

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of )  
 )  
 Q L ) OAH No. 12-0866-MDE  
 ) Agency No.  
 \_\_\_\_\_ )

**DECISION**

**I. Introduction**

Q L applied for Medicaid Home and Community-Based Waiver services. The Division of Public Assistance (DPA) determined that he would be ineligible for a period of time because of a transfer of assets penalty. Mr. L appealed.

A hearing was held on December 10, 2012. Mr. L was represented by his daughter L G. Ms. G and his other daughter T M testified on his behalf. DPA was represented by Jeff Miller. At the close of the hearing, the parties were given the opportunity to submit additional documents. Based on the evidence in the record, DPA's determination is upheld.

**II. Facts**

Mr. L's daughter, L G, has been granted the power of attorney to take various actions on his behalf. Ms. G first applied for Home and Community-Based Waiver services for her father in January of 2012.<sup>1</sup> At that time, she was told by DPA that property owned by Mr. and Mrs. L should be transferred out of their name.<sup>2</sup> Mr. and Mrs. L then quitclaimed several pieces of property to their two daughters and their husbands.<sup>3</sup> They also quitclaimed one piece of property to a family friend.<sup>4</sup> The first application was denied.<sup>5</sup>

Ms. G re-applied on behalf of her father on May 30, 2012.<sup>6</sup> On August 28, 2012, the Division of Senior and Disabilities Services (SDS) notified Mr. L and his care coordinator that he met the medical eligibility Level of Care requirements.<sup>7</sup> On October 15, 2012, SDS

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<sup>1</sup> Testimony of Ms. G. The Home and Community-Based Waiver program allows Medicaid recipients the option of receiving some services in their home when, but for those services, they would need to live in a nursing facility. 7 AAC 130.200; 7 AAC 130.205.

<sup>2</sup> Testimony of Ms. G.

<sup>3</sup> Exhibit 5.1; Exhibit 5.3; Exhibit 5.5. The property was owned jointly by Mr. L and his wife, and transferred by both of them.

<sup>4</sup> Exhibit 5.7, Testimony of Ms. G.

<sup>5</sup> Testimony of Ms. G.

<sup>6</sup> Exhibit 2.

<sup>7</sup> Exhibit 7.1.

approved the plan of care, and set the Home and Community-Based Waiver start date at August 23, 2012.<sup>8</sup> On October 16, 2012, SDS notified Ms. G that her father was not eligible for the waiver benefits because he was ineligible for any Medicaid services.<sup>9</sup> On October 17, 2012, DPA notified Mr. L that he would not receive the waiver benefits for a different reason: he had to wait for a transfer of assets penalty to expire on September 21, 2014.<sup>10</sup> On December 3, 2012, DPA issued a corrected notice stating that the penalty period would run from August 1, 2012 through December 18, 2013.<sup>11</sup>

### III. Discussion

When assets are transferred for less than their fair market value during the five years preceding eligibility for Home and Community-Based Waiver services, payment for those services is delayed. In determining how this penalty will be applied, DPA first calculates a baseline date. In this case, the baseline date is August 23, 2012, the date the waiver services were approved.<sup>12</sup> DPA then looks back at the 60 months prior to the baseline date for any assets transferred at less than the fair market value.<sup>13</sup>

The next step is to total the “uncompensated value” of the assets transferred during the look-back period.<sup>14</sup> This total is then divided by the “the average monthly cost to a private patient of nursing home care in the individual’s community[.]”<sup>15</sup> The resulting figure is the number of months, including partial months, that the recipient must wait before receiving waiver benefits.<sup>16</sup> In this case, the penalty period was calculated as being 16.58 months.<sup>17</sup>

Mr. L did not dispute the dollar values on any of the transferred property, or the calculations used by DPA to determine the penalty period. His daughters did raise other concerns, however. First, Ms. G questioned whether one property, on No Name Lake, should be included. This property had been inherited by Mrs. L, but at the relevant time

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<sup>8</sup> Exhibit 8.1.

<sup>9</sup> DPA letter dated October 16, 2012, submitted by Ms. G after the hearing. DPA subsequently stated that this letter was incorrect.

<sup>10</sup> Exhibit 9.

<sup>11</sup> Exhibit 18.

<sup>12</sup> 7 AAC 100.501(c).

<sup>13</sup> 7 AAC 100.501(b) and (c).

<sup>14</sup> 7 AAC 100.501(e)(1).

<sup>15</sup> 7 AAC 100.501(e)(2). In this case, DPA used the cost from only one nursing facility. Exhibit 8.3. It is not known whether this facility charges more or less than the average cost in Anchorage.

<sup>16</sup> 7 AAC 100.501(e)(3).

<sup>17</sup> Exhibit 8.4.

was titled in both Mr. and Mrs. L's names. Medicaid benefits such as the Home and Community-Based Waiver program are available to individuals who do not have the financial resources to pay for those benefits themselves. The penalty period is imposed so there is no incentive for people with resources to give their property away and then rely on government funded benefits. Although the No Name Lake property was inherited, Mr. and Mrs. L did own it. They could have sold the property and used the money to pay for nursing services. Thus, this property is properly included in the penalty calculation.

Next, Ms. G noted that she and her sister had been maintaining this property and paying the taxes on the property for several years. She wondered whether that would entitle them to some equity in the property, and a consequent reduction in the value used in the penalty calculation. It is possible that the family could have structured the maintenance work and payment of taxes in a way that would have created an ownership interest in the property so that the value of the quitclaim transfer from Mr. and Mrs. L would have been less than the full value of the property.<sup>18</sup> There is no evidence in the record, however, of any agreement transferring an interest in the property in exchange for the services and tax payments, and no evidence that other family members had a lien of any type against the property. At the time of the quitclaim transfer, Mr. and Mrs. L still owned 100% of the property, and they could have sold the entire property for cash.

Ms. M testified about the difficulty of working with various state agencies to obtain assistance for Mr. L. They were given different information about the process each time they spoke with a different person. According to Ms. M, after being told that Mr. L was eligible for the waiver program, they were told he would not lose the waiver by applying for admission to an assisted living home.<sup>19</sup> Shortly after applying for admission, they received the notice that Mr. L was no longer eligible for the Home and Community-Based Waiver.

The family's confusion is understandable. In a letter sent on August 28, 2012, SDS informed Mr. L "This Level of Care was: Approved. Q L meets Medicaid Level of Care criteria for Home and Community Based Waiver eligibility for the period 8/23/2012 to

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<sup>18</sup> For example, if the sisters had each owned 10%, then Mr. and Mrs. L would only have been able to transfer their remaining 80% interest.

<sup>19</sup> At one point, Ms. M and Ms. G thought their father might do better if moved to an assisted living home. They applied, but he did not actually move.

8/22/2013.”<sup>20</sup> Nothing in the letter states that eligibility is based on any further review.<sup>21</sup> Most people reading this letter would believe that Mr. L was eligible to immediately begin receiving services under the waiver program. He was not immediately eligible, however, because there were two more steps in the process. These are described in a post hearing letter submitted by DPA:

Another part of the process for someone to receive HCB is after the LOC is approved by DSDS, the client’s care coordinator is given time to provide DSDS with a Plan of Care (POC). Per regulation 7 AAC 130.205(f), HCB waiver services are payable only after the department approves the POC.

When DPA received notification from DSDS the POC was approved, it was required to implement the transfer of asset penalty for the HCB waiver application. Mr. L was approved for regular Medicaid as the transfer of assets penalty does not apply to a Medicaid only case.<sup>[22]</sup>

To further complicate matters, When Mr. L was denied participation in the waiver program, the letter sent to Ms. G was different than the notice sent to the care coordinator. The letter sent to Ms. G stated that the application had been denied, and that the reason for denial was that Mr. L was not eligible for any Medicaid services whatsoever.<sup>23</sup>

From Ms. G’s vantage point, her father had been approved for the Home and Community-Based Waiver program. She was then told he would not lose eligibility by applying for admission to an assisted living home. After applying for admission to an assisted living home, Mr. L suddenly lost all Medicaid eligibility without any explanation as to why he was no longer eligible.

The different answers from division staff and the incorrect and misleading notices do not, however, change the appropriate legal analysis here. DPA is required to implement the transfer of asset waiting period when assets are transferred for less than the fair market value. Mr. and Mrs. L did transfer assets for less than full value.<sup>24</sup> That property could have instead been sold to pay for nursing services.

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<sup>20</sup> Exhibit 7.1.

<sup>21</sup> The letter did state that a Plan of Care must be submitted.

<sup>22</sup> Letter dated December 12, 2012.

<sup>23</sup> Letter dated October 15, 2012, submitted by Ms. G after the hearing. As noted in its letter of December 12, DPA has acknowledged that the October 15 letter was inaccurate.

<sup>24</sup> If they had not transferred the property, the value of the property would have counted as an available resource, and Mr. L would have been ineligible because of his excess resources.

#### **IV. Conclusion**

DPA correctly calculated the transfer of assets penalty period. DPA's determination that Mr. L may not receive Home and Community Based Waiver services until after December 18, 2013, is upheld.

Dated this 11<sup>th</sup> day of January, 2013.

*Signed* \_\_\_\_\_  
Jeffrey A. Friedman  
Administrative Law Judge

#### **Adoption**

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 25<sup>th</sup> day of January, 2013.

By: *Signed* \_\_\_\_\_  
Name: Jeffrey A. Friedman  
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]