

[names redacted]

Re: Advisory Opinion No. 97-3

Dear [names redacted]:

We are writing in response to your request for an advisory opinion, which we accepted pursuant to 42 C.F.R. Part 1008.41 on June 11, 1997. Your request asks whether Mrs. P's transfer of assets to her nephew, Mr. S, and subsequent application for Medicaid benefits (the "Arrangement"), subjects her to sanction under 42 U.S.C. 1320a-7b(a)(6), which prohibits certain dispositions of assets for the purpose of qualifying for Medicaid.¹ Mr. N advised Mrs. P to transfer her assets and assisted in the transfer process. You may be collectively referred to in this opinion as the "Requestors".

You have certified that all of the information you provided in your request, including all supplementary letters, is true and correct, and constitutes a complete description of the facts regarding the Arrangement. In issuing this opinion, we have relied solely on the facts and information you presented to us. We have not undertaken any independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed, this opinion is without force and effect.

Based on the information provided and subject to certain conditions described below, we conclude that the Arrangement would not constitute grounds for the imposition of sanctions under 42 U.S.C. 1320a-7b(a)(6). This opinion may not be relied on by any person other than the addressee and is further qualified as set out in Part III below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

Mrs. P, an 87-year-old widow residing in a nursing home in the State of Oregon, is in need of long term nursing home care. On February 12, 1997, Mrs. P transferred \$7,785 to her great-nephew, Mr. S, who orally agreed to hold and use the assets for her personal needs in the future. Because the average monthly private nursing home cost in Oregon is \$2,595, this transfer of assets created a three month period during which Mrs. P would have been ineligible for Medicaid had she applied. See 42 U.S.C. 1396p(c), OAR 461-

¹ For the reasons set forth in our letter dated June 11, 1997, we have declined to opine as to other questions set forth in your request.

140-295(2). Between February 12, 1997, and May 13, 1997, Mrs. P spent the remainder of her assets for her continuing care and personal needs until less than \$2,000 remained. Mrs. P applied for prospective Medicaid benefits on May 13, 1997, more than three months after the disposition of her assets to her great-nephew. The application is pending with the State of Oregon Department of Health and Human Services. The parties anticipate that Mrs. P will be deemed eligible for benefits. The Oregon Department of Human Resources has stated that the State of Oregon will not impose a period of ineligibility for Medicaid based on the circumstances of the reported transfer of assets, provided that Mrs. P waited a “durational penalty period” before applying for benefits.²

II. LEGAL ANALYSIS

42 U.S.C. § 1320a-7b(a)(6) applies to any individual who:

knowingly and willfully disposes of assets (including any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under title XIX [42 U.S.C.S. §§1396 *et seq.*], if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c) [42 U.S.C.S. §1396p(c)].

42 U.S.C. § 1396 *et seq.* established the Federal-state health program commonly known as Medicaid. Medicaid benefits are available to persons who meet certain criteria, including financial need. Eligible persons may not have assets that exceed certain thresholds. Pursuant to section 1396p(c), applicants who transfer assets for less than fair market value for the purpose of qualifying for nursing facility, home health, or other long term care services within three years of applying for benefits are temporarily ineligible

² Mrs. P and Mr. N previously submitted a request for an advisory opinion regarding the transfer of assets at issue here, which request was rejected pursuant to 42 C.F.R. §1008.15(c) because the same or substantially same course of action was the subject of an ongoing court proceeding involving the U.S. Department of Justice. That proceeding, a declaratory judgment action filed by Mrs. P and Mr. N in the United States District Court of the District of Oregon (Civ. Action No. [redacted]), was subsequently dismissed for lack of subject matter jurisdiction. Copies of certain pleadings and the court’s order and opinion, along with a copy of a letter from the Oregon Department of Human Resources filed with the court regarding the period of ineligibility, were included with the Requestors’ present request.

for these long term care services.³ The length of the period of ineligibility, which is calculated at the state's option either from the first day of the month in which assets were transferred or the first day of the month following the transfer date is determined by dividing the value of the transferred assets by the statewide monthly nursing home cost as determined by the state.

For purposes of this opinion, the key portion of 42 U.S.C. § 1320a-7b(a)(6) is the last phrase, "if disposing of the assets results in the imposition of a period of ineligibility for such assistance." The State of Oregon has represented that it will not impose a period of ineligibility if Mrs. P waits to apply for Medicaid benefits until after the expiration of the period of time during which she would otherwise have been ineligible for benefits under the statute. The Requestors have represented that, given the value of the transferred assets and the applicable monthly nursing home cost for Oregon, the three month period of ineligibility that would have applied to Mrs. P had she sought Medicaid benefits at the time of her asset transfer expired prior to May 13, 1997. Accordingly, based on the State's representation and assuming, as represented by the Requestors, that three months is the correct ineligibility period under Oregon law, the requestors will not be subject to sanction under 42 U.S.C. § 1320a-7b(a)(6), because no period of ineligibility will be imposed because of Mrs. P's disposition of assets.

III. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [names redacted] who are the Requestors of this opinion. This advisory opinion has no application, and cannot be relied upon, by any other individual or entity.
- This advisory opinion may not be introduced into evidence in any matter involving an entity or individual that is not a Requestor to this opinion.
- This advisory opinion is applicable only to the statutory provision specifically noted above. No opinion is herein expressed or implied with

³ The statute contains exceptions, not applicable here, for certain assets transferred to spouses, children, or siblings, and for certain transfers where the transferee intended to dispose of assets at fair market value, where the transfer was exclusively for a purpose other than qualifying for benefits, or where the assets have been returned to the transferee. States have discretion to waive the period of ineligibility in cases of undue hardship.

respect to the application of any other Federal, state, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Proposed Arrangement.

- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- This advisory opinion is limited in scope to the specific arrangement described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008.

The OIG will not proceed against the Requestors with respect to any action taken in good faith reliance upon this advisory opinion as long as all of the material facts have been fully, completely, and accurately presented, and the arrangement in practice comports with the information provided. The OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, modify or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against the requestors with respect to any action taken in good faith reliance upon this advisory opinion, where all of the relevant facts were fully, completely, and accurately presented and where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion.

Sincerely,

D. McCarty Thornton
Chief Counsel to the Inspector General