

STATE HEARING DECISION

ODHS 4005 (Rev. 9/94)

County MIAMI	District Hearings Section CINCINNATI	Assistance Group Name		Assistance Group Number
Place of Hearing MIAMI CDJFS	Initial Hearing Date 01/16/2002	Rescheduled Postponed to 02/13/2002	Rescheduled Postponed to	Rescheduled Postponed to

Appellant/Representative	Appellant Representation
	Local Agency Representation Tammie Stace, Eligibility Referral Specialist

Date Notice Mailed 12/13/2001	Date Received by Local Agency	Date Received by ODHS 12/20/2001	Date Appeal Summary Received	Date Scheduling Notice Mailed 02/01/2002
Appeal Number(s)/Program(s) 1049650/MED				

Notice to Appellant

This is the official report of your hearing and is to inform you of the decision and order in your case. All papers and materials introduced at the hearing or otherwise filed in the proceeding make up the hearing record. The hearing record will be maintained by the Ohio Department of Job and Family Services. If you would like a copy of the official record, please telephone the hearing supervisor at the CINCINNATI District hearing section at 1-800-686-1571.

If you believe this state hearing decision is wrong, you may request an administrative appeal by writing to: Ohio Department of Job and Family Services, Office of Legal Services, 30 East Broad Street, 31st Floor, Columbus, Ohio 43215-3414 or FAX (614) 752-8298. Your request should include a copy of this hearing decision and an explanation of why you think it is wrong. Your written request must be received by the Office of Legal Services within 15 calendar days from the date this decision is issued. *(If the 15th day falls on a weekend or holiday, this deadline is extended to the next work day.)* During the 15-day administrative appeal period you may request a free copy of the tape recording of the hearing by contacting the district hearings section.

If you want information on free legal services but don't know the number of your local legal aid office, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888, for the local number.

ISSUE SECTION

Appeal No. 1049650 Medicaid: On 12/5/01, the county department of job and family services (CDJFS) mailed notice of approval of Medicaid for the appellant. The approval was restricted to payment for Medicaid reimbursable services and did not include the nursing facility (NF) vendor payment which had been requested by the appellant. The reason for the period of restricted eligibility was an improper transfer of resources. The appellant's authorized representative contended that the transfer of homestead property to the appellant's children, by means of a series of quit claim deeds, was not an improper transfer of resources. After a review of the evidence and the applicable regulations, the hearing officer found the county agency's determination of an improper transfer to be correct.

PROCEDURAL MATTERS

GNB

Appeal(s) OVERRULED 1049650	Date Issued 03/19/2002	Compliance
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Distribution: Original to appellant, one copy to local agency; one copy to district Hearing section; one copy to district office; two copies to State Hearings. *(Photocopy to appellant's authorized representative, if any, and to ODHS units as appropriate.)*

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This appeal was received by the Bureau of State Hearings on 12/20/01. The hearing, scheduled to be held at the local CDJFS, was initially set for 1/16/02. In response to a request from the authorized representative, the hearing was rescheduled for 2/13/02. The appellant was represented by a staff member from his attorney's firm acting as his authorized representative. The county agency was represented by an eligibility referral specialist. Both parties were sworn in by the state hearing officer. Prior to the beginning of the county agency's presentation, the AR indicated that there were two separate issues under appeal. The first issue, the AR said, dealt with the agency's reversal of the payment to the nursing facility (NF) which was incorrect and made without proper notice. In her presentation, the ERS agreed that the demand for a refund from the NF was incorrect on the agency's part. The NF has now been instructed not to reimburse Medicaid for any of the vendor payment received. The payments made after the improper transfer of assets are being treated as an overpayment to be collected from the appellant. Since the agency has reversed its decision requiring the reversal of payment to the NF, the AR indicated that he was then willing to drop the first issue and limit the hearing to the second issue, the agency's denial of the October application for Medicaid NF vendor pay.

SUMMARY OF THE PROCEEDINGS

Agency Testimony

The eligibility referral specialist (ERS) testified that the initial application for Medicaid nursing home vendor pay was submitted on 3/8/01. This was a spousal case, the ERS said, and a resource assessment was completed. The appellant was found to be eligible and the case was approved for payment effective 2/1/01. A homestead deed was transferred from the appellant to his wife, the community spouse, on 6/29/01. Later the same day, the community spouse transferred the homestead deed to her daughter, who had power of attorney, and son to her son. On 7/24/01, the community spouse died. On 8/2/01, the ERS received notification from the nursing home of the death of the community spouse. The ERS said that, in response to this information, on 8/8/01, she sent the appellant's daughter a pre-termination notice and a request for resource information and verification that the appellant's homestead property was being placed on the market. When there was no response to the pre-termination letter by 8/23/01, the ERS entered a termination into the system. Notice went out 8/24/01, with a termination date to be effective 9/30/01.

On 10/9/01, the agency received an application for Medicaid and nursing home vendor payment for the appellant. The intake appointment, completed on 11/6/01, was completed with an attorney representing the appellant. A request for verifications was completed and given to the attorney. In the course of the intake interview, the agency learned, for the first time, of the transfer of assets which had taken place on 6/29/01.

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On 12/5/01, the agency approved the application for restricted Medicaid coverage. This restriction, denying vendor payment, was due to the improper transfer of the homestead property from the couple to their children on 6/29/01.

The ERS reviewed the quit-claim deed signed by the appellant, pointing out that the deed states that the appellant "By execution of this deed, [appellant's name], spouse of [community spouse], irrevocably releases, waives and renounces any and all rights as to the property described above which may or could have now or later as survivor upon the death of [community spouse], including but not limited to rights of election, homestead, curtesy and/or dower." This constituted an improper transfer of assets, the ERS said, and quoted from rule 5101:1-39-07 of the Ohio Administrative Code, "If an otherwise eligible individual transfers his legal interest in real or personal property, the CDHS must determine if the transfer was a proper or an improper transfer. A transfer may be considered proper if: (1) The resources are under the appropriate resources limit;" which, the ERS said, was not the case in the appellant's situation, "or (2) The resources meet the definition of exempt resources in accordance with rule 5101:1-39-078 of the Administrative Code." The ERS said that the resource, the homestead, did meet the basic definition of an exempt resource, however that definition, the ERS pointed out, is subject to the referenced rule, which indicates that homestead property may be transferred to the individual's spouse. The ERS then referenced (A) (2) (a), that resources may be transferred to "The individual's spouse (or to another for the sole benefit of the spouse) or to the community spouse provided the spouse does not transfer the resources to another for less than fair market value . . ." which, the ERS said is exactly what happened in the this situation. The resource was transferred to the community spouse and then, the same day, the ERS said, transferred to the children, which was an improper transfer.

The ERS read the following from 5101:1-38-078 (B), "If the individual transferred homestead property or other resources to any individual not listed above, the individual has the right to rebut the presumption of improper transfer pursuant to rule 5101:1-39-073 of the Administrative Code." The ERS said that she reviewed the referenced rule 1-39-073, which details the requirements of an effective rebuttal of the presumption of an improper transfer of resources, and could not find anything in the case which suggested that the transfer was not improper. The quit-claim deed transferring the property from the appellant's wife to the children, the ERS pointed out, includes a clause which indicates that, even if the community spouse predeceases him, the appellant gives up all of his rights. The appellant, the ERS said, is trying to get rid of the property, so that he doesn't have it. This, the ERS said, substantiates the improper transfer. The ERS said that she e-mailed a Medicaid policy specialist at ODJFS, who discussed the situation with a member of the Office of Legal Services. The response from the Medicaid policy area indicated that the situation described would constitute an improper transfer of assets. The response from ODJFS notified the CDJFS that the calculation of the period of restricted coverage was only one-half as long as it should have been, since it was based on one half of the value of the homestead property. But if the appellant had not transferred his

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interest, he would have come into the entire property on his spouse's death. The ERS quoted one of the e-mails as stating that "There is no provision that would allow the [community spouse] to transfer the property for less than fair market value without penalty." Since the county agency had originally used only 50% of the value of the property in determining the period of restricted coverage, that had to be refigured and is now found to begin in June of 2000 and will continue for 28 months, rather than 14 months.

The state response also addressed the county agency's action to terminate vendor payment to the NF effective 6/29/01, and requiring the NF to return money to the state. This was incorrect. There is an overpayment to the appellant due to the restricted coverage. The ERS stated that the termination of the vendor payment was premature. The ERS said that she had notified the NF of this change and instructed them not to reimburse Medicaid, that the improper payment would be handled as an overpayment to the appellant. The period of the overpayment would begin 6/1/01 and run until the vendor payment was stopped, 8/23/01. The ERS indicated that the agency will be issuing a notice of overpayment to the appellant. The AR asked for a copy of a new 9401, Facility/CDJFS Transmittal, confirming that the NF was no longer being required to pay the money back to Medicaid. The ERS also pointed out that there is a ten-day reporting requirement on any sale or title to real property, and that requirement was not met in the present case. The AR said that he doubted the relevance of the reporting requirement to the issue at hand, although it could, he observed, have some application to the overpayment issue, which would be appealed.

Appellant Testimony

The AR submitted an Appeal Summary on behalf of the appellant. He noted that the appeal identified in the Summary as issue #1, the requirement that the nursing home reimburse Medicaid for the appellant's 6/1/01 to 8/23/01 vendor payment, no longer needed to be addressed as the agency had rescinded that instruction to the NF. The AR then proceeded to his testimony regarding the appeal identified as issue #2, the denial of Medicaid vendor payment on the appellant's October, 2001 application. This denial, the AR said, is not supported by Medicaid regulations.

The AR provided the following history of client activity: On 3/19/01, a Medicaid application was filed on behalf of the appellant, the institutionalized spouse or IS, by his daughter. On 4/12/01, the CDJFS completed the resource assessment indicating that the appellant's wife, the community spouse or CS, was entitled to a community spouse resource allowance of \$17,400 and that current countable resources were \$15,582. The CDJFS approved nursing home vendor pay effective 3/1/01. On 6/29/01, the IS and the CS transferred the couple's home to the CS. The CS then executed and delivered a quit-claim deed transferring the remainder interest in the home to her children and retaining a life estate interest in the home for herself. On 7/27/01, the CS died. On 8/8/01, the CDJFS issued a pre-termination letter to the appellant's family, requesting information regarding the assets available to the IS as a result of the death of the CS. On 8/24/01,

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a termination notice was issued to the IS with an effective date of 9/30/01. On 8/31/01, the CDJFS was notified the appellant was represented by counsel. On 10/4/01, the appellant's representative mailed an application to the CDJFS to reopen the Medicaid case. A face-to-face interview was conducted with an authorized representative 11/6/01. A verification checklist was given to the AR and those items of verification were submitted to the CDJFS on 11/8/01. On 12/6/01, the CDJFS approved Medicaid with a period of restricted eligibility beginning 6/1/00 and ending 7/31/02.

The AR quoted OAC section 5101:1-39-078, "Medicaid: exceptions to the application of the transfer of resources provisions," provides that "The following exceptions apply to the transfer of resources provisions specified in rule 5101:1-39-077 of the Administrative Code. These assistance groups may be eligible for unrestricted Medicaid even though a transfer has been made on or after January 1, 1990: (1) the individual may transfer homestead property to any of the following individuals: (a) the individual's spouse . . ." In addition, the AR said, citing OAC 5101:1-39-362, "Medicaid: transfer of resources for institutionalized spouses with a spouse in the community," provides that "(A) Once the initial eligibility has been established, resources not used to determine eligibility for an institutionalized spouse (pursuant to rule 5101:1-39-361 of the Administrative Code) must be legally transferred to the community spouse when not already in the name of such person. The institutionalized spouse (IS) is entitled to a period of protected eligibility while the resources are being transferred legally to the community spouse. The period of protected eligibility is twelve months or one year from the month in which the initial eligibility determination was completed. The resource transfer must take place no later than the twelfth month after the month of the initial eligibility determination. For example, if the initial eligibility determination is completed in the month of June, the transfer of resources must be completed by the end of June of the next year. Resources being transferred do not count for the purpose of determining continuing eligibility for the institutionalized spouse." Medicaid regulations require the transfer of assets within a one-year period following the approval of Medicaid benefits. The IS was following these rules, the AR said, and pointed out that the marginal comment on the county's copy of Deed transferring the homestead property to the CS indicated that this was a proper transfer. The AR noted that he did not necessarily agree with the property value listed on the county copy. The hearing officer asked the ERS where the value was obtained. From the County Auditor's office, the ERS replied. The property was valued, in June of 2001, at \$99,200.

Continuing to read from his Appeal Summary, the AR stated that the CDJFS claims that when the CS executed and delivered a quit claim deed transferring the remainder interest in the homestead property to her children with a retained life estate, this action was an improper transfer. However, there are no supporting regulations for this decision. All regulations, the AR said, point in the opposite direction, that the transfer was proper. The AR quoted OAC 5101:1-39-07, "Medicaid: transfer of resources," "If an otherwise eligible individual transfers his [or her] legal interest in real or personal property, the CDHS must determine if the transfer was a proper or improper transfer. A transfer may be considered proper if . . . (2) the resources

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meet the definition of exempt resources in accordance with the Administrative Code." Departing from the Appeal Summary, the AR noted that the ERS cited 5101:1-39-07 regarding resources, however, she also provided a copy of 5101:1-39-078. This rule, the AR pointed out, talks about the exceptions to the application of the transfer of resource provisions, not the definition of exempt resources. The definition of exempt resources, the AR said, is found under rule 5101:1-39-26. Returning to the Summary, the AR then referred to OAC 5101:1-39- 26 (A) (4) "Medicaid resource exemptions," which states ". . . the home and the land associated with the home that is lived in and used as a home by the individual, the couple, or the parents with whom the eligible child is living are exempt as a resource." Therefore, the AR said, the transfer is a proper transfer in accordance with Medicaid rules. The internet site used by the agency, has a misquote of the regulations, the AR alleged. Addressing rule 5101:1-39-078, which was used by the agency, the AR stated that the paragraphing structure of the rule was such that the reference to homestead property is limited to items (A) (1) (a) through (A) (1) (e) and that when it prohibits the transfer of resources from the individual's spouse to third parties, it refers, as indicated in (A) (2), as applying to resources other than the homestead property. So, the prohibition does not apply to homestead property, but only to other types of resources. In regard to paragraph (B) of the rule, providing an opportunity to rebutt the presumption of an improper transfer, the AR said that no rebuttal was offered, nor was any necessary because the transfer was to one of the individuals named in 1-39-78, namely, the CS, and the homestead itself was an exempt asset.

Returning to his Appeal Summary, the AR stated that OAC 5101:1-39-07 (B) provided clarification "A resource transfer is considered to be improper if the individual transferred his [or her] legal interest in a countable resource for less than fair market value for the purpose of qualifying for Medicaid, a greater amount of Medicaid, or to avoid utilization of the resource." Neither of the deeds, in this case, were executed for the purpose defined in this section. First, Medicaid for the IS was correctly approved prior to the transfer. Second, the first deed was required under Medicaid regulations and was clearly a proper transfer even by the caseworker's own admission. Finally, the execution and delivery of the second deed did not change the exempt status of the home because the CS continued to utilize the property as her home until her death nor was it done to qualify for Medicaid benefits. The medicaid benefits were already approved. Ohio Law, the AR stated, does not permit the ODJFS, the county DJFS or a caseworker to use Medicaid law to prevent anyone from exercising their right to avoid probate or to do estate planning. The caseworker must only determine Medicaid eligibility for an applicant in accordance with Medicaid law. In this case, the appellant was correctly determined eligible for Medicaid benefits effective 3/1/01 and his spouse was not. All assets were given to the spouse under Medicaid law and unless the spouse applies for Medicaid benefits she retained the right to keep all assets including the right to arrange for distribution of those assets in the event of her death. Not once, but twice, in OAC 5101:1-39-077 it is noted that a spouse may not improperly transfer a resource to make his/her spouse eligible for assistance. The appellant's CS did not improperly transfer the home. Further, the proper transfer of the home did not make the appellant eligible for assistance, because he was eligible, even without the transfer.

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In conclusion, the AR stated that the CDJFS failed to act appropriately regarding this application. The agency failed to schedule the face-to-face interview within the time frame required by the law. The agency failed to issue a decision within the time frame required by the law. The agency failed to apply the correct sections of the OAC, Revised Code and Public Assistance Manual regarding the improper transfer of assets. The caseworker, the AR stated, made an arbitrary decision not supported by Medicaid regulations. Her actions were based on personal conclusions and not based in fact. The AR summarized what he believed to be the facts in the case: The original resource assessment properly found the IS eligible for Medicaid; all assets were deemed to the CS; the CS resided in the homestead until her death; the CS retained the right to do estate planning and avoid probate; a quit claim deed is customarily used for probate avoidance without loss of the right to remain in the home as a residence; and finally, the execution of the quit claim deed was a proper transfer.

The AR pointed out that when the first deed was signed, that did not extinguish the appellant's interest in dower rights, because the appellant and the community spouse were still married. The quit claim deed with a life estate interest is used a lot, the AR said, for probate avoidance. When the CS signed the deed, she reserved a non-assignable and inalienable right to live in that property for the remainder of her life. The fact that the CS died a few months later does not provide any evidence that the CS knew she was dying. All the law firm knows is that the CS contacted them saying that they were told to get the property transferred into the name of the CS. After explaining how this might be done, the AR said, the firm advised their clients as to how to avoid probate at her death. From the standpoint of Medicaid eligibility, the appellant was married to the CS and still had rights to file a claim against the will and in fact, Medicaid regulations would have required him to file a claim against the will. Medicaid cannot force the appellant to file a claim against a life estate deed. The property properly passed to the children through a life estate deed without it being an improper transfer, because it was not made for the purpose of becoming eligible for Medicaid, because the appellant was already eligible for Medicaid prior to the transfer and would have remained so, had his wife not died. The AR asked that the improper transfer decision be reversed, that full nursing facility Medicaid benefits be authorized, and that hearing decision not address the length restricted eligibility, because the hearing decision cannot be more restrictive than the agency's decision. The length of the restricted coverage would be a separate issue and will be taken up when notice is provided. The hearing officer asked the ERS if notice had been issued on the change in the period of restricted coverage. The ERS said that it had not.

The ERS pointed out that although the AR's written appeal summary alleged that no appeal summary was provided to the AR prior the first scheduled hearing, an appeal summary was in fact made available to the firm in a timely manner. On page two of the AR's Appeal Summary, the ERS continued, it was stated that Medicaid regulations require the transfer of assets within a one-year period, but in fact Medicaid does not require that the homestead or one automobile be transferred; other assets, such as checking accounts, savings

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account, stocks or bonds, those do have to be transferred. The agency did not require the appellant to deed his share of the homestead to his wife, nor did it require his wife to deed it on to her children. The appellant, signing the second deed later the same day the first deed was signed, was basically saying, that he did not want any interest in the property, even if his wife died, that it should be given to his children. That was the part that contravened Medicaid policy. The AR replied that this was the ERS's interpretation of the regulations, but their appeal is based on the regulations themselves.

FINDINGS OF FACT

- (1) The appellant was approved for Medicaid NF vendor pay effective 3/1/01.
- (2) On 6/29/01, the appellant and the CS signed a quit-claim deed, Exhibit 2, and referred to hereinafter as "the first deed," transferring title of their home to the CS.
- (3) Later on 6/29/01, the CS and the appellant, the IS, signed another quit-claim deed, Exhibit 3, and referred to hereinafter as "the second deed," transferring title of the homestead property to the couple's children.
- (4) The second deed included a clause stating that "By execution of this deed [the appellant], spouse of [the CS], irrevocably releases, waives and renounces any and all rights as to the property described above which may or could have now or later as survivor upon the death of [CS], including but not limited to rights of election, homestead, curtesy and/or dower."
- (5) The CS died on 7/24/01.
- (6) On 8/2/01, the CDJFS received notification, from the NF, of the death of the appellant's spouse.
- (7) On 8/8/01, the CDJFS mailed a pre-termination notice to the appellant's daughter, requesting resource information and verification that the appellant's former home was being placed on the market.
- (8) Due to not receiving a response to their letter of 8/8/01, the CDJFS terminated vendor payment effective 8/23/01 and proposed termination of Medicaid MA-L effective 9/30/01.
- (9) On 8/31/01, the CDJFS was notified that the appellant was represented by counsel as his authorized representative.

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- (10) On 10/9/01, the CDJFS received an application for medical assistance, including NF vendor pay.
- (11) The face-to-face interview was completed with an AR on 11/6/01. This provided the CDJFS with its first notification of the transfer of resources.
- (12) The transfer of the appellant's interest in the homestead property, gifted to his children for no consideration, was a transfer to them at less than fair market value.
- (13) The signing of the second Quit Claim Deed, transferring title to the appellant's children and surrendering all of the appellant's residual rights to the homestead, meets the definition of an improper transfer of assets as defined by rule 5101:1-39-07 of the Administrative Code.
- (13) On 12/5/01, the CDJFS approved the appellant for Restricted Medicaid coverage. The period of restricted coverage was from 10/1/01 through 11/30/02. The reason for the restricted coverage was the agency's determination that the second Quit Claim Deed constituted an improper transfer of resources.
- (14) The appellant offered no rebuttal, as defined by OAC 5101:1-39-073, of the presumption of an improper transfer of resources.

CONCLUSIONS OF POLICY

Policy

- (1) Ohio Administrative Code (OAC) rule 5101:1-39-362, "Medicaid: Transfer of resources for institutionalized spouses with a spouse in the community," states in paragraph (A) that "Once the initial eligibility has been established, resources not used to determine eligibility for an institutionalized spouse (pursuant to rule 5101:1-39-361 of the Administrative Code) must be legally transferred to the community spouse when not already in the name of that person.
- (2) OAC 5101:1-39-361, "Medicaid: resource budgeting method for institutionalized individuals with a spouse in the community," states in paragraph (A) (5) that, "Beginning January 1, 1990, to determine the amount of resources that must be transferred if the couple's resources remain the same during the first year of eligibility, deduct the individual medicaid resource standard from the amount of resources in the institutionalized spouse's name only and/or held jointly by both spouses. The remaining amount is the minimum amount that must be transferred to the community spouse within the protected period of eligibility.'

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(3) OAC 5101:1-39-26, "Medicaid: resource exemptions," states in paragraph (A), that "There are certain types of property which are exempt from consideration as resources. The following are exempt from consideration as resources counted toward the resource limitations of one thousand five hundred dollars for an individual or two thousand two hundred fifty dollars for a couple . . . (4) The home and the land associated with the home that is lived in and used as a home by the individual, the couple, or the parents with whom the eligible child is living are exempt as a resource.'

(4) OAC 5101:1-39-075, "Medicaid: transfer of the home for institutionalized individuals," states that Medicaid benefits shall be denied or restricted depending upon when the transfer occurred, to institutionalized individuals who have improperly transferred an "exempt" home as defined in OAC 5101:1-39-31, for less than fair market value prior to the Medicaid application date or at any time after that period. The period of ineligibility or restricted coverage is determined in accordance with OAC rules 5101:1-39-074 and 5101:1-39-077.

(5) OAC 5101:1-39-078, Medicaid: Exceptions to the application of the transfer of resources provisions,' states in paragraph (A) that the individual may transfer homestead property to his or her spouse. In paragraph (A) (2) (a), the rule states that "The individual may transfer resources (other than the homestead property as noted above) to: (a) The individual's spouse (or to another for the sole benefit of the spouse) or to the community spouse provided the spouse does not transfer the resources to another for less than fair market value . . ." Paragraph (B) of the rule states that "If the individual transferred property or other resources to any individual not listed above, the individual has the right to rebut the presumption of improper transfer pursuant to rule 5101:1-39-073 of the Administrative Code."

(6) The term for the "sole benefit of," used above in OAC 5101:1-39-078, is defined in 5101:1-39-05, paragraph (13), as follows: 'A transfer for the sole benefit of ' means a transfer arranged in such a way that no individual or entity except the spouse, blind or disabled individual can benefit from the transfer of assets in any way, whether at the time of the transfer or at any time in the future.'

(7) OAC 5101:1-39-05, Medicaid: resource requirement," states in paragraph (A) (16) (e), that "If ownership is shared by an applicant/recipient and an individual who is not the applicant/recipient's spouse, parent (if the applicant/recipient is under eighteen), or child under age eighteen the resources are to be pursued in the following manner . . . (ii) If legal means of pursuit are available, the applicant recipient is required to take any and all necessary actions to make the resource available."

(8) OAC 5101:1-39-07, "Transfer of resources," states that if an otherwise eligible individual transfers legal interest in real or personal property, the CDJFS must determine if the transfer was a proper or an improper transfer. Paragraph (B) of the rule states that "A resource transfer is considered to be improper if the

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individual transferred his legal interest in a countable resource for less than fair market value for the purpose of qualifying for medicaid, a greater amount of medicaid, or to avoid utilization of the resource.'

(9) Rule 5101:1-39-072 of the OAC, "Medicaid: presumption of improper transfer," states that if the assistance group makes any one of three types of transfer of property for less than fair market value the eligibility determiner shall presume that the assistance group actually made the transfer in order to qualify for aid or a greater amount of aid or to avoid the utilization of property unless the assistance group furnishes convincing evidence that the resource was transferred exclusively for some other reason or the assistance group meets one of the exceptions listed in OAC 5101:1-39-078 (see item 6, below). The applicable transfer in this case is found at (A) (2) of the rule: "If the assistance group's transfer of real or personal property safeguards future eligibility by divesting the assistance group of proceeds which would be available if the property were sold, the eligibility determiner shall presume that the assistance group made the transfer in order to avoid utilization of the property." The rule states that, in seeking to rebut this presumption, 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 assistance group could not have anticipated becoming eligible due to the existence of other circumstances which precluded eligibility.

(10) OAC 5101:1-39-073, "Medicaid: rebuttal of presumption," states that "The individual has the burden of rebutting the presumption of improper transfer. The individual rebuts the presumption by providing the eligibility determiner with a full written accounting of the transfer which clearly shows that the property transfer was made for a purpose other than to qualify for medicaid." The rule goes on to state that the written account should cover, at a minimum, the following: the individual's purpose for transferring the resource; the individual's attempts to dispose of the resource at fair market value; the individual's reasons for accepting less than fair market value for the resource and the individual's relationship with the persons to whom the resource was transferred.

(11) Paragraph (E) of OAC 5101:1-39-073 states that "If the presumption of improper transfer is not overcome by the individual's rebuttal, the [CDJFS] shall . . . approve restricted medicaid coverage cases where an improper transfer of resources occurred after January 1, 1990.

(12) OAC 5101:1-39-077, "Medicaid, improper transfers of resources," states in paragraph (A) (2) that when it has been determined that there has been an improper transfer of resources, the agency shall deny or terminate assistance for vendor payment and shall instead issue notice of restricted Medicare coverage. Coverage is defined as the period of time that the individual is ineligible for NF vendor payments or community based services. Paragraph (A) (3) indicates that the period of restricted coverage begins the first day of the month the resources were transferred. Although the individual is not eligible for NF vendor pay or home and community-based services, the individual is eligible for other Medicaid covered services.

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Analysis

In the present case, the CDJFS properly found that the IS was eligible for Medicaid NF vendor pay effective 3/1/01. As the community spouse was residing in the couple's home, that asset was found to be exempt. On 6/29/01, the appellant and his wife executed a quit claim deed, transferring title of the couple's homestead property to the wife. It was undisputed in the hearing that this was a permissible transfer of resources, although the AR was incorrect when he claimed that the transfer was required by Medicaid regulations. As the ERS correctly pointed out, the transfer provision of the rule cited above in item (1) refers to non-exempt resources such as bank accounts, stocks, bonds, etc. The couple's homestead property, as indicated above in the rule cited in item (3), is exempt from the resource assessment, and therefore does not fall within the transfer requirement.

The AR has emphasized that the appellant's action did not meet the definition of an improper transfer of resources because, among other reasons, he was already on Medicaid and therefore could not have been doing so in order to qualify for the program. But the definition of an improper transfer, cited above in item (8), states that an improper transfer may exist, not only where the transfer of resources brings the value of remaining assets within the resource limitation, but also where transfer of real or personal property safeguards future eligibility by divesting the assistance group of proceeds which would have been available if the property were sold. If the appellant had inherited the transferred homestead property from his wife, that resource would have become subject to the Medicaid resource limitation and would have had to be liquidated and spent on his nursing home care. The transfer therefore precisely meets the definition of a situation which the CDJFS is legally required to consider an improper transfer of resources. It should also be noted that the rule cited above in item (4) states that Medicaid benefits shall be restricted when an "exempt" home has been improperly transferred prior to the medicaid application date or at any time after that period.

In the course of the hearing, the AR stated that the prohibition on transfers by the community spouse to a third party was found in paragraph (A) (2) of 5101:1-39-78, and therefore applied only to non-homestead resources. The AR stated that his reason for this assertion was the language in paragraph (A) (2), which begins, "The individual may transfer resources (other than homestead property as noted above) to . . ." This, the AR contended, meant that the ban on transfers to third parties did not apply to homestead property. The hearing officer is unconvinced by this argument. When construing the meaning of a rule, it is generally a good idea to take into consideration the entire rule. The hearing officer finds that the meaning of "other than" in the rule is intended in the sense of "in addition to." This interpretation is supported by the language of paragraph (B), cited in item (5) which includes both homestead property and other resources in the consideration of improper transfer. Another assertion by the AR in regard to interpretation of the language of the Administrative Code involves the statement, found twice in 5101:1-39-077, "Note: A spouse may not

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improperly transfer a resource to make his/her spouse eligible for assistance." The AR interprets this to mean that any transfer of resources by a community spouse cannot be considered improper, but the general connotation of "may" is to have permission, and the sentence, which once again must be considered within the context of the entire rule, is meant to express denial of permission for such transfers.

The nature of the second quit claim deed is the heart of the case, whether it constituted a proper or improper transfer of assets. As the AR himself stated at the hearing, the first deed did not altogether extinguish the appellant's interest in the homestead property; his dower and other rights remained. The OAC section cited above in item (7) requires that if an applicant or recipient share's ownership of a resource with someone other than their spouse, the individual is required to take whatever legal actions are available to access the resource. The appellant's surrender of these rights, along with the CS's transfer of Title, had the effect of transferring his interest in the homestead property to the children, something which is clearly prohibited by Medicaid regulations. In effect, the appellant was giving away an interest that, as a Medicaid recipient, he did not have the right to give away. The transfer was clearly not for the sole benefit of the community spouse as the term "sole benefit" is defined in the rule cited above in item (6); it resulted in a benefit to the appellant's children.

Once the CDJFS identified the signing of the second quit claim deed as an improper transfer of resources, the agency was required by the rule cited above in item (5) to provide the appellant with an opportunity for rebuttal of the presumption. Since the appellant did not offer any rebuttal, the presumption of improper transfer was not overcome, and the agency correctly found that a period of restricted coverage was required by the OAC section cited above in item (11). Although the agency underestimated the number of months of restricted eligibility, the hearing officer can find no justification for holding the imposition of restricted coverage in abeyance. Any additional months of restricted coverage would, of course, require new notice.

HEARING OFFICER'S RECOMMENDATIONS

Based on the record before me, I find the appeal should be **OVERRULED**. The agency's finding of an improper transfer of assets is correct. The appellant's response has not overcome the presumption required by the law and the agency has acted properly in initiating a period of restricted coverage. The imposition of the original period of restricted Medicaid coverage shall not be held in abeyance, however the agency should recalculate the period of restricted eligibility and issue new notice of any additional months of restricted coverage to the appellant and the law firm representing the appellant.

FINAL ADMINISTRATIVE DECISION AND ORDER

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Finding the hearing officer's decision to be supported by the evidence, the recommendations above are adopted. The appeal is overruled.

EXHIBITS

- (1) ODHS 4067, Appeal Summary and attached two page narrative, submitted by the CDJFS.
- (2) Quit Claim Deed transferring title of the homestead property to the appellant's spouse.
- (3) Quit Claim Deed transferring title of the homestead property to the appellant's children.
- (4) Five pages of OAC Policy cited and submitted by the CDJFS.
- (5) Five pages of copies of e-mails to and from ODJFS Medicaid policy bureau.
- (6) Twenty-five pages of CRIS-E screen print-out, including "Notice History Detail," "Real/Personal Property Resource," "Resource/Transfer Eligibility Determination" and "Running Record Commentary.'
- (7) Rights and Responsibilities statement.
- (8) JFS 9401, Facility/CDJFS Transmittal, dated 8/23/01.
- (9) JFS 9401, Facility/CDJFS Transmittal, dated 2/13/02.
- (10) Resource Assessment Worksheet.
- (11) ODHS 7335, Notice of Medicaid Overpayment.
- (12) Appellant Exhibit: Appeal Summary, four pages.
- (13) Appellant Exhibit: OAC 5101:1-39-26.
- (14) County Auditor's assessment of value of homestead property.
- (15) State Hearing Request.

Five additional pages of proffered material.

Date Issued: 03/19/2002