

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

In the Matter of:)	
)	OAH No. 13-0119-MDE
C G)	Agency No.
_____)	

DECISION

I. Introduction

This is the appeal of C G from the denial, on December 12, 2012, of her second application for Medicaid.

This case presents the question of how to craft a fair resolution where the agency has “moved the goalposts” for an elderly client. The agency incorrectly assessed a first application for Medicaid, telling the applicant she could be eligible to use Medicaid for assisted living after taking certain actions. After the applicant took those actions and reapplied, the agency denied the second application on the basis that the applicant should have taken other actions.

Ms. G is presently ineligible for Medicaid, and hence the second denial will be affirmed. However, the basis for the denial will be altered somewhat, and the doctrine of equitable estoppel will place certain parameters on how the affirmance can be construed and applied going forward.

II. Facts

C G, who is 78 years old, moved to Alaska from Tennessee in the summer of 2012 so she could be near her family here. She stayed with her daughter while waiting to make financial arrangements to go into assisted living.

On September 6, 2012, Ms. G applied for the Home and Community-Based Services Medicaid Waiver program, hoping to use those benefits for assisted living. In connection with that application, she disclosed that she owned a home in Tennessee. She indicated on her paper application that she intended to return to it,¹ but told the eligibility technician in her interview that she had moved to Alaska and intended to remain in Alaska.² According to the Division, the

¹ Ex. 2.31.

² Ex. 2.35.

eligibility technician chose “to exempt the property at that time” and therefore the Tennessee “home was not being questioned as a resource.”³

It is undisputed that the eligibility technician handled the Tennessee house erroneously. If the property was in fact exempt on account of being Ms. G’s residence, then she would not qualify for Alaska Medicaid at all because she would not meet the Alaska residency requirement. On the other hand, if the property was not her residence, it was a countable resource. When asked at the hearing how the technician could have thought an Alaska resident’s real estate in Tennessee was exempt, the Division’s representative responded, “That’s a good question.” By treating the Tennessee residence as exempt and not a barrier to qualification, the eligibility technician inadvertently misled Ms. G.

In a denial dated October 23, 2012, Ms. G was informed that she was over-resource because she had \$19,707 in countable resources, consisting of three bank accounts and some land in California.⁴ She was told she needed to “spend down” these resources in an appropriate manner and then reapply. She did spend the resources down, using them primarily to pay moving expenses and pay forward the cost of the assisted living home she was moving into in the expectation of qualifying for Medicaid. She reapplied to the Medicaid Waiver program on December 5, 2012.⁵

In the interim between the first denial and her second application, Ms. G moved into assisted living. She did not put her house in Tennessee on the market because she did not realize it was an impediment to coverage.⁶

On December 12, 2012, the agency denied the second application.⁷ Although the disposition of the \$19,707 in assets was accepted, the new application was denied because “\$126,000 is the amount of your countable resources for Medicaid.”⁸ The single basis for this assertion was Ms. G’s ownership of the house in Tennessee, which the agency now did not exempt and valued at \$126,000 (the basis for this valuation is uncertain). In subsequent discussions with Ms. G’s family, the agency seems to have suggested that Ms. G could transfer

³ Statement of Terri Gagne at hearing.

⁴ Ex. 2.37.

⁵ Ex. 2.0.

⁶ Testimony of Ms. T.

⁷ Ex. 2.21.

⁸ *Id.* The denial also pointed out that Ms. G may need to set up an income trust, but this was not a basis for the denial and the Division did not regard income as an issue at the time of the hearing.

the house to someone else and accept a 22-month transfer penalty under 7 AAC 100.510, representing the number of months of assisted living that could be paid for with \$126,000.⁹

After the second denial, Ms. G put the Tennessee house on the market. It did not sell at \$110,000, and the price has been dropped to \$98,000.¹⁰ To cover the cost of staying in the assisted living home, she has had to borrow money. She had borrowed \$7,000 through the end of January, and expected to have to borrow another \$4,500 by the end of February.¹¹

Ms. G has moved to Alaska and does not intend to return to Tennessee.¹²

III. Discussion

As a legal matter, the Division's denial of Ms. G's second application was correct. To be eligible for assistance, Ms. G cannot have countable resources in excess of \$2,000.¹³ The house in Tennessee is a countable resource, because it is not her residence.¹⁴ Although the net market value of that property is doubtless less than the \$126,000 the Division has assigned to it,¹⁵ there is no dispute that it is greater than \$2,000.

Under certain circumstances, however, the Medicaid regulations cannot be strictly applied because of the doctrine of equitable estoppel. In order to prevail on this theory, the citizen must prove each one of four separate elements:

[E]stoppel may apply against the government and in favor of a private party if four elements are present: (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.¹⁶

When these four elements are met, the government may be estopped or partially estopped (that is, limited or prevented) from applying an eligibility restriction as written. For example, in *In re M.B.*,¹⁷ a case decided by the Department of Health and Social Services hearing unit last year, an eligibility technician inadvertently misled a Medicaid applicant into putting too little money into her Medicaid Qualifying Income Trust. The agency was found to be estopped from denying

⁹ Testimony of Ms. T. See also Letter of Terri Gagne dated 3/1/13 (again mentioning the prospect of a transfer penalty).

¹⁰ *Id.*

¹¹ Testimony of Ms. G. The assisted living home costs \$5,762.92 per month.

¹² Testimony of Ms. G.

¹³ 7 AAC 40.270.

¹⁴ See 7 AAC 40.280.

¹⁵ The house has not sold at much lower asking prices.

¹⁶ *Crum v. Stalnaker*, 936 P.2d 1254, 1256 (Alaska 1997).

¹⁷ Case No. 11-FH-496 (Office of Hearings & Appeals 2012).

Medicaid coverage for that individual for the period when the trust was underfunded as a result of the error.

In this case, the Division's eligibility technician who reviewed the first application took an erroneous position, treating the Tennessee house as exempt property and telling Ms. G that her "countable assets" to be spent down were just \$19,707. It was reasonable for Ms. G, who is not a Medicaid expert, to rely on the agency to steer her right on this fundamental issue. Relying on the agency's guidance, she spent down her cash resources, moved into the assisted living home, and yet did not sell or try to sell the Tennessee property. Hence, the first two criteria for estoppel are met. Skipping to the fourth element, the application of estoppel here to prevent harm, or "prejudice" to Ms. G would also serve the interest of justice to prevent public injury. As the Department's hearing examiner observed in the *M.B.* case:

[T]he public as a whole is served by having government staff who can recognize a situation and correctly respond to public inquiries regarding governmental benefit program, in such cases as the present one, where the citizen, in effect, says "here's the trust, here's the deposit, I need to qualify for Medicaid for this month" and the Division does not inform the citizen of what other steps she needs to perform in order to qualify for Medicaid as requested.

The same is true here: Ms. G said, in effect, "Here are my assets, what would I need to do to qualify for the Medicaid Waiver program?" It would be in the public interest for the government to be able to give her a correct set of goal posts to aim for. Not doing so could lead to unfortunate financial decisions by elderly citizens that could impact not only the citizens themselves but care providers and other government programs.

With that said, Ms. G's situation largely fails to fulfill the *third* element of estoppel. The ultimate desired outcome for Ms. G, had she been correctly advised from the beginning, would have been this: reduction of all her assets to virtually zero, and payment—by means of those assets and thereafter through Medicaid and her own Social Security income—of her assisted living costs. If she arrives at that destination notwithstanding the incorrect handling of her first application, she will not have been prejudiced. It is still possible for Ms. G to arrive at that destination.

Ms. G delayed putting the Tennessee house on the market because of the erroneous understanding that it was exempt property, but she has put it on the market now. It will eventually sell—at a price determined by the current real estate market in Tennessee—less selling costs such as a real estate commission. When it sells, if Ms. G is able to use the net

proceeds to repay the loans she has been incurring to pay her assisted living costs, and then use only the remainder to pay forward assisted living costs before becoming eligible for Medicaid benefits, she will wind up in exactly the same place she would have had the eligibility technician correctly identified the home as non-exempt in October.

Accordingly, the basis for denial of Ms. G's application must be modified somewhat. She is over-resourced, but she is not over-resourced by \$126,000; instead, the asset that prevents her eligibility must be valued at fair market value, taking into account reasonable selling expenses.¹⁸ In the current market, the house is clearly worth much less than \$126,000, because it is on the market for \$98,000 and has not yet sold. Moreover, proceeds from sale of the house may validly be used—as part of a spend-down plan—to repay loans Ms. G has incurred and continues to incur to cover the cost of the assisted living home she moved into in reliance on the eligibility technician. Remaining proceeds after this repayment can be spent down in an appropriate manner (such as paying future assisted living costs) or perhaps addressed through an agreement under 7 AAC 40.290. If this practice is followed, both Ms. G and the agency will wind up in the same financial position they would have been in had the first application been assessed correctly.

The agency has broached the possibility of a penalty under 7 AAC 100.510. This would only come into play if Ms. G gives the Tennessee house away or otherwise disposes of it for less than net market value. If a penalty becomes appropriate and is applied, it must be applied using the true net market value of the home, less any value received for the transfer.¹⁹

IV. Conclusion

The Division's December 12, 2012 denial of C G's application for Medicaid benefits is AFFIRMED, subject to the above observations about the degree to which she is over-resourced. Ms. G may reapply for Medicaid. If her new application is not handled in a manner consistent

¹⁸ For example, if the house, currently on the market for \$98,000, were eventually sold to a buyer offering \$92,000, the fair market value proceeds might be as follows (all figures are hypothetical, used only for illustration):

Market sales price	\$92,000
Less commission	6,000
Less other selling exp.	<u>2,000</u>
Net	\$84,000

¹⁹ A transfer to a lender to repay a valid legal debt (such as Ms. G's debt for payment of assisted living expenses) might be a transfer for less than market value, but it would not be a transfer for no value; in that situation, a transfer penalty would have to be calculated taking into account the value of the debt settled by means of the transfer, because only the "uncompensated value" of such a transfer becomes part of the penalty. See 7 AAC 100.510(d).

with this decision, she may appeal that agency action. Ms. G is reminded that she should get legal advice about the possible need for an income trust, as mentioned in footnote 8 above.

Dated this 14th day of March, 2013.

Signed _____
Christopher Kennedy
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 28th day of March, 2013.

By: *Signed* _____
Name: Christopher M. Kennedy
Title: Administrative Law Judge

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