IRA M. LEFF

AND ASSOCIATES

_____

ATTORNEYS AT LAW

1800 CENTURY PLACE, N.E.
SUITE 100
ATLANTA, GEORGIA 30345

WWW.IRALEFF.COM

IRA M. LEFF

IRALEFF@BELLSOUTH.NET

DIRECT DIAL: (404) 633-1801

FACSIMILE: (404) 634-4300

July 19, 2009

Elder Law Minute

Revocable Living Trust Treatment

I have been retained by a large trust company to advise them about a revocable living trust set up by a Medicaid applicant's (A/R) deceased husband on December 3, 1997. According to its terms, the trustee *shall pay to or for the benefit of Settlor's spouse a portion, all, or none of the net income and principal as needed for Settlor's spouse's maintenance, support, education and health.*

The question is how should Georgia Medicaid treat this trust? Is it an OBRA '93 trust subject to the rules of MEDICAID MANUAL § 2337, or does it fall outside of that definition and is it subject to the rules of MEDICAID MANUAL § 2338?

An OBRA '93 Trust is defined as *a trust created on or after 8-11-93 by an individual, spouse, or someone acting on his/her behalf, with his/her own funds, and with his/her named as beneficiary of the trust.* MEDICAID MANUAL § 2338-1. I quote this rule verbatim (even with its improper grammar) because its interpretation is critical to resolving this matter.

MEDICAID MANUAL § 2337-1 instructs DFCS caseworkers to consider all trusts created by the A/R or spouse which were created *with the A/R's resources AND/OR with the A/R as beneficiary.* Under this language, it clearly appears that the trust in question is an OBRA '93 trust. It that is a correct interpretation of the law, then any portion of the trust from which it is possible to make a disbursement to the A/R counts as a resource. If instead, this trust falls outside of the OBRA '93 definition, then the trust principal is not a resource since the A/R is not legally empowered to revoke the trust and use the principal for her support. MEDICAID MANUAL § 2338-2.

In my opinion MEDICAID MANUAL §§ 2338 and 2337 have not been written in compliance with Federal Law. Next week I will explain my reasoning. If any of you have any thoughts on this topic, please let me know.