

trust was determined to be available resources to Petitioner and her application was denied by letter dated July 21, 2014. The denial letter also stated that Petitioner's failure to produced documentation regarding the use of the trust funds as another reason for the denial.

The Initial Decision found that the trust failed to be set up for the sole benefits of Petitioner as required under Medicaid regulations. As a result the trust was not an excluded trust for the purposes of Medicaid eligibility and, when combined with Petitioners' other resources, exceeded the Medicaid standard. The decision went on to find that Petitioner's failure to provide information regarding other transfers was not willful. For the reasons that follow, I hereby ADOPT and MODIFY the Initial Decision.

Congress has long tried to balance the practice of using trusts to shelter assets that would be otherwise available to pay for medical care and the desire to have disabled individuals protect assets that could only be used for the special needs. In 1993 Congress passed " 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).

However, Congress also made exceptions from this rule, with three types of "special needs trusts" (SNT) or "supplemental needs trusts," which must meet specific requirements, including most importantly, a pay-back provision. 42 U.S.C.A. § 1396p(d)(4)(A), (d)(4)(B), and (d)(4)(C). The pay-back provision requires that "the State will receive all amounts remaining in the trust upon the

death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan.” 42 U.S.C.A. § 1396p(d)(4)(A); see also (d)(4)(B) and (d)(4)(C) (which also require a pay-back provision). In furtherance of this statute, New Jersey enacted legislation in 2000 to also permit special needs trusts for disabled Medicaid beneficiaries. N.J.S.A. 3B:11-36, -37. The assets in the special needs trust may only be excluded if the trust satisfies certain specific requirements, including among other requirements, the pay-back provision. N.J.A.C. 10:71-4.11(g)xii; 42 U.S.C.A. § 1396p(d)(4)(A); see also J.B. v. W.B., 215 N.J. 305, 322-24 (2013).

It is clear that the trust and the trustee’s actions in this matter do not meet the sole benefit requirement. Payments have been made from the trust for items used nearly exclusively by others and for outright gifts which Petitioner’s sister claims that were to maintain Petitioner’s “good health.” Exceptions at 8. This is a contorted reading of the trust to fashion a legitimate reason for the trust to gift nearly \$5,000 to family members. ID at 3. As Petitioner’s sister is her trustee, the gifts to family members benefit the trustee’s family as well. The argument that Petitioner “requested” these gifts seems to indicate that Petitioner exercised control over disbursements. Exceptions at 8.

While the trust provides that payments can be made for Petitioner’s transportation, it appears that any vehicle which could possibly transport Petitioner had its insurance paid for by the trust. R-4 at 4. The trust paid a full year’s worth of insurance for the trustee’s three cars as well as the policy for a vehicle owned by Petitioners’ brother. ID at 3. It cannot be said that these payments were for Petitioner’s sole benefit.

The trust's expenditures show a pattern of paying for items that either did not benefit Petitioner or created a minimal benefit despite using the trust funds to pay the entire cost. For example, despite the fact Petitioner cannot have pets, the trust purchased two cats and pays for their veterinary care. ID at 10. Any benefit received by Petitioner is minimal as the pets live with the trustee. See M.G. vs. DMAHS and OCBSS, OAL DKT. NO. HMA 8636-02, decided April 29, 2003.

There appears to be a pattern of using the trust funds to directly purchase items to benefit others. The trust paid for multiple items of clothing from stores for a wide range of sizes indicating that the purchases were not for Petitioner. See P-27, P-32, P-33, P-36 and P-37. Petitioner provided no explanation for these varied purchases or which ones were for Petitioner. Also, in February 2012 the trust paid \$46.50 for what was identified as a "birthday cake." Petitioner's birthday falls in September. R-4 at 1. The trust made two purchases from Omaha Steaks for \$80.47 and \$77.98 one day apart. R-5. A little more than a week prior to those purchases, the trust was used to purchase \$82.54 from Wegmans. There is no explanation of how these purchases were for Petitioner's sole benefit.

The trust language is very broad with the expenditures that are permitted for Petitioner's special needs. While it is not unreasonable for the trust to pay for Petitioner's and one companion's travel expenses, paying for multiple individuals to travel absent a clear medical or support reason cannot be said to meet the sole benefits requirement. The trust payment for four people to fly to Florida as well as \$1,000 in expenses is not supported as a payment for Petitioner's sole

benefit. The printed e-ticket confirmation does not even include Petitioners' name. Rather one of the ticketed passenger's names is crossed out and Petitioner's name is written in. It is generally known that there are onerous restrictions that make it nearly impossible to transfer tickets once purchased. This handwritten notation is not sufficient to show that Petitioner actually went on the trip. Moreover, there is no proof that she needed three additional people to accompany her.

Since the trust is not an excluded SNT, the regular trust rules apply.

Federal law specifically provides:

(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).]

The State Medicaid Manual (Transmittal 64) expand 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.

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 resource as it could be paid under some circumstance.

As the trust is permitted to pay for Petitioner’s various needs throughout the course of her life, those payments are not shielded from the trust rules and are considered available for purposes of determining Medicaid eligibility. Thus, I FIND that Petitioner’s trust was properly considered an available resource for purposes of determining Petitioner’s Medicaid eligibility and hereby uphold the denial.

With regard to the finding that Petitioner’s trustee was not willful in her failure to provide information regarding wiring funds to two bank accounts, I

MODIFY the Initial Decision in that the failure to provide information need not be willful. I do not find that N.J.A.C. 10:71-2.10, which provides for the denial of an application when an applicant is “unwilling” to provide information, requires a finding of willful conduct. However, Petitioner’s failure to provide information regarding the wire transfers that were later discovered to be gifts to the trustee’s daughter and niece must be examined in light of the extensive annotations including store receipts provided to explain other transfers. It is striking that the wire transfers have either no explanation or simply state “money order for” with no further indication where the funds went. Thus, I FIND that the failure to provide information regarding the transfers and the ownership of these accounts was a valid reason for the denial of Petitioner’s application.

THEREFORE, it is on this 19th day of MAY 2015,

ORDERED:

That the Initial Decision is hereby ADOPTED and MODIFIED as set forth above.



Valerie J. Harr, Director
Division of Medical Assistance
and Health Services