

To: New Jersey Law Revision Commission
From: Jayne Johnson
Re: Miller Trusts - *Saccone v. Bd. of Trustees of Police and Fireman's Retirement System*
Date: May 11, 2015

MEMORANDUM

Executive Summary

This Memorandum presents the additional research the Commission requested concerning the role of Miller Trusts in the project resulting from the Supreme Court decision in *Saccone v. Bd. of Trustees of Police and Fireman's Retirement Sys.*¹ Staff will continue outreach based on the findings discussed in this Memorandum to determine whether statutory revisions to N.J.S. 43:16A-12.1 should be proposed.

Background

Staff presented, at the March 2015 Commission meeting, a project arising from the decision in *Saccone*, where the New Jersey Supreme Court held that a retired firefighter could direct the survivors' benefits for a child with a disability to a first-party special needs trust (SNT).² The Court reversed the Appellate Division decision, which affirmed the determination of the Board of Trustees of the Police and Firemen's Retirement System (PFRS) (the Board).³ The Board ruled that the survivors' benefits must be paid to the spouse or children of the PFRS member.⁴ The Board concluded that the statute only permits the spouse and children of the retiree to receive benefits and does not allow the member to designate a primary or contingent beneficiary.⁵ Moreover, since the survivors' benefits do not exist until the death of the member, the benefits are not assignable by the member.⁶

The relevant statutory language provides that:

[u]pon the death after retirement of any member of the retirement system there shall be paid to the member's widow or widower a pension of 50% of final compensation for the use of herself or himself, to continue during her or his widowhood, plus 15% of such compensation payable to one surviving child or an

¹ *Saccone v. Bd. of Trustees of the Police and Fireman's Retirement Sys.*, 219 N.J. 369, 388 (2014)

² *Id.*

³ *Saccone v. Bd. of Trustees of the Police and Fireman's Retirement Sys.*, 2012 WL 5232167 (Oct. 24, 2012), *rev'd*, 219 N.J. 369 (2014); *see also* Ron Landsman, *Saccone v. Bd. of Trustees of the Police and Firemen's Retirement Sys.*, NAELA J. 77, 78 (Spring 2015).

⁴ *Saccone*, 219 N.J. at 375-76 (noting that the PFRS is administered by the New Jersey Department of the Treasury Division of Pensions and Benefits).

⁵ *Id.* at 377.

⁶ *Id.*

additional 25% of such compensation to two or more children; if there is no surviving widow or widower or in case the widow or widower dies or remarries, 20% of final compensation will be payable to one surviving child, 35% of such compensation to two surviving children in equal shares and if there be three or more children, 50% of such compensation would be payable to such children in equal shares.⁷

As enacted in 1944, N.J.S. 43:16A-12.1 allowed PFRS members to designate any beneficiary and to elect one of three optional retirement plans with differing actuarial values.⁸ When the statute was revised in 1967, however, the three optional plans were eliminated and only the spouse and children were permitted to receive the survivors' benefits.⁹

The Supreme Court "construe[d] the reference to 'child' " in the statute as the equivalent to "a first-party SNT established" solely for the benefit of a child with a disability.¹⁰ The Court viewed the SNT as an extension of the child.¹¹ The Court held that the parent's request did not involve assignment of the survivors' benefits or a change of the primary beneficiary, instead the request involved the "manner in which" the child would receive the survivors' benefits.¹² The Court reasoned that the retired member wanted the fund to be distributed through "a vehicle that prevents the benefit from becoming a financial liability" to the child with a disability.¹³ The Court found that the "Board erred in not accommodating" the request and forced the child "to choose between abandoning survivors' benefits earned" by the parent or "forgoing public assistance to provide for medical needs."¹⁴ The Court held this was an "arbitrary, capricious, and unreasonable" result, "disserving the very individual" the Legislature "intended to help."¹⁵ The Court set aside the Board's determination and ordered administrative action consistent with the majority opinion.

New Jersey's Medicaid Program

The child in *Saccone* received Supplemental Security Income (SSI) and other forms of public assistance, including Medicaid.¹⁶ The federal government established Medicaid in 1965 to

⁷ N.J. STAT. ANN. § 43:16A-12.1 (a) (West 2015).

⁸ *Id.* at 375.

⁹ *Id.* at 388.

¹⁰ *Id.*

¹¹ *Id.* at 377-78; *see also* Amicus Br., Nat'; Academy of Elder Law Attorneys, at 2-4, *Saccone v. Bd. of Trustees of the Police and Fireman's Retirement Sys.*, 219 N.J. 369.

¹² *Saccone*, 219 N.J. at 388.

¹³ *Id.* at 386.

¹⁴ *Id.* at 388.

¹⁵ *Id.* at 376, 388.

¹⁶ *Id.* at 373.

ensure basic medical care for the elderly and disabled poor.¹⁷ Medicaid consists of state health programs that must meet federal requirements and standards to receive federal funding.¹⁸ Prior to December 1, 2014, New Jersey had two major Medicaid programs – “Medically Needy” and pure Medicaid or the “Medicaid Only.”¹⁹ The determination of which program an applicant may enroll in, prior to December 1, 2014, was based on whether or not the applicant’s income exceeded the “income cap.”²⁰ The income cap is 300% of the Supplemental Security Income (SSI) Federal Benefit Rate, and in 2015, the cap was set at \$2,199.²¹

The Medicaid Only program was available to applicants with income below the cap, and covered long-term care for individuals who lived at home, in an assisted living, or a nursing home facility.²² The Medically Needy program was available to individuals whose income exceeded the income cap.²³ Under the Medically Needy program, there was no income cap, but if the applicant lived in an assisted living facility or at home with the assistance of a home health aide, the applicant did not qualify for the program.²⁴ Individuals only qualified for the Medically Needy program, if they lived in a nursing home facility, which left many individuals whose income exceeded the cap, unable to qualify for Medicaid in New Jersey.²⁵

This policy changed on December 1, 2014, when New Jersey eliminated the Medically Needy program.²⁶ The new Medicaid program does not have an income cap, instead, it places any income in excess of the cap in a pass through vehicle, a “Qualified Income Trust” (QIT or Miller Trust).²⁷ By passing the income in excess of the cap through the Miller Trust, the income is no longer counted in determining financial eligibility for Medicaid. Now, individuals with income above the cap may qualify for Medicaid whether they live at home, in an assisted living, or a nursing home facility.²⁸

¹⁷ Amicus Br., Special Needs Alliance, Inc., at 4, *Saccone v. Bd. of Trustees of the Police and Fireman’s Retirement Sys.*, 219 N.J. 369; *see also* U.S. Social Security Admin, Off. of Retirement and Disability Policy at <http://www.ssa.gov/policy/docs/statcomps/supplement/2011/medicaid.html>.

¹⁸ Amicus Br., Special Needs Alliance, Inc., 4.

¹⁹ John Callinan, *Miller Trusts Are Here*, <http://www.eldercarelawyer.com/blog/2014/12/miller-trusts-are-here/>; *see also* Div. of Medical Assistance and Health Svcs., N.J. Dept. of Human Svcs. (DMAHS) at <http://www.state.nj.us/humanservices/dmahs/clients/medicaid/index.html>

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *See id.*

²⁴ *Id.*

²⁵ *See id.*

²⁶ DMAHS at <http://www.state.nj.us/humanservices/dmahs/clients/medicaid/index.html>. (N.J. Family Care Qualified Income Trust (QIT), Frequently Asked Questions, March 12, 2015)(noting that Medicaid Managed Long Term Services and Support (MLTSS) is the method New Jersey now uses to deliver services to Medicaid beneficiaries).

²⁷ *Id.*

²⁸ *Id.*

Miller Trusts

The Miller Trust, now recognized under New Jersey's Medicaid Program, was named after the federal district court case, *Miller v. Ybarra*, which permitted the creation of an irrevocable trust to meet the foreseeable needs of a person with a disability, and protect the income from consideration for Medicaid eligibility.²⁹ In *Miller*, several plaintiffs with severe physical and mental disabilities failed to qualify for Medicaid because their income exceeded the income cap, but they were facing eviction from their skilled nursing care facilities because the costs were higher than their fixed incomes.³⁰ The Court held that a irrevocable trust may be created on behalf of a person with a disability, if the following is demonstrated: (1) the person lacks competence; (2) the person has "property subject to a threat of being dissipated or wasted, or funds that must be needed for support, care and welfare of the person;" and (3) the trust is in the best interest of the person.³¹

Shortly after the decision, in 1993, Congress sought to prevent the use of trusts to enable wealthy individuals to qualify for benefits, but carved out exceptions, including the type of first-person special needs trusts permitted by the *Miller* court.³² Congress approved the Miller Trusts to solve the income cap problem on a case-by-case basis.³³ The statute limits the use of such trusts and income placed in a SNT is still used to determine how much the person is required to pay toward medical costs.³⁴

A Miller Trust may be established by the following: (1) the beneficiary; (2) beneficiary's legal guardian; or (3) the beneficiary's Power of Attorney agent. In order to ensure that the income is not counted toward Medicaid eligibility, the trust must be established prior to the date eligibility is sought.³⁵ The trust is solely for income received by the Medicaid beneficiary and must contain only the income of the individual deposited in the month it is received.³⁶ Once the income is in the trust, it can only be used to pay certain expenses related to the cost of care, and allowable medical expenses.³⁷

²⁹ *Miller v. Ybarra*, 746 F.Supp. 19, 34-35 (D. Colo. 1990).

³⁰ *Id.* at 20-23.

³¹ *Id.* at 30.

³² Amicus Br., Special Needs Alliance, Inc., 4.

³³ *Id.*; 42 U.S.C. 1396p(d)(4)(B),

³⁴ Amicus Br., Special Needs Alliance, Inc., 13.

³⁵ DMAHS, *supra* note 27 (noting that all other eligibility requirements, including, but not limited to, transfer of assets, level of care, citizenship, and residency will remain the same).

³⁶ *Id.*

³⁷ *Id.* (explaining that the "[c]ost share is determined after eligibility is established. Cost share is any income remaining after the deductions are made will be paid for the individual's cost of care up to the managed care capitation amount. The trustee will pay the outlined amount directly to the nursing facility, the assisted living facility or for home and community-based services the trustee will pay directly to the agency."

The trust itself must meet strict requirements, including the following, the Miller trust: (1) must have a trustee to manage the administration and expenditures of the trust pursuant to state and federal law; (2) must be irrevocable; (3) cannot contain resources such as the proceeds from the sale of real or personal property, or money from a savings account; (4) the State of New Jersey must be the first beneficiary of all remaining funds up to the amount paid for Medicaid benefits upon the death of the Medicaid recipient; and (5) income deposited in the trust can only be used as defined in the post-eligibility treatment of income rules and used to pay for the cost share.³⁸

Conclusion

The *Saccone* decision was decided in September 2014, before New Jersey eliminated the Medically Needy program. The Supreme Court recognized that under the Medically Needy program, individuals were not permitted to establish a Miller Trust before determining their Medicaid eligibility.³⁹ The Court found that this exclusion did not provide a “compelling reason to conclude that the Legislature meant *sub silentio* to prohibit the use of a self-settled or first-party SNT created pursuant to 42 U.S.C.A. § 1396p(d)(4)(A).”⁴⁰

The majority opinion in *Saccone* acknowledged that to effectuate the legislative intent of the statute, the Court must look past the plain language to the policy purposes of the statute. The Court reasoned that:

if a statute’s seemingly clear language nonetheless creates ambiguity in its concrete application, extrinsic evidence may help guide the construction of the statute. Extrinsic guides may also be of use ‘if a literal reading of the statute would yield an absurd result, particularly one at odds with the overall statutory scheme.’

Statutory amendments to pension provisions in other jurisdictions have been proposed to ensure a consistent result for similarly situated beneficiaries.⁴¹ It may be beneficial to consider:

³⁸ *Id.* (requiring that “[p]ost-eligibility treatment of income outlines the specific deductions that are allowed to be paid out of a Medicaid recipient’s gross income before their cost share is determined. The expenses must be deducted in designated order from the individual’s gross income. Post-eligibility deduction are made using all monthly income.” Any income left over after post-eligibility payments must remain in the Trust. At the time of death, the funds remaining must be paid to the State of New Jersey up to the cost of funds expended on Medicaid -. Personal Needs Allowance; Maintenance Needs Allowance; and Community Spouse Allowance).

³⁹ *Saccone*, 219 N.J. at 386-387.

⁴⁰ *Id.* at 387 (stating that “[i]ndeed, N.J.S.A. 3B:11–37 expressly authorizes (d)(4)(A) SNTs).

⁴¹ *Suggested Statutory Language* based on MD. Gen. Assembly, Senate Bill 403 (2015):

- a. If the designated beneficiary is an individual with a disability, the pension may be paid into a trust for the benefit of the individual.
- b. The pension shall be distributed to a trust established in accordance with federal law for the benefit of a disabled beneficiary.
- c. The pension shall be distributed only after the Board of Trustees of the Police and Firemen’s Retirement System (PFRS Board of Trustees) receives the following:
 - (1) Written notice that the beneficiary is an individual with a disability;
 - (2) Documentation of the creation of a valid trust for a person with a disability in accordance with federal law;

(1) modifying the language of the N.J.S. 43:16A-12.1 in accord with the *Saccone* holding; or (2) to allow the recent recognition of Miller Trusts in New Jersey's Medicaid program, and the impact of the *Saccone* holding to take effect. The application of both the recent changes and the reasoning of the Court's decision may be sufficient to address the concerns raised about the plain language of the statute. Staff will continue outreach to determine whether statutory revisions should be recommended based on the holding in *Saccone*.

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- (3) Any additional information that the PFRS Board of Trustees requires.
 - d. The Board of Trustees is not liable for an improper payment to a person because the PFRS Board of Trustees did not receive this information required under subsection (c) of this section.
 - e. The Board of Trustees shall adopt regulations to implement this section.