



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

S.M.,
PETITIONER,
v.
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES AND
CUMBERLAND COUNTY BOARD OF
SOCIAL SERVICES,
RESPONDENTS.
ADMINISTRATIVE ACTION
FINAL AGENCY DECISION
OAL DKT. NO. HMA 10914-2015

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this matter, consisting of the case file, the documents submitted into evidence and the Initial Decision. Neither party filed exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision is March 21, 2016, in accordance with an Order of Extension.

This matter concerns the establishment of a trust containing Petitioner's assets. Petitioner created the M. and M. Living Trust in 2001 with her then fiancé. He died in 2010. At some point after his death, Petitioner appears to have created a trust account

at PNC titled as a Survivor's Trust pursuant to Article Eight of the trust document. R-1 at 53. Articles Seven and Nine establish a Family Trust that permits Petitioner, as the Surviving Trustor, to request and receive payment from the income and corpus of that trust. R-1 at 56. The record does not indicate the status of that trust which would also need to be examined under Medicaid rules.

Petitioner entered an assisted living facility in December 2014. The Office of the Public Guardian (OPG) was appointed on February 13, 2015 through a Judgement of Incapacity. P-1 at G. An application for Medicaid benefits was filed March 11, 2015. Cumberland County denied the case due to excess resources which included the \$37,385 balance in the PNC account. R-1 at 8.

On appeal, Petitioner argued that the funds in the PNC account were not accessible to her and could not be counted towards her Medicaid eligibility. See N.J.A.C. 10:71-4.4(b)6i. She claims that since the successor trustees named in the trust document are not responding to letters sent by the OPG, she could not access the funds. The Initial Decision agreed with the OPG and reversed the denial.

After review of the applicable statutes that deal specifically with trusts, I disagree and hereby REVERSE the Initial Decision. The analysis of the Initial Decision fails to address the explicit rules that surround the treatment of trusts for Medicaid purposes. While there are indeed rules and case law surrounding inaccessible resources, when the resources are placed in a trust the trust rules apply.

Congress has long grappled with the use of trusts to evade Medicaid eligibility and protect assets that would otherwise be used for care and passed specific legislation to deal with this problem. It is pursuant to that statute as well as federal guidance and

state regulations, that I FIND that Cumberland County properly uses the trust funds in determining Petitioner's eligibility.¹

Prior to 1986, many individuals made assets "unavailable" by placing them in irrevocable Medicaid qualifying trusts (MQTs), thus rendering the individuals eligible for Medicaid, while simultaneously preserving the assets for their heirs. H.R.Rep. No. 265, 99th Cong., 1st Sess., pt.1, at 71 (1985). Disturbed by this practice, Congress, in enacting 42 U.S.C. § 1396(k), stated (1) Medicaid is a program designed to provide basic medical care for those lacking the resources to care for themselves, and (2) techniques that potentially enrich heirs at the expense of poor people are unacceptable. Id. at 71-72. To remedy the situation, Congress proposed a bill to treat as available assets all self-settled trusts, under which the settlor could receive benefits at the trustee's discretion. Id. at 72. The amount deemed available to such people is the **maximum amount** that a trustee **could**, in the **full exercise of discretion**, distribute to that grantor, whether from income or from principal. Whether the trust was established for the purpose of enabling the grantor to qualify for Medicaid is irrelevant. Id. (emphasis added).

As creative financial planning persisted, in 1993 Congress repealed the 1986 amendment and replaced it "by another statute even less forgiving of such trusts. See 42 U.S.C. § 1396p(d) (1993). This statute added stringent criteria regarding the treatment of MQTs such as the inclusion of the corpus and proceeds of various irrevocable trusts as countable resources." Ramey v. Reinertson, 268 F.3d 955, 959 (10th Cir.2001). That federal law specifically provides:

¹ Petitioner's Medicaid application shows she lived in the community prior to entering the assisted living facility. R-1 at 16. The status and ownership of that home is not in the record and would need to be addressed if Petitioner reapplies.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

....

(C) Subject to paragraph (4) [about special needs trusts], this subsection shall apply without regard to--(i) the purposes for which a trust is established, (ii) whether the trustees have or exercise any discretion under the trust, (iii) any restrictions on when or whether distributions may be made from the trust, or (iv) any restrictions on the use of distributions from the trust.

....

(3)(B) In the case of an irrevocable trust--

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual,....

[42 U.S.C. §1396p(d) (emphasis added).]

When Petitioner, through her own actions, placed the funds first in the M. and M. Living Trust and subsequently in the Survivor's Trust, she clearly set forth circumstances that permitted the withdrawal of funds to be used on her behalf. However, there is no requirement that the funds actually be paid to be counted for Medicaid eligibility.

The State Medicaid Manual (SMM) expands on the statute by stating that "where there are any circumstances under which payment can be made to or for the benefit of the individual from all or a portion of the trust . . . [the] [i]ncome on the corpus . . . [or] [t]he portion of the corpus that could be paid to or for the benefits of the individual is treated as a resource available to the individual." SMM § 3259.6.B (emphasis added). To that end the SMM gives an example of \$50,000 in a trust "that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this

full amount is considered as payment that could be made under some circumstances, even though the likelihood of payment is remote.” SMM § 3259.6.E.

Similarly the Social Security Administration has also issued guidance in Program Operations Manuals (POMS) regarding how an irrevocable trust is counted for eligibility. POMS state that “an irrevocable trust established with the assets of an individual is a resource” when “payments from the trust could be made to or for the benefit of the individual or individual's spouse (SI 01120.201F.1 in this section), the portion of the trust from which payment could be made that is attributable to the individual is a resource.” SI 01120.201D.2.a. The POMS offers an example of a trust that can pay \$50,000 “to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday, the entire \$50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource.” In this example the \$50,000 is a countable resource as it could be paid under some circumstance regardless of the likelihood of the circumstances surrounding the payment. See N.J.A.C. 10:71.4.11(e)2.iii.

Petitioner's argument that the failure of a valid trustee to act does not affect how Medicaid must treat the funds in the trust. Rather the federal law and the various regulations and policy statements require that any funds that could be paid to or for the benefits of the individual, regardless of whether the circumstance is likely, must be counted as a resource for Medicaid eligibility. I find no support for the finding that the corpus of Petitioner's trust can be excluded from determining Medicaid eligibility due to issues with the appointment of a trustee when, according to the above examples, another trust's corpus would be included in determining Medicaid eligibility even though the funds are not accessible as the trustee cannot disburse the funds until the applicant

needed a heart transplant. It is clear that under rules and regulations surrounding the treatment of trusts, when there are any circumstances where the trust funds could be paid to or for the Medicaid applicant's benefit, those trust funds must be considered for determining eligibility.

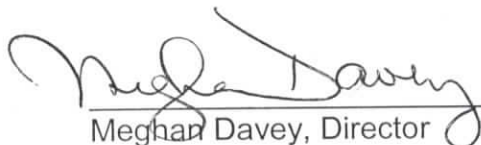
I also note that Petitioner's argument about the difficulties in accessing the Survivor's Trust funds failed to demonstrate that PNC refused release of the funds to the OPG as Petitioner's guardian. At minimum PNC has accepted OPG's status by sending the investment statements to that office's address. R-1 at 10. Moreover, the trust document states that if there is no trustee acting under any of the trusts including the Survivor's Trust, "the vacancy shall be filled by a court of competent jurisdiction." R-1 at 37. There is no evidence that the OPG has acted on this.

THEREFORE, it is on this 18th day of MARCH 2016,

ORDERED:

That the Initial Decision is hereby REVERSED; and

That Petitioner's application remains denied.



Meghan Davey, Director
Division of Medical Assistance and
Health Services