

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

In the Matter of)
)
 S D) OAH No. 17-0970-MDE
) Agency No.
_____)

DECISION

I. Introduction

S D participates in the Medicaid waiver program. The Division of Public Assistance calculated his cost of care liability based on income from a structured settlement received by a special needs trust benefitting Mr. D. Because those payments are income to the trust, not Mr. D, the division’s decision is reversed.

II. Facts

In 1993, S D suffered a traumatic brain injury. A lawsuit followed. The settlement of the lawsuit provided for establishment of a special needs trust to benefit Mr. D. The trust corpus consists of settlement proceeds from the Great Divide Insurance Company, including monthly structured settlement payments of \$3,545 from an annuity issuer payable directly to the trust. The purpose of the trust “is to provide a discretionary, spendthrift trust, to supplement public resources and benefits when such resources and benefits are unavailable or insufficient to provide for the Beneficiary’s special needs.” The trust is irrevocable.¹

Mr. D works at No Name Job 1 and has a seasonal job with No Name Job 2. Based on his work history and payment into the social security system, he also receives monthly benefits from the federal Social Security Disability Insurance (SSDI) program.²

Mr. D receives Medicaid home and community-based waiver services. Based on an application filed in May 2017, the Division of Public Assistance (division) calculated Mr. D’s cost of care liability at \$3,726 for June 2017, \$3,501 for July 2017, and \$3,603 for August 2017 and ongoing.³ The division based its calculation on Mr. D’s income from his employment and

¹ Exhibit 6.1 - 6.2; Testimony of Q.

² Exhibit 2.14.

³ Exhibit 2; Exhibit 5 - 5.2.

No Name Job 1 and No Name Job 2, on his monthly SSDI payments, and \$3,545 in annuity income.⁴

E Q, Mr. D's mother, guardian, and co-trustee of the S D Special Needs Trust, appealed the division's cost of care decision.⁵ A telephonic hearing was held on November 28, 2017. Ms. Q represented Mr. D. Sally Dial, a Fair Hearing Representative with the division, represented the division.

III. Discussion

The division has already determined that Mr. D is eligible to participate in the Medicaid program; the issue in this case is whether the division has correctly calculated Mr. D's cost-of-care liability. In challenging the division's cost of care decision, Ms. Q raised two issues. First, she argued that funds in the irrevocable special needs trust are inaccessible to Mr. D and should not have been counted as income to Mr. D. This argument will be addressed below. Second, Ms. Q argued that the division did not provide adequate notice of its decision because it used an old address when it mailed the notice.

At the hearing, Ms. Q stated that she had repeatedly requested that the division change its records to reflect the new mailing address, but that mail was still being sent to the old address. The division indicated that it had changed the address in its records, but that it may be necessary for Ms. Q to provide separate notice of the change of address to the Division of Senior and Disabilities Services. Because Ms. Q timely requested a fair hearing on the division's August 10, 2017 cost of care decision, she must have received actual notice of that decision, despite any issues with the mailing address used.⁶ Because Ms. Q received notice of the cost of care decision, and requested and received a hearing, the requirements of due process have been met despite the use of the old address. Therefore, the remainder of this decision will focus on whether the division was correct to include the annuity payments in Mr. D's monthly income for purposes of the cost of care calculations.

The only aspect of the division's cost-of-care calculations in dispute is the inclusion of the annuity payments going into the special needs trust each month as income to Mr. D. The division argued that the annuity payments to the trust should be counted as income to

⁴ Exhibit 5 - 5.2.

⁵ Exhibit 6.

⁶ Exhibit 5 - 5.2; Exhibit 6.

Mr. D because Mr. D is the beneficiary of the special needs trust, and because annuities are included in the definition of unearned income in the applicable regulations.

Under the long-term care Medicaid regulations, a recipient's cost-of-care liability is the recipient's total monthly income, less applicable disregards and allowances.⁷ There is no dispute about Mr. D's earned income, SSDI, disregards, or allowances. The only issue is whether the annuity payments should be counted as unearned income payments to Mr. D.

According to the division, the applicable definition of "income" is "any property, money, or service received by an applicant, together with the applicant's spouse under 7 AAC 40.240, which can be used, directly or indirectly to meet the applicant's need for food, clothing, and shelter."⁸ The related definition of "unearned income" specifically includes income from annuities.⁹ Thus, according to the division, because the annuity payments flowing into the trust are funds that can be used to benefit Mr. D, they should be counted as income. The division acknowledges that the funds in the special needs trust are not a countable resource for the purposes of determining Medicaid eligibility, but argues that different rules apply to counting income and calculating the cost-of-care liability.¹⁰

To evaluate this claim, we must look at both the special needs trust, and the surrounding regulatory framework. Under the state Medicaid regulations relating to the treatment of trusts, a trust funded by the proceeds of a court settlement of a lawsuit in which the recipient was a plaintiff is a trust created with the assets of the applicant.¹¹ The text of the trust document makes clear that this is a special needs trust under 42 U.S.C. § 1396p(d)(4)(A), funded by litigation proceeds.¹²

Under general principles of trust law, the trust is a separate legal entity from Mr. D, even though Mr. D is the beneficiary. The trustees must follow very specific limitations on the use of trust funds. At Mr. D's death, funds remaining in the trust will go first to reimburse the Medicaid program for expenditures on Mr. D's behalf.¹³

⁷ Exhibit 10 (7 AAC 100.554(a)).

⁸ 7 AAC 40.300(a)(1).

⁹ 7 AAC 40.300(a)(3).

¹⁰ See 7 AAC 100.606(b) ("A payment or deposit of an asset belonging to the applicant or recipient that is placed into the applicant's or recipient's special needs trust ... is not a countable resource for the purposes of determining Medicaid eligibility.")

¹¹ 7 AAC 100.600(e). See 7 AAC 100.600 - 7 AAC 100.619 relating to the Medicaid treatment of trusts.

¹² Exhibit 6.2 - 6.3.

¹³ Exhibit 6.22.

The division determines Medicaid eligibility for disabled individuals in part according to the eligibility regulations for the Adult Public Assistance (APA) program.¹⁴ The definition of income applicable to the cost-of-care liability calculation is that found in the Adult Public Assistance regulations, at 7 AAC 40.300. Income is defined as “property, money, or service received by an applicant which can be used, directly or indirectly to meet the applicant’s need for food, clothing, and shelter.”¹⁵ The division argues that the annuity payments should be counted because they benefit Mr. D indirectly. However, the annuity payments are not *received by* Mr. D. They are going into the trust. Therefore, they do not fit within the applicable definition of “income.” Furthermore, according to the division’s Adult Medicaid Long Term Care Manual, “A Special Needs Trust allow[s] the beneficiary to control the amount of both income and resources that are used to determine Medicaid eligibility. Only the payments made from the trust are countable income. Resources held in the trust are exempt while the trust is in place.”¹⁶ At the hearing, the division argued that this provision of the manual applied to eligibility determinations only, and not to post-eligibility cost of care calculations, and that this section therefore did not prohibit inclusion of the annuity payments to the trust as income for purposes of calculating the cost of care. However, the division did not cite a manual provision requiring different treatment of the annuity for purposes of cost of care. Because the regulations do not support the division’s interpretation, the division’s decision should be reversed.

IV. Conclusion

Accordingly, the division’s decision to include the annuity payments to the special needs trust in calculating Mr. D’s cost of care is reversed.

Dated: December 29, 2017.

Signed
Kathryn L. Kurtz
Administrative Law Judge

¹⁴ Exhibit 8 (7 AAC 100.400); 7 AAC 100.002(b), (d), and (e).

¹⁵ 7 AAC 40.300(a)(1).

¹⁶ Adult Medicaid Long Term Care Manual § 527.

Adoption

The undersigned, by delegation from 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 16th day of January, 2018.

By: Signed
Name: Kathryn L. Kurtz
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]