Office of Hearings and Appeals
3601 C Street, Suite 1322
P. O. Box 240249
Anchorage, AK 99524-0249
Phone: (907) 334-2239
Fax: (907) 334-2285

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

In the Matter of:)
)
[REDACTED],) OHA Case No. 09-FH-589
)
Claimant.) DPA Case No. [REDACTED]
)
____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) is a Medicaid Choice Waiver Program recipient (Ex. 1; undisputed testimony). On December 31, 2008 the State of Alaska Department of Health and Social Services, Division of Public Assistance (Division or DPA) notified the Claimant that it was imposing an asset transfer penalty of four (4) months and 25 days, and that the Claimant would not be eligible for Medicaid benefits during the penalty period (Ex. 9).[1] The Claimant requested a fair hearing to contest imposition of the asset transfer penalty on January 7, 2009 (Ex. 10.1).

This Office has jurisdiction to resolve this dispute pursuant to 7 AAC 49.010.

Hearings were held on February 5, 2009 and June 2, 2009. On August 18, 2009 this Office issued an Order (OHA Case No. 09-FH-006). That Order held that the benefits change notice issued by the Division on December 31, 2008 (Ex. 9), and a corrected notice dated January 21, 2009 (Ex. 8.1), were defective. Specifically, the Order held that the Division's notices did not comply with the procedural due process standards set forth by the Alaska Supreme Court in *Allen v. State of Alaska Department of Health and Social Services, Division of Public Assistance*, 203 P.3d 1155 (Alaska 2009).

As a result of this Office's holding that the Division's notices were defective, the Claimant was given two options (see Order dated August 18, 2009 issued in OHA Case No. 09-FH-006). The first option was for the Claimant to waive all defects in the Division's then-existing notices and have her case decided based upon the record as it then existed. *Id.* The second option was to refuse

[1] The penalty period was to begin on February 1, 2009 and end on June 25, 2009 (Ex. 9).

to waive the defects in the Division's notices, in which case the Claimant would, upon timely filing a new hearing request, be entitled to a new hearing. *Id.*

On September 2, 2009 the Division issued a new notice to the Claimant advising that it was assessing an asset transfer penalty of four (4) months and 25 days (Ex. 38). [2] On September 4, 2009 the Claimant's representative requested a new hearing (OHA file correspondence). On October 15, 2009 the Division scheduled the Claimant's hearing for December 10, 2009 (OHA file correspondence). [3]

A hearing was held as scheduled on December 10, 2009 before Hearing Examiner Jay Durych. The Claimant was represented by , Esq. of the Disability Law Center of Alaska, who attended in-person. The Division was represented by Assistant Attorney General , Esq. of the State of Alaska Department of Law, who participated by telephone from Juneau.

The Claimant attended the hearing in person and testified on her own behalf. and , (a Legal Rights Advocate with the Disability Law Center of Alaska), attended the hearing in person and testified on behalf of the Claimant. Eligibility Technician III and Eligibility Technician II , both employees of the Division, attended the hearing in person and testified on behalf of the Division. Public Assistance Analysts and , both employees of the Division, attended the hearing in person but did not testify. The witnesses' testimonies were received and all exhibits submitted were admitted into evidence. At the end of the hearing, the record was closed except for submission of certain specific post-hearing filings.

The Claimant's post-hearing brief and additional documentary evidence were filed on December 18, 2009. The Division's post-hearing brief was filed on December 29, 2009. In that brief, the Division substantially revised its position in light of certain new information provided by the Claimant in her post-hearing brief. [4] The Division's new position requested imposition of a 27 day asset transfer penalty instead of a four (4) month, 25 day asset transfer penalty.[5]

---

2 The notice stated that the penalty period was to begin on February 1, 2009 and end on June 25, 2009 (Ex. 38). This is obviously a clerical error in the notice, as the penalty period could not be assessed retroactively (i.e. prior to the date of the notice of adverse action which was mailed on September 2, 2009).

3 Pursuant to 7 AAC 49.080, the Division is generally required to issue a notice of hearing within 10 days of the date that the Division receives a claimant or recipient's hearing request. However, in this case the Division did not notice the hearing until approximately 41 days after receiving the Claimant's hearing request.

Pursuant to 7 AAC 49.180, this Office (the Office of Hearings and Appeals) is generally required to issue a decision no later than 90 days after the date that the Division receives a claimant or recipient's request for a hearing. However, this Office cannot prepare its decision until after the hearing is actually held and all post-hearing briefing has been completed. In this case, because of the Division's delay in noticing the Claimant's hearing, and because the Division scheduled the hearing to occur approximately 55 days after its notice of hearing was sent, the 90 day period within which this Office is required to issue its decision expired 7 days *prior to* the hearing date. It was therefore not possible for this Office to issue its decision within the 90 day period specified by regulation.

4 The Division's substantial revision of its position, and the effect of that revision on this case, is discussed in the Issue and Analysis sections of this decision.

On December 31, 2009 the Claimant requested the opportunity to respond to the Division's change in position. This request was not opposed by the Division and was granted by order dated December 31, 2009. The Claimant's reply brief was filed on January 8, 2010. Following completion of post hearing briefing, the case became ripe for decision.

ISSUES

In its Medicaid Benefits Change Notice dated September 2, 2009,[6] the Division asserted that it was required to impose an asset transfer penalty of four (4) months and 25 days, (from February 1, 2009 through June 25, 2009), because the Claimant "transferred $58,031.38 into [the Claimant's] sister's account on March 28, 2007" but "did not receive anything of value in return for this transfer" (Ex. 38 p. 1). This was also the Division's position at the hearing (oral argument of Ms. [redacted]).

However, on December 31, 2009 the Division filed its post-hearing brief. In that brief, the Division substantially revised its position "based upon testimony developed at the hearing and additional evidence submitted [after the hearing] by [redacted]" (DPA brief at 4). In light of that most recently received evidence, the Division determined that it would "not apply a transfer-of-asset penalty to the entire $58,031.38 amount" (DPA brief at 5). Instead, the Division asserted that a transfer-of-asset penalty should be imposed as to two (2) specific transfers or purchases made by the Claimant. *Id.* The first transfer/purchase objected to by the Division was "the $10,500.00 cost of [a] hot tub" (DPA brief at 5). The second transfer/purchase objected to by the Division was the Claimant's payment of $409.23 in meals for friends who the Claimant had taken out-to-eat at various restaurants (DPA brief at 5). The Division requested imposition of a 27 day asset transfer penalty, effective as soon after a favorable decision as possible (see footnote 5, above).

The Claimant did not object to the Division's substantial change in position, but rather requested permission to file a reply brief to address it (see Claimant's *Request to Submit Reply Brief* dated December 31, 2009). The Division did not oppose the Claimant's request, and so an Order was entered on December 31, 2009 allowing the additional filing.

The Claimant filed her *Reply to State's Post Hearing Brief* on January 8, 2010. In that brief, the Claimant responded as follows to the Division's revised position:

> Hot Tub - The fact that the hot tub purchased by the Claimant was placed at the Claimant's sister's house does not mean that the ownership of the hot tub was actually transferred to the Claimant's sister. However, even if the purchase of the hot tub is deemed a transfer of assets, the Claimant is entitled to an opportunity to revoke the transfer and to sell the hot tub for its fair market value.

---

[5] With regard to the effective date of this penalty, the Division's Post-Hearing Brief states that, "although the start date of the penalty is noted to be 02/01/2009, effectively the newly proposed penalty would be imposed for 27 days as soon as practicable after the date the Division receives a favorable decision in this matter, if the hearing authority rules in the Division's favor" (DPA brief at p. 2, footnote 2).

[6] The Division's Medicaid Benefits Change Notice dated September 2, 2009 (Ex. 38) superseded the Division's prior asset transfer penalty notice dated December 31, 2008 (Ex. 9).

Meal Purchases – The Claimant's purchase of meals for her friends cannot be considered a transfer of assets to those friends, because the Claimant obtained something of value (friendship, camaraderie, socialization) in return for the money she spent. However, even were this not the case, the Division is stopped from asserting otherwise because this use of funds was (at least allegedly) authorized by the Division's representative Ms. [redacted]. Finally, even were that not the case, the $409.00 in meal expenditures "is of no moment because under the guidelines [the Claimant] is entitled to keep $2,000.00 as a resource" (Claimant's reply brief at 4).

Accordingly, the issues to be resolved are:

1. Should a transfer of asset penalty be assessed against the Claimant based on her purchase and/or alleged transfer of a hot tub which she purchased for $10,500.00?

2. Should a transfer of asset penalty be assessed against the Claimant based on her purchase of meals for friends that totaled $409.23?

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence:

1. The Claimant suffers from Antiphospholipid Antibody Syndrome (APS or APLS - a blood clotting disorder), multiple sclerosis, lupus, and asthma (Claimant testimony). She previously worked as a registered nurse. *Id.* However, since the worsening of her medical problems in September 2005, she can no longer practice her profession. *Id.*

2. The Claimant's medication (Lovenox – a blood thinner) costs approximately $4,000.00 per month (Claimant testimony). Without that medicine she will most likely get a blood clot. *Id.* If she gets a blood clot, she will most likely die. *Id.* She has already lost portions of her colon and portions of her right leg to blood clots. *Id.*

3. The Claimant's father died in Virginia in July 2004 (Claimant testimony). His estate included his house, located in Virginia. *Id.*

4. The Claimant (who had been living in Virginia) came to Alaska in June 2006 to stay with her sister ([redacted] testimony). The Claimant had just been discharged from the hospital and it would not have been safe for her to live by herself at her home in Virginia. *Id.*

5. During the summer of 2006 [redacted] helped her sister (the Claimant) apply for Medicaid in Alaska ([redacted] testimony). Since that time the Claimant has at all times relevant hereto been a recipient of the Medicaid Home and Community-Based Waiver Program (HCBW) (Ex. 1).

6. During the period January – February 2007 the Claimant's father's estate sold his former house in Virginia (Claimant testimony). When the Claimant found out that she was going to inherit

money from her father's estate, she informed her care coordinator, who advised that she discuss this with her Eligibility Technician, [redacted]. *Id.*

7. On or about March 16, 2007 the estate's attorneys received $61,666.66 on behalf of the Claimant, representing the Claimant's share of the gross sale proceeds from the sale of the Claimant's father's house (Ex. 7).

8. On or about March 30, 2007 the Claimant received a cashier's check from the estate's attorneys representing the Claimant's share of the net sale proceeds from the sale of the Claimant's father's house (Ex. 2.1). The check was dated March 28, 2007 and was in the amount of $58,031.38 (Ex. 4.0).

9. The Claimant did not maintain her own bank account at the time she received her inheritance check from the sale of her father's house (testimony of Claimant and [redacted]). For instance, when the Claimant's Social Security checks would arrive at [redacted]' house each month, she would routinely cash these checks and give the money to the Claimant. *Id.*

10. Accordingly, when the Claimant received her inheritance check, her sister deposited the certified / cashier's check into her ([redacted]') account at Credit Union 1 (testimony of Claimant and [redacted]; Ex. 4.0)). The check was deposited on April 2, 2007 (Ex. 4.0). At the end of the bank's mandatory 10 day waiting period, [redacted] withdrew her sister's money, in cash, and gave it to her sister (the Claimant) (testimony of Claimant and [redacted]).

11. On April 5, 2007 the Claimant's Care Coordinator sent an e-mail to Eligibility Technician [redacted] (Ex. 2.0). That e-mail informed the Division that the Claimant had received her inheritance money, and stated in relevant part as follows:

> Client received $58,000.00 on Friday. Check was deposited at her sister's account and it may take up to 10 days to get releas[ed] . . . .

12. On April 6, 2007 Eligibility Technician [redacted] closed the Claimant's HCBW case and sent a letter to the Claimant recommending that she establish a Special Needs Trust (Ex. 2.1).

13. On April 9, 2007 the Division mailed to the Claimant a notice stating that her Medicaid case had been closed because her countable resources of $58,000.00 were in excess of the $2,000.00 Medicaid resource limit (Ex. 3). The notice further stated that if the Claimant spent down her money before May 30, 2007, and provided documentation of this, her case could be reopened. *Id.*

14. After receiving the Division's notice of April 9, 2007 [redacted] met with Ms. [redacted] at least twice to show Ms. [redacted] a list of items, prepared by the Claimant, which the Claimant wished to purchase with her inheritance money as part of her "spend-down" ([redacted] testimony).

15. During one of these meetings [redacted] asked [redacted] about purchasing a hot tub (testimony of Claimant and [redacted]). She told Ms. [redacted] that the hot tub would have to be sited at her home because the Claimant lived in an assisted living facility. *Id.* Ms. [redacted] said that would be fine. *Id.* [redacted]s also asked Ms. [redacted] if the Claimant could take her friends out to eat and pay for their meals ([redacted] testimony). Ms. [redacted] said that would be acceptable.

Id. The only specific restrictions voiced by Ms. ██████ were that the Claimant could not give the money to the State or to her church. *Id.*

16. The Claimant then began spending down her inheritance money, based on Ms. █████'s advice, and provided documentation of this to the Division (Exs. 4.1 – 4.39; █████████ testimony). Among the items on the list of purchases made by the Claimant during her spend-down, and provided to Eligibility Technician ████████████, was a hot tub (purchased for $10,500.00) (Ex. 5.0). Also on the list were meal purchases from Lone Star ($122.10), Denny's (amount not stated), Outback Steakhouse (amount not stated), and Villa Pizza (amount not stated). *Id.*

17. On June 7, 2007 Eligibility Technician ████████████ determined that the Claimant was no longer over the Medicaid resource limit and was once again eligible for HCBW services (Exs. 5.0 - 5.1).

18. On June 8, 2007 Eligibility Technician ████████████ mailed to the Claimant a notice which stated in relevant part as follows (Ex. 6):

> Thank you for reporting the receipt of the inheritance money you had received. Also thank you for providing proofs of your spend-down of the funds you received. After further review of your case and of the receipts you provided we have determined your continued eligibility for the [HCBW] Program.

19. On or about December 17, 2008 Eligibility Technician II ██████████████ was contacted by the owner of an assisted living facility which had just been vacated by the Claimant, who had moved to another facility (█████ testimony). The owner told Ms. ████ that she had cleaned the room formerly occupied by the Claimant after the Claimant had moved out. *Id.* In doing so the owner had found some documents which she wished to bring to the Division's attention. *Id.*

20. The assisted living facility owner also advised the Division that the Claimant had collected receipts *from other residents of the facility* to present to DPA to "document" the spend-down of her inheritance (Eligibility Technician III █████████████ testimony).

21. The assisted living facility owner subsequently sent via fax the above-referenced documents to the Division (█████ testimony). The documents received by the Division included (a) a copy of a document showing the gross amount of the Claimant's inheritance; (b) a bank deposit slip evidencing the deposit of the Claimant's inheritance money; and (c) receipts and "a few other items." *Id.*

22. Ms. ████ then reviewed the Claimant's file and determined that there had been an improper spend-down of the Claimant's inheritance money (█████ testimony). Ms. ████ believed that the spend-down was not proper because (a) the Claimant's inheritance money had been deposited into her sister's bank account; and (b) some of the items that the Claimant's inheritance money had been spent on were allegedly not legitimate "spend-down" items. *Id.*

23. On December 30, 2008 Ms. █████ determined that an asset transfer penalty of four (4) months and 25 days should be imposed on the Claimant (Ex. 8.0). On December 31, 2008 the Division mailed to the Claimant a notice stating that her depositing of the $58,031.38 into her

sister's bank account on March 28, 2007 constituted a transfer of assets for purposes of the Medicaid HCBW program and that she must therefore incur an asset transfer penalty of four (4) months and 25 days (Ex. 9).

24. On January 7, 2009 the Claimant requested (a) a fair hearing to contest the Division's imposition of the asset transfer penalty; and (b) continuation of her HCBW benefits pending the outcome of the hearing (Exs. 10.0, 10.1). On January 8, 2009 the Division mailed to the Claimant a notice confirming the continuation of her HCBW benefits pending the outcome of the hearing (Ex. 10.3).

25. On January 21, 2009 the Division mailed to the Claimant a corrected notice (Ex. 8.1). This notice explained that the Division had made an error in calculating the length of the asset transfer penalty period, and that the corrected asset transfer penalty was five (5) months and three (3) days. *Id.*

26. On September 2, 2009 the Division mailed to the Claimant another revised / amended notice (Ex. 38). This notice stated the asset transfer penalty as four (4) months and 25 days. *Id.* The notice stated that the Division's action was based on 7 AAC 100.502, 7 AAC 100.510, and Sections 550-C and 554 of the Division's Aged, Disabled, and Long Term Care Medicaid Manual. *Id.*

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Division's imposition of an asset transfer penalty. As such, the case involves a suspension or interruption of the Claimant's previously existing Medicaid benefits. The party seeking a change in the status quo or existing state of affairs normally bears the burden of proof. [7] Accordingly, the Division bears the burden of proof in this case.

The 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. [8] This standard is met when the evidence, taken as a whole, shows that the facts sought to be proved are more probable than not or more likely than not. [9]

---

[7] *State of Alaska Alcoholic Beverage Control Board v. Decker,* 700 P.2d 483, 485 (Alaska 1985).

[8] A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

[9] *Black's Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979); *see also Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495-496 (Alaska 2003) ("Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true").

II. The Medicaid Program – In General.

Medicaid was established by Title XIX of the Social Security Act in 1965 to provide medical assistance to certain low-income needy individuals and families. 42 USC § 1396 et. seq. Medicaid is a cooperative federal-state program that is jointly financed with federal and state funds. *Wilder v. Virginia Hospital Association,* 496 U.S. 498, 501, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). Medicaid is, in the words of Judge Friendly, "a statute of unparalleled complexity." *DeJesus v. Perales,* 770 F.2d 316, 321 (2nd Cir. 1985).

On the federal level, the Secretary of the U.S. Department of Health and Human Services ("HHS") administers the program through the Health Care Financing Administration ("HCFA"). In Alaska, the Department of Health and Social Services administers the Medicaid program in accordance with applicable federal and state statutes and regulations.

Because Medicaid is a federal program, many of its requirements are contained in the Code of Federal Regulations (CFRs) at Title 42, Part 435 and Title 45, Part 233. The Medicaid program's general eligibility requirements are set forth at 42 CFR Sections 435.2 – 435.1102.

The State of Alaska's statutes implementing the federal Medicaid program are set forth at A.S. 47.07.010 – A.S.47.07.900. The State of Alaska's regulations implementing the Medicaid program are set forth in the Alaska Administrative Code at Title 7, Chapters 43 and 100.

III. Relevant Medicaid and Adult Public Assistance Regulations Concerning Resources.

Alaska Medicaid Regulation 7 AAC 100.400 makes a number of Adult Public Assistance (APA) regulations applicable to Medicaid eligibility determinations involving certain Medicaid eligibility categories. The APA regulations which are relevant to this case and which are made applicable by 7 AAC 100.400 are 7 AAC 40.260 (concerning resources); 7 AAC 40.270 (concerning resource limits); and 7 AAC 40.280 (concerning resource exclusions).

7 AAC 40.260, titled "Resources," provides in relevant part as follows:

> (a) In this chapter, "resources" means any real or personal property that an applicant . . . owns and can convert to cash to be used for his or her support and maintenance.
>
> (b) Any cash or other property received from the sale, exchange, or other disposition of a resource retains the character of a resource.

7 AAC 40.270, titled "Resource Limits," provides in relevant part that "(a) To be eligible for assistance, an applicant . . . must have non-excludable resources which do not exceed . . . (1) $2,000 for an individual . . . . "

7 AAC 40.280 lists a number of specific types of assets which are considered excluded resources and which therefore do not count toward the resource limit. However, none of the categories listed in the regulation include a hot tub or meals provided to others.

IV. Regulations Concerning Asset Transfers.

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. Pursuant to 7 AAC 40.295(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."

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 100.502(a) provides in relevant part as follows:

> (a) To be financially eligible for Medicaid under 7 AAC 100.002(d)(4) while living in a medical institution or under 7 AAC 100.002(d)(8) while receiving home and community-based waiver services, an applicant or recipient may not (1) be subject to or within a transfer-of-asset penalty period under 7 AAC 100.510(d) - (e) . . . .

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 and (2) an individual who is receiving home and community-based waiver services, regardless of eligibility category.
>
> (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.
>
> * * * * * * * * * * * *
>
> (k) The following asset transfers do not result in a transfer-of-asset penalty . . . . (1) a compensated transfer in which the transferor has received a tangible object, service, or benefit that has a value equal to or greater than the value of the equity of the transferred asset; (2) the transfer of an asset that is an excluded asset under 7 AAC 100.400; (3) the transfer of an asset in which an individual attempted to dispose of the asset at fair market value, but actually disposed of the property at less than fair market value . . . . (4) a transfer made exclusively for a purpose other than to qualify for Medicaid or remain eligible for Medicaid at a future date . . . (5) a transfer in which the transferred asset has been returned to the individual . . . .
>
> * * * * * * * * * * * *

> (q) The penalty for transferring an asset for less than fair market value is ineligibility for long-term care services for the duration of the penalty period determined under this section.

* * * * * * * * * * * *

Section 550C of the Aged, Disabled and Long Term Care Medicaid Eligibility Manual provides in relevant part as follows:

> Transfer of asset rules apply to . . . Resources - Any real or personal property, annuity, liquid resource, or funds owned by the individual and his or her spouse that is given away, sold for less than fair market value, or used to purchase a promissory note, loan, mortgage, or life estate.

<u>V. Relevant Definitions of “Transfer,” “Owner,” and “Ownership.</u>”

7 AAC 100.519(12) defines “transfer” as “to change ownership or title, in whole or in part, from the transferor to the transferee, including any action eliminating or reducing control of an asset.”

Section 554A of the Aged, Disabled and Long Term Care Medicaid Eligibility Manual (“Manual”) defines “transfer” as “to change ownership or title from one person(s) to another” and further states that ”a transfer also occurs when an individual takes any action that eliminates his ownership or reduces his control of an asset.”

Black's Law Dictionary (8th Edition 2004) defines owner as: “One who has the right to possess, use, and convey something; a person in whom one or more interests are vested.” Black's Law Dictionary (8th Edition 2004) defines ownership as: “the bundle of rights allowing one to use, manage, and even enjoy property, including the right to convey it to others . . . ownership implies the right to possess a thing, regardless of any actual or constructive control.” *Id.*

Other authorities have defined “ownership” as the “[l]egal right to the possession of a thing;” (American Heritage Dictionary, American Heritage Publishing Company, 1970); “[t]he state or fact of being an owner [and the] legal right to the possession of a thing;” (American Heritage Dictionary Second Edition, 1985 at p. 888); “the state, relation, or fact of being an owner” (Merriam-Webster's Collegiate Dictionary at 1125 (10th Edition1993)); the “legal right of possession; proprietorship” (Random House Webster's College Dictionary, 1997).

<u>VI. Requirements For Asserting The Doctrine of Estoppel Against the Government.</u>

A party invoking estoppel against the government must show four elements:

> (1) The government asserted a position by conduct or words;
> (2) The party acted in reasonable reliance on the government’s assertion;
> (3) The party suffered resulting prejudice; and
> (4) Estopping the government from acting against the party's interests serves the interest of justice so as to limit public injury.

Hidden Heights Assisted Living, Inc. v. State of Alaska Department of Health and Social Services, Division of Health Care Services, 222 P.3d 258, 268 (Alaska 2009).

ANALYSIS

Introduction: Definition of Issue; Burden of Proof.

In its Medicaid Benefits Change Notice dated September 2, 2009 and at the hearing, the Division asserted that the initial deposit of the Claimant's $58,031.38 into her sister's (██████) account on March 28, 2007 was the event constituting the asset transfer. *See* Ex. 38 p. 1; *see also* oral argument of Ms. ████.

However, on December 31, 2009 the Division substantially revised its position "based upon testimony developed at the hearing and additional evidence submitted [after the hearing] by Ms. ████" (DPA brief at 4). In light of that most recently received evidence, the Division determined that it would "not apply a transfer-of-asset penalty to the entire $58,031.38 amount" (DPA brief at 5). Instead, the Division asserted that a transfer-of-asset penalty should be imposed as to two (2) specific transfers or purchases made by the Claimant. *Id.* The first transfer/purchase objected to by the Division was "the $10,500.00 cost of [a] hot tub" (DPA brief at 5). The second transfer/purchase objected to by the Division was the Claimant's payment of $409.23 in meals for friends who the Claimant had taken out to eat at various restaurants (DPA brief at 5). The Claimant did not object to the Division's substantial change in its theory of the case. *See Claimant's Reply to State's Post Hearing Brief* dated January 8, 2010. Accordingly, the only issues remaining to be resolved are:

1. Should a transfer of asset penalty be assessed against the Claimant based on her purchase / transfer of the hot tub?

2. Should a transfer of asset penalty be assessed against the Claimant based on her purchase of meals for friends?

These two issues will be addressed below in the order stated. Because the Division is attempting to change the status quo or existing state of affairs by imposing an asset transfer penalty, the Division bears the burden of proof on these issues. *See* Principles of Law at page 7, above.

I. Did The Claimant's Purchase And Locating Of The Hot Tub Constitute A Transfer Of Assets?

The Division asserts that because "the hot tub was installed at the home of [the Claimant's] sister after [the Claimant] was admitted to an assisted living home," the hot tub "actually belongs to [the Claimant's] sister who, having the hot tub in her possession while [the Claimant is] in assisted living, could dispose of it at any time and could not expect [the Claimant] to make routine use of it." *See* DPA Post-Hearing Brief at 5. The Claimant, on the other hand, asserts that the mere fact that the hot tub purchased by the Claimant was placed at the Claimant's sister's house does not mean that hot tub was not purchased for the benefit of the Claimant. *See Claimant's Reply to State's Post Hearing Brief* at 3-4. Which view is correct?

It is axiomatic that a transfer of asset penalty cannot be imposed unless the asset in question has actually been *transferred*. 7 AAC 100.519(12) defines "*transfer*" as "*to change ownership or title*, in whole or in part, from the transferor to the transferee, including any action eliminating or reducing control of an asset" [Emphasis added]. Section 554A of the Aged, Disabled and Long Term Care Medicaid Eligibility Manual ("Manual") similarly defines "transfer" as "*to change ownership or title from one person(s) to another*" and further states that "a transfer also occurs when an individual takes any action that *eliminates his ownership or reduces his control* of an asset" [Emphasis added].

Thus, pursuant to 7 AAC 100.519(12) and Manual Section 554A, a transfer occurs if an asset *changes ownership* [10] *or title*, or if an applicant or recipient's action *eliminates or reduces his control over the asset.* Accordingly, the following questions must be asked and answered: Was the hot tub "transferred" and/or was the Claimant's control over the hot tub *"eliminated or reduced"* according to these tests?

The first test requires a *change in ownership or title*. The only testimony regarding the hot tub was that (1) [redacted] met with Ms. [redacted] after April 9, 2009 and asked Ms. [redacted] about the Claimant's purchase of a hot tub (testimony of Claimant and [redacted]); and (2) that [redacted] told Ms. [redacted] that the Claimant's hot tub would have to be sited at her home because the Claimant lived in an assisted living facility. *Id.* There is no evidence in the record (either testimony or documents) showing that the hot tub in question ever *changed "ownership or title"* from the Claimant to her sister. Accordingly, the hot tub has not been "*transferred*" according to the first test.

Likewise, there is no evidence in the record that placement of the hot tub at the Claimant's sister's residence *"eliminated or reduced"* the Claimant's control over the hot tub. Although it was not contested that "the hot tub was installed at the home of [the Claimant's] sister after [the Claimant] was admitted to an assisted living home" (*see* DPA Post-Hearing Brief at 5), this fact is not dispositive. There is no evidence in the record indicating that the Claimant's indicia of ownership were *eliminated or reduced,* or that her right to sell the hot tub, her right to use the hot tub, etc. were restricted in any way, by the placement of the hot tub at the Claimant's sister's residence. Indeed, the Division's Eligibility Technician acknowledged that the hot tub would have to be sited at the Claimant's sister's home because the Claimant herself lived in an assisted living facility.

In summary, the Division had the burden of proving, by a preponderance of the evidence, that the Claimant's purchase of the hot tub and placement of the hot tub at her sister's residence constituted an asset transfer as defined by 7 AAC 100.519(12) and Manual Section 554A. The Division failed to carry that burden. Accordingly, the Division may not impose an asset transfer penalty under 7 AAC 100.510 with regard to the hot tub.

---

[10] "Ownership" has been defined as the "[l]egal right to the possession of a thing;" (American Heritage Dictionary, American Heritage Publishing Company, 1970).

II. Did The Claimant's Purchase of Meals For Her Friends Constitute A Transfer Of Assets?

The Division asserts that the Claimant's payment of $409.23 [11] in meals for friends who the Claimant had taken out to eat at various restaurants constitutes a transfer "of assets for less than fair market value" (*see* DPA Post-Hearing Brief at 5). In response, the Claimant asserts that her purchase of meals for her friends cannot be considered a transfer of assets because the Claimant obtained something of value (friendship, camaraderie, socialization) in return for the money she spent (*see* Claimant's Reply Brief at 4).

Initially, the Claimant's purchase of meals for her friends clearly constituted a transfer pursuant to 7 AAC 100.519(12) and Manual Section 554A because the Claimant's agreement to purchase meals for others definitely "eliminated her control" over the money spent on her friends' meals. Do any of the specific features or circumstances of this transfer exempt the transfer from imposition of a penalty under 7 AAC 100.510?

7 AAC 100.510(k) lists a number of particular asset transfers which are exempt from imposition of a transfer penalty (see Principles of Law, above). However, none of the exemptions provided by that regulation apply here.

The Claimant asserts, however, that *even if* the Claimant's purchase of meals for friends would otherwise qualify for an asset transfer penalty, the Division is estopped from imposing an asset transfer penalty in this case due to the actions taken by Eligibility Technician [redacted] (see Claimant's Reply Brief at 3). Because estoppel is an affirmative defense, the claimant asserting it against the government "bears the burden of proof to show the existence of all the necessary elements." *Duran v. City and Borough of Juneau*, 2005 WL 1540493 (Alaska 2005).

A party invoking equitable estoppel against the government must show four elements: (1) the government asserted a position by conduct or words; (2) the party acted in reasonable reliance on the government's assertion; (3) the party suffered resulting prejudice; and (4) estopping the government from acting against the party's interests serves the interest of justice so as to limit public injury. *Hidden Heights Assisted Living, Inc. v. State of Alaska Department of Health and Social Services, Division of Health Care Services*, 222 P.3d 258, 268 (Alaska 2009). Does the doctrine of estoppel apply in this case?

[redacted] testified that she asked Ms. [redacted], the Division's Eligibility Technician, if the Claimant could take her friends out to eat and pay for their meals ([redacted] testimony). [redacted] testified that Ms. [redacted] said that this would be acceptable. *Id.* [redacted]' testimony in this regard was not contradicted. [12] Her testimony is also supported by Ms. [redacted]'s case note dated June 7, 2007 (Ex. 5.0) from the Claimant's DPA file. This note indicates that Ms.

---

[11] The Claimant did not contest the Division's estimate of the amount of money which was spent on meals for the Claimant's friends, as opposed to the amount of money spent on the Claimant's own meals (*see* Claimant's reply brief at 4).

[12] Normally the testimony of a family member might be suspect because of the close relationship between the witness and the claimant. However, in this case [redacted], the only person in a position to contradict [redacted]' testimony, was not called as a witness by the Division, even though the Division has an employer-employee relationship with Ms. [redacted] (See DPA's Witness List at 2).

[redacted] approved purchases of meals from Lone Star ($122.10), Denny's (amount not stated), Outback Steakhouse (amount not stated), and Villa Pizza (amount not stated). *Id.* Accordingly, the Division clearly "asserted a position" by the "conduct or words" of Ms. [redacted].

The second element of estoppel requires that the party acted in reasonable reliance on the government's assertion. In this case the record reflects that the Claimant spent-down her inheritance money based on Ms. [redacted]'s advice ([redacted] testimony). Ms. [redacted] is an Eligibility Technician employed by the Division. Accordingly, the Claimant's reliance on Ms. [redacted]'s advice was reasonable.

The third element of estoppel, applied here, requires that the Claimant suffer prejudice as a result of her reasonable reliance on Ms. [redacted]'s advice. The Division is attempting to impose an asset transfer penalty on the Claimant. This is clearly prejudicial to the Claimant. Accordingly, the third element is also satisfied.

The fourth and last element of estoppel, applied here, requires a finding that estopping the Division from acting against the Claimant serves the interest of justice so as to limit public injury. The public interest, and the interests of justice, are clearly served by a system in which persons are entitled to rely on the statements of authorized Division personnel. These interests can only be served in this case by invoking the doctrine of estoppel.

In summary, the Claimant met her burden and proved, by a preponderance of the evidence, that the doctrine of estoppel bars the Division from imposing an asset transfer penalty as to the Claimant's purchase of meals for her friends. Accordingly, the Division may not impose an asset transfer penalty under 7 AAC 100.510 with regard to the Claimant's prior purchase of meals for her friends.

CONCLUSIONS OF LAW

1. The Division failed to carry its burden and did not prove, by a preponderance of the evidence, that the Claimant's purchase of a hot tub, and placement of the hot tub at her sister's residence, constituted an asset transfer as defined by 7 AAC 100.519(12) and Manual Section 554A.

   a. There is no evidence in the record (testimony or documents) showing that the hot tub in question ever *changed "ownership or title"* from the Claimant to her sister.

   b. There is no evidence in the record that placement of the hot tub at the Claimant's sister's residence *"eliminated or reduced"* the Claimant's control over the hot tub.

   c. Accordingly, the Division may not impose an asset transfer penalty under 7 AAC 100.510 with regard to the Claimant's hot tub.

2. The Division carried its burden and proved, by a preponderance of the evidence, that the Claimant's purchase of meals for her friends constituted a transfer pursuant to 7 AAC 100.519(12) and Manual Section 554A because the Claimant's agreement to purchase meals for others eliminated her control over the money spent on her friends' meals.

3. The Claimant met her burden and proved, by a preponderance of the evidence, that the doctrine of estoppel bars the Division from imposing an asset transfer penalty as to the Claimant's purchase of meals for her friends. Specifically, the Claimant demonstrated that:

a. The Division asserted a position by conduct or words;

b. The Claimant acted in reasonable reliance on the Division's assertion;

c. The Claimant suffered resulting prejudice; and

d. Estopping the Division from acting against the Claimant's interests serves the interest of justice so as to limit public injury.

Accordingly, the Division may not impose an asset transfer penalty under 7 AAC 100.510 with regard to the Claimant's prior purchase of meals for her friends.

DECISION

The Division erred when, on September 2, 2009, [13] it notified the Claimant that it would impose an asset transfer penalty [14] based on alleged asset transfers which included the Claimant's purchase of a hot tub and meals for her friends.

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, 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

If the Claimant appeals, the 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 22nd day of April, 2010.

_______*/signed/*___________
Jay Durych, Hearing Authority

---

[13] The Division's Medicaid Benefits Change Notice dated September 2, 2009 (Ex. 38) superseded the Division's prior asset transfer penalty notice dated December 31, 2008 (Ex. 9).

[14] The length of the asset transfer penalty imposed by the Division was revised during the course of these proceedings from four (4) months and 25 days (Ex. 38) to 27 days (Division's Post-Hearing Brief).

CERTIFICATE OF SERVICE

I certify that on this 22nd day of April 2010
true and correct copies of the foregoing document
were sent to the Claimant via U.S.P.S. mail, and to
the remainder of the service list by e-mail, as follows:

[redacted], Esq., Disability Law Center of Alaska
(counsel for Claimant)
via Certified Mail, Return Receipt Requested

[redacted], Esq.
Attorney General's Office, Department of Law
(counsel for Division of Public Assistance)

[redacted], Director, Division of Public Assistance
[redacted], Policy & Program Development
[redacted], Staff Development & Training
[redacted], Chief of Field Services
[redacted], Fair Hearing Representative
[redacted], Administrative Assistant II
[redacted], Eligibility Technician I

____

J. Albert Levitre, Jr.
Law Office Assistant I