



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. 0000000000

Ms. Jones, Appellant

Appearances: Thomas Herlihy, III, Esq., for Ms. Jones
Mary Ferry, Life Solutions, Inc., Guardian of Ms. Jones
David Ferry, Jr., Esq., Attorney for Life Solutions, Inc.
Ana Cruz-Eaton, Business Office Manager, Millcroft
Geoffrey Henry, Executive Director, Millcroft
Brian Neff, Regional Business Manager, Millcroft

Peter S. Feliceangeli, Deputy Attorney General, Counsel for the Division of
Medicaid and Medical Assistance
Sharmeka Thompson, Sr. Social Worker/Case Manager, Team #230, Division of
Medicaid and Medical Assistance
Wanda Sinibaldi, Sr. Social Worker Supervisor, Team #230, Division of
Medicaid and Medical Assistance

I.

Ms. Jones ("Appellant"), by and through her court-appointed Guardian, Life Solutions, Inc., applied for Medicaid Long Term Care ("LTC"). While the Appellant was approved for LTC Medicaid effective October 1, 2011, prior months were denied based upon being over the resource limit in August 2011 and over the income limit in September 2011. The Appellant asserts that the Division of Medicaid and Medical Assistance ("DMMA") erred in failing to treat court-ordered guardianship fees as business expenses, which would have reduced the Appellant's income below the limit for September 2011.

The Division of Medicaid and Medical Assistance ("DMMA") contends that it correctly determined the Appellant's LTC Medicaid eligibility.

II.

The Appellant applied for Long Term Care Medicaid on October 11, 2011. (Exhibit 10)

On December 22, 2011, the Appellant was sent a Notice to Approve Your Medical Assistance, effective October 1, 2011. (Exhibit 3)

On February 27, 2012, the Appellant filed a request for a fair hearing. (Exhibit 2)

The Appellant was notified by certified letter dated April 20, 2012, that a fair hearing would be held on May 4, 2012. A continuance was granted on April 23, 2012. The Appellant was notified by certified letter dated June 4, 2012, that a fair hearing would be held on June 19, 2012. A continuance was granted on June 20, 2012. The Appellant was notified by certified letter dated June 26, 2012, that a fair hearing would be held on July 13, 2012. The hearing was conducted on that date in Newark, Delaware.

This is the decision resulting from that hearing.

III.

Ms. Jones, by and through her guardian, Life Solutions, Inc. (“Life Solutions”), applied for Long Term Care (“LTC”) Medicaid on October 11, 2011. (Exhibits 9 and 10) Mary Ferry (“Ferry”) testified that she is the owner of Life Solutions, a for-fee service guardianship agency in operation since the year 2000. As a for-fee service guardianship agency, Ferry testified, when the Delaware Court of Chancery appoints Life Solutions as the guardian of a disabled person, she must submit claims through the court for payment of her services. Ferry testified that Life Solutions is not a state employee, but is a private agency. Ferry testified that Life Solutions was appointed as guardian for the Appellant’s person and property on February 24, 2011. (Exhibit 6) Ferry testified that a guardian of the person makes all of the medical decisions for the disabled person, whether it concerns admission to a nursing home or hospital, the type of care that is required, attending care conferences, and receiving feedback from physicians and the nursing home. As a guardian of the disabled person’s property, Ferry testified, she is responsible for marshaling the disabled person’s assets and making appropriate payments. Essentially, Ferry testified, as guardian of the person and property, she makes all personal and financial decisions for the disabled person—while she considers any input from the disabled person and his or her family, ultimately Ferry retains the decision-making power.

Ferry testified that when Life Solutions is appointed as a guardian, the court provides her with a certified court order to that effect. With that authorizing documentation, she testified, she can go to banks and residences in an attempt to obtain information about what assets may be available to the disabled person. In this case, Ferry testified, the Appellant had a former power of attorney, Mr. Smith (“Smith”), who had been working on the Appellant’s LTC Medicaid application, but could progress no further. Ferry testified that on March 15, 2011, after receiving the court order approving Life Solutions’ guardianship of the Appellant, she spoke with Smith via telephone. Basically, she testified, she attempted to learn what steps Smith had taken concerning the Appellant’s LTC Medicaid application, including what banks were being used. Ferry testified

that while the court order she received identified Wilmington Trust, the Appellant actually had accounts with PNC Bank. Ferry testified that she felt it would be best to obtain a new court order that would permit her to re-title the accounts at PNC Bank instead of starting from scratch and trying to transfer everything to Wilmington Trust.

Ferry testified that in April 2011, after she received a court order authorizing her inclusion onto the Appellant's guardian account at PNC Bank, the only information she had was the Appellant's Social Security identification number. Ferry testified that she did not realize until after receiving a bank statement for this account that the Appellant also had a Miller Trust account with PNC Bank: The statement, she testified, showed limited funds in the Appellant's guardianship account, with past transfers of money to another account¹. Because the Miller Trust account was set up with a separate tax identification number and not the Appellant's Social Security number, Ferry testified, she was unaware until that point that Smith had created a Miller Trust account for the Appellant. Further, Ferry testified, these statements showed that Smith was still transferring money out of the Appellant's Miller Trust account, despite the fact that Life Solutions held the Appellant's guardianship.

Ferry testified that it was at this point that she learned there were two (2) accounts for the Appellant at PNC Bank: A guardianship account and a Miller Trust account. Once she learned that the Miller Trust had been established, she testified, she asked Smith for bank statements for that account. However, she testified, Smith did not produce this documentation in a timely manner and was subpoenaed. Ferry testified that Smith was scheduled to be deposed on June 30, 2011; however, after working in conjunction with the attorney representing Life Solutions, she and Smith came to a resolution where Smith would produce a copy of the Miller Trust documentation and sign documentation permitting Life Solutions to assume the trust account. Ferry testified that she did not receive the requested documentation until July or August 2011 and that none of the documentation she received was in order.

Further, Ferry testified, PNC Bank would not permit her to obtain any information concerning the Miller Trust until she was added to that account. Ferry testified that PNC Bank requires all documentation to be sent to their legal department. Ferry testified that PNC Bank has begun denying court orders that do not specify certain items that PNC Bank requires. As a result, she testified, Ferry had to get a court order allowing her to be placed on the Appellant's Miller Trust account. Ferry testified that although she starting speaking with PNC Bank in April 2011, she was still working with the bank through the end of July, in an attempt to be placed on the Appellant's Miller Trust account. Ferry testified that despite working diligently on the Appellant's case, it took approximately half the year to obtain all necessary information. However, she testified, her difficulties in obtaining information from PNC Bank and Smith had concluded by the time she began the LTC Medicaid application on October 11, 2011.

¹ Ferry testified that although she was listed on the account, in the beginning she did not receive statements. Ferry testified that she worked with PNC Bank numerous times over this concern, but kept having to go back to get copies of the statements printed. Ferry testified that PNC Bank later discovered the Mr. Smith had set up the account to receive online statements only. As a result, she testified, even though PNC Bank changed the name on the account, Mr. Smith continued to receive online statements. Ferry testified that this oversight has been corrected.

In addition, Ferry testified, Smith did not forward financial documentation concerning the Appellant even after Life Solutions' guardianship was in place. Ferry testified that the Appellant receives two (2) separate pensions from Canada due to her late husband's Canadian citizenship: one (1) old age pension and one (1) Veteran's pension. Ferry testified that when Smith failed to forward paperwork for these pensions and failed to complete it himself, the pension deposits stopped. Ferry testified that in late September 2011 she noticed that one (1) Canadian pension was not being deposited. Ferry testified that she then had to work with the Canadian government to re-establish this pension, which took at least one (1) month. Further, Ferry testified that since these pensions are coming from Canada, the income had to be converted from Canadian dollars into United States currency: Because conversion rates vary, she testified, the monthly dollar amount is never the same.

Ferry testified that she attended a LTC Medicaid meeting with DMMA representative Sharmeka Thompson ("Thompson") on October 11, 2011. Further, Ferry testified that she submitted documentation to DMMA in support of the Appellant's application, including a bank statement from PNC Bank dated October 6, 2011. (Exhibit 8) Ferry testified that this statement shows a monthly pension deposit from Chrysler on September 1, 2011 for \$180.06, and a monthly Social Security Income deposit on September 2, 2011 for \$1,225.00. (Exhibit 8) The next major transaction, she testified, occurred on September 13, 2011 when a check she wrote on September 12, 2011 was cashed: This check, she testified, was submitted to Progress Pharmacy in the amount of \$1,000.00 to pay an outstanding debt. (Exhibit 8) Ferry testified that to this day, the Appellant continues to owe a large outstanding debt to Progress Pharmacy, who supplies the Millcroft nursing home. Next, Ferry testified that a check was written out of the Appellant's guardian account for \$2,000.00: This amount, she testified, was paid pursuant to a court order allowing Life Solutions to escrow fees for its services. (Exhibit 7 and 8) The court order, Ferry testified, permitted Life Solutions to set a fee reserve at \$2,000.00. (Exhibit 7) Lastly, Ferry testified that one (1) of the Appellant's Canadian pensions was deposited on September 29, 2011, in the amount of \$450.67. (Exhibit 8)

Ferry testified that she submitted this documentation of all of the deposits and checks processed for the Appellant's guardian account by PNC Bank at the time she applied in October 2011. Ferry further testified that she normally provides a computer print-out to show what income was deposited and the reason for the checks written on the account along with the bank statements, but did not testify whether she did so in this case.

Ferry testified that to her knowledge and recollection, no discussion about retroactive LTC Medicaid occurred during the meeting with DMMA on October 11, 2011, and was not aware at that time of the requirements for obtaining retroactive LTC Medicaid. However, Ferry did concede that she requested retroactive LTC Medicaid on the application she signed on the Appellant's behalf in her capacity as guardian. (Exhibit 10) Ferry testified that she knew at the time of application that it was possible that the Appellant could be approved for retroactive LTC Medicaid coverage for the three (3) months before application, or July through September. However, she testified that despite working as in guardianship for the past twelve (12) years, she did not understand the requirements for establishing retroactive LTC Medicaid eligibility.

After the Appellant's LTC Medicaid application was approved effective October 1, 2011, Ferry testified that she spoke with Wanda Sinibaldi ("Sinibaldi") of Millcroft's desire for it to be retroactive. (Exhibit 3) Ferry testified that during this conversation, Sinibaldi conveyed DMMA's stance on what occurred and explained why LTC Medicaid coverage was not approved for earlier months. Ferry testified that according to her recollection, Sinibaldi explained that the Appellant was over-resourced by \$17.00 in August 2011 and that no deposits were made to the Appellant's Miller Trust in September 2011. Ferry testified that she did not know how much she was supposed to deposit into the Appellant's Miller Trust account until the meeting she had with DMMA on October 11, 2011, and that in her experience, it is never clear how much money should go into a Miller Trust account each month.

Ferry testified that although she informed DMMA that she was appointed as the Appellant's Guardian and presented them with the court order to that effect, she was neither asked nor did she disclose the fees she charged for her services as guardian. (Exhibit 6) Further, she testified that although she received the court order permitting her \$2,000.00 fee reserve in September 2011, she did not disclose this expense on the LTC Medicaid application she signed on October 14, 2011. (Exhibits 7 and 10) Ferry testified that while this fee reserve was for future fees and costs and that she could not draw down from the fee reserve without a court order, she did not disclose to DMMA her total fees for August or September 2011. Lastly, Ferry testified that although the LTC Medicaid application asks for the applicant's expenses, and has a section for "other" among listed expenses, because the section was entitled "Shelter and Utility Expenses," she did not think that guardianship fees should have been listed there. (Exhibit 10)

Ferry testified that the \$2,000.00 paid out of the Appellant's guardian account in September 2011 would never be returned to the Appellant. Ferry testified that the check was issued to Life Solutions and was placed in an escrow account. Ferry further testified that if one of her clients is on Medicaid, any outstanding fee reserve is returned to Medicaid upon that client's death. Further, Ferry testified that the \$2,000.00 fee reserve she was granted was commensurate with what her fees would be over a normal period of time. However for all of the work she did for the Appellant, Ferry testified, the \$2,000.00 fee reserve was insufficient, a fact that she testified she knew upon receipt of the \$2,000.00.

Ana Cruz-Eaton ("Cruz-Eaton") testified that she has worked at Millcroft as their business office manager since August 31, 2009. Cruz-Eaton testified that as the business office manager, her duties include billing and collecting from private pay or any other payor such as Medicare or Medicaid. As such, she testified, she has overall responsibility for the Appellant's account with Millcroft. Cruz-Eaton testified that the payment inquiry screen report shows all transactions on a Millcroft resident's account. This statement, she testified, does not go out to the residents' families but is an internal document used to identify each month's expenses and payments for each resident. Cruz-Eaton testified that the Appellant's payment inquiry screen report begins August 2009 and continues through October 2011. (Exhibit 5) As of the end of October 2011, she testified, the Appellant's report shows a balance due of \$105,082.24. (Exhibit 5) This figure, she testified, represents all outstanding room and board charges, laundry charges, and medical supplies needed for the Appellant's stay at Millcroft. (Exhibit 5)

For example, Cruz-Eaton testified that the Appellant incurred \$7,350.00 in room and board charges for the thirty (30) days she spent at Millcroft in September 2011. (Exhibit 5) While the total for that month amounted to \$7,681.00, Cruz-Eaton testified, the only payment made was \$1,000.00 on September 13, 2011, making the month-end balance \$6,771.43. (Exhibit 5) While room and board and other expenses for the month of August 2011 amounted to \$7,971.68, she testified, the only payment made in August 2011 was \$15.00 for a haircut. (Exhibit 5) Further, Cruz-Eaton testified that while July's room and board came to \$6,370.00, Millcroft received two (2) payments of \$2,000.00 and \$1,225.00 on August 15, 2011. (Exhibit 5) Cruz-Eaton testified that the last time the Appellant had a zero balance on her account was November 2009². (Exhibit 5) Lastly, Cruz-Eaton testified that Smith was the Appellant's nephew, and was Millcroft's contact person for forwarding the Appellant's bills.

Sharmeka Thompson ("Thompson") testified that she works for DMMA as a Senior Social Worker/Case Manager. In that role, Thompson testified, she determines financial eligibility for LTC Medicaid in accordance with established regulations. Thompson further testified that she was the caseworker who processed the Appellant's application for LTC Medicaid. Thompson testified that in the course of processing the Appellant's application, she dealt with Ferry in Ferry's role as the Appellant's guardian. Thompson testified that ultimately, the Appellant was eligible for LTC Medicaid effective October 1, 2011. In addition, Thompson testified that the Appellant was not eligible for retroactive LTC Medicaid.

Thompson testified that if the Appellant had been eligible, the Appellant could have possibly been covered for August and September 2011 under LTC Medicaid's retroactivity regulation. Thompson testified that because the Appellant's monthly Social Security benefit of \$1,321.50 was transferred to her Miller Trust, the Appellant did not exceed the income limit for the month of August 2011. Thompson testified that although the Appellant's other income was not transferred to the Miller Trust, the removal of her Social Security income to the Miller Trust reduced her countable monthly income below the \$1,705.00 limit³.

However, Thompson testified, the Appellant's resources exceeded the limit in August 2011: The Appellant's life insurance policy, she testified, had an excess cash value of \$818.03. Thompson testified that according to Stonebridge Life Insurance Company, the Appellant's life insurance policy had a face value of \$2,500.00 with a cash surrender value of \$2,318.03. Thompson testified that after deducting \$1,500.00, there was excess burial or \$818.03. Thompson testified

² Cruz-Eaton testified that after full payment ceased, collection letters were sent to Smith. The State objected to this testimony on the grounds of relevancy. Counsel for the Appellant countered that this testimony showed a pattern of difficulties in working with Smith, which Ferry experienced. D.R.E. 402 holds that irrelevant evidence is inadmissible. Further, D.R.E. 403 identifies that even relevant evidence may be inadmissible if it would waste time, cause undue delay, or constitute needless presentation of cumulative evidence. In this instance, Smith's pattern of difficult behavior in cooperating with others has been amply demonstrated by previous testimony. I affirm the State's objection on grounds other than irrelevancy.

³ Thompson testified that in August 2011 the Appellant received \$1,321.50 in Social Security benefits, \$346.91 old-age pension, \$454.78 Canadian veteran's pension, and a Chrysler pension of \$195.06. This Hearing Officer notes that the Appellant's total income for August 2011 amounted to \$2,318.25 (\$1,321.50 + \$346.91 + \$454.78 + \$195.06 = \$2,318.25). After a \$20.00 disregard and deducting the Social Security benefits transferred to the Miller Trust, the Appellant's countable monthly income amounted to \$976.75, below the \$1,705.00 limit.

that added to an excess resource of \$17.23 after computing income, the Appellant's total resources exceeded the limit of \$2,000.00 by \$835.26.⁴

In addition, Thompson testified, the Appellant was not eligible for retroactive LTC Medicaid for September 2011 because no deposits were made into her Miller Trust account. Thompson testified that usually, DMMA requires that all of the gross income in excess of the monthly income limit be deposited into a LTC Medicaid applicant's Miller Trust account. Thompson testified that the current income limit is \$1,705.00⁵; as a result, she testified, any income received in excess of that amount should have been deposited into the Appellant's Miller Trust account in September 2011. However, she testified, the submitted bank statements showed that no income was deposited into the Miller Trust during the month of September. (Exhibit 8)

Thompson further testified that she provided Ferry with a "we need" letter on October 11, 2011, following their meeting⁶. (Exhibit 11) Thompson testified that this letter requests that Ferry "provide verification that Miller Trust deposits are made monthly while eligibility is being determine and continue to pay nursing home client's income." (Exhibit 11) This, she testified, is an admonition that should be followed the entire time the case is being determined in order to establish eligibility at the earliest date. Thompson testified that while the Appellant's income was appropriately deposited into her Miller Trust account from October 2011, there was no way for Ferry to correct the failure to deposit the Appellant's income in September 2011: For a Miller Trust, she testified, income must be deposited monthly in order to render an applicant eligible under Medicaid regulations. As a result, she testified, the failure to deposit the income in excess of \$1,705.00 into the Miller Trust account in September 2011 could not be corrected at the time the application was made in October 2011.

Further, Thompson testified that Ferry did not disclose to her or the DMMA that the Appellant would incur expenses for guardianship fees. Thompson testified that she only learned of the amount taken for fees while processing the case, when she saw the \$2,000.00 check written in September on the submitted bank statement. (Exhibit 8) Thompson testified that while she knew this expense was for guardianship fees, DMMA does not deduct guardianship fees as an expense from an applicant's income. In addition, Thompson testified that whenever there are large expenditures, DMMA questions where those funds went, in part to determine whether a transfer subject to penalty has occurred. As a result, she testified, she questioned Ferry, who informed her that the expense was for guardianship fees.

Wanda Sinibaldi ("Sinibaldi") testified that she works for the State of Delaware's DMMA as a supervisor. Sinibaldi testified that as Thompson's supervisor, she has reviewed the Appellant's case. Sinibaldi further testified that she was aware of the \$2,000.00 check written from the Appellant's guardian account to Life Solutions. Sinibaldi testified that because DMMA has worked with Life Solutions and Ferry in the past, she knew that Ferry charged her clients certain fees. Sinibaldi testified that with any organization representing disabled clients, there is an understanding that fees will be assessed. However, she testified, fees are generally not deducted from the client's account. Further, Sinibaldi testified, DMMA policy does not permit

⁴ \$818.03 + \$17.23 = \$835.26

⁵ After a \$20.00 disregard.

⁶ Ultimately, Thompson testified, she received all items requested in the "we need" letter by its due date. (Exhibit 11)

guardianship fees to reduce countable income. Instead, she testified, the policy identifies that all gross income from all sources after business expenses where applicable is counted.⁷ However, Sinibaldi testified, the Appellant neither had nor was a business. As a result, she testified, no business expenses would be allowed, causing all of her gross income to be counted as income for eligibility purposes.

IV.

Two major issues were raised in this instance⁸. First, whether the \$2,000.00 fee reserve paid to Life Solutions from the Appellant's guardian account on September 13, 2011 constituted a business expense that would render the Appellant financially eligible for retroactive LTC Medicaid. Second, whether the doctrine of fundamental fairness requires a more positive outcome for the Appellant. I find that both of these matters must be answered in the negative.

Business Expenses and 250% Income Limit

In order to be eligible for Long Term Care Medicaid, Delaware Social Services Manual ("DSSM") 20100 identifies that the applicant must be both medically and financially eligible. In determining an applicant's income, DSSM 20200 identifies that in determining financial eligibility, available income includes all money authorized (designated by the payor) for the recipient's benefit, whether received by the recipient directly or received by a representative payee. Income includes anything received by the individual, in cash or in kind, that can be used to meet needs for food, clothing or shelter. Further, DSSM 20200.4 defines gross income as income from all sources after business expenses, where applicable, have been deducted and before any disregards, exemptions or deductions such as taxes, health insurance premiums such as Medicare, life insurance premiums, loan payments, garnishments, credit union, alimony, child support (including court ordered), union dues etc. have been applied.

In this instance, the Appellant argues that her \$2,000.00 payment to provide for a court-ordered guardianship fee reserve constituted a business expense. However, as Sinibaldi pointed out, the Appellant is not a business nor does she conduct a business. While DSSM 20200.4 does not define the phrase "business expense," the regulation explicitly identifies what is not considered a deductible business expense: Personal expenses such as taxes, insurance premiums, loan payments, and garnishments, among others. It appears from the regulation, therefore, that "business expense" should be construed to mean expenses directly related to producing income, like inventory, manufacturing and shipping costs. The money the Appellant owed to Life Solutions for their guardianship services, in contrast, is more akin to a personal expense like those described in the latter part of DSSM 20200.4. Like court-ordered child support, the Appellant's court-ordered fee reserve payment should not be considered a deductible expense according to DSSM 20200.4. As a result, it appears that DMMA correctly did not categorize the

⁷ See DSSM 20200.4

⁸ In closing remarks, Appellant's Counsel conceded that DMMA correctly determined that the Appellant's resources exceeded the \$2,000.00 limit in August 2011. In computing the financial eligibility of a candidate for Medicaid Long Term Care DSSM 20300 sets a maximum allowable resource level of \$2,000.00 for an individual.

\$2,000.00 transfer as a business expense in calculating the Appellant's income for the month of September 2011.

This Hearing Officer fully credits the Appellant's argument that after the \$2,000.00 fee was paid to Life Solutions, the Appellant actually had negative income for the month of September 2011⁹. (Exhibit 8) However, the issue is whether the Appellant satisfied the eligibility requirements that would justify LTC Medicaid retroactive before October 1, 2011. Pursuant to DSSM 20370, any Medicaid applicant may be eligible for Medicaid coverage of unpaid medical bills incurred in any of the three months prior to the month in which they applied. However, in order for these bills to be paid, the applicant must establish that during the time the bills were incurred, all medical and financial conditions of the Long Term Care Program were met.

According to DSSM 20240.1, gross income is counted in the month it is actually received, subject to a single \$20.00 disregard. Pursuant to DSSM 20100.2.2, effective October 1, 1994, the income eligibility standard for individuals in nursing homes and HCBS Waiver programs became 250% of the SSI standard. In this case, DMMA applied a 250% standard to the Appellant's income, or \$1,705.00.

In computing the financial eligibility of a candidate for LTC Medicaid, 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, is composed only of Social Security, pension, and 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.

In this instance, no testimony disputed the fact that no deposits were made into the Appellant's Miller Trust account in the month of September 2011. (Exhibit 8) However because the \$2,000.00 paid out to Life Solutions that month fails to qualify as a business expense, the full amount of income received by the Appellant must be counted toward her financial eligibility for that month pursuant to DSSM 20200.4. The submitted documentation and testimony show that the Appellant received \$1,855.73 in total gross income for the month of September 2011¹⁰. (Exhibit 8) Because none of this income was deposited into the Appellant's Miller Trust, DSSM 20400 no longer applied to shield the income from counting toward eligibility. (Exhibit 8) As a result, all of the income received by the Appellant for the month of September 2011 must be counted toward her financial eligibility pursuant to DSSM 20240.1. Because the Appellant's

⁹ \$1,225.00 Social Security benefit + \$450.67 Canadian pension + \$180.06 Chrysler Pension = \$1,855.73. \$1,855.73 - \$2,000.00 = (\$144.27)

¹⁰ \$1,225.00 Social Security benefit + \$450.67 Canadian pension + \$180.06 Chrysler Pension = \$1,855.73.

income exceeded the \$1,705.00 limit, she was not financially eligible for retroactive LTC Medicaid for the month of September 2011.¹¹

Fundamental Fairness

While Appellant's Counsel argued that the Appellant may have been eligible for retroactive benefits had Ferry not experienced difficulties from Smith and PNC Bank in obtaining information for the Medicaid application, and so should receive special consideration in determining retroactive benefits, this argument is not persuasive. This Hearing Officer empathizes with Ferry's frustration in her attempts to obtain information from Smith, and to provide the correct documentation so that PNC Bank would permit her to act as guardian. However, DSSM 20103.2 holds that it is the applicant or representative's responsibility to obtain the documentation needed to determine the applicant's eligibility for Medicaid. Further, while the Delaware Superior Court has acknowledged that following the regulations may cause hardship for Medicaid applicants, it also warned against permitting applicants to shirk regulations: "All sorts of potential excuses or circumstances could be argued to circumvent clear regulations designed to insure the truly needy get help, and tax dollars are not wasted." (*Schmidt v. Meconi*, W.L. 3105750 (Del. Super. 2007))

Second, while the Medicaid application process can be confusing to someone who previously has not been involved in the process, Ferry testified that she has twelve (12) years of experience in guardianship matters. In addition, she testified that she has experienced the LTC Medicaid application process with other clients. In this instance, what prevented the Appellant from being eligible for retroactive Medicaid for September 2011 is the fact that her income was not transferred to the Miller Trust account. Ferry, with her years of experience, should have known that income must be transferred to a Miller Trust when it exceeds a certain amount, in order to attain or retain financial eligibility for LTC Medicaid. Further, Ferry testified that she had received all necessary paperwork by July or August 2011. There is no indication why she did not apply for Medicaid on the Appellant's behalf earlier than October 11, 2011. In light of the Superior Court's admonition against permitting excuses or circumstances to circumvent clear regulations, this Hearing Officer finds that the notion of fundamental fairness, based on the legitimate delay experienced by Ferry in obtaining necessary information and documentation from her appointment in February at least until July 2011, cannot be used to circumvent regulations establishing LTC Medicaid eligibility.

While this Hearing Officer can understand Ferry's frustration with the LTC Medicaid application process and its regulations, DMMA has provided substantial credible evidence on which to sustain its denial of retroactive Long Term Care Medicaid.

¹¹ It appears that Life Solutions may receive a better outcome if the agency's fees were deducted from their client's Miller Trust account, as transferring income to the Miller Trust and then paying the fee from the Miller Trust account would avoid the issue here.

V.

For these reasons, the December 22, 2011 decision of the Division of Medicaid and Medical Assistance to approve the Appellant for Long Term Care Medicaid benefits effective October 1, 2011 is AFFIRMED.

Date: August 1, 2012



MICHAEL L. STEINBERG, J.D.
HEARING OFFICER

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

August 1, 2012
POSTED

cc: Thomas Herlihy, III, Esq., for Ms. Jones
Mary Ferry, Life Solutions, Guardian for Ms. Jones
Peter Feliceangeli, Deputy Attorney General
Wanda Sinibaldi, DMMA, Team 230
Sharmeka Thompson, DMMA, Team 230

EXHIBITS FILED IN OR FOR THE PROCEEDING

EXHIBIT #1 - DMMA Fair Hearing Summary consisting of two (2) pages dated March 15, 2012.

EXHIBIT #2 - The Appellant's request for a fair hearing date-stamped February 27, 2012, consisting of two (2) pages.

EXHIBIT #3 – Copy of a Notice to Approve Your Medical Assistance dated December 22, 2011, consisting of five (5) pages.

EXHIBIT #4 – Copy of a letter from Thomas Herlihy, III, Esq., representative for the Appellant dated July 11, 2012, consisting of one (1) page.

EXHIBIT #5 – Copy of a Resident Account Detail (“Payment Inquiry Screen”) from Millcroft dated July 11, 2012, covering dates August 2009 through October 28, 2011, consisting of ten (10) pages.

EXHIBIT #6 – Copy of a Certified Final Order Appointing a Guardian of Person and Property in the Court of Chancery of the State of Delaware dated February 24, 2011, consisting of three (3) pages.

EXHIBIT #7 – Copy of a Court Order from the Court of Chancery of the State of Delaware dated September 7, 2011, consisting of one (1) page.

EXHIBIT #8 – Copy of a Bank Account Transaction Detail Report dated October 6, 2011, consisting of one (1) page.

EXHIBIT #9 – Copy of a Long Term Care Medicaid Client Rights and Responsibilities dated October 11, 2011, consisting of three (3) pages.

EXHIBIT #10 – Copy of a Long Term Care Medicaid Application dated October 11, 2011, signed by Life Solutions Inc. on October 14, 2011, and date-stamped by DMMA on October 19, 2011, consisting of sixteen (16) pages.

EXHIBIT #11 – Copy of a “we need” letter dated October 11, 2011, consisting of one (1) page.