



her children during the lookback period. Petitioner applied for benefits in March 2017. The trust was established in 2005 by Petitioner and contains Petitioner's assets including her home. The terms of the trust require that the income be paid to Petitioner. However, Petitioner is foreclosed to receive the any of the principal of the trust. In 2013 and 2014, the trust paid a total of \$100,000 split amongst her four children. ID at 3.

As the trust was established with Petitioner's assets, Medicaid analyzes the terms of the trust under both the asset availability rules and the transfer of asset rules. 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, (and payments from that portion of the corpus or income—

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

**(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of**

such subsection by including the amount of any payments made from such portion of the trust after such date.

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

The State Medicaid Manual (Transmittal 64) 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 . . . [[p]ayments from income for from the corpus made to or for the benefit of the individual are treated as income to the individual [and the] [i]ncome on the corpus which could be paid to or for the benefit of the individual is treat as a resource available to the individual.” SMM § 3259.6.B. If the income is paid but was not for the benefit of the individual, that payment is a transfer or assets for less than fair market value and subject to penalty.

Based on my review of the record, I FIND that Petitioner was incorrectly assessed a transfer penalty based on the actions of her trustees. Setting up the trust in 2005, Petitioner had engaged in Medicaid planning for twelve years before applying for benefits. Each time she transferred assets into the trust, a penalty-causing event occurred. However, the transfers would need to occur within five years of the Medicaid application to impose a penalty. N.J.A.C. 10:71-4.10 and -4.11. See also 42 U.S.C. §1396p(c)(1)(A). As Petitioner waited seven years from the date of her last transfer to the trust to apply for Medicaid benefits, those transfers are not subject to a penalty.

However, pursuant to Section 2.1.1, Petitioner is entitled to the income from the trust which does affect her eligibility. P-2 and R-3. The foreclosure of her right to the income, which Petitioner did not take exception with, does create a transfer penalty. 42 U.S.C. §1396p(d)(3)(B)(ii) and N.J.A.C. 10:71-4.10(n)(3). Monmouth County shall reassess the value of the income foreclosed to Petitioner and assess a penalty based on that amount.

Thus, I ADOPT the Initial Decision as to the finding that Petitioner’s transfers into the trust are outside the five year lookback. I agree that the matter should be returned to

Monmouth County to determine the value of the income foreclosed to Petitioner and reissue a transfer notice on that amount.

THEREFORE, it is on this <sup>31<sup>st</sup></sup> day of MAY 2018,

ORDERED:

That the Initial Decision is hereby ADOPTED; and

That the matter is RETURNED to Monmouth County for further action on Petitioner's transfer of income.

  
Meghan Davey, Director  
Division of Medical Assistance  
and Health Services

OBO