

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

In the Matter of:)	
)	
H D)	OAH No. 14-1483-MDE
_____)	DPA Case No.

DECISION

I. Introduction

The issue in this case is whether, for purposes of Medicaid resource eligibility, money paid out by a Medicaid applicant using a personal (non-certified) check ceases to constitute a resource upon the signing of the check and its delivery to the payee, or (on the other hand) only upon the transfer of funds from the applicant's bank account to the payee's bank account (*i.e.* upon "clearance" of the check). The Division of Public Assistance (DPA or Division) denied Ms. D's application for participation in the Medicaid Home and Community-Based Waiver Services program, for the month of June 2014, on the basis that funds present in her account on June 1, 2014 caused her to exceed the Medicaid program's maximum resource limit. Ms. D asserts, on the other hand, that because a personal check (in an amount which ultimately reduced Ms. D's bank balance below the resource limit) was written and tendered to the payee prior to June 1, 2014, Ms. D should be determined to be resource-eligible for June 2014.

This decision concludes that, because the payment at issue was made via personal check, and because that check did not clear until June 2, 2014, the funds represented by the check still constituted a countable resource of Ms. D, for purposes of Medicaid, as of June 1, 2014. This is because, even though the check created a legal payment obligation running from Ms. D to the payee of the check from the moment it was delivered, the funds represented by the check remained in Ms. D's account, and she retained the power to use those funds for other purposes, until the check actually cleared on June 2, 2014. Accordingly, the Division was correct to deny Ms. D's Medicaid application for the month of June 2014 because the value of her resources exceeded the applicable resource limit as of the first day of that month. The Division's decision denying Medicaid eligibility for the month of June 2014 is therefore affirmed.

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II. Facts

The facts relevant to the resource eligibility issue are undisputed. H D is 86 years old.¹ At some time prior to May 2014 Ms. D became unable to care for herself and was admitted to No Name, the long-term assisted living facility (ALF) in which she currently resides.² The ALF's daily care fee is currently \$155.00 per day, or \$4,805.00 for a 31-day month.³ The ALF's monthly room and board fee is an additional \$1,275.⁴ Thus, it costs approximately \$6,080.00 per month to stay at the ALF.

Ms. D appointed her daughter, L G, to act on her behalf by executing a general power of attorney on October 16, 2007.⁵ When Ms. D began living at the ALF, Ms. G made arrangements so that the ALF automatically billed its monthly charges to Ms. G's credit card.⁶ Ms. G would subsequently reimburse herself from Ms. D's No Name 2 bank account when, and to the extent there were, funds available to do so.⁷

On Friday, May 30, 2014 Ms. G signed a personal check, drawn on her mother's No Name 2 bank account, reimbursing herself for \$5,606.00 in ALF charges, for May 2014 and June 2014, which she had previously paid to the ALF using her credit card.⁸ The check was then deposited by Ms. G into her own bank account.⁹ Although it is not clear from the record exactly when the check was deposited, the Division did not dispute Ms. G's assertion that the check was deposited to her account by Saturday, May 31, 2014. The check cleared (i.e. the funds were debited from Ms. D's account, and were credited to Ms. G's account) on June 2, 2014.¹⁰ Before the check cleared, Ms. D's account had a balance of \$6,439.32; after the check cleared, Ms. D's account had a balance of \$833.32.¹¹ This payment thus reduced the amount of funds in Ms. D's bank account below the applicable \$2,000.00 maximum resource limit.¹²

¹ Ex. 1.

² Exs. A, E, F, G, I, and J; L G's hearing testimony.

³ Exs. A, E, F, G, I, and J; L G's hearing testimony.

⁴ Exs. A, E, F, G, I, and J; L G's hearing testimony.

⁵ Exs. 3.3, 3.4, 3.5.

⁶ Exs. B, C, H, and K; L G's hearing testimony.

⁷ L G's hearing testimony.

⁸ Exs. D, L; L G's hearing testimony.

⁹ L G's hearing testimony.

¹⁰ Exs. D, L, and 4.1.

¹¹ The Division's calculations, set forth in its Fair Hearing Position Statement, result in figures \$1.00 higher than the figures arrived at by the undersigned. This \$1.00 discrepancy is not material in the context of this case.

¹² The precise issue in this case is whether the reduction of Ms. D's account balance below the \$2,000.00 limit occurred prior to June 1, 2014, or after June 1, 2014.

On June 26, 2014 Ms. G, with the assistance of Ms. D's Care Coordinator completed, signed, and submitted her mother's Medicaid application to the Division.¹³ The application sought Medicaid coverage beginning in June 2014.¹⁴

On August 19, 2014 the Division notified Ms. D that it had denied her application for Medicaid coverage for June 2014, but had found her eligible for Medicaid beginning July 1, 2014.¹⁵ The Division's notice stated that it had found Ms. D ineligible for Medicaid during June 2014 because the amount of money in her bank account on June 1, 2014, which the Division found to be \$6,440.32, exceeded the applicable \$2,000.00 resource limit.¹⁶ Ms. D requested a hearing to contest the Division's determination on August 27, 2014.¹⁷

Ms. D's hearing was held on September 25, 2014. Ms. D did not participate. She was represented at the hearing by her daughter and power-of-attorney holder L G, who attended the hearing and testified on her mother's behalf. Ms. D's Care Coordinator also attended the hearing and spoke on behalf of Ms. D. Public Assistance Analyst Jeff Miller represented the Division and testified on its behalf. The record closed at the end of the hearing.

III. Discussion

A. Overview of Relevant Medicaid Eligibility and Waiver Services Categories

Medicaid is an “entitlement program” created by the federal government, but administered by the state, to provide payment for medical services for low-income citizens.¹⁸ People qualify for Medicaid by meeting federal income and asset standards and by fitting into a specified eligibility category.¹⁹ In order to participate in Medicaid, federal law requires states to cover certain population groups (mandatory eligibility groups) and gives states the flexibility to cover other population groups (optional eligibility groups).²⁰

Alaskans age 65 and over who qualify for APA-related Medicaid, and who require a level of long term care provided by a nursing facility, may qualify for additional Medicaid services under

¹³ Exs. 2.0 - 2.7; Ex. 3.

¹⁴ Ex. 3; L G's hearing testimony.

¹⁵ Exs. 5.0, 5.1, 5.2.

¹⁶ Exs. 5.0, 5.1, 5.2.

¹⁷ Ex. 9.1.

¹⁸ See State of Alaska Division of Health Care Services website at http://dhss.alaska.gov/dhcs/Pages/medicaid_medicare/default.aspx (date accessed October 29, 2014).

¹⁹ *Id.*

²⁰ See the official Medicaid website at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Eligibility.html> (date accessed October 29, 2014).

the Alaskans Living Independently (ALI) waiver.²¹ The program is called a “waiver” program because certain statutory requirements, which would otherwise be applicable, have been waived by the U.S. Secretary of Health and Human Services.²² Congress created the Home and Community-Based Waiver Services program to allow states to offer long-term care, not otherwise available through Medicaid, to serve recipients in their own homes and communities instead of in nursing facilities.²³ Ms. D seeks coverage for her assisted living facility (ALF) costs under the ALI waiver in this case.

B. Resource Eligibility Standards Applicable to the ALI Medicaid Waiver

A person may become eligible for the ALI waiver by meeting the financial eligibility criteria for Adult Public Assistance-related (APA-related) Medicaid.²⁴ Among the Adult Public Assistance regulations used to make financial eligibility determinations for APA-related Medicaid (and thus for the ALI waiver) are those concerning resources, resource limits, and excludable resources.²⁵

Under 7 AAC 40.270, the APA-related Medicaid countable resource limit is \$2,000.00 for an individual, and \$3,000.00 for an individual living with a spouse, regardless of whether the spouse is otherwise eligible for assistance.²⁶ This standard applies to persons seeking payment of ALF costs under the ALI waiver.²⁷

Under 7 AAC 40.270(b), the value of an applicant's countable resources is determined as of the first day of the month in which the application is received.²⁸ For purposes of APA-related

²¹ See the Alaska Department of Health and Social Services' "Aged, Disabled and Long Term Care Medicaid Eligibility Manual" at Section 560(B), accessed online at <http://dpaweb.hss.state.ak.us/manuals/adltc/adltc.Htm> (date accessed October 29, 2014). The Alaskans Living Independently (ALI) waiver, formerly known as the ODA (Older and Disabled Adults waiver), is for disabled adults, over 21, who require a level of long term care provided by a nursing facility, or adults age 65 and over that require a level of long term care provided by a nursing facility. *Id.*

²² See 42 USC 1396n(c).

²³ See 42 USC 1396n(c)(1); 42 CFR §§ 435.217; 42 CFR §§441.300 - 310. Federal Medicaid regulation 42 CFR 440.180, titled “Home or Community-Based Services,” provides in relevant part:

(a) Description and requirements for services. “Home or community-based services” means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of Part 441, subpart G of this chapter

²⁴ See the Alaska Department of Health and Social Services' "Aged, Disabled and Long Term Care Medicaid Eligibility Manual" at Section 530(C), accessed online at <http://dpaweb.hss.state.ak.us/manuals/adltc/adltc.Htm> (date accessed October 29, 2014).

²⁵ 7 AAC 40.260, 7 AAC 40.270, 7 AAC 40.280.

²⁶ See also the Alaska Department of Health and Social Services' Adult Public Assistance Manual at Section 430-2 (stating that to be eligible for assistance, countable resources may not exceed \$2000 for an individual, or \$3000 for a couple, as long as at least one member is eligible for assistance), accessed online at <http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm> (date accessed October 29, 2014).

²⁷ See the Alaska Department of Health and Social Services' "Aged, Disabled and Long Term Care Medicaid Eligibility Manual" at Addendum 2, accessed online at <http://dpaweb.hss.state.ak.us/manuals/adltc/adltc.Htm> (date accessed October 29, 2014).

²⁸ See also the Alaska Department of Health and Social Services' Adult Public Assistance Manual at Section 430-3, accessed online at <http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm> (date accessed October 29, 2014).

Medicaid, "resources" are defined broadly by Alaska Medicaid regulation 7 AAC 40.260(a) as "any real or personal property that an applicant . . . owns and can convert to cash to be used for his or her support and maintenance."²⁹ The federal Medicaid regulation on which Alaska's regulation is based, 20 CFR § 416.1201, provides a bit more guidance and states in relevant part that "[i]f the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource."

There are a number of types of resources which are exempt (not countable) for purposes of determining the value of an individual's resources.³⁰ However, bank accounts are generally not exempt, and are therefore countable, for purposes of the Medicaid resource limit.³¹

C. *Application of the Regulations to the Facts of This Case*

Ms. D does not dispute that the money represented by the check at issue here would normally be considered a countable resource. She asserts, however, that because the check at issue was written and deposited to Ms. G's account prior to June 1, 2014, the funds represented by the check did not constitute a countable resource for June 2014. This is a purely legal issue.

In this case there is no dispute that, upon the depositing of the check at issue to Ms. G's account, Ms. G had the right to attempt to enforce payment of the check, according to its terms, under applicable negotiable instruments law.³² However, the fact that Ms. G obtained certain legal rights following the deposit of the check does not mean that the money represented by the check was no longer owned by, or was no longer a resource of, Ms. D. Under Alaska's negotiable instruments laws, bank deposit and collections laws, and funds transfers laws, the money represented by the check remained Ms. D's property until the check cleared.³³

More importantly, under Medicaid law, the focus is on an applicant's actual and practical ability to utilize an asset; the test is whether the resource is available as a matter of fact rather than legal fiction.³⁴ The funds represented by the check dated May 30, 2014, totaling \$5,606.00, were

²⁹ See also the Alaska Department of Health and Social Services' Adult Public Assistance Manual at Sections 430 - 431, accessed online at <http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm> (date accessed October 29, 2014).

³⁰ 7 AAC 40.280; see also the Alaska Department of Health and Social Services' Adult Public Assistance Manual at Section 432, accessed online at <http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm> (date accessed October 29, 2014).

³¹ 7 AAC 40.280 ; see also the Alaska Department of Health and Social Services' Adult Public Assistance Manual at Section 432, accessed at <http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm> (date accessed October 29, 2014).

³² See Alaska Statutes (AS) 45.03.301, 45.03.308, and 45.03.415.

³³ See A.S. 45.03.310, A.S.45.03.601, A.S. 45.04.215, A.S. 45.14.104, A.S. 45.14.405, and A.S. 45.14.406.

³⁴ See *Post v. Cass County Social Services*, 556 N.W.2d 661 (N.D. 1996), citing *Schrader v. Idaho Dept. of Health and Welfare*, 768 F.2d 1107, 1112 (9th Cir.1985).

still on deposit in Ms. D's account on June 2, 2014.³⁵ Accordingly, those funds could, as a practical matter, have been used by Ms. D for her support and maintenance.³⁶

D. Though the Result in This Case may Seem Unfair, the Division Does not Have the Authority to Disregard the Applicable Regulations

The Division did not dispute that Ms. D has a great need for Medicaid benefits, and the record supports that finding. However, the Division is required to follow Medicaid income eligibility regulations as currently written.³⁷ Likewise, the Office of Administrative Hearings does not have the authority to create exceptions to these regulations.³⁸ To provide Medicaid coverage for Ms. D for June 2014 would require changes in law at both the state and federal level. Those changes cannot be made through the hearing process.

IV. Conclusion

In summary, resource eligibility for Medicaid is determined on the first day of the month.³⁹ On June 1, 2014 Ms. D's account balance was \$6,440.32, or \$4,440.32 over the \$2,000.00 resource limit. Ms. D was therefore not financially eligible for Medicaid during June 2014. Accordingly, the Division was correct to find Ms. D financially ineligible for benefits, due to excess resources, for the month of June 2014. The Division's decision is therefore affirmed.

Dated this 31st day of October, 2014.

Jay Durych
Administrative Law Judge

³⁵ Exs. D, L.

³⁶ For cases discussing the process of bank clearance of personal checks, and the delay which occurs between the deposit of a check and the date the check clears an account, see *Sutro Brothers & Company v. Indemnity Insurance Company of North America*, 264 F.Supp. 273 (D.C.N.Y. 1967); *Rapp v. Dime Savings Bank of New York*, 408 N.Y.S.2d 540, 24 UCC Rep. Serv. 1220 (N.Y.A.D. 1978).

³⁷ “Administrative agencies are bound by their regulations just as the public is bound by them.” *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010).

³⁸ See 7 AAC 49.170 (limits of the hearing authority).

³⁹ 7 AAC 40.270(b).

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 19th day of November, 2014.

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

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