

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

XXXXXXXXXXXX,)	
Petitioner,)	Docket No.: OSAH-DFCS-NH-
)	0906362-Langston
)	
v.)	Agency Ref. No.: 222402114
)	
)	
DEPARTMENT OF HUMAN RESOURCES)	
DIVISION OF FAMILY AND CHILDREN)	
SERVICES,)	
Respondent.)	

**PETITIONER’S RESPONSE TO RESPONDENT’S
MOTION FOR SUMMARY DETERMINATION**

1.

Petitioner moves to strike Respondent’s Motion for Summary Determination and Response to Petitioner’s Motion for Summary Determination since it was not filed by the deadline prescribed by the OSAH rules.

Petitioner mailed its Motion for Summary Determination on August 20, 2008. Respondent had 20 days from service (which in the case of service by mail is deemed to have occurred on August 23) to respond. OSAH Rules 5 & 15. The deadline expired on September 12, 2008. Respondent did not file its response until October 1, 2008. Therefore, it was untimely and should not be considered. The Court instead should rule solely on Petitioner’s Motion for Summary Determination.

2.

Alternatively, Petitioner responds to Respondent’s Motion for Summary Determination as follows:

MEDICAID MANUAL § 2342-3 states:

A transfer of assets penalty does not apply if any one of the following conditions is met: ... The assets were transferred to a trust established for the sole benefit of (1) A/R’s disabled child or (2) a disabled individual who

is under 65 years of age. Use the same definition of sole benefit of as for transfer to a spouse. See Section 2502, Chart 2502.1.

Respondent argues that in order for a transfer to a trust to avoid being penalized the trust must be a special needs trust meeting all of the requirements of MEDICAID MANUAL § 2346. There are several problems with this argument.

A special needs trust must be established for a disabled individual under age 65. 42 USC § 1396p(d)(4)(A) & MEDICAID MANUAL § 2346-1. The exception to the transfer penalty under MEDICAID MANUAL § 2342-3 quoted above applies either in the case of a disabled child (of any age) or in the case of a disabled individual under age 65. Therefore, when the Department of Community Health ("DCH") uses the term *trust* in Section 2342-3, it cannot mean to refer solely to a special needs trust.

The federal Medicaid law which establishes the parameters in which the States operate their programs requires that assets transferred *to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child* be exempt from the transfer penalty. 42 USC § 1396p(c)(2)(B)(iii). Subsection (d)(4) is an exception to the normal trust rules for special needs, qualified income and pooled trusts. The parenthetical (*including a trust ...*) clearly implies that a (d)(4) trust is just an example of the kind of trust which can be utilized to avoid the transfer penalty. Respondent's contention that a (d)(4)(A) (special needs) trust is clearly contrary to federal law.

Respondent contends that implicit in Section 2342-3 is a provision found in MEDICAID MANUAL § 2337 which says that creation of any trust either results in a resource or a transfer unless it meets one of the specific exceptions found in Section 2337 for special needs, pooled or qualified income trusts. If DCH intended Section 2342-3 to refer to Section 2337, the Department should have incorporated a cross-reference to that Section. The sentence that immediately follows the provision in question contains a cross-reference to Section 2502 for the definition of sole benefit. Therefore it is clear that DCH uses cross-references when appropriate. Because no such reference was included with regard to the provision in question, it is incumbent on the Court to conclude that Section 2342-3 provides an independent exception to the transfer rules for transfers to trusts for the A/R's disabled child. The only requirements of this exception are that the assets must be transferred to a trust which has been established for the sole benefit of A/R's disabled child.

Respondent takes the position that a transfer to a trust is only permitted if the assets transferred to the trust are themselves exempt under Medicaid policy. There is such a rule in MEDICAID MANUAL § 2342-3 (BULLET 6). It says that a transfer penalty does not

apply if the resource was excluded under Non-FBR policy and was transferred into a trust. However, that is not the provision upon which Petitioner is relying in this case. Petitioner is relying on bullet 4 which says that a transfer penalty does not apply if assets were transferred to a trust for the sole benefit of A/R's disabled child.

Respondent apparently takes the position that all of the requirements contained in each of the six bullets under Section 2342-3 must be satisfied in order for a transfer to a trust not to be penalized. However, the sentence introducing the bullets says: *A transfer of assets penalty does not apply if any of the following conditions is met (emphasis added)*. Therefore, Respondent is incorrect in requiring that the promissory note in the trust be actuarially sound, and its inquiries into the terms of the annuity in the trust were irrelevant and improper.

3.

Respondent argues that a trust is not a legal instrument unless it is considered valid by DCH Legal. In so doing, Respondent puts itself above the law, which is consistent with a pattern of actions that Respondent has displayed in this case.

For example, Respondent violated the standard of promptness found in MEDICAID MANUAL § 2060-5, which requires a decision within 45 days of filing of an application. Respondent refused to render a decision in this case for over one year until ordered by this Court on July 3, 2008. OSAH Docket No. 0826696-67. Even after the Court entered this Order, Respondent failed to comply with the Order's deadline and Petitioner had to request that the Court enter a Default before Respondent finally issued a determination.

Respondent objected to Petitioner's subpoena of the DCH Legal worker who handles all trust decisions. In its Brief in Support of its Motion to Quash, Respondent argued that granting Petitioner's request (subpoena) would result in a floodgate of subpoenas served on the Legal Services Section of DCH. The arrogance of Respondent is patent and reprehensible.

Respondent ignored OSAH Rule 15 in failing to timely respond to Petitioner's Motion for Summary Determination.

Until Respondent filed its Motion for Summary Determination in the case at bar, Respondent refused to explain why it thought (albeit incorrectly) the trust involved in this case (the "Trust") was required to be a special needs trust and why the assets in the Trust need be exempt resources, notwithstanding several letters from Petitioner requesting support for Respondent's position.

Moreover, the Medicaid Manual defines the requirements of a trust in Section 2338. *A trust is a legal arrangement by which one person holds property for the benefit of another.* MEDICAID MANUAL § 2338-1. Respondent has no basis to argue that those elements are lacking in this case.

Finally, if Respondent was correct that a trust is not a trust unless it is considered valid by DCH Legal, MEDICAID MANUAL § 2337-2 would be arbitrary and capricious and permit DCH to determine the fate of Medicaid applicants without the application of any legal standards. Such a provision would be in violation of the 14th Amendment to the U.S. Constitution which prohibits a State from *depriv[ing] any person of life, liberty, or property, without due process of law; nor deny[ing] any person within its jurisdiction the equal protection of the laws.* Therefore, Petitioner asks this Court to interpret the Georgia Medicaid Manual to be consistent with federal Constitutional rights and reject Respondent's contention that the Trust in this case is not a trust because Respondent does not want it to be a trust.

4.

MEDICAID MANUAL § 2060-6 requires that DFCS provide adequate notification of its eligibility determination including the specific reason for the determination. Generic reasons may never be used as the sole justification.

Respondent's Notice of Denial date July 28, 2008, (P-5) lists the reason for the denial as, **THE VALUE OF YOUR RESOURCES IS MORE THAN THE RESOURCE LIMIT...YOUR APPLICATION FOR MEDICAID HAS BEEN DENIED DUE TO THE PROMISSORY NOTE NOT BEING ACTUARIALLY SOUND.**

As indicated in Petitioner's Motion for Summary Determination, Petitioner holds no promissory notes. The only note that Petitioner ever owned was assigned to the Trust for Petitioner's daughter on February 26, 2007.

The Trust established by Petitioner is for the sole benefit of her disabled daughter. Petitioner has no interest in the Trust whatsoever. A *resource* is an asset which the owner has a right to convert to cash and is not legally restricted from using for his or her support. MEDICAID MANUAL § 2300-1. Petitioner has no right to convert the assets in the Trust to cash or to use the assets for her support. An independent trustee is obligated to use the Trust assets solely for the benefit of Petitioner's daughter. So the Trust cannot be a resource belonging to Petitioner in this case.

Therefore, contrary to Respondent's claim, the denial letter cannot be referring to the Trust when it said that Petitioner was over the resource limit. It must have been referring to the promissory note that Petitioner no longer owns. That being the case, Respondent's

denial is based upon a mistake of fact. Respondent assumed that Petitioner owned a promissory note when in fact she does not. Therefore, the Court is requested to Order Respondent to correct this error.

5.

Respondent argues that the affidavit attached to Petitioner's Motion for Summary Determination was insufficient to support the facts asserted therein. OSAH Rule 15 requires that the affidavit be made upon personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that affiant is competent to testify to the matters stated therein. The undersigned has represented Petitioner since January 26, 2007. The undersigned has personally been involved in each of the transactions referenced in the affidavit and is competent to testify about them. Therefore, the affidavit signed by the undersigned is sufficient to support Petitioner's motion.

6.

For all of the aforementioned reasons, Petitioner moves to strike Respondent's Motion for Summary Determination and Response to Petitioner's Motion for Summary Determination, or in the alternative to deny Respondent's Motion and grant Petitioner's Motion for Summary Determination.

Respectfully submitted,

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