

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ATHENA BROUNTAS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 97-116-B
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

The plaintiff presents a claim for Supplemental Security Income (“SSI”) and asserts that the Commissioner erroneously determined that she had been overpaid from December 1992 through June 1995. The dispute concerns the appropriate characterization of a trust created by the plaintiff to hold proceeds from her settlement in 1988 of a legal claim. The Commissioner’s position on this issue has apparently changed over time. I nevertheless recommend that the court affirm the decision.

This claim was not subject to the usual sequential evaluation process applied by the Commissioner to claims for benefits. The administrative law judge decided the following two

¹ This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A) which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on June 12, 1998 pursuant to Local Rule 16.3(1)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

issues without a hearing based on written arguments submitted by agreement of the parties:

1. Whether the claimant owns wholly, or in part, the trust principal of the “Brountas Trust” and could liquidate all or part of that principal for her support and maintenance. . . .
2. Whether under the law of the State of Maine the Brountas Trust is irrevocable.

Record p. 14. The administrative law judge ruled in favor of the plaintiff. *Id.* at p. 20. The Appeals Council, on its own motion, reviewed and reversed the decision. *Id.* at pp. 6-10.

I. Background

While receiving SSI benefits, the plaintiff in January 1988 received an insurance settlement in excess of \$10,000. *Id.* at p. 7. In March 1988 the plaintiff created a trust with \$11,123.75 from the proceeds of the settlement. *Id.* The Social Security Administration was aware of the existence of the trust and determined that it did not constitute a countable resource under applicable regulations, informing the plaintiff that she was eligible for SSI benefits effective April 1988. *Id.*

By memorandum dated November 7, 1994, the district manager of the Bangor, Maine office of the Social Security Administration requested the assistant regional commissioner to review the question whether the trust was a countable resource. *Id.* at p.74. The Office of General Counsel reported on December 23, 1994 that the trust should be considered a resource to the plaintiff because it was revocable under Maine law due to the fact that there was no named beneficiary. *Id.* at p.76. The plaintiff was notified by letter dated January 11, 1995 that her SSI benefit payments would cease because her newly-counted resources were worth more than \$2,000 and that the Social Security Administration had determined that she had been overpaid since December 1992. *Id.* pp. 31-34. The

amount of the overpayment was calculated as \$6,514. *Id.* at p. 8.

The plaintiff appealed from this determination. Eventually, the matter was referred to an administrative law judge, who concluded, based on the language of the trust document and *Skillin v. Skillin*, 133 Me. 347 (1935), that the intent of the trust grantor was that the trust be irrevocable; that in the absence of a court decree to the contrary, the Social Security Administration must treat the trust as irrevocable; that the plaintiff did not have the right, authority or power to liquidate the trust within the meaning of 20 C.F.R. § 416.1201(a)(1); and that the trust principal was therefore not a liquid (or “countable”) resource. Record p. 20.

Unhappy with this outcome, the acting regional commissioner in December 1996 asked the Appeals Council to review the administrative law judge’s decision on its own motion. *Id.* at pp. 86-87. The Appeals Council undertook a review and in a decision dated April 8, 1997 reversed the decision of the administrative law judge, finding that the trust was “revokable” under Maine law and therefore a countable resource, precluding the plaintiff’s eligibility for SSI from December 1992 through June 1995. *Id.* at pp. 9-10. The Appeals Council relied on section 339 of the Restatement of Trusts (1935)² to support its decision and distinguished *Skillin* on the ground that residual beneficiaries were specifically named in the trust at issue in that case while the plaintiff’s trust only provides that assets remaining at the time of her death are to be paid to “such heirs as she names in her will” or in equal shares to her surviving heirs. *Id.* at p. 8.

² The language used by the Appeals Council in citing to the first Restatement, Record p. 8, does not differ from the language of section 339 of the second Restatement. Because the Commissioner referred to the second Restatement in his argument to the administrative law judge, *id.* at p. 77, and because application of the current version appears appropriate, I will refer to the Restatement (2d) of Trusts.

II. Discussion

The issue of countable resources has its genesis in 42 U.S.C. § 1382(a), which defines an individual eligible for SSI benefits as, *inter alia*, one whose income is not more than \$1,752 per year and whose resources do not exceed \$2,000. Certain items are to be excluded from the determination of an individual's resources. 42 U.S.C. § 1382b. The regulation promulgated by the Social Security Administration to implement these statutory requirements is 20 C.F.R. § 416.1201, which provides, in relevant part:

(a) *Resources; defined.* For purposes of this subpart L [entitled Resources and Exclusions], resources means cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual.

* * *

(b) *Liquid resources.* Liquid resources are cash or other property which can be converted to cash within 20 days Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts . . . and similar items.

* * *

(c) *Nonliquid resources.* (1) Nonliquid resources are property which is not cash and which cannot be converted to cash within 20 days Examples of resources that are ordinarily nonliquid are loan agreements, household goods, automobiles, trucks, tractors, boats, machinery, livestock, buildings and land.

20 C.F.R. § 416.1205(a) & (c) provide that a disabled individual with no eligible spouse is eligible for SSI benefits if her resources do not exceed \$2,000.

The plaintiff's trust agreement provides that the trustee

shall distribute to or expend for the benefit of the [plaintiff] so much of the net income and principal of this Trust, in such amount or amounts, and at such time or times, as the Trustee believes desirable for the health, support in reasonable comfort and education . . . of the [plaintiff], considering all circumstances and factors deemed pertinent by the Trustee.

Trust Agreement, Paragraph Second, Record p. 65. The trust mentions beneficiaries other than the plaintiff only in the following paragraph:

This trust is to terminate upon the [plaintiff's] attaining the age of sixty (60) years or upon her death, or when the trust has no more assets, whichever shall first occur. If the [plaintiff] lives to attain the age of sixty (60) years, then when she attains that age, the Trustee shall pay the then remaining principal and any undistributed income of this trust to her free and clear of any trust. If the [plaintiff] dies before attaining the age of sixty (60) years, then on the death of the [plaintiff], the Trustee shall pay the then remaining principal and undistributed income of this trust to, or hold the same for the benefit of such person, or persons or the estate of the [plaintiff], in such amounts and proportions and for such estates and interests and outright or upon such terms, trusts, conditions and limitations as the [plaintiff] shall appoint by her will and referring specifically to this power of appointment herein given to the [plaintiff]. If, or to the extent that, the [plaintiff] does not effectively exercise her power to appoint by will, the then remaining principal and undistributed income of this trust shall be distributed in equal shares among the then living heirs of the [plaintiff].

Id. Paragraph Fourth, Record p. 66. The trust agreement also provides: “This trust is irrevocable and cannot be altered, amended, revoked or terminated, in whole or in part by the [plaintiff].” *Id.* Paragraph Eleventh, Record p.70.

The plaintiff relies on the opinion of attorney Susan E. Hunter that the trust is irrevocable, Record pp.79-80, and *Skillin*. In that case, the grantor transferred to her son in trust certain securities, “to pay the income of said trust, of such part of the principal thereof as he may see fit, to me in my lifetime and upon my decease to pay” certain portions of the principal and interest to certain named individuals. 133 Me. at 348-49. The trust agreement also included a clause stating

that the trust was irrevocable. *Id.* at 349. One year later the grantor asked the trustee to return the trust property. This was done, and she created a new trust leaving the corpus to two different named individuals upon her death. *Id.* The plaintiffs, residual beneficiaries under the first trust, sued after the death of the grantor, asserting that the first indenture was irrevocable and that, their rights under it having vested, the reconveyance of the trust property was beyond the power of the trustee. *Id.* at 350. The Law Court agreed, remarking that the provision stating that the first trust was irrevocable “would be without force or effect, if the trustee, under the discretionary power given to him, could reconvey the trust res to the donor in order that she might revoke or modify the terms of the agreement.” *Id.* The plaintiffs, the Law Court held, acquired a vested interest in the principal of the trust of which they could only be divested by their consent. *Id.*

Section 339 of the Restatement of Trusts (2d) provides, in its entirety: “If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished.” Comment a to this section states that the rule is applicable “even though it is provided in specific words by the terms of the trust that the trust shall be irrevocable.” The Maine Law Court has not addressed this section of the Restatement of Trusts, although it has mentioned with approval many other sections of this Restatement. *See, e.g., Estate of Wilde*, 1998 ME 55 ¶ 8, 1998 WL 119447, at *2-3 (March 17, 1998) (§ 205); *Attorney General v. First United Baptist Church of Lee*, 601 A.2d 96, 98 (Me. 1992) (§ 348); *In re Longworth*, 222 A.2d 561, 564 (Me. 1966) (§ 333).

The language of section 416.1201 does “not purport to define [a] plaintiff’s property rights as a matter of federal law.” *Navarro v. Sullivan*, 751 F. Supp. 349, 350 (E.D.N.Y. 1990). State law determines whether a claimant owns or has “right, authority or power to liquidate.” *Id.* This

explains the parties' focus on Maine law. The plaintiff argues that, even if the trust is revocable, she would have to obtain court approval in order to revoke it, with notice of such an action to potential remaindermen, and that this procedural requirement means that she does not have the present right to liquidate the trust. She argues that the word "present" must be read into the definition of a resource in section 416.1201 as property which the claimant has the right, authority or power to liquidate. This argument was rejected by the Second Circuit in *Frerks v. Shalala*, 52 F.3d 412 (2d Cir. 1995).

In *Frerks*, the claimant, an SSI recipient, received a settlement in a medical malpractice action. The funds were placed in a bank account to be released only with court approval as necessary "for the support, education and medical needs" of the claimant. *Id.* at 413. The Social Security Administration terminated the claimant's SSI benefits because he possessed excess resources. *Id.* On appeal, he argued that the settlement funds were not a resource because he could not convert them into cash absent a court order. *Id.* at 414. The court rejected this argument, holding that "the fact that Frerks may neither draw on nor dispose of the funds at will does not negate the fact that the funds can be released and used for his support and maintenance as the need arises." *Id.* Here, where the trust agreement specifically provides that the income and principal may be distributed to the plaintiff or spent for her benefit for her health and support, the *Frerks* rationale applies even more strongly. The fact that court action may be necessary to revoke the entire trust is not a distinguishing factor under the circumstances.

This conclusion is also supported by the finding of the Third Circuit in *Chalmers v. Shalala*, 23 F.3d 752 (3d Cir. 1994), that a one-quarter interest in a family partnership formed to hold rental property is a resource under section 415.1201. *Id.* at 755. There, the claimant could have sold her

interest in the real estate or brought court action to partition the property, and the court concluded that she thus had the legal right to liquidate her interest in the property, making it a resource under the regulation. *Id.* The plaintiff attempts to distinguish *Chalmers* on the ground that there was no question in that case about the court's power to partition the real estate but that "here neither the claimant nor SSA knows how a Court would rule on the irrevocability of the Trust." Statement of Specific Errors (Docket No. 4) at 5. Given the express language of the trust allowing all income and principal to be used for the support of the plaintiff, it does not appear necessary to reach the issue of revocability. I find *Frerks* to be persuasive authority on this point as well.

To the extent that it is necessary to reach the issue of revocability of the trust, I conclude that the Maine Law Court would follow the Restatement (2d) of Trusts, as it has done on over 40 occasions. *Skillin*, decided before the Restatement was published, does not require a different result. In *Skillin*, the remaindermen were specifically identified in the trust document. 133 Me. at 349. Here, the remaindermen are unknown and subject to change by the plaintiff at any time. This is a significant difference.

The plaintiff's final argument is that, even if the trust were a resource, its value in January 1995, when the Social Security Administration found her ineligible, must be presumed to have been less than \$2,000 because its value on the open market was far less than the amount of money in the trust's bank account. There is no evidence in the record of the amount of money remaining in the trust in January 1995. An exhibit shows a balance in a bank account under the name of the trustee of the trust "I/T/F" the plaintiff in the amount of \$3,274.48 on October 1, 1994. Record p. 56. The applicable regulation provides that "[n]onliquid resources are evaluated according to their equity value," 20 C.F.R. § 416.1201(c)(1), and that equity value is defined as "[t]he price that item can

reasonably be expected to sell for on the open market in the particular geographic area involved,” *id.* § 416.1201(c)(2). If the plaintiff were to liquidate the entire trust, there is no dispute that such liquidation would take more than 20 days and that the trust would therefore be a nonliquid asset under the regulation. The plaintiff argues that the failure of the Administrator to present evidence of an open market value is a fatal failure to carry his burden of proof, citing *Chitwood v. Chater*, 928 F. Supp. 874, 880-81 (E. D. Mo. 1996) (burden to prove overpayment is on commissioner; citing cases).

The plaintiff’s argument would be on firmer footing if the trust did not explicitly provide for the use of its principal and interest “as the Trustee believes desirable” for the plaintiff’s health and support, considering “the other income and assets known to Trustee to be available to the” plaintiff, including direct distribution to the plaintiff. Record pp. 65-66. This makes it unlikely that the plaintiff would ever need to revoke the trust, because the very purpose of the trust is to provide for her health and support. Indeed, the evidence suggests that over \$8,000 had been paid out of the trust, which had an original corpus of slightly over \$11,000, between March 1988 and October 1994. *Id.* at p. 56. The regulations are awkward in their application to the situation presented in this case. The sale of a beneficiary’s interest in a trust is not a common occurrence. However, given the availability of the trust principal to the plaintiff under the terms of the trust, I conclude that the market value in January 1995 must be considered to have been in excess of \$2,000.

III. Conclusion

For the foregoing reasons, I recommend that the Commissioner’s decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 18th day of June, 1998.

*David M. Cohen
United States Magistrate Judge*