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JOHN R. GUHL
Director

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

G.L.,	:	
	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
	:	
v.	:	**FINAL AGENCY DECISION**
	:	
DIVISION OF MEDICAL ASSISTANCE	:	**OAL DKT. NO. HMA 5080-08**
	:	
AND HEALTH SERVICES AND	:	
	:	
MIDDLESEX COUNTY BOARD OF	:	
	:	
SOCIAL SERVICES,	:	
	:	
RESPONDENTS.	:	

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the OAL case file and the motions filed below. Both parties filed exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is October 23, 2008, in accordance with an Order of Extension.

At issue is whether a promissory note made by G.L. and her son for $86,000 is a transfer for less than fair market value. G.L. receives monthly

payments of over $7,000 for 12 months. The ALJ found that the note met the provisions of the Deficit Reduction Act of 2005 and was not a transfer for less than fair market value. The ALJ also found that the note cannot be sold on the open market.

Having reviewed the terms of the note, I concur that it meets the requirements of the DRA regarding a transfer of assets. I FIND that there is no competent evidence that the note cannot be sold on the "open market." A finding of fact based on hearsay – a sentence in a brief relating statements made to Petitioner's attorney by a third party - must be supported by competent evidence. N.J.A.C. 1:1-15.5(b), the **residuum rule,** requires "some legally competent evidence" to exist "to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." No such evidence was presented in this matter.

THEREFORE, it is on this 23rd day of OCTOBER 2008,

ORDERED:

That the Initial Decision is hereby ADOPTED in so far as the promissory note meets the terms of the DRA regarding transfers of assets; and

That the Initial Decision is REVERSED in its finding regarding the whether the note can be purchased.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. HMA 5080-08

G.L.,

Petitioner,

v.

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

Respondent.

Donald D. Vanarelli, Esq., for petitioner

Lawrence Rosa, Esq., for respondent Middlesex County Board of Social Services

Record Closed: July 3, 2008 Decided: July 17, 2008

BEFORE **JOSEPH PAONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner G.L. appeals her denial of Medicaid eligibility. She filed for a fair hearing and the Division of Medical Assistance and Health Services transmitted the contested case to the Office of Administrative Law on April 10, 2008. N.J.S.A. 52:14B-1 through -15; N.J.S.A. 52:14F-1 through -13.

G.L. made a $86,000 loan to her son in exchange for a promissory note. Respondent Middlesex County Board of Social Services (MCBSS) imposed a transfer penalty. It contends that the note cannot be sold on the open market and has no intrinsic value, and, therefore, the transfer of $86,000 was for less than its fair market value. G.L. disputes the MCBSS's contention.

Both parties moved for summary decision and submitted briefs. Oral arguments were heard on July 3, 2008, on which date the record closed.

STATEMENT OF FACTS

The parties have stipulated that G.L. made a loan to her son on December 27, 2007, (during the look back period) in the amount of $86,000. The loan is evidenced by a promissory note, which is non-negotiable, non-assignable, non-transferable, and must be repaid by G.L.'s son within G.L.'s life expectancy, making it actuarially sound. The loan is not cancelable upon G.L.'s death. The monthly payments range from $7,003.01 to $7,331.74 for twelve months with no deferral of payment and no balloon payment. F.S. Gerald, Inc., a finance company, has advised that it would not purchase a note of this kind because it has no recourse and no security, and thus the note cannot be sold on the open market. Accordingly, I find the foregoing as **FACT**.

CONCLUSIONS OF LAW

The issue that this motion raises is whether a Medicaid applicant's transfer of money to her son in exchange for an unsecured and non-negotiable promissory note constitutes a transfer of assets for less than fair market value, subjecting the applicant to the imposition of a penalty period. Since the facts related to this issue are undisputed, the matter is ripe for summary decision. N.J.A.C. 1:1-12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995),

Medicaid eligibility is based upon an applicant's income and resources. Pursuant to the Medicaid Act, 42 U.S.C.A. §§ 1396 et seq., an asset cannot be disposed of for

less than fair market value during a specified period of time known as a "look-back period" 42 U.S.C.A. § 1396p(c)(1); See also N.J.A.C. 10:71-4.7(a); N.J.A.C. 10:71-4.10; N.J.A.C. 10:72-4.5(b)(3). If such a transfer occurs, a Medicaid applicant will be subject to a transfer penalty, which results in a period of Medicaid ineligibility, irrespective of her other resources. Ibid. The length of the period of ineligibility, which is not in issue, is determined in accordance with 42 U.S.C.A. § 1396p(c)(1)(E).

The MCBSS argues that the promissory note G.L. received from her son has no fair market value, and, therefore, her $86,000 loan to him constitutes an uncompensated transfer. Since this transfer took place, as stipulated, during the look-back period, G.L. is subject to a transfer penalty. In support of its position, the MCBSS relies on N.J.A.C. 10:71-4.10(b)(6), which provides that

> [f]air-market value shall be an estimate of the value of an asset, based on generally available market information, if sold at the prevailing price at the time it was actually transferred. Value shall be based on the criteria for evaluating assets as found in N.J.A.C.10:71-4.1(d).

N.J.A.C. 10:71-4.1(d) adds that "the value of a resource shall be defined as the price that the resource can reasonably be expected to sell for on the open market in the particular geographic area . . . ." And according to the parties' stipulation of facts, the note cannot be sold on the open market. Further, "[i]In determining whether or not an asset was transferred for fair-market value, only tangible compensation, with intrinsic value[,] shall be considered. For example, a transfer for 'love and affection' shall not be considered a transfer for fair market value." N.J.A.C. 10:71-4.10(b)(6)(i). [Emphasis added.] Because an unsecured promissory note cannot be sold in a secondary market, according to the MCBSS, G.L.'s note is commercially valueless. The MCBSS proffers that a reasonable person would never have agreed to provide a loan in exchange for such an instrument, and posits that G.L.'s loan to her son was, consequently, not an arms-length-transaction, but rather an exchange analogous to a transfer for "love and affection." Therefore, the note also lacked intrinsic value. Hence, when G.L. loaned $86,000 to her son in exchange for the promissory note she received, she disposed of an asset for less than its fair market value because the note lacked intrinsic value and could not be sold on the open market.

G.L. counters that the Deficit Reduction Act of 2005 (DRA), which modified the Medicaid Act, excludes by definition her loan to her son as a transfer of assets. She relies on 42 U.S.C.A. § 1396p(c)(1)(I), which provides:

> For purposes of this paragraph with respect to a transfer of assets, the term 'assets' includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage –
>
> (i) has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration.
> (ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
> (iii) prohibits the cancellation of the balance upon the death of the lender.
>
> In the case of a promissory note, loan, mortgage that does not satisfy the requirement of clauses (i) through (iii), the value of such a note, loan, or mortgage shall be the outstanding balance due as of the date of the individual's application for medical assistance for services described in subparagraph (C).

G.L. argues that since the parties have stipulated that the promissory note she received satisfied the foregoing requirements, her loan to her son was not a transfer of assets for less than fair market value. Therefore, she is not subject to a transfer penalty. The MCBSS, however, responds that merely because 42 U.S.C.A. § 1396p(c)(1)(I) excepts a loan or promissory note from the definition of a transferable asset if it meets certain specific requirements, the MCBSS isn't precluded from still concluding that the loan in question constitutes a transfer of assets for less than fair market value when the note received in exchange lacks any fair market value, as defined by N.J.A.C. 10:71-4.10(b)(6). But that argument is unconvincing.

Subsection "a" of N.J.A.C. 10:71-4.10 provides that a Medicaid applicant is ineligible for institutional level services if she transfers assets for less than "fair market value" during the look-back period. In the following subsection, "b," the regulation

provides definitions for terms used in subsection "a" that apply to the transfer of assets, including the definition for "fair market value." The MCBSS's argument incorrectly assumes that G.L.'s loan is subject to the "fair market value" definition articulated in subsection "b." But the definition of "fair market value" described in N.J.A.C. 10:71-4.10(b)(6) applies only to a "transfer of assets." Since by virtue of 42 U.S.C.A. § 1396p(c)(1)(I) the loan G.L. made to her son is excluded as a transferable asset, the definition of "fair market value" contained in N.J.A.C. 10:71-4.10(b)(6) is inapplicable to the loan. Moreover, as G.L. highlighted in her argument, 42 U.S.C.A. § 1396p(c)(4) precludes the imposition of "any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection." The MCBSS's argument adding an additional fair market analysis to G.L.'s loan would result in the imposition of a condition not in accordance 42 U.S.C.A. § 1396p(c), and would, thus, violate the DRA. Therefore, I **CONCLUDE**, as a matter of law, that the loan G.L. made to her son in exchange for the promissory note she received did not constitute the disposition of assets for less than fair market value.

ORDER

Accordingly, I hereby **ORDER** that G.L.'s motion for summary decision is **GRANTED** and the MCBSS's motion denied, and the denial by the MCBSS of Medicaid eligibility to G.L. due to the imposition of a transfer penalty for the loan she made to her son is **REVERSED.**

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 (45) 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 (7) 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.

July 17, 2008
DATE

JOSEPH A. PAONE, ALJ

Date Received at Agency:
7.23.08

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW