[2]Under the First Article, Susan is entitled to distributions of income and principal.

mortgage valued at $230,000 on the Property. The original promissory note is secured by the mortgage, which, by its payment terms, does not have a balloon provision and provides for equal monthly installments. This note designates Michelle as the Obligor/Maker and Susan as the Obligee/Holder. The interest rate on the note is 5.6 percent. The note states that beginning on June 30, 2007 and for the next twenty years, the daughter will pay Susan $1,595.16 on the last day of each month. Susan may not assign or transfer the note. The note may be converted to a private annuity at the election of both the Obligor/Maker and Obligee/Holder but neither alone. Michelle signed the note but Susan did not.

MassHealth regarded the transaction as a transfer of assets for less than fair market value. On April 9, 2008, several days before the administrative hearing but before the record closed, Susan and Michelle executed an amended promissory note, which made the promissory note **(not)*** self-cancelling at death. The Hearing Officer determined that the amendment was ineffective.

Subsequently, on October 30, 2007 George applied for Medicaid benefits by filing an application with the Tewksbury Enrollment Center. MassHealth issued a notice of denial of benefits on February 8, 2008. George appealed the denial and an appeal hearing was held before Hearing Officer Susan Burgess on March 24, 2008. MassHealth denied the appeal on May 28, 2008. The Hearing Officer found that the transfer of the forty four percent interest in the Property from Susan to Michelle was for less than fair-market value and therefore a disqualifying asset transfer.

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DISCUSSION

I. Standard of Review

The Court may modify or set aside an administrative agency's decision where the decision exceeded the agency's authority, was based upon an error of law, was unsupported by substantial evidence, or was arbitrary and capricious or otherwise not in accordance with law. Connolly v. Suffolk County Sheriff's Dep't, 62 Mass. App. Ct. 187, 192 (2004), citing G. L. c. 30A, §14(7). Substantial evidence is evidence "that a reasonable mind might accept as adequate to support a conclusion." Bournewood Hosp. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303, 317 (1976), citing G. L. c. 30A, §1(6). Pursuant to G. L. c. 30A, §14, it is the function of the agency rather than the court to make findings of fact, and it is the duty of the agency rather than the court to weigh the credibility of the witnesses. Catrone v. State Racing Comm'n, 17 Mass. App. Ct. 484, 486 (1984). The agency has the benefit of observing the witnesses, and thus is better able to make assessments as to the credibility of the testimony. Cherubino v. Board of Registration of Chiropractors, 403 Mass. 350, 356 (1988). A reviewing court gives deference to "'the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.'" Connolly, 62 Mass. App. Ct. at 192.

In reviewing an agency's decision, the court is not permitted to substitute its choice for the agency's choice between two fairly conflicting views if the court would have decided an issue differently if the matter was before it de novo. Id., 62 Mass. App. Ct. at 192-193, citing Embers of Salisbury, Inc. v. Alcoholic Bevs. Control Comm'n, 401 Mass. 526, 529 (1988). The court considers the entire record and takes into account anything in the record that fairly detracts

from the weight of the evidence supporting the agency's determination. Salem v. Massachusetts Comm'n Against Discrimination, 44 Mass. App. Ct. 627, 640-41 (1998); Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966). The burden of proof is on the appealing party to show the invalidity of the administrative decision. Merisme v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

II. Review of the Merits of the Motion for Judgment on the Pleadings

A. Hearing Officer's Decision

In its decision, the Board states that Medicaid is a cooperative federal and state program, which provides payment for medical services to eligible individuals and families. To receive federal funding, the state Medicaid programs must meet all the requirements of the federal act and the implementing regulations. Specifically, 130 Code Mass Regs. §§ 515.000 through 522.000 list the requirements that must be met for certain institutionalized individuals to become eligible for Medicaid benefits. The Hearing Officer concluded that these regulations applied to George as an institutionalized person.

The Hearing Officer further elaborates that MassHealth considers any transfer during the appropriate look-back period by the nursing facility resident or spouse of a resource or interest in a resource, owned by or available to the nursing facility resident for less than fair-market value a disqualifying transfer unless listed as permissible in 130 Code Mass. Regs.§ 520.019(D), identified in 130 Code Mass. Regs. § 520.019(F), or exempted in 130 Code Mass. Regs. 520.019(J). 130 Code Mass. Regs.§ 520.019(C). A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available. The

Hearing Officer found that the transfer of forty-four percent of the Property from Susan to Michelle was intended to make the formerly available asset no longer available. Although MassHealth may consider such a transfer as permissible, the Hearing Officer concluded that the transfer at issue here does not reflect such a permissible transfer.

Here, the Hearing Officer acknowledged that the transfer and execution of the original promissory note followed by the making of an amended promissory note was an attempt to avoid the disqualification period. The original promissory note, however, did not have an express provision prohibiting cancellation of the balance upon the death of the spouse. Even though the amended promissory note had such a provision, the Hearing Officer found the amendment ineffective. She reasoned that the amendment demonstrates that if the document is so readily subject to amendment, it cannot be fixed or binding and its enforcement is not likely among family members. The Hearing Officer also found it irrelevant that the promissory note was secured by a mortgage because he believed that the parties involved could not prove that they were contractually bound by the note. She believed that Susan would not avail herself of remedies such as foreclosure or bringing a lawsuit against Michelle, if Michelle defaulted on the promissory note.[1] Finally, the Hearing Officer found that the plaintiff failed to show that the forty-four percent interest in the Property had an ascertainable fair market value. For all the above reasons, the Hearing Officer found that the transaction at issue did not cure the original disqualifying transfer.

B. MassHealth's Arguments

MassHealth first argues that because the original promissory note does not have an express provision prohibiting cancellation of the balance upon the death of the lender, the forty-

four percent transfer between Susan and Michelle does not cure the original disqualifying transfer.

MassHealth alleges that the amended promissory note contained a curious provision[1] that allowed for deferral of payments, violating the federal requirements listed under 130 Code Mass. Regs. 520.007(J)(3). MassHealth further claims that even if the amended promissory note is sound and effective, the amendment did not take place until April 9, 2008, and the disqualification should extend until that date.

Additionally, MassHealth argues that George has failed to show that either the promissory note or the mortgage securing it is reasonably enforceable. MassHealth reasons that the transaction is between close family members and George has failed to demonstrate Michelle's solvency, or that Susan would sue her daughter or bring foreclosure proceedings against the daughter if the daughter defaults on the promissory note.

Moreover, MassHealth maintains that George has failed to show that the mortgage or promissory note could be sold on an open market. Therefore, MassHealth cannot provide a fair-market value for the interest in the Property.

C. George's Arguments

George argues that Susan's transfer of a forty-four percent interest in the Property in exchange for the promissory note and mortgage with a face value of $230,000 was an allowed sale of assets for fair market value. George further argues that the transfer was permissible under 130 Code Mass. Regs. § 520.09(C) because it was secured by a recorded and enforceable

[1] The provision states: Each and every party to this instrument, either as Obligor/Maker, endorser, surety, or otherwise, hereby waives demand, presentment for payment, notice of dishonor, protest and notice of protest hereof, and agrees to any extension or postponement of the time of payment hereof.

mortgage, and by its payment terms, it did not have a balloon provision and provided for equal monthly payments. Additionally, the amended promissory note was not self-canceling at death.

George also asserts that the transfer was proper because 130 Code Mass. Regs. § 520.007(J)(2) allows for the transfer of assets in exchange for an annuity and does not limit its availability to non-familial parties. Furthermore, George argues that the transaction is consistent with the policy objectives of the regulations because provisions in both federal and state law exist to protect a community spouse and prevent his or her impoverishment in the event a spouse should need long-term care that can otherwise not be paid for from other sources.

George agrees that the Property was a countable resource that "made him [the applicant] ineligible for MassHealth benefits . . . ." The dispute only exists as to the effect of transfer of the forty-four percent on George's eligibility to receive Medicaid benefits. This court finds that the promissory note did cure the earlier disqualifying transfer.

C. Analysis

1. The Cancellation of the Balance upon the Death of the Lender Requirement

The use of assets to make a loan or purchase of a promissory note is regarded as a transfer for less than fair market value –

> . . . unless such note, loan or mortgage –
> (i)has a repayment term that is actuarially sound . . .
> (i)provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
> (ii)prohibits the cancellation of the balance upon the death of the lender.

130 Code Mass Regs. 520.007(J)(3). The original promissory note in this case did not have an express provision prohibiting the cancellation of the balance upon the death of the community spouse. The regulation, however, does not require an express provision. Thus, absence of

language expressly allowing for cancellation upon death suggests that the promissory is not cancellable upon death.

Moreover, the amended promissory note did have an express provision making it cancellable upon death. The Hearing Officer found the amendment ineffective because he believed that if the note could be easily amended, it was not a binding document. In making this decision, he failed to rely on any law or evidence.

Therefore, this decision was arbitrary and capricious. The amended promissory note is in the record. This court accepts that the amended note relates back to the date the original note was signed, June 27, 2007.

2. The Deferral of Payments Requirement

MassHealth argues that the note violated the second provision of 130 Code Mass Regs. 520.007(J)(3)(c) by inserting the following curious provision:

> Each and every party to this instrument, either as Obligor/Maker, endorser, surety, or otherwise, hereby waives demand, presentment for payment, notice of dishonor, protest and notice of protest hereof, and agrees to any extension or postponement of the time of payment hereof.

The Hearing Officer does not acknowledge this provision at all. First, the court notes that the above phrasing is boilerplate language included in numerous promissory notes and its purpose is to make enforcement of the note obligation easier by eliminating technical defense which might be assented by the obligator/maker. Second, this court finds that the Note expressly states that there will be no deferral of payment by using language which states, "[t]his note shall not provide for the deferral of payments." Third, the so-called "curious provision" does not suggest that there will be deferral, and such ambiguous language cannot dilute the express "no deferral" language.

3. The Note is Reasonably Enforceable

The Hearing Officer and MassHealth argue that the note is not reasonably enforceable because the transaction is between family members. A transaction is a disqualifying transfer if it does not have a fair market value and a transfer does not have a fair market value if the underlying agreement is not legally binding. 130 Code Mass. Regs. § 515.001; 130 Code Mass. Regs.§ 520.007(J)(4)[2]; 130 Code Mass. Regs. § 520.019. MassHealth cites Drury v. Hartigan, 312 Mass. 175, 177 (1942) for support. Drury is not on point because even though the promissory note here is between a daughter and a mother, there is consideration for the transfer. It is true that there is no evidence that guarantees the mother will avail herself of all the legal remedies. It is also true a mortgage on a minority interest in a residential property would have little value. However, the regulations do not provide that transaction between family members are by nature disqualifying transfers. The relevant regulation 130 Code Mass. Regs. 520.007(J)(3) sets forth the conditions under which a transfer of property will not be considered for less than fair market value.[3] However, there is also nothing in the regulation which requires a mortgage as security for a promissory note, and thus, the value of the mortgage cannot be a privotal factor in deciding whether a promissory note is for less than fair market value. Moreover, the regulation does not make family

[2] Any transaction that involves a promise to provide future payments or services to an applicant, member, or spouse, including but not limited to transactions purporting to be annuities, promissory notes, contracts, loans, or mortgages, is considered to be disqualifying transfer of assets to the extent that the transaction does not have an ascertainable fair-market value or if the transaction is not embodied in a valid contract that is legally and reasonably enforceable by the applicant, member, or spouse. This provision applies to all future performances whether or not same payments have been made or services performed. 130 Code Mass. Regs. 520.007(J)(4).

[3] Michelle, as the owner of the majority interest in the Property would likely be the only purchaser of a foreclosure sale. However, Michelle's equity interest in the Property would be subject to attachment upon a default.

members ineligible to meet these conditions. Indeed family and estate planners rely upon the regulation as allowing transfers between family members as long as the expressed conditions of the regulation are met. L. Cushing, S. Allen & T. Lutsky, *Medicaid and Health Care Planning Update 2008*, MCLE Seminar, 2008, at 24. The value of the transfer is set by the note obligation of $230,000 and equals or exceeds the interest transferred. The obligation is legally and reasonably enforceable and it is not appropriate to assume that Susan will not seek to enforce the obligation by all available means in the event that her daughter defaults on the obligation. Such a conclusion could be reached in any situation involving a transfer between family members. If this result was intended, then the regulation would directly provide that transfers between family members are per se disqualifying transfers.

4. The Transaction has an Ascertainable Fair-Market Value

MassHealth regulation 130 Code Mass. Regs. § 515.001 defines fair market value as: "an estimate of the value of a resource if sold at the prevailing price. For transferred resources, the fair-market value is based on the prevailing price at the time of transfer." The Hearing Officer found that that transaction was invalid because forty-four percent of the Property cannot be sold on an open market. The definition of fair market value, as given above does not indicate that the real estate transferred should have a market for it. The definition only suggests that the fair market value should be assessed based on the prevailing price. The Hearing Officer and MassHealth fail to cite any other regulations that would suggest that under Medicaid law the property being transferred should be able to be sold on an open market. Neither MassHealth, nor

the Hearing Officer argues that $230,000 was not the fair-market value of the forty-four percent of the Property. The evidence demonstrates that the period allowed to pay for the transfer of the forty-four percent of the Property was actuarially sound and that the newly structured transaction cures the original disqualifying transfer.

ORDER

For the foregoing reasons, the plaintiffs' motion(to)* for judgment on the pleadings is ALLOWED.

Thomas R. Murtagh
Justice of the Superior Court

Dated: July 23, 2009

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