STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. S-08/18-580
	)	
Appeal of	)	
	)	

INTRODUCTION

Petitioner is represented in this matter by her granddaughter who is her Court-appointed guardian and authorized representative. She appeals the decision by the Department for Children and Families Economic Services Division (DCF) to impose a penalty period which operated to delay petitioner's eligibility for Medicaid. The Department determined that petitioner's loss of a parcel of real estate through a municipal tax deed sale due to a tax delinquency was a transfer for less than fair market value, which in turn justified the imposition of a penalty period. The following facts are adduced from a hearing, several telephone status conferences and party filings with the record closing in October of 2019.

FINDINGS OF FACT

1. On January 30, 2018, petitioner was adjudicated by the Probate Division of the Windsor Superior Court as unable

to conduct her own affairs and petitioner's granddaughter was appointed in an emergency ex parte proceeding to serve as petitioner's temporary guardian.

2. Following a guardianship hearing on February 8, 2018, the Court, on February 13, 2018, issued an Appointment of Emergency Temporary Guardian which described petitioner's numerous physical and mental health issues, including but not limited to chronic heart failure, pulmonary hypertension and dementia. That document also described petitioner as having been involved in two recent car accidents, (and totaling a rental car in one of those accidents), driving on a suspended license and being stopped by authorities on multiple occasions for erratic driving.

3. The Appointment document also noted that petitioner owned and lived at the Hetty Green Motel in Rockingham and that her living unit was infected with black mold and the motel was described as unsafe. Petitioner was also described as non-compliant with respect to taking prescribed medication.

4. Petitioner's granddaughter indicated during the hearing in this case that the guardianship was necessary because, after a lengthy decline in both intellectual as well

as physical health, petitioner could no longer care for herself or live on her own.

5. Petitioner's only income was Social Security retirement. Up until March of 2018, she had been living in the dilapidated motel described above, which she owned, and which has since been condemned. Petitioner's granddaughter opined that the residence was so unsafe that she did not feel comfortable entering the premises. It was also reported that petitioner heated her living quarters with a space heater and that her monthly electric bill often exceeded her social security check and Green Mountain Power had put her on a payment plan.

6. Petitioner had previously owned a 19-acre parcel of undeveloped real estate in rural Westminster, Vermont for over three decades.

7. The status of the 19-acre parcel on March 28, 2018, was that the Town of Westminster had auctioned it off at a tax sale the year before, on May 18, 2017 due to delinquent taxes in the amount of $18,786.13. The Town itself was listed as purchaser of the property at the tax sale for that same amount, in an acknowledgement dated that same day, presumably because there was no other bid made on the property. Pursuant to law, petitioner had the right to a

one-year period of redemption, and if she was able to pay the delinquent taxes during that year, she could redeem the land and become the owner again.

8. Using her authority as guardian, petitioner's granddaughter placed petitioner in a nursing home in Vermont on March 28, 2018.

9. On that same day, the petitioner's granddaughter applied for Long Term Care Medicaid. The initial application contained a note indicating that petitioner's primary residence, (presumably the motel), had "taxes greater than value land" and that another parcel of land was "soon to be sold @ tax sale" and had been "sold @ tax sale" and "land going to be released "sold at tax sale".[1]

10. After learning that petitioner's 'ownership' of the 19-acre lot was considered by the Department to be a resource which was preventing petitioner from being immediately eligible for LTC Medicaid, and that putting up the property for sale would convert the property to an excluded resource, petitioner's granddaughter applied to Windsor Superior Court for authority to sell property as part of her guardianship

[1] While the status of the primary residence, the hotel, is mentioned in the application, the only issue in this proceeding concerns the 19-acre parcel of undeveloped land that was the subject of a tax sale by the Town of Westminster in 2017.

powers and was granted that authority on April 3, 2018. The one-year redemption period permitted by the tax deed sale procedure severely limited the amount of time that the granddaughter had authority to sell the property, as the redemption period was set to expire on May 17, 2018.

11. On April 6, 2018 petitioner's granddaughter listed the real property for sale, and it was thus considered an excluded asset under the "up for sale" exclusion. The initial marketing agreement had listed the property for sale at a value of $49,0000, which was revised upward shortly thereafter to a value of $61,000.00.[2] The assessed value of the property according to the Town of Westminster was $82,100.

12. The property did not sell by May 18, 2018, which was the date on which the one-year redemption period following the tax deed sale ended.

13. Upon expiration of the redemption period the property was permanently transferred by deed to the town of Westminster and the $18,786.13 tax delinquency was extinguished.

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[2] Testimony at hearing inferred that this increase in value was an attempt by petitioner's granddaughter to ensure that the sale price reflected "fair market value" based on the official assessed value of $81,000, but in retrospect, as will be further explained below, both values appear to have been far in excess of "fair market value" for this land.

14. That same day, the Department mailed a Potential Transfer Penalty letter to petitioner for the full $82,100 assessed value of the property, imposing a nine-month penalty period which was to run from April 18, 2018 to January 20, 2019. The Department's action was based on the conclusion that petitioner had "transferred" an asset (the unimproved lot) for less than its fair market value.

15. In response, on May 31, 2018, petitioner's granddaughter requested an exception to the transfer penalty asserting that the asset transferred was exclusively for a purpose other than to become or remain eligible for long term care Medicaid and that the transfer was not in petitioner's control.

16. Petitioner died on June 4, 2018.

17. On June 15, 2018 the Department issued a Notice of Decision denying the request for an exception to the transfer penalty provisions.

18. On that same day the Department notified petitioner's granddaughter of her right to request an Undue Hardship determination. The form letter conveying this information directed a person seeking such a determination to check all applicable reasons from a list of seven reasons.

19. On June 22, 2018 petitioner's granddaughter timely filed a request for undue hardship and checked the box that she thought most applicable to her situation, which was that: *The person to whom the asset(s) were transferred has no reasonable way to make arrangements for your care up to the value of the transfer.* Because the Town of Westminster was not legally obligated, inclined to, or perhaps even legally permitted to use the value of the real estate for petitioner's care, the petitioner's granddaughter thought this exemption applied.

20. On August 6, 2018, the petitioner's request for an "undue hardship" exception was denied because "the property was given to an entity, and not a person." The denial letter also stated: "No other undue hardship reasons apply to this situation."

21. Petitioner's granddaughter appealed to the Human Services Board on August 21, 2018 seeking review of the Department's decisions rejecting her request for an undue hardship exemption as well as the decision to impose a penalty period based on the asset transfer.[3]

[3] The Department has argued that petitioner was only entitled to appeal the Department's decision denying petitioner relief under the "undue hardship" exemption and not the imposition of the penalty period. This overly narrow characterization of petitioner's appeal rights is

22. During this appeal, petitioner's granddaughter provided to the Department as much information as she was able to find to document that petitioner herself had tried to sell the property on numerous prior occasions through realty companies, and also sought to provide the Department with all available information on the actual value of the property.

23. To that end, Petitioner's granddaughter provided her personal recollections about petitioner's many efforts to sell the property over the years. Specifically, she noted that immediately after the May 18, 2017 initial tax sale, petitioner drove to the location of a realtor she had used in the past, but the realtor no longer had offices in the area. Petitioner then drove from Bellows Falls, Vermont to Northampton, Massachusetts looking for a new realtor, but was pulled over by law enforcement for erratic driving, having a suspended license and was ultimately brought to a nearby hospital for medical evaluation, whereupon petitioner's granddaughter was called in to retrieve petitioner.

24. Petitioner's granddaughter also testified that the real property was extremely difficult to sell because it was in an undesirable location in Westminster, did not have any

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incorrect. Petitioner has the right to appeal all aspects of the Department's decision and has done so in a timely manner.

road frontage and had to be accessed via a right of way, that it was adjacent to but not accessible from nearby Interstate 91, could not be subdivided, and had a large power line, and an associated utility right-of-way running across the middle of the property. In addition, she expressed her belief that petitioner invariably overvalued the property, and this was reflected when she listed it for sale at the appraised value of $82,100 and was also of the opinion was that this was the reason it did not sell. Petitioner's granddaughter also offered testimony that the $61,000 price she listed the property for in April of 2018 in her effort to redeem the property, was above the fair market value, as was the current sale price of $30,000 that the Town is seeking to get for the property.

25. In response to the Department's request for documentation of prior attempts to sell the property, such as real estate listings or marketing contracts, petitioner's granddaughter credibly explained why such documentation was difficult to obtain. Not only were some of the efforts to sell the property in the distant past, but all the petitioner's records, if any existed, were at the mold infested, dilapidated and condemned Hetty Green Motel where petitioner had lived prior to her stay in the nursing home.

Petitioner's granddaughter noted that after her grandmother entered the nursing home the motel was boarded up and reiterated that she did not believe it was safe to enter the premises. She also expressed realistic doubt that her dementia plagued grandmother would have kept records in an orderly fashion.

26. Petitioner's granddaughter did track down one realtor who remembered petitioner and her efforts to sell the property. That realtor, whose name and contact information petitioner's granddaughter gave to the Department confirmed that petitioner overvalued the property, that the property has serious deficiencies and did not sell.

27. Petitioner's granddaughter also provided current internet real estate listing information showing that the real property was currently listed for sale by the Town of Westminster at a price of $30,000, which was less than half the assessed value, and half of what petitioner's granddaughter tried to sell it for in April and May of 2018, and that at that point it had been on the market for over five months. The property remained unsold as of August of 2019 and no current information about the property is available.

28. In response, the Department indicated that they were not satisfied with the information provided and that they needed documentation, either in the form of real estate contracts or a print-out from the real estate company showing when the property was on the market. The Department later indicated that they would accept affidavits about prior efforts to sell the property.

29. After expending considerable effort researching this matter, the petitioner's granddaughter obtained and submitted an affidavit from an employee of a realty company that had held a listing on the property in 2006. In that affidavit the employee stated:

> *I recall speaking with [Petitioner] who I remember to be a very strong-willed woman. She had listed the 19-acre lot located off of Pine Banks Rd in Westminster with an agent, who then worked as an agent in the office that I was the broker. [Petitioner] was not happy with the activity on the listing being obtained by her agent and had called me to complain about the service. [Petitioner] thought that there was a high value on the property located on Pine Banks Road in Westminster, Vermont, because it abuts Interstate 1-91. [Petitioner] envisioned an off ramp and direct access to the land from the highway. I informed her that the interstate is a limited access highway and there was no chance that an exit could ever be created off the interstate. Additionally, the only access to the land was by Right of Way (ROW) along a long ROW that initiated on Pine Cliff Rd in an area with some less desirable housing. The ROW also meant the land could not be further subdivided. All these factors limited the value. [Petitioner] and I had a substantial*

difference in opinion as to what the value of the land was really worth. I told her the land was not worth the $70,000 listing price.

30. The Department in response, rejected the assertion that the petitioner had made reasonable efforts to sell the property during the 5 years prior to the application date. However, the Department did adjust its calculation of fair market value to reflect a lower value of the property, from $81,200 to $30,000 which in turn shortened, but did not eliminate the penalty period during which petitioner would not have been entitled to Medicaid coverage.

31. However, the figure accepted by the Department is merely the last known asking price for the property, and evidence adduced at hearing showed that the property remained unsold at this price, even over a year after the redemption period expired and the Town became the unrestricted fee simple owner and put the property on the market. While record evidence of the fair market value of this parcel is scant, petitioner's claim that it is not worth the asking price of $30,000 is found to be credible.

32. The Department maintains that the transfer of the property to the town for payment of delinquent taxes was not eligible for exclusion under the applicable rules, and that as the transfer was for less than their revised estimate of

the fair market value of the property that the imposition of the penalty period is justified.

ORDER

The Department's decision is reversed

REASONS

Health Benefits Eligibility and Enrollment ("HBEE") Rule 25.01(b) gives the Department authorization to change their characterization of a transfer if they receive additional information about a transfer after the fact. During the extended hearing process the Department did review evidence of prior efforts to sell the property, but did not alter their characterization of the transfer, although ultimately the Department did significantly revise downward their estimate of the fair market value of the property.

However, the Department from the time of the initial application forward refused to consider certain facts pertinent to the transfer, the evidence of which was in the Department's possession from the inception of this case; which documented the circumstances attendant to this transfer: specifically that the transfer occurred through means of an involuntary tax deed sale for a long standing tax

delinquency, giving rise to the question of whether the transfer should have been allowed under H.B.E.E. Rule 25.03(c)(4) which describes the eligibility criteria for certain less than fair market value transfers if they are made "for a purpose other than creation or maintenance of eligibility for Medicaid coverage of long-term care services and supports". The full text of the rule subsection is as follows:

Transfer of resource for a purpose other than creation or maintenance of eligibility for Medicaid coverage of long-term care services and supports. The transferor has documented to AHS's satisfaction convincing evidence that the resources were transferred exclusively for a purpose other than for the individual to become or remain eligible for Medicaid coverage of long-term care services and supports. A signed statement by the transferor is not, by itself, convincing evidence. Examples of convincing evidence are documents showing that:

(i) The transfer was not within the transferor's control (e.g., was ordered by a court);

(ii) The transferor could not have anticipated the individual's eligibility for Medicaid coverage of long-term care services and supports on the date of the transfer (e.g., the individual became disabled due to a traumatic accident after the date of transfer); or

(iii) A diagnosis of a previously undetected disabling condition leading to the individual's eligibility for Medicaid coverage of long-term care services and supports was made after the date of the transfer.

HBEE Rule 25.03(c)(4)

The initial application for benefits in this case fully and clearly disclosed that the real property at issue had

been the subject of a tax deed sale the year prior to the application, and that only seven weeks remained of the year-long redemption period. The exclusive and well documented reason for this 'transfer' was that the Town of Westminster wanted to collect delinquent taxes and the decision to put the property up for sale at a tax deed sale was not within the control of the petitioner. It is therefore indisputable that this transfer occurred for a purpose other than creating Medicaid eligibility.

The Medicaid application also made equally as clear that the petitioner lacked the financial means to redeem the property, a circumstance that had existed for a significant period of time, as her only income was from social security and she had no assets of any value. That her penury had been the cause of the tax delinquency in the first place, (the taxes on the property had not been paid for almost a decade) is also far more likely than not.

It is also true that if one considers the initial tax deed sale date of May 18, 2017 as the date of transfer, and indeed the tax deed sale did occur on that date, petitioner could not then have anticipated that she would need long term care Medicaid, and the disabling conditions that led to her eligibility, dementia being chief among them, was not

diagnosed until several months later, at the time of the guardianship proceedings that occurred in early 2018. That petitioner had the right to redeem the property during the year-long period after the tax deed sale supports rather than defeats the assertion that the actual transfer had already occurred. Petitioner had the right to buy back the property, but absent payment, the Town, who became the owner at the tax deed sale because no one bid on it, remained the record owner of the property.

Thus, there is ample, indeed overwhelming documented record evidence that this transfer qualified as an allowable transfer under each of the three eligibility categories identified in the subsections of Rule 25.03(c)(4). Where an applicant is only required to provide evidence of one of these categories, petitioner's eligibility under this section of the rule cannot be questioned.

In addition, Rule 29.08(a)(3)(v) which governs real property up for sale deems an offer to buy property "reasonable" if it is for at least two thirds of the property's most recent fair market value and requires an owner to accept such an offer. In this matter, the Department conceded several months ago that the fair market value of the property is no more than $30,000. Petitioner

received a benefit, in the form of the elimination of a tax delinquency of $18,786.13 when the Town assumed ownership of the property. That figure constitutes 62.6% of the value of the land if the fair market value was $30,000. However, on this record, the property appears to be worth less than that, as there is no evidence it could be sold at that price, despite lengthy efforts. If the fair market value of the parcel were determined to be equal or less than $28,179.65, then the amount petitioner received for it (in the form of payment of back taxes) would be at least two thirds of the fair market value and had she been offered that amount for the property, she would have been obligated to accept it under the rule. Under these circumstances this transfer should be excluded in its entirety.

Mootness

In this matter, as the petitioner passed away prior to the conclusion of the appeal process, it is incumbent upon the Board to consider the matter of mootness. The Department was initially asked to state a position on mootness and standing in October of 2018, and in essence asserted that the matter was not moot, because the money was still owed to a nursing home for care of petitioner before she died.

Upon review, during the lengthy pendency of this case, the Department continued to assert that this matter was not moot, but on different grounds. In October of 2019, the Department espoused the theory that because petitioner's eligibility for Medicaid Long Term Care had been established prior to her death, and the remaining dispute was about the propriety and/or length of a penalty period imposed for a transfer of resources, that there was still a case or controversy and given that petitioner had a duly appointed legal guardian, the guardian and the Department both had the authority to "finish up this process on behalf of petitioner". This position is inconsistent with positions taken by the Department in other cases and treating the imposition of a penalty period as separate from the eligibility determination is in essence, creating a distinction without a difference.

The Board has considered the issue of whether an appeal survives the death of a Medicaid applicant in numerous prior cases. In most of those cases, the Board has dismissed the appeal as "moot" based on a lack of a surviving "interest" of the applicant in the outcome of the appeal. *See* Fair Hearing No. 18,450; Fair Hearing No. 18-476; Fair Hearing No. B-04/10-194; Fair Hearing No. B-10/12-669; Fair Hearing No. B-

01/12-60; Fair Hearing L-04/18-260 ; Fair Hearing No. L-04/18-577; Fair Hearing No. R-06/18-403. *But see* Fair Hearing No. A-2/15-133 (Spouse of deceased Medicaid applicant may pursue appeal); Fair Hearing No. 17,208.[4]

However, recent caselaw, along with additional guidance from current rules and regulations, calls for reconsideration of this issue, and in particular compels the Board to determine whether the federal requirement of "final agency action" on all applications means the application of a deceased applicant generally includes (at a minimum) the fair hearing process.

In the first place, federal Medicaid rules and attendant state rules provide for a fair hearing in mandatory terms:

> (a) The State agency *must grant an opportunity for a hearing* to the following:
>
> (1) Any individual who requests it because he or she believes the agency has taken an action erroneously, denied his or her claim for eligibility...

42 C.F.R. § 431.220 (titled "When a Hearing is *Required*") (emphasis added); *see also* Health Benefits Eligibility and

[4] It is noted that the decision in Fair Hearing No. 17,208 takes a broader view of the interests and issues at stake: "Although the petitioner has not and will not be denied access to health benefits by any decision of PATH, the integrity of the program and thus the access of other recipients to healthcare is certainly still very much at stake, making a decision by the Board appropriate in this matter."

Enrollment ("HBEE") Rules § 80.03 (Right to a State Fair Hearing).

Pointedly, federal rules promulgated in 2016 also circumscribe when a fair hearing may be "denied" or "dismissed":

> The agency *may deny or dismiss* a request for a hearing if—
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> (a) The applicant or beneficiary withdraws the request. The agency must accept withdrawal of a fair hearing request via any of the modalities available per § 431.221(a)(1)(i). For telephonic hearing withdrawals, the agency must record the individual's statement and telephonic signature. For telephonic, online and other electronic withdrawals, the agency must send the affected individual written confirmation, via regular mail or electronic notification in accordance with the individual's election under § 435.918(a) of this chapter.
>
> (b) The applicant or beneficiary fails to appear at a scheduled hearing without good cause.

42 C.F.R. § 431.223 (promulgated by 81 FR 86449, Nov. 30, 2016) (emphasis added).[5]

[5] As noted below, federal and state rules also provide that an applicant "need not be alive" at the time of application. This provision in the federal Medicaid rules was added in 1978, when certain Medicaid rules were decoupled from rules governing other federal benefit programs covered by Title 45 of the Code of Federal Regulations (*see* 43 Fed.Reg. 45176, at 45187, September 29, 1978). Of special emphasis, the pre-1978 regulations under Title 45 (which included Medicaid at the time) did not require a determination of eligibility if there was proof the applicant "had died" – this exception remains in the current rules governing the programs falling under Title 45. *See* 45 C.F.R. § 206.10. This only gives stronger emphasis to the fact that this exception (that an eligibility

Federal Medicaid regulations further provide that:

> As used in connection with the Medicaid program, unless the context indicates otherwise—
>
> *Applicant means an individual whose written application for Medicaid has been submitted to the agency determining Medicaid eligibility, but has not received final action*. This includes an individual (*who need not be alive at the time of application*) whose application is submitted through a representative or a person acting responsibly for the individual.
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> . . .*Medicaid agency or agency means the single State agency* administering or supervising the administration of a State Medicaid plan. . .

42 C.F.R. § 400.203 [Definition of Applicant] (emphasis added).

Furthermore, under state law, "final agency action" on a Medicaid application does not occur until the AHS Secretary reviews the decision of the Human Services Board – meaning the fair hearing process must occur *before* there is final agency action. *See* 3 V.S.A. § 3091.

The consequences of these requirements on whether the application of a deceased applicant *must be* determined through the fair hearing stage (at a minimum) has been noted by at least one federal court. In *Hillspring Health Care*

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determination need not be made for a deceased applicant) was effectively removed from the federal Medicaid rules in 1978 and replaced by the proviso that a Medicaid applicant "need not be alive" to receive "final action" on an application.

Center, LLC V. Dungey, 2018 WL 287954, U.S. Dist. Ct., S.D. Ohio (2018), the Court – in denying the plaintiff's standing to bring an affirmative suit in federal court – clearly provides that the requirement of "final agency action" includes the fair hearing process, despite the petitioner's death:

> As Graham's application proceeded through both the administrative and state court of common pleas appeal process, she received a final action on her application as contemplated by the regulation. Therefore, Graham is no longer an applicant under that definition, which terminates any authority the authorized representative arguably may have under that definition to proceed on Graham's behalf following her death.

Id. at 5. *See also Tiggs v. Ohio Department of Job and Family Services,* 2018 WL 3815054, Court of Appeals of Ohio, Eighth District (2018).

Finally, the current Health Benefits Eligibility & Enrollment Rules contain a provision allowing for an authorized representative to "file an appeal on behalf of a deceased person." HBEE Rules § 4.02(g)(4). The HBEE Rules replaced the previous Medicaid rules in 2014; those rules had no apparent provision for the right to file an appeal on behalf of a deceased applicant. *See* https://humanservices.vermont.gov/sites/ahsnew/files/document(10).pdf.

The Department – through its long-term care Medicaid program – will generally process the application of a deceased applicant, as a function of fulfilling its administrative responsibilities. The question before the Board is whether the fair hearing is a necessary and included element of the *administrative* process of rendering a decision on a Medicaid application, or whether the fair hearing process independently implicates the constitutional principle of mootness. The clear dictate of the rules and thrust of caselaw is that the fair hearing decision is part of the application process itself, and not an independent process.

Moreover, an exhaustive and broad search of caselaw vis-à-vis the administrative Medicaid appeal process provides virtually no support for application of the conventional principle of "mootness" to a Medicaid fair hearing determination – if anything, there are numerous cases which effectively provide a deceased appellant with a decision on the merits, or suggest that the fair hearing process is a necessary and automatic element of the administrative application process, without regard to issues of mootness, including:

- Federal court decisions. *See Hillspring, supra;*

Diversicare v. Glisson, 2017 WL 4873510 (noting that, after the death of the Medicaid applicant, the authorized representative was authorized to complete the fair hearing administrative process on her behalf); *James v. Richman*, 547 F.3d 214 (3d Cir. 2008) (finding Medicaid litigation by estate of deceased individual not moot where "District Court adjudicated the question of 'ultimate liability' for the costs of nursing care and the Department continues to contest its liability.");

- State court decisions holding that a fair hearing is required once the issue of authorized representation or "standing" is established. *See D.T. v. Division of Medical Assistance and Health Services*, WL 6816927, Not Reported in Atl. Rptr. (NJ Sup.Ct.)(rejecting argument that legal authority automatically terminated upon the death of the "applicant," citing 42 C.F.R. 400.203, and concluding "that DMAHS shall transfer the matter to the OAL for it to address that standing claim, and if FCC is successful, the merits of the dispute related to the BSS's March 1, 2017 income eligibility calculations at a fair hearing conducted consistent with fundamental notions of due process."); *J.G. v. Medical Assistance and Health Services, 2019 WL* 2082108,

Not Reported in Atl. Rptr. ((NJ Sup.Ct.) (same); *J.C. v. Division of Medical Assistance and Health Services*, 2019 WL 852181 (NJ Sup.Ct.) (same);

- State court decisions presuming jurisdiction, without specifically discussing mootness, over Medicaid appeals of deceased applicants. *See Estate of Gsellman v. Ohio Dept. of Job & Family Servs.*, 2012 WL 1207419 Not Reported in N.E.2d (2012) (Estate of deceased Medicaid applicant allowed to maintain appeal without discussion of mootness); *Appeal of Thi of New Hampshire at Derry, LLC d/b/a/ Pleasant Valley Nursing Home*, 2010 WL 11437243 (Assuming, without deciding, that a nursing home had standing to pursue and appeal of the denial of a deceased petitioner's long term care Medicaid application*); Estate of V.M. v. Division of Medical Assistance and Health Services*, 896 A.2d 503 (2006) (Appeal of fair hearing decision reviewed without discussion of mootness); *Wahl v. Morton County Social Services*, 574 N.W.2d 859 (1998) (considering, on the merits, denial of Medicaid eligibility in appeal by deceased applicant's estate); *Grossi v. Division of Social Services of D.H.S.S. of State,* 1995 WL 562141 (Not Reported in A.2d) (1995) (considering post-humous appeal of deceased Medicaid applicant, noting that the

request for fair hearing was the deceased applicant's "*right* under 42 CFR § 431.220."); *Dawson v. Ohio Dept. of Human Services*, 68 Ohio App.3d 262 (1990) (Executor of estate allowed to maintain court appeal of Medicaid denial, after death of applicant during fair hearing process); *S.R. v. Camden County Board of Social Services*, 2016 LW 2958383 (N.J. Adm.) *(May 13, 2016) (*representatives of the deceased petitioner authorized to appeal a Medicaid denial through the fair hearing process; denials were upheld on alternate grounds*); G.S. v. Division of Medical Assistance & Health Services, 19999 WL 493551* (N.J. Adm.)(May 28, 1999) (same).

There is no known court or administrative decision (apart from the Board precedent under reconsideration) holding that a Medicaid *fair hearing* is moot – and assuming the existence of valid authorization of someone to pursue the appeal - due to the death of the applicant.[6] The requirements of federal law, recent caselaw, and provisions in the current rules compel the opposite result here. In this case, an estate has been established for petitioner, an

[6] It is recognized that the Board has consistently cited the *Pickering v. Dept of PATH* decision, an unpublished Vermont Supreme Court case, in finding appeals to be moot. However, *Pickering* – to the extent it may be cited as precedent - does not address whether a fair hearing decision may be rendered moot in light of the essential requirements of the federal Medicaid statute. Whether a court appeal of a Medicaid-related decision becomes moot is a completely separate issue, and not relevant here.

administrator appointed who has authorized pursuit of the appeal, and petitioner has a liability for her nursing home care, payment for which care was the subject of petitioner's application for Medicaid – and, petitioner's appeal of her denial for lack of verification is disputed by the Department.

For all of the above reasons, this appeal remains an active dispute that is subject to the Board's fair hearing process. While it is understood that this may be viewed as departing from prior Board precedent and to the extent it does depart, overruling such precedent, this conclusion is based in substantial part on new caselaw as well as greater clarity in the current rules. And, nothing about this conclusion should preclude the Board from reviewing individual Medicaid cases to determine whether valid party status (and/or representational status) and an active and cognizable dispute remains present in any given appeal.

For these reasons, the Department's decision to characterize the transfer for less than fair market value resulting in the imposition a penalty is inconsistent with the applicable rules and must be reversed. *See* 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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