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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of)
)
 [REDACTED],) OHA Case No. 08-FH-0648
)
 Claimant.) Division Case No. [REDACTED]
_____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for the Medicaid Long Term Care Services program on or about August 27, 2008 (Ex. 2.0, Ex. 5.0). The Division of Public Assistance (DPA or Division) denied the application on or about September 4, 2008 (Ex. 4, Ex. 5.0). The Claimant requested a fair hearing contesting the denial on or about September 9, 2008 (Ex. 6.0). This office has jurisdiction pursuant to 7 AAC 49.010(a).

A hearing was held on October 2, 2008 at 1:30 p.m. before Hearing Officer Jay Durych. [REDACTED] appeared in person to represent the Division and testified on behalf of the Division. [REDACTED] (the adult son of the Claimant) appeared telephonically, representing and testifying on behalf of the Claimant.

ISSUE

The Division asserted that its denial of the Claimant's application for Medicaid Long Term Care Services was correct because, pursuant to 7 AAC 100.510(g) and Alaska Medical Assistance Manual section 554 E, the Claimant's asset transfer penalty began on the first day of the month that the Division determined that the Claimant was eligible to receive long-term care services

(the first day of the month that the Claimant would be eligible for Medicaid and receiving institutional level of care services but for the imposition of an asset transfer penalty).

The Claimant asserted that the Division could not legally apply 7 AAC 100.510(g) to the Claimant's asset transfer, which occurred prior to the effective date of the regulation. Specifically, at the hearing, the Claimant's representative asserted five (5) distinct arguments as to why the start date of the asset transfer penalty period should be the first day of the month after the transfer took place:

1. The Division's application of 7 AAC 100.510 to the Claimant's asset transfer constitutes a retroactive or retrospective application of the regulation and thereby violates the Equal Protection Clause (Article I Section 1) of the Constitution of the State of Alaska.
2. The Division's application of 7 AAC 100.510 to the Claimant's asset transfer constitutes a retroactive or retrospective application of the regulation, is arbitrary and capricious, and thereby violates the Due Process Clause (Article I Section 7) of the Constitution of the State of Alaska.
3. The Division's application of 7 AAC 100.510 to the Claimant's asset transfer constitutes an ex-post-facto law and thereby violates Article I Section 15 of the Constitution of the State of Alaska.
4. The law requires that the Division apply the asset transfer regulation(s) in effect at the time the transfer was made and/or that the new penalty period start date provision contained in 7 AAC 100.510 must be applied prospectively only to asset transfers made on or after July 20, 2007.
5. The Division is equitably estopped from applying 7 AAC 100.510 to the Claimant's asset transfer.

Based on the parties' arguments, the resulting issue is: was the Division correct to deny the Claimant's application for Medicaid Long Term Care Services based on an asset transfer penalty which was imposed beginning on the first of the month following the date of the Claimant's application (September 1, 2008) rather than on the first of the month following the date of the Claimant's asset transfer (March 1, 2007)?¹

¹ See Exhibits 5.0, 5.1 and 6.1; see also hearing testimony of [REDACTED]. The Claimant has not asserted that a penalty period should not have been imposed under 7 AAC 100.510, or that the length (duration) of the penalty period was improperly calculated.

FINDINGS OF FACT

1. The Claimant was born on [REDACTED] and was [REDACTED] years old at the time of the hearing (Ex. 2.0).
2. The Claimant was living in [REDACTED] when her husband died on September 4, 2006 ([REDACTED] hearing testimony). The Claimant's adult son and his wife assisted with the Claimant's sale of her [REDACTED] home and then brought the Claimant back to their home in the [REDACTED] area. *Id.*
3. On or about May 14, 2007 the Claimant began residing at the [REDACTED] assisted living facility in [REDACTED], Alaska (Ex. 2.0, Ex. 2.4, [REDACTED] hearing testimony).
4. On or about February 28, 2007 the Claimant transferred the sum of \$120,000.00 cash to her son [REDACTED] (Ex. 2.8, Ex. 2.9; [REDACTED] hearing testimony).
5. The transfer of \$120,000.00 from the Claimant to [REDACTED] was a gift; no consideration was given in return for the transfer of funds (Ex. 2.8, [REDACTED] hearing testimony).
6. The Claimant's application for Medicaid Long Term Care Services dated August 19, 2008 was completed and signed by [REDACTED] (Ex. 2.0 – 2.7). The asset transfer of February 28, 2007 was disclosed at page 4 of said application (Ex. 2.3).
7. The Division issued to the Claimant a notice of denial of Medicaid benefits dated September 5, 2008 (Ex. 5.0). That notice stated in relevant part as follows:

Your request for Medicaid long term care services received on 08/19/08 is denied. Your application is denied as you reported transferring the following asset: asset: cash; date of transfer: 02/27/07; value: \$120,000.00. We have determined that your transfer of asset penalty begins on 09/01/08 and will continue until 07/14/09. You can re-apply for benefits on or after 07/15/09.
8. A supplemental notice of denial of Medicaid benefits also dated September 5, 2008 (Ex. 5.1) was issued to the Claimant. This notice stated the reasons for denial in terms substantially identical to the reasons stated in the notice referenced in Paragraph 7, above, except that the supplemental notice added that "Medicaid Manual Section 554 supports this action." *Id.*
9. A Fair Hearing Request was filed on behalf of the Claimant on or about September 9, 2008 (Ex. 6.0). The stated basis for contesting the Division's denial of Medicaid benefits was disagreement "with application of penalty period". *Id.* The Claimant's representative acknowledged at hearing that there did not appear to be any material issues of fact in dispute and stated that "the argument that we are making is primarily legal" ([REDACTED] hearing testimony).

PRINCIPLES OF LAW

Ordinarily, the party seeking a change in the status quo has the burden of proof. State of Alaska Alcoholic Beverage Control Board v. Decker, 700 P.2d 483, 485 (Alaska 1985). This case involves the denial of an initial application for Medicaid benefits by the Division. Accordingly, the Claimant has the burden of proof here because she is attempting to change the existing status quo by obtaining Medicaid benefits.

A party in an administrative proceeding can assume that preponderance of the evidence is the standard of proof unless otherwise stated. Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission, 711 P.2d 1170 (Alaska 1986). The state and federal regulations applicable to this case do not specify any particular standard of proof. Therefore, the “preponderance of the evidence” standard is the standard of proof applicable to this case. This standard is met when the evidence, taken as a whole, shows that the fact sought to be proved is more probable than not or more likely than not. Black’s Law Dictionary 1064 (5th Ed. 1979).

7 AAC 49.170, titled “limits of the hearing authority, provides that, “except as otherwise specified in applicable federal regulations and 7 AAC 49.160, the role of the hearing authority is limited to the ascertainment of whether the laws, regulations, and policies have been properly applied in the case and whether the computation of the benefit amount, if in dispute, is in accordance with them.”

“Administrative agencies do not have jurisdiction to decide issues of constitutional law.” Alaska Public Interest Research Group v. State, 167 P.3d 27, 36 (Alaska 2007).

The Medicaid program was enacted in 1965, creating a cooperative federal/state program in which the federal government reimburses states for a portion of the cost of medical care for persons in need. See Title XIX of the Social Security Act of 1965, 42 U.S.C. § 1396 et seq. and Schweiker v. Gray Panthers, 453 U.S. 34, 36, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981). The purpose of the program is to provide medical assistance to those whose resources are insufficient to meet the costs of necessary medical care. Atkins v. Rivera, 477 U.S. 154, 106 S.Ct. 2456, 91 L.Ed.2d 131 (1986).

7 AAC 40.295 (effective October 1, 2001) is a regulation pertaining to the denial of public assistance benefits as a result of the voluntary transfer of assets by an applicant. Prior to the enactment of 7 AAC 100.510 (effective July 20, 2007), 7 AAC 40.295 was applied to Medicaid applications to determine whether an application was required to be denied due to a voluntary transfer of assets, and, if so, the length of the period of ineligibility. 7 AAC 40.295 does not contain a provision specifying the start date of the period of ineligibility or disqualification due to a voluntary transfer of assets.

7 AAC 100.510, effective July 20, 2007, provides in relevant part as follows:

(a) The requirements of this section apply to

(1) an individual eligible for long-term care Medicaid under 7 AAC 100.500 - 7 AAC 100.502;

* * * * *

(b) To establish Medicaid eligibility for an individual described in (a) of this section, the department will determine whether the applicant transferred an asset for less than fair market value during the look-back period described in (c) of this section. If the department determines that during the look-back period the applicant transferred an asset for less than fair market value, the department will determine if the applicant is subject to a transfer-of-asset penalty under (d) or (e) of this section.

(c) The look-back period is the period beginning with the baseline date and extending back to the look-back date. The baseline date is the date an applicant is admitted to a medical institution for a continuous period of institutionalization, the date home and community-based waiver services are approved under 7 AAC 43.1010, or the date of application for Medicaid, whichever is later. The look-back date is the earliest date on which a transfer-of-asset penalty may be assessed, and is always the same day of the month as the baseline date. . . . For all other applicants who apply before July 20, 2007, the look-back period is the 36 months immediately preceding the baseline date and extending back to the look-back date. For an applicant who applies on or after July 20, 2007, the look-back period is 60 months immediately preceding the baseline date and extending back to the look-back date.

* * * * *

(e) For a transfer of an asset for less than fair market value that occurs on or after February 8, 2006, the transfer-of-asset penalty will be determined by

(1) totaling the uncompensated value of all transfers that occurred during the look-back period;

(2) dividing the total in (1) of this subsection by the average monthly cost to a private patient of nursing home care in the individual's community on the date of application or, if the department cannot determine the community in which the

individual would receive nursing facility services, the current swing-bed rate established under 7 AAC 43.685(j) ; and

(3) establishing a transfer-of-asset penalty period equal in months, including any partial month, to the quotient in (2) of this subsection.

* * * * *

(g) The penalty period determined under (d) of this section begins the first day of the month after the first transfer was made and runs continuously through the end of the penalty period, regardless of whether the individual continues to live in a medical institution or receive home and community-based waiver services. The penalty period determined under (e) of this section begins on the first day of the following month, whichever is later:

(1) the month immediately after the month the transfer occurred;

(2) the month that the department determines the recipient is eligible to receive long-term care services.

* * * * *

A federal Medicaid statute, 42 U.S.C. Section 1396p, has, at least since 1982, contained some provision specifying the start date of the period of ineligibility or disqualification due to a voluntary transfer of assets. The provisions of 42 U.S.C. Section 1396p pertaining to penalty period start dates were last amended by Public Law 109-171, § 6011, 120 Stat. 62 (enacted and effective Feb. 8, 2006). Since February 8, 2006, 42 U.S.C. Section 1396p(c) has provided in relevant part as follows:

(c) Taking into account certain transfers of assets

(1)(A) . . . the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance . . . during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E). [Emphasis added].

* * * * *

(1)(D)(i) In the case of a transfer of asset made before February 8, 2006, the date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which

does not occur in any other periods of ineligibility under this subsection.

(1)(D)(ii) In the case of a transfer of asset made on or after February 8, 2006, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

* * * * *

42 U.S.C. Section 1396p was subsequently amended on December 20, 2006 (Public Law 109-432, Div. B, Title IV, § 405(b)(1), 120 Stat. 2998), and on July 15, 2008 (Public Law 110-275, Title I, § 115, 122 Stat. 2507). However, neither of these subsequent amendments modified the penalty period start date provisions.

“A prospective statute ... operates on conduct, events, and circumstances which occur after its enactment” while a retrospective statute “operate[s] on transactions which have occurred or rights and obligations which existed before passage of the act.” 2 C. Sands, *Sutherland Statutory Construction* § 41.01, at 245 (4th ed. 1973), quoted in Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985).

A retrospective law is “[e]very statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.” *Black's Law Dictionary* 1480 (rev. 4th ed. 1968), quoted in Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985).

“A retroactive [retrospective] statute is one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute.” Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 *Harv.L.Rev.* 692, 692 (1960), quoted with approval in Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985).

Procedural changes in the law which do not affect substantive rights may be applied retroactively. Herning v. Eason, 739 P.2d 167, 168 (Alaska 1987), citing Matanuska Maid, Inc. v. State, 620 P.2d 182, 186-87 (Alaska 1980). “A corollary to this rule is that substantive statutes are given prospective effect because retroactive application is manifestly unjust by definition.” Yukon-Kuskokwim Health Corp., Inc. v. Trust Ins. Plan for Southwest Alaska, 884 F.Supp. 1360 (D. Alaska 1994).

“The reason for the statutory presumption against retrospective legislation is that people in conducting their business should be able to rely on existing laws with reasonable certainty.” Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985).

A.S.01.10.090, titled “Retrospective Statutes”, states that “[n]o statute is retrospective unless expressly declared therein.”

A.S.44.62.240, titled “Limitation on Retroactive Action,” provides as follows:

If a regulation adopted by an agency under this chapter is primarily legislative, the regulation has prospective effect only. A regulation adopted under this chapter that is primarily an "interpretative regulation" has retroactive effect only if the agency adopting it has adopted no earlier inconsistent regulation and has followed no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct.

A legislative regulation is one which addresses fundamental policy matters or matters within the scope of agency expertise. Kelly v. Zamarello, 486 P.2d 906, 909-11 (Alaska 1971).

Interpretive regulations generally clarify existing duties and do not require notice and comment. Bankers Life and Casualty Company v. United States, 142 F.3d 973, 978 (7th Cir.1998).

Courts determining the effect of transfers to trust on Medicaid eligibility have either explicitly or implicitly held that the validity of the trust transfers must be determined based on the law in effect at the time of the transfer of assets to the trust, regardless of subsequent changes to the Medicaid laws. See Williams vs. Kansas Department of Social and Rehabilitative Services, 899 P.2d 452 (Kansas 1995); Ronney vs. Michigan Department of Social Services, 532 N.W.2d 910 (Michigan 1995); Sanders vs. Pilley, 684 So.2d 460, 464 (La. App. 1996); Cohen vs. Commissioner of the Division of Medical Assistance, 668 N.E. 2d 769, 770-773 (Mass. 1996); Cook v. Department of Social Services, 570 N.W.2d 684 (1997), Ramey v. Rizzuto, 72 F.Supp.2d 1202 (D. Colo. 1999), affirmed 268 F.3d 955 (10th Cir. 2001).

ANALYSIS

I. Introduction.

This case does not involve any disputed issues of material fact. Moreover, the Claimant has not asserted that a penalty period should not have been imposed under 7 AAC 100.510 Likewise, the Claimant has not asserted that the length or duration of the penalty period imposed under 7 AAC 100.510 was not properly calculated. Rather, the sole issue for determination in this case is the start date of the penalty period.

The Division determined the start date of the penalty period by applying 7 AAC 100.510(g). That provision, by its terms, applies to asset transfers (like the one at issue here) which occurred on or after February 8, 2006. Pursuant to 7 AAC 100.510(g), the penalty period for asset transfers which occurred on or after February 8, 2006 begins on the first day of either (1) the month immediately after the month the transfer occurred; or (2) the month that the Division determines that the recipient is eligible to receive long-term care services, whichever is later.

It is not disputed that the asset transfer at issue here occurred on February 28, 2007. It is not disputed that 7 AAC 100.510(g) became effective July 20, 2007. It is not disputed that, if that provision applies, the start date of the penalty period was properly determined by the Division thereunder. Thus, the issue in this case is not whether the Division correctly determined the start date of the penalty period under 7 AAC 100.510(g). The issue is, rather, whether the penalty period start date provision of 7 AAC 100.510(g) (which did not become effective until July 20, 2007) can legally be applied to an asset transfer which occurred on February 28, 2007.

II. The Office of Hearings and Appeals Does Not Have Jurisdiction to Decide the Constitutional Arguments Raised By The Claimant.

The Claimant's representative asserts five (5) distinct arguments as to why the start date of the asset transfer penalty period should be the first day of the month after the transfer took place. Three (3) of those five (5) arguments are Constitutional arguments, and are as follows:

1. The Division's application of 7 AAC 100.510 to the Claimant's asset transfer constitutes a retroactive or retrospective application of the regulation and thereby violates the Equal Protection Clause (Article I Section I) of the Constitution of the State of Alaska.
2. The Division's application of 7 AAC 100.510 to the Claimant's asset transfer constitutes a retroactive or retrospective application of the regulation, is arbitrary and capricious, and thereby violates the Due Process Clause (Article I Section 7) of the Constitution of the State of Alaska.
3. The Division's application of 7 AAC 100.510 to the Claimant's asset transfer constitutes an ex-post-facto law and thereby violates Article I Section 15 of the Constitution of the State of Alaska.

7 AAC 49.170, titled "limits of the hearing authority", confines the role of the Office of Hearings and Appeals "to the ascertainment of whether the laws, regulations, and policies [of the State of Alaska Department of Health and Social Services] have been properly applied," and "whether the computation of [any] benefit amount, if in dispute, is in accordance with them." More specifically, the Office of Hearings and Appeals, although created as an independent office, is within the State of Alaska Department of Health and Social Services, and "administrative agencies do not have jurisdiction to decide issues of constitutional law." Alaska Public Interest Research Group v. State, 167 P.3d 27, 36 (Alaska 2007). Accordingly, the Claimant's Constitutional arguments are noted for the record but are not addressed in this decision.

III. The Law Requires That the Division Apply the Asset Transfer Regulation(s) in Effect at the Time the Claimant's Asset Transfer Was Made.

In addition to the Constitutional arguments discussed above, the Claimant also asserts two (2) distinct non-Constitutional arguments. Those arguments are that:

A. The law requires that the Division apply the asset transfer regulation(s) in effect at the time the transfer was made and/or that the new penalty period start date provision contained in 7 AAC 100.510 be applied prospectively only to asset transfers made on or after July 20, 2007.

B. The Division is equitably estopped from applying 7 AAC 100.510 to the Claimant's asset transfer.

This section will address the first of the Claimant's two non-Constitutional arguments as stated above.

A. 7 AAC 100.510(g) is a Retroactive or Retrospective Regulation.

In Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985), the Alaska Supreme Court discussed three different tests for determining whether a statute or regulation operates retroactively or retrospectively. The Norton decision quoted 2 C. Sands, Sutherland Statutory Construction § 41.01, at 245 (4th ed. 1973) for the proposition that "a prospective statute . . . operates on conduct, events, and circumstances which occur after its enactment" while a retrospective statute "operate[s] on transactions which have occurred or rights and obligations which existed before passage of the act." 7 AAC 100.510 became effective on July 20, 2007 and contains provisions which apply to asset transfers which occurred prior to the promulgation of the regulation. Accordingly, 7 AAC 100.510 is retrospective based on the definition contained in the Sutherland treatise. This being the case, it is unnecessary to determine whether 7 AAC 100.510 is also retrospective based on the other two tests discussed in the Norton decision.

B. The Law Governing Retroactive or Retrospective Statutes and Regulations Does Not Allow 7 AAC 100.510(g) to be Applied to an Asset Transfer Which Occurred Prior to the Effective Date of the Regulation.

Under both Alaska statutory law and Alaska case law, the retroactive or retrospective application of statutes and regulations is generally to be avoided. A.S.01.10.090, titled "Retrospective Statutes," states that "[n]o statute is retrospective unless expressly declared therein." In Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985), the Alaska Supreme Court stated that "the reason for the statutory presumption against retrospective legislation is that people in conducting their business should be able to rely on existing laws with reasonable certainty." And in Yukon-Kuskokwim Health Corp., Inc. v. Trust Ins. Plan for Southwest Alaska, 884 F.Supp. 1360 (D. Alaska 1994), it was stated that "substantive statutes are given prospective effect because retroactive application is manifestly unjust by definition."

While the foregoing statutes and case law apply to retroactive legislation generally, A.S.44.62.240 specifically governs retroactive regulations such as at issue here. A.S. 44.62.240, titled "Limitation on Retroactive Action," provides as follows:

If a regulation adopted by an agency under this chapter is primarily legislative, the regulation has prospective effect only. A regulation adopted under this chapter that is primarily an "interpretative regulation" has retroactive effect only if the

agency adopting it has adopted no earlier inconsistent regulation and has followed no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct.

Thus, under A.S.44.62.240, in order to determine whether a regulation may be applied retroactively, it must first be determined whether the regulation is primarily “legislative” or primarily “interpretive.”

A legislative regulation is one which addresses fundamental policy matters or matters within the scope of agency expertise. Kelly v. Zamarello, 486 P.2d 906, 909-11 (Alaska 1971). On the other hand, interpretive regulations generally clarify existing duties and do not require notice and comment. Bankers Life and Casualty Company v. United States, 142 F.3d 973, 978 (7th Cir. 1998).

Whether to temporarily disqualify an applicant from a public benefit program based on a voluntary disposal of assets by the applicant (and, if so, the period of disqualification and the start date of that period) are fundamental policy matters. Further, because federal Medicaid statutes such as 42 U.S.C. Section 1396p have required since at least 1982 that States participating in the Medicaid program deal with those issues, the Department of Health and Social Services has longstanding expertise in dealing with the issues currently addressed by 7 AAC 100.510. Accordingly, 7 AAC 100.510 is clearly a legislative regulation based on the relevant case law.

Because 7 AAC 100.510 is a primarily legislative regulation, it has prospective effect only pursuant to A.S. 44.62.240. This means that it can properly be applied only to asset transfers occurring after its effective date of July 20, 2007. Because the Claimant’s asset transfer occurred on February 28, 2007, approximately five (5) months prior to the effective date of the regulation, 7 AAC 100.510(g) cannot be used to determine the start date of the penalty period applicable to the Claimant’s asset transfer.

This conclusion is reinforced by a number of decisions in which courts determining the effect of transfers to trust on Medicaid eligibility have either explicitly or implicitly held that the validity of the trust transfers must be determined based on the law in effect at the time of the transfer of assets to the trust, regardless of subsequent changes to the Medicaid laws. See Williams vs. Kansas Department of Social and Rehabilitative Services, 899 P.2d 452 (Kansas 1995); Ronney vs. Michigan Department of Social Services, 532 N.W.2d 910 (Michigan 1995); Sanders vs. Pilley, 684 So.2d 460, 464 (La. App. 1996); Cohen vs. Commissioner of the Division of Medical Assistance, 668 N.E. 2d 769, 770-773 (Mass. 1996); Cook v. Department of Social Services, 570 N.W.2d 684 (1997), and Ramey v. Rizzuto, 72 F.Supp.2d 1202 (D. Colo. 1999), affirmed 268 F.3d 955 (10th Cir. 2001).

In summary, the Division erred by retroactively applying 7 AAC 100.510(g) to calculate the penalty period start date for an asset transfer which occurred prior to the effective date of the regulation. Given this resolution of this issue, it is unnecessary to consider the other non-Constitutional argument raised by the Claimant, which was that the Division is equitably estopped from applying 7 AAC 100.510(g) to the Claimant’s asset transfer.

The only issues still remaining for determination are (1) what was the Medicaid statute or regulation applicable to asset transfers that was in effect at the time of the Claimant's asset transfer of February 28, 2007? and (2) what is the start date of the penalty period determined under that law?

IV. The Medicaid Statutes and Regulations in Effect at the Time the Claimant's Asset Transfer Was Made Compel the Same Result Here as Would 7 AAC 100.510(g).

Prior to the enactment of 7 AAC 100.510 (July 20, 2007), 7 AAC 40.295 was applied to Medicaid applications to determine whether an application was required to be denied due to a voluntary transfer of assets, and, if so, the length of the period of ineligibility. In addition, federal statute 42 U.S.C. Section 1396p was in effect.

The state regulation, 7 AAC 40.295, does not contain a provision specifying the start date of the period of ineligibility or disqualification due to a voluntary transfer of assets.² However, the

² 7 AAC 40.295, titled "Denial of assistance for voluntary transfer of resources", provides as follows:

(a) The division may deny assistance for a maximum of 36 months to an applicant who, within 36 months before applying for assistance, makes a voluntary assignment or transfer of a resource in order to qualify for assistance. If the transfer is made for less than fair market value, it is presumed that the transfer was made intentionally and for the purpose of qualifying for assistance. The individual who made the transfer may rebut the presumed intent and purpose of the transfer by providing evidence satisfactory to the division that the transfer was made unintentionally or for a different purpose. Evidence to support a determination that the individual made the transfer unintentionally or for a different purpose may include any of the following:

(1) documents or testimony establishing that the transfer was made to settle a legally enforceable debt approximately equal to the equity value of the resource;

(2) documents establishing that the transfer was required by a court or an administrative agency empowered to require the transfer of property;

(3) documents establishing that the individual was a victim of theft, fraud, or coercion; the transfer was made as a result of the theft, fraud, or coercion; and the individual has taken appropriate steps to recover the resource or the equity value of the resource;

(4) evidence that the individual did not believe the transfer would affect the eligibility of the assistance unit;

(5) evidence that the individual believed that the compensation received was approximately equal to the equity value of the resource;

(6) evidence that the individual received property or services approximately equal to the equity value of the resource in exchange for the resource, regardless of whether the property received in exchange would be considered an excludable resource under 7 AAC 40.280;

federal Medicaid statute, 42 U.S.C. Section 1396p, has, at least since 1982, contained some provision specifying the start date of the period of ineligibility or disqualification due to a voluntary transfer of assets.

The provisions of 42 U.S.C. Section 1396p pertaining to penalty period start dates were last amended by Public Law 109-171, § 6011, 120 Stat. 62 (enacted and effective Feb. 8, 2006). Since February 8, 2006, 42 U.S.C. Section 1396p(c)(1)(D) has provided in relevant part as follows:

(1)(D)(i) In the case of a transfer of asset made before February 8, 2006, the date specified in this subparagraph [the penalty period start date] is the first day of the first month during or after which assets have been transferred . . . and which does not occur in any other periods of ineligibility under this subsection.

(1)(D)(ii) In the case of a transfer of asset made on or after February 8, 2006, the date specified in this subparagraph [the penalty period start date] is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not

(7) evidence that, if the transfer had not occurred, the transferred resource would not have caused the assistance unit's countable resources as determined under 7 AAC 45.270 - 7 AAC 40.290 to exceed the resource limit under 7 AAC 45.270 in the month following the transfer;

(8) evidence that the individual was not receiving assistance at the time of the transfer and did not anticipate applying for assistance within the potential period of disqualification under this section.

(b) A transfer is grounds for denial of assistance under (a) of this section if the transfer is (1) not one approved by the Social Security Administration (SSA), or by the division under 7 AAC 40.290; and (2) one that would make an applicant ineligible for SSI benefits under 42 U.S.C. 1382b(c), as revised as of December 14, 1999, which is adopted by reference.

(c) A transfer is not grounds for denial of assistance under (a) of this section if the transfer is one that (1) has been approved by the SSA or the division; and (2) as provided in 42 U.S.C. 1382b(c), as revised as of December 14, 1999, would not make the applicant ineligible for assistance.

(d) The division will establish the period for which assistance is denied under (a) of this section by determining the uncompensated value of the resource disposed of and dividing that amount by the amount of maximum monthly assistance payable under 7 AAC 40.370(c) . The resulting quotient, rounded, in case of a fraction, to the nearest whole number, represents the number of months for which the applicant is ineligible for assistance, up to a maximum of 36 months.

(e) For purposes of this section, (1) "fair market value" of a resource means the equity value that would be assigned to the resource if the resource were available to the applicant in the month following the transfer of the resource; (2) "transfer" includes assignment.

occur during any other period of ineligibility under this subsection. [Emphasis added].

Because it has been determined that applying 7 AAC 100.510(g) to the Claimant's asset transfer would constitute an unlawful retrospective application of that regulation, the federal statute, 42 U.S.C. Section 1396p, applies by default. Does application of the federal statute change the start date of the asset transfer penalty in this case?

To answer this question it is helpful to compare the state regulation and the federal statute side-by-side. 7 AAC 100.510(g) provides in relevant part as follows:

The penalty period determined under (e) of this section [involving the transfer of an asset for less than fair market value that occurs on or after February 8, 2006] begins on the first day of the following month, whichever is later: (1) the month immediately after the month the transfer occurred; (2) the month that the department determines the recipient is eligible to receive long-term care services.

The version of 42 U.S.C. Section 1396p(c)(1)(D)(ii) in effect now and at the time of the Claimant's asset transfer provides in relevant part as follows:

In the case of a transfer of asset made on or after February 8, 2006, the date specified in this subparagraph [the penalty period start date] is the first day of a month during or after which assets have been transferred . . . or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

A careful reading of 7 AAC 100.510(g) and 42 U.S.C. Section 1396p(c)(1)(D)(ii) demonstrates that both provisions are functionally identical. Both provisions apply to asset transfers occurring on or after February 8, 2006, and both provisions set the penalty period start date at the first day of the month following the asset transfer, or the first day of the month following the filing of an otherwise eligible claimant's Medicaid application, whichever is later.

Here, the Claimant applied for the Medicaid Long Term Care Services program on or about August 27, 2008 (Ex. 2.0, Ex. 5.0). The Division determined that the start date of the penalty period was September 1, 2008 (Ex. 5.0, Ex. 5.1). That date was the first day of the month following the date of the Claimant's application, which would have been approved but for the asset transfer penalty period.

Thus, even though 7 AAC 100.510(g) cannot lawfully be applied to the Claimant's transaction due to the retroactive nature of that application, the Division's determination of the penalty period start date was never-the-less correct under 42 U.S.C. Section 1396p(c)(1)(D)(ii).³

Accordingly, the Division was correct to deny the Claimant's Medicaid application based on an asset transfer penalty period start date of September 1, 2008.

CONCLUSIONS OF LAW

1. The Office of Hearings and Appeals does not have jurisdiction to determine whether the Division's application of 7 AAC 100.510 to the Claimant's asset transfer:

a. Violates the Equal Protection Clause (Article I Section I) of the Constitution of the State of Alaska.

b. Violates the Due Process Clause (Article I Section 7) of the Constitution of the State of Alaska.

c. Constitutes an ex-post-facto law and thereby violates Article I Section 15 of the Constitution of the State of Alaska.

2. The asset transfer penalty period start date provisions of 7 AAC 100.510 cannot be applied retroactively (to asset transfers that occurred before the regulation's effective date of July 20, 2007). Rather, the law requires that the Division determine an asset transfer penalty period start date based on the asset transfer regulation(s) in effect at the time the transfer was made.

3. Based on Conclusion of Law No. 2, the Claimant's assertion that the Division is equitably estopped from applying 7 AAC 100.510 to the Claimant's asset transfer is moot.

4. The asset transfer regulation in effect at the time the Claimant's asset transfer was made, which includes provisions governing asset transfer penalty period start dates, is 42 U.S.C. Section 1396p.

5. Application of the asset transfer penalty period start date provisions of 42 U.S.C. Section 1396p(c)(1)(D)(ii) to the undisputed facts of this case results in an asset transfer penalty period start date of September 1, 2008.

6. The Division was therefore correct when it denied the Claimant's Medicaid application based on an asset transfer penalty period start date of September 1, 2008.

³ This result is not surprising when one considers that a state Medicaid system must be consistent with, and no more restrictive than, the federal system. J.P. v. Division of Medical Assistance and Health Services, 920 A.2d 707 (N.J.Super.A.D. 2007), citing Wisconsin Department of Health and Family Services vs. Blumer, 534 U.S. 473, 479, 122 S.Ct. 962, 966, 151 L.Ed.2d 935, 943 (2002); see also Ekloff v. Rodgers, 443 F.Supp.2d 1173 (D.Ariz. 2006); Collins ex rel. Collins v. Hamilton, 231 F.Supp.2d 840 (S.D. Ind. 2002); TLC Home Health Care, L.L.C. v. Iowa Dept. of Human Services, 638 N.W.2d 708 (Iowa 2002) (states electing to participate in Medicaid must develop state Medicaid plans consistent with the federal Medicaid statute, regulations, and administrative rules); Emily Q. v. Bonta, 208 F.Supp.2d 1078 (C.D. Cal. 2001); and Dalzin v. Belshe, 993 F.Supp. 732 (N.D.Cal. 1997).

DECISION

The Division was correct when it denied the Claimant’s Medicaid application based on an asset transfer penalty period start date of September 1, 2008.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, the Claimant must send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

An appeal request must be sent within 15 days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision.

DATED this _____ day of December, 2008.

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this _____ day of December 2008, true and correct copies of the foregoing were sent to:

Claimant – Certified Mail, Return Receipt Requested
_____, Director
_____, Policy & Program Development
_____, Staff Development & Training
_____, Fair Hearing Representative

Al Levitre
Law Office Assistant I