



The Delaware Code (31 Del. C. §520) provides for judicial review of hearing decisions. In order to have a review of this decision in Court, a notice of appeal must be filed with the clerk (Prothonotary) of the Superior Court within 30 days of the date of the decision. An appeal may result in a reversal of the decision. Readers are directed to notify the DSS Hearing Office, P.O. Box 906, New Castle, DE 19720 of any formal errors in the text so that corrections can be made.

**DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES  
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**

In re:

DCIS No. Redacted

Redacted

Appearances: John Williams, Esq., Counsel for Redacted  
Redacted, Appellant's son –in- law, Power of Attorney for Redacted

Peter Feliceangeli, Esq., Deputy Attorney General, DOJ  
Ada Baker, Sr. Social Worker/Case Manager, Division of Medicaid and  
Medical Assistance

I.

Redacted ("Appellant"), by and through Redacted, Power of Attorney for Redacted, applied for Medicaid Long Term Care ("LTC"). The Appellant's application was ultimately approved; however, two (2) months remain at issue, March and April 2009, when the Appellant's income exceeded the limit.

The Division of Medicaid and Medical Assistance ("DMMA") contends that the Appellant's income limit was exceeded for March and April 2009 and therefore, his claim for Medicaid Long Term Care application was properly denied for those months.

II.

The Appellant applied for Medicaid Long Term Care on January 21, 2009.

By notice dated September 1, 2009, DMMA denied the Appellant's application for Medicaid Long Term Care, effective March 1, 2009 to March 31, 2009. (Exhibit 3)

By notice dated September 1, 2009, DMMA denied the Appellant's application for Medicaid Long Term Care, effective April 1, 2009 to April 30, 2009. (Exhibit 4).

On November 19, 2009, the Appellant requested a fair hearing. (Exhibit 2).

The Appellant was notified by certified letter dated December 22, 2009 that a fair hearing would be held on January 12, 2010. A continuance was granted on January 4, 2010. The Appellant was notified by certified letter dated January 7, 2010 that a fair hearing would be held on January 28, 2010. The hearing was conducted on that date in New Castle, Delaware. This is the decision resulting from that hearing.

### III.

Redacted, by and through Redacted, Power of Attorney for Redacted, applied for Medicaid Long Term Care on January 21, 2009. (Exhibit 5). Ms. Baker testified that Redacted disclosed the Appellant's monthly income in the amount of \$1,677.40 in Social Security benefits, \$183.00 in interest and dividends and \$1,073.03 in pension to her at the time of application. Ms. Baker testified that she did not recall whether Redacted asked about the need for counsel during the process. She further testified that seeking a lawyer's assistance is not deterred and it is the privilege of the applicant to obtain legal counsel if they chose to do so.

Ms. Baker testified that the total amount of his monthly income was calculated at \$3,086.97. ( $\$1,667.40 + \$183.00 + \$1,073.03 = \$3,086.97$ ). The Appellant's monthly income placed him over the income limit of \$1,705.00.<sup>1</sup>

Ms. Baker testified that she provided Redacted with the first "we need" letter on January 21, 2009.<sup>2</sup> (Exhibit 6). The "we need" letter was provided so Redacted would have a reminder about the matters discussed at the face to face meeting on January 21, 2009. One (1) of the line items on the January 21, 2009 "we need" letter at Number 18 instructed Redacted to open a Miller Trust.

Ms. Baker informed Redacted about the income limits at her meeting and he was then provided with an opportunity to obtain a Miller Trust. Ms. Baker testified that she believed she received the Miller Trust on February 3, 2009. (Exhibit 9). Ms. Baker testified that she informed Redacted that he needed to deposit at least the Social Security income into the Miller Trust. The Social Security income was chosen because it represented the highest amount of his income and DMMA wanted to make sure that the funds would be deposited properly and it would ensure that the Appellant would be eligible for LTC Medicaid.

Ms. Baker testified that she forwarded a second "we need" letter to Redacted, via e-mail, to him in February 2009 (February 6, 2009). (Exhibit 6). At that time, Ms. Baker had a copy of the Miller Trust. In the e-mail, Ms. Baker asked for a print out of activities in the Miller Trust account. DMMA asked for this information to make sure that the appropriate amount was

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<sup>1</sup> I note that the Appellant's Notices reveal that the income limit was \$1,685.00. Ordinarily such a discrepancy would have warranted a remand to the State for further calculations. However, the State is providing the Appellant with the opportunity to establish a monthly income level at \$20.00 more than they originally indicated on September 1, 2009 to qualify for LTC Medicaid. Thus, Ms. Baker's testimony is beneficial to the Appellant and no remand is necessary to address this issue.

<sup>2</sup> Redacted testified that he was sure that he read this letter. He could not recall having a conversation with Ms. Baker about the portion of Number 18, which indicated that he needed to have the appropriate amount deposited into the Miller Trust account. (Exhibit 6).

deposited monthly. Ms. Baker testified that she informed Redacted that the Social Security amount should be deposited monthly. The e-mail additionally reflected that the funds in the Miller Trust needed to be used to pay the patient pay amount to the nursing home monthly.

Ms. Baker testified that she sent Redacted a third “we need” letter on March 11, 2009. (Exhibit 6). At that time she needed a copy of the Miller Trust account showing the appropriate deposits from February 7, 2008 to current.<sup>3</sup>

Ms. Baker testified that she created a Case Remark on June 4, 2009 documenting her contact with Redacted on May 29, 2009. (Exhibit 7). Ms. Baker testified that she needed the Miller Trust bank statements, which she had requested previously. Ms. Baker noted that an initial deposit had been made into the account on January 26, 2009 in the amount of \$2,865.57. However, the bank statements she needed involved the period from February 7, 2009 and ongoing. She noticed that the Social Security income had not been deposited for February 2009 but a deposit had been made on February 27, 2009 in the amount of \$2,529.03. Ms. Baker testified that she did not question the deposit of an amount higher than the Appellant’s Social Security benefit because a number of her clients decide to deposit all of their income into the Miller Trust. The bank statements revealed that no deposit was made in March 2009 or April 2009. Redacted deposited \$3,000.00 in the account on May 7, 2009. Ms. Baker testified that the account showed no withdrawals. She concluded that no funds were being used to pay the nursing home. Ms. Baker testified that Redacted was informed that he needed to pay the nursing home as instructed in the “we need” letters. Redacted never asked any additional questions.

Ms. Baker testified that a decision about the March 2009 and April 2009 denials was not processed until September 1, 2009 due to the excessive amount of paperwork involved in the case. Ms. Baker further testified that the decision to deny benefits was not made solely on the basis of the Miller Trust. The case involved a number of other documents and DMMA felt Redacted needed additional time and the agency tried to help by providing the time.

Redacted testified that he previously placed his mother in a nursing home and sought legal assistance for her placement from an attorney in Pennsylvania. Redacted testified that when he asked about an attorney, Ms. Baker informed him that she would rather not have him retain counsel as they had “messed up” applications previously. She indicated that he could come into the agency and provide the necessary documentation to her. Redacted concluded that it was not necessary to retain counsel. Redacted admitted that Ms. Baker never informed him that he could not obtain legal counsel during the process. Redacted testified that he did not believe he asked Ms. Baker if he could have an attorney help him.

Redacted testified that he retained counsel to draft the Miller Trust. Redacted admitted that he did not discuss the Miller Trust with the lawyer. He further admitted that he never read the document. When asked if Article 1 indicated that after the first deposit all Social Security payments needed to be contributed to the Miller Trust account, Redacted testified that “I guess that is what it says, yeah.”

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<sup>3</sup> Ms. Baker testified that February 7, 2008 was a typographical error, which should have read February 7, 2009. Redacted never questioned the date.

Redacted testified that he had no experience handling patient pay amounts. He deposited \$2,865.57 on January 26, 2009 because it represented all of the Appellant's income and he needed to open the account. He deposited the amount because Ms. Baker informed him that he needed a Miller Trust. Redacted testified that he was never informed of an amount to deposit in documentation or in person. He believed that he was to deposit the patient pay amount. He received eight (8) letters changing the patient pay each month. He recently received a letter in January 2010 indicating that the patient pay amounted to \$700.00. He had no idea about what amount to pay the nursing home. Redacted testified that he deposited all of the Appellant's income in February as well.

Redacted testified that in March 2009 he received a telephone call from Ms. Baker, who indicated that the application needed to be processed again because she had used the wrong date to establish the Appellant's entry into the nursing home. Ms. Baker had originally documented that the Appellant entered the nursing home in January 2009 when he went into the nursing home in June 2009. Redacted then needed to obtain more documentation because the agency did not have the proper documentation to process the Appellant's case.

Redacted testified that he did not deposit any funds into the Miller Trust account in March 2009 because he needed to pay his mother-in-laws bills. He began paying the nursing home \$1,500.00 in May or June 2009 because his mother-in-law was being "hassled" by the nursing home for payment each time she visited her husband. He arrived at the \$1,500.00 amount on his own.

Redacted finally e-mailed Ms. Baker's supervisor asking that she remove Ms. Baker from the Appellant's case because it was costing him a lot of money to deal with the matter.

Redacted testified that he was unaware of an income cap to qualify for LTC Medicaid and he believed that only an asset (resource) cap applied. He could not recall ever asking Ms. Baker any questions about the Miller Trust account. Redacted testified that he relied upon Ms. Baker to guide him through this unfamiliar process.

#### IV.

The Division of Social Services of the Department of Health and Social Services operates the Medicaid Program under Title XIX of the federal Social Security Act and under the authority it derives from 31 Del. C. 502(5), 503(b) and 505(3). The Medicaid Program provides for services to defined groups of individuals and families and is financed with State and federal funds. Children qualifying for benefits must meet income, resource and status eligibility tests.

In computing the financial eligibility of a candidate for Medicaid Long Term Care, Delaware Social Services Manual ("DSSM") 20400 allows for a trust to be set up to allow the Appellant's income to not be counted towards the monthly income limit. This trust, called a Miller Trust, made pursuant to DSSM 20400.11 - Income Trusts (Miller Trusts) is composed only of Social Security, pension, and/or other income to the individual, including accumulated interest in the trusts.

To qualify, the individual must receive the income and place it into a Miller trust. If an individual has transferred his/her right to receive the income, and the income is legally received by the trust, then this income is no longer considered to be the individual's income. In this situation the income does not meet the requirements for exemption. The trust must be composed only of income. No resources may be used to establish or add to the trust. The inclusion of resources will void the Medicaid eligibility of the trust.

The trust must state that, upon the death of the individual, the State will receive all funds remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the individual under the State Medicaid plan. (DSSM 20400.11.1) Only when a trust meets all requirements for exemption, and is irrevocable, the corpus of the trust is exempt from being counted as available to the individual. (DSSM 20400.11.2).

### *Equitable Estoppel*

The State argued that Redacted was asserting that he relied upon Ms. Baker to guide him through the process. However, equitable estoppel will not lie against the State unless there is affirmative misconduct. The State maintained that there was no evidence of affirmative misconduct in the matter.

The Appellant maintained that Redacted made a good faith effort and relied upon Ms. Baker.

Generally, a governmental agency is not estopped by the mistaken or erroneous decisions of its officers; however, the government will be estopped if notice to appeal has not been provided. Kopicko v. State, Dept. of Services for Children, Del Super., 805 A. 2d 877, 879 (2002).

The record does not reflect that the Appellant's application for March 2009 or April 2009 involved an absent notice to appeal.

Estoppel against a governmental agency will apply in other limited circumstances. However, none of the circumstances of the cases where estoppel applies are similar to the matter at issue here. See, Artesian Water Co. v. State Department of Highways and Transp., Del Supr., 330 A.2d 432, 440 (1974) (finding that a franchise grant from the State created through the State's participation and acquiescence in a facility's relocation twenty years prior to the claim prevents the State from denying the grant was made), State v. Dabson, 217 A.2d 497 (Del. 1966) (applying estoppel based on a contract between the State and contractor).

I conclude that the record does not support a finding that estoppel will bar DMMA's intention to deny the Appellant's application for LTC Medicaid for March and April 2009.

### *Miller Trust*

The State argued that while DMMA would allow occasional irregular payments due to the times funds are deposited, especially involving the end of the month, this case did not involve a timeliness issue. Redacted had been instructed in a January 21, 2009 "we need" letter about

depositing the appropriate amount into the Miller trust account. He never asked Ms. Baker about the appropriate amount. He obtained the Miller Trust from an attorney and never read it. If he had done so, he would have learned within the first few sentences about the amount he was to deposit. He was functioning as a fiduciary at the time he administered the Miller Trust account and he had fiduciary obligations, which he did not administer. If Redacted had deposited the Social Security amounts into the Miller Trust account in March and April 2009, the Appellant would have qualified for LTC Medicaid for those months.

The Appellant maintained that if he had known about the necessary deposits, he would have complied.

In general, DMMA employees act in a ministerial capacity. In this case, they informed the Appellant's representative about what documentation was needed for the application process, they gathered the information provided and they analyzed the information to determine whether it corresponded to the information requested in the "we need" letters. DMMA workers have no authority to act in a discretionary capacity, other than where authorized by statute.

Pursuant to Division of Social Services Manual ("DSSM") 2000, under the application process the primary responsibility for establishing eligibility resides with the client, however, DMMA will take necessary action to assist the applicant to establish his eligibility for assistance. DMMA 2000 provides the following instruction for agency workers to follow to discharge their application responsibilities:

each applicant will be informed of the programs for which he may be eligible, of his right to a decision on eligibility within a reasonable period of time, and will be informed of his right to appeal any Division decision on eligibility. Each applicant will have his need for assistance determined in accordance with Division standards. The income of an applicant will be considered in relation to his needs during the calendar month in which the individual applies for assistance. Only such resources as an applicant has currently available will be used in determining eligibility.

I find that the agency employees have acted within their authority and have processed the Appellant's application with the information provided to them by Mr. Schuck. Ms. Baker processed the Appellant's application according to agency procedure, gathered the necessary documents and then evaluated the information provided by Redacted as indicated under DSSM 2000. The regulations provide no requirement that Ms. Baker offer any advice to Redacted about how he should proceed or that she "micro manage" the Appellant's application process.

The evidence establishes that Redacted obtained legal counsel to produce a Miller Trust. He chose not to ask questions about the Miller Trust at the time he received it from the lawyer who drafted it, he chose not to contact Ms. Baker about questions he had about the process and he chose not to read the Miller Trust document when he was a fiduciary charged with the responsibility of managing the Appellant's affairs. The evidence supports a conclusion that none of the responsibility for the March and April denials at issue here rests upon the State.

I find that substantial evidence supports the agency's decisions for the reasons previously provided and they are affirmed on the record before me.

V.

For these reasons, the September 1, 2009 decisions of the Division of Medicaid and Medical Assistance to deny the Appellant for Medicaid Long Term Care benefits, effective from March 1, 2009 to April 30, 2009, is AFFIRMED.

Date: February 22, 2010



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MICHAEL L. STEINBERG, J.D.  
HEARING OFFICER

THE FOREGOING IS THE FINAL DECISION OF THE  
DEPARTMENT OF HEALTH AND SOCIAL SERVICES

February 22, 2010  
POSTED

cc: Redacted  
John Williams, Esq., Counsel for Redacted  
Ada Baker, Team 230  
Kathleen Dougherty, Team 230  
Peter Feliceangeli, DOJ

EXHIBITS FILED IN OR FOR THE PROCEEDING

EXHIBIT #1 - DSS Hearing Summary consisting of two (2) pages date-stamped December 15, 2009.

EXHIBIT #2 - The Appellant's request for a fair hearing date-stamped November 23, 2009, consisting of one (1) page.

EXHIBIT #3 – Copy of Notice to Deny Your Medical Assistance dated September 1, 2009 consisting of three (3) pages.

EXHIBIT #4 – Copy of a Notice to Deny Your Medical Assistance dated September 1, 2009 consisting of three (3) pages

EXHIBIT #5 – Copy of the Appellant's Application for Long Term Care Medicaid dated January 21, 2009 consisting of nine (9) pages.

EXHIBIT #6 –Copies of three (3) we need letters dated January 21, 2009, February 6, 2009 and March 11, 2009 respectively consisting of three (3) pages.

EXHIBIT #7 –Copy of a Case Remark dated June 4, 2009 consisting of one (1) page.

EXHIBIT #8 – Copies of bank statements consisting of thirteen (13) pages.

EXHIBIT #9 – Copy of a Miller Trust date stamped February 3, 2009 consisting of five (5) pages.