

**GEORGIA DEPARTMENT OF COMMUNITY HEALTH
OFFICE OF THE COMMISSIONER
AGENCY APPEAL REVIEW**

**Eva Mae Fossett,
Petitioner,
v.**

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OSAH-DFCS-NH-0932233-155-Miller

Agency Reference No.: 892412619

**Department of Human Services,
Division of Family and Children Services,
Respondent.**

**NOTICE OF FINAL ADMINISTRATIVE DECISION
RIGHT OF APPEAL**

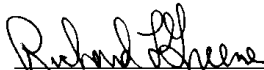
PLEASE READ CAREFULLY:

Enclosed is the Final Administrative Decision of the Commissioner of the Georgia Department of Community Health ("DCH") pursuant to the authority granted in O.C.G.A. § 49-4-153 (b)(1). The Commissioner, pursuant to the authority conferred on her and through the undersigned as her designated representative, has MODIFIED both the decision issued by the Respondent and the Initial Decision of the Office of State Administrative Hearings ("OSAH") Administrative Law Judge ("ALJ") as is indicated in the attached Final Administrative Decision.

If you desire to contest this Final Decision, you may do so only by filing a timely petition for judicial review in accordance with the provisions of O.C.G.A. § 49-4-153 and O.C.G.A. § 50-13-19. When a decision becomes a Final Decision, a petition for judicial review must be filed in the Superior Court of Fulton County or the county of residence of the appealing party within thirty (30) days of service of the Department's Final Decision. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. A copy of such a petition shall be served upon the Commissioner and all parties of record. Additional requirements related to the filing of such a petition are found in the two statutes referenced above. You are directed to review and comply with each and every requirement found therein. **As is set out in the attached Decision, there are alternative appeal processes and dates available to the Petitioner in accordance with the provisions of the attached Decision.**

This Notice and enclosed copy of the Final Administrative Decision is hereby:
Issued and mailed with adequate USPS postage properly affixed or hand delivered.

This November 17, 2009 by



Richard L. Greene
Agency Review Officer
Georgia Department of Community Health
Designated Representative of
Commissioner Rhonda M. Medows, M.D.

cc: Honorable Kristin L. Miller, Administrative Law Judge, OSAH
Mr. John Rasheed, Clerk, OSAH
Ms. Ginger Henry, DHS

**GEORGIA DEPARTMENT OF COMMUNITY HEALTH
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Eva Mae Fossett,	*	
Petitioner,	*	OSAH-DFCS-NH-0932233-155-Miller
v.	*	
	*	Agency Reference No.: 892412619
Department of Human Services¹,	*	
Division of Family and Children Services,	*	
Respondent.	*	

FINAL ADMINISTRATIVE DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PROCEDURAL BACKGROUND

This appeal is before the undersigned as the Commissioner's designated representative upon both the Petitioner's and the Respondent's Request for Agency Review of the Initial Decision issued by Administrative Law Judge ("ALJ") Kristin L. Miller of the Office of State Administrative Hearings ("OSAH"). The Initial Decision reversed in part and approved in part the Respondent's decision to deny certain benefits and to impose a transfer of resources penalty to the approved Nursing Home Medicaid benefits of Mrs. Eva Mae Fossett ("Petitioner").

The Petitioner's application for Medicaid Nursing Home benefits was denied by the Division of Family and Children Services ("DFCS") for January 2009 and approved beginning February 2009, subject to a transfer of resources penalty for the months of February, March and part of April 2009. The Administrative Hearing was conducted on June 17, 2009. The ALJ "Remanded" the case back to the Respondent for certain recalculations in accord with that Initial Decision. The Respondent chose to request an Agency Appeal rather than have the matter remanded as instructed by the ALJ. The Petitioner then followed with a request for Agency Appeal. Except for the digital recording of the administrative hearing (poor quality- could hear and understand the ALJ but the witnesses and attorney mostly were garbled and not interpretable; therefore, only minor parts of the recording could be reviewed), the entire written record has been reviewed and all issues have been considered by the Agency Appeals Reviewer. The record includes, but is not limited to, the OSAH Notice of Hearing, the Initial Decision issued on July 16, 2009 by ALJ Kristin L. Miller, the OSAH Form 1 (including various attachments) filed on May 27, 2009, Plaintiff's Exhibits 1-5, Respondent's Exhibits 1-20, numerous communications between the parties and from the parties to the ALJ and to this Agency Appeal Reviewer, requests for administrative review filed on behalf of each party, an agreement of the parties to extend the time for the issuing of a Final Administrative Decision, information submitted in relation to a conference call on November 3, 2009, all other documentation submitted by the parties as part of the administrative hearing and the Agency Appeal Review processes, as well as the relevant state and Federal statutes, Rules, Regulations, guidelines and policy manuals.

¹ As of July 1, 2009, the Department of Human Resources was reorganized and renamed by statute as the Department of Human Services.

II. INTRODUCTION

This appeal involves Petitioner's application for Nursing Home Medicaid benefits. Petitioner's application was approved by DFCS, but Respondent denied coverage for the month of January 2009 for the Petitioner being over-resources and assessed a transfer of resources penalty for the impermissible expenditure of the Petitioner's assets. The alleged impermissible expenditures included items such as payments for utilities, taxes, repairs to the Petitioner's residence, renovations to the home of one of Petitioner's son's to accommodate the physical needs of the Petitioner, reimbursements for personal services and miscellaneous expenditures made on behalf of the Petitioner by her two adult sons, Frank and Danny Fossett. Therefore, the issues in controversy include the denial of coverage for January 2009 for being over-resources and the expenditure of certain funds considered impermissible, thus subject to a transfer of resources penalty for February, March and part of April 2009. The Respondent correctly denied coverage for the month of January 2009 and appropriately applied the transfer of resources penalties in accordance with certain provisions of its written policy. Likewise, that policy also provides for the presentation of acceptable documentation to establish proper application of or exceptions to the policy, including but not limited to issues relating to personal care contracts, joint ownership of real estate, apportionment and appropriateness of claimed expenses that require a level of interpretation that is based on factors that may be better determined after a full administrative proceeding. Such is the case in this proceeding. The issues in this matter are (1) should the month of January 2009 have been excluded from benefit coverage because the Petitioner was over the resources limit for that month, and (2) whether Respondent correctly determined that a transfer of resources penalty should be applied and if the transfers met any exceptions to the policy or applications of established law. Based upon the entire record and in accord with *Greene v. DCH*, 293 Ga. App. 201, the undersigned, on behalf of the Commissioner, MODIFIES in part both the determinations of the Respondent and the Initial Decision of the ALJ, and finds the following:

III. FINDINGS OF FACT

1. Mrs. Eva Mae Fossett's January 28, 2009 application for Medicaid Nursing Home benefits was approved by DFCS on May 12, 2009, subject to the denial of coverage for January 2009 due to her being over resources from the cash surrender value of insurance in the approximate amount of \$14,425; and a transfer of assets penalty for the months of February, March and part of April 2009 that was based on alleged impermissible transfers in the approximate amount of \$12,400, primarily made to the two sons of the Petitioner.
2. The alleged impermissible transfers included payments through December 2008 for portions of utility bills, taxes, appraisals and repairs for the residence of the Petitioner who had only a one-fourth ownership interest in the homeplace, the payment of funds to reimburse Danny Fossett for renovations to his house that were made to accommodate the physical and health needs of the Petitioner in order to keep her from having to be admitted to a nursing home, payments made to Danny Fossett under the terms of an oral personal care contract providing for the healthcare and related needs of the Petitioner and payments to Frank Fossett for reimbursement of expenses he incurred while handling the affairs of the Petitioner and while assisting Danny in providing care for their Mother.
3. After a detailed review of the record in this matter, all documents and exhibits submitted by both parties as part of the OSAH Administrative Hearing and the DCH Agency Appeal Review processes, as well as the relevant state and Federal statutes, Rules, Regulations, guidelines and policies, the undersigned hereby incorporates herein and adopts the Introduction (except not including the last sentence of that paragraph) and Findings of Fact 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12 as set forth in the Initial Decision dated July 16, 2009.

4. Finding of Fact 3 establishes the joint ownership rights of one-quarter each divided between Mrs. Fossett and her then living three adult children. Although Petitioner's daughter predeceased her, the daughter's estate retained its one-quarter interest in the residence of the Petitioner through the time of the Petitioner's application for Medicaid benefits. Finding of Fact 4 establishes the Petitioner was first hospitalized due to a stroke from late December 2007 through March 2008. After some improvements of her medical condition, from April 2008 through November 2008², Petitioner was cared for in the home of one of her sons and his wife, Danny and Margaret Fossett, along with the regular assistance of Frank Fossett, Jr. and his wife Gloria. Frequently two people were required transfer the Petitioner, she was incontinent, required assistance to eat and could not be left unattended because of the high risk of injury from falling. This is an example of a family coming together to provide for the direct care for a parent in an attempt to keep that parent out of a nursing home. The Petitioner was eventually transferred to a nursing home where she could receive skilled nursing care only after she was experiencing increased memory loss and became aggressive toward her caregivers.

5. The Petitioner had lived in her residence from 1972 until December 2008. There was an interlude from residing in her home from the first stroke/hospitalization in December 2007 to her permanent move to the skilled nursing home in December 2008. The interlude included her first hospitalization, initial short-term admission into a nursing home and her subsequent move to her son's residence. This interlude was considered temporary with the expectation the Petitioner might be able to return to her residence. By December 2008 it became clear the Petitioner would no longer be able to reside in her home.

6. Finding of Fact 5 explains how the Respondent applied its policy manual to apportion three-quarters of all expenditures for utilities, taxes, repairs, etc. to be the legal obligation of the Petitioner's children and only one-quarter of those expenditures could be considered as permissible transfers. Respondent did not take into consideration the established payment obligation assumed by the Petitioner to pay all of those types of expenses even though her children had an ownership interest in the real estate since 1982 and perhaps through November 2008.

7. In 2006 Frank Fossett became the attorney in fact for the Petitioner as her ability to look after her financial and health needs deteriorated. They entered into an oral agreement for Frank to coordinate the provision for the financial and health related well-being of the Petitioner. The terms of the agreement are entered into the record as set out in an affidavit by Frank Fossett. The Petitioner also entered into an oral agreement with Danny Fossett to provide certain services for her as are set out in the affidavit by Danny Fossett that was entered into the record. Importantly, extensive documentation of virtually every expenditure made under the terms of those oral contracts was also introduced into the record.

8. Finding of Fact 10 is not adopted because the record is not clear as to how the total of impermissible transfers was calculated or which precise expenses were included in the total impermissible amount or in the impermissible amount assignable to Danny as alleged by the Respondent.

9. Finding of Fact 12 correctly details why the Respondent disallowed Nursing Home Benefits for the Petitioner for the month of January 2009. The Petitioner was over resources as of January 1, 2009. Likewise, the Petitioner's argument is that if those resources were used to pay for valid incurred medical expenses (as contended by Petitioner's counsel), then the net effect is to make the Petitioner qualified to receive Medicaid Nursing Home Benefits for the month of January.

² The Petitioner was transferred to the nursing home in the later half of November 2008. Because Medicaid policy often rounds up or down months to the beginning of a month and for the continuity of this final decision, December 1, 2008 shall be considered the date of permanent entry by the Petitioner into the nursing home.

IV. CONCLUSIONS OF LAW

10. The Georgia Department of Community Health is the single state agency established and designated to administer and supervise the administration of the Georgia Medicaid programs. *42 U.S.C.S. § 1396a and 42 C.F.R. § 431.10(e)(1)(ii)*.

11. Nursing Home Medicaid is a class of assistance that provides benefits to eligible individuals residing in a Medicaid-participating nursing home. An applicant is eligible for such benefits when both basic program criteria and financial eligibility criteria regarding income and resources are met. *ESSM §§ 2141, 2339 and 2342*.

12. The program's policies also provide for exceptions to the penalty for certain resource transfers. One such exception is that an individual may remain eligible for medical assistance to the extent that resource transfers are exclusively for a purpose other than to qualify the individual for medical assistance. *42 U.S.C.S. § 1396p(c)(2)(C)*. Many of the Petitioner's resource transfers met that exception, subject to the terms of this decision.

13. The Petitioner proved through convincing evidence that the majority of the care for which her sons and others were reimbursed was not care that had been provided to her for free in the past. This conclusion meets another such exception, subject to the terms of this decision. *ESSM §§ 2141, 2339 and 2342*.

14. The Respondent functionally applied its policy so that the complex issues of this particular case could be fully vetted through the administrative processes. The evidence developed during the Administrative Hearing and Agency Appeal Review processes showed that the purpose of most of the claimed resource transfers, under the unique and specific circumstances of this particular case, were exclusively for a purpose other than to qualify the Petitioner for Medicaid Nursing Home benefits and that most previous care had not been provided for free. These policy exceptions are subject to the specific facts in each particular case that may necessitate a full administrative review. The evidence also was sufficient to find that the two oral personal care contracts between the Petitioner and her two sons were valid in this singular case. The complexities of the components and the evidence presented related to this particular case are such that the Conclusions of Law found herein apply only to the very specific facts and circumstances of this case.

15. After a detailed review of the record in this matter, all documents and exhibits submitted by both parties as part of the OSAH Administrative Hearing and the DCH Agency Appeal Review processes, as well as the relevant state and Federal statutes, Rules, Regulations, guidelines and policies, the undersigned hereby incorporates herein and adopts the Conclusions of Law 1, 2, 3, 4, 6, 7 and 8 as set forth in the Initial Decision dated July 16, 2009.

16. The Respondent is correct that current policy (issued in May 2009) requires such personal care agreements to be in writing; otherwise the resource transfer will be impermissible. The primary events of this particular case predate the effective date of the current policy; therefore, under prior policy it is possible for an oral contract to be valid so that in some limited cases, certain resource transfers were permissible. Not all oral or even written contracts are sufficient under the prior policy to avoid the transfer of resources penalty. Likewise, not all written contracts under the current policy are sufficient to make every transfer permissible. Each contract under the prior and current policies must be reviewed on its own merits. In this particular case, both Danny Fossett and Frank Fossett kept extensive records that are contemporaneous with the initial implementation of each oral agreement. The extensive and precise documentation of expenditures kept by both brothers lends considerable credibility to the validity of the terms of the oral contracts as described in the two affidavits. The affidavits of Danny and

Frank Fossett by themselves would not have been sufficient to affirmatively declare the terms of the two agreements to be binding as stated. On their face with no other substantial method of verification such as the detailed expenditure records, the affidavits could be considered to be self-serving and inadequate to meet the requirements of the prior personal service contracts policy provisions and other exceptions to applying a transfer of resources penalty.

17. The payments made to Danny Fossett under the terms of the two oral agreements between Eva Mae Fossett, Danny Fossett and Frank Fossett relating to renovations to the home of Danny Fossett for the benefit and care of the Petitioner and the payments actually made (not to exceed \$200 per week, plus reimbursement for expenses directly related to the Petitioner's care) are not impermissible transfers. Since the Initial Decision is unclear as to the computation of the expenditures considered being permissible and those that were considered to be impermissible, those payments are to be documented by the Petitioner and recalculated by the Respondent to be applied in accordance with this final decision.

18. Payments incurred or made to Frank prior to December 1, 2008 for the purchase of items for the health and well-being of his Mother's are generally permissible expenditures. Normally, reimbursement of gasoline expenditures for Frank to drive to Danny's house would not be permissible transfers. However, the circumstances of this case as shown by the record indicate that Mrs. Fossett wished to remain independent as long as possible. She did not want to become a financial burden on her children. It is reasonable that Mrs. Fossett would want her son's travel expenses to be reimbursed whenever he came to visit for the purpose of providing healthcare for her. The totality of the facts in this case leads to this possible conclusion, even though local respite caregivers clearly were available to assist Danny and Margaret Fossett. However, since the recorded testimony of the witnesses is indiscernible, if the Petitioner cannot show that she reimbursed Frank for gas prior to moving into Danny's home, then the expenditure for an item such as gasoline would be an impermissible transfer. These expenditures will need to be reviewed by the Respondent and recalculated accordingly.

19. Payments made on behalf of the Petitioner from her resources that exceed 25 percent to any person or entity for taxes, utilities or repairs to the Petitioner's residence after November 30, 2008 are to be considered as impermissible transfers. The Respondent is to recalculate the imposition of any transfer of resources penalty by apportioning at least three-quarters of any such expenditure as impermissible. The amount should be established in accordance with this decision.

20. Payments incurred or made on behalf of the Petitioner during the 60-month look-back period to any person or entity for taxes, utilities or repairs to the Petitioner's residence beginning on December 1, 2008 are to be considered as permissible transfers if the Petitioner can show she was making 100 percent of such payments from her own resources during the look-back period. If all or a portion of such payments were made by her children, then those payments should be apportioned accordingly beginning with the date the Petitioner no longer made the entire payments from her own resources. Again, the digital record being unclear will necessitate a review and recalculation by the Respondent in accordance with this Decision.

21. The payments made for the two appraisals of the Petitioner's residence were not related to the health of the Petitioner. Apparently, one appraisal was made upon the death of the adult daughter for the purposes of establishing property values for estate purposes. The other appraisal may have been made for the purpose of disputing the tax valuation of the jointly owned residence. The appraisal dated December 2008 in the amount of \$275.00 was made after the Petitioner was no longer residing in the property. The record contains two copies of one appraisal rather than copies of two separate appraisals. Regardless, the expenditures made for the two appraisals are to be allocated as one-fourth being a permissible payment on behalf of the Petitioner. This will require a review and recalculation by the Respondent in accordance with this Decision.

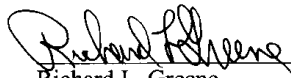
22. Mrs. Fossett's children went to great lengths to care for their Mother and to keep her out of a skilled nursing home until such a level of care was absolutely necessary. Even if certain expenditures are found to be impermissible after further review by the Respondent in accordance with this decision, there are numerous other expenditures in the record that were not directly addressed in either the Respondent's or the ALJ's decisions that may qualify as permissible expenditures. Those expenditures should be reviewed by the Respondent to determine the appropriateness of whether the expenditures are permissible transfers and/or qualify as an incurred medical expense that can be used to offset the denial of coverage for the month of January 2009 or other transfers found to be impermissible.

23. The various recalculations required of the Respondent in accordance with this decision perhaps would not have been necessary if the digital recording had been of a better quality or if the Respondent would have followed the instructions of ALJ Miller for the case to have been "REMANDED for a re-determination of the transfer penalty" rather than first filing for this Agency Appeal Review.

V. DECISION

Based on the foregoing, both the decisions of the Respondent and the Initial Decision of the ALJ are MODIFIED, subject to the review and recalculations as instructed in this Final Administrative Decision. If the Petitioner elects to appeal this decision without the recalculations being remanded to the Respondent, then the Petitioner should so notify the Respondent and this Agency Reviewer and file her appeal within thirty days of service of this Final Decision upon the Petitioner as set out in the attached "Notice of Final Administrative Decision", "Right of Appeal". If the Petitioner elects to permit the case to be returned to the Respondent for review and recalculation, then this Agency Reviewer retains jurisdiction over this proceeding to aid the parties in resolving points in dispute and explicitly to permit the Petitioner to seek an agency appeal of the case after the review and recalculations. In that instance, a new Final Decision will be issued by the Department and the Petitioner will have retained all rights of appeal of that new decision to a Superior Court as permitted by law. If the Petitioner elects to accept the Respondent's recalculations, then Petitioner should forthwith notify the Respondent and this Appeal Reviewer that the matter has been resolved.

SO ORDERED, this November 17, 2009.


Richard L. Greene
Agency Appeal Review Officer
Georgia Department of Community Health
Designated Representative of
Commissioner Rhonda M. Medows, M.D.

**GEORGIA DEPARTMENT OF COMMUNITY HEALTH
OFFICE OF THE COMMISSIONER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing Notice of Final Administrative Decision, Right of Appeal and Final Administrative Decision on all parties by depositing a copy of same in the United States Postal Service mail, First Class or Certified postage properly affixed to the addresses of the parties or by hand delivery if so noted, each as shown below:

FOR PETITIONER: (USPS First Class to Mr. Frank Fossett. First Class and certified mail to Counsel)

Mr. Frank S. Fossett, Jr., POA for
Mrs. Eva Mae Fossett
162 Morrison Campground Road
Rome, Georgia 30161-7736

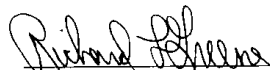
Mrs. Eva Mae Fossett
C/O Mr. David L. McGuffey, Esquire
105 North Pentz Street
Dalton, Georgia 30722-1203

FOR RESPONDENT: (USPS First Class mail for Caseworker and hand delivery to Counsel)

Ms. Carol Crow, Caseworker
Whitfield County DFCS Office
P. O. BOX 1203
Dalton, Georgia 30722-1203

Ms. Lynnette Rhodes, Esquire
Department of Community Health
Legal Services Section
2 Peachtree Street, 40th Floor
Atlanta, GA 30303

November 17, 2009
Date


Richard Greene