

Commonwealth of Massachusetts
County of Norfolk
The Superior Court

CIVIL DOCKET# **NOCV2009-00542**

Plaintiff

VS.

Thomas Dehner, Director of the Office of Medicaid,
Executive Office of Health and Human Services,
Defendant

JUDGMENT

This action came on before the Court, Elizabeth B. Donovan, Associate Justice presiding, on the Plaintiff's Motion for Judgment on the Pleadings. Upon consideration thereof and after hearing the Court issued its Memorandum of Decision and Order allowing Judgment on the Pleadings for the Defendant

It is **ORDERED and ADJUDGED:**

The decision of the Defendant, Mass Health is Affirmed.

Dated at Dedham, Massachusetts this 19th day of February, 2010.

Walter F. Timilty,
Clerk of the Courts

Assistant Clerk

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Walter F. Timilty
Walter F. Timilty, Clerk

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2009-00542-A_____,
Plaintiff

vs.

THOMAS DEHNER, DIRECTOR OF THE MEDICAID OFFICE,
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES,
BOARD OF HEARINGS,
Defendant**MEMORANDUM OF DECISION AND ORDER**
[On Cross Motions for Judgment on the Pleadings]

This case arises as an appeal under G.L. c. 30A, § 14 seeking reversal of the Defendant State Agency, Office of Medicaid, EOHHS, (hereinafter MassHealth) which denied long term nursing home care Medicaid benefits to the Plaintiff (Ms. _____), on the grounds of an impermissible transfer of assets. For the following reasons the motion for judgment on the pleadings for MassHealth is allowed.

BACKGROUND

In September, 2004 Ms. _____ moved into her son's three bedroom home in Franklin where it was intended that she would live for the rest of her life. She was 79 years old and had a series of falls while living alone. The medical advice was that she no longer live alone. The son's home was fully occupied by Ms. _____'s son, daughter-in-law, grandson and granddaughter. As a result the den on the first floor was

transformed into her bedroom while plans were drawn up to make modifications to the home to provide handicapped equipped living accommodations for Ms. _____. On March 30, 2006 Ms. _____ signed a Care Agreement with her son and contributed \$182,000.00 as her share of the cost of the addition, which included handicapped accessible space for her. Ms. _____ relied on her son to provide the care needed, including assisting with two person transfers between bed, commode, chair and car. After her son injured his back which required back surgery, he was no longer able to assist with two-person transfer required in order to care for Ms. _____ in the home setting. On May 22, 2008, Ms. _____ was admitted to the Medway Country Manor. An application for MassHealth long term care coverage was filed on May 27th. On October 29th MassHealth denied Ms. _____'s application because of the transfer of her assets. It imposed a penalty which delayed eligibility for 682 days beginning on May 22, 2008.

In September, 2004 Ms. _____ was evaluated by a neuropsychologist. Dr. _____ took a history both from Ms. _____ and her son. The history indicated Ms. _____ was suffering from memory difficulties for 4-5 years with a significant decline over the past two years. She was 79 at the time of the evaluation. Test scores indicated her overall intellectual functioning was moderately to severely impaired. Her verbal abstract reasoning was in the borderline range. In summary, Dr. _____ concluded that the "neuropsychological testing reveals borderline level of intellectual functioning with significant discrepancy between borderline verbal and extremely low nonverbal skills, consistent with significant decline from premorbid level estimated to be at least high average. . . test results in conjunction with reported history of progressive

cognitive decline . . . and difficulty with management of activities of daily living are consistent with a diagnosis of dementia of the Alzheimer's type, moderate . . . Severe level of memory impairment was noted . . .".

Ms _____ was living with her son, _____, and daughter-in-law, _____, in hopes that she could be maintained in the least restrictive environment.

The parties expected her to live with her son until her death.

The Care Agreement set forth the terms including the duties and responsibilities of the son, care-giver. to modify the home and to provide care to the Ms.

In addition to building a handicapped bedroom and bathroom for Ms. her son contracted for other improvements to the home. The total cost of the addition/renovations project was \$320,000.00 which included the cost of an upgraded septic system, that being a requirement of the Town of _____ to add a fourth bedroom to the house. The fourth bedroom was for Ms. _____ on the first floor; the other three bedrooms were all on the second floor.

During the period from September, 2004 until May 22, 2008, Ms. _____'s son and daughter-in-law who was a nurse assisted Ms. _____ with all of her activities of daily living. It included, bathing, toileting, laundry, meal preparation, transportation to and from medical appointments and constant supervision at the home' when Ms. _____ was not participating in an adult day program. Mr. and Mrs. _____ modified their work schedules so as to be home for Ms. _____'s two-person transfers.

In addition to the cost of making modifications to the home, there was also the

¹The Care Agreement set out all these services. See §§2-1 1.

cost of replacing furniture that had been ruined by Ms. _____'s incontinence which increased the amount of laundry needed to be done for her. The addition/modifications were completed to the home and Ms _____ had the use and enjoyment of the addition including the fully handicapped equipped bathroom and wheelchair accessibility until her admission to the Medway Country Manor 22 months later.

The Hearings Officer imposed a penalty period for the full amount of the transfer of \$182,000.00. The hearing officer concluded that (1) the Care Agreement dated 3/30/06 was invalid because (a) it could not be enforced; (b) it terminated when Ms. _____ entered the nursing home; (c) Ms _____ was incompetent to enter the agreement; (d) she did not receive fair market value; and (2) Ms. _____ intent in making the transfer was to qualify for MassHealth benefits.

DISCUSSION

Standard of Review

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Merisme v. Board of Appeals of Motor Vehicle Liab, Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989); *Faith Assembly of God v. State Building Code Comm'n*, 11 Mass. App. Ct. 333, 334 (1981), citing *Almeida Bus Lines, Inc. v. Dept. of Pub. Utils.*, 348 Mass. 331, 342 (1965). The court may either review and affirm, reverse, remand compel action or modify a state agency's administrative decision if the court determines that the substantial rights of any party may have been prejudiced because the agency decision is . . . (c) based upon error of law ... or is unsupported by substantial evidence. G.L. c. 30A, § 14(7). With respect

to a review of the actions of the state agency defendant, the courts defer to but are not bound to adhere to the position taken by the agency. See *Tarin v. Commissioner of the Div. of Medical Assistance*, 678 N.E.2d 146 (1997), *Rudow v. Commissioner of the Div. of Medical Assistance*, 70 N.E.2d 339, 343 (1999).

Although deference is owed to an administrative agency when it is interpreting the regulations it is charged with enforcing "this principle is one of deference, not abdication, courts will not hesitate to overrule agency interpretations [that are] inconsistent with the plain language of the [regulation] itself" *Massachusetts Mun. Wholesale Elec. Co. v. Energy Facilities Sitting Council*, 411 Mass. 183, 191 (1991). When the language of a regulation is clear and unambiguous, the courts are constrained to follow it and enforce the regulation according to its terms. See *Bynes v. School Committee of Boston*, 411 Mass. 264, 267 (1991); *Johnson Lumber v. Woodscape Home, Inc.*, 51 Mass. App. Ct. 323, 326 (2001).

The Court in *Andrews v. Division of Medical Assistance*, 68 Mass. App. Ct. 228,231 (2007) discussed the standard of review in a MassHealth appeal. The Court stated:

...the burden is on the appealing party to demonstrate the invalidity of the administrative determination. (citations omitted) It is rare that a party with the burden of proof successfully can claim that she had met the burden as a matter of law. Thus we look at the record to determine if, considering the evidence as a whole, the decision of the hearing officer was arbitrary or capricious and whether the decision took into account all of the facts that fairly supported the Ms. _____'s claim as well as those that fairly detracted from them. (citations omitted)

The Court continued: "[U]nder the definition of fair market value, the transmittal notes, inter alia that a "transfer for love and consideration, for example, is not considered a transfer for fair market value. Also, while relatives and family members legitimately can be paid for care they provide to the individual, HCFA presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, **an individual can rebut this presumption with tangible evidence** that is acceptable to the State." Id. At 232 (emphasis, supplied).

Under federal Medicaid law, when a nursing home resident applies for MassHealth long term care subsidy, the applicant must show that her current assets are below the allowable limit (\$2,000.00) and must disclose all significant financial transactions occurring the during the three year period prior to application ("the look back period"). MassHealth may review such transactions for potential disqualifying transfers - transfers made for which less than value was received in return. If a forbidden transfer is found to have occurred, the applicant is penalized by being found ineligible for the subsidy for a period of time. 42 USC § 1396p. The penalty period, that is, the number of days of ineligibility is computed by taking the total, cumulative uncompensated value of assets transferred and dividing that amount by the state's average private pay facility costs, which in 2008 was \$267 per day. 42 USC § 1396p(c)(1); 130 CMR 520.019(G).

Federal law, 42 U.S.C. § 1396p(c)(2), states:

An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that --

(C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either fair market value, for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or . . ."

Massachusetts has implemented this federal mandate at 130 CMR 520.019(F):

. . .the MassHealth agency will not impose a period of ineligibility for transferring at less than fair-market value if the nursing - facility resident or the spouse demonstrates to the MassHealth's satisfaction that: (1) the resource was transferred exclusively for a purpose other than to qualify for MassHealth; or (2) the nursing-facility resident or spouse intended to dispose of the resource at either fair-market value for other valuable consideration. Valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.

Here, the hearing officer concluded that the Care Agreement was a nullity because at the time it was executed Ms. [redacted] did not have the mental capacity. This is supported by Dr. Wald's findings and prognosis.

There was no conservator appointed by the court to act on her behalf. Thus, there is no evidence to suggest the transfer of her \$182,000.00 to her son was in her best interest or intended to pay for her care pursuant to the Care Agreement².

it is clear from the record that her son intended on making his mother comfortable and safe in his home but the plaintiff had the burden of proof to persuade the hearing officer that she intended, at the time the services were rendered, to pay for the work. See 130 Code Mass. Regs. § 520.019(C), (F). Due to her dementia, there is nothing in the record to demonstrate her intent at the time she transferred the \$182,000.00. The hearing officer's conclusion that Ms. [redacted] has provided insufficient evidence to prove that the payment of \$182,000.00 to her son was solely for a purpose other than to qualify for MassHealth stands.

² If there was such evidence then the care rendered had a fair market value which could be calculated either by reference to the daily rate in the nursing home of \$267.00 or by fee charged by a home health care.

ORDER

It is hereby ORDERED that the decision of the defendant is affirmed.

Justice of the Superior Court

Date: February 19, 2010

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