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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/13/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CONCETTA BARRAL,)	1 CA-CV 11-0293
)	
Plaintiff/Appellee,)	DEPARTMENT C
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication
ARIZONA HEALTH CARE COST CONTAINMENT)	- Rule 28, Arizona
SYSTEM ADMINISTRATION, an agency of)	Rules of Civil
the State of Arizona; THOMAS J.)	Appellate Procedure)
BETLACH, in his capacity as Director)	
of AHCCCS,)	
)	
Defendants/Appellants.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. CV LC2009-000848-001

The Honorable Crane McClennen, Judge

REVERSED AND REMANDED WITH INSTRUCTIONS

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N O R R I S, Judge

¶1 Defendant/Appellant Arizona Health Care Cost
Containment System ("AHCCCS") timely appeals from the superior

court's order vacating its decision subjecting Plaintiff/Appellee Concetta Barral to a three-month "penalty period" before receiving health care benefits from the AHCCCS-funded Arizona Long Term Care System ("ALTCS"). For the reasons discussed below, we vacate the superior court's judgment and affirm AHCCCS's decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 In March 2009, Barral, who was living in a nursing facility, applied for ALTCS benefits. On March 26, 2009, Barral, through her son pursuant to a power of attorney, paid \$17,000 for a \$17,017 whole life insurance policy. Simultaneously, Barral irrevocably assigned ownership of the policy to an estate planning trust. The assignment form designated the trust as the "policy beneficiary" and stated the terms of the trust included "payment of the policy proceeds for the funeral, burial and cremation expenses for [Barral]" (the "burial trust"). Barral's son, on behalf of his mother, purchased the policy and assigned it to the trust on the advice of a law firm he had retained to help Barral meet ALTCS's low-income eligibility requirements.

¶3 On April 22, 2009, AHCCCS notified Barral's law firm that it intended to treat the burial trust as an uncompensated transfer -- which meant the assets of the trust could not be

excluded from Barral's assets for ALTCS eligibility purposes -- because "[a]llthough [the burial trust implied] the funds [would] be used for burial expenses, there [was] no guarantee of how the funds from the policy [would] be used. Neither [was] there a guarantee that all of the funds [would] be used for burial expenses." Then, on May 12, 2009, AHCCCS sent a "Notice of Uncompensated Value" to Barral's law firm, formally notifying it that because Barral "did not receive enough compensation for the item(s) [she] transferred, [she was] not eligible for long term care services [for a three-month penalty period]."¹

¶4 On May 26, 2009, Barral, through her son as her attorney-in-fact, signed two "Statement[s] of Funeral Goods and Services Selected," one for a funeral home in Arizona, and one for a funeral home in New York. The statements listed various funeral services to be performed by each funeral home for a combined price of \$17,010. Barral's law firm submitted these statements to AHCCCS, along with other documentation, as a "rebuttal of [the] uncompensated notice," arguing that "compensation was received in the form of services." On June 22, AHCCCS notified the firm their "rebuttal [was] not

¹Federal and Arizona statutes require agencies to impose periods of ineligibility corresponding to the value of transferred assets when an individual has "transferred or assigned for less than fair consideration assets . . . for the purpose of meeting the eligibility criteria." Ariz. Rev. Stat. ("A.R.S.") § 36-2934(B) (2009).

successful because although the two contracts provide lists of goods and services, they only show what might be purchased. . . . There is no guarantee that [the funds] will be used in that manner. There is nothing that ties the burial trust to the two contracts." Accordingly, on July 7, AHCCCS notified the firm Barral would be ineligible for long term care benefits for approximately three months because she had "transferred assets and [had] not receive[d] something of equal value in return." Barral's law firm immediately disputed the imposition of a penalty period and requested a hearing.

¶15 Barral died on July 15, 2009. An administrative law judge ("ALJ") held a hearing on the matter on September 18, 2009. The "benefits administrator" for the law firm testified the burial trust had been established to comply with AHCCCS regulations, but both she and the attorney representing Barral at the hearing affirmed the burial trust allowed Barral's son to substantially change what funeral services would be provided by the funeral home and to personally receive any excess proceeds. The transcript of the hearing includes the following exchanges between the ALJ and Barral's counsel ("B.C."), and between AHCCCS's counsel ("A.C.") and the law firm's benefits administrator ("Ben. Admin."):

[ALJ]: So according to . . . what you're saying, if there are

excess proceeds, it would be returned to the son?

[B. C.]: I believe that's correct, Your Honor.

. . .

[A. C.]: Is it possible at the last moment that the son could change services and goods?

[Ben. Admin.]: Yes.

[A. C.]: Okay. So is it possible . . . the son could say "I think [that] maybe it might be a better idea just to have a cremation?"

[Ben. Admin.]: Yes.

[A.C.]: Which would cost less money.

[Ben. Admin.]: That is possible.

[A.C.]: And who would get that extra money?

[Ben. Admin.]: Whoever is listed as the beneficiary of the excess proceeds.

An AHCCCS manager then testified the burial trust did not, in fact, comply with the regulations governing ALTCS's eligibility requirements for those reasons. The ALJ concluded that because Barral's "burial trust allow[ed] for [Barral's] son to adjust the terms and obtain trust assets without compensating the trust, creation of the trust was a transfer of assets for less than fair market value," and recommended denial of Barral's

eligibility appeal. The Director of AHCCCS, through his designee, adopted the ALJ's decision and concluded Barral had failed to show AHCCCS had violated any statute, regulation, or "general legal principle" by imposing the penalty period (the "Director's Decision").

¶6 Barral appealed the Director's Decision to the superior court. After briefing and oral argument, the court notified the parties that whether Barral's son "was obligated to pay the full \$17,000 . . . or whether he could pay something less and keep the difference" and the amount Barral's son had "actually paid for [Barral's] burial could be relevant," and it "would like to know how much [Barral's son] actually paid." The parties eventually stipulated that the trust had spent approximately \$13,315 on Barral's funeral services and had then returned approximately \$3,800 to Barral's son. The parties also attached, as exhibits to their stipulation, statements from funeral homes in Arizona and New York listing funeral services and prices totaling \$13,315. These statements listed services and expenses substantially different from the statements signed by Barral's son in May 2009. *See supra* ¶ 4.

¶7 After considering this information and additional oral argument, the superior court ruled Barral was "mostly right in that most of the funds from the [burial trust] were used to pay

for [Barral's] funeral and burial expenses, and [AHCCCS was] somewhat right in that some of the funds from the [burial trust] went to [Barral's son]." The superior court then vacated the Director's Decision and remanded the case to AHCCCS "to make a decision based on the actual distribution of the funds from the [burial trust] as shown in the parties' stipulation."

DISCUSSION

¶18 AHCCCS argues on appeal that "[i]nherent in the Superior Court's final written judgment is the erroneous conclusion that the use of [Barral's] \$17,000 to purchase a life insurance policy and irrevocably assign it to the [burial trust] was not a transfer for less than fair market value." AHCCCS also argues the Director's Decision was supported by substantial evidence. We agree with both arguments.

¶19 We review the superior court's resolution of an administrative appeal to "determine whether the record contains substantial evidence to support the [court's] decision [and] independently resolve issues of law." *Lake Havasu City v. Ariz. Dep't of Health Servs.*, 202 Ariz. 549, 551, ¶ 4, 48 P.3d 499, 501 (App. 2002) (citations omitted). Our review, like that of the superior court, centers on whether AHCCCS's decision was illegal, arbitrary, capricious, or an abuse of discretion.

Smith v. Ariz. Long Term Care Sys., 207 Ariz. 217, 221, ¶ 19, 84 P.3d 482, 486 (App. 2004) (citation omitted).

¶10 Arizona “has elected to participate in the federal Medicaid program by establishing programs such as ALTCS,” and therefore “[a]s a condition of receiving federal funds, Arizona must use federal eligibility standards.” *Id.* at 221 n.2, ¶ 21, 84 P.3d at 486 n.2. In accordance with federal eligibility standards, AHCCCS requires ALTCS applicants to have available resources of no more than \$2,000. See Ariz. Admin. Code (“A.A.C.”) R9-28-407(B); 42 U.S.C. § 1382(a)(3)(B) (2005) (eligibility requirements for individual with “no spouse with whom [she] is living”). AHCCCS permits, however, ALTCS applicants to exclude “[a]ssets that [they have] irrevocably assigned to fund the expense of a burial” from their “available resources” (the “burial fund exclusion”). A.A.C. R9-28-407(C)(4)(c). In evaluating whether assets should be excluded, AHCCCS employs an “Eligibility Policy Manual” (“Manual”), <http://www.azahcccs.gov/shared/Downloads/EligibilityManual/AEPM/ahccseligibilitypolicymanual.htm> (last visited Mar. 7, 2012), which includes “advisory only” substantive policy statements.² The Manual details multiple types of “burial funds” that are

²See Notice to the Public, <http://www.azahcccs.gov/shared/EligibilityManual/EligibilityManual.aspx?ID=applicants> (last visited Mar. 7, 2012).

treated differently for eligibility purposes "based on the type of burial fund and whether it is revocable or irrevocable." Manual § 706.08(A).

¶11 The legal issue we therefore must resolve is whether Barral's trust arrangement qualified under the burial fund exclusion. AHCCCS argues the assets in Barral's burial trust could not be excluded from her available resources because "the money was not 'irrevocably' assigned to pay *only* funeral expenses, and the amount actually used to fund funeral expenses could not be determined until after the death of [Barral]." We agree the burial fund exclusion required Barral to present sufficient evidence to assure AHCCCS -- the agency charged with complying with Medicaid regulations -- that the assigned assets had been irrevocably assigned in their entirety to fund burial expenses. See A.A.C. R9-28-409(G) ("A person found ineligible for ALTCS services by reason of a transfer of assets for uncompensated value shall have the right to rebut the disqualification. . . . The person shall have the burden of rebutting the presumption.").

¶12 Further, we note that although the Director's Decision found the burial trust was "irrevocably assigned to a funeral home," -- a finding we believe to be factually questionable but

nonetheless accept³ -- it also concluded the burial trust failed to qualify for the burial fund exclusion because Barral's son "could change the underlying agreements within the trust and take the remaining money out of the trust." We agree with this conclusion; there is no evidence in the record that the *funds* in the burial trust were ever irrevocably assigned to pay for specific funeral services, as the controlling regulation, A.A.C. R9-28-407(C)(4)(c), requires. As discussed, see *supra* ¶ 4, Barral's son signed statements that listed services to be purchased for \$17,010 from two separate funeral homes on May 26, 2009. The record is clear, however, that Barral's son (and, if she had been able to do so, Barral herself) could change the services described in the statements and designate the recipient of any excess proceeds. Indeed, this is what happened here: after Barral's death, her son contracted for a different -- and substantially less expensive -- package of funeral services and received \$3,800 in excess proceeds.

³Although the benefits administrator of the law firm testified the burial trust arrangement they used was "irrevocably assigned to a funeral home," she also testified "[i]t [was her] understanding . . . when you have a burial contract or burial trust, if you wish to change your funeral provider, you are allowed to change funeral homes from one home to another home." Thus, while the burial trust may have been generally designated for burial expenses, the record does not demonstrate it was "irrevocably assigned" to a specific funeral home.

¶13 The Director's Decision is consistent with the internal guidelines outlined in the Manual. Among the various types of "burial funds" identified in the version of the Manual in effect at the time Barral assigned her life insurance policy to the trust was a "burial trust[]," which the Manual defined, among other types of funds, as "clearly designated for burial expenses and separated from all nonburial-related assets." Manual § 706.08(B)(1).⁴ The assets in Barral's burial trust, however, were not "separated from all nonburial-related assets,"

⁴AHCCCS amended the Manual in September 2010 to include an "Irrevocable Burial Trust," which is defined as "a trust that does not fund a specific burial plan at a specific funeral home." Manual § 706.08(B)(3). The Manual now states that such trusts should be "excluded as a resource," but maintains the requirement that the trust contain only burial-related assets:

since the funds placed into a burial trust are not tied to specific good[s] and services, they must be evaluated as a transfer. The amount in a burial trust [that] does not exceed the average cost of a funeral . . . shall be considered a compensated transfer provided the burial trust meets both of the following conditions: [1] The individual does not already have an irrevocable burial plan; and [2] [t]he burial trust contract specifies that any amount not used for burial will revert to the person's estate, where it would be subject of the Estate Recovery program. Any amount placed into a burial trust that does not meet both requirements shall be evaluated as a transfer with uncompensated value.

§ 706.08(C)(2).

as Barral and her son retained the right to decide which assets in the burial trust would be burial-related and which would be nonburial-related. In addition, the Manual specified that in order to qualify as an excludable "irrevocable burial arrangement," Barral's burial trust had to disallow her from "obtain[ing] any portion of the funds under any circumstances except for burial expenses." Manual § 706.08(B)(5). Here again, because Barral's son, acting as Barral's legal proxy, could redirect a portion of the burial trust's funds so they could be used for non-burial purposes, the burial trust failed to meet this "under any circumstances" test.

¶14 Finally, the Director's Decision that Barral's transfer of assets to the burial trust was a "transfer of assets for less than fair market value" is also consistent with state and federal law. When a trustor places non-excluded assets (assets not excluded under the burial fund exclusion or another exclusion) in an irrevocable trust that "cannot be disbursed to or on behalf of the [trustor]," those assets are "treated as a transfer of assets for less than fair market value." Manual § 905.00(E); see *Johnson v. Guhl*, 91 F. Supp. 2d 754, 763 (D.N.J. 2000) (if trustor is not a beneficiary of irrevocable trust, "the corpus of the trust will be considered a transfer of assets for less than fair market value" and trigger a penalty

period); 42 U.S.C. § 1396p(d)(3)(B)(ii) (2009) (“In the case of an irrevocable trust . . . any portion of the trust from which . . . no payment could under any circumstances be made to the individual shall be considered . . . to be assets disposed by the individual [subject to fair market value analysis and the imposition of a penalty period.]”).

¶15 We therefore hold the Director’s Decision that the burial trust could not “be excluded from consideration as a transfer of assets for less than fair market value” was supported by substantial evidence and was not illegal, arbitrary, or capricious. The superior court’s conclusion that Barral was “mostly right in that most of the funds from the [burial trust] were used to pay for [Barral’s] funeral and burial expenses” is, thus, incorrect as a matter of law. Because the burial trust never qualified under the burial fund exclusion and therefore failed to comply with federal and state laws established to prevent abuse of public-subsidized health care, it is immaterial how the funds were actually spent. See *Miller v. Ibarra*, 746 F. Supp. 19, 28 (D. Colo. 1990) (“One purpose evident in the federal and state Medicaid laws . . . is to prevent abuse of the Medicaid system. For example, federal and state laws provide for periods of ineligibility when individuals attempt to become eligible for Medicaid benefits by

[improperly] disposing of assets."); *Smith*, 207 Ariz. at 223, ¶ 30, 84 P.3d at 488 (quoting *Forsyth v. Rowe*, 226 Conn. 818, 828, 629 A.2d 379, 385 (1993)) ("The [M]edicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving [M]edicaid benefits from the state.").

CONCLUSION

¶16 For the foregoing reasons, we reverse the judgment of the superior court and remand this matter to the superior court to enter judgment in favor of AHCCCS. As the prevailing party on appeal, AHCCCS is entitled to recover its costs on appeal subject to its compliance with Arizona Rule of Civil Appellate Procedure 21.

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

_____/s/_____
MARGARET H. DOWNIE, Judge

_____/s/_____
DIANE M. JOHNSEN, Judge