State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
SUMMARY DECISION
OAL DKT. NO. HMA 9733-09

M.S.,

Petitioner,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,

Respondents.

Donald D. Vanarelli, Esq., for petitioner

Lawrence M. Rosa, Board Counsel, for respondent

BEFORE **JOSEPH A. PAONE**, ALJ:

Respondent Middlesex County Board of Social Services (MCBSS) denied petitioner M.S.'s eligibility for Medicaid benefits due to excess resources. M.S. appealed, and the matter was transmitted to the Office of Administrative Law, where it was filed as a contested case on August 28, 2009. M.S. has now filed for summary decision.

The parties have stipulated to the relevant facts. On November 23, 2007, M.S. gave her daughter C.P. power of attorney over her affairs. On October 1, 2008, M.S.

became eligible for nursing home Medicaid. On May 15, 2009, C.P advised the MCBSS that her mother was in receipt of the proceeds from the sale of her home and that she should no longer be eligible for Medicaid assistance. On May 26, 2009, the MCBSS advised M.S. that she would no longer be eligible for Medicaid benefits as of June 30, 2009, due to excess resources. On June 1, 2009, C.P., on behalf of M.S., and through the power of attorney provided by M.S., entered into a Loan Agreement with herself. That agreement provided that M.P. give C.P. $112,120 in exchange for a promissory note.

The MCBSS contends that this promissory note, dated June 1, 2009, constitutes a "trust-like device." 42 U.S.C.A. §1396p(d) provides that the funds used to create a trust or trust-like device must be considered an available resource. Under the facts of this case, if the funds used by M.S. to procure the promissory note do, indeed, constitute an available resource, M.S.'s resources would exceed the threshold resource level and render her ineligible for Medicaid assistance.

M.P counters that C.P.'s promissory note, as a matter of law, is not a trust or trust-like instrument, and, therefore, cannot constitute an available resource. The parties agree that in order for a trust-like device to exist, it requires that (1) a grantor (2) transfers assets (3) to a person or entity with fiduciary obligations (4) to be held or administered for the benefit of the grantor or others. There is no dispute that M.P., the grantor, transferred assets to C.P. But the parties dispute whether C.P. had a fiduciary relationship with M.P. that required C.P. to hold and administer the funds she received for M.P.'s benefits. A fiduciary relationship may arise under three circumstances: (1) traditional fiduciary relationships such as principal and agent, (2) situations in which one or both parties expressly repose trust and confidence in the other or where such trust and confidence is necessarily implied, and (3) contracts or transaction which are intrinsically fiduciary. United Jersey Bank v. Kensey, 306 N.J. Super 540, 551 (1997).

A loan does not generally create a fiduciary relationship and such a transaction is not generally intrinsically fiduciary. But here, where there is no arms-length transaction, the borrower is acting as the attorney-in-fact for the lender, and a situation is created

where a mother may become impoverished if her daughter fails to act in her mother's best interest, there is an absolute dispute as to whether C.P. is merely holding her mother's proceeds from the sale of her home in trust for her mother's benefit. That dispute can only be resolved through a hearing, where an inquiry can be made into the parties understanding at the time the loan was made. When a genuine issue regarding a material fact remains in dispute, summary decision must be denied. N.J.A.C. 1:1-12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995). Therefore, I hereby **ORDER** that the M.S.'s motion for summary decision is **DENIED**. The case is scheduled for a hearing on January 8, 2010.

This order may be reviewed by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

December 21, 2009

DATE

JOSEPH A. PAONE, ALJ