



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

L.M.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
V.	:	FINAL AGENCY DECISION
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 17776-2017
	:	
AND HEALTH SERVICES AND	:	
	:	
MERCER COUNTY BOARD OF	:	
	:	
SOCIAL SERVICES,	:	
	:	
RESPONDENTS.	:	

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this matter, consisting of the Initial Decision, the documents in evidence and the contents of the OAL case file. Only the respondent filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is June 14, 2018, in accordance with an Order of Extension.

The matter arises as the result of the Mercer County Board of Social Services' ("the Board") termination of Petitioner's medical assistance under the New Jersey Care...Special Medicaid Programs (Medicaid). Petitioner's Medicaid benefits terminated because two (2)

checks totaling \$31,704.33 were deposited into a special needs trust ("SNT"). At the time of the trust's creation, Petitioner was not yet sixty-five (65) years old. The SNT was created in 2006 pursuant to 42 U.S.C. § 1396pd(4)(A) by Petitioner's mother, L.J.M., before Petitioner's sixty-fifth birthday. L.J.M. intended that the SNT would receive Petitioner's share of an inheritance established by the Last Will and Testament of Petitioner's sister, M.M.M. (P-2; P-6). M.M.M. died in 1969, leaving her Estate in a testamentary trust to her father and step-mother, L.J.M., for their lifetimes. M.M.M.'s will instructed that the testamentary trust was to be dissolved following the death of her parents, and if any assets remained, Petitioner and her siblings would receive equal shares. (P-6). L.J.M. died in or about December 2016. Petitioner was sixty-seven (67) years old at the time. Upon L.J.M.'s death the remaining assets in the testamentary trust were distributed. Petitioner's share of the assets was \$31,704.33, which was deposited into the 2006 SNT. Petitioner's Medicaid benefits terminated when the Board determined that the \$31,704.33 inheritance was an available resource because Petitioner was over sixty-five (65) and no additions can be made to an SNT after a beneficiary reached the age of sixty-five (65).

The Initial Decision reversed the Board's determination and concluded that Petitioner could deposit the asset in the trust because she irrevocably assigned her interest in the testamentary trust to the 2006 SNT before she was sixty-five (65). The Initial Decision reasoned that the assignment was akin to an irrevocable assignment of an annuity or support payment, which is allowed to continue after a trust beneficiary reaches the age of sixty-five (65).

At issue is whether a future interest in an estate can be considered the same as an annuity or support payment, such that it can be irrevocably assigned to a trust. For the reasons that follow, I hereby REVERSE the Initial Decision's finding that Petitioner's irrevocable assignment of her interest in the estate is akin to the irrevocable assignment of an annuity or support payment.

An individual's interest in an annuity or support payment is not akin to interest in an estate and should not be evaluated as such. Without any citations or case law, the Initial Decision concluded that Petitioner's irrevocable assignment of her future share in the estate was akin to the irrevocable assignment of annuity or support payments. However, an individual who receives annuity payments has a vested interest the moment the individual is named the annuitant. Annuities have actual value that can be calculated from the onset, regardless of how long the annuity is paid out. The annuity or support payments would be known with a due and owing amount through an annuity contract or support order in existence and paying at the time of the assignment. As such, an individual can assign his/her right to an annuity before the age of sixty-five (65), because he/she has an actual, tangible right to the value of the annuity. This is not so with a future interest in an estate because the interest in, and value of the estate itself, are contingent on the time of death, and the spending habits of prior and current beneficiaries. Unlike interest in an annuity, interest in estate may never vest. A bequest may be altered at any time up to the death of the testator; or the first remaindermen could spend all of the resources. Thus, Petitioner irrevocably assigned nothing because she had nothing to assign and no actual right to the inheritance until her mother died. Since Petitioner was over sixty-five years old when her interest in the inheritance vested, the deposit of the inheritance is not subject to the exemption and is available to Petitioner under the trust rules See 42 U.S.C. §1396p(d)(4)(a).

As the transfer is without the exemption of the SNT rules, it must be analyzed as an irrevocable trust. As such, 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).]

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.

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.

The SNT in this case was written to take advantage of irrevocable trusts set up pursuant to 42 U.S.C. § 1396p(d)(4)(A), to make payments for Petitioner’s benefit without

impacting her Medicaid. Because the transfer here occurred after sixty-five, the SNT rules do not apply and the \$31,704.33 does impact her eligibility. The transferred funds are an available resource.

Moreover, the trust at issue in this case contains several provisions which would remove the trust from the SNT exemption found in 42 U.S.C. § 1396p(d)(4)(A). First, the assets in the trust are available to Petitioner because Article Second, subsection (b) 6 of the trust permits the Trustee to make payments to Petitioner without regard to the amount or reason for the payments. P-2 at 9. Second, the trust is not for Petitioner's sole benefit as Article Second, subsection (b) allows the Trustee to give "gifts or donations" to "community residences, group homes, or assisted living facilities or other long-term healthcare facilities." P-2 at 7. In Article Second, subsection (c)5 of the trust, the Trustee has discretion with regard to the collection of a pro rata share from others for the benefits they may receive from Trust distributions. P-2 at 9. Finally, the trust is not irrevocable because Article Tenth, subsection (a) authorizes the Grantor to acquire the assets of the trust, "without the approval or consent of any person, including the Trustee." P-2 at 15. These provisions do not comply with N.J.A.C. 10:71-4.11(g), as such, they would remove the trust from the SNT exemption found in 42 U.S.C. § 1396p(d)(4)(A) regardless of when the transfer occurred and with the same result as stated above.

Thus, the matter is REVERSED as the transfer to the trust is an available resource.

When Petitioner has spent down she may reapply.

THEREFORE, it is on this ^{12th} day of JUNE 2018

ORDERED:

That the Initial Decision is REVERSED.

That Petitioner is ineligible due to excess resources.


Meghan Davey, Director
Division of Medical Assistance
and Health Services