

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

|   |   |  |
|---|---|--|
| BETTY BRYANT,                           | : | Docket No.: OSAH-DFCS-NH-0930797-155-Kennedy |
| Petitioner,                             | : |  |
|   | : |  |
| v.                                      | : | Agency Reference No.: 456071412              |
|   | : |  |
| DEPARTMENT OF HUMAN RESOURCES, DIVISION | : |  |
| OF FAMILY AND CHILDREN SERVICES,        | : |  |
| Respondent.                             | : |  |

**NOTICE OF INITIAL DECISION**

This is the Initial Decision of the Administrative Law Judge (Judge) in the case. This decision is reviewable by the Referring Agency. If a party disagrees with this decision, the party may file a motion for reconsideration, a motion for rehearing, or a motion to vacate or modify a default order with the OSAH Judge. A party may also seek agency review of this decision.

**FILING A MOTION WITH THE JUDGE AT OSAH**

The Motion must be filed in writing within ten (10) days of the entry, i.e., the issuance date, of this decision. **The filing of such a motion may or may not toll the time for filing a request for agency review.** See OSAH Rules 616-1-2-.28 and .30 in conjunction with O.C.G.A. § 49-4-153. Motions must include the case docket number, be served simultaneously upon all parties of record, either by personal delivery or first class mail, with proper postage affixed, and be filed with the OSAH clerk at:

Clerk  
Office of State Administrative Hearings  
Attn.: Hazel Jackson, [hjackson@osah.ga.gov](mailto:hjackson@osah.ga.gov)  
230 Peachtree Street, NW, Suite 850  
Atlanta, Georgia 30303-1534

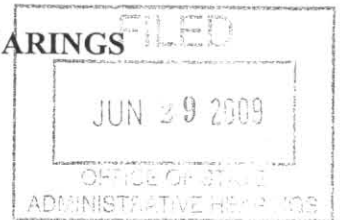
**REQUEST FOR AGENCY REVIEW**

A request for Agency Review must be filed within thirty (30) days after service of this Initial Decision. O.C.G.A. § 49-4-153(b)(1). A copy of the application for agency review must be simultaneously served upon all parties of record and filed with the OSAH clerk. The application for Agency Review should be filed with:

Department of Community Health  
Legal Services Unit, Attn: Appeals Reviewer  
2 Peachtree Street, 40<sup>th</sup> Floor  
Atlanta, Georgia 30303

This Initial Decision will become the Final Decision of the agency if neither party makes a timely application for agency review. O.C.G.A. § 49-4-153(b)(1) and (c). When a decision becomes Final, an application for judicial review must be filed within thirty (30) days in the Superior Court of Fulton County or the county of residence of the appealing party. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. O.C.G.A. § 49-4-153(c).

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA



BETTY BRYANT, )  
Petitioner, )  
v. ) Docket No.:  
 ) OSAH-DFCS-NH-0930797-155-Miller  
DEPARTMENT OF HUMAN )  
RESOURCES, DIVISION OF FAMILY ) Agency Reference No.: 456071412  
AND CHILDREN SERVICES, )  
Respondent. )

INITIAL DECISION

I. Introduction

The Petitioner in this matter seeks review of the Respondent's action imposing a transfer of resources penalty and denying Medicaid vendor payments through April 2013. The hearing in this matter was held on June 17, 2009. The Petitioner was not present at the hearing but was represented by David L. McGuffey, Esq. Carol Crow, Medicaid eligibility specialist for the Whitfield County Department of Family and Children Services, appeared as the Respondent's representative. After considering all of the admissible evidence, the Respondent's action is hereby **AFFIRMED IN PART** and **REVERSED IN PART**.

II. Findings of Fact

1.

The Petitioner, Betty Bryant, is an applicant for Medicaid benefits under the nursing home class of assistance. After receiving her application, the Respondent evaluated her eligibility for Nursing Home Medicaid for the months of February 2009 and ongoing. (Testimony of Carol Crow; Exhibit R-1, R-5.)

2.

Prior to submitting her Medicaid application, the Petitioner transferred certain of her resources to her adult son, Garry Bryant, as follows:<sup>1</sup>

|                  |  |              |
|------------------|--|--------------|
| August 14, 2008  | Certificate of Deposit 1007795605        | \$100,016.96 |
| January 28, 2009 | Cash transfer                            | \$10,000.00  |
| January 28, 2009 | Individual Retirement Account 5740330871 | \$38,139.59  |
| January 30, 2009 | Certificate of Deposit 0045102570        | \$100,000.00 |

<sup>1</sup> The Petitioner also transferred her homeplace to Mr. Bryant. However, the Respondent agrees that this transfer does not trigger a penalty under its policies. (Testimony of Ms. Crow; Exhibits R-4, R-12.)

Mr. Bryant was diagnosed with Amyotrophic Lateral Sclerosis ("ALS") in January 2008. The Social Security Administration determined that he was disabled and eligible for Retirement, Survivors and Disability Insurance ("RSDI") benefits as of January 2009. Mr. Bryant also experienced symptoms of ALS prior to January 2009.<sup>2</sup> He died in April 2009. (Testimony of Ms. Crow and Frances Lucille Bryant; Exhibits P-5, R-6, R-8, R-9, R-10, R-11.)

3.

The Respondent determined that the Petitioner was eligible for Nursing Home Medicaid benefits effective February 2009 and ongoing. However, the Respondent treated the payments to Mr. Bryant set forth in paragraph 2, above, as a transfer of assets for less than fair market value. As a result, the Respondent imposed a penalty denying nursing home vendor payments through April 2013. (Testimony of Ms. Crow; Exhibits R-14, R-15, R-16.)

### III. Conclusions of Law

1.

Because this matter involves an application for Medicaid benefits, the Petitioner bears the burden of proof. Ga. Comp. R. & Regs. r. 616-1-2-.07(d). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

2.

The Respondent's policy entitled "Transfer of Assets" provides that "[i]f an A/R [Applicant/Recipient] . . . gives away or sells assets for less than current market value (CMV) during the look-back period, the A/R may be subject to a transfer of assets penalty." Economic Support Services Manual of the Georgia Department of Human Resources ("ESSM") § 2342-1. The look-back-period is 60 months for all assets transferred after February 8, 2006. ESSM § 2342-2. Here, the evidence is undisputed that the Petitioner transferred assets to Mr. Bryant for less than current market value during the look-back period. However, the question remains whether, under the particular circumstances of this case, a transfer of assets penalty is authorized by federal law.

3.

Pursuant to 42 U.S.C. § 1396p(c), a transfer of assets either into a trust or directly to a disabled child will not result in the imposition of a transfer penalty. The statute provides:

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<sup>2</sup> The Petitioner presented an affidavit of Mr. Bryant's treating physician, Dr. Robert Pederson, M.D., as evidence that Mr. Bryant was disabled prior to January 2009. However, Dr. Pederson did not testify at the hearing, and his affidavit is therefore hearsay. O.C.G.A. § 24-3-1. Although the parties agreed that his affidavit would be admitted in evidence, "even in the absence of objection hearsay is without any value to establish any probative fact." Finch v. Caldwell, 155 Ga. App. 813, 815 (1980). Accordingly, to the extent Dr. Pederson's affidavit contains hearsay that is not corroborated by other evidence presented at the hearing, it has not been considered in the rendering of this decision.

(2) An individual shall not be ineligible for medical assistance by reason of [transfer of assets for less than fair market value] to the extent that—

(B) the assets— . . .

(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II). . . .

42 U.S.C. § 1396p(c)(2)(B)(iii). Because Mr. Bryant was the Petitioner's child and was disabled as of January 2009, as determined by the Social Security Administration, no penalty may be imposed for transfers that took place in January 2009 or thereafter. See also 42 U.S.C. §§ 1396p(c)(2)(A)(ii)(II), 1396p(d)(4)(A); 42 U.S.C. § 1382c(a)(3).

4.

The Respondent, relying on its policy manual, has taken the position that a transfer penalty must be imposed where a transfer is made to a disabled child, unless "[t]he assets were transferred to a trust established for the sole benefit of . . . the A/R's child." ESSM, § 2342-3 (Exhibit R-12). However, although the Respondent is authorized to implement federal law through the state Medicaid program, the implementation must be consistent with the parameters established by the federal statute. U.S. Const. art. VI, cl. 8. Here, the Respondent's policy manual conflicts with the relevant federal statutory provision by rejecting the law's approval of transfers made directly to a disabled child. The Respondent's policy manual, then, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and the policy is preempted by the federal statute. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Accordingly, this Court finds that the Respondent is not authorized to impose a transfer of assets penalty where resources are transferred directly to a disabled child.

5.

The Petitioner proved, by a preponderance of the evidence, that Mr. Bryant was disabled in January 2009, when three of the transfers, totaling \$148,139.59 were made. However, given that no credible medical evidence was presented regarding his disability status prior to January 2009, the Petitioner failed to prove, by a preponderance of the evidence, that Mr. Bryant was disabled in August 2008, when one transfer in the amount of \$100,016.96 was made. Therefore, the Respondent is authorized to impose a penalty with regard to the transfer of \$100,016.96.

6.

The duration of a transfer penalty is calculated by dividing the amount of the transfer, minus any compensation received, by the nursing home private pay billing rate. The result is the number of months of the transfer penalty. In this case, the private pay billing rate was increased from \$4,614.90 to \$4,916.55 as of April 2009. Therefore, the transfer penalty is calculated as follows:


$$\begin{aligned}
 &(\$100,016.96 - \$0.00) - (\$4,614.90 \times 2)^3 = \$90,787.16 \\
 &(\$90,787.16 - \$0.00) \div \$4,916.55 = 18.46 \\
 &18.46 + 2 = 20.46 \text{ months}
 \end{aligned}$$

In accordance with this calculation, the Respondent is authorized to deny nursing home vendor payments on the Petitioner's behalf for a period of 20.46 months.<sup>4</sup> For the partial month, the penalty amount of \$2,289.26 (the value of the full months' penalty subtracted from the uncompensated value of the transferred asset, or \$90,787.16 - \$88,497.90) will be included as the Petitioner's unearned income. ESSM, § 2342; Appendix A1.

#### IV. Decision

In accordance with the above Findings of Fact and Conclusions of Law, the Respondent's action imposing a transfer of assets penalty is hereby **AFFIRMED IN PART** and **REVERSED IN PART**. As set forth above, the Respondent is authorized to impose a transfer of assets penalty against the Petitioner for a period of 20.46 months.

SO ORDERED, this 29<sup>th</sup> day of June, 2009.

  
**KRISTIN L. MILLER**  
 Administrative Law Judge

<sup>3</sup> This calculation represents the reduced private pay rate for the months of February and March 2009.

<sup>4</sup> The penalty period may be recalculated by the Respondent in the event of future private pay rate increases.

RE: BETTY BRYANT, Petitioner

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