

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

J [REDACTED] H [REDACTED],
Petitioner,

v.

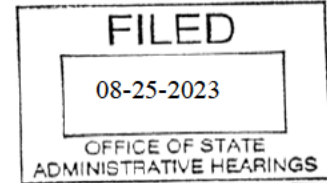
**DHS, DIVISION OF FAMILY AND
CHILDREN SERVICES,
Respondent.**

Docket No.: [REDACTED]
[REDACTED]-OSAH-DFCS-M-NH-60-Teate

Agency Reference No.: [REDACTED]

INITIAL DECISION

I. Introduction



Petitioner J [REDACTED] H [REDACTED] appealed the decision of the Department of Human Services, Division of Family and Children Services (hereinafter “Respondent” or “DFCS”) to impose a transfer of assets penalty on her Medicaid case. At an evidentiary hearing on July 19, 2023, Benjamin Powell, Esq. represented Petitioner. Madelyn Suriel, Esq. represented Respondent. The hearing record remained open through July 31, 2023, to allow post-hearing submissions. For the reasons indicated below, DFCS’s decisions to deny Petitioner’s hardship application and to impose a transfer of assets penalty are **AFFIRMED**.

II. Findings of Fact

1. Petitioner suffered several strokes between January and April 2022 and was subsequently admitted to a nursing facility on May 13, 2022.¹ (Testimony of C [REDACTED] A [REDACTED]; Petitioner Exhibit 4).

¹ Although Petitioner’s daughter asserts that Petitioner was healthy prior to January 2022, there is no supporting medical evidence regarding her prior health in the record. (Testimony of C [REDACTED] A [REDACTED]). Petitioner’s unavailability to provide testimony is not clearly articulated in an affidavit submitted from her treating physician who did not become her treating physician until her admission on May 13, 2022. His statement in Paragraph 6 regarding Petitioner’s health prior to May 13, 2022, or the time of the debt incurred have little or no probative value and are unsupported by any medical records. Id.

2. After Petitioner's apartment in South Carolina flooded on August 21, 2017, it became uninhabitable. Having coverage for both loss of personal property in the amount of \$68,800 and loss of use in the amount of the actual loss sustained, Petitioner filed a claim with State Farm for her loss. (Testimony of C [REDACTED] A [REDACTED]; Petitioner's Exhibit 1; Petitioner Exhibit B).

3. Per C [REDACTED] A [REDACTED], Petitioner's daughter: (1) Petitioner needed a place to live and agreed that she would move in with Ms. A [REDACTED] at her property in Sandy Springs, Georgia ("the Property"); (2) Petitioner desired to contribute towards the costs and expenses while living at the Property; (3) Petitioner and Ms. A [REDACTED] agreed that Petitioner would contribute \$1,100 per month for rent and living expenses at the Property; (4) Petitioner and Ms. A [REDACTED] entered into a signed and notarized Lease/Expenses Agreement ("Lease") on August 26, 2017, signed by Petitioner and notarized by a South Carolina notary; (5) the duration Petitioner would be living with Ms. A [REDACTED] was undetermined at the time of the lease. (Testimony of Ms. A [REDACTED]; Petitioner's Exhibit 3).

4. Ms. A [REDACTED] and her husband, N [REDACTED] acquired the Property on January 16, 2013. On March 13, 2015, she transferred her interest to her husband, who immediately transferred it to Cecnic Group, LLC on the same date. On December 3, 2018, Cecnic Group, LLC transferred the property to Ms. A [REDACTED]. Per Ms. A [REDACTED], this transfer was made as part of a divorce settlement. This divorce settlement was not made part of the record in this case.

5. At the time of the execution of the lease agreement on August 26, 2017, Ms. A [REDACTED] had no established ownership rights in the property. She did not acquire such rights until December 3, 2018. (Testimony of Ms. A [REDACTED]; Petitioner's Exhibits 2 and 3).

6. According to Ms. A [REDACTED]: (1) Petitioner lived with her from August 2017 through January 2022, when she had her first stroke; (2) Petitioner owed back rent to Ms. A [REDACTED] in the amount of \$60,500; (3) Prior to her sudden and unexpected stroke in January 2022, Petitioner was healthy

and living on her own in the community; (4) Petitioner and Ms. A [REDACTED] originally planned that Petitioner would defer payment under the lease until she received payment from State Farm;² (5) Petitioner had several strokes and was no longer able to pursue her State Farm claim that had not been paid by State Farm as of April 2022; and (6) in April, May, and June 2022, Petitioner paid Ms. A [REDACTED] approximately \$60,000 from her Wells Fargo account ending in 1135 for the debt owed. Ms. A [REDACTED]'s testimony is uncorroborated either by Petitioner or any other witness. (Testimony of Ms. A [REDACTED]; Respondent's Exhibit C).

7. Petitioner applied for Medicaid benefits on August 16, 2022, at which time the application was denied for being over the resource limit. Petitioner reapplied for Medicaid benefits on or about October 11, 2022. On January 20, 2023, Respondent issued a Notice approving Petitioner for Medicaid effective October 1, 2022, with a transfer penalty of 6.64 months for the transfer of \$60,000. (Hearing record).

8. On February 7, 2023, Petitioner appealed the transfer penalty. The following day, February 8, 2023, she filed an undue hardship waiver application. She attached to the undue hardship waiver application the statement of Dr. Kirpich Joseph, M.D., her treating physician. In his statement, Dr. Joseph indicated that Petitioner's conditions "require[d] that be cared for by skilled nursing professionals in a nursing home" and that she would "be in substantial danger of death or her health [would] suffer substantial and irreparable harm if she [was] discharged" from the nursing home. Petitioner also asserted that no legal or equitable action could be taken to recover the transferred asset. (Ex. E to Petitioner's Prehearing Brief).

9. On March 27, 2023, DFCS denied the undue hardship waiver application. Before it could

² Although Petitioner issued a subpoena to State Farm on May 5, 2023, there is no indication that State Farm complied with the request. No motion to quash was received from State Farm and no motion to sanction State Farm for non-compliance with the subpoena was made. (Hearing record).

consider the undue hardship application, it explained, Petitioner was required to demonstrate that she took legal action or exercised equitable remedies to recover the transferred assets. (Ex. E to Respondent's Motion for Summary Determination).

10. Petitioner appealed the denial of the undue hardship waiver application on April 18, 2023. In the appeal of the imposition of the transfer penalty and the denial of the hardship waiver application, Petitioner asserted the validity of the debt created by non-payment of rent, which was due to Ms. A [REDACTED] per the lease agreement. (Hearing record; Testimony of Joanna Barton, DFCS eligibility worker; Petitioner Exhibit E; Respondent Exhibit C).

11. Along with the application, Petitioner submitted a copy of the agreement and bank records. Upon examining this documentation, Respondent found the lease to be improperly notarized such that it could not be verified or accepted as a legitimate lease agreement. The lease was entered in Georgia, but it was notarized in South Carolina by a South Carolina notary. The name of the notary is not clear on the seal affixed; there is no separate indication of the notary's name; and there is no attestation that Petitioner and/or Ms. A [REDACTED] appeared before the notary. The notary was not subpoenaed. (Respondent's Exhibits A, B, and C).

12. Additionally, Respondent questioned claims that Petitioner owed her daughter living expenses beginning in August 2017 through January 2022. Bank records indicate Ms. A [REDACTED] made fourteen payments to Petitioner from September 2017 to May 2021, \$15,200.00 in total. Ms. A [REDACTED] testified that these payments were requested by Petitioner for living expenses, and were not part of Petitioner's debt for deferred rental payments. (Testimony of Ms. A [REDACTED]; Respondent Exhibit C).

13. Beginning in June 2020, Petitioner made regular payments to her daughter. Based on available records, Petitioner paid her daughter a total of \$4,724.53 from June 2020 to August 2022.

(Respondent's Ex. C).

14. Ms. A [REDACTED] testified that Petitioner began transferring funds to her for the deferred rental payments in February 2022, after Petitioner's first stroke in January of 2022. (Testimony of Ms. A [REDACTED]).

15. Respondent reviewed the undue hardship waiver application with supporting documentation, including the statement of Petitioner's treating physician.³ Although Respondent did not challenge the physician's assessment that Petitioner need skilled nursing care, it determined that the payments were made specifically for the purpose of qualifying for Medicaid.

III. Conclusions of Law

Medicaid Overview

1. Medicaid is a joint federal-state program that provides comprehensive medical care for certain classes of eligible recipients whose income and resources are determined to be insufficient to meet the costs of necessary medical care and services. 42 U.S.C. §§ 1396 *et seq.*; Moore v. Reese, 637 F.3d 1220, 1232 (11th Cir. 2011). Participation is voluntary, "but once a state opts to participate it must comply with federal statutory and regulatory requirements." Moore, 637 F.3d at 1232. All states have opted to participate and, thus, each must designate a single state agency to administer its Medicaid plan. Id.; 42 C.F.R. § 431.10(a), (b)(1). In Georgia, applicants may apply for Medicaid through Respondent, which issues guidelines on Medicaid eligibility in Section 3480 of its Economic Support Services Manual (hereinafter "Medicaid Manual").⁴

³ Although Petitioner's physician opined in his statement that Petitioner did not require nursing home care at the time she incurred the debt in paragraph 6, that statement is inconsistent with his statements in paragraphs 2 and 3 that indicate he became her treating physician only upon admission to the nursing facility on May 13, 2022. (Petitioner Exhibit A).

⁴ The Medicaid Manual is available to the public at <http://odis.dhs.ga.gov/ChooseCategory.aspx?cid=1037>.

Transfer of Assets Penalty

2. An institutionalized individual who is found eligible for Nursing Home Medicaid is subject to a transfer of assets penalty if the “institutionalized individual . . . disposes of assets for less than fair market value on or after the look-back date,” which begins five years prior to the date of application. 42 U.S.C. § 1396p(c)(1); see also Medicaid Manual § 2342. When a transfer penalty is imposed, Medicaid will not make vendor payments for an institutionalized individual’s long-term care services, including nursing home care, for the duration of the penalty. However, the individual will continue to be otherwise covered by Medicaid. 42 U.S.C. § 1396p(c)(1)(A), (c)(1)(C)(i); Medicaid Manual § 2342.

3. A transfer of assets penalty is not applied if the transfer was made in order to pay a valid debt. Medicaid Manual § 2342. In the present case, Petitioner asserts the payment of \$60,000.00 to Ms. A [REDACTED] was for the purpose of satisfying a valid debt; namely, the rent and expenses accumulated over the course of her tenancy of the property.

4. Based on the record, the Court does not conclude that the transfer was made in order to pay a valid debt. First, the validity of the lease is dubious. At the time it was executed, Ms. A [REDACTED], the purported landlord, held no ownership interest in the property. Under Georgia law, the landlord-tenant relationship “is created when **the owner of real estate** grants to another person, who accepts such grant, the right simply to possess and enjoy the use of such real estate either for a fixed time or at the will of the grantor.” O.C.G.A. § 44-7-1(a) (emphasis added). In the absence of a valid instrument, the Court cannot find a valid debt.⁵

5. The Deficit Reduction Act of 2005 prohibits the imposition of a transfer of assets penalty

⁵ The Court disagrees with Respondent’s contention that the lease was invalid for lack of proper notarization. Georgia does not require notarization to validate contracts, including leases of real property. O.C.G.A. § 13-5-30(a). While the Court finds the lease to be invalid and insufficient to establish a valid debt, it expresses no opinion as to its authenticity.

upon a showing that “the assets were transferred exclusively for a purpose other than to qualify for medical assistance.” 42 U.S.C. § 1396p(c)(2)(C)(ii). Similarly, Respondent’s policy manual provides that no transfer of assets penalty will apply where “[a]n asset was transferred **exclusively** for a purpose other than to qualify for Medicaid.” Medicaid Manual, § 2342-2 (emphasis in original).

6. A legal presumption exists that a resource that is given away or sold for less than fair market value was transferred for the purpose of establishing Medicaid eligibility. 42 U.S.C. § 1396p(c); 20 C.F.R. § 416.1246(e); Johnson v. Llewellyn, 194 Ga. App. 186, 186 (1990); Johnson v. Ellis, 174 Ga. App. 861, 862 (1985). Petitioner bears the burden of rebutting this presumption with “convincing evidence that the resource was transferred exclusively for some other reason.” 20 C.F.R. § 416.1246(e); see 42 U.S.C. § 1396p(c)(2)(C). “Convincing evidence may be pertinent documentary or non-documentary evidence which shows, for example, that the transfer was ordered by a court, or that at the time of transfer the individual could not have anticipated becoming eligible due to the existence of other circumstances which would have precluded eligibility.” 20 C.F.R. § 416.1246(e).

7. Here, Petitioner introduced insufficient evidence to establish that the transfer of assets was exclusively for a purpose other than to qualify for Medicaid.

Undue Hardship

8. A transfer of assets penalty cannot be applied where it would result in undue hardship. 42 U.S.C. § 1396p. Respondent’s Medicaid Manual defines undue hardship as “a situation where an individual would be deprived of medical care such that his/her health or life would be endangered; or would be deprived of food, clothing, shelter, or other necessities of life.” Medicaid Manual § 2345. According to the Medicaid Manual, an individual’s health or life is considered to be

endangered if “[a] medical doctor with knowledge of [his or her] medical condition at the time of the application of the penalty period, certified in writing that in his or her professional opinion, [he or she] will be in substantial danger of death or . . . suffer substantial and irreparable harm.” *Id.* The Medicaid Manual further provides that undue hardship does not exist when the individual’s “total available income and assets . . . are sufficient to provide [him or her] with medical care and food.” *Id.* It also requires the individual to exercise legal action and equitable remedies to reclaim the transferred asset.

9. It is unclear from the record whether Petitioner possesses income and assets sufficient to provide her with medical care and food. Moreover, her treating physician stated, in writing, that her discharge from the nursing home would endanger her health. However, from the record, it does not appear that Petitioner took action to recover the assets transferred to Ms. A [REDACTED]. This is a required showing before the application can even be considered. Medicaid Manual § 2345.⁶

10. Therefore, the undersigned concludes that DFCS appropriately applied a transfer of assets penalty. The number of months for which the transfer of assets penalty must be applied is determined by dividing the total uncompensated value of the assets. This results in a transfer of assets penalty period of 6.64 months due to the \$60,000.00 transfer within the 60-month look back period. Medicaid Manual § 2342-12.

IV. Decision

Accordingly, DFCS’s decision to impose a transfer of assets penalty is **AFFIRMED** per

⁶ Other states also appear to impose this prerequisite to finding undue hardship. *See, e.g., Tarrytown Hall Care Ctr. v. McGuire*, 116 A.D. 3d 871, 873 (N.Y. App. Div. 2014) (“An undue hardship occurs where the institutionalized individual is otherwise eligible for Medicaid, is unable to obtain appropriate medical care without the provision of Medicaid, **and is unable to have the transferred assets returned.**”) (emphasis added) (citing 18 NYCRR 360-4-.4); *R.P. v. Div. of Med. Assistance & Health Servs.*, Docket No. A-6148-11T3, 2013 N.J. Super. Unpub. LEXIS 2547, at * (N.J. Super. Ct. App. Div. Oct. 22, 2013) (in order to obtain an undue hardship waiver, the individual “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.”) (quoting N.J.A.C. 10:71-4.10(g)(ii)).

notice issued on March 6, 2023.

SO ORDERED, this 25th of August, 2023.



Steven W. Teate
Administrative Law Judge

