Clearinghouse Review

NATIONAL CLEARINGHOUSE FOR LEGAL SERVICES, INC.

Volume 28 ■ Number 6 October 1994

ELDER LAW

Climbing Out of the Utah Gap: 1993 Medicaid Amendments Support the Use of *Miller* Trusts

By Patricia Nemore

Patricia Nemore is a staff attorney at the National Senior Citizens Law Center (NSCLC), 1815 H St. NW, Suite 700, Washington, DC 20006, (202) 887-5280

I. Introduction

Lottie Bernice Ham spent eight and one-half years in a nursing home in Colorado. She suffered from Parkinson's disease and complications following numerous strokes. She was completely paralyzed except for eye movements and had no ability to communicate. She needed skilled nursing care to clear her esophagus to prevent choking, irrigate her catheter, feed her by inserting a syringe between her clenched jaws, and turn her to prevent bed sores.

Lottie Ham received Medicaid benefits to pay for her nursing home care for four years. When, after her husband's death, she became eligible for a pension as his survivor, her income exceeded the Medicaid eligibility limit (cap) and her Medicaid benefits were terminated, despite her inability to pay for her care at the private pay rate. Her daughter spent over $40,000 to pay for her mother's care.

In 1993, Congress passed legislation to help people like Lottie Ham. The legislation permits residents of states with Medicaid income eligibility limits similar to Colorado's to establish trusts to receive their income, so that they can become eligible for Medicaid.

This article describes the legal developments around income cap issues prior to the passage of the legislation, sets forth the provisions of the legislation and its interpretations by the Health Care Financing Administration (HCFA), and discusses how such trusts might best be used for the benefit of individuals needing nursing facility care.

II. Background

Colorado is one of 20 states that utilize a specific dollar limit on Medicaid eligibility for nursing home services. /1/ They do not have medically needy programs for these services. Thus, no spend-down of excess income is permitted. These states are generally referred to as "income cap states" or "300 percent states," or more colorfully, if enigmatically, as "Utah gap states." /2/ The dollar limit ranges from 100 percent to 300 percent of the Supplemental Security Income (SSI) benefit rate for a single individual. /3/ The problems for low-income people needing nursing home care in these states are severe: If they have one dollar of income over the cap, they are ineligible for coverage of nursing facility care, regardless of their inability to pay the much higher private pay rate. (Average private pay rates are over $2,500 per month; 300 percent of the SSI rate for 1994 is $1,338 per

month.) A study of the problem in 1991 concluded that those unable to pay for nursing home care due to the income cap received inadequate medical care and that their primary care givers faced tremendous financial and emotional burdens with little hope for relief. /4/

Advocates' efforts to address the problem caused by income caps have met with various degrees of success. Efforts in some community property states have resulted in the application of community-property principles to divide income between spouses in those instances where the Medicaid applicant spouse receives the larger income in her name. /5/ Advocates have similarly utilized Qualified Domestic Relations Orders /6/ to force the division of spousal income and, thus, reduce the amount of money coming to the applicant spouse. These strategies, while successful, have their limitations. The first example works only for married people in community-property states; the second works only for married people who have pensions governed by the federal Employee Retirement Income Security Act of 1974. /7/

Another strategy was developed and upheld through litigation in Colorado. In 1990, Colorado nursing home residents, including Lottie Ham, successfully sued the state Medicaid director for denying them Medicaid eligibility after all their income had been placed in a trust by court order. /8/ The residents claimed that the income was not available to them and therefore could not be used to deny them eligibility for Medicaid. They argued that the trustees had legal title to the property and that their rights as beneficiaries did not rise to the level of property rights. The court found in plaintiffs' favor on this issue and concluded that the act of establishing the trust was not a transfer without fair market value in violation of federal and state transfer-of-assets provisions. This finding was based, in part, on the involuntary nature of the establishment of the trust, since it was done by the court on behalf of an incompetent person. The court also found that a Medicaid recipient's attempt to shelter assets to pass onto heirs was not at issue, since any funds remaining in the trust upon the beneficiary's death went first to the state to repay for Medicaid services received. Because the court's holding rested, in part, on the fact that the trust had been established by court order, the strategy affirmed by the case appeared to be limited to incompetent individuals.

Guidance from HCFA subsequent to the decision supported the court's favorable opinion. /9/ Moreover, HCFA suggested that such trusts could be set up by individuals themselves, thus broadening the population for whom the trusts could be used. Advocates in many income-cap states began using the so-called Miller trusts to establish Medicaid eligibility for their clients.

III. 1993 Medicaid Amendments

The 1993 Medicaid amendments contained new and rather complicated rules governing the consideration of trusts in Medicaid eligibility determinations. These otherwise highly restrictive rules included three exceptions, one of which explicitly authorized the use of Miller-like trusts in income-cap states. The exception reads as follows:

(4) This section shall not apply to any of the following trusts:

(A) . . .

(b) A trust established in a State for the benefit of an individual if --

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title, and

(iii) the State makes medical assistance available to individuals described in section 1902(a)(10)(A)(ii)(V), but does not make such assistance available to individuals for nursing facility services under section 1902(a)(10)(C). /10/

In plain language, the statute provides for the use of trusts under this exception if the trust contains only income (not resources) of the individual, the state receives repayment for medical assistance at the death of the individual from whatever is left in the trust, and the state does not have a medically needy program for nursing facility services.

The trust rules from which this type of trust is exempted discuss how a trust's corpus and income are treated for purposes of Medicaid eligibility and when transfers in, and out of, the trust are considered transfers without fair value, subject to transfer-of-asset penalties. These rules are quite different from the SSI program rules for counting income and resources, which normally apply in Medicaid unless Medicaid has explicit language. The apparent significance of being "exempted" from the explicit Medicaid rules is that the SSI rules and the standard Medicaid "availability" principles should apply in considering income paid from this trust. HCFA's guidance on the use of these trusts confirms this view.

IV. HCFA Guidance

Since the passage of the statute, HCFA has issued two memoranda interpreting the statutory language. In a memorandum dated March 17, 1994, /11/ HCFA lists four problems with the language of the statute, which it ascribes to "errors in drafting."

First, HCFA points out, as discussed above, that, even if the trusts are exempted from the new Medicaid trust rules, usual income and resource rules apply. If the trust were revocable, for example, "under SSI rules it would be counted as an available resource, even if it is exempt from section 1917(d)." /12/

Second, HCFA states that the original Miller trusts involved situations in which the right to receive income was transferred to a trust. As a result, the income was not considered received by the individual and, therefore, was not counted to him or her. But, HCFA points out, recipients of certain kinds of income that would go into such a trust cannot, by law, assign their right to receive it to another individual. /13/ Moreover, HCFA states, if the individual does transfer the right to receive income to the trust, then payments are no longer "income to the individual," one of the required elements of the trust exception. (HCFA seems to be saying that Miller trusts under the

Medicaid amendments are an impossibility: Either the right to receive the income cannot, by law, be transferred to another, in which case the trust could not be established at all, or, alternatively, the right to receive income is transferred to the trust and therefore the income no longer "belongs" to the individual and thus falls outside the trust exception.)

Third, if the individual "receives" the income and then places it in the trust, the income will, in fact, be counted to the individual and he will not be eligible due to excess income.

Fourth, if the income or the right to receive it is transferred to the trust, the transfer is subject to penalties under the transfer-of-asset provisions of the law.

HCFA acknowledges that its interpretations render the Miller trust exception a nullity. It then seeks to resolve the conflicts it has described, acknowledging that Congress clearly intended to provide relief to people in income-cap states. In the March memorandum and a second issued May 25, 1994, /14/ HCFA sets forth rules for using Miller-type trusts:

1. If the statutory provisions for the exemption are met, and the trust is irrevocable, the corpus of the trust is exempt from being counted as available to the individual.

2. Income placed in the trust will not be considered income to the individual if the individual first receives the income then places it in the trust. HCFA distinguishes this situation from one in which the individual has transferred the right to receive income; in the latter instance, according to HCFA, the income would no longer belong to the individual and so the Miller exemption would not apply. (See second point, above.) HCFA states that, by not counting income placed in the trust, it is giving precedence to the OBRA-93 exemption language over normal Medicaid income counting principles which would be derived from the SSI program and would require the counting of this income. /15/

3. Income placed in a Miller-type trust is subject to the transfer-of-asset provisions. However, HCFA states, to the extent the income paid out of the trust is paid for certain types of expenditures, that amount of income will not be considered subject to penalties. Permissible expenditures are, basically, those made for the benefit of the individual or the individual’s spouse. Examples discussed are medical care expenditures for either party, administrative fees of the trust, income tax owed by the trust, attorney fees, and expenditures for food, clothing, and shelter. When income in the trust exceeds the amount paid out for permissible expenditures, the remainder will be considered assets transferred without fair value and will be subject to penalties.

HCFA states that when payments from the trust are made for the individual’s medical care (but not for the other expenses listed above), states must require the payments to be made at intervals specified by the state. According to the agency, "funds cannot be allowed to accumulate indefinitely in a Miller trust and still avoid transfer of assets penalties." /16/ The memoranda are silent on the time frame for making other permissible payments out of the trust to avoid penalties.

4. Income paid out of the trust is considered income to the individual to the extent that it is paid to the individual, or to another for the individual’s benefit, for food, clothing or shelter. This analysis follows SSI principles for counting income. HCFA points out that a payment directly from

the trust to a nursing facility would not be considered income to the individual since it is an indirect payment and not intended for food, clothing, or shelter. However, this conclusion is meaningless since HCFA has already stated that income going into the trust is not income for eligibility purposes, but is, as discussed below, income for posteligibility purposes.

5. HCFA applies posteligibility income-counting principles and deductions to all of the individual's income, including income placed in the trust. Under the posteligibility process, the individual must pay all of his income to the nursing home, except for amounts required or permitted to be deducted. These are:

- personal needs allowance (required by law);
- family maintenance allowance, including spousal allowance (required by law to the extent it is made available to the spouse);
- amount for maintenance of the home, if such allowance is included in the state plan (optional deduction); and
- medical expenses not subject to third-party payment (required by law). /17/

Since all income is counted for posteligibility purposes, and only the above-described deductions are allowed from what the individual must pay to the nursing facility, it is questionable whether payments for items such as administrative costs and attorney fees can, in fact, be made from the trust.

(Under trusts developed as a result of the Miller case itself, income in the trust was not considered available for either eligibility or posteligibility purposes; payments were made from the trust to the individual in amounts just under the state's income cap, and the individual's share of cost to the nursing facility was determined on the basis of those payments. Amounts left in the trust were available to meet special needs of the individual, i.e., to make payments for items that were not food, clothing, or shelter.)

HCFA's interpretation has the effect of making all of an individual's income, except for the amount protected by mandatory and optional posteligibility deductions, available to pay for the cost of nursing home care. Nursing facility residents in medically needy states face a similar result, with a major exception. Individuals who need nursing home care in medically needy states do not need to establish trusts to become eligible for Medicaid; thus, they do not incur the administrative costs and attorney fees related to the establishment and maintenance of Miller-type trusts. (At least one court has found that court-ordered attorney fees, guardian commissions, and other related court costs are remedial care, qualifying as mandatorily deductible expenses. /18/ A similar argument could reasonably be made about the costs of administering a Miller-type trust.)

V. Oregon's Miller Trust Form

Prior to HCFA's issuance of guidance, Oregon had approved a standard form for use by individuals seeking to take advantage of the exemption in the 1993 amendments. /19/ The form includes a number of provisions that are less restrictive than those which appear to be required by HCFA's interpretation.

The purpose of assigning income to the trust, under Oregon's form, is "to bring the beneficiary's total monthly pension and social security income $10.00 under the 'income cap.'" /20/ The trust is established as a supplemental-needs trust -- "[t]he retained funds in the trust are not available, in any event, for basic support, that is, for basic food, shelter and clothing costs for the beneficiary." /21/ Thus, the trust appears to be intended to receive only that portion of the individual's income necessary to bring the remaining income under the "$10.00-under-the-cap" standard described above.

Examples of special needs that the trust might be used to fund are listed, including various types of medical services, supplies, and equipment as well as television and telephone services, stamps and writing supplies, and payments to bring family and friends to visit. /22/ But the trustee is directed to pay for these expenses only if a public benefit program does not cover them. This directive is, in part, a reference to the statutory provision that requires states to allow deductions from an individual's payment to the nursing home for incurred medical expenses not covered by the state plan. /23/

It is questionable, under HCFA's analysis that defines income for posteligibility purposes as all income in or out of the trust, whether the supplemental-needs provisions of the Oregon-approved trust instrument could actually be made effective for the beneficiary. To the extent the provisions are intended to cover medical expenses not covered by Medicaid, they will be effective, as noted above. Others of the supplemental needs listed as examples may have to be paid for from the individual's personal-needs allowance, as required for individuals in medically needy states.

VI. Conclusion

By exempting income-only trusts in 300-percent states from otherwise restrictive trust rules, Congress demonstrated its interest in assuring that individuals in those states receive nursing home services they need and that their spouses receive the necessary spousal allowance provided by law. Advocates should insist that their states adopt easy procedures for the use of Miller-type trusts and should publicize widely their availability. The Utah gap may be closing.

Footnotes

/1/ Identifying the income cap states is more difficult than one would think. For reasons unfathomable to this author, every apparently reliable source of information on this subject lists the states somewhat differently. As best as can be determined, the current income cap states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Iowa, Kansas,

Louisiana, Mississippi, Nevada, New Jersey, New Mexico, Oregon, South Carolina, South Dakota, Texas and Wyoming.

/2/ The origin of the term "Utah gap" is attributed to Virginia Fraser, the long-term care ombudsperson for Colorado. Fraser has likened the position of people affected by income caps to a gap in the Utah canyon lands with no way out. Ironically, Utah does not have a Utah gap in its Medicaid program; only in its geological formations. Utah has a medically needy program.

/3/ 42 U.S.C. Sec.1396a(a)(10)(A)(ii)(V) describes this optional category of Medicaid eligibility as people "who are in a medical institution for a period of not less than 30 consecutive days (with eligibility by reason of this subclause beginning on the first day of such period), who meet the resource requirements of the appropriate State plan described in clause (i) or the supplemental security income program, and whose income does not exceed a separate income standard established by the State which is consistent with the limit established under section 1396b(f)(4)(C) of this title."

/4/ Jill Quadagno et al., Falling into the Medicaid Gap: The Hidden Long-Term Care Dilemma, 31 Gerontologist 521 -- 26 (1991).

/5/ See, e.g., New Mexico Dep't of Human Servs. v. HHS, 4 F.3d 882 (10th Cir. 1993).

/6/ 29 U.S.C. Sec. 1056(d)(3)(A). These are authorized by amendments to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.Secs. 1001 -- 1462, contained in the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426.

/7/ 29 U.S.C.Secs. 1001 -- 1462.

/8/ Miller v. Ibarra, 746 F. Supp. 19 (D. Colo. 1990) (Clearinghouse No. 46,154). The trusts at issue in the case gave the trustee discretion to pay living expenses for the beneficiary but restricted the trustees' discretion to paying no more than $20 less than the income eligibility standard used by the Medicaid agency for determining Medicaid eligibility. Thus, under the trust arrangement, the individual would never receive income at the level of the cap.

/9/ See Letters from Gary Wilks, Associate Regional Administrator, Region VIII, HCFA, to Irene Ibarra, Executive Director, Colorado Department of Social Services (on file with NSCLC, Washington, D.C., office).

/10/ 42 U.S.C. Sec. 1396p(d)(4) (added by section 13611(b) of Pub. L. No. 103-66, 107 Stat. 312 (Aug. 10, 1993)).

/11/ Memorandum on Miller-type Trust Exemption Under OBRA-93 from Sally K. Richardson, Director of Medicaid Bureau, to Regional Administrators (Mar. 17, 1994) (on file with NSCLC, Washington, D.C., office).

/12/ Id. at 2.

/13/ See, e.g., section 207 of the Social Security Act, 42 U.S.C. Sec.407, concerning Title II payments; 5 U.S.C.Sec. 8346 for federal employees pensions; and 29 U.S.C. Sec. 1056(d)(1) for pensions governed by ERISA. These antialienation clauses contain language such as that benefits are not "transferable or assignable, at law or in equity." 42 U.S.C. Sec. 407. This social security provision has been interpreted by at least one court as applying to voluntary as well as involuntary transfers. Ellender v. Schweiker, 575 F. Supp. 590 (D.N.Y. 1983).

/14/ Memorandum on Miller-type Trust Exemption Under OBRA 93: Supplement to Memorandum Dated March 17, 1994, from Sally K. Richardson, Director of Medicaid Bureau, to Regional Administrators (May 25, 1994) (on file with NSCLC, Washington, D.C., office) [hereinafter May Memorandum].

/15/ 42 U.S.C. Sec. 1396a(a)(10).

/16/ May Memorandum, supra note 14, at 3.

/17/ See 42 U.S.C.Sec. 1396r-5(d)(1); 42 C.F.R.Sec. 435.725 (posteligibility treatment of income and resources of institutionalized individuals: application of patient income to the cost of care for optional groups of aged, blind, and disabled in states covering individuals receiving SSI).

/18/ Missouri Div. of Family Servs. v. Barclay, 705 S.W.2d 518 (Mo. App.1985). HCFA disapproved the Missouri State Plan Amendment that was submitted to implement this court's order. A reconsideration hearing was scheduled for March 18, 1987. 52 Fed. Reg. 1970 (Feb. 18, 1987). While the outcome of this hearing is not known, the approach that Missouri took seems correct and suitable to apply to the fees and costs related to Miller-type trusts. In the interest of giving effect to the 1993 amendments, HCFA might be more willing to accept this interpretation now than it was in 1987.

/19/ A copy of relevant portions of the Oregon form is available from the NSCLC Washington, D.C., office.

/20/ Oregon form Para.3.1 -- Trust Funding -- Initial Funding.

/21/ Oregon form Para.8.1 -- Supplemental Needs Trust -- Supplemental Purposes.

/22/ Oregon form Para.8.2(b) Supplemental Needs Trust -- Supplemental Needs Described.

/23/ 42 U.S.C. Sec. 1396r-5(d)(1)(D) (referring to 42 U.S.C. Sec. 1396a(r)(1)).