

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

[REDACTED]

APPEAL NO. 11F-08633

PETITIONER,

Vs.

CASE NO. 1353357449

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on December 13, 2011 at 11:42 a.m.

APPEARANCES

For the Petitioner: [REDACTED] daughter to the petitioner.

For the Respondent: [REDACTED] district legal counsel

STATEMENT OF ISSUE

The petitioner is appealing the amount of her Institutional Care Program (ICP) Medicaid patient responsibility. The petitioner's daughter is seeking to have the petitioner's income available to pay the mortgage obligation due to a trust which includes the real property.

PRELIMINARY STATEMENT

Petitioner was not present.

Appearing as witnesses for the respondent were [REDACTED], supervisor and [REDACTED] Economic Self-Sufficiency Specialist.

The notice of Case Action was dated July 21, 2011 and the petitioner requested an appeal on November 2, 2011. However, prior to the November 2011 request, the petitioner called the Department on July 29, 2011 to request an appeal; this request was not forwarded to the Office of Appeal Hearings. The respondent did not object to this hearing request being timely.

The record was held open until 5:00 p.m. on December 16, 2011 to allow time for the petitioner and respondent to submit evidence. Evidence was received and entered as the Petitioner Exhibit 1 and Respondent Exhibit 3.

FINDINGS OF FACT

1. The petitioner's daughter applied for Institutional Care Plan (ICP) Medicaid benefits for the petitioner on June 6, 2011. There was a previous ICP application in February 22, 2011 however, she was not yet placed in the nursing home.

2. At the time petitioner's daughter and her children ([REDACTED] and [REDACTED]) moved in with petitioner, \$59,000 of petitioner's grandchildren's money was used to invest in petitioner's mortgage (the children were minors at that time). In turn, petitioner chose to establish a trust agreement to protect the grandchildren's investment and provide a home for them. The real property is in the trust. The Department stipulates this is an irrevocable trust based on the trust law in

1996. Petitioner established herself and her daughter as trustees. Petitioner retained 56 percent of the shares of the trust corpus and the grandchildren were given the remaining 44 percent. Petitioner intended to provide for the future expenses in connection with the residence and had that included in the trust language as the grandchildren invested money into the home. The petitioner's daughter had been paying the mortgage payments through a joint account owned by herself and the petitioner. Both her Social Security income and her mother's retirement income went into this account. Petitioner's daughter believes the trust was not set up to deceive the Department, as the petitioner was healthy in 1996 and was not expected to live in a nursing home. Petitioner now has Alzheimer's disease.

3. The petitioner's grandchildren [REDACTED] and [REDACTED] prepared a letter for the Department on December 1, 2011. Part of the letter states:

...The trust was created for us and my mother for we had invested money into the trust and in no way would we have never known that my grandmother would end up in a nursing home. The trust states she must pay all expenses and that was the way she set it up and she would not take the money we invested without the trust.

4. The petitioner's daughter believes that she is entitled to use the petitioner's retirement income to pay the mortgage according to the trust agreement. The petitioner's daughter believes the paragraphs in the trust at sections 5.A. and 7.F. directs such. Section 5.A. states:

She shall use the funds received from or on behalf of [REDACTED] and [REDACTED] and other funds of hers to entirely satisfy a mortgage presently encumbering the real property described above; said mortgage is dated September 21, 1994, and secures an indebtedness in the initial sum of \$59,950.00, and is now held (or serviced) by Lomas Mortgage, USA.

Section 7.F. of this trust states,

To complete, extend, modify or renew any loans, notes, bond, mortgages, contracts or other obligations which the trust may owe or to which the trust may be party or which may be liens or charges against the trust estate, although it may not be liable thereon, in such manners as the trustee may deem advisable; to pay, compromise, compound, adjust, submit to arbitration, sell or release any claims or demands of the trust estate against others or of others against the trust estate as the trustee may deem advisable, including the acceptance of deeds of real property in satisfaction of bonds and mortgages, and to make any payments in connection therewith which the trustee may deem advisable.

5. The joint bank account petitioner's daughter referred to is where petitioner's U.S. Treasury check is deposited in the net amount of \$1513.82. The petitioner's gross monthly income consists of \$1886 in Federal Retirement benefits. Petitioner agrees the trust did not require her income to be put into the checking account. This account is not identified as a trust account. The Department requested for the petitioner's daughter to provide proof that the bank account was assigned to the trust; none was received. It is the respondent's conclusion that the bank account where the petitioner's retirement benefits are deposited is not included in the trust. The Department believes the petitioner's retirement income that is deposited into the bank account is considered to be available and must be used towards the calculation of the petitioner's patient responsibility for ICP Medicaid eligibility.

6. Petitioner granted her daughter a limited and specific power of attorney on April 11, 2011 stating, "Said Agent shall have authority and the power to undertake and perform only the following acts on my behalf: Mortgage, Property, Finances, [REDACTED] [REDACTED] Trust..."

CONCLUSIONS OF LAW

7. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Fla. Stat § 409.285. This order is the final administrative decision of the Department of Children and Families under § 409.285, Fla. Stat.

8. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056.

9. In accordance with Fla. Admin. Code § 65-2.060 (1), the burden of proof was assigned to the petitioner.

10. The issue of this case is whether or not the Department should require petitioner to use her income to pay for her care in the nursing home while Medicaid pays the balance of the vendor payment not paid by petitioner. If the Department does not consider her income, Medicaid would pay the entire monthly cost of her care and the family would have the income to assist with the mortgage payment.

11. The Department agrees that the irrevocable trust instrument language does require petitioner to pay expenses of the home. However, the trust instrument language did not irrevocably assign petitioner's income to the trust; petitioner still owns her income and it is available to her. The Department's position is that this situation is no different from other situations without a trust where a homeowner goes into the nursing home and her income must be used to pay for her care; the family in the community may have the same dilemma of how to make the mortgage payment without that individual's income. The Department believes its policy program manual is clear on the

income usage and it must be counted. In the alternative, the Department argues that at a minimum, 56% of her income should be available to her because she can no longer live there and she has 56% ownership in the home.

12. The petitioner's daughter's position is that the income is not a part of the trust and because the home is in the trust and the language of the trust requires petitioner to make mortgage and other necessary payments, the income must be used for that purpose. She does not believe the income has to be a part of the trust as the language is clear as to who is to make the payments and this is in return for her grandchildren's lump sum investment.

13. The undersigned considered the testimony, evidence and the following law and Departmental policy:

14. The Department's Program Policy Manual (Department's Manual), 165-22, section 1640.0303.03 Trusts Ownership (MSSI, SFP) defines what a trust is and states:

A legally binding verbal or written trust is a right of property held by one party for the benefit of another (the beneficiary). The beneficiary of a trust does not hold legal title, but has an equitable ownership interest in the property. According to the terms of the particular trust involved, the beneficiary must be the individual designated to receive income from the trust either directly or through the trustee. Generally, an individual who is appointed a trustee cannot use any of the funds in the trust for personal benefit. In this situation, the trust is not an asset to the individual acting as the trustee.

15. The Department's Manual, 165-22, explains the ICP Program and states in part:

2040.0801.05 Institutional Care SSI Eligible Except for Income
(MSSI)
Any Florida resident who has been determined eligible for "SSI

Eligible Except for Income" is entitled to Florida Medicaid. Any Florida resident who would be eligible for SSI in the institution except for the amount of their income and who meets all additional eligibility criteria under the Institutional Care Program is also entitled to full Medicaid benefits.

The initial date of entitlement for ICP Medicaid benefits is the first day of the month in which the individual files an application, provided the individual meets all factors of eligibility for that month, including placement in a Title XIX facility...

16. Fla. Admin. Code 65A-1.701, Definitions, states in relevant part:

(16) Institutional Provider Payment: The payment made by the Medicaid program to a Medicaid licensed nursing facility for the medical care of eligible individuals...

(17) Institutionalized Individual: An inpatient in a nursing facility, hospital swing bed, hospital distinct-part skilled nursing facility, or intermediate care facility for the developmentally disabled for whom Medicaid payments are paid based on the level of care provided...

(23) Patient Responsibility: That portion of an individual's monthly income which the department determines must be considered as available to pay for the individual's institutional care...

17. The Department's Manual, 165-22, section 0240.0102, Program Overview

(MSSI, SFP), states in part:

SSI-Related Medicaid provides medical assistance as defined by policy (see below) to certain groups of individuals. Although Medicaid is run by the state, the state is given federal matching funds for the program and must follow certain federal requirements in order to receive these funds.

SSI-Related Medicaid Programs include:

1. SSI Eligible Individuals (SSI-DA),
2. Institutional Care Program (ICP)...

However, the basic eligibility requirements for these programs are still based on SSI policy.

18. The above Department manual passage explains that the basic eligibility requirements for ICP Medicaid are based on SSI policy. SSI policy on how unearned income is counted is found in the Code of Federal Regulations at 20 C.F.R. §416.1123

and unearned income that is not counted is found at section §416.1124. These regulations set forth that unearned income is counted at the earliest point it is received, credited to the individual's account or set aside for its use. The first \$20 is not counted as it is a general exclusion. An example of unearned income not counted is income received and used to fulfill an approved plan to achieve self-support if the individual is blind or disabled and under age 65. However, §416.1124 does not list an exclusion for income when a trust agreement requires that the trustee use "other funds of hers to entirely satisfy a mortgage presently encumbering the real property" or any other exclusion for similar circumstances.

19. Fla. Admin. Code 65A-1.713 (3) SSI-Related Medicaid Income Eligibility Criteria reiterates what the federal regulation sets forth and states, "When Income Is Considered Available for Budgeting. The department counts income when it is received, when it is credited to the individual's account, or when it is set aside for their use, whichever is earlier."

20. The Department's Manual, 165-22, states in relevant parts:

1840.0106 Availability of Income (MSSI, SFP)

Some types of income are readily available to the individual and must be included; however, the individual may have limited or no access to income in certain situations. Some unavailable income may still be included as income.

1840.0108 Available Income (MSSI, SFP)

Income must be available to meet the SFU's needs to be considered, except in the case of lump sum income. Generally, income is considered available when it is actually available and/or when the individual has the legal ability to make the income available.

21. The Department's Manual, 165-22, section 1840.0109.02 Determining Ownership of Income (MSSI, SFP) states, "The individual who has title to the proceeds

of a payment or property is the individual who 'owns' the income. If the income is received by an individual's legal representative or guardian, the individual still owns the income."

22. The Department's Manual, 165-22, section 1840.0905 Annuities, Pensions and Retirement Income (MSSI, SFP), states, "Annuities, pensions, retirement or disability payments are all included as unearned income."

23. The Department's Manual, 165-22, sets forth the ICP income procedures as follows:

2640.0115.02 Determining Eligibility Based Upon Income (MSSI, SFP)

The countable income of an individual or couple is subtracted from the appropriate income limit to determine eligibility based on income. For the ICP, HCDA, Hospice and HCBS, the gross income is used to determine eligibility.

2640.0116 Eligibility Tests (MSSI)

The policy in passage 2640.0116 through 2640.0125.04 applies only to ICP, institutionalized MEDS, Hospice, and the Assisted Living waiver. Specific policy may only apply to one or several of the above programs and will be so noted in the appropriate sections.

Any Medicaid eligible individual (except Medically Needy) who meets additional Medicaid institutional criteria is eligible for institutional care services. Eligibility for ICP, institutionalized MEDS, Institutionalized Hospice, Hospice, or Assisted Living waiver entitles the individual to the appropriate additional Medicaid services of institutional vendor payment...

2640.0117 Patient Responsibility Computation (MSSI)

The following policy applies to ICP, institutionalized MEDS...

After the individual is determined eligible, the amount of monthly income to be applied to the cost of care (patient responsibility) is computed as follows:

Step 1 - Deduct the personal needs allowance and one half of the gross therapeutic wages up to the maximum of \$111 if applicable. Refer to 2640.0118 for information regarding the personal needs allowance.

Step 2 - Deduct the community spouse income allowance, family member allowance, or the dependent's allowance, if applicable.

Step 3 - Consider protection of income policies for the month of admission or the month of discharge, if appropriate (refer to 2640.0123) for the following programs:

1. Institutional Care Programs, (including institutionalized MEDS and institutionalized Hospice) - the month of admission to and discharge from a nursing facility,
 2. Assisted Living Waiver - the month of admission to and discharge from an ALF,
 3. PACE and Long-Term Care Diversion - the month of admission or discharge from a nursing home facility or from an assisted living facility.
- Step 4 - Deduct uncovered medical expenses as discussed in passages 2640.0125.01 through 2640.0125.04.
The balance is the amount of the patient responsibility.

24. According to the above authorities, for the ICP Medicaid program, the Department considers income when it is available to meet the individual's needs and when it is actually available or when the individual has the legal ability to make the income available. The above policy states that retirement payments are included income for the SSI-Related Programs which includes ICP Medicaid. The above policy also states that an individual who has title to the proceeds of a payment is the individual who owns the income and if the income is received by an individual's legal representative or guardian, the individual still owns the income. The evidence did not show that the retirement income is a part of the trust at issue. The evidence did not show that petitioner no longer has the legal ability to access her retirement income.

25. After a thorough review of the facts of the case, the evidence and controlling authorities, the undersigned concludes that the ICP Medicaid program does not recognize a deduction for a financial obligation such as a mortgage payment. There is no provision for the ICP eligible individual to continue to make her mortgage payment once entering the nursing home, in this situation. The petitioner failed to meet her burden of proof that the Department incorrectly included her income to determine her

patient responsibility for the ICP Medicaid Program.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is denied.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this _____ day of _____, 2012,

in Tallahassee, Florida.

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