

The matter arises regarding the denial of Petitioner's Medicaid application due to her income of \$12,990.08 exceeding the private pay room rate at the nursing facility where she lives. Petitioner, who was 96 years old at the time of the application, is seeking eligibility as of June 1, 2018 so as to start a penalty for transferring property and assets worth over \$380,000 to an irrevocable grantor trust she established in February 2018. She then used \$298,401.57 to purchase an annuity paying her \$8,304.92 for thirty-six months. Her life expectancy is just over three years.

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 ("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 Qualified Income Trust (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).

The type of financial planning used by Petitioner is called "half-a-loaf" where a Medicaid applicant gifts half of their assets while using the remaining half to pay for care during the transfer penalty. The Deficit Reduction Act of 2005 specifically sought to put an end to this planning by delaying the transfer penalty until the applicant was otherwise eligible for Medicaid. See N.M. v. Div. of Med. Assist. & Health Servs., 405 N.J. Super. 353, 362-63 (App. Div.), certif. denied, 199 N.J. 517 (2009) (explaining the Congressional intent behind the enactment of the DRA). However, Medicaid annuities are now used to

convert resources to an income stream to pay for nursing home care while subject to penalty.

Due to the unique facts associated with this case, I concur with the Initial Decision that Petitioner's total income is barely under the private pay costs associated with her nursing home care and other medical expenses. Her income of \$12,990.08 is not a barrier to Petitioner's eligibility determination. Beyond the daily room rate of \$399.11, Petitioner incurs costs associated with her Medicare premium, Medicare supplemental plan and prescription drugs. These total expenses put her at a deficit each month. It is clear that if her only medical expense was her nursing home costs, she would have sufficient income to pay and would not be eligible. See A.D. vs. Camden County Board of Social Services and DMAHS, OAL Dkt. No HMA 2068-2016 (decided September 12, 2016).

However, the Initial Decision also reverses the finding that Petitioner is ineligible for benefits due to excess resources. ID at 6. This does not appear to have been considered below but the record does raise questions regarding Petitioner's resource eligibility with regard to the availability of the funds placed in trust. This finding is hereby reversed and the extent of the availability of the resources placed in the trust shall be reviewed by Mercer County.

In addition to the use of annuities, individuals also gain access to taxpayer-funded healthcare by shielding their assets in trusts while retaining the benefit of their wealth and the ability to pass that wealth to their heirs. Despite Congress' efforts, prior to 1986, many individuals made assets "unavailable" by placing them in irrevocable Medicaid qualifying trusts (MQTs), thus rendering the individuals eligible for Medicaid, 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 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^{or}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 ^{of} or assets for less than fair market value and subject to penalty.

Similarly the Social Security Administration has 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 despite it being unlikely.

Petitioner's trust gives authority to the trust protector to add her as a “lifetime beneficiary.” Section 4.10(g). The discretion afforded to give her beneficiary status is immaterial to the Medicaid determination. Mercer County should review the trust for a determination on the availability of the assets in the trust based on this language. As the

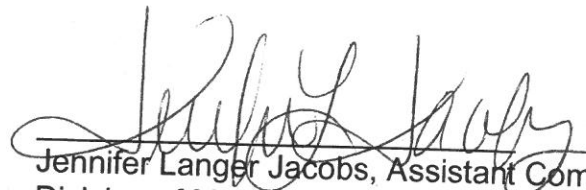
penalty period cannot begin until she is otherwise eligible, this review could impact Petitioner's plan to have the penalty begin during the annuity payout.

THEREFORE, it is on this 27th day of JANUARY 2020,

ORDERED:

That the Initial Decision is hereby ADOPTED, in part, and REVERSED, in part, as set forth above; and

That Mercer County shall review the August 2018 application including the language of the trust and issue a new determination letter.


Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance
and Health Services