*State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**ORDER DENYING MOTIONS FOR SUMMARY DECISION**

OAL DKT. NO. HMA 15716-12

AGENCY DKT. NO. N/A

**M.K.,**

Petitioner,

v.

**DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND SOMERSET COUNTY BOARD OF SOCIAL SERVICES,**

Respondents.

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**Donald Vanarelli,** Esq., appearing on behalf of petitioner M.K. (Law Offices of Donald Vanarelli, attorneys)

No appearance by or on behalf of respondent Division of Medical Assistance and Health Services

**Frederick H. Allen III,** Esq., appearing on behalf of respondent Somerset County Board of Social Services

BEFORE **SUSAN M. SCAROLA,** ALJ:

## STATEMENT OF THE CASE

Petitioner M.K. appeals the action of respondents Division of Medical Assistance and Health Services (DMAHS) and the Somerset County Board of Social Services (Board) granting eligibility for Medicaid nursing home benefits, but imposing a penalty period of six months and thirteen days before her benefits commenced, based upon a transfer of resources during the look-back period.

## PROCEDURAL HISTORY

Petitioner M.K. commenced the Medicaid application process with the DMAHS and the Board on June 11, 2012. On September 13, 2012, petitioner was approved as medically eligible for long-term care and was approved for Medicaid nursing-home benefits with resource eligibility as of June 1, 2012. As a result of transfers during the look-back period, a penalty period was imposed, making petitioner eligible for benefits as of January 25, 2013. Petitioner requested a fair hearing on the Board's determination and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on November 26, 2012. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The petitioner filed a motion for summary decision on February 26, 2013; the Board replied to the motion and filed a cross-motion for summary decision on March 22, 2013. The petitioner responded to the Board's reply brief on April 4, 2013.

## STATEMENT OF FACTS

The material facts are not in dispute:

1. During the sixty-month look-back period, petitioner M.K. made transfers or gifts of assets, totaling $5,500, to her adult disabled daughter, S.L., born April 29, 1942.

2. In 2004, prior to the date of any gifts/transfers, S.L. was found to be disabled by the Social Security Administration.

3. Upon reaching full retirement age of sixty-five on April 29, 2007, S.L. became eligible for Social Security retirement benefits, and, as a result, her benefits changed from disability to retirement.

4. S.L. was over the age of sixty-five at the time that the transfers of assets were made.

5. Also during the look-back period, petitioner M.K. made transfers or gifts of assets, totaling $54,494.45, to her adult disabled son, I.D.K., born December 27, 1943.

6. In 1997, prior to the date of any gifts/transfers, I.D.K. was found to be disabled by the Social Security Administration.

7. Upon reaching full retirement age of sixty-five on December 27, 2008, I.D.K. became eligible for Social Security retirement benefits, and, as a result, his benefits changed from disability to retirement.

8. I.D.K. was over the age of sixty-five at the time that the transfers of assets were made.

9. Petitioner M.K. applied for Medicaid on June 11, 2012.

10. By letter of September 13, 2012, Medicaid granted M.K.'s application for Medicaid benefits, but imposed a penalty as a result of the gifts/transfers totaling $59,994.45 to her adult disabled children.

11. As a result of the penalty period Medicaid imposed based upon the transfers, the Medicaid applicant (petitioner) was found to be ineligible for benefits from June 1, 2012, through January 25, 2013.

12. To further explain the basis of denial, the Board forwarded a letter dated November 20, 2012, which stated:

> [M.K.'s] case was reviewed to determine if an error was made in our determination to impose a penalty for transfer of assets. It is clearly stated in [N.J.A.C.] 10:71-4.10(e)1, the application of a transfer penalty set forth in this section shall not apply when the assets were transferred to a trust established for the sole benefit of an individual under 65 years of age [who] is disabled as defined by the Social Security Administration.
>
> We do not dispute the fact that [M.K.] has two adult children, but the transfers occurred after their 65th birthday. . . .
>
> Therefore, based on this information, our decision to impose a penalty for transfer of assets is correct.

13. The gifts were made by the Medicaid applicant to her adult disabled children outright and not in trust.

## LEGAL ANALYSIS AND CONCLUSION

Summary decision may be granted only "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). These provisions mirror the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

Motions for summary decision in agency actions must be analyzed "in accordance with the principles set forth by the Supreme Court in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995)." Nat'l Transfer, Inc. v. N.J. Dep't of Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). In Brill, the Court explained that

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. . . . [W]hen the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment.
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> [Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986).]

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). An evidentiary hearing is not required if there is no genuine issue of material fact. Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). As the parties in this matter are in accord as to the material facts surrounding the application, and there appears to be no genuine issue as to any of them, no hearing is necessary, and the matter is ripe for summary decision as a matter of law.

Congress created the Medicaid program under Title XIX of the Social Security Act (the "Act"), 42 U.S.C. §§ 1396 to 1396w-5. The program is funded by the federal government and administered by the states, including New Jersey. A.K. v. DMAHS, 350 N.J. Super. 175 (App. Div. 2002).

New Jersey participates in Medicaid through the New Jersey Medical Assistance and Health Services Act. N.J.S.A. 30:4D-1 to -19.5. The Commissioner of the Department of Human Services has promulgated regulations implementing New Jersey's Medicaid Only and Medically Needy Medicaid programs to include income and resource eligibility standards for all applicants and recipients. N.J.A.C. 10:71-4.1 to -5.9; N.J.A.C. 10:70-4.1 to -5.4. A "resource" is "real or personal property . . . which could be converted to cash to be used for [the individual's] support and maintenance." N.J.A.C. 10:71-4.1(b); N.J.A.C. 10:70-5.3(a). Unless specifically excluded, all liquid and non-liquid resources are considered "countable" resources in determining eligibility for

participation in the Medicaid Only and Medically Needy Medicaid programs. N.J.A.C. 10:71-4.1(b), -4.2(a); N.J.A.C. 10:70-5.3(a). The resource must also be "available." A resource is deemed "available" to an individual when "[t]he person has the right, authority, or power to liquidate real or personal property or his or her share of it." N.J.A.C. 10:71-4.1(c)(1); N.J.A.C. 10:70-5.3(a).

An applicant's Medicaid eligibility is postponed until all of the available assets, except those that are exempt, have been "spent down" to the eligibility limits. N.J.A.C. 10:70-6.1(a). Participation in the Medicaid Only program must be denied or terminated if the total value of an individual's resources exceeds $2,000. N.J.A.C. 10:71-4.5(c). Resource eligibility is generally determined as of the first moment of the first day of each month for which eligibility is sought to be established. N.J.A.C. 10:71-4.5(a)(1).

Pursuant to the Deficit Reduction Act (DRA) of 2005 (enacted February 8, 2006), if an applicant transfers assets for less than fair market value during the look-back period, then those assets are included in the eligibility analysis as funds available to the applicant, and a period of ineligibility is assessed by the imposition of a transfer penalty. See 42 U.S.C. § 1396p(c)(1); N.J.A.C. 10:71-4.10(a).

The issue presented here is whether the petitioner has been wrongfully denied eligibility for Medicaid benefits by the imposition of a penalty period for transferring assets to her adult disabled children, who were over the age of sixty-five, during the look-back period.

N.J.A.C. 10:71-4.10(a)(2) provides that an individual shall be ineligible for institutional-level services through the Medicaid program if he or she (or his or her spouse) has disposed of assets at less than fair market value at any time during or after the sixty-month period immediately before the date the individual applies for Medicaid as an institutionalized individual. However, the application of a transfer penalty does not apply when:

> 1. The assets were transferred to a trust established for the sole benefit of an individual under 65 years of age who is

> disabled as defined by the Social Security Administration;
>
> . . . .
>
> 5. The assets were transferred from the individual or individual's spouse to the individual's child who is blind or permanently and totally disabled.
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> [N.J.A.C. 10:71-4.10(e).]

N.J.A.C. 10:71-4.10(e)(5)(i) provides that if the child does not have a determination from the Social Security Administration (SSA) of blindness or disability, the blindness or disability will be evaluated by the Disability Review Unit of DMAHS (in accordance with regulation). Clearly, the regulations contemplated that the SSA's determination was not the only method of determining whether an individual's child were disabled or blind.

The Board relies upon N.J.A.C. 10:71-4.10(e)(1) as the basis for its determination to deny Medicaid benefits to petitioner because the assets were transferred to adult children who were over the age of sixty-five at the time when the transfers were made, and not to a trust established for the sole benefit of an individual who was disabled (as defined by the SSA) before he or she reached the age of sixty-five. The problem with this conclusion is that the two above-quoted subsections of the regulations, N.J.A.C. 10:71-4.10(e)(1) and N.J.A.C. 10:71-4.10(e)(5), have been conflated into one subsection by the Board.

In Sorber v. Velez, 2009 U.S. Dist. Lexis 98799 (D.N.J. October 23, 2009), the court noted that Congress has legislated that certain transfers of resources are exempt from the transfer-penalty rules.[1] Specifically, 42 U.S.C. § 1396p(c)(2)(B)(iii) provides that "[a]n individual shall not be ineligible for medical assistance by reason of [the transfer-penalty rules] to the extent that . . . the assets . . . were transferred to, or to a trust . . . established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II) [describing blind and disabled children]."

[1] While not a reported decision, this case can be used for guidance for the interpretation of the federal statutes on which the State's regulations were based.

In Sorber, the assets were transferred directly to blind and disabled children, and not to a trust. Although no mention was made of the ages of the children involved in that case, the court found that 42 U.S.C. § 1396p(c)(2)(B)(iii) clearly exempted outright transfers of resources to such children, and enjoined the social service agency from applying the asset-transfer penalties described in 42 U.S.C. § 1396p(c)(1) to the plaintiffs' outright transfers of assets to their respective blind or disabled children. The limitation on whether the asset was transferred "solely for the benefit of" the disabled children applied to transfers made to trusts, and not to direct transfers to the children. The conclusion to be drawn then from Sorber is that if outright transfers were made to adult disabled children, they are not subject to the transfer penalty, but if transfers were made to a trust, then certain limitations would apply for the transfers to be exempt from the penalty.

The issue in this matter then becomes whether the outright transfers to petitioners' children after reaching the age of sixty-five would fall within the exemption of N.J.A.C. 10:71-4.10(e)(5) because the children remained blind or disabled. The Board concluded that once petitioners' children reached the age of sixty-five and their Social Security benefits were re-designated as "retirement benefits" and not "disability benefits," they were no longer considered "disabled" for the purposes of being entitled to an exemption under N.J.A.C. 10:71-4.10(e)(5) for outright transfers made to them.[2] But the re-designation of disability benefits as retirement benefits is part of Social Security's legislative scheme and has nothing to do with determination of disability. Would that every disability or blindness could be cured upon reaching the age of sixty-five. What matters is whether the disability itself remains, not the label placed upon the type of benefits received.

And that leads to the following conclusion: it cannot be determined under the facts presented whether the petitioners' children remain blind or disabled such that they would meet the definition as set forth in the Social Security Act or under the regulations

[2] Social Security disability benefits compensate a worker for lost income. The re-designation of benefits from disability to retirement upon reaching the full retirement age (in this case, sixty-five) simply presumes a retirement from the work force as would have occurred had the worker been able to remain in the labor market. It also spares the SSA from periodically reviewing disability status. See 42 C.F.R. § 404.316 (2012).

as applied by the Disability Review Unit of the DMAHS, with the result that the transfers to them would be exempt from the transfer penalty pursuant to N.J.A.C. 10:71-4.10(e)(5).

S.L. was declared disabled by the SSA in 2004 and turned sixty-five three years later. There is no way to determine whether her disability was short term or long term, given that only three years had elapsed from the SSA's original determination. Updated medical information should be presented to the Disability Review Unit of the DMAHS to see whether S.L. continues to meet the criteria for blind or permanently and totally disabled.

With I.D.K., the situation is somewhat different. He was declared disabled by the SSA in 1997, and turned sixty-five eleven years later. This demonstrates a long-term disability which substantially impacted I.D.K.'s ability to work. Presumably, the disability continues to this date, but updated medical information is required to confirm his condition. This information should be presented to the Disability Review Unit of the DMAHS to see whether I.D.K. continues to meet the criteria for blind or permanently and totally disabled.

If petitioners' children S.L. and I.D.K. continue to meet the medical criteria for blind or permanently and totally disabled, and were so disabled when the transfers were made, then the outright transfers made to them after reaching the age of sixty-five remain exempt from the transfer penalty imposed upon the petitioner. If they do not meet the criteria, then the amount of assets transferred to the children by petitioner is not exempt from the transfer penalty, and the appropriate transfer penalty shall be imposed.

In summary, the issue concerned whether the petitioner's children continued to remain disabled to the extent required such that transfers of assets to them, although occurring after the age of sixty-five, would have remained exempt from the imposition of a transfer penalty on petitioner. Additional information should be obtained by the petitioner and presented to the Board for consideration as part of petitioner's application for Medicaid nursing home benefits. Without this information, the motion cannot be

decided for either party. Accordingly, I **CONCLUDE** that both motions for summary decision should be denied and the matter scheduled for hearing, if necessary, after the medical information has been provided and presented to the Board for its re-consideration and determination of eligibility.

## COUNSEL FEES

As for the claim of counsel fees, the Administrative Code does not authorize an award of counsel fees in this forum.

## ORDER

I hereby **ORDER** that the petitioner's and respondent's motions for summary decision are **DENIED**. The matter shall be scheduled for a hearing, if necessary, after the medical information concerning disability of the adult children has been provided and presented to the Board for its consideration and determination of petitioner's eligibility for Medicaid nursing home benefits.

This order may be reviewed by 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.

April 10, 2013
DATE

Susan Scarola
**SUSAN M. SCAROLA,** ALJ

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