

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES
DIVISION OF PUBLIC ASSISTANCE

SARAH PALIN, GOVERNOR

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June 24, 2009

[REDACTED]

Re: OHA Case #08-FH-382
Medicaid
Agency Case # [REDACTED]

Dear [REDACTED]:

This is in response to your request for a Director's review of [REDACTED] Medicaid fair hearing decision of April 27, 2009. Your appeal was received in my office on May 11, 2009. On June 11, 2009 I wrote and explained that, due to the complexity of the issues, additional time was needed to review the issues and make a decision. I sincerely appreciate your understanding of the need for me to have additional time to thoroughly review this case and issue my decision.

In your appeal, you asked for reconsideration of the Hearing Authority's decision to uphold our agency's action to count the \$1,275 Alaska Native dividend that was issued on behalf of [REDACTED] in July 2007, which was payable to her Special Needs Trust, in determining her post-eligibility cost of care contribution.

The prevailing argument presented at the hearing and in your appeal is that the Alaska Native dividend check that was payable to [REDACTED]'s Special Needs Trust is not legally available to meet her needs, thus it should not be considered as unearned income to [REDACTED] for post-eligibility purposes. You also asserted that the policy for counting this income is not supported in the Department's regulations and Medicaid policy manual.

Federal Medicaid regulations at 42 CFR 435.735 outlining cost-of-care determinations for individuals receiving home and community-based services support the hearing officer's decision by requiring state agencies to count a person's total income (including amounts disregarded in determining eligibility) in determining a person's cost-of-care liability. In addition, as stated in the fair hearing officer's decision, State Medicaid regulations at 7 AAC 100.554 provide that "[a] recipient's cost-of-care liability in any given month is the recipient's total monthly income, less any applicable disregards and allowances" The Division of Public Assistance's policy manual also supports the hearing officer's decision. Section 527 D of the

Division's Aged, Disabled and Long-Term Care Medicaid Eligibility manual provides the following guidance: "Use the income policy described for Qualifying Income Trusts for the treatment of income placed into a Special Needs Trust or Pooled trust if the income placed into the trust belongs to the beneficiary." Section 526 E. of the same manual provides that "[t]he amount of income going into a Qualifying Income Trust is added to any other income the beneficiary received in the month to calculate cost-of-care liability."

In regards to the issue surrounding the legal availability and assignment of [REDACTED]'s Alaska Native dividend, I find that these funds legally cannot be assigned (either revocably or irrevocably) to [REDACTED]'s Special Needs Trust. Therefore, the right to receive the dividend is hers. The Alaska Native Claims Settlement Act (ANCSA) prohibits the present or future assignment of the rights to dividends or distributions declared with respect to Settlement Common Stock except to another Native Alaskan or descendant of an Native Alaskan (43 U.S.C. 1606(h)(1)(B) and (C)). A Special Needs Trust is a separate legal entity from Ms. Cole, and assignment to the trust would make the trust the owner of the right to [REDACTED]'s dividends in direct violation of ANCSA. Therefore, [REDACTED]'s Alaska Native dividends cannot legally be assigned to her trust. The hearing authority's analysis and reliance upon *Reames v. Oklahoma* is directly on point: [REDACTED]'s Alaska Native distribution counts as income for her cost-of-care liability because she could not legally assign the distribution to the trust. Absent an assignment, the right to the distribution remains hers and that distribution is deemed to have passed through her hands. Dividends that exceed the annual \$2,000 income exclusion allowed under ANCSA are legally available to her and must be counted as income in her Medicaid post-eligibility cost-of-care determination.

I therefore affirm and incorporate by reference the Hearing Authority's April 27, 2009 decision that our agency was correct to count the Alaska Native Dividend check of \$1,275 [REDACTED] received in July 2007 as income in determining her contributions to her cost of care. This decision has been reached based upon a review of the hearing record, fair hearing exhibits, the Hearing Authority's decision, and applicable laws and regulations. This constitutes the final agency action. If for any reason you are not satisfied with this decision, you may appeal to the Superior Court within 30 days.

Sincerely,

Ellie Fitzjarrald
Director

Cc: [REDACTED], Assistant Attorney General
[REDACTED], Policy and Program Development
[REDACTED], Staff Development and Training
Case File
Hearing File

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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of)
)
 [REDACTED],) OHA Case No. 08-FH-382
)
 Claimant.) Division Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) receives Medicaid benefits from the State of Alaska. (Ex. 1) On May 16, 2008, the Division of Public Assistance (Division) sent the Claimant written notice she was required to make a payment of \$1,278.74 toward her cost of care (Cost of Care)¹ for the month of July 2008. (Ex. 2.1) The Claimant's conservator requested a fair hearing on May 28, 2008. (Ex. 3.0) This office has jurisdiction pursuant to 7 AAC 49.010.

Pursuant to the Claimant's conservator's request, a hearing was held on September 26, 2008. The Claimant did not attend the hearing. The Claimant's conservator, [REDACTED], the Public Guardian from the Office of Public Advocacy, attended the hearing in person and testified. [REDACTED] Esq. and [REDACTED], Esq., both with the Office of Public Advocacy, attended the hearing in person and represented the Claimant's conservator.

[REDACTED], Esq. and [REDACTED], Esq., both Assistant Attorney Generals, appeared in person at the September 26, 2008 hearing and represented the Division. [REDACTED], an Eligibility Technician III employed by the Division, attended the September 26, 2008 hearing and testified on behalf of the Division.

The record was held open after the September 26, 2008 hearing for post-hearing briefing, which was completed on January 23, 2009. Pursuant to the parties' request, post-hearing oral argument was held on February 17, 2009. [REDACTED], Esq. and [REDACTED], Esq., both with the Office of Public Advocacy, appeared in person at the oral argument on behalf of the Claimant's conservator. [REDACTED], Esq., Assistant Attorney General, appeared in person at the oral argument on behalf of the Division.

¹ "Cost of Care" is a Medicaid recipient's "co-pay," i.e. that portion of her medical costs not covered by Medicaid, which she is personally obligated to pay. See 7 AAC 100.552 – 554.¹

ISSUE

The Division sent the Claimant notice she was required to make a monthly payment of \$1,278.74 toward her Cost of Care for the month of July 2008. The Claimant argued the Division's calculation of her July 2008 Cost of Care payment was incorrect because it counted a June 30, 2008 \$1,275 Alaska Native corporate dividend as her income, when the Dividend check was issued payable to the Claimant's irrevocable trust and deposited into her irrevocable trust.² Accordingly, the issue is:

Was the Division correct when it counted the Claimant's June 30, 2008 \$1,275 Alaska Native corporate dividend as her income for Medicaid Cost of Care payment purposes?

FINDINGS OF FACT

1. The Claimant is a disabled individual under the age of 65, who receives Medicaid benefits from the State of Alaska. (Ex. 1) [REDACTED], the Public Guardian with the Office of Public Advocacy, is her court appointed conservator. ([REDACTED] testimony)
2. The Claimant is the beneficiary of an Irrevocable Asset Trust (Trust), created pursuant to 42 USC 1396p(d)(4)(A). (Ex. A) The Trust was created in December 2000; The Office of Public Guardian is the Trustee of the Trust. *Id.* The terms of the Trust provide that upon the Claimant's death, the Trust residue is payable to the State in reimbursement for Medicaid benefits paid by the State for the Claimant's benefit. *Id.*
3. The Claimant is a shareholder in an Alaska Native Regional corporation (Corporation). (Ex. B) She receives periodic dividends from the Corporation. (Ex. B) Beginning in December 2007, the Corporation began sending the Claimant's dividend checks to the Claimant's conservator. (Ex. B; Attachment 1 to Claimant's October 9, 2008 "Notice of Filing") The dividend checks were written payable to the Claimant's Irrevocable Trust; they were not written payable to either the Claimant or her conservator. *Id.*
4. There has been no formal assignment of the Claimant's corporate dividends to the Trust.³
5. On May 16, 2008, the Division sent the Claimant written notice she was required to make a payment of \$1,278.74 toward her Cost of Care for the month of July 2008, because she was due to receive \$1,275 in dividend income from the Corporation at the end of June 2008. (Exs. 2.1 – 2.2; Crowe testimony)
6. On June 30, 2008, the Claimant's Corporation sent the Claimant's dividend check to her conservator. (Attachment 1 to Claimant's October 9, 2008 "Notice of Filing") The dividend check was written payable to the Claimant's Irrevocable Trust; it was not written payable to either the Claimant or her conservator. *Id.*

PRINCIPLES OF LAW

² The Claimant is not challenging the Division's math. It is only challenging the counting of the \$1,275 as the Claimant's income.

³ Claimant's counsel stated on the record that there is no formal written assignment of the Claimant's dividends to her trust.

This case involves the question of whether or not the Division was correct when it counted the Claimant's June 30, 2008 \$1,275 Alaska Native corporate dividend as her income for Medicaid Cost of Care payment purposes. Because this case involves the Division making a change to the Claimant's financial obligations under the Medicaid program, the Division has the burden of proof⁴ by a preponderance of the evidence.⁵

The Alaska Medicaid regulations provide that funds placed in a recognized Medicaid trust (such as a Special Needs Trust) are not counted for the purposes of determining an individual's financial eligibility for Medicaid benefits. 7 AAC 100.606(a); 7 AAC 100.619(3). The requirements for a Special Needs Trust are contained in Federal Medicaid statute, 42 USC 1396p(d)(4)(A), as follows:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual . . . if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a state plan under this subchapter.

42 USC 1396p(d)(4)(A). Also See 7 AAC 100.604(a)(2); 7 AAC 100.612.

However, if a Medicaid recipient has countable monthly income, after applicable "disregards" (deductions), the Medicaid recipient is required to apply that countable monthly income towards paying her Medicaid provider. 7 AAC 100.552 – 554.⁶ This is called "Cost of Care." *Id.*

Alaska Native Corporation dividends that exceed \$2,000 per year are considered countable income to a Medicaid recipient. 7 AAC 40.300 - 320; 7 AAC 100.400(a)(16) – (19). "Income" is generally defined as "any 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." 7 AAC 40.300(a)(1); 7 AAC 100.400(a)(16).

The State Medicaid Manual is issued by the federal government. "It is an official medium by which the Health Care Financing Administration (HCFA) issues mandatory, advisory, and optional Medicaid policies and procedures to the Medicaid State agencies." State Medicaid Manual, Foreword §A. It "provides instructions, regulatory citations, and information for implementing provisions of Title XIX of the Social Security Act (the Act). Instructions are official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies." State Medicaid Manual, Foreword §B(1).

The State Medicaid Manual has the following provisions:

⁴ "Ordinarily the party seeking a change in the status quo has the burden of proof." *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

⁵ Preponderance of the evidence is the normal standard of proof in an administrative proceeding. *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). Preponderance of the evidence is defined as "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (5th Ed. 1979)

⁶ These Alaska Medicaid regulations are the Alaska implementation of the post-eligibility Cost of Care requirement contained in federal regulations 42 CFR 435.725, 733, 735, and 832, which are specifically referenced in State Medicaid Manual §3259.7(C)(5).

1. Trusts Established with Income. - - . . . When an exempt trust for a disabled individual is established using the individual's income, (i.e., income considered to be received by the individual under the rules of the SSI program), the policies set forth in subsection C for treatment of income used to create Miller trusts apply.

NOTE: The following policies assume that the income placed in the trust is the individual's own income, placed in the trust after he or she receives it. When the right to income placed in the trust actually belongs to the trust and not the individual the income does not count under SSI rules as income received by the individual.

The policies pertaining to treatment of income belonging to the individual include:

- Not counting for eligibility purposes income before it is placed in the trust;

* * *

- Application of post-eligibility treatment of income rules to income placed in the trust;

* * *

For a detailed discussion of how these policies apply to income placed in an exempt trust for a disabled individual, see subsection C.

State Medicaid Manual §3259.7(B)(1)

C. Miller-Type or Qualifying Income Trusts (QIT).--This type of trust, established for the benefit of an individual, meets the following requirements:

- o The trust is composed only of pension, Social Security, and other income to the individual, including accumulated interest in the trust; and

- o Upon the death of the individual, the State receives all amounts remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the individual under your State Medicaid plan. To qualify for this exception, the trust must include a provision to this effect.

NOTE: HCFA has interpreted §1917(d)(4)(B) of the Act as explained below to avoid reading it as a nullity. This interpretation applies to those situations in which an individual first receives income and then places it into a Miller trust. It does not apply to situations in which an individual has irrevocably transferred his or her right to receive income to the trust. Under SSI rules, this income is no longer considered to be the individual's income. As a result, a trust established with income the right to which has been transferred to the trust does not meet the requirements for exemption under this section, since the statute requires that a Miller trust be established using the income of the individual.

* * *

5. Post-Eligibility Treatment of Income. - - All of the post-eligibility treatment of income rules in 42 CFR 435.725, 733, 735, and 832, as well as §1924 of the Act, apply in cases involving Miller trusts, as follows.

* * *

b. Income Placed in a Miller Trust. - - Income placed in a Miller trust is income for SSI purposes although it is not counted as available in determining Medicaid eligibility. Thus such income is also subject to the post-eligibility rules.

State Medicaid Manual §3259.7(C).

ANALYSIS

This case presents a narrow issue: was the Division correct to count the Claimant's June 30, 2008 \$1,275 Alaska Native corporate dividend as her income for Medicaid Cost of Care payment purposes? The Claimant is not challenging the Division's math, i.e. the Cost of Care calculations. The Claimant's Medicaid eligibility is not an issue. There are no disputed factual issues.

The Claimant receives periodic dividends from an Alaska Native corporation. The Division counted the amount of the Claimant's June 30, 2008 Alaska Native corporate dividend as the Claimant's income for the purposes of calculating her Cost of Care payment.

The Claimant, through her court appointed conservator, argued that the Alaska Native corporate dividends should not be counted as her income because they do not pass through her hands. It is undisputed that neither the Claimant nor her conservator have access to the funds before they are placed in the trust because the Claimant's Corporation writes the check directly payable to the Claimant's special needs trust.

There is no assignment⁷ that irrevocably⁸ requires the Claimant's Corporation to issue the Claimant's dividends directly to the Claimant's special needs trust. The Claimant's conservator is her financial manager; he has the ability to receive and direct the disposition of her funds.⁹ Without an irrevocable assignment, the conservator could require the Claimant's Corporation to make the Claimant's dividend checks payable to the Claimant, to the Claimant's creditors, or otherwise direct the application of the Claimant's dividends.

The State Medicaid Manual, which provides the "official interpretations of the [Medicaid] law and regulations, and, as such, [is] binding on Medicaid State agencies"¹⁰ directs a conclusion that because the Claimant has not irrevocably assigned her corporate dividends to her trust, those dividends are properly countable as her income for determining the Claimant's Cost of Care obligation. The reasoning is as follows:

- 1) Miller Trust rules are applicable to Special Needs Trusts. State Medicaid Manual §3259.7(B)(1)
- 2) When an individual's income is placed in a Miller Trust (or Special Needs Trust), it is not counted for the purposes of determining Medicaid eligibility. State Medicaid Manual §3259.7(B)(1); State Medicaid Manual §3259.7(C)(5)(b).

⁷An assignment is the "transfer or making over to another of the whole of any property, real or personal . . . The transfer by a party of all of its rights to some kind of property, usually intangible property such as rights in a lease, mortgage, agreement of sale or a partnership." Black's Law Dictionary 109 (5th Ed. 1979)

⁸The term "irrevocable" is defined as "[t]hat which cannot be revoked or recalled." Black's Law Dictionary 744 (5th Ed. 1979)

⁹ See AS 13.26.165 and 13.26.280 for a description of when a conservator may be appointed and the powers of a conservator.

¹⁰ State Medicaid Manual, Foreword § B(1).

- 3) However, when an individual's income is placed in a Miller Trust (or Special Needs Trust), it is counted for the purposes of determining post-eligibility treatment of income, which includes determining whether an individual is liable for a Cost of Care payment. State Medicaid Manual §3259.7(B)(1); State Medicaid Manual §3259.7(C)(5) and (C)(5)(b).
- 4) In order for income placed into a trust not be considered for post-eligibility purposes, it must "actually belong[s] to the trust." State Medicaid Manual Note to §3259.7(B)(1). Income that is irrevocably assigned to the trust is not considered as the individual's income. State Medicaid Manual Note to §3259.7(C).

There are three relevant court decisions that reviewed the federal Medicaid statutes, the federal Medicaid regulations, and the State Medicaid Manual to reach the same conclusion: there must be an irrevocable assignment of the Claimant's income to her special needs trust,¹¹ in order for the Claimant's dividends to not be counted as income for Cost of Care purposes.

In *J. P. v. Div of Medical Assistance and Health Services*, 920 A.2d 707 (N.J. Super. Appellate Div., 2007), the New Jersey Court held that J.P.'s alimony payments could not be counted as her "income" for Cost of Care purposes because the alimony payments were placed directly into her supplemental needs trust by court order: "the right to receive the alimony has been irrevocably given to the trust by court order." *J. P.*, fn. 5 at 714.

In *Wong v. Daines*, 582 F.Supp.2d 475 (S.D. N.Y., 2008) the District Court held that because Mr. Wong's Social Security Disability Insurance payments passed through his hands prior to being deposited in his supplemental needs trust, they were required to be counted as income in the calculation of his Medicaid Cost of Care. *Wong* at 485.

In *Reames v. Oklahoma*, 411 F.3d 1164 (10th Cir., 2005), the Court of Appeals held that despite the fact Ms. Reames had effectively assigned her Social Security Disability check to her special needs trust by having the check directly deposited into the trust, her Social Security Disability payment was still countable as income for her Medicaid Cost of Care. The Court's reasoning in *Reames* was based on the fact that her income could only be sheltered "if the income [did] not pass through her hands" and the fact that Social Security payments were not legally assignable. *Reames* at 1171.

The holdings in *J. P.*, *Wong*, and *Reames* all demonstrate that the Division was correct to require the Claimant to make a Cost of Care payment because of her corporate dividends. *Reames* is on point because it involves, like the instant case, a de facto assignment of income. However, because the de facto assignment is not irrevocable, the income is countable to the Claimant for post-eligibility purposes.

The Division was therefore correct to count the Claimant's Alaska Native corporate dividend as her income, despite it being paid directly into her special needs trust. Because the Claimant had countable dividend income in the amount of \$1,275, the Division was correct to require that she make a Cost of Care payment of \$1,278.74 for the month of July 2008. See 7 AAC 100.552 – 554.

CONCLUSIONS OF LAW

¹¹ Special needs trusts are also referred to as supplemental needs trusts or payback trusts. *Wong v. Daines*, 582 F.Supp.2d 475, 481 (S.D. N.Y., 2008)

1. An irrevocable assignment of the Claimant's June 30, 2008 Alaska Native corporate dividend over to the Claimant's special needs trust was required in order for the dividend to not be counted as the Claimant's income for Medicaid post-eligibility purposes.
2. Because there was no irrevocable assignment of the Claimant's June 30, 2008 Alaska Native corporate dividend over to the Claimant's special needs trust, the Claimant's dividend in the amount of \$1,275 was countable as her income for Medicaid post-eligibility purposes.
3. The Division was therefore correct to count the Claimant's June 30, 2008 Alaska Native corporate dividend in the amount of \$1,275 as the Claimant's income, when it determined the Claimant was liable for a Medicaid Cost of Care payment in the amount of \$1,278.74 for July 2008.

DECISION

The Division was correct to require the Claimant to make a July 2008 Cost of Care payment in the amount of \$1,278.74.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, the Claimant must send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

An appeal request must be sent within 15 days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision.

DATED this 27th day of April, 2009.

Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 27th day of April 2009, true and correct copies of the foregoing was sent:
By First Class Mail, Certified, Return Receipt Request to Claimant's Attorney, Mara Rabinowitz, Esq.,
and to the following by electronic mail:

[REDACTED], Assistant Attorney General
[REDACTED], Director
[REDACTED], Director's Office
[REDACTED], Policy & Program Development
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training

Larry Pederson

