



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
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**A copy of the administrative law
judge's decision is enclosed.**

**This decision was mailed to the parties
on DEC 18 2014**



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 05391-14

AGENCY REF. NO. 2010047912

M.Y.,

Petitioner,

v.

UNION COUNTY BOARD OF SOCIAL SERVICES,

Respondent.

Stephanie Kay, Esq., for petitioner, **M.Y.** (The Kaye Law Firm, attorneys)

Pamela Dunn-Hale, Esq., Assistant County Counsel, for respondent

Record Closed: December 3, 2014

Decided: December 17, 2014

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

Petitioner, M.Y., a 96-year-old resident of the Manor Care Nursing Home (Manor Care), challenges the denial by the respondent, Union County Board of Social Services (Union County), of her application for an undue hardship exception under N.J.A.C. 10:71-4.10(q). Union County asserts that M.Y. has failed to establish eligibility for a waiver of the transfer of assets penalty it has imposed.

PROCEDURAL HISTORY

This request for a fair hearing was filed on March 25, 2014, and was transmitted to the Office of Administrative Law (OAL) on April 29, 2014. This matter has a long procedural history, and comes before the OAL after two earlier fair hearings.

M.Y. was admitted to Manor Care in or about February 2011. By notice dated February 24, 2012, Union County found M.Y. eligible for Institutional Medicaid benefits effective February 1, 2011, but imposed a transfer penalty of 33 months and 25 days due to the alleged transfer of \$246,371.62. A challenge to this penalty was the subject of an earlier fair hearing (HMA 0281-12), at which it was determined that M.Y. had failed to rebut the presumption that the funds were transferred to qualify for Medicaid.

Thereafter, M.Y. was served with a formal Notice of Discharge for non-payment, which was stayed pending a timely appeal. By letter dated October 23, 2012, M.Y. requested an additional fair hearing, contending that Union County had not issued a decision relative to her hardship waiver application. The hardship waiver was formally denied on November 20, 2012. Her challenge to the denial of the hardship waiver was consolidated with the challenge to the notice of discharge and the matters proceeded to hearing before Administrative Law Judge Tahesha Way on February 7, 2013, and April 15, 2013.¹ Judge Way issued a decision on June 7, 2013, remanding the matter back to Union County with a finding that it had failed to properly analyze the hardship waiver application. (HMA 12685-12). A final agency decision dated October 13, 2013, affirmed Judge Way's decision, and likewise remanded the matter to Union County to properly process the hardship waiver application filed on M.Y.'s behalf.

Thereafter, on or about March 3, 2014, Union County again denied petitioner's hardship waiver application, noting that "evidence of the disposition of the transfer of

¹ The Notice of Discharge was withdrawn without prejudice while the consolidated matters were pending.

\$246,371.62 has yet to be provided as well as documentation of any and all attempts to recover these funds.² This appeal followed.

On July 28, 2014, I conferred via telephone conference with counsel and it was agreed that the issues raised by this latest appeal could be decided on the 2013 record before Judge Way.³ A transcript of the proceedings in 2013 was shared with me as well as the documentary record; the parties filed briefs; and the record closed on December 3, 2014.

ISSUE PRESENTED

Does M.Y. meet the criteria for an undue hardship exception under N.J.A.C. 10:71-4.10(q)?

FINDINGS OF FACT

The facts found by Judge Way in the prior proceedings are incorporated herein by reference. Additionally, I **FIND** the following based upon my review of the record below:

Control of the Controverted Assets

This is now the third time that an ALJ has been called upon to analyze the whereabouts of an inheritance received by M.Y. It is uncontroverted that she was bequeathed the amount of \$246,371.62 when her sister died. At the 2012 proceeding, M.Y.'s son testified that his father was a compulsive gambler and that the controverted

² After Union County denied the hardship waiver for a second time, Manor Care entered into a written agreement with M.Y.'s power of attorney to continue to pursue the waiver appeal on her behalf. Counsel points out that a July 27, 2006, letter from the Centers for Medicare and Medicaid Services (CMS) provides that a facility may, with written consent of the individual or the individual's personal representative, represent the individual throughout the appeals process, "including an appeal of the denial of a hardship waiver application." A copy of that letter, and its enclosures, accompanies counsel's October 30, 2014, brief. Union County has made no objection to Manor Care counsel's appearance.

³ It was decided to proceed in this fashion, in part, due to witness unavailability issues, and because the substantive facts remain unchanged from those presented at the earlier proceedings.

funds were squandered by his father in casinos. During the hearing conducted in 2013, the ALJ met both M.Y. and her husband. M.Y. was nonverbal; G.Y. could be engaged in conversation. He is now deceased. The transcript of his testimony reveals an individual who appeared a bit confused, but who testified clearly and unequivocally that he had no money. His words were, "[I have] nothing, I'm broke." Elsewhere, his testimony reflected uncertainty about how the money at issue was spent. He claimed to not even recall that M.Y. received money from his sister-in-law as an inheritance, and then stated "I don't know what happened to [the sister-in-law's] money."

M.Y.'s son, G.Y., also testified in 2013. His testimony was clear, consistent, responsive to the questions asked, non-evasive, and as a result, quite credible. A review of his testimony makes it clear, and I **FIND**, that regardless of how the \$246,371.62 that M.Y. inherited from her sister was disposed of, it is spent and gone. M.Y. does not have the controverted money or any access to it. The younger G.Y. was clear that neither he nor his sister, or her children, have the money. There are no other assets in his mother's estate. At the time of the earlier proceeding the family house was owned by the younger G.Y., and was in foreclosure. Any furnishings in the home in which money could have been hidden have been disposed of at auction.

Nor did M.Y. have any role in the disposition of the controverted funds. Her son, G.Y., likewise was unequivocal, and I **FIND** that, as was not atypical for women of her generation, his mother did not take an active role in the family's finances. Indeed, she left all financial transactions, including the writing of checks, to her husband. The record before Judge Way during the 2013 hearing makes clear, and I **FIND**, that the transferred assets are not in the control of any member of M.Y.'s family, and thus, as a result, cannot be recovered. Since not a single witness could account for where the money is, other than to urge, as M.Y.'s son has done repeatedly, that it was gambled away, I **FIND** that there are no remedies available to the family in law or in equity to recover the controverted funds.

M.Y.'s Medical Condition and Need For Care

I **FIND** that M.Y. cannot live independently, and that her life and/or health would be endangered without full-time care. Clarice Gogia is a registered nurse at Manor Care who was admitted as an expert in nursing care. She is familiar with M.Y. and her medical condition and testified that M.Y. is dependent on the assistance of others for all Activities of Daily Living (ADL). Gogia testified that M.Y. suffers from dementia, is not alert, and requires 24/7 supervision. M.Y. cannot transfer or ambulate independently, and Gogia indicated that two to three healthcare providers move M.Y. from her bed each day using a specialized Hoyer Lift and Geri Chair. The younger G.Y. testified that he now lives out-of-state with his sister, and testified that neither he nor his sister could physically care for their mother in their home in Wyoming. He urged that they lacked both the proper equipment and the requisite expertise. Accordingly, I further **FIND** that if discharged from the nursing home, M.Y. would have nowhere to go. She does not own a home; has no assets with which to pay rent; and per the testimony of her son, she cannot reside with him.

CONCLUSIONS OF LAW

Title XIX of the Social Security Act established the Medicaid program under which participating states may provide federally funded medical assistance to certain eligible needy persons. Dougherty v. Dep't of Human Servs., 91 N.J. 1, 4 (1982); see also 42 U.S.C.A. § 1396. By enacting the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5, New Jersey has elected to participate in the Medicaid program. L.M. v. Div. of Med. Assistance and Health Servs., 140 N.J. 480, 485 (1995).

According to 42 U.S.C.A. § 1396p(c)(1)(A), if an institutionalized individual, or, at the option of a State, a non-institutionalized individual, disposes of assets for less than fair market value on or after the applicable look-back date, the individual is ineligible for medical assistance for certain services. Upon imposition of a period of ineligibility for long-term care level services because of an asset transfer, the CBOSS shall notify the

applicant/beneficiary of his or her right to request an undue hardship waiver. N.J.A.C. 10:71-4.10(q). Undue hardship shall be considered to exist when:

- i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life; and
- ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.

[N.J.A.C. 10:71-4.10(q)(1)]

Undue hardship does not exist when the application of a transfer penalty merely causes the applicant/beneficiary an inconvenience or restricts his or her lifestyle. N.J.A.C. 10:71-4.10(q)(2).

In her June 7, 2013, decision, Judge Way remanded the matter to Union County, having concluded that the agency had failed to properly analyze M.Y.'s entitlement to an undue hardship waiver under N.J.A.C. 10:71-4.10(q). She noted that Union County "solely analyzed M.Y.'s case based upon a prior determination that she could not convincingly prove how the inheritance was spent and that it was transferred for reasons other than to establish future Medicaid eligibility." Indeed, the record reveals that the undue hardship waiver application was denied in 2012 for the following reason:

[M.Y.] has met the eligibility requirements for the above Medicaid Program effective 2/1/11, however, due to the fact that you are unable to provide evidence of the disposition of the transfer of \$234,371.62 and cannot "irrefutably demonstrate" that these funds cannot be recovered, your request for a hardship waiver has been denied...

[Exhibit P-2, at proceeding before Judge Way, HMA 12685-12]

Upon receipt of this remand, Union County once more denied the undue hardship waiver application, this time citing the following rationale:

Please be advised that due to the fact that evidence of the disposition of the transfer of \$246,371.62 has yet to be provided as well as documentation of all attempts to recover these funds, your request for a Hardship Waiver has been denied and the transfer of resource penalty period remains imposed.

M.Y. urges that Union County has again denied the waiver application without properly analyzing her entitlements under the relevant regulation. Since Union County has renewed its denial for essentially the same reasons earlier relied upon, I am forced to agree. I **CONCLUDE** that despite the admonition contained in both Judge Way's decision, and the final agency decision, Union County has for a second time denied M.Y.'s hardship waiver application without consideration of the factors clearly set forth in N.J.A.C. 10:71-4.10(q). At this juncture, however, another remand to Union County would disserve these litigants. Not only does the history of this matter leave little confidence that the application will be properly assessed at the local level, this petitioner is entitled to a decision that brings closure to this dispute. For the reasons that follow, I **CONCLUDE** that Union County improperly denied a hardship waiver to M.Y.

Relative to the transfer penalty itself, N.J.A.C. 10:71-4.10(j)(k) and (l) required Judge Way to analyze several factors, including the purpose for the transfer; how the applicant supported herself subsequent to the transfer; and the applicant's relationship to the individual to whom the funds were transferred. The regulations require that the presumption that assets were transferred to establish Medicaid eligibility will be considered successfully rebutted only if the applicant demonstrates that the asset was transferred exclusively for some other purpose. N.J.A.C. 10:71-4.10(l)(1). Judge Way thus determined that although G.Y. clearly was a compulsive gambler, M.Y. could not establish that her husband specifically used the inheritance money to fuel his habit. Thus M.Y. could not successfully rebut the presumption that the controverted \$246,371.62 was transferred to establish Medicaid eligibility.

Conversely, a hardship waiver is a remedy potentially available to an applicant for benefits, like M.Y., who has failed to meet her burden of rebutting the presumption that assets were transferred to establish Medicaid eligibility. Indeed, the regulation reads as follows:

Upon imposition of a period of ineligibility for long-term care level services because of an asset transfer, the county welfare agency shall notify the applicant/beneficiary of his or her right to request an undue hardship exception. An applicant/beneficiary may apply for an exception to the transfer of asset penalty if he or she can show that the penalty will cause an undue hardship to him- or herself.

[N.J.A.C. 10:71-4.10(q).]

Accordingly, the issue now presented, is whether, notwithstanding a transfer of assets to create Medicaid eligibility, M.Y.'s situation is such that imposing a penalty would create an undue hardship for her. Simple common sense would dictate that a different analysis would be required than that utilized to review the propriety of the asset transfer itself. By now twice denying the hardship waiver application because M.Y. could not demonstrate "evidence of the disposition of the transfer of \$246,371.62," Union County is misapprehending its obligations to this applicant under the regulatory scheme. Union County must now determine, relative to M.Y.'s finances, whether the sum of \$246,371.62 is "beyond...her control and that the assets cannot be recovered." N.J.A.C. 10:71-4.10(q)(1)(ii). While an answer to the question of how the money was disposed of might likewise answer the question of whether it remains in M.Y.'s control, it is not the only answer that could successfully do so under N.J.A.C. 10:71-4.10(q).

Neither M.Y. nor her son may be able to prove what happened to the money. M.Y.'s husband was either not lucid enough or honest enough to tell Judge Way what happened to her inheritance, assuming that he gambled it away as his son suspects. But it is clear from the testimony below that the senior G.Y. was penniless when he died; that his wife had no control of their finances; and that their son and daughter do not have the money. Thus, notwithstanding the family's inability to prove to Judge Way that the controverted assets were not transferred to establish Medicaid eligibility, they

have nonetheless credibly asserted that the money is irretrievably gone. This showing is all that N.J.A.C. 10:71-4.10(q)(1)(ii) requires.

Moreover, it is noteworthy that relative to a challenge to the transfer penalty itself, the regulation provides that the applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility," by presenting proof that the transfer was for some other purpose. (emphasis supplied) N.J.A.C. 10:71-4.10(j). The regulation thus required Judge Way to assume that the inheritance at issue was transferred to establish eligibility, unless M.Y. could establish otherwise. An artificial presumption such as the one contained in the regulation is intended to achieve public policy objectives. Coffman v. Keene Corp., 133 N.J. 581,597 (1992). Since the incentive to dispose of assets when seeking to have Medicaid fund a costly institutional placement is great, the public policy reasons for this presumption are clear. Conversely, the inquiry presently before me requires that I apply regulatory language that includes no such presumption disfavoring the applicant. Rather, the regulation simply specifies the type and nature of the hardship that might qualify an applicant for a waiver of the transfer penalty. For this additional reason, it is clear that the analysis employed by Union County was faulty and cannot be sustained.⁴

Finally, Union County has twice persisted in wholly ignoring the second prong of the undue hardship regulations, which require an assessment of whether application of the transfer of assets provisions would deprive M.Y. of "medical care such that...her health or ...her life would be endangered," or whether it would deprive her of "food, clothing, shelter, or other necessities of life." It has done so, undoubtedly, because the whereabouts of the \$246,371.62 has been its singular focus. But the harm that would come to M.Y. if she were to be discharged from Manor Care is an essential element of the hardship waiver analysis. She is a 96-year-old woman who suffers from dementia; cannot take care of any of her own needs, personal, medical, or otherwise; is destitute; and has nowhere else to go. I **CONCLUDE** that a strict application of the transfer penalty would plainly endanger M.Y.'s health and well-being, and deprive her of food

⁴ Union County makes the somewhat remarkable argument that there is "no right to [Medicaid]." But of course M.Y., like all citizens, has every right to Medicaid, assuming she is eligible under the regulations.

and shelter. Union County makes the specious argument that M.Y. would be merely inconvenienced by a move to Wyoming to live with her children. M.Y.'s son testified that he cannot care for his mother; perhaps the fact is that he chooses not to. It matters not. The younger G.Y. and his sister have no legal obligation to care for their mother, and any efforts they have taken on her behalf thus far are rooted only in morality and love. This record makes it amply clear that unless an undue hardship exception is granted to M.Y., she will be deprived of the care and supervision she plainly needs.

ORDER

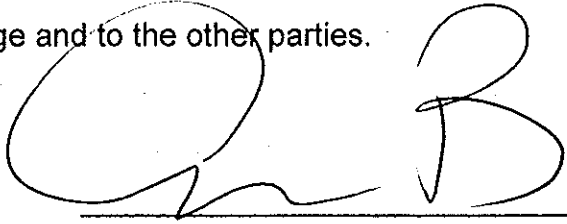
It is hereby **ORDERED** that the action of Union County in denying an undue hardship exception to M.Y. is **REVERSED**. M.Y. is hereby determined to be eligible for institutional Medicaid benefits effective February 1, 2011.

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.

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, P.O. 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.

December 17, 2014



DATE

ELLEN S. BASS, ALJ

Date Received at Agency:



Date Mailed to Parties:

DEC 18 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE