

SECTION 8 and SPECIAL NEEDS TRUSTS

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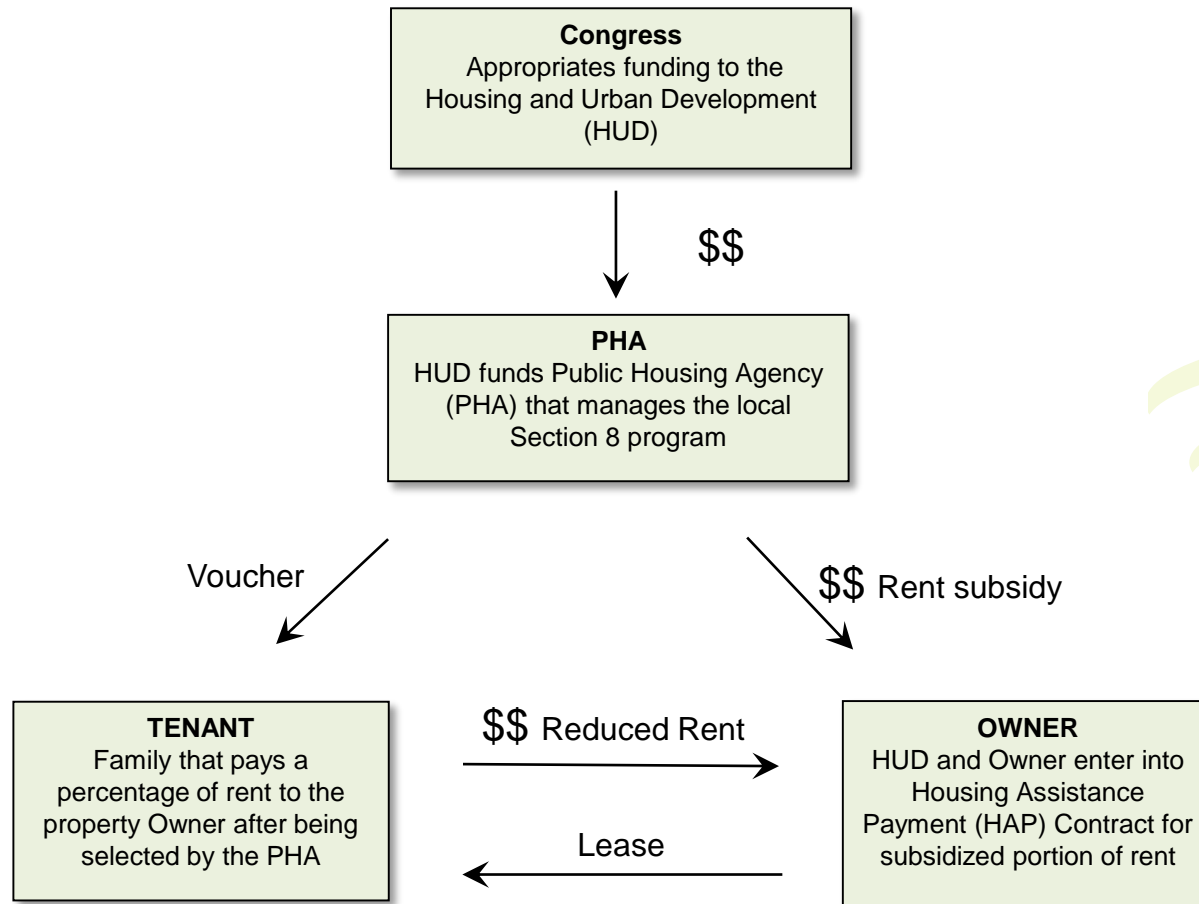
MAKING A GOOD LIFE POSSIBLE

Section 8 Terms to Know

- Area Median Income
- Extremely low income (30% of AMI)
- Annual Income
- Voucher
- Fair Market Rent
- Total Tenant Payment (TTP)
- Public Housing Agencies (PHA, aka MHA)

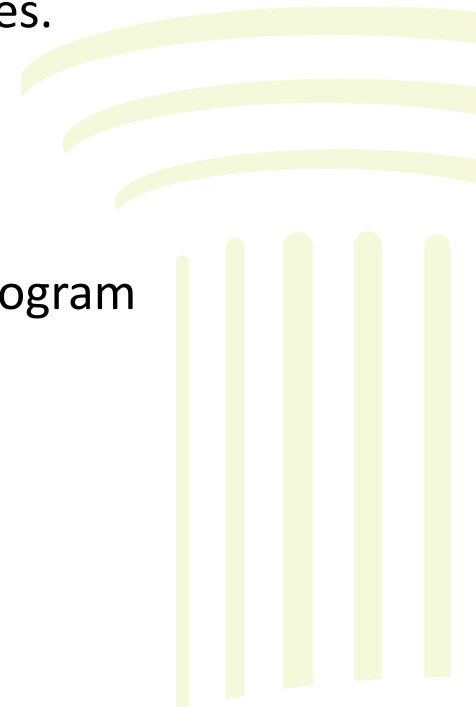


How Section 8 Works



Public Housing Agencies (PHA's)

- Public Housing Agencies are (generally) the local administrative authority
 - ✓ Often known as “metropolitan” housing authorities.
- Great variation in size and sophistication
- PHA's have great flexibility to manage the Section 8 Program



Annual Income

24 C.F.R. § 5.609(a)

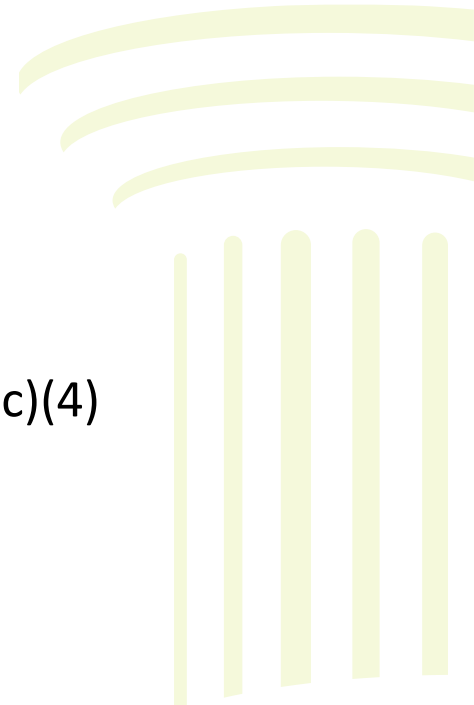
- All amounts that are received by the family head, spouse or co-head, or any other family member, or
- All amounts anticipated in the 12 month period in advance of when the determination is made, and
- Which are not specifically excluded in §5.609(c)
- Annual income includes income from assets to which any member had access

Annual Income Exclusions

24 C.F.R. § 5.609(c)

Among the lengthy list of items excluded from income are:

- All lump-sum additions to family assets, (c)(3)
 - ✓ Inheritances
 - ✓ Insurance payments
 - ✓ Capital gains
 - ✓ Settlement for personal or property losses
- The cost of medical expenses for any family member, (c)(4)
- Temporary, nonrecurring or sporadic income (c)(9)



Treatment of Trusts

24 C.F.R. §5.603(b)(definitions)

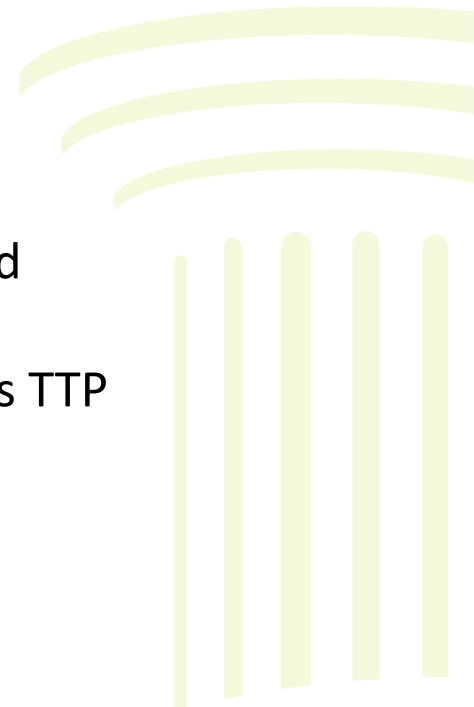
Definition of “Net Family Assets”

- Revocable Trusts
 - ✓ Treated as an asset if any family member can withdrawal.
- Irrevocable Trusts (...and those not controlled by a family member)
 - ✓ NOT an asset. But, “any income distributed from the trust fund shall be counted when determining annual income under §5.609”

Tenant Rent and Subsidy

How rent subsidy is calculated

- Determine the Total Tenant Payment (TTP)
 - ✓ The “rent burden” that family can sustain.
 - ✓ 30% of the annual income
- Next determine subsidy the PHA will pay the landlord
 - ✓ Fair Market Rent (FMR) for the size of unit minus TTP
$$\text{FMR} - \text{TTP} = \text{Rent Subsidy}$$



Tenant Rent Burden

Example

- Fair market rent for 2 bedroom apartment in West Jefferson = \$811.00
- Tenant income = \$600/month
- TTP (30% x annual income) is \$180
- Section 8 subsidy (TTP-FMR) is \$631.00



Finley v. City of Santa Monica

2011 WL 7116184 (Cal. Super. Ct. May 25, 2011)

FACTS

- Sheila Finley: 64 year old, with a disability
 - ✓ Annual income of \$10,260 (Social Security)
- Receives Section 8 rent assistance from Santa Monica Housing Authority (SMHA)
- Personal injury and workers' comp. settlement with former employer = \$47,800
- Court established SNT – 42 U.S.C. 1396p(d)(4)(A)
 - ✓ Finley promptly notifies the SMHA
- Trust funds are earning no interest
- Annual re-certification triggers the dispute

Finley v. City of Santa Monica

Distributions

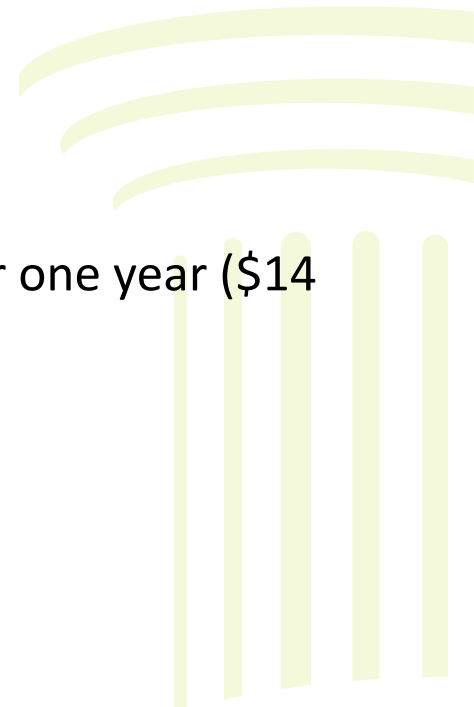
- Over 6 months Trustee paid 3rd parties = \$3,886
 - ✓ Texaco
 - ✓ Exxon Mobil
 - ✓ AFLAC
 - ✓ Rocket Smog
 - ✓ Fantastic Sam
 - ✓ A+ Auto Repair
 - ✓ Time Warner
 - ✓ Trustee fee



Finley v. City of Santa Monica

Opinion of SMHA

- Distributions were regular and periodic payments from the trust and therefore annual income
- The trust itself was not countable
- Rent recalculation
 - ✓ Increase in TTP of \$101 per month, retroactive for one year (\$14 was due to increase in FMR)



Finley v. City of Santa Monica

Opinion of the Court

The Court confronted a “strange dichotomy”

- The lump sum was not countable, whether given to Finley directly or to the SNT under §5.609(c)(3)
- But, expenditures suddenly become income simply because they are made from the trust under §5.603(b)(2)

“If Finley were to . . . place the money under her mattress, she could use it for any purpose When [the money is] placed in a SNT . . . any distribution . . . is converted to annual income.”

Finley v. City of Santa Monica

Opinion of the Court

The Court's resolved the tension between §5.609(c)(3) and §5.603(b)(2) to give the "plain meaning" to both

- The lump sum making up the trust principal is excluded
- Only principal was distributed (the funds did not earn interest)
- The distributed principal originated from excludable income source
- Therefore, the distributions are excluded also

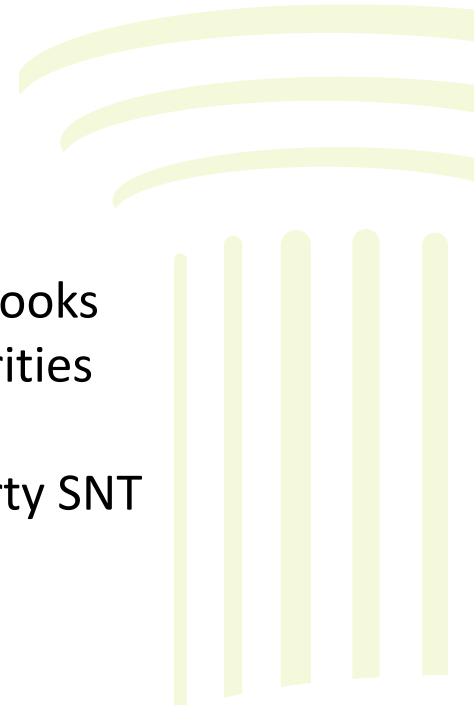
The court did not address the issue of "periodic" payments

DeCambre v. Brookline Housing Authority, et. al

U.S. District Court, D. Massachusetts, NO. 14-13425-WGY

Why is this case important?

- Very few court opinions on SNT's and Section 8
 - ✓ Specifically analyzes and rejects oft-cited *Finley*
 - ✓ Thorough opinion (40 pages, a lot of *dicta*)
- Deference to HUD and the housing authority
 - ✓ Significant reliance on HUD advisories and guidebooks
 - ✓ Likely to have great weight in with housing authorities
 - ✓ May embolden more entrenched agencies
- Might advance the trend towards suspicion of first party SNT



DeCambre v. BHA

FACTS

- Kimberly DeCambre: 59 year old with a disability (stemming from kidney disease and other ailments)
- Since 2005, receives Section 8 rent assistance from Brookline Housing Authority
- Receives Medicaid and SSI
- Annual income – \$9,748.68
- SNAP – \$2,004.00
- Personal injury settlement = \$330,000 (multiple defendants)
- Court established SNT – 42 U.S.C. 1396p(d)(4)(A)
- At annual re-certification, BHA requested trust expenditure records



DeCambre

Distributions

BHA reviewed distributions of about \$200,000 between 2011 and 2013

- Cell phone bills
- Cable TV and internet
- Veterinary care for cats
- Dental and medical bills
- Travel costs (including for a companion)
- A car (in two payments) *titled to the trust*
- Trustee fees



DeCambre v. BHA

Brookline Housing Authority Action

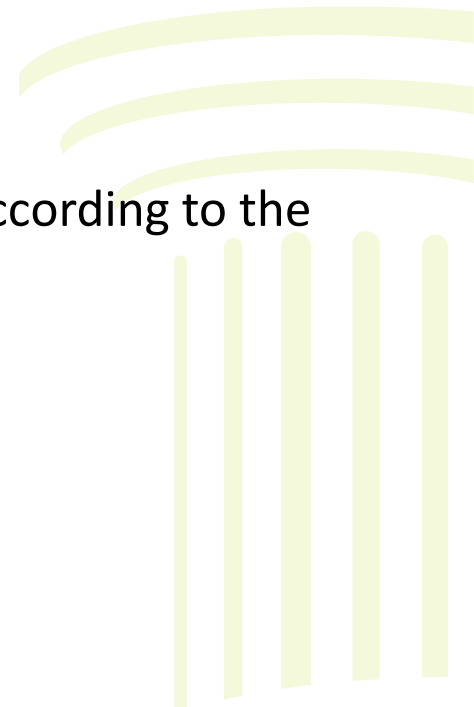
- Rent before recalculation = \$312/mth
- October 2013, BHA adjusted rent to \$435/mth
 - ✓ BHA: 2012 unreported income of \$31,749
- Certain medical expenses and trustee fees were okay
- Upon annual recertification and review of information submitted by Trustee
 - ✓ February 2014: DeCambre no longer eligible for Section 8
 - ✓ BHA: 2013 (through Nov.) unreported income of \$62,829
- March 2014: DeCambre given eviction notice!!

DeCambre v. BHA

Independent Hearing

Hearing Officer's report

- The lump sum is not income
- But, once placed in a trust, distributions are treated according to the income rules



DeCambre v. BHA

Position of Plaintiff

DeCambre argued that distributions were excluded because the trust was funded from and excluded source; a lump sum settlement (a la *Finley*)

Back story: Focus of trustee was on SSI and Medicaid



DeCambre v. BHA

Position of Plaintiff

Alternatively, DeCambre argued that distributions were excluded

Medical expense under §5.609(c)(4).

- Veterinary care for cats
- Dental and medical bills
- Travel costs (including for a companion)
- The car (as two payments)

Temporary, nonrecurring or sporadic under §5.609(c)(9).

- Cell phone bills
- Cable TV and internet



DeCambre

Request For Reasonable Accommodations

DeCambre requested BHA modify its policy income counting policies for medical expenses

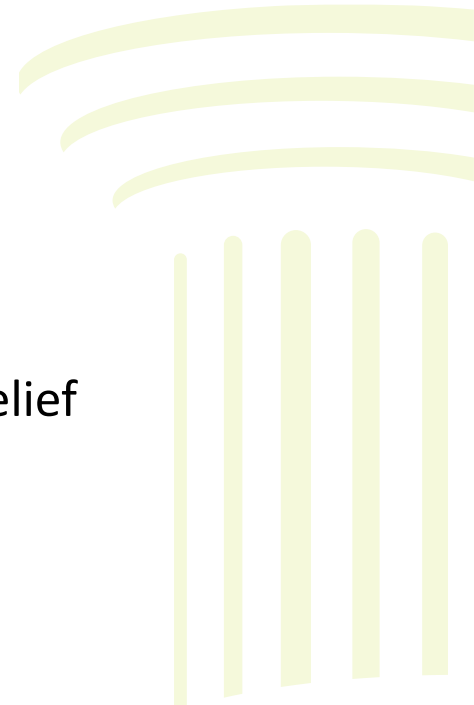
- Phone
 - ✓ Because of medically precarious condition
- Veterinary costs for the care of her cats
 - ✓ As companion animals for mental and physical health
- Car
 - ✓ She could not be exposed to hot or cold outdoor temperatures



DeCambre v. BHA

Cause of Action

- Failure to provide reasonable accommodation pursuant to Section 8
- Breach of contract (lease)
- Interference with quiet enjoyment
- Section 1983 civil rights violation
- Disability discrimination
 - ✓ Rehab Act
 - ✓ ADA
 - ✓ Fair Housing Act
- Seeking money damages, injunctive and declaratory relief



DeCambre v. BHA

Procedural Posture

- Complaint with Massachusetts Commission Against Discrimination (June, 2014) (subsequently withdrawn)
- Lawsuit filed and Massachusetts Superior Court
- Case removed to the Federal District Court (August, 2014)
- “Case Stated” hearing (September, 2014)
 - ✓ Waives trial
 - ✓ Allows court to fact-find



DeCambre v. BHA

Primary Issue and Holding

- Are distributions from an SNT (i.e. an irrevocable trust) which is funded from a lump-sum settlement excluded from income?

(Recall *Finley* – the lump-sum settlement exclusion prevails over the trust distribution language.)

- *DeCambre* – there is no justification for a court to decide that one provision of the law (i.e §609) prevails over another (i.e. §603)
 - ✓ The lump sum loses its exclusion once placed in a trust
 - ✓ Then, §609 applies to distributions
 - ✓ Agency entitled to a high level of deference
 - ✓ Remand to the agency to determine nature of the distributions
 - ✓ Ruled against *DeCambre* on all other claims

DeCambre v. BHA

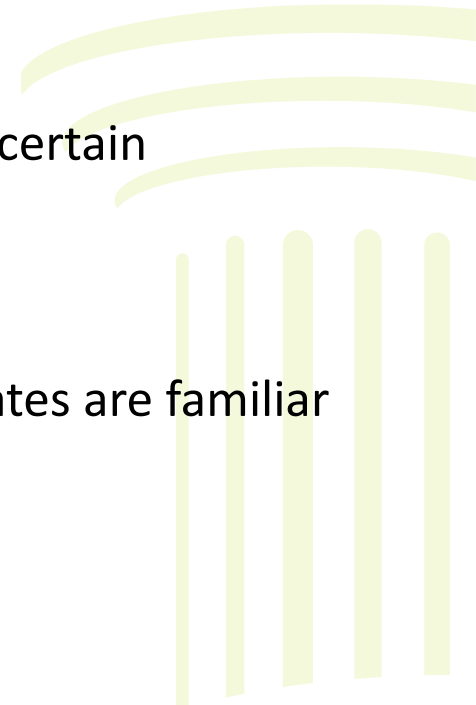
Support Used By The Court

- HUD New England PIH Advisory Letter #07-05, April 18, 2007
 - ✓ Explained why Section 8 is more restrictive than Medicaid – no payback
 - ✓ Amounts not excluded are presumed by the regulations to be counted towards annual income
- HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs, U.S. Department of Housing and Urban Development (Nov. 3, 2014)

DeCambre v. BHA

ADA/§504 Claim and Analysis

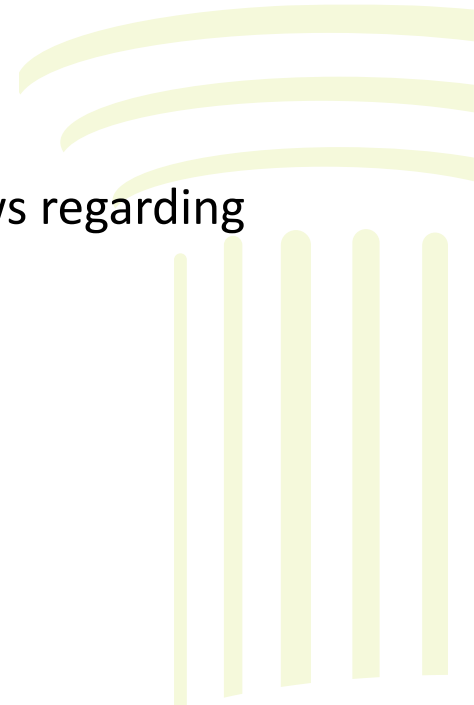
- Under the Fair Housing Act, PHA's may not refuse to make reasonable accommodations in rules, policies, practices
- DeCambre requested changes in policies to recognize certain expenditures as medical expenses
- Insufficient analysis by the court
 - ✓ Lacking the structured analysis with which advocates are familiar



DeCambre v. BHA

Remand and Dicta

- “...it is clear that the BHA could perform a more thorough determination of each potentially excludable expense proffered by DeCambre.”
- The court was frustrated with the absence of clear laws regarding SNTs
 - ✓ Suggested HUD should provide guidance



DeCambre v. BHA

Remand and Dicta

- The Court remanded to BHA for determinations about particular expenditures
- Dicta – the Court raised “several issues” with BHA’s determinations
 - ✓ Citing *Lewis v. Alexander*, 685 F.3d (3rd Cir.)
 - Cable and internet expenses may be excludable even though they are not temporary (*caution*)
 - Travel expenses could also be excluded (*caution*)
 - ✓ Medical expenses
 - Veterinary bills (\$6000)
 - But, see “assistance animals” (HUD Handbook)
 - ✓ The car is owned by the trust

DeCambre v. BHA

Current Status

- Being appealed and there are settlement discussions
- The refusal of accommodation is a very strong point for DeCambre
- The car should not have been included
- Kimberly DeCambre is in a different apartment with others helping her with rent

TAKE AWAYS

- Consider ALL public assistance programs
 - ✓ In my experience, many attorneys are overly-focused on Medicaid.
- Don't be afraid of the HUD regulations
- Make requests for accommodations and modifications in policies
- Consider the "appearance" of distributions from SNTs
- Expect more requests for trust expenditures



Questions?

MAKING A GOOD LIFE POSSIBLE

