

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 633 17 <sup>th</sup> Street, Suite 1300 Denver, Colorado 80202	▲ COURT USE ONLY ▲
<div style="border: 1px solid black; width: 200px; height: 20px; margin-bottom: 5px;"></div> Appellant,  vs.  <b>DENVER COUNTY DEPARTMENT OF HUMAN SERVICES,</b> Appellee,  and  <b>STATE DEPARTMENT OF HEALTH CARE POLICY AND FINANCING,</b> Intervenor.	
<b>INITIAL DECISION</b>	

Hearing in this matter was held at the Office of Administrative Courts, Denver, Colorado, on May 30, 2007, before Administrative Law Judge ("ALJ") Donald E. Walsh. David Bernhart, Esq., appeared on behalf of the Appellee ("County Department"). Robert Douglas, Esq., appeared on behalf of the intervenor, State Department of Health Care Policy and Financing (HCPF). The Appellant was represented by Joseph Dawson, Esq. and Mark Chayet, Esq. In order to maintain confidentiality, the Appellant will be referred to as "BG." His full name will be marked out of any public copy of this Initial Decision. Appellant's exhibits A through G were admitted into evidence. The County Department's exhibits 1 through 31 were admitted into evidence and the State Department's exhibits A through J were likewise admitted into evidence. The hearing was electronically recorded in courtroom number 5.

In this Initial Decision, the ALJ refers to the Colorado Medical Assistance Program as "Medicaid"; and, to the Colorado Revised Statutes as "C.R.S." The rules of the State Department referred to herein are printed in 10 CCR 2505-10 and are cited by their section number. The cited rules are those currently in effect unless otherwise stated in the decision.

## ISSUES PRESENTED

In this case the Appellant appeals the decision of the County Department to impose a disqualification period, which denied Medicaid benefits until May 24, 2007, on the basis of having disposed of resources without fair consideration.

## FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. On August 31, 2006, BG, by and through his son and court-appointed guardian, Jeffrey N., applied for Medicaid benefits. The caseworker with the Denver County Department of Social Services referred the case to the State Department because of questions and concerns about the applicant's assets that had been liquidated by the guardian. After reviewing documentation supplied by the guardian's attorney, the State Department determined that between June 2006 and December 2006, the guardian cashed out accounts held by BG in the amount of \$84,622.90. Likewise, the State Department also determined that much of the guardian's compensation was inappropriate and unnecessary and also counted those payments as transfers without fair consideration.

2. The State Department determined that a period of ineligibility should be imposed as a result of the alleged transfers without fair consideration. By letter dated May 18, 2007, they determined that BG was eligible for Long Term Care benefits beginning on May 24, 2007. This was based upon a reevaluation of the amount thought to have been transfers without fair consideration. The new amount was \$ 26,920.41. But for the alleged transfers without fair consideration, the State Department determined that BG would have been eligible for Long Term Care benefits on December 14, 2006. As set out in more detail below, the ALJ finds that BG was eligible for Long Term Care benefits on December 14, 2006.

3. The Department alleges that the following expenses were transfers without fair consideration.

AMOUNT	PURPOSE
\$ 12,000.00	Guardian's time, mileage and meals.
\$ 5,200.00	Personal services contract with Elaine C.
\$ 1,507.00	Reimbursements to Bruce G. for two trips to visit ward and miscellaneous expenses

\$ 1,297.50	Payments to services providers for repairs at the apartment for July-November 2006
\$ 1,185.00	To guardian for his work and repairs on ward's former apartment
\$ 3,000.00	Back rent on two storage units
\$ 1,766.00	Costco expenses
\$ 1,046.00	Television for BG
\$ 118.91	Barbeque for Law Firm
\$ 27,120.41	TOTAL

4. As a result, the Department calculated a penalty period associated with the transfers pursuant to 10 CCR 2505-10 § 8.110.53.C.1-3. Under that calculation, the penalty period ended on May 23, 2007.

5. At all times relevant to these proceedings, BG was a full-time resident of Iliff Care Facility, a Long-Term Care facility providing complete medical, nursing, occupational therapy, and dietary services.

6. On April 27, 2006, BG sustained a fall outside of his apartment, which required his hospitalization and ultimate discharge to the Iliff Care Facility on May 2, 2006. On May 15, 2006, Jeffrey N. was appointed BG's guardian by the Denver County Probate Court. BG had previously given Jeffrey N. authority under a General Power of Attorney in December 1998. Additionally, Jeffrey N. along with his brother, Bruce G, were appointed co-trustees by BG under a living trust agreement dated September 4, 2002.

7. In the performance of his fiduciary duties with respect to his father, BG, Jeffrey N. expended funds in the amounts and for the purposes stated below.

**\$ 12,000.00 for Guardian's Time, Mileage and Meals**

8. Prior to placing his father, BG, at Iliff Care Facility, Jeffrey N., the guardian, spent three to four hours each week with his father, sometimes watching television, taking him to breakfast or lunch. He was not remunerated for these devotions of a son to his father and did not expect to be. He continued maintaining a close relationship with his father, visiting him with almost the same regularity after placement at the Facility. Jeffrey N.'s visits were for his father's comfort and to let him know he cared. After that placement, and after being appointed guardian, the time Jeffrey N. spent traveling to and from Iliff, and the time he spent talking with his father

and watching television with him and spending meal times with him, were billed at an hourly rate of \$25.00.

9. Jeffrey N.'s time and services have been well-documented. Jeffrey N. provided various services to BG either as a co-trustee under BG's trust, as an agent under BG's durable power of attorney, and as BG's court appointed guardian. Per Colorado Statutes and BG's written directives, Jeffrey N. charged an hourly rate, based on the average cost of such services in the Metro Area, of \$25 per hour for 354.50 hours of his time and services as co-trustee, agent, and guardian since May 26, 2006. Jeffrey N. is authorized under all three roles to hire individuals, including himself, to provide other services, such as companion care. Article 4, Section 3 of the Trust document specifically instructs Jeffrey N. to hire services, including providing companion care, to improve BG's quality of life. Jeffrey N. was reimbursed for 3984 miles at a rate of \$.50 per mile, based on the IRS rates for 2006 and adjusted for increasing gas prices. Jeffrey N. was also reimbursed for meals and other items he paid from his personal funds on behalf of BG.

10. BG was the direct beneficiary of the services provided and items purchased (such as mileage) by Jeffrey N. in the pursuit of his fiduciary duties towards BG. The fee of \$25.00 per hour for his services to BG was reasonable. BG received fair consideration for the expenditure of these funds.

#### **\$ 5,200.00 Personal Services Contract**

11. BG entered into a personal services contract with Elaine C. Ms. C. is the husband of Jeffrey N. Ms. C. is a Registered Nurse and was experienced and capable of performing the duties required of the contract.

12. The Iliff Care Facility had in place a Plan of Care for BG that had been compiled with input from BG's medical doctor, as well as a registered nurse, a dietician, and an occupational therapist. The Iliff Plan of Care was followed by the facility in providing all services for BG and its cost was included in the monthly long-term care fees legitimately charged to the ward.

13. The Appellant has submitted ample documentation to support the need for supplemental professional services to be provided to BG. Jeffrey N., as legal representative for BG., was instructed through the BG Living Trust to hire services necessary to provide for BG's needs and promote his independence. Elaine C.'s, services were beneficial and necessary for BG. The rate charged for services under the agreement of \$100.00 per week, is below the market rate for such services in the Denver Metro Area. The services provided to BG for the fee charged by Ms. C. was fair consideration for these services.

**\$ 1,507.00 reimbursement to Bruce G.**

14. Bruce G., as co-trustee of the living trust, was reimbursed \$ 1,507.00 for two trips to visit BG and miscellaneous expenses associated therewith. Pursuant to the trust document Bruce G. is specifically entitled to charge for his time and be reimbursed for any out-of-pocket expenses he incurs on behalf of BG. Bruce G. traveled to Colorado to assist in his father's placement in a proper facility. Certainly an expense contemplated by the trust to be reimbursed to the co-trustee. This expenditure is not a transfer without fair consideration, but a reimbursement/payment to the co-trustee pursuant to the trust document. The expenditure directly benefited BG as the beneficiary of the living trust.

**\$ 1,297.50 for Payments for Repairs at the BG's Condominium  
\$ 1,185.00 to Guardian for his Work and Repairs on BG's Former Condominium**

15. The Appellant paid \$2,482.50 to service providers to clean and repair his former condominium. These expenditures were for services and supplies received and billed at a fair market rate. Prior to placement at the Iliff Care Facility, BG resided for approximately five years in the private condominium, which was rented from an individual owner. BG left the rental in a state unacceptable to the owner/landlord and extensive repairs and cleaning were necessary. Jeffrey N. arranged and paid for all the cleaning and repairs from BG's funds. These repairs occurred in June 2006, although some service invoices were not paid for several months.

**\$ 3,000.00 for Back Rent on Two Storage Units**

16. Pursuant to a bill from a collections agent for the payment of arrearages in rent of \$3,000.00, Jeffrey N. satisfied BG's obligation from BG's resources. This transaction was not a transfer without fair consideration.

**\$ 1,766.00 Costco Expenses**

17. Jeffrey N. incurred expenses at Costco that exceeded \$1,766.00. These expenses were incurred for the benefit of BG. The \$1,766.00 spent on these items of merchandise was fair consideration for the merchandise received. There was no evidence that BG provided Costco with a gift and no credible evidence that the items of merchandise were for the benefit of anyone other than BG.

**\$ 1,046.00 for a Television Set and Extended Warranty**

18. Jeffrey N. purchased a TV for BG that BG had requested. The TV and service warranty were purchased from Circuit City for BG. The evidence established

that this was not a transfer without fair consideration as the TV was received for fair market value from a national retailer.

#### **\$ 118.91 Barbeque Food for Law Firm**

19. The Appellant's counsel avers that this expenditure has been resolved by crediting the amount against legal bills due and owing, therefore, this issue is considered moot.

#### **CONCLUSIONS OF LAW**

The underlying question to each of these expenditures is, "Did BG receive fair consideration for the expenditure of funds from his assets?" If so, then there was no transfer of assets without fair consideration and the inquiry ends.

Section 8.110.53, Transfers of assets without fair consideration, provides the following pertinent definitions at Section 8.110.53.B.2. and 3.:

2. Fair market value is the value of the asset if sold at the prevailing price at the time it was transferred.

3. Fair consideration is the amount the individual receives in exchange for the asset that is transferred, which is equal to or greater than the value of the transferred asset.

#### **\$ 12,000.00 for Guardian's Time, Mileage and Meals**

The State Department argues that there is a rebuttable presumption that transfers without fair consideration were made for the purpose of Medicaid eligibility unless the individual provides convincing, objective evidence that the transfer was exclusively for some other purpose that did not include Medicaid eligibility. 10 CCR 2505-10 § 8.110.53.G.1.

This is true enough, however, the State Department leaps to the conclusion that the transfers were indeed without fair consideration.

The State Department argues that most of the guardian's expenses include travel time to and from the nursing home, running errands and taking his father out for a juice, and later, bringing food in. They cite the following case in support of their proposition.

The Appellate Court of Illinois refused to reimburse a guardian for expenses similar to those at issue in this case. In its conclusion that the guardian, if acting as a creditor, was not entitled to circumvent the trust's spendthrift provisions by way of exceptions enumerated in section 157(b) of the Restatement (Second) of Trusts, the court found that "[the guardian]

is not required to provide the services she is now seeking to have the trust reimburse, such as grocery shopping, taking [the ward] to lunch, or taking [the ward] on vacation." In re Estate of McInerny, 682 N.E. 2d 284, 290 (Ill. App. 1997).

That case refers to the fact that a spendthrift provision of the underlying trust was being violated. In the instant case, however, the trust provisions are being carried out to the letter. The funds were spent in furtherance of the objectives of the trust.

The fee of \$25.00 per hour was not above the current market rate. Jeffrey N. provided services to BG and was compensated at a fair market rate. No transfer without consideration occurred in the payment or reimbursements rendered to Jeffrey N.

It should be noted that while an action was pending in the Probate Court involving the parties hereunder during the conduct of the instant proceedings, the ALJ renders the decision herein based upon the evidence presented. No evidence before the ALJ establishes that any of the remuneration received by Jeffrey N., either as a co-trustee, agent, or guardian, has been determined to be improper. Contrary to the argument of the Appellee, the ALJ is not aware of any presumption that arises under the facts hereunder, that reimbursement of a co-trustee, agent, or guardian creates a presumption of a transfer without fair consideration. If there is a transfer without fair consideration, then and only then, does a presumption arise that the transfer was for the purpose of establishing Medicaid eligibility.

Here, the Appellant has established by a preponderance of the evidence that the transfers to Jeffrey N. pursuant to the trust, power of attorney, and guardianship were not transfers without fair consideration. Thus, no presumption arises under the rules that said transfers were for the purpose of obtaining Medicaid eligibility and the evidence does not establish otherwise that the transfers in question were for such purpose even in the absence of such a presumption.

As allowed by Colorado Statutes and BG's written directives, Jeffrey N. has charged an hourly rate, based on the average cost of such services in the Metro Area, of \$25 per hour for 354.50 hours of his time and services as co-trustee, agent, and guardian since May 26, 2006. Jeffrey N. is authorized under all three roles to hire individuals, including himself, to provide other services, such as companion care. Article 4, Section 3 of the Trust document specifically instructs Jeffrey N. to hire services, including providing companion care, to improve BG's quality of life. Jeffrey N. was reimbursed for 3984 miles at a rate of \$.50 per mile, based on the IRS rates for 2006 and adjusted for increasing gas prices. Jeffrey N. was also reimbursed for meals and other items he paid from his personal funds on behalf of BG.

## **\$ 5,200.00 Personal Services Contract**

The State Department alleges that the personal services contract in the amount of \$ 5,200.00 paid in advance to the guardian's wife, Elaine C., a registered nurse, was a transfer without fair consideration. They argue that

as a family member providing care, this service was subject to a rebuttable presumption that it was without fair consideration. The evidence offered by the Appellant failed to rebut the presumption.

The Appellant submits that the evidence shows that Ms. C. provided services to BG and was compensated under the fair market rate, concluding that no transfer without consideration occurred in the payment rendered to Ms. C. The ALJ agrees.

The agreement fully comported with the regulations. The agreement was signed on August 30, 2006, by both Elaine C. and Jeffrey N. Jeffrey N. is not a beneficiary under the agreement. The agreement was dated and the signatures were notarized. This agreement was entered into prior to the delivery of services. The remuneration received by Elaine C. for the services performed was \$100.00 per week for weekly visits and services including the production of reports. Comparable services would cost approximately \$200.00 per week. The cost of the agreement to BG was below the market rate for comparable services.

To the extent that a rebuttable presumption arose as a result of this transaction that the transaction created a transfer of assets without fair consideration, that presumption has been overcome by a preponderance of the evidence.

The rule states as follows:

### **4. Personal care services**

a. Effective for agreements that were signed and notarized prior to March 1, 2007, family members who provide assistance or services are presumed to do so for love and affection, and compensation for past assistance or services shall create a rebuttable presumption of a transfer without fair consideration unless the compensation is in accordance with the following:

1) A written agreement must be executed prior to the delivery of services.

2) The agreement must be signed by the applicant, or a legally authorized representative, such as agent under a power of attorney, guardian, or conservator. If the agreement is signed by a representative, that representative may not be a beneficiary of the agreement.

3) The agreement must be dated and the signature must be notarized.

4) Compensation for services rendered must be comparable to what is received in the open market.

As can be seen there was full compliance, and thus no transfer without fair consideration.

**\$ 1,507.00 reimbursement to Bruce G.**

The Appellee again argues a presumption. Once again the Appellee's argument is misplaced. The presumption expressed under 10 CCR 2505-10 § 8.110.53.G.3.b. arises only when you have a transfer without fair consideration to one of the listed individuals. The first hurdle for the Appellee is to establish that the transfer was without fair consideration. Based upon the evidence submitted herein the ALJ finds that the transfer to Bruce G. was not a transfer without fair consideration. BG specifically set up his trust to allow for the payment of expenses to Bruce G. as a co-trustee. Bruce G.'s travel expenses back to Colorado for the purpose of assisting his father's placement in a facility due to falls was for the direct benefit of BG and was not a transfer without consideration.

**\$ 1,297.50 for Payments for Repairs at the BG's Condominium  
\$ 1,185.00 to Guardian for his Work and Repairs on BG's Former Condominium**

The State Department alleges that no adequate documentation was placed into evidence to show that these repairs were necessary and/or actually performed. The ALJ disagrees, as stated under the findings of fact. The Appellant established the legitimacy of these expenditures. The Appellee provided no evidence or testimony beyond the personal opinions of Ms. Daniels that these expenditures did not comply with Medicaid regulations. These expenditures were for bona fide services and items rendered. These were not transfers without fair consideration.

**\$ 3,000.00 for Back Rent on Two Storage Units**

The State Department alleges that no adequate documentation was provided to show that a \$ 3,000.00 arrearage was owed on storage units or that \$ 3,000.000 had actually been paid. As determined in the findings of fact the ALJ holds that there was adequate documentation. Once again, the Appellee provided no evidence or testimony beyond the personal opinions of Ms. Daniels that expenditures did not comply with Medicaid regulations.

The evidence shows that this expenditure was not a transfer without fair consideration.

**\$ 1,766.00 Costco Expenses**

The Costco expenses are more than adequately documented and the goods were purchased for fair market value at a national discount store. As found by the ALJ, goods were purchased for BG's use. There was no transfer without fair consideration with respect to the Costco purchases.

**\$ 1,046.00 for a Television Set and Extended Warranty**

The State Department alleges that no evidence was offered to justify the purchase of a large and expensive television for BG. On the contrary, BG had requested that Jeffrey N. buy a TV for BG's use in the facility. This purchase was not a transfer of assets without fair consideration.

**\$ 118.91 Barbeque Food for Law Firm**

As stated in the findings of fact this issue is moot.

**INITIAL DECISION**

It is therefore the Initial Decision of the Administrative Law Judge that the County Department's decision to deny long-term care Medicaid benefits to BG based upon having transfers without fair consideration is not in conformance with State Department regulations and is hereby reversed. As found, BG's eligibility date for Long Term Care Medicaid benefits is December 14, 2006.

Pursuant to Section 25.5-1-107(1)(a), and 24-4-105(14)(a)(I), C.R.S. (2002), this Initial Decision will be reviewed by the Office of Appeals, State Department of Health Care Policy and Financing. The parties shall have 15 calendar days from the date this Initial Decision is mailed, plus 3 days for mailing, to file written exceptions with the Office of Appeals at 1575 Sherman Street, 5<sup>th</sup> floor, Denver, Colorado 80203, unless extended by the Office of Appeals. This Initial Decision will not be implemented while pending State Department review and final agency action. Pursuant to State Department rules, the failure to file exceptions to provisions of the Initial Decision will waive the right to seek judicial review of a final agency decision affirming those provisions.

**DONE AND SIGNED** this 16 day of July, 2007.



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Donald E. Walsh  
Administrative Law Judge