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

A.G.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE :

AND HEALTH SERVICES AND

OCEAN COUNTY BOARD OF

SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 2405-09

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the OAL case file and the Initial Decision in this matter. Petitioner filed exceptions. Procedurally, the time period

for the Agency Head to file a Final Agency Decision in this matter is January 11, 2010, in accordance with an Order of Extension.

This matter arises from transfers of Petitioner's assets to her son. Petitioner applied for benefits in February 27, 2006. While she was deemed eligible as of March 1, 2006, she was in the process of selling her home and entered a plan of liquidation. On March 22, 2006 she signed a care agreement whereby her son, E.G. would provide services in exchange for a lump sum payment of \$68,952.00 when her home sold. The same day she signed a Power of Attorney naming her son as her attorney in fact.

On August 9, 2008 Petitioner signed a promissory note to repay her son for all funds he lent her until the closing on the home. On August 27, 2008, the property was sold for \$145,000. Petitioner netted \$47,580.00 which was deposited in her attorney's trust account. Her son received \$57,207.12 from the proceeds representing \$17,427.00 under the August 2008 promissory note, and \$39,780 for the 2006 care giver agreement. In a letter dated November 3, 2008, Petitioner's attorney stated that E.G. would accept the reduced amount of \$39,780 under the caregiver agreement. (R-10C). That letter also states that Petitioner's attorney is "prepared to pay over to the state the proceeds from the sale of the house."

When it became apparent that Ocean County had taken the position that the caregiver agreement was a transfer of assets that resulted in a penalty, Petitioner's counsel stated in a December 22, 2008 letter that proceeds would only be turned over to the State "if her benefits are not terminated." (R-10B).

Absent that, counsel warned that A.G. would enter a promissory note with E.G. so that the State would not receive the funds.

Petitioner did just that and Ocean County imposed a transfer penalty of 5 months and 23 days due to the caregiver agreement and terminated Petitioner's benefits finding that the promissory note was an available resource. The ALJ found that the caregiver agreement was indeed a transfer for less than fair market value and the penalty had been correctly calculated. However, the Initial Decision found that the promissory note was not a trust-like device and was not an available resource under the trust rules.

The very issue of whether a promissory note is a trust like device that can be considered available for purposes of determining Medicaid eligibility is pending before the Federal Court, District of New Jersey in *Mary Sable, et al., v. Jennifer Velez, Commissioner, New Jersey Department of Human Services, and John R. Guhl, Director, New Jersey Department of Human Services, Division of Medical Assistance and Health Services*, Civ. No. 09-2813. In a recent order denying Plaintiff's Motion for Reconsideration, U.S. District Judge Anne Thompspon wrote "[t]here is nothing in SSI law that prohibits promissory notes from being counted as trust-like devices . . . [and that] [p]rivate persons cannot avoid liability to the government by labeling an agreement between themselves as one sort of transaction when in substance it is an entirely different sort of arrangement." 2009 U.S. Dist. LEXIS 118063. The Court went further to hold that extrinsic evidence may be used to show that the promissory note is indeed a "trust-like arrangement whereby [the individual]'s close relatives are holding money for the benefit of [the individual]."

When looking at the extrinsic evidence surrounding this promissory note in this case, it is clear that the purpose of the note was not to loan money but was contrived when it became clear that Petitioner would be penalized for transferring her assets under the guise of a caregiver agreement. By entering into the note, Petitioner would be ineligible under the caregiver agreement but could use the money transferred under the note to pay for her nursing home care while she was ineligible.

This arrangement is more commonly known as a half-a-loaf transfer, a common strategy used by families to transfer $\frac{1}{2}$ of the assets to the children and, since prior to 2006, the penalty would begin on the date of the transfer, use the other $\frac{1}{2}$ to pay for care until the penalty expired. Congress specifically sought to stop this type of arrangement under the Deficit Reduction Act of 2005 by starting the penalty period when the individual is otherwise eligible—meaning the second $\frac{1}{2}$ has been spent down to the resource standard.

Petitioner is using the note as a guise to appear eligible since the \$42,000 is no longer in her bank account but is really being used for her care and shelter as E.G. is paying the loan to the nursing facility. Indeed, the Initial Decision recounts E.G. testifying that he held the \$42,000 "in a bank account and made the monthly payments due under the note directly to the nursing facility, on behalf of his mother. (ID at 5). The agreement has some characteristics of informal loans as defined in the POMS, but there is no loan purpose, it is not backed by collateral and probably would not be repayable based on E.G.'s income if the money were not just being held in a bank account.

At the time A.G. entered the promissory note, she had been terminated from Medicaid due the transfer of \$39,780 under a care giver agreement that both Ocean County and later the ALJ found to be a transfer of assets for less than fair market value. If Ocean County had not taken action on caregiver agreement, E.G. would retain \$39,780 in exchange for paying the State \$42,000 and continuation of A.G.'s benefits.

The Omnibus Budget Reconciliation Act of 1993, 42 U.S.C. § 1396 (hereinafter "OBRA 93"), broadly defines the term "trust" to include "any legal instrument or device that is similar to a trust . . ." 42 U.S.C. § 1396p(d)(6). See also N.J.A.C. 10:71-4.11(a). Based on the documents in evidence and the testimony elicited at the hearing, it is plain that this agreement must be analyzed as to how the assets transferred are to be treated.

The Initial Decision relies on the omission of "an obligor under a promissory note" in the statutory definition of fiduciary. However, the statute does define fiduciary to include "any other person acting in a fiduciary capacity for any person, trust or estate." N.J.S.A. 3B:14-53(b). In that the statute uses the term fiduciary in the definition of a "fiduciary" demonstrates that a fiduciary relationship is not subject to a precise definition. Indeed, Bogert, Trust and Trustees 2d §481 (1978) states "[t]he exact limits of the term 'fiduciary relation' are impossible of statement. Depending upon the circumstances of the particular case or transaction, certain business, public or social relationships may or may not create or involve a fiduciary character." Furthermore, "[w]hen legal title to a particular property is in one person, with a special confidence reposed in him to apply the property faithfully and according to such confidence, for the benefit of

another, this amounts to the definition of a trust." Duff v. Gilliland, 139 F. 16, 22 (3d Cir. 1905).

It is the last phrase of N.J.S.A. 3B:14-53(b) that describes E.G.'s role as a fiduciary. E.G. testified that he is holding the \$42,000 in an account and paying the monthly loan amount from that account to the nursing home for A.G.'s care.(ID at 5). He did not use the money to purchase a home or car, make home improvements, or pay for education – common reasons to borrow money. Rather he is acting to help his mother preserve Medicaid eligibility while retaining \$39,720 himself. E.G. is A.G.'s only son and her Power of Attorney. Were he to default on the note, he would have to bring suit as the POA against himself. But, at the time, there is no need to do this since the money has just changed bank accounts.

This testimony as to the use of the money by E.G. also meets the second criteria. The transfer was intended to have the assets "held, managed, or administered by the trustee for the benefit of the grantor or others." N.J.A.C.10:71-4.11(a). The money was not used for any of the reasons people normally seek to borrow money. Instead the \$42,000 is being used for the benefit of the grantor, namely to keep her in the nursing home while the penalty for the caregiver agreement runs. E.G. also benefits from the arrangement as he retains the \$39,780 transferred to him under the caregiver agreement.

Moreover, the note requires that payment be made to A.G., not to the nursing home. As E.G. is paying the nursing home directly, the terms of the promissory note do not encapsulate all of the agreements and the arrangements

between A.G. and E.G. regarding the \$42,000. The actions of A.G. and E.G. show that the assets were to be held by E.G. for both their benefit.

Finding that the note document is similar to a trust, the matter turns to the treatment of the \$42,000 under the trust rules.

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

This trust like device was set up to be used for A.G.'s benefit. While the terms of the promissory note require the loan to be paid back to A.G., the repayment to the nursing facility is directly for her benefit. I FIND that the \$42,000 was available to her in determining Medicaid eligibility. N.J.A.C. 10:71-4.11(e)2ii. Thus, I FIND that Petitioner is not eligible for Medicaid as she is over the resource standard and that the 5 month and 23 day transfer penalty related to the caregiver cannot begin until she is otherwise eligible for Medicaid.

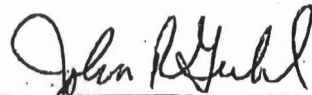
THEREFORE it is on this th6 day of JANUARY 2010,

ORDERED:

That the Initial Decision in this matter is hereby ADOPTED in part regarding the imposition of a five month and twenty-three day period of ineligibility due to the transfer of assets under the caregiver agreement;

That the Initial Decision is hereby REVERSED in part regarding the termination of Petitioner's benefits due to the availability of the \$42,000 for the purpose of determining Petitioner's Medicaid eligibility; and

That Petitioner may reapply for benefits.



John R. Guhl, Director
Division of Medical Assistance
and Health Services