

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

██████████ Claimant, through
OFFICE OF PUBLIC ADVOCACY, conservator,

Appellant,

vs.

STATE OF ALASKA, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES, DIVISION
OF PUBLIC ASSISTANCE,

Appellee.

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ATTORNEY GENERALS OFFICE
JUNEAU

Case No. 3AN-09-09059 CI.

**ORDER AFFIRMING THE DIVISION'S DETERMINATION THAT MS. ██████████
MUST PAY \$1,278.74 TOWARD HER MEDICAID POST-ELIGIBILITY COST-
OF-CARE LIABILITY**

I. RELEVANT FACTS.

Ms. ██████████ receives Medicaid benefits and services through the Long Term Care Community Based Medicaid Waiver. The Office of Public Advocacy has been appointed full conservator for Ms. ██████████. In 2000, OPA, acting in its capacity as conservator for Ms. ██████████ established an irrevocable trust (██████████ Asset Trust) for her benefit pursuant to 42 U.S.C.A. §1396p(d)(4)(A).¹

Ms. ██████████ is also a shareholder in Cook Inlet Regional Incorporated (CIRI) an ANCSA regional corporation from which she receives periodic dividends. The CIRI

¹ Neither party disputes that the ██████████ Asset Trust falls under the section 1396p(d)(4)(A) definition of special needs trust.

dividend checks are payable directly to the [REDACTED] Asset Trust. In July 2008 CIRI issued a check directly to the [REDACTED] Asset Trust.

As a result of that distribution, the Division of Public Assistant (the Division) notified Ms. [REDACTED] that she was required to pay \$1,278.74 toward her post-eligibility cost of care for the month of July 2008.² In response to this notice OPA requested a fair hearing on Ms. [REDACTED] behalf. The hearing authority held that the Division was correct to require Ms. [REDACTED] to make a July 2008 post-eligibility cost of care payment in the amount of \$1278.74. Ms. [REDACTED] appealed that decision to the director who affirmed the hearing authority. The director's decision represents the final agency order. Ms. [REDACTED] appeals that decision. The parties agree there are no material fact issues.

II. ISSUE ON APPEAL.

The only issue in this appeal is whether the division properly concluded that Ms. [REDACTED] Alaska Native July 2008 dividend check (dividend check) should be considered as income for post-eligibility cost of care purposes despite the fact that the check was issued to the [REDACTED] Asset Trust.

III. STANDARD OF REVIEW.

The parties disagree whether the reasonable basis test of the independent judgment standard should be applied. The reasonable basis test is applied where an agency decision “involves questions in which the particularized experience and knowledge of the

²In 2008, prior to the \$1278.47 July dividend payment, Ms. [REDACTED] had already received at least \$2,000 in dividend payments from CIRI. The division considered the first \$2,000 received in annual dividends exempt from cost of care liability provisions in accordance with 7 AAC 40.300-320; 7 AAC 100.400(a)(16)-(19); 7 AAC 40.280(15)(A).

administrative personnel goes into the determination,” and involves “administrative expertise as to either complex subject matter or fundamental policy formulations.”³

Where the knowledge and expertise of the agency is of little guidance to the court or where the case concerns statutory interpretation or other analysis of legal relationships about which the court has specialized knowledge and experience, the independent judgment standard should be applied.⁴

In Ms. [REDACTED] reply brief she argues that the independent judgment standard should be applied because the issue involved in this appeal is a matter of interpretation of federal law that does not implicate the expertise of the agency.⁵ In the very next sentence she states that agency expertise is applicable to the issue.⁶ She acknowledges that the agency made its decision, in part, based on the directives set forth in the State Medicaid Manual (SMM).⁷ She then goes on to describe the deficiencies in the SMM and argues that it should therefore be given no deference.⁸

Ms. [REDACTED] advances these arguments without addressing what the SMM is. As the hearing authority cited in this case, it is a manual issued by the federal government’s Health Care Financing Administration (HCFA).⁹ “It is an official medium by which the HCFA issues mandatory, advisory, and optional Medicaid policies and procedures to the

³ *Beers, Inc. v. Robison*, 708 P.2d 65, 68 (Alaska 1985) (citing *Kelly v. Zamarello*, 486 P.2d 906, 916 (Alaska 1971)).

⁴ *Earth Resources v. State Department of Revenue*, 665 P.2d 960, 964 (quoting *Kelly v. Zamarello*, 486 P.2d 906, 916 (Alaska 1971)).

⁵ [REDACTED] Reply Brief at 2.

⁶ [REDACTED] Reply Brief at 2.

⁷ See [REDACTED] Reply Brief at 2.

⁸ See [REDACTED] Reply Brief at 2-4.

⁹ Fair Hearing Decision at 4.

Medicaid State agencies.”¹⁰ It “provides instructions, regulatory citations, and information for implementing provisions of Title XIX of the Social Security Act.”¹¹ “Instructions are official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies.”¹²

The SMM may not create binding law but it does attempt to clarify and make workable this complex area of law. Reliance on the SMM is necessary to interpret the relevant law in this appeal. The decision to consider the dividend check as income for post-eligibility purposes required agency expertise. Therefore the applicable standard of review is the reasonable basis test.¹³ Under the reasonable basis test an agency decision is upheld where it has a reasonable basis in law.¹⁴

IV. DISCUSSION.

The director affirmed and incorporated the hearing authority’s decision adding only that Ms. [REDACTED] CIRI dividends cannot legally be assigned to her trust. The director determined that the right to the distribution remained hers and therefore because the dividend check passes through her hands, it must be counted as income for cost of care post-eligibility purposes.

¹⁰ State Medicaid Manual, Foreward § A.

¹¹ State Medicaid Manual, Foreward § B(1).

¹² State Medicaid Manual, Foreward § B(1).

¹³ Ms. [REDACTED] relies on *Sai Kwan Wong v. Doar*, 571 F.3d 247 (2nd Cir. 2009) for the proposition that a less deferential standard is appropriate. In *Wong*, a case where section 3259.7 of the SMM was also at issue, the Second Circuit applied *Skidmore* deference. *Wong* is a federal case and thus the federal court analyzed whether to apply *Chevron* or *Skidmore* deference to the issue. The Alaska Supreme Court has set forth standards of review different from *Chevron* and *Skidmore* when an appellate court reviews agency decisions in state cases. That being said, even the *Wong* court stated that “SMM 3259.7 is an appropriate exercise of the agency’s authority” and affirmed the district court’s determination that the agency correctly considered *Wong*’s monthly SSDI benefits as income for post-eligibility purposes although that “income” was placed in his special needs trust. To this court, *Wong* represents affirmation that particularized expertise and knowledge of the agency was involved in the decision and therefore the reasonable basis test is appropriate.

¹⁴ *Beers, Inc. v. Robison*, 708 P.2d 65, 68 (Alaska 1985) (citing *Kelly v. Zamarello*, 486 P.2d 906, 918 (Alaska 1971)).

Ms. [REDACTED] argues that the division's decision does not have a reasonable basis in law because federal statutes unambiguously exempt the corpus of a special needs trust asset from being counted as unearned income to the beneficiary of that trust.

Ms. [REDACTED] advances this argument by citing to 42 U.S.C.A. §§1382a(a), 1382b and 1396p(d)(4). That statute contains the definitions of income and unearned income and exclusions for purpose of determining benefits. Dividends are considered unearned income.¹⁵ Any earnings of, and additions to, the corpus of a trust established by an individual pursuant to section 1382b is also considered unearned income.¹⁶

Section 1382b describes how to determine resources of individual. Section 1282b(e) governs how to determine resources of an individual who has established a trust.¹⁷ Section 1382b(e)(5) states that "this subsection shall not apply to a trust described in (C) of section 1396p(d)(4) of this title."¹⁸

Section 1396p(d)(1) states that "for purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such an individual." Paragraph (3) states the circumstances under which certain trusts are to be considered resources available to an individual. Paragraph (4) then states that "this subsection shall not apply to any of the following trusts." One such trust is a special needs trust, which both parties agree is the type of trust at issue in this case.

¹⁵ 42 U.S.C.A. § 1382a(a)(2)(F).

¹⁶ 42 U.S.C.A. § 1382a(a)(2)(G).

¹⁷ 42 U.S.C.A. §§ 1382b(e)(1), 1382b(e)(2).

¹⁸ (C) of section 1396p(d)(4) is a special needs trust of the type Ms. [REDACTED] has established.

From this statutory compilation, Ms. [REDACTED] argues “any addition to a trust established for the benefit of an individual shall count as unearned income if the trust falls within the purview of 1382b(e).” Since Ms. [REDACTED] trust does not fall within that purview, it cannot legally be considered income to Ms. [REDACTED]. Again, Ms. [REDACTED] states this is unambiguous and explicit. If this were the end of the story, Ms. [REDACTED]’s ultimate conclusion may be correct.

In *Reames v. Oklahoma*, the court did state that Congress enacted section 1396p(d)(4)(A) in 1993 to enable the assets of a disabled individual under the age of 65 to be contributed to the special needs trust for his/her benefit without having such assets treated as countable income for Medicaid purposes.¹⁹ But, there is more to the story.

As the director correctly concluded, Ms. [REDACTED] could not legally assign her right to the dividend to the trust.²⁰ Therefore, if only for a moment in time, the dividend had to be considered unearned income in her possession. Also, there are differences between calculating an individual’s assets for eligibility purposes and post-eligibility purposes.

*Reames v. Oklahoma*²¹, a case relied upon by the division, is a case that is on point. A discussion of *Reames* will help clarify the rest of the story.

In *Reames*, the Oklahoma Department of Human Services (ODHS) counted a Medicaid recipient’s monthly Social Security checks when it calculated her monthly co-pay for her nursing home.²² When Congress enacted section 1396p(d)(4) *Reames* immediately established a special needs trust and assigned her Social Security checks to

¹⁹ *Reames v. Oklahoma*, 411 F.3d 1164, 1166 (10th Cir. 2005).

²⁰ 43 U.S.C.A. § 1606(h)(1)(B) and (C).

²¹ *Reames v. Oklahoma*, 411 F.3d 1164 (10th Cir. 2005).

²² *Reames v. Oklahoma*, 411 F.3d 1164, 1166 (10th Cir. 2005).

that trust.²³ ODHS continued to consider her Social Security checks in its determination of her co-pay and she appealed.²⁴

The *Reames* court did conclude that section 1396p(d)(4) authorizes income of an individual to be contributed to a special needs trust without such income being treated as countable assets for Medicaid purposes but recognized there are different regulations for treatment of the income of an institutionalized individual for post-eligibility purposes.²⁵

For example, after originally determining one's eligibility federal regulations mandate that a state agency reduce its payments to the institution in an amount equal to the recipients income.²⁶ They also mandate that unearned income be counted at the moment it is received.²⁷

Finally, the *Reames* court recognizes that the State Medicaid Manual seeks to resolve the conflict between the mandate that a special needs trust protects assets for Medicaid benefits and the mandate that a State must reduce its payment to an institution for post-eligibility purposes by considering the individuals income at the moment it is received. It does so by concluding that income placed in a Miller trust (and also special needs trusts) is not counted as available in determining Medicaid eligibility but is subject to post-eligibility rules.²⁸

Like Ms. [REDACTED] *Reames* argued that this reading of the State Medicaid Manual must be invalidated because it is inconsistent with the language of section 1396p(d)(1)

²³ *Reames v. Oklahoma*, 411 F.3d 1164, 1166 (10th Cir. 2005).

²⁴ *Reames v. Oklahoma*, 411 F.3d 1164, 1166 (10th Cir. 2005).

²⁵ *Reames v. Oklahoma*, 411 F.3d 1164, 1168-69 (10th Cir. 2005).

²⁶ *Reames v. Oklahoma*, 411 F.3d 1164, 1169 (10th Cir. 2005) (citing 42 C.F.R. § 435.733).

²⁷ *Reames v. Oklahoma*, 411 F.3d 1164, 1169 (10th Cir. 2005) (citing 20 C.F.R. § 416.1123(a)).

²⁸ *Reames v. Oklahoma*, 411 F.3d 1164, 1169 (10th Cir. 2005) (citing State Medicaid Manual § 3259.7)

which states that “for purposes of determining an individual’s eligibility for, or *amount of*, benefits under a State plan under this subchapter...”²⁹ The *Reames* court rejected that argument. It stated “because of the pastiche of references and incorporations required to do so (find that the SMM is in conflict with a clear Congressional mandate) is so haphazard and complex, we cannot conclude that Congress, in passing sections 1396p(d)(4)(A) and 1396p(d)(1) has addressed the precise question.”³⁰

In short, *Reames* concluded that section 1396p(d)(4)(1) only gives section 1396p(d)(4)(A) shelter to income if the income does not pass through the individuals hands.³¹ And because *Reames*’ Social Security checks were also not legally assignable, like Ms. [REDACTED] dividend checks, they could be considered for post-eligibility purposes.³²

This court cannot say that the Divisions reliance on *Reames* was unreasonable. The Division’s decision clearly articulates that it relied on the same federal statutes and regulations that *Reames* relied upon. It further supported its decision with applicable provisions of the SMM and the Alaska Administrative Code. The Divisions decision was thorough, clear and not in conflict with an unambiguous Congressional mandate. The Division’s decision was reasonable.

Because [REDACTED] can not legally assign her dividend check to the [REDACTED] Asset Trust, she or her guardian can spend the money without restriction. The fact that the guardian chooses to place the money in a special needs trust is irrelevant. The character of the money is determined the moment it is received, not by how it is used. Therefore

²⁹ *Reames v. Oklahoma*, 411 F.3d 1164, 1169 (10th Cir. 2005) (citing 42 U.S.C.A. § 1396p(d)(1)).

³⁰ *Reames v. Oklahoma*, 411 F.3d 1164, 1170 (10th Cir. 2005).

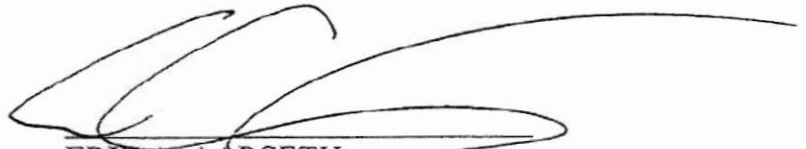
³¹ *Reames v. Oklahoma*, 411 F.3d 1164, 1172 (10th Cir. 2005).

³² *Reames v. Oklahoma*, 411 F.3d 1164, 1171-73 (10th Cir. 2005).

the Division may count the dividend check when calculating Ms. [REDACTED] post-eligibility cost of care liability.

The Division's decision is AFFIRMED.

DATED at Anchorage, Alaska this 17th day of May, 2010.



ERIC A. AARSETH
Superior Court Judge

I certify that on 17th May, 2010, a
copy was mailed to:

CPT - Robinson; AH. Parker; AH. Bakalar

Casey Knblmaier
Casey Knblmaier, Law Clerk