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

J.W.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
	:	**FINAL AGENCY DECISION**
v.	:	
	:	**OAL DKT. NO. HMA 2432-2014**
DIVISION OF MEDICAL ASSISTANCE	:	
AND HEALTH SERVICES,	:	
RESPONDENT.	:	

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 Motions for Summary Decision and the Initial Decision. Both parties filed exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision is May 7, 2015, in accordance with an Order of Extension.

This matter concerns trusts established with Petitioner's assets. In her 2013 application for Medicaid benefits Petitioner produced three trusts – one

dated 1997, one dated 1998 and one dated 2013.[1] The 2013 trust, which contains vacant land in New Mexico worth around $5,000, was determined to be an excluded trust as it met the Special Needs Trust (SNT) provisions. Respondent's brief at Exhibit R-15. The 1997 and 1998 trusts were determined to be available resources to Petitioner and her application was denied.

The Initial Decision, issued on cross-motions for summary decision, determined that the 1997 trust could not be considered an exempt trust under the SNT provisions and is an available to resource for purposes of determining Medicaid eligibility. The 1998 trust was determined to be established a valid SNT.

I have reviewed the record and agree that the 1997 trust was properly determined to be an available resource. However, I do not agree that the 1998 trust is an SNT as it explicitly does not contain a payback provision for Petitioner's Medicaid expenditures. However, I FIND that the funds used to set up the 1998 trust did not belong to Petitioner. As such the 1998 trust need not meet the requirements for a SNT.

By way of background, 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, especially children, protect assets that could only be used for the special needs. Prior to 1986, many individuals made assets "unavailable" by placing them in irrevocable Medicaid qualifying trusts (MQTs), thus rendering the individuals eligible for Medicaid,

[1] The Initial Decision states the fair hearing stems from a 2012 application. That is incorrect. While Petitioner did apply in 2012, that application was denied and no appeal was taken. The matter herein deals with the denial of the August 25, 2013 application.

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).

However, Congress also made exceptions from this rule, with three types of "special needs trusts" 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 OBRA, 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, despite averring in Article Seventeen to be set up as a SNT pursuant to 42 U.S.C.A. § 1396p(d)(4)(A), the 1997 trust fails to meet the requires for an excluded SNT under both the federal and state rules. Further I disagree that applying the 2001 trust regulations to Petitioner's 2013 Medicaid application that included the 1997 trust is retroactive in nature. Petitioner was not applying for Medicaid in 2001 during the time the SNT rules were promulgated. Rather it was more than a decade later that she eventually applied for benefits. The comments to the adoption of the new rules specifically addressed the effect of the rules on existing trusts.

> 3. COMMENT: A number of commenters have questioned the effective date of the rules and whether DMAHS will grandfather in existing trusts or indicate that they will be construed in accordance with the new rules. (General comment.)
>
> RESPONSE: New applications and applications that are pending will be treated under the new rules, effective on June 18, 2001, the date of publication of the adopted new rules in the New Jersey Register. There will be no grandfathering of existing trusts or annuities. To make the effective date of the new rules explicit, the Division has added the date to N.J.A.C. 10:71-4.10(a) and 4.11(a). Additionally, both amended rules and new rules, when published in

> the New Jersey Administrative Code, will contain annotations which will state the effective date of the amendments and new rules.
>
> 33 N.J.R. 2195(a)

Had Petitioner been applying for or receiving Medicaid benefits at the time the rules were promulgated, her argument that the rules could not apply retroactively would have more merit. Rather she is arguing that the 1997 trust must be reviewed in a legal stasis and only the rules in effect that year apply to her trust.

The Appellate Division of the Superior Court of New Jersey has recognized that a Medicaid applicant is bound by the rules in effect at the time of application. In a matter where a trustee sought approval from the Chancery Court to expend funds from a SNT, the Appellate Division found that the court's order that held the trustee's spending would not impact any future application for Medicaid benefits, exceeded the Chancery Court's jurisdiction. The Appellate Division stated:

> Therefore, as required by federal and state law, only the designated Medicaid agency is authorized to determine Medicaid eligibility. That determination requires a detailed analysis, to be conducted through the expertise of the agency charged with administration of the complex statutory and regulatory Medicaid provisions. That review involves analysis of resources and expenditures within a five-year look-back period. Indeed, at any future time that an application might be made on A.N.'s behalf, Medicaid statutes and regulations might be different than when the Chancery Court order was entered.

In the Matter of A.N., a Minor, 430 N.J. Super. 235, 244 (2013). (Emphasis added).

The Appellate Division clearly understood that determinations regarding Medicaid are made with the rules in effect at the time of the application. However, in addition to not complying with the decade old SNT rules, the 1997 trust fails to comply with the federal law and guidance that undeniably was in effect at the time the trust was drafted. The provision of the 1997 trust to pay for funeral and burial expenses before reimbursement to the Medicaid agency does indeed violate the federal law enacted in 1993. 42 U.S.C.A. § 1396p(d)(4)(A) specifically states that in order to have a trust excluded from the preceding trust rules, the trust must provide that "the State will receive all amounts remaining in the trust upon the death of" the Medicaid recipient. The federal guidance that was promulgated in 1994 similarly states that "[t]o qualify for an exception to the rules in this sections, **the trust must contain a provision stating, that upon the death of the individual, the State receives all amounts remaining in the trust**, up to an amount equal to the total amount of medical assistance paid on behalf of the individual" State Medicaid Manual § 3259.7.A, effective December 13, 1994 (emphasis added). By expressly permitting the payment of funeral and burial expenses prior to any reimbursement to the State, the language in the 1997 trust clearly does not comply with the Congressional and federal agency mandate that an excluded SNT must reimburse the State first and foremost. Thus, Petitioner's 1997 cannot be afforded the protections of an SNT.

The SNT law also applies only to trusts set up by a parent, guardian or court. It has been established that Petitioner, at the time the 1997 trust document was signed, did not have a guardian and that none of the persons

specifically enumerated in SNT federal law set up the 1997 trust. 42 U.S.C.A. § 1396p(d)(4)(A).

Petitioner's exceptions contained a motion to reopen the record so as to give Petitioner "45 days to attempt to locate a copy of the 're-executed' [1997] trust document." Petitioner is basing her request on one sentence in a 1998 letter from her prior attorney that the 1997 trust was "re-executed by [Petitioner's brother] upon his appointment as legal Guardian. Petitioner's September 30, 2014 brief, Exhibit A. Putting aside that this 1998 letter is unsigned and was not authenticated at a hearing, the 1997 trust presented with the Medicaid application is clearly the trust that Petitioner's trustee has been relying on all these years. Petitioner's own phrasing in the motion for time to locate this other trust does not show that trustee is in possession of such a document. There is simply no good cause to delay this case further. The 1997 trust presented with the Medicaid application is the only one relevant to this case. Thus, I DENY the motion to reopen the record.

While Petitioner argues in exceptions that some of the SNT requirements are found in the 1997 trust, she also continues to argue the rules at N.J.A.C. 10:71-4.11(g) do not apply. However, one section of the regulation that requires the SNT state that the purpose of the trust is to supplement and not to supplant any Federal or State benefits does not appear in the 1997 trust but does in the 1998 trust. Petitioner fails to explain why the 1998 trust contains the exact language and phrasing of the regulation even though the regulation was not proposed until two years later. It appears that the drafter of the 1998 trust was

familiar with the language that was being included in SNTs but failed to include that language in in the 1997.

With regard to the 1998 trust, I hereby REVERSE the Initial Decision's determination that this trust is excluded as a SNT. It fails to comply with the federal law in so much as there is no payback provision for the cost of Petitioner's Medicaid benefits. It also lacks the other criteria found at N.J.A.C. 10:71-4.11(g). However, I am satisfied that since this trust does not contain funds that were owned by Petitioner, it need not meet the SNT requirements. Due to the availability of the 1997 trust under the Medicaid trust rules, Petitioner's path to Medicaid eligibility is presently blocked due to excess resources. Should Petitioner gain Medicaid eligibility in the future, payments from the 1998 trust to or for her benefit would be part of the eligibility analysis.

Since the 1997 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 trusts 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.

In Article Second and Third the 1997 trust permits the trustee to disburse all or part of the income and principal to Petitioner. Thus, I FIND that the 1997

was properly considered an available resource for purposes of determining Petitioner's Medicaid eligibility and uphold the denial.

THEREFORE, it is on this 6th day of MAY 2015,

ORDERED:

That the Initial Decision is hereby ADOPTED with regard to the 1997 trust; and

That the Initial Decision is hereby REVERSED with regard to the 1998 trust as set forth above.

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