

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

E [REDACTED] W [REDACTED],
Petitioner,

v.

DHS, FAMILY & CHILDREN SERVICES
Respondent.

FILED
OSAH

DEC 16 2016

Docket No.:
OSAH-DFCS-NH-[REDACTED]16-Teate

Agency Reference No.: [REDACTED]

Gloria McDonald
Gloria McDonald, Chief Legal Assistant

INITIAL DECISION

I. Introduction

Petitioner E [REDACTED] W [REDACTED] by and through A [REDACTED] M [REDACTED], her daughter and personal representative, 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 December 2, 2016. Ms. M [REDACTED] represented Petitioner and Jonathan Riggins represented Respondent. For the reasons indicated below, DFCS’s decision to impose a transfer of assets penalty is **MODIFIED** and **REMANDED**.

II. Findings of Fact

1. Ms. W [REDACTED], a resident of Westwood Nursing Center, formerly received Medicaid under the Nursing Home class of assistance. *Testimony of A [REDACTED] M [REDACTED]*
2. In a letter dated November 19, 2015, Ms. M [REDACTED] notified Respondent that Ms. W [REDACTED] received a \$41,000 settlement payment in a lawsuit. Ms. M [REDACTED] further indicated in this letter that she made a gift of \$23,724. Receipt of the \$41,000 settlement made her ineligible for Medicaid benefits. *Respondent’s Exhibit A.*
3. Effective December 31, 2015, Respondent terminated Ms. W [REDACTED]’s Nursing Home Medicaid benefits based on its determination that the total value of her assets—specifically, the

\$17,276 of the settlement payment that remained after the gift—exceeded program resource limits. *Respondent's Exhibits B, C.*

4. Ms. W [REDACTED] loaned \$16,000 of the \$17,276 to Ms. M [REDACTED].¹ Pursuant to a promissory note executed November 5, 2015, Ms. M [REDACTED] repaid the \$16,000 to Ms. W [REDACTED] in monthly installments of \$4,000, plus 1% interest, from December 2015 to March 2016.² Ms. M [REDACTED] testified that these payments were not made to Ms. W [REDACTED], but were paid directly to Westwood Nursing Center to partially cover the cost of Ms. W [REDACTED]'s care. *Testimony of A [REDACTED] W [REDACTED]; Stipulation of the parties.* The promissory note provides that it is non-negotiable, that it cannot be transferred or assigned without Ms. M [REDACTED]'s consent, and that it is not cancellable in the event of Ms. W [REDACTED]'s or Ms. M [REDACTED]'s death. The promissory note contains no prepayment clause. *Petitioner's Exhibit 1; Testimony of A [REDACTED] M [REDACTED]*

5. Ms. W [REDACTED], through her representative, reapplied for Medicaid on or about April 18, 2016. *Respondent's Exhibit G.*

6. In a letter dated July 27, 2016, DFCS notified Ms. M [REDACTED] that it would impose a transfer of assets penalty on Ms. W [REDACTED]'s Medicaid benefits from September 2016 through January 2017, meaning that it would not pay for the costs associated with Ms. W [REDACTED]'s stay in the nursing home during such time. *Respondent's Exhibit E.*

7. DFCS calculated the transfer of assets penalty based on its determination that Ms. W [REDACTED] had transferred assets having a total fair market value of \$26,251.39, for which she did not receive any compensation. These assets consisted of: (1) the \$23,724 gift to Ms. M [REDACTED] and (2) the \$2,527.39 cash surrender value of three life insurance policies that Ms. W [REDACTED] transferred to Ms. M [REDACTED]. DFCS calculated a four-month transfer of assets penalty by

¹ According to Ms. M [REDACTED], Ms. W [REDACTED] spent the remaining \$1,276 on clothes for herself. *Testimony of A [REDACTED] M [REDACTED]*

² Ms. M [REDACTED] testified that Ms. W [REDACTED]'s monthly nursing home bill was approximately \$4,900. According to Ms. M [REDACTED], Ms. W [REDACTED]'s nursing home bill was covered by the monthly payments of \$4,000 and Ms. W [REDACTED]'s social security benefits from December 2015 through March 2016. *Testimony of A [REDACTED] M [REDACTED]*

dividing the total uncompensated value by the nursing home private pay billing rate of \$6,175. This left a \$1,551.39 partial month penalty amount, which DFCS treated as unearned income for January 2017. *Respondent's Exhibit E, F.*

8. In a letter dated August 19, 2016, DFCS notified Ruthann Lacey, Esq., Ms. W [REDACTED]'s attorney at the time, that it was denying Ms. W [REDACTED]'s undue hardship waiver application, and that the four-month transfer of assets penalty would go into effect on September 1, 2016 in accordance with the original transfer of assets penalty calculation. *Respondent's Exhibit H.*

9. On or about August 30, 2016, Ms. W [REDACTED], through counsel,³ appealed DFCS's decision to impose the transfer of assets penalty. *Respondent's Exhibit I.*

10. At the hearing, Ms. M [REDACTED] contended that application of the transfer of assets penalty from September 2016 to January 2017 was inappropriate, as the transfer of assets penalty had already been applied to her mother's Medicaid case for the months of December 2015, January 2016, February 2016, and March 2016, during which time the cost of her mother's care was covered through private pay and social security benefits. *Testimony of A [REDACTED] M [REDACTED]*

11. Ms. M [REDACTED] further argued that if a transfer of assets penalty was deemed applicable, it should be reduced. She asserted that the cash surrender value of the life insurance policies was included in the \$23,724 gift, and that DFCS therefore improperly added the cash surrender value to the total value of the gift. *Testimony of A [REDACTED] M [REDACTED]*

III. Conclusions of Law

1. Because this matter concerns the proposed reduction or suspension of Ms. W [REDACTED]'s Medicaid benefits, Respondent bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07(e). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

³ Ms. W [REDACTED]'s attorney withdrew during the pendency of the evidentiary hearing.

2. 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. An institutionalized individual who is found eligible for Nursing Home Medicaid is subject to a transfer of assets penalty if the “institutionalized individual, or the spouse of such 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); 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. 42 U.S.C. § 1396p(c)(1)(A), (c)(1)(C)(i); Medicaid Manual § 2342. In the present case, Ms. M [REDACTED] does not dispute that Ms. W [REDACTED]’s gift of \$23,724 should have resulted in a transfer of assets penalty. However, she argues that DFCS erred by: (1) failing to apply the transfer of assets penalty immediately after it was notified of the transfer and (2) adding the cash surrender value of Ms. W [REDACTED]’s insurance policies to the total uncompensated value of the transfer, when, she alleges, it was included in the \$23,724 gift.

4. Under the Deficit Reduction Act of 2005, the transfer of assets penalty must be applied on “[1] the first day of a month during or after which assets have been transferred for less

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

than fair market value, or [2] the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care . . . based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.” 42 U.S.C. § 1396p(c)(1)(D)(ii). DFCS did not apply the transfer of assets penalty after Ms. M [REDACTED] provided notification of the gift in November 2015, but instead terminated Ms. W [REDACTED]’s benefits based on its determination that her resources—specifically, the \$17,276 remainder of the settlement amount—exceeded program resource limits. However, from the evidence presented at the hearing, it does not appear that Ms. W [REDACTED] retained the remainder as a resource, but rather loaned it to her daughter in exchange for a promissory note on or about November 5, 2015.

5. Pursuant to Respondent’s Medicaid Manual, a promissory note is not considered to be a countable resource, and payments received by the individual pursuant to the promissory note will instead be treated as unearned income, if it is not secured by collateral and meets all of the following criteria:

- The repayment terms must be actuarially sound;⁵
- Payments must be made in equal monthly amounts during the term of the loan with no deferral of payments and no balloon payments;
- Must not contain a prepayment clause; and
- The note, loan, or mortgage must prohibit cancellation of the debt upon death of the lender.

Medicaid Manual § 2313; see also 42 U.S.C. § 1396p(c)(1)(I).

⁵ According to the Medicaid Manual, “[a]ctuarially sound means that the average number of years of expected life remaining for the owner of the contract must be equal to or more than the number of years stated in the contract to be paid.” Medicaid Manual § 2313.

6. The promissory note at issue is not secured by collateral. Further, it appears that its terms are actuarially sound; the term of repayment covers only four months. The promissory note does not allow for deferral of payments or balloon payments. It does not contain a prepayment clause. Finally, the note expressly prohibits cancellation upon the death of either Ms. W [REDACTED] or Ms. M [REDACTED]. Therefore, pursuant to the Manual, monthly payments under the note must be treated as unearned income, rather than a countable resource. Medicaid Manual § 2313; see also Gragert v. Lake, 541 Fed. App'x. 853, 857 (10th Cir. 2013) (“If a promissory note cannot be transferred . . . then it is not convertible to cash and is therefore not a resource.”); Medicaid Manual § 2401 (“An asset can never be considered as both income and a resource in the same month.”). Pursuant to this interpretation, Ms. W [REDACTED] received unearned income in the amount of \$4,000.00, plus 1% interest, per month from December 2015 through March 2016.

7. In order to be eligible for Medicaid under the nursing home class of assistance, the individual must meet “basic and financial eligibility criteria.” Medicaid Manual § 2141. When a Medicaid beneficiary resides in a nursing home, his or her financial eligibility for Medicaid will be determined by comparing the beneficiary’s gross income to the Medicaid CAP. Medicaid Manual § 2510. If the beneficiary’s income exceeds the Medicaid CAP, he or she will be ineligible for continued receipt of nursing home Medicaid. Medicaid Manual § 2141. In 2015, the Medicaid CAP was \$2,199 per month. Medicaid Manual App’x A1.

8. After reviewing the record and the applicable law, the undersigned concludes that Ms. W [REDACTED] was not “eligible for medical assistance under the State plan” beginning in December 2015 such that DFCS was required to apply the transfer of assets penalty. At that time, Ms. W [REDACTED] was receiving unearned income in amounts that exceeded the gross monthly income limit for nursing home Medicaid. See Medicaid Manual App’x A1. Ms. W [REDACTED] again became eligible in April 2016, after she ceased receiving monthly payments under the promissory note.

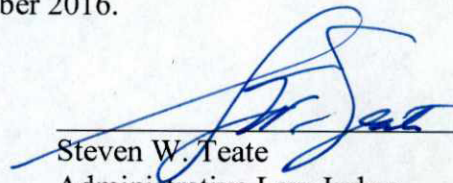
Accordingly, DFCS was required to apply the transfer of assets penalty beginning April 2016, the month in which she was “eligible for medical assistance under the State Plan.” 42 U.S.C. § 1396p(c)(1)(D)(ii).

9. DFCS appropriately calculated the duration of the 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 (\$26,251.39) by the nursing home private pay rate, which, as of April 2016, is \$6,175. This results in a transfer of assets penalty period of four months and a remainder of \$1,551.39. Accordingly, the transfer of assets penalty must be applied during the months of April, May, June, and July 2016, and the remainder of \$1,551.39 counted as unearned income for the month of August 2016. Medicaid Manual § 2342-12. Although Ms. M [REDACTED] testified that the value of the three life insurance policies was included in the \$23,724 gift, she introduced no documentary evidence to corroborate her testimony.

IV. Decision

Accordingly, DFCS’s decision to impose a transfer of assets penalty is **MODIFIED** to apply the penalty during the months of April, May, June, and July 2016. This matter is **REMANDED** to Respondent for recalculation of Ms. W [REDACTED]’s cost share liability beginning August 2016.

SO ORDERED, this 16th day of December 2016.



Steven W. Teate
Administrative Law Judge