

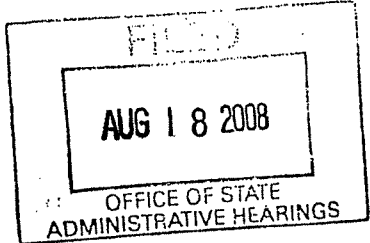
BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[REDACTED]
Petitioner,

v.

DIVISION OF FAMILY AND
CHILDREN SERVICES, GEORGIA
DEPARTMENT OF HUMAN
RESOURCES,
Respondent.

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: Docket No.: OSAH-DFCS-NH-
: 0831918-76-Woodard
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: Agency Reference No.: 777036586
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INITIAL DECISION

I. Introduction

The issue in this case is whether the Houston County Department of Family and Children Services ("DFCS") correctly denied Petitioner's application for Medical Assistance Only ("MAO", or "Medicaid") based on the funds contained in two Irrevocable Trusts created by Petitioner on or about February 2, 2000. DFCS determined that the combined value of the corpus of funds held in both trusts was approximately \$64,000, which exceeded the Medicaid resource limit. Petitioner asserts that according to the language of the trust documents and the provisions of state Medicaid policy regarding such trusts, the principal held in the irrevocable trusts is not an available resource to the Petitioner.

A hearing was held on July 16, 2008 at the Houston County Government Annex, Warner Robins, Georgia. Petitioner was represented by [REDACTED] Attorney at Law, The Pollan Law Firm, Atlanta, Georgia. Appearing on behalf of Respondent was [REDACTED] Regional ABD-Economic Support Administrator, DHR Division of Family and Children Services; and [REDACTED], Medicaid Eligibility Supervisor, Houston County DFCS.

For the reasons set forth below, I AFFIRM DFCS' determination that the value of the corpus held in the two irrevocable trusts is an available resource for purposes of determining her Medicaid eligibility.¹

II. Findings of Fact

1. Petitioner is a resident of Summerhill, a long-term care nursing facility in Perry, Houston County, Georgia. On or about April 21, 2008, an application for Medicaid was filed on her behalf by her daughter, [REDACTED]. This application was evaluated under the "Nursing Home" category of Medicaid.

2. [REDACTED] provided DFCS with copies of two trust documents, "The [REDACTED] Irrevocable Trust" and "The Second [REDACTED] Irrevocable Trust," both created on February 2, 2000. Petitioner is named as the "Settlor" of both trusts, as well as a co-trustee along with [REDACTED]. [REDACTED] verified that the total value of the two trusts at the time of application for Medicaid was \$64,146.00.

3. Article I of both trusts states in full as follows:

(a) During the lifetime of the Settlor, the Co-Trustees shall hold and maintain the Trust Estate, including all additions thereto, and apply for the benefit of Settlor, or accumulate, as the Settlor may direct, all of the net income and so much of the principal as the Settlor may direct, all of the net income and so much of the principal as the Settlor shall request in writing delivered to the Co-Trustees; provided, however, that in the event Settlor shall become disabled or incapacitated or enters a long-term care facility (for the purpose of this definition, indefinite confinement in a long-term care facility or the certificate of two licenses physicians certifying as to the mental or physical disability or incapacity of Settlor shall be conclusive)("Incapacitated Settlor"), any Co-Trustee may not distribute any principal to such Incapacitated Settlor and may distribute from income for the benefit of such Incapacitated Settlor, in the Trustee's sole discretion, amounts only for supplementary, non-Medicaid covered items and services, but may continue to distribute from income and principal for the benefit of the non-Incapacitated Settlor such amounts as the co-Trustee, in his or her sole

¹ At the conclusion of Respondent's evidence, Petitioner's counsel moved for involuntary dismissal. This motion is denied under OSAH Rule 616-1-2-.35, as Respondent did not bear the burden of proof.

discretion, deems needful and desirable for his or her maintenance and support keeping in mind the income which may be available to or for her from any source.

(b) The income and principal of this trust is to be used to supplement, and not supplant, any benefits or services to the Settlor, beneficiary or beneficiaries of this Trust who may be entitled by reason of age, disability or incompetence from Federal, State or local government entities.

(c) If the Settlor, beneficiary or beneficiaries of this Trust enter a nursing home or medical institution for which payments could be made under Medicare and/or Medicaid programs, then that beneficiary's right to income or principal of this Trust shall lapse during the period in which Medicare and/or Medicaid payments could be made.

4. DFCS determined that the corpus of the trust was a resource available to Petitioner, which caused her to exceed the Medicaid resource limit of \$5,000.00. [REDACTED] appealed this adverse action, and an evidentiary hearing was conducted.²

5. Petitioner emphasized during the hearing that there have been no assets transferred into either trust within the five years prior to the application for Medicaid. There has been no income distributed from the trusts since Petitioner has resided in the Summerhill long-term nursing care facility.³

III. Conclusions of Law

1. Since this matter involves denial of an application for public assistance benefits, the burden of proof rests on the Petitioner, however, both Petitioner and Respondent bear the burden of proof as to any fact, asserted by them, if the proof of said fact is essential to their case or defense. *O.C.G.A. § 24-4-1, OSAH Rule 616-1-2-.07(1)(d)*. At the hearing, the Administrative Law Judge required the Respondent to present its case first, but this

² Houston County DFCS was advised by the State Policy Unit in an email message dated April 29, 2008 that it should apply the irrevocable trust policy found in Section 2237-3 of the *Manual*. DFCS was instructed that "Any money generated by the trust will be countable income to the AR and the principle/corpus of the trust from which it is possible to make disbursements will be a countable resource."

³ Petitioner emphasized that there have been no distributions of trust income or principal to Petitioner since she entered the facility, and that there have been no deposits of Petitioner's assets into the corpus of either trust within the past 60 months. If the ALJ concluded that the resources in the two trusts were not considered resources under the applicable Federal statute and the State Medicaid policy manual, then these

did not shift the burden of proof from the Petitioner to the Respondent. The standard of proof is preponderance of the evidence. *O.C.G.A.* § 50-13-15(1), *O.C.G.A.* § 24-4-3, OSAH Rule 616-1-2-.21(4).

2. The Medical Assistance Only Program (“Medicaid”) is jointly funded by the Federal government and the various states. The Federal enabling statute governing Medicaid is found at 42 U.S. Code § 1396 *et seq.* In Georgia, the Department of Community Health has overall authority over the administration and funding of the Medicaid program. Administration of the program at the local county level is delegated to the Department of Human Resources (DHR), Division of Family and Children Services. DHR has issued guidelines for use by DFCS in the *Economic Support Services Manual (Manual), Volume II.*

3. Among the factors DFCS considers to determine if an individual is eligible for Medicaid is the amount and availability of the individual’s resources. 42 U.S. Code § 1396a(a)(10); *Manual*, Section 2300. According to Appendix A of the *Manual*, the resource limit for a person residing in a nursing facility is \$5,000.00.

4. Treatment of resources held in trust accounts is governed by U.S. Code § 1396p(d), and *Manual* Sections 2336-2338. 42 U.S. Code § 1396p(d) (2) states as follows in pertinent part:

(B) In the case of an irrevocable trust—

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could made shall be considered resources available to the individual....

5. *Manual* Section 2337 titled “Trust Property- OBRA ‘93” provides State guidelines for the treatment of trusts created on or after August 11, 1993. The “Policy Statement” for

factors would be significant to a determination if Petitioner should incur a transfer of resources penalty under 42 U.S. Code § 1396p(c).

this section states that for trusts created by the Medicaid applicant or recipient, or by persons acting on their behalf, "the corpus of a trust is either (1) a resource available to the A/R [applicant / recipient], or (2) is subject to the transfer of resources penalty. Disbursements from the trust are countable income." Irrevocable trusts are specifically dealt with in Section 2337-3, which states in pertinent part as follows:

Count any money generated by the trust as income to the A/R, whether or not received by the A/R.

Count any portion of the corpus or principal of an irrevocable trust from which it is possible to make a disbursement to the A/R as a resource available to the A/R.

6. The language contained in 42 U.S. Code § 1396p(d)(2)(B)(i) holds that the corpus of an irrevocable trust must be counted as income to a Medicaid applicant / recipient "if there are *any circumstances* under which payment from the trust could be made to or for the benefit of the individual...." (Emphasis added by the ALJ). *Manual* Section 2337-3 states that DFCS should "Count any portion of the corpus or principal of an irrevocable trust from which it is *possible* to make a distribution to the A/R as a resource available to the A/R." (Emphasis added by the ALJ).

7. Article I, Paragraph (a) of the two trusts states that that if Petitioner (Settlor) enters a long-term care facility, such as Summerhill, then the Trustee cannot distribute any principal to Petitioner. Article I, Paragraph (c) states that if Petitioner enters a nursing home for which payments could be made under Medicaid, then Petitioner's right to principal and income from both trusts shall lapse during the period when Medicaid payments could be made. The choice to enter a nursing facility that accepts Medicaid is a voluntary one that can be made by Petitioner or her family. Petitioner is free to leave Summerhill⁴ and enter another type of residence, which could include: (1) a nursing facility that does not accept Medicaid; (2) a personal care home; or (3) the home of a family member or her own homeplace. If any such option were to be exercised, then the provisions of Article I, Paragraphs (a) and (c) that prohibit distribution or income from the two trusts would not be triggered, and Petitioner's access to a distribution from the

⁴ Georgia's Long-Term Care Patient Bill of Rights, *Ga. Comp. R. & Regs. 290-5-39-.01 et seq.* guarantees freedom of a resident to voluntarily leave a long-term care nursing facility.

principal or interest in both trusts would be allowed. Therefore, the “any circumstances” language of the Federal statute and the “if possible” standard found in State Medicaid policy require that the corpus of the two trusts be considered an available resource.

IV. Decision

It is the Initial Decision of the administrative law judge that the funds held in “The [REDACTED] Irrevocable Trust” and “The Second [REDACTED] Irrevocable Trust” must be considered an available resource to Petitioner. As the value of these funds exceeds the Medicaid resource limit, DFCS’ denial of Petitioner’s application for Medicaid is AFFIRMED.

SO ORDERED, this 18th day of August 2008



M. PATRICK WOODARD, JR.
Administrative Law Judge