IRA M. LEFF

AND ASSOCIATES

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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

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Elder Law Minute

Revocable Living Trust, Part 2

Last week I wrote about a Medicaid applicant/recipient (A/R) who is the beneficiary of a trust set up by her deceased husband in 1997. An independent trustee has complete discretion as to whether income or principal is distributed to her.

MEDICAID MANUAL § 2337-1, which pertains to OBRA '93 Trusts, instructs DFCS caseworkers to consider as resources 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 appears that the trust in question is an OBRA '93 Trust and therefore the A/R would not be eligible for Medicaid.

However, if you look back at the legislative history behind this regulation, you might come to a different conclusion. 42 USC § 1396p(d), which was added to the Federal Code by OBRA '93, says that in order to be considered a resource of the A/R, assets of the *individual* must have been used to form all or part of the corpus of the trust.

Individual is defined as the A/R or her spouse where the spouse is acting in place of or on behalf of the A/R. *CMS Transmittal 64*, November 1994.

In our case, the trust was set up by A/R's husband and was funded exclusively with his assets. He was not acting on behalf of A/R, but rather in his own individual capacity. Therefore, I would conclude that the trust is not a resource of the A/R's since it is not an OBRA '93 trust.

Out of an abundance of caution, I ran my conclusions by Ginger Henry of DHR and Kathanette Barnes of DCH, both top consultants on Medicaid policy. They both concluded that the trust is an OBRA '93 trust since A/R is a beneficiary.

While I disagree, it is clear that DFCS will consider an *inter vivos* trust set up by a spouse as a resource until a decision is rendered to the contrary.

Please let me know if any of you have tried this case.

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