



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**

A.D.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	ORDER OF REMAND
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 2068-2016
	:	
AND HEALTH SERVICES AND	:	
	:	
CAMDEN COUNTY BOARD OF	:	
	:	
SOCIAL SERVICES,	:	
	:	
RESPONDENTS.	:	

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the OAL case file and the documents filed below. Both parties filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is September 15, 2016 in accordance an Order of Extension.

The matter arises regarding Petitioner's Medicaid application wherein Camden County Board of Social Services determined that Petitioner was eligible as of October 1, 2015 but subject to a transfer penalty until March 3, 2016. Petitioner has been residing in a nursing home since June 2014. She applied for Medicaid benefits in April 2015. She had Social Security income totaling \$1,764.90. On November 10, 2014 she used \$78,000 to purchase a nine-month annuity from the Croatian Fraternal Union of America. It paid Petitioner \$8,673.90 from December 15, 2014 through August 15 2015. Exhibit D. On November 24, 2014, Petitioner wrote a check to her daughter for \$51,000 from their joint account.

The Initial Decision determined that Petitioner was eligible as of May 1, 2015 and that the transfer penalty of \$51,000 was correct. However, while I concur that the transfer penalty was correct, FIND that neither the record nor the law support the finding of a May 1, 2015 date. As such, I hereby ADOPT the Initial Decision with regard to the amount of the transfer penalty but REVERSE with regard to the eligibility date.

Petitioner engaged in Medicaid planning by using \$78,000 to purchase an annuity. The Croatian Fraternal Union appears to require a certification, signed by an experienced elder law attorney, who had advised the annuity owner that this annuity product "is only suitable if the Owner or Owner's spouse are applying for government benefits under which the total amount of assets are relevant in the determination of benefit eligibility." Exhibit C at 8. By converting the \$78,000 into an income stream, Petitioner is seeking accelerate her eligibility date so as to start the transfer penalty for the \$51,000 transferred to her daughter.

Petitioner claims that the penalty should be reduced as her daughter contributed \$4,200, in increments of \$400, to their joint account from July 2013 through April 2014.

While stating that the funds came from the daughter's account, Petitioner never explained why she received those funds. Petitioner had ample resources in that account as evidenced by writing the \$51,000 check from the account in November 2014. Her daughter, who had her own account, could have been gifting her funds, paying her share of the costs of the house or reimbursing an expense covered by Petitioner. As noted by Camden County, the fact that the daughter deposited the funds does not mean that she did not intend them to belong to Petitioner. Thus, I FIND that the Initial Decision correctly upheld the \$51,000 transfer.

Federal law requires that when a resource is transferred or disposed of for less than fair market value during or after the start of the sixty month period before the individual becomes institutionalized or applies for Medicaid as an institutionalized individual, the individual will be subject to a period of Medicaid ineligibility that is imposed once he or she is otherwise eligible for Medicaid benefits. 42 U.S.C.A. § 1396p(c)(1); see also N.J.A.C. 10:71-4.10(a) and N.J.S.A. 30:4D-3(i)(15)(b).¹ The problem in this case is that Petitioner's income exceeds the private pay cost of her medical care. With monthly income of \$10,438.80, Petitioner had ample income to pay for her nursing home care. The record from the nursing home shows the largest monthly charge while she was receiving the annuity income was for \$9,920. R-8.

Medicaid is a federally-created, state-implemented program designed, in broad terms, to ensure that qualified people who cannot afford necessary medical care are able to obtain it. See 42 U.S.C.A. § 1396, et seq., Title XIX of the Social Security Act

¹ Congress is well aware that applicants and their families begin planning to achieve Medicaid benefits long before ever applying. To that end, Congress extended the look back period from three years to five years. Deficit Reduction Act of 2005, P.L. 109-171, § 6011 (Feb. 8, 2006).

("Medicaid Statute"). The overarching purpose of the Medicaid program is to provide benefits to qualified persons "whose income and resources are insufficient to meet the cost of necessary medical services." 42 U.S.C.A. § 1396-1. It "is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." Atkins v. Rivera, 477 U.S.154, 156 (1986). In setting up the QIT the federal courts described situations where individuals in nursing homes had incomes that were "too low to enable them to pay their own nursing home costs, but too high to qualify for Medicaid benefits." Miller v. Ibarra, 746 F.Supp. 19 (1990). That is simply not the case here, Petitioner's purchase of the annuity assured her that she had income in excess of the private nursing home rate. Thus, Camden County was correct in finding that Petitioner's income was sufficient to meet those costs and she was not eligible for Medicaid.

Despite having sufficient funds to pay the nursing home costs, Petitioner established a Qualified Income Trust (QIT) as of May 1, 2015 in an attempt to be determined otherwise eligible for Medicaid and to start the penalty period.² However, her subsequent actions in placing resources into the trust violate the terms of the QIT as well as the federal law. Article IV of the QIT states that the trust "shall be composed of income only" and "[n]o resources, as defined by SSI, shall be used to establish or augment the trust." Moreover, the Grantor of the trust "acknowledges that the inclusion of any such resources will not allow this Trust to qualify as a Miller trust in accordance with 42 U.S.C. 1396p(d)(4)(B). 3257.7C." Exhibit L at page 7.

² As of December 1, 2014, New Jersey ceased covering nursing home services under the Medically Needy program and those applicants, who needed institutional level of care in a nursing facility, an AL facility or home and had income in excess of \$2,163 (currently \$2,199) were required to place the excess income in a Qualified Income Trust (QIT), also known as a Miller Trust, to obtain Medicaid benefits. See 42 U.S.C. § 1396p(d)(4)(B). By placing the excess income in a QIT, Camden County is able to exclude that amount from the income limit.

By email dated May 1, 2015, Petitioner's counsel acknowledged that the April annuity check of \$8,673.90 was deposited in Petitioner's checking account that same day. The email continues "most of this annuity income for April will be deposited into the Miller Trust next week." Exhibit M. This violates the terms of the trust which requires that "the income allocated to the Trust shall be deposited in the trust account in the same month the income is received by" Petitioner. Exhibit L at page 8 (emphasis added).

Moreover, the deposit in May 2015 was, under SSI rules, a deposit of Petitioner's resources.³ Petitioner received a check from the Croatian Federation dated April 14, 2015. Exhibit N. That check is considered income during the month of April. When funds from that check were deposited on May 1, 2015 into Petitioner's checking account and then into the QIT, those funds represented Petitioner's resources for May 2015. By the trust's own terms that deposit "will not allow this Trust to qualify as a Miller trust in accordance with 42 U.S.C. 1396p(d)(4)(B). 3257.7C." Exhibit L at page 7. Camden has no authority to ignore the income received by Petitioner and placed into a non-qualifying trust. Thus, even if she didn't have sufficient funds to pay for her care, Petitioner's income of \$10,438.80 would have been countable and rendered her ineligible.

Contrary to Petitioner's exceptions, New Jersey still has a Medically Needy program. As of December 1, 2014, that program no longer covers nursing home services. The use of the Medically Needy cases in Camden County's argument is

³ Income is only considered "income" in the month it is received. N.J.A.C. 10:71-5.2(b)1. The unspent income in the following month counts towards resources. N.J.A.C. 10:71-4.1(c). See Supplemental Security Income (SSI) guidance, namely Program Operations Manual System (POMS), SI 00810.010 Relationship of Income to Resources ("In general, anything received in a month, from any source, is income to an individual, subject to the definition of income for SSI purposes in What is Income SI 00810.005. Anything the individual owned prior to the month under consideration is subject to the resource-counting rules. An item an individual receives in the current month is income for the current month only. (See exceptions to this general rule in SI 00810.030.) If held by the individual until the following month, that item is subject to resource-counting rules. (See exception in SI 01110.100 - SI 01110.115.)").

germane as a federal law requires that states chose between covering nursing home services under the Medically Needy Program, which New Jersey did from 1995 through November 30, 2014, or permit individuals to create a QIT, which New Jersey opted for as of December 1, 2014. As explained by the New Jersey Supreme Court in L.M. v. DMAHS, 140 N.J. 480,488-489 (1995):

We note that as part of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), Pub.L. No. 103-66, Congress expressly provided for the creation of so-called "Miller Trusts," which permit "persons in income cap states whose fixed income places them over the income limit ... nevertheless [to] qualify for Medicaid nursing home benefits." Sanford J. Schlesinger & Barbara J. Scheiner, *OBRA '93 Makes Sweeping Changes in Medicaid Rules*, 21 *Est. Plan.* 74, 80 (1994). (Those trusts are so named because a precursor to the current codified version, involving the judicial creation of trusts for incompetent persons, was initially accepted in *Miller*, *supra*, 746 F. Supp. 19, as a method of excluding income for eligibility purposes, thereby avoiding the income cap.) Presently, in a state such as New Jersey, which provides for nursing-home coverage under 42 U.S.C.A. § 1396a(a)(10)(A)(ii)(V) but does not provide such coverage under the medically needy program, a trust containing "pension, Social Security, and other income to the individual" can be established under federal law to exclude that income from a Medicaid eligibility determination. 42 U.S.C.A. § 1396p(d)(4)(B)(i). That trust, however, must provide 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)(B)(ii). Accordingly, those trusts provide a mechanism that prevents persons requiring long-term nursing-home care from becoming caught in the "Medicaid Gap," and also helps to preserve the financial integrity of the Medicaid program.

The court defined the Medicaid Gap as "a term used to describe a level of income that is 'just above the Medicaid cut-off yet too low to cover the cost of nursing home care.' Jill Quadagno et al., *Falling into the Medicaid Gap: The Hidden Long-Term Care Dilemma*, 31 *The Gerontologist* 521, 521 (1991)." Ibid at 480. Congress addressed the Medicaid Gap by requiring states to either cover nursing home services under Medically Needy or allowing QITs.

It must be pointed out that Petitioner does not fall into the Medicaid Gap so as to invoke the protections to establish Medicaid eligibility. Her income is actually the converse of the Medicaid Gap definition. Her income of \$10,438.80, which she set when she purchased the Croatian annuity, is well over the Medicaid standard of \$2,199 and just above the \$9,920 cost of her nursing home care. Thus, I concur with Camden County's determination that Petitioner was not eligible for Medicaid.

I cannot discern from the record what happened with Petitioner's finances in September and October 2015, which are the first two months Petitioner was not receiving the annuity payment so as to start the penalty. Camden County notes that Petitioner had ample funds to pay the nursing home bill of \$9,600 in September 2015 and to make a payment of \$5,140 in October. R-8. The last payment of the annuity was in August 2015. Her income for September would have been her Social Security benefit of \$1,764.90 which is below the Medicaid standard and does not give her sufficient income to pay those bills. I do note that the nursing home statement shows that in February and August her charges were \$2,240. R-8.⁴ This would have left her with \$8,198.80 from her income in each month for a total of \$16,397.60. It is unclear if this amount was spent for Petitioner's benefits or was used to pay the \$14,740 in nursing home charges for these two months. Thus, I am REMANDING the matter to OAL for further findings on Petitioner's financial eligibility in September and October 2015 so as to determine if the October 1, 2015 date is correct.

⁴ In January and July 2015 the nursing home charges were \$8,320 and \$8,640. R-8. Her income after paying those bills would have been \$2,118.80 and \$1,798.80.

Based on my review of the record, I concur with the Initial Decision's conclusion that Petitioner was subject to a transfer penalty of \$51,000. However, for the reasons set forth above, I hereby REVERSE the Initial Decision's finding that Petitioner established Medicaid eligibility May 1, 2015. I hereby REMAND the matter to OAL for further findings on Petitioner's financial eligibility including accumulated resources for September and October 2015.

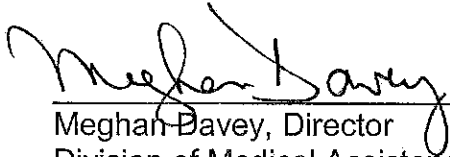
THEREFORE, it is on this ^{12th} day of SEPTEMBER 2016,

ORDERED:

That the Initial Decision is hereby ADOPTED with regard to the transfer amount of \$51,000 to Petitioner's daughter;

That the determination that Petitioner established Medicaid eligibility as of May 1, 2015 is REVERSED; and

That the matter is hereby REMANDED to the OAL for further findings as set forth above.



Meghan Davey, Director
Division of Medical Assistance
and Health Services