FILED
OFFICE OF ADMINISTRATIVE HEARINGS
02/03/2023 12:13 PM

STATE OF NORTH CAROLINA

COUNTY OF HALIFAX

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 DHR 03096

Shannon Edwards Bellflower Petitioner, v. NC Department of Health and Human Services Respondent.	**FINAL DECISION**

This contested case was heard by Michael C. Byrne, Administrative Law Judge (the "Tribunal") on January 12, 2023, at the Town Hall in Ayden, NC.

APPEARANCES

Ms. Shannon Edwards Bellflower
Petitioner, pro se
910 Bolling Road
Roanoke Rapids, NC 27870

Mr. Milind K. Dongre
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Attorney for Respondent

EXHIBITS

Admitted For Petitioner: Exhibit 1

Admitted For Respondent: Exhibits A through G

WITNESSES

For Petitioner: Ms. Shannon Edwards Bellflower

For Respondent: Ms. Glana Surles

ISSUE

Whether Respondent erred by failing to give Petitioner an undue hardship waiver of Respondent's Medicaid estate recovery claim against the estate of Mary Edwards?

BURDEN OF PROOF

The burden of proof is on Petitioner pursuant to N.C.G.S. 150B-25.1.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Tribunal makes the following findings of fact and conclusions of law. In making the findings of fact, the Tribunal has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner Shannon Edwards Bellflower ("Petitioner") is a citizen and resident of Roanoke Rapids, NC. Petitioner works for the Roanoke Rapids Graded School District as a custodian. (Pet. Ex. 1). Petitioner was a credible witness.

2. Respondent North Carolina Department of Health and Human Services ("DHHS" or "Respondent") is an agency of the State of North Carolina subject to Article 3 of the Administrative Procedure Act, N.C.G.S. Chapter 150B. Among the subdivisions of DHHS is the Division of Health Benefits. The Division of Health Benefits administers North Carolina's Medicaid program.

3. The Division of Health Benefits contains a Third-Party Recovery and Estate Recovery Section. The Estate Recovery Section pursues recovery claims against the estates of deceased persons who were Medicaid recipients. This responsibility also encompasses administration of waiver and/or deferral requests for Medicaid estate recovery claims, including requests based on "undue hardship" (below).

4. Ms. Glana Surles ("Surles") is an Estate Recovery Case Manager in the Third-Party Recovery and Estate Recovery Section. Surles has worked for the Division of Health Benefits for 29 years. Surles has processed all requests for waiver/deferral of Medicaid estate recovery claims during that time. Surles was a credible witness.

5. Ms. Mary Edwards ("Decedent") died on November 26, 2021. Prior to her passing, Decedent received $64,735.42 of recoverable (nursing home) medical services through the North Carolina Medicaid Program. In January 2020, Decedent's representative (her daughter, Jane Butler) signed a document purporting to give notice to Decedent that her

estate may be subject to Medicaid estate recovery by Respondent. Ms. Butler did not testify at the contested case hearing, so the Tribunal has no knowledge of what Ms. Butler understood herself to be signing or its legal significance, if any.

6. Respondent intends to proceed against Decedent's estate to satisfy the Decedent's debt to Medicaid. This includes the real property which is now the Petitioner's home.

7. On March 17, 2022, Petitioner submitted an Undue Hardship Application ("Hardship Application") to Respondent. Surles processed and reviewed Petitioner's Hardship Application.

8. Petitioner's Hardship Application was admitted into evidence as Respondent's Exhibit C.

9. Surles reviewed Petitioner's Hardship Application under factors appearing in the North Carolina State Medicaid Plan ("State Plan"). As described by the Court of Appeals in 2009:

> North Carolina's Medicaid plan describes the nature and scope of its Medicaid program and gives assurance that it will be administered in conformity with specific federal statutory requirements and other applicable official issuances of the federal Department of Health and Human Services. See 42 C.F.R. § 430.10 (2006). The State Plan does not incorporate the State Adult Medicaid Manual; the manual acts instead as an internal instructional reference for DHHS employees in the application of DHHS policy and interpretation of federal Medicaid requirements.

Martin v. N. Carolina Dep't of Health & Hum. Servs., 194 N.C. App. 716, 720, 670 S.E.2d 629, 632–33 (2009); review denied, 363 N.C. 374, 678 S.E.2d 665 (2009). The portion of the State Plan on which Respondent based the challenged agency action in this case was admitted into evidence as Respondent's Exhibit F. Exhibit F gives its effective date as October 1, 2018.

10. Applying the factors in the State Plan to Petitioner's Hardship Application, Surles (and thus Respondent), concluded that Petitioner did not meet the State Plan's criteria for an undue hardship waiver, and therefore denied Petitioner's Hardship Application. Respondent's reasoning was set out in a denial letter, admitted into evidence as Respondent's Exhibit E:

> The poverty guideline for 2022 as published by the U.S. Department of Health and Human Services in the Federal Register of January 21, 2022, Volume 87, No. 14, on pp. 3316 is $18,310.00 for a family of two, and 200% of this guideline is $33,620.00. Based on the information furnished your gross household income is not below 200% of the federal poverty level.
>
> (Res. Ex. E).

11. Petitioner's Exhibit 1 shows that her actual regular wage payment for the 2021-2022 school year, from the Roanoke Rapids Graded School District, calculated from her base pay, was $12,306.00 for 2021 and $13,518.00 for a school year total of $25,824.00.

12. Petitioner's Exhibit 1 shows that her base pay for 2021 was $2,051.00 per month. Petitioner's Hardship Application (Res. Ex. C.), however, states that her income was $2,291.24 per month.

13. Petitioner's 2021 pay was sporadically inflated by sporadic payments of "Bonus/Supplement from Covid Relief Funding." (Pet. Ex. 1). During 2021, these payments, which occurred in July, August, and December, totaled $2,871.32. (Pet. Ex 1). There is no evidence that these payments were regular wages.

14. Respondent's Exhibit D was admitted into evidence. This consists of Petitioner and her spouse's 2021 W2 Forms. Petitioner's spouse's W2 gives a wage of $11,191.10. Petitioner's W2 gives a wage of $26,256.14.

15. Petitioner contends that the sporadic "Covid payments" should not have been taken into consideration when Respondent calculated her 2021 income, as they were sporadic payments (Petitioner Testimony). Nonetheless, Petitioner testified that she reported the "Covid payments" on her income taxes for 2021 as income. Petitioner contends that removal of these funds from Respondent's calculation of her income would place her, and her spouse, under Respondent's 200% poverty level threshold.

16. Respondent's Exhibit F defines "Gross Income Available" as follows:

> For Medicaid estate recovery purposes, "gross income available" means the total income of a qualified undue hardship applicant and his or her spouse and related family members in his or her household prior to any deductions or adjustments.
>
> (Res. Ex. F).

17. Ultimately, the effect of "Covid payments" on Petitioner's 2021 income is not determinative. It is thus unnecessary for the Tribunal to resolve that issue. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

18. At one time, Respondent had rules, enacted pursuant to N.C.G.S. Chapter 150B, addressing waiver of Medicaid estate recovery, including both "Undue Hardship" and "Determination of Undue Hardship." See Mariusz Leonard Poppe v. NC Dep't of Health Services, Division of Medical Assistance, Medicaid Estate Recovery, Ms. Glana M Surles, 2016 WL 4547388, 14 DHR 05078. These rules were codified in the North Carolina Administrative Code in Chapter 10A, 21D, Section .0500:

> **SECTION .0500 - WAIVER OF RECOVERY**

10A NCAC 21D .0501 RECOVERY NOT COST EFFECTIVE
10A NCAC 21D .0502 UNDUE HARDSHIP
10A NCAC 21D .0503 DETERMINATION OF UNDUE HARDSHIP

19. These rules, however, were repealed effective July 1, 2018. See NC Administrative Code, 10A N.C.A.C. 21D. They have not been replaced with rules enacted under the Chapter 150B rulemaking process.

CONCLUSIONS OF LAW

1. The Tribunal has subject matter jurisdiction over this contested case. N.C.G.S. 150B-23.

2. Notice of Hearing was provided to all parties as required by N.C.G.S. 150B-23, and there are no issues as to joinder or misjoinder.

3. To the extent that the Findings of Fact contain Conclusions of Law, and vice versa, they should be so considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).

4. The Tribunal need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders, 110 N.C. App. at 440, 429 S.E.2d at 612.

5. Medicaid is a federal program designed to provide health care funding for the needy. Luna v. Div. of Soc. Servs., 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004). It is a joint program administered by participating states and overseen by the federal government. Id.

6. North Carolina's Medicaid plan ("State Plan") describes the nature and scope of its Medicaid program and gives assurance that it will be administered in conformity with specific federal statutory requirements and other applicable official issuances of the federal Department of Health and Human Services. See 42 C.F.R. § 430.10. "The State Plan does not incorporate the State Adult Medicaid Manual; **the manual acts instead as an internal instructional reference for DHHS employees** in the application of DHHS policy and interpretation of federal Medicaid requirements." Martin, 194 N.C. App. at 720, 670 S.E.2d at 632–33.

7. "Pursuant to N.C.G.S. § 108A-70.5, Respondent is required, in applicable circumstances, to recover from the estates of Medicaid recipients the cost paid for the recipient's medical assistance." Cloyd A. Greene v. North Carolina Department of Health and Human Services Division of Medical Assistance, 2012 WL 1301210.

8. Here, Decedent received $64,735.42 of recoverable medical services through the North Carolina Medicaid Program prior to her passing. This event, by operation of law, required Respondent to attempt to recover those funds from her estate. Axiomatically, that recovery process must comply with North Carolina law.

9. There are circumstances when Respondent waives estate recovery, including when the sale of the estate's real property would result in undue hardship to a surviving heir. Under the State Plan, this requires the persons seeking such waivers, traditionally, to meet various qualification criteria – including the 200% federal poverty level maximum income discussed above. Respondent as of the time of Petitioner's matter reviewed these requests for "undue hardship waivers" under the criteria set out in the State Plan.

10. As Respondent cites in its summary judgment materials, the determination in these cases, historically, has been simple: if the Petitioner's income for the year in question exceeds the applicable 200% Federal poverty amount, Petitioner does not qualify for the undue hardship exception:

> This kind of straightforward application of the State Plan criteria to deny undue hardship applications has been affirmed on numerous occasions at summary judgment, by numerous ALJs. Lisa Delcine Totten v. NCDHHS, DHB, **2021** WL 5049214 (N.C.O.A.H., Aug. 19, 2021) (Byrne, A.L.J.); Mary Margaret Smith v. NCDHHS, DMA, **2016** WL 7664234 (Lassiter, A.L.J.); Ivola Banks, Executrix of the Estate of Laura B. Mercer v. NCDHHS, DMA, **2005** WL 1523934 (Gray, A.L.J.); Brett D. Little v. NCDHHS, DMA, 2005 WL 1719773 and Tina T. James/Williams v. NCDHHS, **2006** WL 1506353 (Chess, Jr., A.L.J.); Princess Watson v. Division of Medical Services Third Party Recovery Section, **2006** WL 1506349 (Mann, A.L.J.); and Estate of Nora L Edwards, Wanda Harrington Administrator v. NCDHHS, DMA, **2010** WL 1738067 (Overby, A.L.J.).

Motion For Summary Judgment, p. 9 (emphasis supplied for identifying the year of the decision).

11. All of the OAH Final Decisions Respondent cites, barring Totten (discussed below), occurred prior to July 1, 2018 – the date Respondent's rules regarding undue hardship exceptions were repealed.

12. As of 2021, despite the 2018 repeal of Respondent's rules regarding the undue hardship waiver, the State Plan had, in general terms, the "force and effect" of a rule:

> **State Plans**, State Plan Amendments, and Waivers approved by the Centers for Medicare and Medicaid Services (CMS) for the North Carolina Medicaid Program and the NC Health Choice **program shall have the force and effect of rules adopted pursuant to Article 2A of Chapter 150B** of the General Statutes.

N.C.G.S. 108A-54.1B(d) (emphasis supplied).

13. This same statute provides:

> [Respondent] **is expressly authorized to adopt temporary and permanent rules to implement or define** the federal laws and regulations, the **North Carolina State Plan of Medical Assistance**, and the North Carolina State Plan of the Health Insurance Program for Children, the terms and conditions of eligibility for applicants and recipients of the Medical Assistance Program and the Health Insurance Program for Children, audits and program integrity, the services, goods, supplies, or merchandise made available to recipients of the Medical Assistance Program and the Health Insurance Program for Children, and reimbursement for the services, goods, supplies, or merchandise made available to recipients of the Medical Assistance Program and the Health Insurance Program for Children.

Id. at (a) (emphasis supplied).

14. In general terms, "An administrative rule is not valid unless adopted in accordance with the provisions of Article 2A of the Administrative Procedure Act." N.C.G.S. 150B–18; Dillingham v. N. Carolina Dep't of Hum. Res., 132 N.C. App. 704, 710, 513 S.E.2d 823, 827 (1999). Respondent's rulemaking authority under N.C.G.S. 108A-54.1B is, by operation of that statute, in addition to any rulemaking authority granted to Respondent under N.C.G.S. 150B (N.C.G.S. 108A-54.1B(b)). However, Respondent's filings cite no such rules, nor are any apparent to the Tribunal.

15. Further, N.C.G.S. 150B-1(22) exempts Respondent from the rulemaking requirements of N.C.G.S. 150B, Chapter 2A, with respect to "the **content** of State Plans, State Plan Amendments, and Waivers approved by the Centers for Medicare and Medicaid Services (CMS) for the North Carolina Medicaid Program and the NC Health Choice Program." (emphasis supplied).

16. However, the General Assembly carved out a specific exception to Respondent's general authority and rulemaking exemptions regarding implementation of the State Plan, including specifically undue hardship exceptions in the Medicaid estate recovery context. This exception is in N.C.G.S. 108A-70.5, "Medicaid Estate Recovery Plan," which states in pertinent part:

> The Department of Health and Human Services **shall adopt rules pursuant to Chapter 150B of the General Statutes to implement the Plan**, **including rules to waive whole or partial recovery when this recovery would be inequitable because it would work an undue hardship** or because it would not be administratively cost-effective and rules to ensure that all recipients are notified that their estates are subject to recovery at the time they become eligible to receive medical assistance.

Id. at (b) (emphasis supplied).

17. N.C.G.S. 108A-70.5 is the statute giving Respondent legal authority to seek Medicaid estate recovery. Cloyd A. Greene v. North Carolina Department of Health and Human Services Division of Medical Assistance, 2012 WL 1301210.

18. When "the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must adhere to its plain and definite meaning." Lemons v. Boy Scouts of America, Inc., 322 N.C. 271, 277, 367 S.E.2d 655, 658, rehearing denied, 322 N.C. 610, 370 S.E.2d 247 (1988); Gummels v. N. Carolina Dep't of Hum. Res., Div. of Facility Servs., Certificate of Need Section, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990).

19. N.C.G.S. 108A-70.5 is clear and unambiguous: Respondent "shall" adopt rules pursuant to Chapter 150B of the General Statutes regarding, as pertinent here, undue hardship issues in the Medicaid estate recovery process. "[O]rdinarily, the word 'must' and the word 'shall,' in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory." State v. Watson, 258 N.C. App. 347, 354, 812 S.E.2d 392, 397, appeal dismissed, 371 N.C. 340, 813 S.E.2d 852 (2018); see also Owen v. UNC-G Physical Plant, 121 N.C. App. 682, 685, 468 S.E.2d 813, 816 (1996).

20. It was therefore mandatory that Respondent adopt rules regarding Medicaid estate recovery and, specifically, the undue hardship waivers at issue in this case –through the Chapter 150B rulemaking process. N.C.G.S. 108A-70.5.

21. Any conflict between N.C.G.S. 108A-54.1B and N.C.G.S. 108A-70.5, is easily resolved. The General Assembly gave Respondent general independent rulemaking authority over the State Plan in N.C.G.S. 108A-54.1B. N.C.G.S. 108A-70.5, by both title and text, addresses Medicaid estate recovery, is the source of Respondent's authority to do so, and specifically requires Respondent to adopt rules under Chapter 150 governing the undue hardship waiver process. "It is a general rule of statutory construction that where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." Oxendine v. TWL, Inc., 184 N.C. App. 162, 165–66, 645 S.E.2d 864, 866 (2007) (quoting Fowler v. Valencourt, 334 N.C. 345, 349, 435 S.E.2d 530, 532–33 (1993)). N.C.G.S. 108A-70.5 controls in this case.

22. The same is true of N.C.G.S. 150B-1(22). That statute, by its terms, excludes Respondent from rulemaking requirements regarding the **content** of the State Plan. N.C.G.S. 108A-70.5, by contrast, requires rulemaking to "**implement** the Plan, including rules to waive whole or partial recovery when this recovery would be inequitable because it would work an undue hardship." Id. at (b) (emphasis supplied). The content of the Plan, on the one hand, and implementation of the Plan, on the other, are two different things.[1] And, (as with N.C.G.S. 108A-54.1B) N.C.G.S. 108A-70.5, unlike N.C.G.S. 150B-1(22), is specific to the Medicaid estate recovery process. Oxendine, above.

[1] "Content" – "Subject matter of a book or other written work as distinguished from its form." "Implement" – "to put into practical effect; to carry out." American Heritage Dictionary, Second Edition (1985).

23. Despite N.C.G.S. 108A-70.5's statutory mandate that Respondent adopt rules for the undue hardship process under N.C.G.S. Chapter 150B, from July 1, 2018 to the date of this Final Decision, Respondent has had none. Accordingly, Respondent has failed to fulfill a nondiscretionary statutory duty imposed by the General Assembly.

24. North Carolina's appellate courts have not hesitated to reverse agency actions taken in violation of an agency's statutory obligations. See Nanny's Korner Care Ctr. by Bernice M. Cromartie, CEO v. N. Carolina Dep't of Health & Hum. Servs.-Div. of Child Dev., 234 N.C. App. 51, 61, 758 S.E.2d 423, 429 (2014) (DHHS failed to conduct independent investigation as required by statute); Hunt v. N.C. Dep't of Pub. Safety, 260 N.C. App. 40, 53, 817 S.E.2d 257, 265 (2018) (DPS failed to comply with its statutory duty under N.C.G.S. 126-35(a)) Nor, in turn, has the Office of Administrative Hearings. North Carolina Addictions Specialist Professional Practice Board v. Lucretia Glass-Wooten, 2022 WL 1201802, 21 SAP 02140 (licensing board failed to conduct investigation required by N.C.G.S. 90-113.33(4), relying instead on third party entity).

25. Also, as they were not adopted as rules, as N.C.G.S. 108A-70.5 requires, the State Plan provisions on which Respondent relies, previously held to be "an internal instructional reference for DHHS employees" (Martin, 194 N.C. App. at 720, 670 S.E.2d at 632-33) may not be enforced. Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer, 261 N.C. App. 325, 345, 821 S.E.2d 196, 210 (2018), aff'd sub nom. 374 N.C. 3, 839 S.E.2d 814 (2020) (citing N.C.G.S. 150B-18):

> An agency shall not seek to implement or enforce against any person a policy, guideline, or other nonbinding interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other nonbinding interpretive statement has not been adopted as a rule in accordance with this Article.

N.C.G.S. 150B-18.[2]

26. "An administrative rule is not valid unless adopted in accordance with the provisions of Article 2A of the Administrative Procedure Act. N.C. Gen. Stat. § 150B–18." Dillingham, 132 N.C. App. at 710, 513 S.E.2d at 827. In another case involving North Carolina's Medicaid program, the Court of Appeals held that Respondent's "policy of denying Medicaid coverage for hospital inpatient services . . . is also unauthorized because it involves the application of an unpromulgated legislative rule. An administrative agency may not act outside the mandates of the NCAPA." Duke Univ. Med. Ctr. v. Bruton, 134 N.C. App. 39, 51, 516 S.E.2d 633, 640 (1999).

27. In December 2022, in an unpublished opinion also dealing with Medicaid, the Court of Appeals held: "When a state agency implements an unpromulgated rule not permitted by statutory or regulatory authority, the rule implemented may not be enforced." Hendrixson

[2] As N.C.G.S. 108A-70.5 requires Respondent to adopt rules under Chapter 150B, the question for determination is not whether the State Plan meets the statutory definition of a rule, but whether rules were adopted. Therefore, it is not necessary to decide whether the State Plan provisions at issue meet the statutory definition of a rule.

v. Div. of Soc. Servs., 2022-NCCOA-10, ¶ 1, 866 S.E.2d 919. The situation here differs only in that Respondent here implemented an unpromulgated rule in a fashion specifically prohibited by the governing statute.

28. OAH holdings are in accord. "Pursuant to N.C. Gen. Stat. § 150B-18, an interpretative statement made by Respondent is not binding unless it is adopted in substantial compliance with the APA." Cornerstone Church of Salisbury, Inc. (cacfp # 9069) v. North Carolina Dep't of Health and Human Servs., Div. of Public Health, Special Nutrition Program Cacfp, 2012 WL 3158831. "When a state agency implements an unpromulgated rule not permitted by statutory or regulatory authority, the rule implemented may not be enforced." FSC II LLC v. NC Dep't of Revenue, 2022 WL 1591545; aff'd, 22 CVS 5410, 2023 WL 1111921 (N.C. Super. Jan. 30, 2023).

29. The wisdom of the General Assembly requiring Respondent to adopt rules through the N.C.G.S. Chapter 150B rulemaking process is readily apparent. The Administrative Procedure Act provides fairness and due process when, among other circumstances, an agency seeks to "deprive the petitioner of property." N.C.G.S. 150B-23. The agency action at issue here would do exactly that – though Petitioner herself owes no debt to Medicaid. Barring N.C.G.S. 108A-70.5's requirements, Respondent could deprive citizens of their property while setting the "rules" by which it does so, with no oversight or review of those procedures. That is untenable. Wright v. N. Carolina Off. of State Hum. Res., 264 N.C. App. 641, 824 S.E.2d 925, 2019 WL 128381 (N.C. Ct. App. 2019) (unpublished).

30. The Tribunal concludes as a matter of law that Respondent's agency action must be reversed on multiple grounds set forth in N.C.G.S. 150B-23, as Respondent attempted to deprive Petitioner of property and/or substantially prejudice Petitioner's rights, and:

    a. Respondent exceeded its authority or jurisdiction by enforcing the provisions of the State Plan, which are nonbinding interpretive statements, against Petitioner on her undue hardship application despite being statutorily mandated to adopt formal rules for that process;

    b. Respondent acted erroneously by both failing to adopt rules for the implementation of the Medicaid estate recovery process and the undue hardship waiver provisions, and instead enforced unpromulgated rules/nonbinding interpretive statements against Petitioner;

    c. Respondent failed to use proper procedure, for the same reasons as (b); and

    d. Respondent failed to act as required by law or rule, in that it both failed its statutory duty to adopt rules as required by N.C.G.S. 108A-70.5 and enforced unpromulgated rules/nonbinding interpretive statements against Petitioner.

    N.C.G.S. 150B-23.

31. Petitioner has met her burden of proof. N.C.G.S. 150B-25.1.

32. Lisa Delcine Totten v. NCDHHS, DHB, 2021 WL 5049214, 21 DHR 01504, found in Respondent's favor on the same issue as in this case. While the Office of Administrative Hearings is not restricted in the manner of In Re Civil Penalty, 324 N.C. 373, 379 S.E.2d 30 (1989), consistency of holdings is as important a consideration in an administrative Tribunal as in any other judicial or quasi-judicial context.

33. When it decided Totten, the Tribunal was not aware that Respondent's rules for undue hardship waivers, previously set out in Chapter 10A of the Administrative Code, were repealed in July 2018. As Justice Ervin wrote many years ago, "There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right." State v. Ballance, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949).

34. Justice Ervin's wisdom is equally true today. Totten was wrongly decided. It is now specifically **disapproved,** as is the Tribunal's similar ruling in Wayne D Joiner v. NC Dep't of Health and Human Servs., 2021 WL 4355193.

35. As Respondent failed to comply with its statutory duty to adopt rules imposed by N.C.G.S. 108A-70.5, and the provisions of the State Plan dealing with waivers due to undue hardship were not adopted as rules under N.C.G.S. Chapter 150B, Respondent may not enforce those provisions against persons, such as Petitioner, seeking waivers from Medicaid estate recovery proceedings based on undue hardship.

36. Respondent may not proceed with Medicaid estate recovery against Petitioner's real property as a part of the Decedent's estate, as in the absence of rules in compliance with N.C.G.S. 108A-70.5 there are no legally enforceable provisions for waivers based on undue hardship for Respondent to implement.

FINAL DECISION

The agency action is **REVERSED.** Petitioner's application for waiver of Medicaid estate recovery proceedings based on undue hardship is **ALLOWED**. Respondent may not proceed with Medicaid estate recovery against Petitioner's real property, as there are no legally enforceable provisions for exemptions based on undue hardship.

NOTICE OF APPEAL

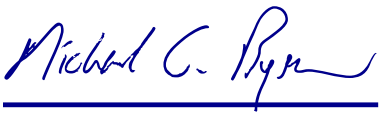
This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code

03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 3rd day of February, 2023.



Michael C. Byrne
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Shannon Bellflower
johnandshannon@ymail.com
Petitioner

NC Department of Health and Human Services, Division of Medical Assistance
2501 Mail Service Center
Raleigh NC 27699
Respondent

Thomas J Campbell
Special Deputy Attorney General, NC Department of Justice
AGO_PublicAssistance@ncdoj.gov
Attorney For Respondent

Milind Kumar Dongre
North Carolina Department of Justice
mdongre@ncdoj.gov
Attorney For Respondent

This the 3rd day of February, 2023.

Christine E Cline
Law Clerk
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850