
In the Matter of the Appeal of

[REDACTED]

from a determination by the Nassau County
Department of Social Services

:
DECISION
: AFTER
FAIR
HEARING

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of the Regulations of the New York State Department of Social Services (Title 18 NYCRR, hereinafter Regulations), a fair hearing was held on August 19, 1994, in Nassau County, before James J. Dalton, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Howard Atlas, Esq., Appellant's Representative, [REDACTED]
[REDACTED] Witnesses

For the Social Services Agency

Sharon Wallach, Fair Hearing Representative

ISSUE

Was the Agency's determination to limit the Appellant's Medical Assistance coverage on the grounds that the Appellant had transferred a resource for less than fair market value correct?

If the Agency's determination to limit the Appellant's Medical Assistance is correct, was the Agency's determination to limit the Appellant's Medical Assistance coverage for the period from November 1, 1991 to April 30, 1994 correct?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, a single individual, age 89 years, applied for Medical Assistance on September 16, 1993.

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2. The Appellant had been an inpatient in the Long Beach Nursing Home, which is a nursing facility, from June 9, 1993 to her death on August 9, 1994.

3. On December 28, 1993, the Agency notified the Appellant that the Appellant's application for Medical Assistance was denied, and the Appellant would not be entitled to full Medical Assistance coverage until April 30, 1994 because the Appellant had transferred liquid assets between November, 1991, and August, 1993 for \$0.00, which is \$167,612.29 less than fair market value.

4. From November 1, 1991 to August 2, 1993, the Appellant transferred liquid assets from a number of different accounts, for no consideration, to her children and grandchildren.

5. Such resources have been valued by the Agency at \$167,612.29.

6. The Appellant was otherwise eligible for Medical Assistance.

7. At the hearing, for the first time, the Appellant's representative submitted evidence to rebut the presumption that the intent of the transfers was for the purpose for qualifying for Medical Assistance.

8. The Appellant was first hospitalized in March, 1993.

9. The Appellant was again hospitalized in June, 1993. On June 9, 1993, the Appellant entered the nursing home, where she remained until her death on August 9, 1994.

10. Prior to March, 1993, the Appellant had transferred over \$127,000.00 to her children and grandchildren.

11. From March 1, 1993 through August, 1993, the Appellant transferred an additional \$39,738.00 to her children and grandchildren.

12. From March, 1993 through July, 1993, \$32,733.00 was returned from the children and grandchildren to the Appellant's accounts. In addition, from March, 1993 to October, 1993, \$3,970.00 was expended on the Appellant's behalf by her children.

13. The Appellant paid the cost of her nursing home care from June, 1993 to August, 1993.

14. On February 25, 1994, the Appellant requested this fair hearing.

APPLICABLE LAW

Section 366.5(c) of the Social Services Law and section 360-4.4(c)(2) of the Department's Regulations govern the treatment of transfers of resources under the Medical Assistance Program when such transfer is made on or after October 1, 1989 by an applicant or recipient, or on or after September 1, 1991 by the applicant or recipient's spouse.

Any transfer of a resource for less than fair market value made within or after the thirty month period immediately preceding the date the person becomes an institutionalized person, or the date the institutionalized person applies for medical assistance, whichever is later, shall make the person ineligible for certain services for a period specified in section 366.5(c)(4) of the Social Services Law and 18 NYCRR 360-4.4(c)(2)(iii). Certain types of transfers as discussed below do not make a person ineligible for nursing facility services.

Effective September 9, 1992, multiple transfers of resources within a 30 month period will be considered to be a single transfer of the total amount of such resources, and the period of ineligibility will run from the date of the first transfer to the extent that:

- (1) the resources were available at the time of the first transfer and could have been transferred all at once; and
- (2) treating the transfers as separate would result in concurrent periods of ineligibility, and in a shorter total period of ineligibility than if the transfers are considered to be a single transfer.

18 NYCRR 360-4.4(c)(2)(iii)(C)

Section 366.5(c)(4) of the Social Services Law and 18 NYCRR 360-4.4(c)(2)(iii) provide that the person shall be ineligible for:

- nursing facility services;
- services at a level of care equivalent to that of nursing facility services provided in any hospital; and
- care, services or supplies provided pursuant to a waiver pursuant to section 1915(c) of the federal social security act.

Such person will remain ineligible for such services under Medical Assistance for the lesser of:

- (i) a period of thirty months from the date of transfer, or
- (ii) a period equal to the uncompensated value of the transferred resources, divided by the average cost of care to a private patient for skilled nursing facility services in the region in which such person is institutionalized, on the date the person first applies for medical assistance or recertifies for medical assistance as an institutionalized person.

The cost of care to a private patient in the region in which the person is institutionalized will be presumed to be 120 percent of the average MA rate for skilled nursing facility care for the facilities within the

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region. The average regional rate will be updated each January first by the Department. Regions shall be the same as those established by Section 2807-c of the Public Health Law. Social Services Law section 366.5(c) (4); 18 NYCRR 360-4.4(c) (2) (iii) (b).

The following types of transfers which are specified in section 366.5(c) (3) (i) through (iv) of the Social Services Law and 18 NYCRR 360-4.4(c) (2) (ii) do not make a person ineligible for full Medical Assistance coverage:

- (c) the resource was transferred:
 - (2) to the person's child who is certified blind or certified permanently and totally disabled; or
- (d) (1) a satisfactory showing is made that:
 - (ii) the resource was transferred exclusively for a purpose other than to qualify for nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to a level of care provided in a nursing facility; or care, services, or supplies furnished pursuant to a waiver under section 1915(c) of the federal social security act; or
 - (2) In the absence of a satisfactory showing under (1) above, denial of eligibility will result in an undue hardship upon the institutionalized person. Denial of eligibility will result in an undue hardship if:
 - (i) the institutionalized person is otherwise eligible for MA; and
 - (ii) the institutionalized person is unable to obtain appropriate medical care without the provision of MA; and
 - (iii) despite his/her best efforts, the institutionalized person or the person's spouse is unable to have the transferred resource returned, or to receive fair market value for the resource. Best efforts will include cooperating, as deemed appropriate by the commissioner of the local department of social services, in the pursuit of the return of such resource.

Section 366.5(c) (i) of the Social Services Law and 18 NYCRR 360-4.4(c) (2) (i) provide that a person is considered to be an institutionalized person subject to the above discussed transfer provisions if such person:

- (i) is an in-patient in a nursing facility,

The applicant or the applicant's spouse must be allowed a minimum of twenty days to present evidence rebutting the presumption that the transfer was made for the purpose of qualifying for nursing facility level of care or waived services. An applicant's MA coverage may not be restricted due to a transfer of resources without first advising the applicant and the spouse, in writing, of the right to rebut the presumption. The applicant or the spouse must be given the opportunity to prove that the transfer was not made to qualify for: nursing facility services; level of care equivalent to that of nursing facility services provided in a hospital; or care, services or supplies furnished pursuant to a waiver under Section 1915(c) of the Act. Some factors suggesting that the transfer was made for some other purpose are:

The traumatic onset of a disability after the transfer (e.g. applicant has a heart attack shortly after the transfer and there was no previous record of heart disease);

The unexpected loss of other resources which would have precluded MA eligibility;

The unexpected loss of income which would have precluded MA eligibility;

Court ordered transfers;

If the applicant or spouse was not capable of managing his/her resources at the time of transfer; or

Other reasons that strongly suggest that the transfer was made for purposes other than to qualify for nursing facility level of care or waived services.

DISCUSSION

The evidence establishes that from November, 1991 through August, 1993, more than \$167,000.00, from eleven different accounts, was transferred by the Appellant to her children and grandchildren. In denying the Appellant's application for Medical Assistance, the Agency stated that the transfers are presumed to be for the purpose of qualifying for Medical Assistance. According to the Agency, the Appellant was at least 87 years of age, and could reasonably be expected to incur medical expenses.

The evidence shows that the property at issue was transferred for less than fair market value. The Appellant's representative, in contesting the Agency's determination, contended that the property was transferred for a purpose other than to qualify for Medical Assistance. The representative further contended that the period of disqualification was not computed correctly.

The Appellant's representative contended that since her spouse died in 1984, the Appellant had distributed sums of money from her accounts to her

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children and grandchildren in the form of gifts. The representative also submitted a letter from the Appellant's physician, dated August 3, 1994. The physician stated that the Appellant was in excellent health prior to March, 1993, and lived in an independent manner.

The Appellant's representative also submitted documents, for the first time at the hearing, to contest the period of disqualification. Those documents showed that nearly \$36,000.00 was either returned to the Appellant, or spent on the Appellant's behalf. The representative contended that these sums should be used to offset any transfer of non-exempt resources.

It is noted that the Agency was not provided with any of this documentation prior to this hearing, or for that matter, prior to its December 28, 1993 Notice of Denial. The Appellant's representative contended that the Agency did not request any explanation of the transfers, or of the disposition of funds, prior to its determination. The Agency for its part, admitted that no request for an explanation was made to the Appellant.

Under the circumstances of this case, the Agency's determination to deny Appellant's Medical Assistance application, and to disqualify her from Medical Assistance coverage for in-patient care until April 30, 1994, was not correct. The Agency should redetermine the Appellant's eligibility for Medical Assistance, taking into account the documents submitted for the first time at this hearing and any additional documentation necessary to establish her eligibility for Medical Assistance.

DECISION AND ORDER

The Agency's determination to deny the Appellant's application for Medical Assistance, and to limit the Appellant's Medical Assistance coverage through April 30, 1994, on the grounds that the Appellant transferred a resource for less than fair market value is not correct and is reversed.

1. The Agency is directed to evaluate the additional documentation submitted by the Appellant's representative at the hearing, and to afford the Appellant's representative an opportunity to submit any further documentation;
2. The Agency is further directed to recompute the proposed period of disqualification, based upon any additional documentation; and
3. The Agency is directed to inform the Appellant's representative in writing of its reevaluation.

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As required by Department Regulations at 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York

SEP 14 1994

NEW YORK STATE DEPARTMENT
OF SOCIAL SERVICES

By

Susan M. Grimes

Commissioner's Designee

