BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH

In the Matter of	)	
	)	
D.K	)	OAH No. 26-0030-MDE
	)	

DECISION

I. Introduction

Can income in a Medicaid qualified income trust, often called a Miller trust, be used after its creation to pay the legal fees of creating the trust? Federal law permits five kinds of payments from Miller trusts but is silent on whether states can allow other sorts of payments. Alaska regulations and the Department of Health's Aged, Disabled and Long Term Care Medicaid Eligibility Manual ("ADLTC Manual") do not mention attorney's fees as a payment from a Miller trust. Finally, Alaska trust statutes allow a trustee to be reimbursed for attorney's fees "[e]xcept as otherwise provided in the trust instrument[.]" Here the trust instrument does not allow payment of attorney's fees for the Respondent's, Ms. D.K's, situation. Therefore, the Division of Public Health's (Division's) determination that the cost of creating Respondent D.K's Miller trust is not allowable as part of her cost of care is AFFIRMED.

II. Background

Ms. K is a long-term care Medicaid recipient living in a home and community-based waiver facility.[1] T.C is Ms. K's daughter and has a power of attorney to make decisions for her care. When Ms. K's husband died in 2024, she became the recipient of 70% of his pension.[2] That pension income to Ms. K put her above the monthly income limit to continue receiving Medicaid coverage for her long-term care. To continue receiving Medicaid coverage for her assisted living facility costs, Ms. C had a Miller trust created for Ms. K's income.[3] A Miller trust is an estate planning device established under federal law that allows a Medicaid recipient to have their monthly income put into a trust. Only certain monthly amounts are paid to the recipient for allowable expenses, and the rest of the income is paid to the assisted living facility, with Medicaid covering the balance of the cost of the assisted living facility.[4] Upon the death of the Medicaid

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1 Exhibit 1.
2 Exhibit 5.
3 Exhibit 5.1.
4 42 U.S.C. § 1396p(d)(4).

recipient, any funds left in the Miller trust are paid to the state as partial reimbursement of what it paid for care at the assisted living facility.[5]

Ms. C had her mother's Miller trust drafted by an attorney who charged $4,500 to create the trust.[6] All of Ms. K's income gets paid into the trust, consisting mostly of a pension and social security. Ms. C reports that income to the Division. The Division, in turn, allocates how much of that money can be paid for various deductions, including a personal needs payment to Ms. K, and how much is paid to the facility in which Ms. K lives. After this process, the trust has a few tens of dollars left in it at the end of every month.[7] This is called the "cost of care" calculation. The cost of care for December 2025, the month at issue here, is itemized as follows:

Income	Amount
SSA	$1,958.00
Pension	$1,359.50
"Income Adjustment"	$2,605.21 (One-time life insurance payment)
Total Income:	$5,922.71

Allowed Expenses	Amount
Personal Needs	$1,396.00
Income Taxes	$14.28
Insurance Premiums	$223.50
Uncovered Medical Expenses	$531.20 (Dental bill)
Total Expenses:	$2,164.98

TOTAL COST OF CARE	$3,757.73[8]

This means that Ms. K's Miller trust can pay the amounts in the allowed expenses as described and then must pay the remaining $3,757.73 to the facility in which she lives. The monthly total cost owed to the facility is not part of the record, but Medicaid pays that remainder.

5 42 U.S.C. § 1396p(d)(4)(A).
6 Exhibit 2.9.
7 C testimony.
8 Exhibit 4.

Ms. C sought permission to have the income into the trust be used to pay for the attorney's fees paid to create the trust, which the Division carefully considered but denied.[9] Ms. C requested a fair hearing, which was held on February 2 and 5, 2026.

III. Discussion

Federal regulations require states to make five deductions from the income of a Miller trust beneficiary: personal needs, maintenance needs of a spouse, maintenance needs of the family, expenses not subject to third-party reimbursement such as health insurance premiums and out-of-pocket necessary medical expenses, and supplemental security income or certain state cash benefits.[10] The regulation is silent on whether the state may make other deductions. At least one state, Arizona, specifically allows deductions for attorney fees and other trust administrative expenses.[11] Alaska, however, has no equivalent regulation or policy.[12]

Alaska law governing trusts might provide some relief, but not here. Alaska statutes on trusts provide, "[e]xcept as otherwise provided in the trust instrument … a trustee is entitled to be reimbursed out of trust property, with interest as appropriate, for … expenses that were properly incurred in the administration of the trust[.]" Merriam-Webster's Dictionary defines "administration" as "performance of executive duties" and "the act or process of administering something[.]"[13] Arguably creating a trust is the first administrative duty, and Ms. C is the trustee of Ms. K's trust. As such, she should be able to seek reimbursement for the administrative expense of creating the trust, except as otherwise provided by the trust document.

Article IV of Ms. K's trust governs disposition of trust income and principal.[14] Section A applies while Ms. K is not disabled and allows the payment of "legal services reasonably incurred by the Beneficiary" and "attorney's fees which the trust is obligated to pay."[15] Section B applies when Ms. K is not in a nursing home or waiver care program and allows payment of "attorney's fees which the trust is obligated to pay."[16] Section C applies when Ms. K is enrolled in a waiver program, which has been her situation through the relevant period here. That section essentially repeats Alaska regulations on payment of cost of care and does not mention attorney's fees.[17]

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9 Exhibits 6, 8.
10 42 C.F.R. § 435.725(c)(1)-(c)(5).
11 *See, e.g.,* Arizona Health Care Cost Containment System Medical Assistance Eligibility Policy Manual § 609 ("Allowable expenses include … Attorney fees and court costs[.]").
12 *See* 7 AAC 100.550-.579 *and* ADLTC Manual § 526.
13 https://www.merriam-webster.com/dictionary/administration
14 Exhibit A at 2.
15 *Id.* at 3-4.
16 *Id*. at 4-6.
17 *Id.* at 6-9.

Finally, Section D applies when Ms. K is a nursing home resident and does not mention attorney fees.[18] The trust specifically allows attorney fees in two situations but does not mention them in two others. The trust allowing for payment of attorney fees in two sections excludes the paying of attorney fees in the other sections.[19] Because the trust document does not allow for payment of attorney's fees in her current situation, general Alaska trust law does not allow payment of the attorney's fees incurred creating Ms. K's Miller trust.

Ms. C states, "[t]his is a catch 22."[20] Because Ms. K was already in a waiver care facility when her husband died and she started receiving his pension, there was no time when she could have used that pension income to pay for the trust prior to it being allocated solely to her cost of care. Now Ms. C is directly responsible for the $4,500 cost of the trust. This is certainly a difficult situation, and the tribunal reiterates that Ms. C is to be commended for the effort she puts into her mother's care. The Division, however, has no current authority or ability to relieve Ms. C of this obligation. Without the trust, Ms. K may lose her Medicaid coverage. However, it is this tribunal's role to interpret statutes and regulations as they exist and not to create new policies or procedures for the Division.

IV. Conclusion

Neither federal regulations, state regulations, nor state policy allow for the payment of attorney's fees incurred in the creation of Miller trusts when the beneficiary is in long-term care. Ms. K's trust also does not allow such payments in her current situation. Therefore, the decision of the Division to disallow credit for payment of attorney's fees incurred in creating Ms. K's trust is AFFIRMED.

DATED: March 5, 2026.

By: *Signed*
Robert H. Schmidt
Administrative Law Judge

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18 *Id.* at 9-12.

19 The Latin phrase for this rule of construction is "expression unius est exclusio alterius," meaning "mentioning one thing excludes the other." Here the trust allowing payment of attorney's fees in two situations but not mentioning it in two others reasonably excludes the payment of attorney fees in those situations.

20 Exhibit 5.1.

Adoption

The undersigned, by delegation from the Commissioner of Health, 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 25th day of March, 2025.

By: *Signed*
Name: Robert H. Schmidt
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]