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

In the Matter of	)	
	)	
H J	)	OAH No. 14-0850-MDE
_____	)	Agency No.

DECISION

I. Introduction

H J is an elderly lady under a court-appointed guardianship. Her guardian applied for Medicaid on her behalf on January 24, 2014. We know now that—as of January 24—there were both assets and income in her name that would ordinarily disqualify her from eligibility. This case turns on whether those assets and income were truly available to her, and on whether her guardian properly disclosed the information available to him regarding the assets and income.

This case is solely about historical eligibility for Medicaid from the date of application in January until a date early in the summer. Ms. J filed a second, protective application for Medicaid during the summer, after a qualifying trust was established, and thus her present and ongoing eligibility is not at issue.

The case was heard on August 19, 2014, with extensive testimony taken from Ms. J's guardian and from an eligibility technician for the Division of Public Assistance who handled Ms. J's application. This decision concludes that the guardian did not meet his burden of showing that the January 24 application should have been, or should now be, granted.

II. Facts

In the latter part of 2013, H was living in an assisted living home, with General Relief as her sole support. She had been found by Adult Protective Services, suffering from dementia, and that organization had placed her in the home.[1]

On October 14, 2013, the Superior Court made the Public Guardian Ms. J's guardian.[2] Steven Young is the lead Public Guardian at the Office of Public Advocacy (OPA), and he was the primary individual exercising the guardianship role on her behalf.[3]

The Public Guardian was promptly able to get Ms. J her Social Security benefits. There was a suggestion in a court visitor's report that Ms. J might have other income, but the Public Guardian was initially stymied in his efforts to investigate. He located Ms. J's son, who held a

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1 Testimony of Steven Young.
2 Ex. 13.
3 Testimony of Young.

power of attorney for her. The son, who was in prison, refused to provide information. Late in 2013, Mr. Young referred Ms. J's case to OPA's Elder Fraud unit.[4]

As mentioned in the introduction, on January 24, 2014 Mr. Young applied for Medicaid on Ms. J's behalf, with a view toward obtaining Waiver services. He listed no assets other than $2,112 held by OPA, and no income other than $1,252 in monthly Social Security.[5] However, in an interview with the Division regarding the application on February 13, 2014, he stated that there might also be a Key Bank account (on which her son was listed as primary) and some real estate held by the son; he had not been able to develop firm information on these items.[6]

For its part, the Division was able to discount the potential real estate ownership by checking property records. It was also able to tell Mr. Young that Ms. J had applied for Medicaid in 2011, and that at that time she was apparently receiving some kind of retirement benefits.[7] Mr. Young believed the retirement benefits were likely being deposited into the Key Bank account.[8] The Division hoped to get additional information relating to the pension from its own records, although it was unclear whether this would be possible or adequate to resolve questions about eligibility.[9]

The Division pended the application for 30 days to allow the Public Guardian to supply information about all assets and income, notifying him that the application would be denied if the information was not received in that time.[10] Two weeks later, on March 4, Mr. Young sent the Division's John Lawson an e-mail saying:

> Ms. J filed a Med #4 and was pended for verification of assets including bank accounts; however, Ms. J reported all known assets in the Med #4. If DPA/LTC is familiar with additional assets or income, please notify the Office of Public Advocacy Public Guardian at your earliest convenience. Please contact me if you have additional questions. Steven Young, Public Guardian.[11]

At this point there was a breakdown in communication. Mr. Young thought his e-mail was an unequivocal announcement that there were no further assets or income to report. Mr. Lawson, however, saw the e-mail only as a reiteration that Ms. J had reported everything known

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4 *Id*. (whole paragraph).
5 Ex. 2.
6 Ex. 3; testimony of Steven Young and John Lawson.
7 Ex. 3; testimony of Lawson.
8 *Id*.
9 Testimony of Lawson.
10 Ex. 4.
11 Ex. 5.

when she applied, but not as a declaration that Mr. Young *could not get* additional information. He gave Mr. Young additional time, and left the application in pend status.[12]

As it happens, the Public Guardian did have extensive information about the Key Bank account, and about the monthly retirement benefits that were being deposited into it, at the time of the March 4 e-mail. This is because OPA's Office of Elder Fraud and Assistance had received a full transmission of bank records from Key Bank on February 24.[13] Regrettably, Mr. Young did not know these records were in his possession, apparently because the Elder Fraud and Assistance section "operates independently" and does not "share records that we receive in the course of an investigation with our clients, even if the clients are public guardians."[14] Be that as it may, there can be no question that the Public Guardian was the client and Elder Fraud was acting as its counsel.[15] The knowledge of an attorney is imputed to the client.[16]

The Key Bank materials showed $18,828.47 held in a bank account for the H J Living Trust as of January 14, 2014.[17] They showed ongoing monthly deposits from the Ohio Public Employee Retirement System of approximately $824 per month.[18] They showed check-writing activity against the account by two signatories (presumably Ms. J and her son) in 2012, with more recent check-writing (through April of 2013) solely by Ms. J herself.[19]

Following the March 4 e-mail, Mr. Young did not communicate further with the Division for the next two months.[20] On May 9, 2014, Mr. Lawson called him to check on the status of the additional information the Division was expecting. Lawson got no answer and left a voice mail; later the same day, he recorded internally his intention to deny the January 24 application.[21] The denial at issue in this case was issued the following business day, May 12.[22] The basis for the denial was failure to provide verification of assets and income.[23]

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12 Testimony of Lawson.

13 Ex. 12.

14 Affidavit of Beth Goldstein.

15 Ms. Goldstein's affidavit implies this. Insofar as the affidavit is not explicit on this point, the Office of Administrative Hearings takes official notice that Elder Fraud is in an attorney-client relationship with those whom it represents, such as Ms. J (through her guardian). If any party objects to the taking of official notice of this fact, the party may object in its Proposal for Action, specifying the evidence it will present to refute the officially noticed fact.

16 *See, e.g.*, *Preblich v. Zorea*, 996 P.2d 730, 736 (Alaska 2000).

17 Ex. 12.8.

18 Ex. 12.9, 12.11, 12.13, 12.16.

19 Ex. 12-109 – 12.119. There has been no allegation or evidence that the signatures by Ms. J are forged. They suggest that Ms. J had concurrent access to the account in 2012-13.

20 Testimony of Young.

21 Ex. 6; testimony of Lawson.

22 Ex. 7.

23 *Id.*

On approximately May 15, 2014, the Public Guardian's counsel (Elder Fraud) passed on to the Public Guardian information that Ms. J had a public employee pension from the State of Ohio.[24] On May 22, Mr. Young wrote to Ohio PERS requesting that the funds be redirected to an OPA account.[25] On the same date, the Office of Public Advocacy approached Key Bank again, seeking access to the $18,828.47 bank account.[26]

The next day, May 23, 2014, the Public Guardian appealed the Division's denial of the Medicaid application. In spite of the information finally received from the Public Guardian's counsel eight days previously, the appeal form asserted—somewhat remarkably—that: "There [are] simply no additional assets or income to report at this time."[27]

Twenty-nine days after going back to Key Bank, OPA received the funds in the bank account.[28]

III. Discussion

In an appeal hearing such as this one, an applicant for new benefits, such as Ms. J, has the burden of proving his or her eligibility by a preponderance of the evidence.[29] Relatedly, at the application stage, it is likewise the applicant's responsibility to "provid[e] whatever verification is necessary to establish his or her own eligibility for benefits,"[30] unless the information is readily available to the department.[31]

Department of Health and Social Services regulations require the Division to verify that applicants meet the requirements for eligibility, and to request documentation as needed.[32] If an applicant has not provided all of the documents needed to verify eligibility, the Division may not approve the application.[33] If the applicant refuses to provide documentation, the application must be denied.[34]

Here, the Division had notes from a prior application indicating that the applicant had a retirement pension. Income is central to Medicaid eligibility, and this issue had to be run down.

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[24] Affidavit of Beth Goldstein, ¶ 7.
[25] Ex. 9.9.
[26] Ex. A to Position Statement of Claimant.
[27] Ex. 8. The guardian should think seriously about whether this statement was as candid as it should have been.
[28] Ex. A to Position Statement of Claimant.
[29] 7 AAC 49.135.
[30] OHA Case No. 10-FH-20 (Fair Hearing Decision, Dep't of Health & Soc. Serv., 2010), at 5-6 (published at http://aws.state.ak.us/officeofadminhearings/Documents/HSS/10-FH-20.pdf).
[31] *See* 7 AAC 100.016(b).
[32] 7 AAC 100.016(a), (b).
[33] 7 AAC 100.016(d). The Division may grant provisional benefits under very limited circumstances (not asserted here), but only for the month of application and the following month.
[34] 7 AAC 100.016(b).

The guardian was sent to gather more information on the subject, and his only follow-up was to send an e-mail reporting "Ms. J reported all known assets" in her application. This communication was equivocal in multiple ways. It did not mention income, which was one of the primary concerns. As to assets, it used ambiguous phrasing that could easily be read to mean only that, when he filled out the application, the guardian reported everything he knew about at that time. There was no explanation of subsequent efforts to gather information, whether successful or not.

It is plain that the Division's decision to deny the application for failure to provide was correct, when it was made, on two levels. First, it was correct based on the information available to the Division at the time: the guardian's lack of follow through and failure to communicate clearly left the Division with a file that could not support granting the Medicaid application. Second, it was correct, in hindsight, even with the benefit of the fuller knowledge of the circumstances developed at the de novo hearing. We now know that on February 24 the guardian's legal counsel had critical information about Ms. J's assets which the guardian failed to disclose. Since the information known to counsel must be imputed to the client, denial for failure to provide was appropriate.

This does not quite end the inquiry. Even though the Division was correct to deny for failure to provide, it can be argued—and the Public Guardian does argue—that the application ought to be granted after hearing if the evidence developed *at the hearing* shows that the applicant was, in fact, substantively eligible for Medicaid at the time of application. In other words, the Public Guardian contends that the consequence of a failure to provide is to put the applicant to the extra effort, expense, and uncertainty of going to fair hearing, but that is as far as the negative consequences go. At the end of the process the applicant would still receive benefits retroactive to the month of application if the information, when finally and belatedly provided at hearing, shows the applicant to have been eligible all along.

The Public Guardian's argument on this point is plausible. It is not self-evident that an 87-year-old woman beset by dementia and multiple health problems should be denied assistance for which she was truly eligible, simply because she, or her guardian, took extra time to get the disclosure process right. Indeed, such a forgiving approach would be consistent with the way de novo hearings are often handled. The Department of Revenue, for example, will set child support at a hearing at the level that the support substantively should have been, even if the

applicant has failed at every pre-hearing stage to provide the appropriate evidence to calculate that support.

We need not resolve, in this case, whether the Department of Health and Social Services should likewise focus on substance alone in an appeal such as this one—whether, in a failure-to-provide case, the ultimate result should turn only on whether the applicant was actually eligible, and not on whether information was provided at the appropriate time. The reason this need not be resolved is that Ms. J cannot prevail even if the case is decided on substance.

As an applicant, Ms. J (through her guardian) has the burden of proof to establish eligibility. Substantively, we know that Ms. J had an asset of $18,828.47 in a non-qualifying trust at the time of application, as well as ongoing income of approximately $2,075 per month. The parties agree that such an asset and such income would disqualify her,[35] unless it was unavailable to her due to theft or some legal impediment to access.

The Public Guardian suggests that the asset and income were indeed unavailable to Ms. J. That contention has not been proven by a preponderance of the evidence, however. Ms. J continued to write checks from her Key Bank account as recently as April of 2013. Moreover, the Public Guardian's assertion that it could not obtain information about the account is mistaken: its counsel managed to obtain that information by February 24, just one month after the application was filed. Lastly, when OPA finally used that information and went back to Key Bank, it took only 29 days to receive the funds. On the record placed in evidence in this case, the Key Bank asset has not been shown to be unavailable, and has to be regarded as disqualifying.

IV. Conclusion

The Division's denial of Ms. J's January 24, 2014 Medicaid application will not be disturbed.

DATED this 30th day of October, 2014.

Signed
Christopher Kennedy
Administrative Law Judge

[35] Mr. Young conceded this during his testimony at the hearing. *See also* 7 AAC 40.270; 7 AAC 40.310; 7 AAC 100.400.

Adoption

The undersigned 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 8th day of December, 2014.

By: *Signed*
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

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