

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

FILED

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OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

PETITIONER,
Vs.

APPEAL NO. 09F-05738

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES
CIRCUIT: 18 Brevard
UNIT: ICP

CASE NO. 1292781297

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was telephonically convened before the undersigned at 3:45 p.m. on December 2, 2009. The petitioner was not present but was represented by her daughter, : Bobbi VanCott, ACCESS supervisor, represented the respondent.

ISSUE

At issue was whether the Institutional Care Program (ICP) Medicaid application approval can be effective before June 2009. As an applicant, the petitioner bears the burden of proof.

FINDINGS OF FACT

1. The petitioner (through a family representative) applied for ICP coverage several times between August 2008 and June 2009. The respondent approved eligibility effective June 2009, but not before.

2. The petitioner seeks eligibility effective February 2009. The respondent determined that all eligibility factors were not met until June 2009, so an earlier approval was not authorized.

3. On September 16, 2008, the respondent notified the petitioner that her gross income at approximately \$2008.77 exceeded state standard of \$1911. (The 2008 income was actually \$2142.83 gross.) The respondent gave the petitioner information about income trust options (pages 15 and 16 of Respondent's Exhibit 1) as a means of becoming eligible. The petitioner's representative was notified of the state income standard as well as need for "Income trust document, statement from **irrevocable** (emphasis added) income trust bank account and durable power of attorney. ..." The information was sent to the correct address and was received. The respondent received no response and application was not approved.

4. Another application was filed in October 2008. It was denied in November 2008 due to lack of "required information." The respondent had again asked for the same financial information.

5. In December 2008, the respondent received some financial information from the petitioner and the petitioner filed another application. It is possible the petitioner did not receive all the respondent's correspondence as the apartment number was omitted from some correspondence. However, communication between the respondent and the petitioner's representative continued.

6. The petitioner had created an income trust during 2008. The Department's legal office declared its legal adequacy in January 2009. The trust

was irrevocable. The related bank account was not irrevocable. That is undisputed and was a critical problem. The Community Educators Credit Union account was established as an "agreement for trustee account(s) for revocable living trusts." The account was expressly revocable. The petitioner was the trustee as well as the "individual" owner. The respondent again denied the December 2008 application in February 2009.

7. Another application was filed. On March 27, 2009, the respondent notified the petitioner (at correct address) of need for:

...bank statements from irrevocable income trust account and the funding to the irrevocable income trust bank account. The one you have opened at Community Educator Credit Union ... is not the irrevocable income trust bank account....

Gross income at that time was undisputedly \$2259.83.

8. On April 22, 2009 the March application was denied, as the respondent had not received enough information. The respondent added a note on the denial letter. The note said, "You will need to open the new income trust account. You can be the trustee. Make sure your mother will not have access to that account."

9. In May 2009, \$250 was deposited to the credit union account. Eligibility could have occurred if the bank account had been irrevocable. However, the petitioner continued to have undisputed legal access to that credit union account. (There were other problems, but account accessibility was the key problem).

10. On June 17, 2009 another application was filed. That application was approved effective June 2009. A new and irrevocable income trust bank account

was opened at Chase Bank in June 2009. The account was funded enough to bring income below the state standard, and the income trust document remained legally sufficient. All eligibility factors were met.

11. The new account was irrevocable and the parties agreed to that fact. The June 2009 deposits were \$325 or \$326 (difficult to read page 93 in Respondent's Exhibit 1, but parties agreed there was sufficient funding for June) and July 2009 deposit was \$300. Income became lower than \$2022 and eligibility was authorized from June 2009 ongoing.

CONCLUSIONS OF LAW

The petitioner's representative argued she should not be adversely affected due to miscommunications, bank mistakes, or inadequate information. The respondent's representative argued that all criteria must be fulfilled and benefits could not be authorized until all criteria were completely met.

Florida Administrative Code 65A-1.701, "**Definitions**," informs:

(26) Qualified Income Trust: A trust established on or after October 1, 1993, for the benefit of an individual whose income exceeds the ICP income standard and who needs institutional care or HCBS. The trust must consist of only the individual's pension, Social Security and other income. The trust must be irrevocable and provide that upon the death of that individual the State shall receive all amounts remaining in the trust up to an amount equal to the total amount of medical assistance paid on behalf of that individual pursuant to the state's Title XIX state plan.

Under this rule, a trust may enable eligibility for some individuals.

Florida Administrative Code 65A-1.702 "**Special Provisions**" (15) "Trusts" in part states:

(a) The department applies trust provisions set forth in 42 U.S.C. § 1396p(d).

(b) Funds transferred into a trust or other similar device established other than by a will prior to October 1, 1993 by the individual, a spouse or a legal representative are available resources if the trust is revocable or the trustee has any discretion over the distribution of the principal. Such funds are a transfer of a resource or income, if the trust is irrevocable and the trustee does not have discretion over distribution of the corpus or the client is not the beneficiary. No penalty can be imposed when the transfer occurs beyond the 36-month look back period. Any disbursements which can be made from the trust to the individual or to someone else on the individual's behalf shall be considered available income to the individual. Any language which limits the authority of a trustee to distribute funds from a trust if such distribution would disqualify an individual from participation in government programs, including Medicaid, shall be disregarded.

(c) Funds transferred into a trust, other than a trust specified in 42 U.S.C. § 1396p(d)(4), by a person or entity specified in 42 U.S.C. § 1396p(d)(2) on or after October 1, 1993 shall be considered available resources or income to the individual in accordance with 42 U.S.C. § 1396p(d)(3) if there are any circumstances under which disbursement of funds from the trust could be made to the individual or to someone else for the benefit of the individual. If no disbursement can be made to the individual or to someone else on behalf of the individual, the establishment of the trust shall be considered a transfer of resources or income.

Florida Administrative Code 65A-1.713 in part states:

SSI-Related Medicaid Income Eligibility Criteria.

(1) Income limits. An individual's income must be within limits established by federal or state law and the Medicaid State Plan. The income limits are as follows:...

(d) For ICP, gross income cannot exceed 300 percent of the SSI federal benefit rate after consideration of allowable deductions set forth in subsection 65A-1.713(2), F.A.C. Individuals with income over this limit may qualify for institutional care services by establishing an income trust which meets criteria set forth in paragraph 65A-1.702(15), F.A.C.

Consistent with these regulatory standards, ACCESS Florida Program

Policy Manual 165-22 Appendix A-9 sets ICP gross income limits for an

individual at \$1,911 in January 2008 (related to first application date) and \$2022 in January 2009 (related to approved application). Thus, it must be concluded that proper financial standards were applied and gross income exceeded standards.

Policy Manual, 165-22, Section 1840.0110 further states:

1840.0110 Income Trusts (MSSI)

The following policy applies only to the Institutionalized Care Program (ICP), institutionalized MEDS-AD, institutionalized Hospice, Home and Community Based Services (HCBS) and PACE. It does not apply to Community Hospice.

To qualify, an individual's gross income cannot exceed 300 percent of the SSI federal benefit rate (refer to Appendix A-9 for the current income standard). If an individual has income above the ICP income limit, they may become eligible for institutional care or HCBS if they set up and fund a qualified income trust. A trust is considered a qualified income trust if:

1. it is established on or after 10/01/93 for the benefit of the individual;
2. it is irrevocable;
3. it is composed only of the individual's income (Social Security, pensions, or other income sources); and
4. the trust stipulates the state will receive the balance in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on their behalf.

...

The individual (or their legally authorized representative) must deposit sufficient income into the income trust account in the month in which the income is received to reduce their countable income (the income outside the trust) to within the program income standard. The individual must make the deposit each month that eligibility is requested. This may require the individual to begin funding an executed income trust account prior to its official approval by the District Legal Counsel.

...

If the Region or Circuit Program Office and the District Legal Counsel determine the trust is a qualified income trust:

1. do not consider the corpus of the trust an asset to the individual for any month the qualified income trust exists and eligibility is requested;

2. do not apply penalties for transfers of income placed in a qualified income trust account provided the individual receives fair compensation;
3. do not count income deposited into the trust account as income when determining if the individual's income is less than the program income standard;

The preceding rules and policies provide that an income trust may reduce monthly income below the state income limits. The respondent correctly set forth the income limits as \$1911 for 2008 and \$2022 for 2009. The 1993 Omnibus Reconciliation Act created this option. If an applicant or his representative wanted to reduce monthly income below the state standard, a trust could be established. This opportunity to create eligibility is a federal option, not a state or a federal mandate. However, if a person selects the income trust account option, the instrument must be irrevocable, legally sufficient, and adequately funded to an irrevocable account during a particular month, in order to reduce income below standards. All criteria must be met and exceptions are not permitted. Problems with financial institutions, misunderstandings or communication obstacles do not provide for favorable mitigation of the situation.

In the case at hand, the problem was that all necessary standards were not met until June 2009. While there was an adequate trust document in place well before June 2009, it was not until June 2009 that an irrevocable bank account existed and was funded enough to reduce monthly income below standards. Thus, despite difficulties reflected in this unfortunate situation, it must be concluded that denials for months before June 2009 were proper and justified.


DECISION

The appeal is denied and the respondent's action is affirmed.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the Department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The Department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this 22nd day of January 2010, in
Tallahassee, Florida.



J. W. Alper
Hearing Officer
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850-488-1429

Copies Furnished To: