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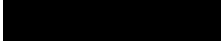
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BEFORE THE IDAHO DEPARTMENT OF HEALTH AND WELFARE

)	
)	Appeal No. 22-76773
Appellant,)	
)	PRELIMINARY ORDER
vs.)	
)	
STATE OF IDAHO DEPARTMENT OF HEALTH AND WELFARE,)	
)	
Respondent.)	

The Idaho Department of Health and Welfare’s decision is *REVERSED*.

This matter comes on appeal by Appellant, . Appellant appealed a decision issued by the Idaho Department of Health and Welfare (“Respondent” or “the Department”). Respondent found Appellant transferred an asset for less than fair market value and imposed an asset transfer penalty that resulted in a period of nursing home coverage ineligibility from December 1–6, 2021. The asset at issue was a \$2,000.00 brokerage fee she paid for a Medicaid eligible annuity.

On January 26, 2022, Respondent informed the Fair Hearings Unit of the Idaho Attorney General's Office of Appellant's appeal. The Fair Hearings Unit is the independent entity assigned to conduct fair hearings in these matters.

The Hearing Officer scheduled a hearing for February 14, 2022. However, Appellant requested a continuance to March 2022. The Hearing Officer granted the request and issued an amended notice scheduling the hearing for March 17, 2022.

On March 15, 2022, the parties jointly requested a continuance and an opportunity to submit briefs. The Hearing Officer continued the March 17, 2022, hearing to May 10, 2022, and established a briefing schedule. Both parties timely submitted briefs. (Appellant's Brief in Support, filed March 29, 2022; Respondent's Response Brief, filed April 8, 2022; Appellant's Brief in Reply, filed April 26, 2022).

On May 10, 2022, the Hearing Officer conducted a hearing. G. Connie Runia, attorney, represented Appellant. Dale Krause appeared on Appellant's behalf. Jessica Partridge, attorney, represented Respondent. Callie Keller appeared on behalf of Respondent. Exhibits 1–11 & B–E were admitted into the record.¹ The parties submitted written closing arguments. (Appellant's Closing Argument; Respondent's Closing Brief.)

The Hearing Officer reviewed and considered the arguments contained in the briefs and closing arguments.

The Hearing Officer's review is limited to the information available to Respondent at the time it made its decision and she must defer to Respondent's interpretation of statutes, rules, regulations or policy unless those interpretations are contrary to statute or an abuse of discretion. IDAPA 16.05.03.131. Based on the evidence in the record, Appellant did not transfer an asset for less than fair market value and is not subject to the 6-day asset transfer penalty.

¹ Appellant originally submitted, then subsequently withdrew, Exhibit A.

I. ISSUE

Whether Appellant is subject to an asset transfer penalty per IDAPA 16.03.05.831.

II. FINDINGS OF FACT

Based on the evidence in the record, the Hearing Officer sets forth the following Findings of Fact:

- 1) On December 1, 2021, Appellant applied for Medicaid nursing home coverage. Her spouse did not seek benefits. At the time of application, Appellant's resources exceeded the limit for nursing home coverage eligibility.
- 2) Appellant and her spouse purchased an ELCO Mutual Annuity for \$22,000 during the look back period to spend down jointly owned resources for Appellant to qualify for nursing home coverage. The irrevocable annuity paid to Appellant's spouse three monthly installments of \$7,334.56 until the entire investment of \$22,000.00 was repaid. Each payment on the annuity had an interest factor of \$1.22 cents. The annuity paid a total of \$3.66 in interest.
- 3) Respondent found the annuity was an eligible Medicaid annuity.
- 4) The [REDACTED] paid the Krause Agency \$2,000.00 as a brokerage fee for processing /establishing the ELCO Mutual Annuity. Per the Processing Fee Acknowledgement, the "processing fee due to Krause Brokerage Services is for Medicaid planning services associated with the annuity purchase."
- 5) There is a fee in any state where an annuity has a term of less than 24 months because a firm could not earn a commission on such a short-term annuity.
- 6) The Krause Agency has a standard fee schedule. The \$2,000.00 fee is what they would standardly charge for the annuity purchased by the [REDACTED]. The \$2,000.00 fee is standard for what any brokerage firm would charge for the same or substantially similar annuity that was purchased by the [REDACTED]
- 7) Dale Krause is the founder, president and CEO of the Krause Agency. He has his juris doctorate and an L.L.M. in tax law. He recently held an insurance license and securities license, but because the Krause Agency provides the brokerage services it holds the insurance licenses for each state. He has also been recognized in publications including the National Academy of Elder Law Attorneys, the Wall Street Journal and Lawyers Weekly, USA. He has also testified in approximately 20 hearings, in which he was qualified as an expert. He is familiar with the Idaho Medicaid program.
- 8) The Krause Agency provides oversight of the individual insurance agent's activities, 2) provides back-office support, including multiple reviews of the annuity application, 3)

coordination with the independent agent; and 4) ensuring timely issuance of the annuity. It assures that the annuity is Medicaid compliant and reduces the risk of litigation. Additionally, the annuity provided Appellant's husband with a stream of income. It transitioned an asset (which would have excluded Appellant from Medicaid) into a stream of income for her spouse. In doing so, Appellant qualified for Medicaid and her husband receives a stream of income.

- 9) Respondent determines fair market value of a brokerage fee by whether the fee is at least equal to what the annuity would return. If so, Respondent would not assess an asset transfer penalty on the fee. It starts to scrutinize a brokerage fee when it exceeds the annuity's financial return.
- 10) Although the annuity was exempt under the rules, Respondent found the fee was not. Further, the purpose of the fee was to qualify the [REDACTED] for Medicaid. It believes that the annuity did not infer an appropriate financial benefit on the [REDACTED] and thus found the brokerage fee of \$2,000.00 did not represent "Fair Market Value" and assessed Appellant an asset transfer penalty.

III. DISCUSSION

Appellant applied for Medicaid nursing home coverage. However, she was over the resource limit at the time. She and her spouse purchased a Medicaid eligible annuity in order to spend down assets to qualify her for coverage. She paid a \$2,000.00 brokerage fee for the annuity. (Hearing Recording; Exhibits 4, B–C.)

Respondent determined that the \$2,000.00 brokerage fee constituted an asset transfer for less than fair market value and imposed a six-day penalty. Appellant appealed. She argued that 1) she did not receive adequate due process due to deficiencies in Respondent's notice of decision, and 2) that the brokerage fee is not subject to an asset transfer penalty. Each of her arguments are addressed below. (Hearing Recording; Exhibit 2; Appellant's Brief in Support; Appellant's Brief in Reply & Appellant's Closing Argument.)

a. Due Process

Appellant asserts in her pre-hearing briefing that she did not receive adequate due process because Respondent's notice was insufficient. Specifically, Appellant asserts that Respondent's

notice did not cite the applicable rules on which the decision was based, lacked a clear statement of the specific reasons supporting its intended action and failed to reveal the method of value determinations, the resources relied upon to do so, and the calculations used to determine “fair market value.” (Appellant’s Brief in Support, filed March 29, 2022; pp 4–7.)

Notices must “detail[] the reasons for a proposed termination” sufficiently enough for a recipient to challenge both the application of the law to their factual circumstances and the “factual premises” of the state’s action. K.W. v. Armstrong, 298 F.R.D. 479, 490 (2014), citing Goldberg v. Kelly, 397 U.S. 254, 267–268 90 S. Ct. (1970). Federal regulation also sets forth the requirements that a notice must provide, including:

- (b) A clear statement of the specific reasons supporting the intended [action](#);
- (c) The specific regulations that support, or the change in Federal or State law that requires, the [action](#);

42 C.F.R. 431.210(b).

Appellant’s arguments are well made and understood. Respondent’s decision in its exhibits states the following:

As of 12/01/2021, the Department has Denied your Medicaid program.

Here is why: Other

██████ has transferred property for less than the market value and must serve a period of ineligibility beginning on 12/01/2021 and ending on 12/06/2021. You can stop the period of ineligibility if all transferred resources are returned.

The penalty may be waived if you~ are granted a hardship waiver. A written request for the hardship waiver must be submitted to the Department within 10 days of the date of this notice

(Exhibit 2.)

Respondent’s decision does not state the specific reasons for its actions, including failure to identify the asset for which Respondent issued the asset transfer penalty, nor does it state the specific legal citation that supports Respondent’s action. On its face, the decision does not provide sufficient detail on which Appellant could adequately challenge the action.

Nonetheless, Appellant's completed request for hearing form shows a specific, detailed understanding for the basis of the decision. The request stated:

The Department has imposed an Asset Transfer Penalty because of check #1699 for \$2,000. The department has determined that the customer did not receive any benefit from the Krause Agency for their Brokerage Services in establishing a Medicaid Qualified Annuity for [REDACTED].

Since a very specific Annuity is allowed in IDAPA 16.03.05.838, and since annuities are financial products only available through insurance companies, and since the insurance industry is a highly regulated industry with very specific legal requirements, the Brokerage fee on this annuity should be considered a legitimate legal / professional fee that the customer found to be worth paying for the benefit received.

There is no familial or business connection that would create an ulterior motive for the customer to "give" money to the Krause Agency, without the benefit of the Medicaid Qualified Annuity that was purchased.
(Exhibit 3.)

The record does not sufficiently show that the deficiencies found in Respondent's decision adversely impacted Appellant's ability to challenge Respondent's action to the point that Appellant did not receive adequate due process. Appellant's request for hearing demonstrates a profound understanding of the asset on which Respondent based the asset transfer and why it believed the asset penalty was inappropriate. Additionally, Appellant provided lengthy briefing, both post and pre-hearing. They presented case law and arguments articulating why the brokerage fee constituted fair market value and, in the alternative, why it was exempt from a penalty. Appellant's attorney and witness appeared at the hearing and articulated her position well. Her legal arguments and the facts she presented demonstrated an excellent grasp on the issue. There is no indication to this Hearing Officer that Appellant was not able to effectively argue her position or provide facts to support her case. (Hearing Recording; Exhibits B-C; Appellant's pre and post hearing briefs.)

Appellant's frustrations are understood and acknowledged. However, it appears that the deficiencies in Respondent's notice found in the exhibits was rectified through other means.

Appellant has not sufficiently shown that the deficiencies inhibited her from challenging Respondent's action related either to the application of the law to their factual circumstances and/or the "factual premises" to the extent that she was denied due process.

b. The \$2,000 Brokerage Fee Constituted Fair Market Value

Appellant applied for Medicaid nursing coverage. (Exhibit 4.) She was over the resource limit and spent down assets to meet the eligibility requirements, including purchasing a \$22,000.00 Medicaid eligible annuity. (Hearing Recording; Exhibits 5 & 7.) She and her husband paid a \$2,000.00 brokerage fee for the annuity. (Exhibit 8.) Respondent found the brokerage fee was excessive in that it conferred no value to Appellant. (Exhibits 1 & 9.) It asserts the annuity "conveys no value, returns all of the money to the Appellants within three months, and leaves the Appellants \$2,000.00 poorer after the brokerage fee. Over the term of the annuity, it would not appreciate in value in any way, and does not promise and cannot deliver any financial benefit." (Respondent's Response Brief, p 3.) Thus, Respondent found it amounts to "giving away assets for less than fair market value." More pointedly, Respondent argues "that to pay a brokerage firm for a financial product that confers no value to the purchaser, and whose only utility is Medicaid qualification, that the brokerage fee is an asset transfer subject to a penalty." (Respondent's Response Brief, p 3.) Respondent assessed an asset transfer penalty of six days. (Hearing Recording; Exhibit 2.)

Appellant's argument is three-fold. First, she asserts that the Department of Insurance regulates annuities and fees and that Respondent overstepped its authority. Second, Appellant asserts that Respondent added requirements in IDAPA 16.03.05.838.03. Appellant notes that rule does not set a minimum duration of annuity, it only sets the maximum. Therefore, penalizing Appellant for a shorter duration annuity is an added requirement. Lastly, Appellant asserts that she received value

and benefit from the brokerage service, both via research and drafting of annuity, and therefore the brokerage fee received was for fair market value. (Appellant's Briefs & Closing Argument.)

Respondent bears the burden of proof in cases whether the action limits, reduces or terminates benefits. IDAPA 16.05.03.132. Here, Respondent's action reduced/terminated Appellant's Medicaid coverage for six days in December 2021 due to an asset transfer penalty. She was otherwise eligible. Therefore, Respondent bears the burden of showing the asset transfer penalty applies. However, if Respondent carries its burden, then Appellant bears the burden of overcoming a presumption regarding the reason for the transfer. Burdens of proof must be satisfied by a preponderance of the evidence. IDAPA 16.05.03.134. A "preponderance of the evidence" is evidence that, when weighed with that opposed to it, has more convincing force and from which a greater probability of truth results. Edwards v. Independence Services, Inc., 140 Idaho 912, 915, 104 P.3d 954, 957 (2004).²

Appellant applied for Medicaid nursing home coverage. (Exhibit 4.) To meet coverage requirements, she spent down assets during her look-back period. As part of her spend-down, she purchased a Medicaid eligible annuity. She paid a brokerage fee of \$2,000.00. (Exhibits 5, 7-8.) Respondent agreed the annuity qualifies for Medicaid, but contended the brokerage fee was a transfer of her assets for less than fair market value and thus, subject to an asset transfer penalty. (Hearing Recording; Exhibit 2; Respondent's Response Brief.)

There is no dispute that this issue is governed, in part, under IDAPA 16.03.05.831. According to the regulation, a participant is subject to a penalty ***if*** he/she transfers his/her income or resources for less than fair market value. IDAPA 16.03.05.831. Thus, if Respondent fails to

² Respondent's counsel believed Appellant bears the burden. The Hearing Officer told counsel she could include her argument in her written closing argument. Respondent's closing argument was silent on the issue. However, even if Appellant has the burden of proof, she provided sufficient evidence to show by a preponderance of the evidence that the brokerage fee constituted fair market value of the annuity.

show that an appellant transfers an asset for less than fair market value, no penalty is assigned. Here, no one contested that Appellant's payment of \$2,000.00 constituted an asset transfer. Therefore, it must first be determined whether the transfer was for "fair market value." Fair market value of an asset is defined as "the price for which the asset can be reasonably expected to sell on the open market, in the geographic area involved." IDAPA 16.03.05.010.12.

Respondent argues that no one would purchase such an annuity on the open market with the small investment return. In support it argues that no one would pay \$2,000.00 for an annuity in which an individual receives their investment back with little to no investment return. Thus, the individual would be \$2,000.00 poorer due to paying the brokerage fee. (Hearing Recording.)³

Respondent's witness stated that the "asset" for determining fair market value here is the Medicaid eligible annuity. (Hearing Recording.) Therefore, we must look to what the reasonable brokerage fee would be for such a Medicaid eligible annuity. While Respondent asserts that the annuity provided \$0.00 value to Appellant rendering the \$2,000.00 fee was excessive, the asset provided more than just monetary value. The asset in Medicaid planning carries much value outside of generating revenue. It serves as a method for income preservation to a community spouse by converting a resource into income for the community spouse. This allows the spouse to remain in their community without spousal impoverishment. Here, Appellant's spouse received payments from the annuity. (Hearing Recording.) Also, the federal and state government support this type of financial vehicle to allow an individual to legally spend down assets to qualify for Medicaid. IDAPA 16.03.05.838; Health Care Fin. Admin, U.S. Dep't of Health & Human Servs., State Medicaid Manual 64 § 3258.11 (1994) (aka "Transmittal 64"). Respondent agreed Appellant's annuity met the necessary conditions and found the annuity purchased by Appellant

³ The annuity is not at issue. Respondent's arguments related to the annuity details were offered to show that the annuity resulted in little to no financial benefit for Appellant.

met the requirements. In doing so, Appellant qualified for nursing home coverage and her husband received income to remain living in the community. Thus, the annuity has value beyond its fiscal investment.

Further, the record contains credible evidence that the brokerage fee paid by Appellant is comparable to what is normally charged for such an asset. Dale Krause is the founder, president and CEO of the Krause Agency. He has his juris doctorate and an L.L.M. in tax law. He recently held an insurance license and securities license, but because the Krause Agency provides the brokerage services it holds the insurance licenses for each state. He has also been recognized in publications including the National Academy of Elder Law Attorneys, the Wall Street Journal and Lawyers Weekly, USA. He has also testified in approximately 20 hearings, in which he was qualified as an expert. He is familiar with the Idaho Medicaid program. There is nothing in the record that would render Mr. Krause's testimony untrustworthy or not credible. As such, his testimony related to this matter carries great weight. (Hearing Recording.)

Mr. Krause stated that his office provided valuable services for Appellant for the \$2,000.00 fee. The Krause Agency provides support of sale. He stated that there is a fee in any state where an annuity has a term of less than 24 months. It is structured that way because it would be difficult to earn a commission on the product with such a short-term duration. In order to get the product to the customer for those types of annuities, it charges a fee (versus a commission.) Without the fee the agency would work for free. (Hearing Recording.)

Appellant also argued that the brokerage fee considers the work and value of the asset provided to an individual. The product ensures the annuity is Medicaid compliant and reduces the risk of litigation. The product that Mr. Krause developed and sold to Appellant included a suite of services offered and available, including 1) oversight of the insurance agent's activities, 2)

provides back-office support, including multiple reviews of the annuity application, 3) coordinating with the independent agent; and 4) ensuring timely issuance of the annuity. A brokerage fee also accounts for the asset's research and development to ensure a product is "in compliance with federal requirements for Medicaid eligible annuities planning services and support of the local vendor ... and that the product gave Appellant access to a planning tool specifically prescribed to provide an income stream that would not otherwise exist if it were not for the research and development work by the broker." (Hearing Recording; Appellant's Brief in Support, pp 11–12.) Mr. Krause noted that the brokerage fee has never been challenged as "excessive." (Hearing Recording.)

The Hearing Officer acknowledges that she must defer to Respondent's interpretation. IDAPA 16.05.03.131. However, in this case Respondent's interpretation of fair market value constitutes an abuse of discretion. The plain language of the definition of "fair market value" states that "the asset can be reasonably expected to sell on the open market, in the geographic area involved." Respondent's witness focused on the asset conferring no financial benefit to a person and thus it would not sell to any reasonable person on the open market. (Hearing Recording.) However, the asset in this matter is a Medicaid eligible annuity. It has value, as set forth above, outside of pure revenue generation. For those seeking this asset specifically, the record contains credible, expert testimony from Mr. Krause that a \$2,000.00 brokerage fee is "reasonable" for the asset. In other words, the brokerage fee is reasonable for the value conferred to individuals seeking this type of asset. The "value" includes more than simply interest or other revenue generated by the asset. Based on the record as a whole, the Hearing Officer finds Respondent's narrow interpretation does not follow the plain meaning of the definition of fair market value.

Since Respondent has failed to sufficiently show that the payment of \$2,000.00 for the brokerage fee was for less than fair market value, Appellant is not subject to a penalty. As such, there is no need to determine whether Appellant meets an exception to the asset transfer penalty. Appellant is not subject to an asset transfer penalty associated with the annuity brokerage fee.

IV. CONCLUSION OF LAW

Respondent did not sufficiently show that Appellant transferred assets for less than fair market value. She is not subject to the six day asset transfer penalty related to the brokerage fee.

V. PRELIMINARY ORDER

Based on the foregoing analysis, the Idaho Department of Health and Welfare's decision is REVERSED. Appellant is not subject to an asset transfer penalty per IDAPA 16.03.05.831.

DATED this 1st day of June 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: Rebecca Ophus
REBECCA OPHUS
Hearing Officer

This decision is a Preliminary Order. Motions for reconsideration of a Preliminary Order will not be accepted. A Petition for Agency Review of this Preliminary Order must be filed with the Administrative Procedures Section by mail, email or fax within 14 days after the mailing (service) date to:

Administrative Procedures Section
450 West State Street, 10th floor
P.O. Box 83720
Boise, ID 83720-0036
208-334-5564 (Boise)
Email: APS@dhw.idaho.gov
Fax: 208-639-5741 (Boise)

On the fifteenth day (after the deadline has passed for seeking Agency Review), this Preliminary Order will become a Final Order without further notice. From the date a Preliminary Order becomes a Final Order, a Petition for Judicial Review may be filed in district court within 28 days under Idaho Code § 67-5273(2), and must comply with Idaho Code § 67-5270.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June 2022, I caused to be served a true and correct copy of the foregoing by the following method to:

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By: Becky Ahli
BECKY IHLI
Paralegal