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

In the Matter of	)	
	)	
J O	)	OAH No. 18-0437-MDE
	)	Agency No. 05932986

DECISION AFTER REMAND

I. Introduction

J O is a disabled senior. His daughter, who holds his power of attorney, applied for Medicaid Long-Term-Care (LTC) benefits for him. Mr. O's application was denied because he was unable to provide information the Division of Public Assistance (Division) requested. However, that information was unavailable to him because it had to be obtained from his estranged wife. Mr. O and his wife have been living separately since 2013. She refused to provide it. Mr. O requested a hearing to contest the denial of his application.

A proposed decision was issued on July 5, 2018. The Division submitted a proposal for action objecting to the proposed decision. Mr. O submitted a proposal for action requesting the proposed decision be adopted. The proposed decision, the case file, and the parties' proposals for action were transmitted to the authorized delegee for the Commissioner of the Health and Social Services. The Commissioner's delegee then remanded the case back with instructions to hold a supplemental hearing to address the following issues:

> (1) Whether Mr. O is potentially eligible for other categories of Medicaid coverage, and whether the Division of Public Assistance reviewed his application for eligibility in any other categories of Medicaid coverage; and
>
> (2) Take additional argument regarding the construction and reconciliation of Medicaid regulations 7 AAC 100.400, 7 AAC 100.500 – 519, and any pertinent federal Medicaid regulations.

Briefing and a supplemental hearing followed.

The evidence shows that because Mr. O is over 65 years old and residing in assisted living. Given these factors and his income, the appropriate Medicaid coverage category for him is the LTC category, which is the Medicaid category reviewed by the Division. The Division strictly applied the Medicaid LTC financial eligibility regulations when it denied his application. However, the underlying federal Medicaid statute, 42 USC § 1396r-5, allows a variance from strict application of those regulations when the applicant would experience undue hardship. The

evidence adduced at hearing showed that Mr. O has lived separately from his wife since 2013, that he has been financially abandoned by her, that she refuses to provide her financial information, and that he has no ability to comply with the Division's request for her financial information. He experiences undue hardship as a result. He therefore qualifies under the specific federal statutory exception allowed for Medicaid LTC applicants when "denial of eligibility would work an undue hardship."[1] Given the extremely unique facts of this case, and the undue hardship that would otherwise be sustained by Mr. O, the Division's denial of his application is REVERSED.

II. Facts

Mr. O is 82 years old.[2] He is married. He and his wife separated in 2013. They are still legally married and do not have a legal separation. Mr. O has not lived with his wife since 2013. He moved in with his daughter B H in 2013. When Mr. O moved in with his daughter, he had no financial resources, and his wife has not and does not provide him with any financial support. Mr. H's only income is from Social Security, which is $1,781 net per month, Native Corporate Dividends, and the PFD.[3] Ms. H holds Mr. O's power of attorney. Mr. O has advanced dementia, is in poor physical health, and resides in an assisted living home.[4]

Ms. H applied for Medicaid benefits for Mr. O on January 16, 2018.[5] She participated in an eligibility interview for him on February 8, 2018. During that interview, she notified the Division's eligibility technician that Mr. O was then living with her, and that he had been "legally" separated from his wife for some time.[6]

The Division followed up on Mr. O's application by requesting additional information on February 9, 2018. In addition to other items, it requested the following:

1. A copy of court documents showing that Mr. O was legally separated from his wife;
2. A copy of all bank statements for accounts jointly held by Mr. O and his wife;
3. Verification of assets (Native corporation shares, land, stocks, bonds, IRAs, vehicles, etc.) owned by Mr. O and his wife;

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[1] 42 USC § 1396r-5(c)(3)(C).
[2] Ex. 1.
[3] Exs. 2.1, 8.11.
[4] Ms. H's testimony; Exs. 6.1, 8.1 – 8.4.
[5] The application is not in the record.
[6] Ex. 2.

4. A property appraisal of the wife's home; and
5. Information regarding his wife's current employment and whether she had long-term care insurance coverage available for Mr. O.[7]

On February 13, 2018, the Division received a letter from Ms. H stating that she spoke to Mr. O's wife, who refused to provide any of the requested information.[8] Ms. H's credible testimony was that she asked her mother for the information; her mother told her that she would not provide it. Ms. H provided the Division with copies of Mr. O's individual financial information but was not able to provide any information regarding the wife's financial information.[9] The Division subsequently denied Mr. O's application for failure to provide the requested information.[10]

III. Discussion

Mr. O and his wife are not legally separated. They, however, have been living apart since 2013 and have not been economically interdependent since 2013. This raises a legal question: are the wife's assets a factor in determining Mr. O's eligibility for Medicaid? The Division argued that under the LTC financial regulations, that the Division is required to count his wife's income and resources in determining his eligibility, even though they are living apart.[11]

Mr. O made two arguments.[12] The first being that the failure to provide information regarding the wife's resources should be excused because his representative, Ms. H, had offered to assign his support rights to the State. The second being that the failure to provide information regarding the wife's resources should be excused because denial of Mr. O's application would constitute an undue hardship to him.

A. Special Rules for LTC applicants

The Division's argument relies upon regulations contained at 7 AAC 100.500 *et. seq.* Those regulations provide for an exception to the general Medicaid financial eligibility rules for LTC applicants. They provide that financial eligibility is based upon the countable assets of

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[7] Ex. 3 – 3.1.

[8] Ex. 4. The letter from Ms. H is not contained in the record.

[9] Exs. 8.5 – 8.14.

[10] Ex. 9.

[11] The Division also argued that Mr. O's wife's assets are a factor because Mr. O and his wife are not legally separated. In return, Mr. O argued that his wife's assets could not be considered because he and his wife had been physically separated for some time. It is not necessary to address this issue because, as discussed later in this decision, Mr. O qualifies for an undue hardship exception, regardless of his wife's assets.

[12] *See* fn. 11 above.

applicants and their community spouses (someone who does not live in a long-term care facility and who is not receiving Medicaid home and community-based waiver services). However, they provide a mechanism whereby the community spouse may have what would otherwise be an otherwise financially ineligible applicant's countable assets transferred to the community spouse and not have them counted towards the applicant's financial eligibility, and also not have those transfers trigger a transfer of asset penalty.[13]

The Division argued that for the purposes of determining financial eligibility, that Mr. O's wife's income and resources had to be taken into account, despite the fact that Mr. O have been physically and financially separated for years. It relies upon the *Medicaid Aged and Disabled Long-Term Care Manual*[14] that requires all countable resources of an applicant and his or her community spouse, to be "pooled together" when determining financial eligibility. The Division does not differentiate between spouses that reside together or that have separated.

The specific LTC financial regulation, 7 AAC 100.506(b) also requires that spousal resources be combined when determining eligibility. However, it is important to look at 7 AAC 100.506 in its entirety. It is entitled "Allocation of resources to prevent spousal impoverishment" and it sets out a mechanism where the entire finances of both spouses are considered and, if necessary, the applicant can transfer income and assets over the non-applicant (community) spouse for their maintenance and support. The applicant's financial eligibility is then determined in light of that transfer.[15]

There are therefore two possible ways of construing the applicable regulations. The first is to adopt the Division's reasoning, which is that LTC applicants are required to have the community spouse's resources taken into account when determining eligibility, regardless of the general Medicaid rule, for aged and disabled applicants, that when an applicant is separated from his or her spouse, the assets of the non-applicant spouse are not considered assets of the applicant spouse.[16] This reasoning results in a denial of Mr. O's application because he was unable to comply with the Division's request for information regarding his wife's assets.[17]

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[13] The Medicaid LTC rules are contained at 7 AAC 100.500 – 519. The definition of "community spouse" is contained at 7 AAC 100.990(14).

[14] *Medicaid Aged and Disabled Long-Term Care Manual,* § 553D.

[15] 7 AAC 100.502(a)(2); 7 AAC 100.504; 7 AAC 100.506.

[16] The general Medicaid financial criteria for aged and disabled applicants are contained at 7 AAC 100.400(a)(11) and (13).

[17] *See* 7 AAC 100.016(b).

The second way of construing the Medicaid regulations is to look at them as a whole. This would apply the general Medicaid rule that a separated spouse's assets are not counted, and find that the need to determine and count the community spouse's assets would only apply when the spouses are not separated, and an otherwise financially ineligible applicant is trying to establish eligibility by transferring either his or her sole or jointly owned assets over to his or her spouse. Neither of these are present in this case. This reasoning would result in Mr. O's application being granted.

The underlying federal Medicaid statute, 42 USC § 1396r-5, which specifically deals with determining financial eligibility in the situation where there is an institutionalized spouse and a community spouse, explicitly states "[i]n determining the eligibility for medical assistance of an institutionalized spouse … the provisions of this section supersede any other provision of this subchapter … which is inconsistent with them."[18] That statute then provides that separate income of the community spouse is not "deemed available to the institutionalized spouse"[19] and further provides that resources of both the institutionalized spouse and the community spouse are to be considered in determining eligibility.[20] Based upon the underlying federal statute, the Division's interpretation of the Medicaid financial eligibility rules is the correct one. The Division is required to take a community spouse's countable resources into account when determining initial Medicaid eligibility for an institutionalized spouse.[21] Consequently, the Division could legitimately inquire regarding the community spouse's countable resources.[22] It would then normally follow that Mr. O's failure to provide the requested information would justify a denial of his application.

B. Assignment of Rights and Undue Hardship

The relevant federal Medicaid statute 42 USC § 1396r-5 contains two relevant exceptions to the requirement that the wife's assets must be considered in determining Mr. O's eligibility. The first is where the institutionalized spouse, Mr. O, assigns "to the State any rights to support

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[18] 42 USC § 1396r-5(a)(1).

[19] 42 USC § 1396r-5(b)(1)

[20] 42 USC § 1396r-5(c). Please note that the treatment of community spousal resources is handled differently for post-eligibility purposes. 42 USC § 1396r-5(c)(4).

[21] *Houghton ex. rel. Houghton v. Reinertson*, 382 F.2d 1162, 1173 – 1175 (Tenth Circuit 2004).

[22] The Division inquired about countable resources (bank accounts, land, IRAs, etc.), but it also inquired about non-countable resources such as the community spouse's home and Alaska Native corporate stocks. *See* 42 USC § 1396r-5(c)(5)(A).

from the community spouse."[23] The second is where "the denial of eligibility would work an undue hardship."[24]

1. Assignment of Rights

Mr. O's attorney-in-fact offered to assign Mr. O's support rights to the State. Although the offer of an assignment did not happen until after the application was denied,[25] it should be noted that the Division was apparently unaware that this was an option to persons in Mr. O's situation.[26] There is a federal case on point which highlights the availability of this option. In that case, Ms. Morenz filed an application with the State of Connecticut for Medicaid for her institutionalized spouse. As part of that application, she stated that she would not contribute any financial support for her husband, and she, acting under his power of attorney, assigned her husband's spousal support rights to the State of Connecticut. Connecticut denied Mr. Morenz's application because the combined resources exceeded the resource cap. The case ended up in federal court. The Federal District Court ordered approval of Mr. Morenz's application along with retroactive Medicaid benefits. The State of Connecticut appealed. The Federal Court of Appeals upheld the District Court decision.[27] However, there has been no actual assignment of Mr. O's right to spousal support rights in this case, only an offer to sign one. Accordingly, this argument is not persuasive.

2. Undue Hardship

The federal statute also allows approval of a Medicaid application without regard to the community spouse's assets when "the denial of eligibility would work an undue hardship."[28] Mr. O is in the advanced stages of dementia, resides in an assisted living home, and has limited income. His monthly net Social Security income is $1,781. He is not eligible for expansion group Medicaid coverage due to both his income (limit of $1,645) and because he is elderly and had Medicare coverage.[29] He is also not eligible for Medicaid through the Adult Public Assistance program due to his income (limit of $1,393 for an individual living in an assisted

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23 42 USC § 1396r-5(c)(3)(A).

24 42 USC § 1396r-5(c)(3)(C).

25 The first reference to an assignment was made during the May 17, 2018 hearing.

26 The Division's representative stated during oral argument on August 28, 2018 that she had never encountered an assignment of support rights during her tenure with the Division and was unsure of how such an assignment would be processed.

27 *Morenz v. Wilson-Coker*, 415 F.3d 230 (Second Circuit 2005).

28 42 USC § 1396r-5(c)(3)(C).

29 *Family Medicaid Eligibility Manual* §5706 and Addendum 5 "MAGI Income Standards."

living home).[30] He, however, is income eligible for LTC Medicaid, which has an income limit of $2,250.[31]

Mr. O's inability to provide to provide his wife's resource information is preventing him from qualifying for LTC Medicaid. This is an undue hardship for him because of his complex care needs for which he needs Medicaid coverage. Because the federal statute provides an undue hardship exception when an applicant's community spouse's countable resources causes the applicant to exceed the program's resource limit, similarly his inability to provide information regarding those resources qualifies him for Medicaid under the undue hardship provision.

IV. Conclusion

The Division requested financial information regarding Mr. O's wife's finances to determine his eligibility for Medicaid benefits. Mr. O, who has been separated physically and financially from his wife since 2013, did not have that information. His wife refused to provide it. Denial of Mr. O's application due to his inability to provide the requested information constitutes undue hardship. As a result, the denial of Mr. O's Medicaid application is reversed.

Dated: November 27, 2018

By: *Signed*
Signature
Lawrence A. Pederson
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

30 *Alaska Adult Public Assistance Manual* § 1.
31 *Aged, Disabled and Long Term Care Medicaid Eligibility Manual* Addendum 1.

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this __28th___ day of November, 2018.

By: *Signed*
Signature
Deborah Erickson, MBA
Project Coordinator
Office of the Commissioner
Department of Health and Social Services