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Medicaid eligibility not affected by sale

Interest in property was sold to daughter

By Eric T. Berkman

A woman's sale of interest in real property to her daughter, in return for a promissory note secured by a mortgage, did not constitute a transfer of assets that would disqualify the woman's husband from receiving Medicaid disability benefits, a Superior Court judge has ruled.

A hearing officer with MassHealth — the Office of Health and Human Services division that manages the state's Medicaid program — denied the husband's claim for benefits, finding that because the property interest could not be sold on the open market, the sale was for less than fair market value.

Accordingly, the officer determined that the sale amounted to a disqualifying wealth transfer, making the husband ineligible for Medicaid benefits.

But Judge Thomas R. Murtagh disagreed.

"It is not appropriate to assume that [the wife] will not seek to enforce the obligation by all available means in the event that her daughter defaults," Murtagh wrote, granting the husband's motion for judgment on the pleadings. "Such a conclusion could be reached in any situation involving a transfer between family members. If this result was intended, then [the relevant regulation] would directly provide that transfers between family members are per se disqualifying transfers."

Additionally, Murtagh said, "[t]he hearing officer and MassHealth fail to cite any … regulations that would suggest that under Medicaid law the property being transferred should be able to be sold on an open market."

The 12-page decision is *Clark v. Dehner,* Lawyers Weekly No. 12-177-09.

'Important' decision

David J. Correira of Correira & Iacono in Boston and Swansea, who represented the claimant husband, called the ruling "particularly important" in the trusts-and-estates and elder-law practice areas.

Correira, whose client was a resident in a nursing home, described the transaction in question as a "sophisticated planning technique" that involves converting an asset into an income stream, protecting the asset, and reducing contributions to the nursing home.

However, he said, the commonwealth has "essentially made a policy decision that [it] will challenge and litigate all transactions with family members — whether they be sales, mortgages, care contracts or private annuity agreements. … And that specifically contravenes federal law as well as our own state regulations."

Correira added that *Clark* could be particularly significant given the "dozens, if not hundreds" of pending administrative appeals and Superior Court cases involving those types of issues.

"It's very likely that many attorneys will be looking at this decision in terms of their own pleadings and arguments," he said. "And if nothing else, it sends a message to other attorneys and clients that they shouldn't let these rulings by caseworkers or administrative hearing officers go unchallenged."

Harry S. Margolis, an elder-law attorney with Margolis & Bloom in Boston, agreed.

"In effect, [MassHealth] has been making policy, and they've usually been getting to do what they want," he said. "That's because of the cost in terms of money, stress and time to pursue an appeal and, later, a Superior Court action. … So even if these positions violate any common-sense reading of the law, they're rarely challenged and, as a result, [MassHealth] runs roughshod over Massachusetts taxpayers and consumers."

Margolis said if the decision in *Clark* emboldens others to pursue similar cases, and a pattern of MassHealth denials being overturned emerges, "attorneys like us can be more confident in telling our clients that it'll be a long haul to pursue their case, but they'll be successful in the end. MassHealth has been acting like a bully on these things, and we've got to fight back."

CORREIRA
Lawyer: ruling could impact hundreds of cases

But MassHealth spokesperson Jennifer Kritz said the ruling "may have no applicability beyond the unique facts of this specific case."

Denial of benefits

In May 2005, plaintiff George E. Clark and his wife, Susan, established an irrevocable trust into which they transferred their real estate in Marshfield, which was valued at $412,359. Based on Medicaid law and regulations, the transfer disqualified the plaintiff from receiving benefits for 52 months.

In June 2007, with more than two years remaining in the penalty period, Susan, in her capacity as trustee, transferred a 44-percent interest in the property for no consideration to her daughter, Michelle, who then transferred the interest back to Susan individually.

Susan then sold the interest to Michelle in exchange for a promissory note and $230,000 mortgage on the property to be paid back in fixed monthly installments for 20 years. The transaction was designed to cure the earlier disqualifying transfer.

The plaintiff, who suffered from Pick's Disease and had been living in a long-term care facility since August 2006, applied for Medicaid benefits on Oct. 31, 2007.

MassHealth regarded the $230,000 transaction in and of itself as a disqualifying transfer of assets for less than fair market value. Susan and Michelle subsequently attempted to fix the problem by amending the promissory note so that it explicitly would not be self-cancelling upon Susan's death, meeting a requirement of the relevant MassHealth

regulation, §520.007(J)(3), that had apparently been flagged by a MassHealth officer.

But after the plaintiff officially applied for benefits, MassHealth issued a notice of denial, which a hearing officer upheld on appeal. In particular, the officer found the amendment to be ineffective, reasoning that if the note could be so readily amended, it must not be binding and therefore family members would be unlikely to enforce it.

Similarly, the officer gave little credence to the fact that the note was secured by a mortgage, believing that Susan would be unlikely to foreclose or bring suit against Michelle if she defaulted. Finally, the officer found that the plaintiff had failed to show that the 44-percent interest had an ascertainable fair market value.

The plaintiff subsequently filed suit in Superior Court challenging MassHealth's decision.

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— Harry S. Margolis, Boston elder-law attorney

Abuse of discretion

Addressing the plaintiff's motion for judgment on the pleadings, Murtagh first stated that, under §520.007(J)(3), the use of assets to purchase a promissory note is indeed considered a transfer for less than fair market value unless the note contains actuarially sound repayment terms; provides for payments to be made in equal amounts throughout the term of the loan; and prohibits the cancellation of balance upon death of the lender.

The judge then noted that the original promissory note — which provided for equal payments throughout the loan — did, in fact, lack an express provision prohibiting its cancellation upon Susan's death.

Nonetheless, Murtagh said, the relevant regulation does not require an express provision, and the absence of language expressly *permitting* cancellation upon death suggests that the note was *not* cancellable upon death.

Plus, the officer's interpretation of the amended note as invalid because it was so easily amended was not supported by any law or evidence, the judge said. "Therefore, this decision was arbitrary and capricious."

The judge also rejected MassHealth's finding that the note was not reasonably enforceable because it was between family members.

"It is true that there is no evidence that guarantees the mother will avail herself of all the legal remedies," Murtagh said.

"It is also true a mortgage on a minority interest in a residential property would have little value. However, the regulations do not provide that transaction[s] between family members are by nature disqualifying transfers," he said, adding that MassHealth's reasoning had the effect of improperly categorizing all intra-family transactions as disqualifying.

Finally, Murtagh took issue with MassHealth's determination that, because a 44-percent property interest could not be sold on the open market, the sale could not be considered a fair market value transaction.

"The definition of fair market value [provided in the regulation] does not indicate that the real estate transferred should have a market for it," the judge said.

"The definition only suggests that the fair market value should be assessed based on the prevailing price," Murtagh continued, commenting that neither MassHealth nor the hearing officer had argued that the $230,000 purchase price represented less than the value of 44 percent of the property.

Accordingly, "the period allowed to pay for the transfer … was actuarially sound and … the newly structured transaction cures the original disqualifying transfer," Murtagh said, finding that MassHealth abused its discretion in denying the plaintiff's claim. MLW

CASE: *Clark v. Dehner*, Lawyers Weekly No. 12-177-09

COURT: Superior Court

ISSUE: Where a woman sold her daughter a 44-percent interest in real property she shared with her husband, and received a promissory note secured by a mortgage in return, did this constitute a transfer of assets that would disqualify the husband from receiving Medicaid disability benefits?

DECISION: No, because the note's terms were actuarially sound and reasonably enforceable and the transfer was not for less than fair market value

For more information about the judge mentioned in this story, visit the Judge Center at www.judgecenter.com.

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