

**OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
BUREAU OF STATE HEARINGS**

ADMINISTRATIVE APPEAL SECTION

In Re Appeal of:

Docket Number:	AA-3636	
Appeal No(s)	1451280	MED
AG No.	5072175754	
Hearing Request Date:	11/24/2008	
Hearing Decision Date:	02/13/2009 / TDA	
Appeal Request Date:	03/02/2009	
Agency:	MAHONING CDJFS	

Administrative Appeal Decision

The appellant is appealing an August, 2008, agency denial of her July, 2008, application for Medicaid nursing home vendor payment, due to her transfer for less than fair market value of \$40,000 to her daughter and son-in-law in installments from November, 2007, through July, 2008. The agency based the denial on the fact that the appellant had “showed no evidence of a contract entered into before transfers were made.” In turn, the hearing officer overruled the appeal because she found that “there was no evidence presented to show that in fact the Community Spouse required \$4000 per month in care from his daughter and son-in-law beginning November 1, 2007 up to August, 2008.

In her request for administrative appeal the appellant asserts a Statement of Error that the hearing decision was contrary to the weight of the evidence presented at the hearing that the \$40,000 was paid from the Community Spouse’s share of the joint spousal resources, and that the appellant used her share to pay her private nursing home costs since 2005.

Improper Transfer of Resources

OAC 5101:1-39-07 defines an "improper transfer" as “a transfer on or any time after the look-back date, . . . of a legal or equitable interest in a resource for less than fair market value for the purpose of qualifying for Medicaid, a greater amount of Medicaid, or for the purpose of avoiding the utilization of the resource to meet medical needs or other living expenses.” “The “look-back date” means the earliest date on which a penalty for transferring assets for less than fair market value can be assessed. The look-back date is sixty months prior to the baseline date.”¹ “The “baseline date” means the first date upon which the individual has both applied for Medicaid and is institutionalized.”²

1 OAC 5101:1-39-07(B)(9)
2 OAC 5101:1-39-07(B)(3)

The rule provides that certain types of transfers are presumed to be improper transfers for less than fair market value:

- (1) Any transfer that reduces the individual's resources and brings the value of their remaining resources within the resource limitation;
- (2) Any transfer that has the effect of safeguarding future eligibility by divesting the individual of property that could otherwise be sold and the proceeds then used to pay for support and medical care for the individual;
- (3) Any transfer of income-producing real property; or
- (4) Any transfer by an individual of an exempt home as defined in Chapter 5101:1-39 of the Administrative Code, whether prior to or after the Medicaid application date.
- (5) For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the consideration received for the asset must have a monetary value.
- (6) A transfer for love and consideration is not considered a transfer for fair market value. Clear and convincing evidence is required to rebut the presumption that it is an improper transfer.³

The rule allows the appellant to rebut a presumption of an improper transfer. "The individual must first provide a full written accounting and documentation of the transfer which clearly explains the following:

- (a) The purpose for transferring the resource; and
 - (b) The attempts to dispose of the resource at fair market value; and
 - (c) The reasons for accepting less than fair market value for the resource; and
 - (d) The individual's relationship, if any, to the person to whom the resource was transferred.
- (2) The individual has the burden of rebutting the presumption of improper transfer by clear, convincing, and credible evidence.
- (a) The evidence may include, but is not limited to: any documentary evidence such as contracts, realtor agreements, sworn statements, third party statements, medical records, financial records, court records, and relevant correspondence.

³ Ohio Admin. Code 5101:1-39-07(C)

(b) Evidence which is provided must be reviewed by the administrative agency to determine if it is clear, convincing and credible.

(c) Evidence that is not clear, convincing and credible does not rebut the presumption of an improper transfer.”⁴

Fair Market Value

Ohio Admin. Code 5101:1-39-05 defines fair market value as “the going price, for which real or personal property can reasonably be expected to sell on the open market, in the particular geographic area involved.” The appellant bears the burden of rebutting the presumption of an improper transfer by establishing that she received fair market value for the services she received. Some of the factors that should be examined in determining fair market value are what services are provided under the contract, what expertise the contractor has to provide those services, what is the going rate of those discrete services in the open market, and whether the contractor is otherwise legally responsible for providing the services provided under the contract without compensation.

Analysis

The first stage of any analysis of a Medicaid improper transfer is whether the agency properly assumed that one exists, under the standard set forth in the rule. In this case the evidence supports that determination, inasmuch as the appellant’s daughter and son-in-law, as her Power of Attorney, issued themselves \$40,000 in the nine months prior to the appellant’s Medicaid application being filed. Thus “For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the consideration received for the asset must have a monetary value.” And the burden is on the appellant to establish that fact by clear and convincing evidence.

In that regard the appellant’s evidence consisted of her attorney’s hearsay testimony to the effect that the monthly payments were in exchange for personal care provided by the daughter and son-in-law to the Community Spouse, and that they also “spent most of the money on the nursing home, purchasing a new car for the...(Community Spouse) and repairs to the home.” The attorney also submitted income tax forms indicating that the daughter and son-in-law included the payments in their federal tax return. She also submitted a hand-written note from the Community Spouse’s doctor indicating that the spouse “requires 24-hour care for activities of daily living.”

⁴ Ohio Admin. Code 5101:1-39-07(D)

As the hearing officer noted, however, the note was written in July, 2008, eight months after the payments started. Even if we engaged the inference that the spouse's condition was equally poor the previous eight months, we agree with the hearing officer's finding that the record is devoid of evidence supporting the appellant's contention that the spouse required \$4000 of monthly care, or that such care was necessarily provided by the daughter and son-in-law. As indicated above, the Medicaid asset transfer rule requires an appellant to rebut a presumption of prohibited transfer by "clear, convincing, and credible" evidence. The Ohio Supreme Court has defined clear and convincing evidence as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." [Cross v. Ledford \(1954\), 161 Ohio St. 469.](#)

We do not agree with the agency's conclusion that payments made by a Medicaid applicant for personal care services must always be supported by a personal care contract as a means of establishing fair market value. While a formal contract may expedite the analysis of a presumed prohibited asset transfer, even among family members – for whom cash transfers are more suspect as lacking fair market value – the general "family service rule" provides for a presumption of implied contract attendant to the voluntary provision of services.⁵ Either way, the ultimate question is whether the applicant received fair market value in services for what she paid the caregiver during the period in question, regardless of the blood relationship of the caregiver.

As this case shows, however, this determination is complicated considerably by the existence of the relationship, as well as other factors. For example, O.R.C. 2919.21 provides that "No person shall abandon, or fail to provide adequate support to. . . The person's aged or infirm parent or adoptive parent, who from lack of ability and means is unable to provide adequately for the parent's own support." In that event, how does one distinguish personal services which an adult child should provide out of legal or moral obligation, from those for which it is reasonable to expect payment? In addition, ORC Chapter 1337 imposes certain fiduciary duties on a Power of Attorney which one could argue are not subject to separate payment by the principal – e.g. "An attorney in fact is not personally liable for a debt of the attorney in fact's principal, unless one or more of the following applies:.. The debt was incurred

⁵ Hinkle v. Sage (1902), 67 Ohio st. 256, 65 N.E. 999; Merrick v. Ditzler (1915), 91 Ohio St. 256, 110 N.E. 493; Sabin v. Graves (1993), 86 Ohio App.3d 628, 621 N.E. 2d 748

for the support of the principal, and the attorney in fact is liable for that debt because of another legal relationship that gives rise to or results in a duty of support relative to the principal.”⁶

In this case, there is essentially no evidence in the record in support of the appellant’s justification for the monthly payments to the daughter and son-in-law, except for the attorney’s hearsay testimony. In that regard:

The hearing officer may be guided, but shall not be bound, by the “Ohio Rules of Evidence (7/1/2007) in conducting hearings and in making findings of fact. The hearing officer shall consider all relevant evidence offered at the hearing... Hearsay evidence may be considered by the hearing officer in arriving at the findings of fact. However, such evidence must be critically evaluated, since it is not given under oath and cannot be cross-examined to test the perception, memory, and veracity of the declarant. Direct evidence shall normally be given more weight than hearsay evidence when the two are in conflict.”⁷

And the appellant is also operating on an errant understanding regarding the nature of the Medicaid resource assessment and obligation to avoid asset transfers for less than fair market value. ““Resource assessment” means the process where the resources of both the institutionalized spouse and the community spouse are assessed to determine the couple’s total countable resources existing at the beginning of the first continuous period of institutionalization...The purpose of the resource assessment is to aid in the determination of the amount of resources that may be transferred from the institutionalized spouse to the community spouse should an application be filed in conjunction with the request for an assessment of resources or filed at a later date. Additionally, the resource assessment aids in the determination of whether or not resources were recently transferred.”⁸ But the Community Spouse is also included in the definition of “individual” for purposes of the asset transfer prohibition, which means that neither spouse is free to simply give away assets with impunity.⁹

On the other hand, if, as the appellant alleges, the daughter and son-in-law were simply the conduit for payment of documented expenses of the appellant and the Community Spouse, then those payments could be used to justify at least some of the \$40,000 that was transferred and thus potentially reduce the ineligibility period. Although it would have been most desirable for the appellant to have provided such documentation during the hearing, it is not clear from the record whether the appellant was necessarily aware of this opportunity, inasmuch as the agency advised her that absent a contract none of the payments could be justified. For that reason, we agree with the Statement of Error to the limited extent that the appellant should be given a

6 ORC 1337.092(B)

7 OAC 5101:6-7-01(C)(1)(b)

8 OAC 5101:1-39-35(B)(5), (D)(4)

9 OAC 5101:1-39-07(B)(7)

reasonable opportunity to provide such documentation in advance of the agency redetermining the amount of transferred assets and resulting period of ineligibility.

DECISION

We hereby ORDER that the decision is REVERSED and an order of COMPLIANCE issue to the agency to allow the appellant an additional opportunity to provide documentation of specific expenditures by the daughter and son-in-law for her or her spouse's benefit during the period of November, 2007, through August, 2008; then redetermine the period of ineligibility calculated in this case.

The agency is directed to send the appellant written notice of the action taken as a result of this decision via an ODJFS 4074, 4065, 7334, 7401 or other appropriate state form. The agency is to attach a copy of this notice to the ODJFS 4068 State Hearing Compliance form. The appellant retains all state hearing rights regarding any future agency determination.

Administrative Appeal Officer

CONCUR:

Administrative Appeal Officer

Chief Legal Counsel

Date of Issuance: March 13, 2009

Notice to Appellant

This Administrative Appeal decision is the final decision on this appeal from the state department of job & family services. It is binding on the department and agency, unless it is reversed or modified on appeal to the court of common pleas.

An Appellant who disagrees with this decision may appeal it to the court of common pleas pursuant to sections 119.12 and 5101.35(E) of the Revised Code. The Appellant shall mail the original notice of appeal to the department at the following address:

**Ohio Department of Job & Family Services
Office of Legal Services
30 E. Broad Street, 31st Floor
Columbus, OH 43215-3414**

The Appellant must also file a copy of the notice of appeal with the court of common pleas in the county in which the Appellant resides (Franklin County, if the Appellant does not reside in Ohio). Please note: Both the mailing to the department and the filing with the court must occur within thirty (30) calendar days of the date of issuance of this decision.

If you have questions about appealing to a court, contact your attorney, local legal aid society, or bar association. If you want information about free legal services, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888.

cc:

Director, MAHONING CDJFS

RAMOSD, DAMICT, Bureau of State Hearings