SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/25/11	DEPT. 85
HONORABLE JAMES C. CHALFANT JUDGE	A. FAJARDO DEPUTY CLERK
HONORABLE #4 JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
J. DE LUNA, C.A. Deputy Sheriff	J. CAMPBELL, CSR #11859 Reporter

9:30 am BS127077

SHEILA FINLEY

VS

THE CITY OF SANTA MONICA ET AL

Plaintiff Counsel: DENISE MCGRANAHAN [X]
ANDREA LUQUETTA [X]

Defendant Counsel: IVAN O. CAMPBELL [X]

NATURE OF PROCEEDINGS:

DENISE MCGRANAHAN
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Santa Monica, CA 90401

MINUTES ENTERED
05/25/11
COUNTY CLERK

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NATURE OF PROCEEDINGS:

HEARING ON PETITION FOR WRIT OF MANDATE

The matter is called for hearing.

The Administrative Record is admitted in evidence.

The Court indicates that he has not yet completed his ruling on the matter.

The matter is argued.

The matter stands submitted.

LATER...

Upon further review of all documents and consideration of the oral argument, the Court now rules as follows:

The Petition for Writ of Mandate is granted. A copy of the Court's "Decision on Petition" is sent to all Counsel this date.

An ORDER TO SHOW CAUSE RE: JUDGMENT is set on JUNE 27, 2011 at 9:30a.m. in this department.

Counsel for the Petitioner is to prepare a proposed Judgment and Writ and serve them on opposing Counsel to approve as to form. After ten(10) days, Counsel

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NATURE OF PROCEEDINGS:

is to submit the proposed documents to the Court along with a Declaration stating the nature and extent of any objections received.

The Administrative Record is ordered returned to Counsel for the Defendant. Counsel is to arrange for pick up of the Record, from Department 85, within the next seven(7) business days.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 5/25/11 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 5/25/11

John A. Clarke, Executive Officer/Clerk

By: A. Fajardo
A. Fajardo

MINUTES ENTERED
05/25/11
COUNTY CLERK

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles
MAY 25 2011
John A. Clarke, Executive Officer/Clerk
By [illegible], Deputy
ANNETTE FAJARDO

Finley v. City of Santa Monica
BS 127077

Decision on petition for writ of mandate: granted

Petitioner Sheila Finley ("Finley") applies for a writ of administrative mandamus overturning the decision by Respondent City of Santa Monica ("City"), through the Santa Monica Housing Authority, to increase Finley's Total Tenant Payment ("TTP") by $87 monthly based on payments to third parties from a lump-sum personal injury settlement held in the Sheila Finley Special Needs Trust ("Finley SNT"). The court has read and considered the moving papers, opposition and reply, heard oral argument, and renders the following decision.

A. Statement of the Case

Petitioner Finley commenced this proceeding on June 30, 2010. The Petition alleges in pertinent part as follows. Finley is a disabled, low-income 64 year-old woman who resides in the City. Finley has qualified for, and has been a participant in, the Section 8 Program administered by the City through its Santa Monica Housing Authority ("SMHA"). The SMHA is a public housing authority ("PHA") that administers the Section 8 Program funded by HUD, a program that provides rental assistance to low-income families, including senior citizens, disabled or handicapped persons. The City has jurisdiction to administer the Section 8 Program through its SMHA under 42 U.S.C. §1437f (b)(1); 24 C.F.R. §982.51, and California Health and Safety Code §34200 *et seq*.

Generally, a Section 8 participant pays about 30% of his or her income towards rent. The tenant portion of the payment is called the Total Tenant Payment ("TTP"). 24 C.F.R. §5.628(a). The PHA pays the owner the remaining balance, until the total rent paid to the owner reaches what is called the "Fair Market Rent" ("FMR"). 24 C.F.R. §888.405(b). (If the total rent exceeds the FMR, the participant is responsible for the difference, but is limited during the first year of tenancy to no more than 40% of her income.) At least annually, the PHA is required to re-determine the participant's eligibility for the program, and to adjust the TTP to reflect changes in the participant's monthly income. 24 C.F.R. §5.628(b).

A participant in the Section 8 Program is entitled to administrative hearings if she disputes certain of the SMHA's decisions, including the calculation of her TTP or a rent increase. 24 C.F.R. §982.555(a)(1)(i).

In June 2008, Finley informed the SMHA that she was receiving settlements from two lawsuits (against a former employer) and that the superior court had ordered the creation of the Finley SNT, but no funds were in the Finley SNT yet. In March 2009, the trustee of the Finley SNT received a portion of a settlement of the two lawsuits. Finley provided the SMHA with a copy of the settlement agreement and the Finley SNT stating that settlement proceeds in the amount of $47,800 had been deposited into the Finley SNT. Over the next six months, the SNT Trustee, Sigrid Hawkes, wrote checks to third parties from the Finley SNT totaling $3,886.

On December 9, 2009, the SMHA issued a notice of amendment to Annual Section 8 Contract Modification # VC311332, retroactively increasing Petitioner's TTP by $101 to $358, for the time period November 1, 2009 to November 1, 2010. Fourteen dollars of the increase was based on the difference between the FMR and Finley's actual rent. The other $87 was based on what the SMHA concluded was Finley's anticipated income for the next year, including payments made to third parties from the Finley SNT between December 2008 and August 2009.

Specifically, the SMHA concluded that "any amount distributed to the family member in the form of periodic payments from a trust is counted as income, even though the trust is not accessible to the family member." The $101 increase was delayed by the SMHA and went into effect on January 1, 2010.

After a timely request by Finely, an informal hearing was held regarding the SMHA's calculation of the Petitioner's TTP and the increase in her share of rent by $101. The hearing took place at the SMHA on March 17, 2010 before Angela Shaw, contracted by the SMHA to perform the role of hearing officer. The SMHA anticipated Finley would receive $3,866 in the following year in additional income from the Finley SNT (beyond her Social Security and SSI annual income of $10,260). This anticipated income was based on payments to third parties made by the Finley SNT Trustee between December 2008 and August 2009. The SMHA concluded that the payments to third parties from the Finley SNT were income under 24 C.F.R. §5.609 ("all amounts, monetary or not, which... go to or on behalf of, the family... or are anticipated to be received ... and which specifically excluded in paragraph (c) of this section," as well as "amounts derived.., from assets to which any member of the family has access.")

The SMHA also concluded that the payments from the Finley SNT were income "paid to the beneficiary regularly" and thus counted as income. HUD Occupancy Handbook 350.3, Ch. 5, "Determining Income and Calculating Rent", pp. 5-27; 5-30, H. 86-23, p. 12.

On or about March 31, 2010, the hearing officer issued a decision upholding the SMHA's decision to increase Finley's TTP based upon the distributions from the Finley SNT. The hearing decision was based solely on a finding that payments to third parties from the Finley SNT were not temporary, nonrecurring, or sporadic, and, therefore, not exempt from income under 24 C.F.R. §5.609(c)(9).

B. <u>Standard of Review</u>

CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 514-15. At a minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the decision. This analysis is governed by an "abuse of discretion" standard. CCP §1094.5(b). Section 1094.5 does not in its face specify which cases are subject to independent review. Fukada v. City of Angels (1999) 20 Cal.4th 805, 811. Instead, that issue was left to the courts. In administrative mandamus actions to review decisions concerning public assistance, the trial court exercises independent judgment on the evidence. Frink v. Prod, (1982) 31 Cal.3d 166, 178-79. *See* CCP §194.5(c).

Under the independent judgment test, "the trial court not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo." Bixby v. Pierno (1971) 4 Cal.3d 130, 143. The court must draw its own reasonable inferences from the evidence and make its own credibility determinations. Morrison v. Housing Authority of the City of Los Angeles Board of Commissioners, (2003) 107 Cal.App.4th 860, 868. However, "[i]n exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the

administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." Fukuda v. City of Angels 20 Cal.4th at 817.

The hearing officer's decision to terminate benefits must be based on a preponderance of the evidence presented at the hearing. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. A hearing officer is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, *supra*, 11 Cal.3d at 514-15. Implicit in section 1094.5 is a requirement that the agency set forth findings to bridge the analytic pag between the raw evidence and ultimate decision or order. Topanga, 11 Cal.3d at 515.

C. The Housing Choice Voucher Program

The Housing Choice Voucher is a federal program that provides rental assistance via vouchers to low-income families, including senior citizens, disabled or handicapped persons. It is funded through the Department of Housing and Urban Development ("HUD") and administered by public housing authorities ("PHA") formed by local jurisdictions. United States Rousing Act of 1937, 42 U.S.C. §1437f *et seq.*; 24 C.F.R. §982, *et seq.*; Health & Safety Code §34240.1. The current Housing Choice Voucher program was started in 1998 when HUD merged its Section 8 rental certificate and voucher programs. Housing Choice Voucher Program Guidebook; AR 164-167. Each local PHA must adopt a written Administrative Plan documenting its local policies for administration of the Voucher program. The Administrative Plan is formally adopted by the PHA and must comply with HUD regulations and requirements. 24 C.F.R. §982.54.

To use the program, tenants must find private landlords renting homes in the community who are willing to participate. Once the tenant finds a cooperating landlord, the tenant generally pays 30% of her income towards the rent; this portion of the payment is called the Total Tenant Payment ("TTP"). 24 C.F.R. §5.628(a). The local PHA supplements the remaining rent by issuing a check paid directly to the landlord. In this manner, the PHA ensures that the landlord is paid the "fair market rent." 24 C.F.R. §888.111.

The tenant must remain qualified to participate in the Voucher program. Accordingly, the PHA must recertify the tenant's program eligibility no less regularly than an annual basis. 24 C.F.R. §5.628(b). Among other things, the PHA calculates any changes in the tenant's monthly income and adjusts the TTP if necessary. 24 C.F.R. §5.657. Voucher participants are entitled to informal hearings before a PHA may take an adverse action, including the adjustment of income that results in an increase of the TTP. 24 C.F.R. §982.555(a)(1)(i).

D. Statement of Facts

The SMHA is an agency of Respondent City. Santa Monica Housing Authority Administrative Plan, Chapter 1 ¶l-I.B; AR 343. It governs the Voucher program in the City and has adopted an Administrative Plan as required under 24 C.F.R. §982.54. AR 342. Petitioner Finley, who is low-income and has major disabilities, participates in the Voucher program in the City. AR 105-113, 202.

After Finley settled personal injury and worker's compensation lawsuits against her

former employer, the court established a trust on behalf of petitioner for deposit of the settlement proceeds. AR 128. In accordance with Title XIX of the Social Security Act, 42 U.S.C. section 1396p(d)(4)(A) and Probate Code section 3605(b), the trust is structured as a "Special Needs Trust," a trust created for the sole benefit of an individual with a disability under the age of 65 and established by the individual's parent, grandparent, legal guardian, or the court. The Finley SNT is irrevocable and the State receives any amounts remaining in the trust upon her death. AR 132-135. The trust corpus is held in a non-interest bearing checking account. AR 114-126. Only the SNT Trustee may make payments from the trust. AR 131. The Trustee has sole and absolute discretion to use the trust when, in her judgment, it is necessary to do so to maintain Finley's health, safety and welfare. AR 128-29.

In June 2008, Finley informed the SMHA that she was receiving settlements from two lawsuits against a former employer. AR 141. She advised the SMHA that the superior court had ordered the creation of the Finley SNT, but that it held no funds yet. Ibid. In March 2009, the Finley SNT Trustee received a portion of a settlement of the two lawsuits. Ibid. Ms. Finley promptly informed the Housing Authority that these settlement proceeds were deposited into the trust. Ibid.

Between December 2008 and August 2009, the Finley SNT Trustee wrote checks to third parties from the trust. AR 212. The total amount paid out was approximately $3,886. AR 212. Checks were written to a variety of recipients, including Texaco, Exxon Mobil, AFLAC, Rocket Smog, Fantastic Sam, A+ Auto Repair, Time Warner Cable, and the Finley SNT Trustee herself, who is permitted to pay herself a trustee's fee. AR 203-204, 214.

In December 2009, the SMHA notified Finley that her TTP (her monthly share of rent) increased by $101 to $358.00, for the time period November 1, 2009 to November 1, 2010. AR 11, 211. Fourteen dollars of the increase was based on an increase in the Fair Market Rent which generally increases the tenant's portion of the rent. The remaining $87 was based on the SMHA's conclusion that Finley's annual income had increased by $3,886 due to the Trustee's payments to third parties from the Finley SNT from December 2008 and August 2009. Ibid. Specifically, the SMHA concluded that "any amount distributed to the family member in the form of periodic payments from a trust is counted as income, even though the trust is not accessible to the family member." Ibid.

At Finley's request, an informal hearing was held regarding the SMHA's calculation of her income and the increase in her share of rent by $101. AR 004, 211. The hearing officer determined that the "applicable law" was 24 C.F.R. §5.609 (2010) and the HUD Occupancy Handbook 4350.3. AR 214. The hearing officer concluded that the SMHA "correctly applied HUD regulations in calculating Complainant's Total Contract Rent." AR 215.

E. Analysis

This case turns on the interpretation and applicability of HUD regulations in determining Finley's income for purposes of establishing her TTP.

The SMHA must calculate Petitioner's annual income for the purpose of certification or reexamination of Section 8 eligibility. Depending on the annual income, the SMHA calculates

any changes in the tenant's monthly income and adjusts the TTP if necessary. 24 C.F.R.[1] §5.657.

A family's annual income is defined as (a).. .all amounts, monetary or not, which: (1) Go to, or on behalf of, the family head or spouse . . .; or (2) Are anticipated to be received from a source outside the family during the [preceding] 12 month period; and (3) **Which are not specifically excluded in paragraph (c) of this section.** (4) Annual income also means amount derived (during the 12-month period) from assets to which any member of the family has access." §5.609(a). (Emphasis added.)

The term "income" means "income from all sources of each member of the household, as determined in accordance with criteria prescribed by the Secretary.... 42 U.S.C. §1437f(b)(4).

Section 5.609(b) contains a non-exhaustive list of examples of annual income, including "(3) Interest, dividends, and other net income of any kind from real or personal property....Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family. Where the family has **net family assets** in excess of $5,000, annual income shall include the greater of the actual income derived from all net family assets or a percentage of the value of such assets....as determined by HUD." §5.609(b). (Emphasis added.)

Annual income does not include: "(3) Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains and **settlement for personal or property losses**...." §5.609(c)(3). (Emphasis added.)

"Net family assets" is defined to mean:

"(1) Net cash value after deducting reasonable costs that would be incurred in disposing of real property, savings, stocks, bonds, and other forms of capital investment....The value of necessary items of personal property such as furniture and automobiles shall be excluded.

(2) In cases where a trust fund has been established and the trust is not revocable by, or under the control of, any member of the family or household, the value of the trust fund will not be considered an asset so long as the fund continues to be held in trust. **Any income distributed from the trust fund shall be counted when determining annual income under §5.609.** §5.603(b)(2). (Emphasis added.)

Thus, SMHA was required by HUD regulations to calculate Finley's annual income, excluding any lump-sum personal injury settlement and including net family assets in excess of $5,000 or a percentage value of such assets, whichever is greater. The calculation of net family assets does not include the value of the Finley SNT, which is irrevocable. Any income distributed from the Finley SNT should be counted.

The problem in this case lies in the fact that the funds in the Finley SNT are excludable from annual income because they are a lump-sum personal injury settlement and that the Finley SNT is excluded from the definition of net family asset because it is irrevocable.

The City takes the position that any distribution from the Finley SNT is income as broadly defined in 42 U.S.C. section 1437f(b)(4), and it does not matter whether the distribution is principal or interest from the excluded net family asset under section 5.603(b)(2). There is no interest income from the Finley SNT, but distribution of approximately $3,886 in principal is

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[1]All further citations are to 24 C.F.R. unless expressly stated otherwise.

income to Finley which is included in the calculation of annual income for purposes of determining Finley's TTP.[2]

As the City's counsel candidly acknowledge at hearing, its position creates a strange dichotomy. If Finley were to take her personal injury settlement and place the money under her mattress, she could use it for any purpose and it would be excluded from annual income for purposes of calculating her TTP. *See* §5.609(c). When these same settlement funds are placed in a SNT to which Finley does not have access, while they are not initially a net family asset, and their value is not included in the calculation of annual income, any distribution of the funds to Finley is converted to annual income. *See* §5.603(b)(2).

The City's argument is erroneous because both sections 5.609 and 5.603(b)(2) can be harmoniously applied to determine that the distribution of principal from the Finley SNT is not annual income.

Under section 5.609(a), Finley's annual income is defined as all amounts, monetary or not, which (1) go to her, or are paid on her behalf, and (3) which are not specifically excluded by 5.609(c). Finley's lump sum settlement is specifically excluded by section 5.609(c)(3). Therefore, the settlement is not considered to be part of her annual income.

Under section 5.603(b)(2), the settlement funds placed in the Finley SNT are not net family assets for purposes of calculating annual income. However, per the express direction of section 5.603(b)(2), the distribution of principal (which meets the broad definition of "income") from the Finley SNT must be "counted when determining annual income."

So far, so good. But section 5.609(a) requires more than that money be "counted" in determining annual income. The term "annual income" is defined as all amounts, monetary or not, which: (1) Go to, or on behalf of, the family head. . ..**and** (3) which are not specifically excluded in section 5.609(c). In order to qualify as annual income, the provision requires both that the funds in question benefit the family head and that they not be specifically excluded. The Finley SNT principal must be "counted" in the annual income calculation as funds benefitting the family head under section 5.603(b)(2), but they remain excluded under section 5.609(c). Since section 5.609(a) requires that both conditions be met, the principal is not annual income for the purpose of determining Finley's eligibility and TTP.[3]

This interpretation, which gives effect to the plain meaning of section 5.609(a) and (c), and of section 5.603(b)(2), by requiring that funds be counted in the annual income determination while also requiring that the funds not be excluded from annual income, is entirely consistent with the treatment of interest and principal in HUD's Housing Choice Voucher

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[2]Finley has a permanent disability and her settlement has been placed in a SNT to enable her to enjoy the benefits of the settlement without concern for her disability benefits per Social Security. If accepted, the City's argument would force her to avoid a SNT in order to ensure that the settlement is excluded from income.

[3]It is worth noting that section 5.603(b)(2) states only that the irrevocable trust distribution must be "counted when determining annual income" and does not state that the distribution must be included in annual income. The latter language potentially could have foreclosed consideration of any exclusions from annual income.

Guidebook. AR 161-200. The Guidebook provides that PHAs are required to include in the calculation of annual income any interest or dividends earned on assets held by the family. AR 190.

A lump sum settlement payment is considered a family asset, and therefore interest earned on it is counted as income. AR 191.

Since an irrevocable trust is not a family asset, interest on it is not considered income so long as the interest remains in the trust. §5.603(b)(2). Once it is distributed to the beneficiary, the interest is "counted" as income under section 5.603(b)(2). As there is no exclusion in section 5.609(c) for such interest income, the distributed interest is part of the family's annual income.

While a distribution of interest from an irrevocable trust would not be a distribution from an asset, section 5.603(b)(3) still requires that it be counted as income. Again, the interest has no exclusion under 5.609(c), and therefore it is part of the family's annual income.

This interpretation of sections 5.609(c) and 5.603(b)(3) places interest distributions from an irrevocable trust on the same level field with distributions from family assets, including settlements. It also means that a distribution of principal from an irrevocable trust, which is not a family asset, is not annual income where the principal was excluded from annual income under section 5.609(c)(3).[4]

F. Conclusion

The petition for writ of mandate is granted. In addition to an administrative writ of mandamus under CCP section 1094.5 on her own TTP calculation, Finley seeks a traditional writ under CCP section 1085 to compel SMHA to correct its interpretation of the pertinent regulations in its Administrative Plan. The City has filed no specific opposition to this claim, and both a traditional and administrative mandamus writ will issue.

Finley's counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on the City's counsel for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for June 27, 2011.

Dated: May 25, 2011

/s/ JAMES C. CHALFANT

Superior Court Judge

JAMES C. CHALFANT

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[4]Given the determination that distribution of principal from the Finley SNT does not qualify as annual income, the court need not determine whether the separate exclusion of "temporary, nonrecurring or sporadic income (including gifts). *See* §5.609(c)(9).