



**State of New Jersey**

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

PO Box 712

TRENTON, NJ 08625-0712

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

SARAH ADELMAN  
*Acting Commissioner*

JENNIFER LANGER JACOBS  
*Assistant Commissioner*

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

**M.H.,**

**PETITIONER,**

**v.**

**DIVISION OF MEDICAL ASSISTANCE :**

**AND HEALTH SERVICES AND :**

**ATLANTIC COUNTY BOARD OF :**

**SOCIAL SERVICES, :**

**RESPONDENTS. :**

**ADMINISTRATIVE ACTION**

**FINAL AGENCY DECISION**

**OAL DKT. NO. HMA 6381-2021**

As Assistant Commissioner 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. Neither party filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Decision is March 28, 2022 in accordance with an Order of Extension.

The matter arises regarding the denial of Medicaid benefits due to Petitioner's

available assets exceeding the \$2,000 limit. Specifically, Petitioner had placed over \$162,862.06 into an irrevocable trust (Trust) she established in July 2019. Under the terms of the trust, the trust protector had the authority to add Petitioner "as a lifetime beneficiary of the trust." Trust § 4.10(g). Atlantic County Board of Social Services determined that the funds in this trust were available to Petitioners pursuant to N.J.A.C. 10:71-4.11. This appeal followed.

The only issue on appeal is whether Petitioner has resources in excess of the \$2,000 standard which resulted in the denial of her March 2021 application. As a result both Petitioner and Respondent cross-moved for summary decision. I agree with the Initial Decision's determination that the matter was ripe for summary decision.

In placing \$162,862.06 other assets in a trust, Petitioner sought to obtain Medicaid eligibility without spending down. Trusts have long been used as a mechanism to preserve assets that would otherwise need to be spent down to the resource standard. To that end various changes in the federal law have occurred to prevent this. 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 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).

That 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).]

Therefore, a trust containing the assets of the Medicaid applicant is a countable available resource regardless of the purpose for which the trust was established, regardless of whether the trustees have or exercise discretion under the trust, regardless of any restrictions on when or whether distributions may be made from the trust, and regardless of any restrictions on the use of distributions from the trust. See N.J.A.C. 10:71-4.11(b); 42 U.S.C.A. 1396p(d)(2)(C).<sup>1</sup>

The State Medicaid Manual 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.

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

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<sup>1</sup> There are exceptions to the trusts rules but none of those exceptions apply in this matter.

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.

It is undisputed that Petitioner’s trust gives authority to the trust protector to add her as a “lifetime beneficiary.” Section 4.10(g). See H.L. v. DMAHS and Mercer County Board of Social Services HMA 10820-18 (Final Agency Decision signed January 27, 2020) raising the same concerns about the trust protector’s ability to name the Medicaid applicant as a trust beneficiary. The discretion afforded to grant her beneficiary status is immaterial to the Medicaid determination as under some circumstance Petitioner can become a beneficiary to the trust and the funds held by the trust were correctly determined available to her. Thus, for the reasons set forth above and those contained in the Initial Decision, I hereby ADOPT the Initial Decision.

THEREFORE, it is on this 15<sup>th</sup> day of MARCH 2022,

ORDERED:

That the Initial Decision is hereby ADOPTED.



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