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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. 11-FH-17  
 )  
 Claimant. ) Division Case No. [REDACTED]  
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**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

Ms. [REDACTED] (Claimant) applied for Medicaid benefits on December 28, 2009. (Exs. 2.0 – 2.9) On August 5, 2010, the Division of Public Assistance (Division) notified Claimant her December 28, 2009 application for Medicaid benefits was denied; Claimant re-applied using the same application on August 9, 2010 and was denied again on December 17, 2010. (Ex. 4; Ex. 6; Ex. 10)

The Claimant requested a fair hearing on January 11, 2011.<sup>1</sup> (Exs. 9.4-9.5)

This office has jurisdiction pursuant to 7 AAC 49.010.

A Fair Hearing was held on February 17, 2011. Claimant appeared telephonically through her power of attorney, daughter-in-law [REDACTED], who testified telephonically on Claimant's behalf and represented Claimant. Claimant also was assisted by Ms. [REDACTED], Claimant's care coordinator; Ms. [REDACTED], administrator and co-owner of the [REDACTED], the home where Claimant presently lives; and Mr. [REDACTED], Claimant's son. Each of these persons appeared telephonically and testified on behalf of Claimant.

Ms. [REDACTED], Public Assistance Analyst with the Division, attended in person, represented the Division and testified on its behalf. Mr. [REDACTED], Public Assistance Analyst with the Division, attended in person, represented the Division and testified on its behalf after Ms. [REDACTED] left the hearing.

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<sup>1</sup> On January 11, 2011, Claimant requested a Fair Hearing for the purpose of determining whether she may be granted an exemption from the transfer of asset penalty. Claimant had not previously requested the exemption from the Department of Health and Social Services.

## ISSUE

1. Was Claimant entitled to an undue hardship exception from the imposition of a transfer of asset penalty which was required by the Medicaid Program because Claimant gifted her home on March 20, 2008?<sup>2</sup>

## SUMMARY OF DECISION

Claimant applied for Medicaid benefits twice: December 28, 2009 and August 9, 2010. Claimant's first application was denied on August 5, 2010 because she did not meet the Medicaid income eligibility requirement: also the application never was completed because Claimant failed to be assessed to determine whether she needed a nursing facility level of care. In addition, Claimant was informed that a transfer of asset penalty period of one year, one month and 20 days would be imposed on the first day of the month following a determination she needed a nursing facility level of care.

On October 28, 2010, Claimant's second application (of August 9, 2010) was denied because she again did not meet the income eligibility requirements. The application also was denied because her assessment showed she did not meet the nursing facility level of care required for the Medicaid home and community based waiver program. The notice informing her of the denial also informed her that a transfer of asset penalty would begin November 1, 2010 and end December 14, 2011.

Subsequent to the second denial, on November 30, 2010, Claimant supplied supplementary medical information which resulted in a December 7, 2010 notification from the Division of Senior and Disabilities Services that Claimant now met the Medicaid level of care criteria for a nursing facility level of care. Claimant understood this to mean she had been found eligible for Medicaid home and community based waiver benefits. However, on December 17, 2010, the Division of Public Assistance informed Claimant she was not eligible for Medicaid benefits because it would impose a transfer of asset penalty. On January 11, 2011, Claimant requested a Fair Hearing to determine if she could get an exemption from the imposition of the transfer of asset penalty period.

This decision also holds that Claimant failed to meet her burden of proving she is entitled to an exemption from the transfer of asset penalty because she did not prove she would suffer undue hardship endangering her life for lack of medical care, food, clothing, shelter or basic life necessities. Claimant also failed to meet her burden of describing why she transferred her asset for less than fair market value and what efforts were made to retrieve her asset. 7 AAC 100.516. Claimant's request for a transfer of asset undue hardship exemption is denied.

This decision also holds that because the law requires the transfer of asset penalty to begin the first day of the month following the date an individual is determined to be eligible for Medicaid benefits, and because Claimant has not yet met all the legal pre-requisites to be eligible for Medicaid benefits, the

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<sup>2</sup> The parties stipulated this was the sole issue at the Fair Hearing. Claimant had not previously requested the exemption and therefore the Division of Public Assistance had neither approved nor denied the request.

transfer of asset penalty period was prematurely imposed and therefore improperly imposed.<sup>3</sup> 7 AAC 100.510(g).

### **FINDINGS OF FACT**

These facts were proved by a preponderance of the evidence:

1. On December 28, 2009, Claimant<sup>4</sup> signed an application for Medicaid Program (Program) benefits. (Ex. 2.0-2.9<sup>5</sup>) The application, and an eligibility interview, disclosed Claimant is a 69 year old single woman, living in an assisted living home and not receiving Supplemental Security Income. (Ex. 2.0-2.9; Ex. 8) The Division date stamped the application as received on December 31, 2009. (Ex. 8).
2. The December 28, 2009 application disclosed Claimant had transferred ownership of her home as a gift from Claimant to her son and daughter-in-law. (Ex. 2.4) The transfer occurred on March 10, 2008.<sup>6</sup> (Ex. 3.1) The undisputed value of the home at the time of transfer was \$184,900.<sup>7</sup> (Ex. 3.1; stipulation of the parties at fair hearing).
3. This December 28, 2009 application also disclosed Claimant had monthly income from pensions (\$2378.51) and social security (\$1205.00) totaling \$3583.51. (Ex. 2.3) The Division determined Claimant's "countable" income was \$2526.39. (Ex. 4) On the application Claimant disclosed she has Medicare Parts A and B health insurance, Blue Cross health, dental and vision insurance, and private prescription drug insurance. (Ex. 2.6)
4. On February 2, 2010, the Division sent 3 coupons to Claimant. (Ex. A) Claimant sent them to a care coordinator, whom she expected would arrange for Claimant's medical assessment to determine whether she was medically eligible for Medicaid home and community based waiver benefits. (Ex. A; Claimant's testimony) Claimant's care coordinator did not ever schedule the assessments of Claimant's medical circumstances. (Claimant's testimony; Ex. A-A1)

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<sup>3</sup> On December 17, 2010, the Division denied Medicaid benefits to Claimant because it imposed a transfer of asset penalty, and because she did not meet the Medicaid income limit eligibility requirements. Claimant requested the exemption from the imposition of this penalty. Part of determining if there should be an exemption from a transfer of asset penalty necessarily involves determining whether the transfer of asset penalty is legally correct. In this case, it was determined the imposition of the transfer of asset penalty was prematurely imposed. Nonetheless, due to the stipulation as to the issue(s) at the hearing, Claimant's request for an exemption from the penalty was addressed.

<sup>4</sup> At all times herein, "Claimant" is understood to mean Claimant, herself, and/or her power of attorney and daughter in law, [REDACTED].

<sup>5</sup> Exhibit 7.0-7.9 is identical to Exhibit 2.0-2.9

<sup>6</sup> The quitclaim deed was recorded on March 10, 2008, not March 20, 2008. (Ex. 3.1) The Division has used March 10, 2008 as the date of transfer. (Exs. 6, 9.0, 10)

<sup>7</sup> Claimant's application estimates the home's value at \$164,000. (Ex. 2.4) At the time of the hearing, the parties stipulated the value of the home at time of transfer was \$184,900.

5. On February 16, 2010, Claimant engaged in an eligibility interview. (Ex. 8) On February 16, 2010, processing of Claimant's application was suspended pending the Division's receipt of certain information. (Ex. 8.0)

6. On August 4, 2010, the Eligibility Technician processing Claimant's application determined that an asset transfer penalty of one year, one month and twenty days would be imposed beginning the "first day of the month following level of care approval" because Claimant had transferred her home, valued at \$184,900, by quitclaim deed to her son on March 10, 2010.<sup>8</sup> (Ex. 3.0-3.3) During the Fair Hearing, the parties stipulated there was no dispute about the time length of the asset transfer penalty.

7. On August 4, 2010, the Eligibility Technician determined Claimant's countable income totaled \$2,526.98.<sup>9</sup> (Ex. 3.0) On August 4, 2010, the Eligibility Technician denied Claimant's December 28, 2009 application because Claimant's income exceeded the Medicaid income eligibility limit and because Claimant had not been determined to need a skilled or intermediate nursing facility level of care.<sup>10</sup> (Ex. 3.0)

8. On August 5, 2010, Claimant was given written notice her December 28, 2009 application had been denied for two reasons. (Ex. 4) The first reason for the denial was her income exceeded the maximum income limit for her household size and therefore she was not eligible. (Ex. 4) The second reason she was not eligible was because she had transferred her home and would not become eligible until she served a transfer of asset penalty. (Ex. 4) The penalty period was identified as one year, one month and 20 days, beginning the first day of the first month after Claimant became eligible for skilled or intermediate nursing level of care benefits.<sup>11</sup> (Ex. 4)

9. On August 9, 2010, Claimant contacted the Division to check on the medical assessment, after receiving the written notice of August 5, 2010. (Ex. A) Claimant learned the medical assessment had never been done. (Ex. A; Claimant's testimony) On August 9, 2010, Claimant re-applied for Medicaid benefits using the same application she submitted on December 28, 2009. (Ex. 9.4; Ex. 10)

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<sup>8</sup> The case note shows the date as March 8, 2010 but this is a typographical error. The correct date is March 10, 2008. *See*, Exs. 3.1, 6)

<sup>9</sup> Claimant's burial insurance policy included a cash value that was available to Claimant, and therefore Claimant did not meet the financial eligibility requirements for this reason also. (Ex. 3.0) However, this subject is not at issue and will not be addressed further.

<sup>10</sup> The case note states: "Denied due to no LOC start on DSDS denying for income but will address the transfer in letter." (Ex. 3.0) Before Medicaid Home and Community Based Waiver Services are available, an applicant must show he or she is eligible for either the nursing level of care provided at a skilled or intermediate nursing facility. This is termed a "level of care" determination, which results from one or more assessments of the applicant. In this case, Claimant was not assessed until after her first application had been denied and therefore there could be no determination of whether Claimant's condition required a skilled or intermediate level of nursing care or a "start" date.

<sup>11</sup> This information is not legally correct, as is discussed below. Regulation 7 AAC 100.510(g) expressly provides the transfer of asset penalty period begins on the first day of the month after the month the Department of Health and Social services determines an individual is eligible for Medicaid long term benefits.

10. Claimant obtained a new care coordinator and the medical assessment was completed on October 6, 2010. (Ex. A1)

11. On October 28, 2010, Claimant was informed her August 9, 2010 re-application for the Medicaid home and community based waiver benefit had been denied because her assessment results showed she was not eligible. (Ex. A1) The Division also notified Claimant in writing that her August 9, 2010 re-application was denied because her income exceeded the Medicaid income limit.<sup>12</sup> (Ex. 10) This written notice repeated that Claimant was not eligible for Medicaid (home and community based waiver services) until she served a transfer of asset penalty. (Ex. 10) This notice stated the penalty period would begin November 1, 2010 and end December 14, 2011. (Ex. 10)

12. On November 30, 2010, Claimant supplied the Division with additional medical information concerning Claimant's condition. (Ex. A1)

13. On December 7, 2010, the Division of Senior and Disabilities Services informed Claimant that she met the "Medicaid Level of Care criteria for Home and Community Based Waiver eligibility for the period November 30, 2010 to November 29, 2011." (Ex. 5)

14. On December 16, 2010, the Eligibility Technician determined the "level of care" start date was November 30, 2010, and applying the transfer penalty starting December 1, 2010 would result in a transfer penalty end date of January 21, 2012.<sup>13</sup> (Ex. 5.1) There is no evidence in the record this information was conveyed in writing or orally to Claimant.

15. Claimant was sent a written, undated, notice concerning the November 1, 2010 to December 14, 2011 penalty period.<sup>14</sup> (Ex. 10) The notice refers to Claimant's "application for Medicaid benefit received on August 9, 2010"<sup>15</sup> which "I denied because your monthly countable income is too high." (Ex. 10) This undated notice, informing Claimant of the transfer of asset penalty period, also informs Claimant she is not eligible for Medicaid benefits because her income exceeds the Medicaid income limit for her household size. (Ex. 10)

16. On December 17, 2010, Claimant was given the same written notice she had been given on August 5, 2010. (Ex. 6) This notice again informed Claimant she was not eligible for benefits because her income exceeded the Medicaid maximum income limit for her household size and that she would

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<sup>12</sup> The copy of the electronic record supplied as Exhibit 10 does not have a date the notice was sent.

<sup>13</sup> However, on January 11, 2011, the Eligibility Technician incorrectly re-determined the transfer penalty start date to be November 1, 2010 and the stop date to be December 14, 2011. (Ex. 9.2-9.3) On January 11, 2011, during a telephone conversation pertaining to Claimant's Fair Hearing request, Claimant disclosed she had received a noticed dated December 17, 2010 stating the penalty period would prevent her eligibility until December 14, 2011. (Ex. 9.4) This notice is not in the evidentiary record.

<sup>14</sup> Exhibit 10 is a copy of an electronic record of the notice sent. The notice is undated in the copy supplied as evidence but it references the August 9, 2010 re-application.

<sup>15</sup> Claimant requested the Division consider her December 28, 2009 application a re-application when Claimant contacted the Division on August 9, 2010. (Ex. A)

not receive benefits until after she was approved for a level of care and the transfer penalty period expired.<sup>16</sup> (Ex. 6)

17. On January 11, 2011, Claimant requested a Fair Hearing for the purpose of determining whether she may be granted an exemption from the transfer of asset penalty.<sup>17</sup> (Exs. 9.1, 9.4-9.5) Claimant asserted the hardship imposed by the penalty was that Claimant had enough money for her care through to January 1, 2011 but thereafter “does not have the money to pay for care on her own.” (Ex. 9.1; Ex. A2) Claimant asserted undue hardship existed because the penalty period would have elapsed if the first care coordinator had not failed to get Claimant assessed. (Ex. A1; Claimant’s testimony; [REDACTED] testimony)

## PRINCIPLES OF LAW

### I. Burden of Proof

“Ordinarily the party seeking a change in the status quo has the burden of proof.” *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

### II. Standard of Proof

The regulations applicable to this case do not specify any particular standard of proof. A preponderance of the evidence is the normal standard of proof in an administrative proceeding. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Comm’n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). Therefore, the standard of proof in this case is the preponderance of the evidence.

“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.” *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003) (quoting *Saxon v. Harris*, 395 P.2d 71, 72 (Alaska 1964)).

### III. Medicaid Program

Medicaid applicants, who are not receiving Supplemental Security Income benefits and who are either disabled or over the age of 65 years old, must meet the Medicaid financial eligibility requirements to qualify for Medicaid benefits. 7 AAC 100.400. One eligibility requirement is that an individual may not own more than \$2,000.00 in “countable” resources. 7 AAC 40.270(a)(1); 7 AAC 100.400(a)(14).

To be financially eligible for Medicaid under 7 AAC 100.002(d)(8) while receiving home and community-based waiver services, an applicant or recipient may not be subject to or within a transfer-of-asset penalty period under 7 AAC 100.510(d)-(e). 7 AAC 100.502. Regulation 7 AAC 100.002(d)(8) applies to individuals 65 years of age or older, and who meet the requirements of 7 AAC

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<sup>16</sup> See footnote 9.

<sup>17</sup> The parties stipulated this was the sole issue at the Fair Hearing. Claimant had not previously requested the exemption and therefore the Division of Public Assistance had neither approved nor denied the request.

100.502 for long term care, including home and community based waiver services, and meet other requirements established by federal law. Such individuals may be eligible for Medicaid benefits, and are subject to a transfer-of-asset penalty under 7 AAC 100.510(d)-(e).

Regulation 7 AAC 100.510, titled “[T]ransfer of assets” applies to an individual eligible for long-term Medicaid and an individual receiving home and community-based waiver services. 7 AAC 100.502(a)(1). Regulation 7 AAC 100.510 embodies procedures for determining the duration of a transfer-of-asset penalty as well as when such a penalty is to be imposed:

(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 home and community-based waiver services are approved under 7 AAC 130.205<sup>18</sup>, 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 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.

(g) [T]he 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.

Regulation 7 AAC 100.516 provides an exception from the imposition of the transfer-of-asset penalty in cases of undue hardship. This regulation provides:

(a) An applicant or recipient, ... may request an undue hardship exemption from a transfer-of-asset penalty period imposed under 7 AAC 100.510(d) or (e).

(b) An applicant or recipient who seeks an undue hardship exemption must submit the following to the department no later than 30 days after the date of notice that a transfer-of-asset penalty is being imposed:

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<sup>18</sup> Regulation 7 AAC 130.205 governs eligibility for home and community based services, including the assessment determination that the applicant needs a skilled or intermediate nursing facility level of care.

(1) a written statement indicating how the applicant, recipient, or community spouse would face undue hardship if the penalty were imposed;

(2) a written statement describing

(A) why the assets transferred for less than fair market value cannot be returned; and

(B) what efforts the applicant or recipient has made to retrieve the assets.

(c) The director of the division of the department that handles public assistance, or the director's designee, shall decide whether to grant or deny an exemption under this section.

(d) The department will not grant an undue hardship exemption if the department determines that

(1) imposing the penalty merely causes the applicant or recipient inconvenience or restricts the applicant's or recipient's lifestyle; or

(2) the applicant or recipient transferred the asset without due consideration of the cost of medical care, food, clothing, or shelter that the applicant, recipient, or community spouse could reasonably expect to incur.

(e) In this section, "undue hardship" means that imposition of the transfer-of-asset penalty would deprive the applicant, recipient, or community spouse of

(1) medical care to the degree that the individual's life or health would be endangered; or

(2) food, clothing, shelter, or other basic necessities.

## ANALYSIS

### I. Issue

Was Claimant entitled to an undue hardship exception from the imposition of a transfer of asset penalty which was required by the Medicaid Program because Claimant gifted her home on March 20, 2008?

### II. Burden of Proof and Standard of Proof

Claimant is applying for Medicaid benefits, specifically home and community based waiver services, and must prove she meets the eligibility requirements. "Ordinarily the party seeking a change in the



status quo has the burden of proof.” *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). Submitting an application is seeking a change in the status quo from not receiving benefits to seeking benefits. Therefore, Claimant has the burden of proof.

### III. Undisputed facts

On March 10, 2008, Claimant gave her \$184,900 home to her son and his wife.

On December 28, 2009, Claimant applied for Medicaid benefits, specifically, home and community based waiver services as a non-working 69 year old individual residing in an assisted living home who does not receive Supplemental Security Income. Claimant’s countable monthly income is \$2,526.39, which exceeds the Medicaid monthly maximum income limit for a household of one person. Claimant has full medical insurance coverage through Medicare, Blue Cross and has prescription drug insurance coverage through a private company. Claimant never completed her initial application process because she did not get medically assessed as to her need for a nursing facility level of care because her first care coordinator failed to schedule the assessment. On August 5, 2010, Claimant’s December 28, 2009 application was denied because she did not meet the income eligibility requirements for Medicaid.

The application denial also informed Claimant she would have to serve a transfer of asset penalty because she had transferred her home as a gift. The transfer of asset penalty would apply for a period of one year, one month and twenty days during which she would not be eligible for Medicaid benefits.

On August 9, 2010, Claimant re-applied for long term home and community based waiver Medicaid benefits using the same December 28, 2009 application. Claimant obtained a new care coordinator. Claimant obtained a medical assessment of her need for a skilled or intermediate nursing facility level of care on October 6, 2010 and was determined not to need this level of care. On October 28, 2010, Claimant was informed her August 9, 2010 re-application was denied because her assessment results had shown she did not need the required nursing level of care and because her income exceeded the Medicaid income limit.

Subsequent to this second denial, Claimant supplied additional medical documentation in support of her medical needs assessment. On December 7, 2010, the Division of Senior and Disabilities Services informed Claimant that she met the “Medicaid Level of Care criteria for Home and Community Based Waiver eligibility for the period November 30, 2010 to November 29, 2011.”

On December 17, 2010, Claimant was denied Medicaid benefits because the transfer of asset penalty was being imposed. Claimant also was informed by this notice that she was not eligible for Medicaid benefits because her income exceeds the Medicaid income limit for a single person household.

On January 11, 2011, Claimant requested a hardship exemption from the transfer of asset penalty. She sought the exemption because she did not have funds to pay for her care and because she believed that if her first care coordinator had obtained the required assessment, the penalty period would have been completed by the time she was found to have met the nursing facility level of care criteria.

#### IV. Transfer of Asset Penalty

To be eligible for Medicaid Program benefits an individual may not own or have resource(s) worth in excess of \$2,000.00, unless the resource(s) are excluded by law from counting as a resource, which is not the case here. 7 AAC 40.270(a)(2); 7 AAC 100.400(a)(14). If an individual transfers a resource or asset after July 20, 2007, the Division must “look back” for 60 months immediately preceding the “baseline date” to determine the value of the resource(s) transferred. 7 AAC 100.510(c).

Claimant transferred her home as a gift by quit claim deed on March 20, 2008. Therefore, the Division correctly determined Claimant’s transfer of her home was a transfer subject to the transfer-of-asset penalty.<sup>19</sup> The parties stipulated (agreed) that the penalty period of one year, one month and twenty days was correct.

#### V. Period During Which the Transfer Of Asset Penalty Applies

Regulation 7 AAC 100.510(g) provides that the penalty period for transfers which were completed on or after February 8, 2006 begins “on the first day” of the month following either (1) the month immediately after the month the transfer occurred, or (2) the month that the department determines the recipient is eligible to receive long term care, i.e., in this case, home and community based services.<sup>20</sup> Regulation 7 AAC 100.510(g) is unequivocal that it is the later of either of these two events which sets the start date for the penalty period. In this case, the transfer of asset penalty period must begin on the first day of the month following the month that the department determines the recipient is eligible to receive Medicaid benefits.

Eligibility to receive Medicaid home and community based services requires the applicant to meet the income requirements, the resource requirements and the need for skilled or intermediate level of care criteria. 7 AAC 40.270-.280; 7 AAC 100.400; 7 AAC 100.500-.502. The fact Claimant has met the skilled or intermediate level of care criteria for medical eligibility and has met the eligibility requirement of owning less than \$2000 value of resources is insufficient to make her eligible for Medicaid benefits. In this case, Claimant has been determined to not meet the income eligibility requirements. Therefore, she is not eligible to receive Medicaid benefits.

The penalty period will not begin to run until the first day of the month following the month that Claimant “is eligible to receive” home and community based waiver services. 7 AAC 100.510(g).

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<sup>19</sup> The “baseline date” applicable in this case is the “date home and community-based waiver services are approved under 7 AAC 130.205, or the date of application for Medicaid, whichever is later.” 7 AAC 100.510(c). Regulation 7 AAC 130.205 governs eligibility for home and community based services, including the assessment determination that the applicant needs a skilled or intermediate nursing facility level of care. Therefore, the baseline date applicable in this case is the date Claimant was found to meet the Medicaid level of care criteria for home and community-based waiver services, which is November 30, 2010. Applying regulation 7 AAC 100.510(c) using the baseline date of November 30, 2010, the 60 month “look-back” period applies from November 2010 to November 2005.

<sup>20</sup> The regulation uses the words “long term care services.” Home and community based services are one kind of long term care services.

Claimant will not be eligible to receive these services until she also meets the income requirements for eligibility for this Medicaid program.

At the time of the Fair Hearing, the parties did not address Claimant's eligibility or non-eligibility based on her income because the parties stipulated the issue in dispute was whether Claimant should be granted a hardship exemption from the transfer of asset penalty. The Division should review Claimant's eligibility based on her income. If the Division of Public Assistance finds Claimant has met all of the eligibility criteria to receive Medicaid benefits, then the penalty period may be imposed. It should be imposed from the first day of the first month after the date of Medicaid eligibility, for the period of one year, one month and 20 days.

#### VI. Undue Hardship Exemption from Transfer of Asset Penalty

On January 11, 2011, Claimant requested a Fair Hearing for the purpose of determining whether she may be granted an exemption from the transfer of asset penalty. The parties stipulated this was the sole issue at the Fair Hearing. Claimant had not previously requested the exemption and therefore the Division of Public Assistance had not approved nor denied the request.

Regulation 7 AAC 100.516(b) provides that an individual who seeks an exemption from the transfer of asset penalty must submit the request, supported by certain information, to the Department of Health and Social Services. The Department of Health and Social Services has within its jurisdiction the Division of Public Assistance, which made the financial eligibility determinations in this case; the Division of Senior and Disability Services, which made the medical eligibility (level of care) determination in this case; and the Office of Hearings and Appeals, which provided Claimant with the Fair Hearing. Therefore, Claimant's request for a Fair Hearing for the purpose of determining whether she may be granted an exemption from the transfer of asset penalty meets the requirement that her request be brought to the Department of Health and Social Services. In addition, Claimant's request is authorized by regulation 7 AAC 49.020, providing the opportunity for a Fair Hearing.

#### A. Request for exemption must be made within 30 days of notice penalty will be imposed. 7 AAC 100.516(b).

To obtain the hardship exemption from the transfer of asset penalty period, Claimant must have requested the exemption within 30 days of receiving the notice the penalty was to be imposed. 7 AAC 100.516 (b). Claimant was informed on December 17, 2010, and by the undated written notice denying her August 9, 2010 re-application, that the transfer of asset penalty would be imposed.<sup>21</sup> She

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<sup>21</sup> The Division first notified Claimant a transfer of asset penalty would be imposed in its written notice to Claimant dated August 5, 2010. However, that notification was informative, telling Claimant a transfer of asset penalty would be imposed, and not that it was being imposed. Therefore, the August 5, 2010 notice did not start the 30 day period for requesting the exemption. Claimant was similarly informed in the October 28, 2010 notice that her August 9, 2010 re-application was denied. Again, the 30 day period for requesting the exemption did not begin to run because, again, Claimant was not eligible for Medicaid benefits. On December 16, 2010, Claimant was first informed the penalty was being imposed.

was informed by written notice of December 17, 2010. Claimant requested the exemption on January 11, 2011, which is within the 30 day period set by 7 AAC 100.516(b).<sup>22</sup>

B. Request for exemption must include statements of hardship and of efforts to retrieve transferred asset. 7 AAC 100.516(b)(1) and (2).

Regulation 7 AAC 100.516(b) requires Claimant to provide a written statement including: how Claimant would face undue hardship if the penalty were imposed (7 AAC 100.516(b)(1); why the assets transferred for less than fair market value cannot be returned; and what efforts the applicant or recipient has made to retrieve the assets. (7 AAC 100.516(b)(2)).

Claimant supplied Exhibit A-A2 as a written statement supporting her request for the undue hardship exemption. This Exhibit, referred to during the hearing as a “timeline,” consists of a date by date narrative description of the difficulties Claimant has encountered in seeking Medicaid benefits. The sole statement provided by Claimant concerning how Claimant would face hardship if the penalty were imposed consists of: “[Claimant] does not have the money to pay for care on her own.” This statement does not meet the requirement of 7 AAC 100.516(b)(1) requiring Claimant to show her life will be endangered or she will suffer the lack of basic necessities such as food, clothing, or shelter. Claimant has not met her burden of proof by a preponderance of the evidence.

Also, Claimant did not offer testimony or other evidence concerning why her real property, which was transferred as a gift to her son and daughter-in-law, that is, for less than fair market value, cannot be returned to her. Claimant did not offer any evidence concerning efforts, if any, Claimant has made to retrieve the assets. Claimant has failed to meet her burden of proving by a preponderance of the evidence either of the two elements required by 7 AAC 100.516(b)(2)(A-B) to obtain an exemption from the penalty based on undue hardship.

The focus of the undue hardship exemption is to discover if imposition of the penalty period would deprive Claimant of medical care to the degree that her life would be endangered or that she would lack the basic necessities of life such as food, clothing or shelter. 7 AAC 100.516(b)(1) and (e). Claimant did not meet her burden of proving the imposition of the penalty period would endanger her life or cause her to lack basic life necessities. At best, Claimant’s undisputed assertion was that she could not pay for her care on her own. This is different from proving her life will be endangered or she will not have her basic needs met without an exemption from the penalty. Furthermore, Claimant has Medicare Parts A and B insurance, Blue Cross insurance covering medical, dental and vision needs, and another private insurance for her prescription drug needs.

C. Claimant’s arguments did not meet her burden of proving she is entitled to the exemption.

Claimant argued that if her first care coordinator had obtained the medical assessment timely, that is, in February 2010, the penalty period would have elapsed by the time Claimant was found eligible for the nursing facility level of care required by the home and community based waiver Medicaid program,

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<sup>22</sup> However, the Department has not yet determined Claimant is eligible for Medicaid benefits, although it has determined Claimant’s needs meet the skilled or intermediate nursing facility level of care medical criteria for eligibility for home and community based waiver benefits. *See, Ex. 5.*

that is, by November 30, 2011. However, this argument is mistaken and not persuasive because it does not satisfy the requirements to qualify for an undue hardship exemption from the transfer of asset penalty.

First, Claimant's application of December 28, 2009 was denied on August 5, 2010 and again on October 28, 2010 because Claimant failed to meet the income requirement for Medicaid benefits, not because she failed to obtain an assessment.

Second, Claimant's re-application of August 9, 2010 was denied (also) because her assessment showed she did not meet the level of care criteria required to be eligible for Medicaid home and community-based waiver services.

Third, the penalty period does not begin until Claimant is found eligible for Medicaid benefits and is not triggered merely by an assessment which finds an individual meets the level of care criteria for a Medicaid program. Claimant has not yet been found eligible for Medicaid benefits: she has been found to meet only the Medicaid level of care criteria for the home and community-based waiver services and the resource eligibility requirement. She has not yet met the income eligibility requirement. Therefore, the penalty would not have begun on December 1, 2010 (the first day of the month following November 30, 2010) or at any time, yet. Otherwise stated, the transfer of asset penalty does not begin to run upon a showing that an individual met one or some, but not all, of the eligibility requirements of a Medicaid program because then the "look-back" period easily could be circumvented.

Regulation 7 AAC 100.510(g) is clear that the transfer of asset penalty begins only after the department determines eligibility to receive the Medicaid benefits. The regulation does not state the penalty begins to run when the individual meets the level of care criteria, or meets the income requirements or meets the resource requirement. Therefore, the failure of the first care coordinator to obtain an assessment timely had nothing to do with the date on which the penalty period will begin.

Therefore, Claimant has not met her burden of proving by a preponderance of the evidence that she qualifies for the undue hardship exemption from the transfer of asset penalty period of imposed by the Division on December 17, 2010.

### **CONCLUSIONS OF LAW**

1. Claimant failed to meet her burden of proving by a preponderance of the evidence, that she would face undue hardship if the penalty is imposed as required by 7 AAC 100.516(b)(1). She failed to prove:
  - a. She will be deprived of medical care to the degree that her life or health would be endangered as a consequence of the imposition of the transfer of asset penalty;or

b. She will be deprived of food, clothing, shelter or other basic necessities as a consequence of the imposition of the transfer of asset penalty.

2. Claimant failed to meet her burden of proving by a preponderance of the evidence, as required by 7 AAC 100.516(b)(2), why her home, which was an asset transferred for less than fair market value, cannot be returned and what efforts Claimant has made to retrieve it.
3. The Division correctly denied Claimant's January 11, 2011 request for an undue hardship exemption from the transfer of assets penalty imposed on December 17, 2010.
4. The Division prematurely imposed the transfer of asset penalty because Claimant did not meet the income eligibility requirement for Medicaid benefits.

### **DECISION**

The Division was correct when it denied the Claimant's January 11, 2011 request for an undue hardship exemption from the transfer of asset penalty imposed on December 17, 2010. The Division prematurely imposed the transfer of asset penalty because Claimant did not meet the income eligibility requirement for Medicaid benefits.

### **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 April 8, 2011.

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*/signed/*  
Claire Steffens  
Hearing Authority

