



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. HMA 565-08

AGENCY DKT. NO. N/A

E.C.,

Petitioner,

v.

**DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES, AND
SOMERSET COUNTY BOARD OF
SOCIAL SERVICES,**

Respondents.

Peter A. Marra, Esq., and Shirley B. Whitenack, Esq., for petitioner (Schenck,
Price, Smith & King, attorneys)

Frederick H. Allen III, Esq., for respondents (Mauro, Savo, Camerino & Grant,
attorneys)

Record Closed: January 26, 2009

Decided: February 6, 2009

BEFORE **PATRICIA M. KERINS, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the denial of Medicaid benefits by respondents Division of Medical Assistance and Health Services (DMAHS) and Somerset County Board of Social Services (SCBSS). By letter of January 24, 2008, the SCBSS informed E.C. that her application for benefits under the Medicaid Only Program was denied. In its letter the SCBSS based its decision on a finding that a court-ordered reformation of testamentary trusts created by petitioner's parents constituted a transfer of resources under Medicaid regulations, citing N.J.A.C. 10:71-4.10.

Petitioner invoked her right to a fair hearing on the denial of benefits and the matter was transmitted to the Office of Administrative Law (OAL) on February 13, 2008, for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. Petitioner moved for summary decision. The parties submitted a Stipulation of Facts and briefs, and the record closed on January 26, 2009, after oral argument and supplementation of the factual record by the parties.

FACTUAL DISCUSSION

General Background

Most of the relevant facts in this matter are not in dispute and the parties have agreed to a Stipulation of Facts (J-1). E.C. is a sixty-seven-year-old woman who currently resides in a nursing home in Somerset County, New Jersey. She is physically and developmentally disabled, with diagnoses of mental retardation and obsessive compulsive disorder. She is disabled under the provisions of the Social Security Act, 42 U.S.C.A. § 1382c(a)(3)(A). Her parents are deceased, and she, along with her two brothers, J.C. and M.C., were the beneficiaries of a testamentary trust created by her parents' wills.

The Original Trust

On September 6, 1997, E.C.'s mother, C.C., died leaving a Last Will and Testament dated March 3, 1993. She was survived by her husband A.C. and her children E.C., J.C. and M.C. On November 5, 2000, A.C. died, leaving a Last Will and Testament dated March 3, 1993. Pursuant to Article Four of both wills, the decedents devised their residuary estates to a testamentary family trust. On November 5, 2000, petitioner and her brothers J.C. and M.C. became the beneficiaries of the testamentary trust ("trust").¹

According to Article IV of the trust, the grantor's "primary concern" was "for the health, support in reasonable comfort, best interests and welfare of my children." Exhibit P-B, Article IV, ¶ A(2). The trust provided that the "trustee shall distribute" the trust funds, including the principal, as the "trustee believes desirable from time to time for the health, support in reasonable comfort, best interests, and welfare" of the beneficiaries "considering all circumstances and factors deemed pertinent by [the] trustee." Exhibit P-B, Article IV, ¶ A. Under the original trust, the trustee had discretion to distribute the income and principal of the trust and to make unequal distributions to the beneficiaries without consideration of the beneficiaries' interests. Nor was the trustee of the unreformed trust required to use any of the trust funds for E.C.'s benefit. The trustee, however, did pay monies to the nursing home in which E.C. was residing to bring the nursing home account to a zero balance for charges incurred up to the point of reformation of the trust.

Reformation of the Trust

On March 29, 2007, the Hon. Harriet Derman, J.S.C., entered judgment reforming the trust provision of the will as requested by the beneficiaries to make it consistent with the testator's probable intent. One result was the creation of three sub-

¹ There were in fact two separate trusts, one created by each of petitioner's parents. However, these trusts contained the same terms as each other both before and after reformation. As the parties both refer to the trusts collectively as "the trust," they will be referred to singularly throughout this opinion.

trusts, one for each of the beneficiaries. One third of the trust's assets, or \$168,015.75, went into the sub-trust for E.C.'s benefit at the point of reformation on March 29, 2007. The reformed trust provides that "the Trustee, at any time or times that the Trustee deems it advisable, may pay . . . such sums . . . as the Trustee, in the Trustee's sole and nonreviewable discretion shall deem to be in the interest of E.C." Exhibit P-D, Article IV, ¶ B(1)(a). The reformed trust also provides that the trustee shall take governmental aid into consideration when determining whether payments to the beneficiaries should be made. Ibid.

The present value of E.C.'s trust monies is \$83,539.00. No monies have been paid to the nursing home account for E.C. since the reformation of the trust.

Denial Action

The value of E.C.'s portion of the trust monies was approximately \$168,015.75 on May 10, 2007, the date of her application for Medicaid benefits. On September 19, 2007, the SCBSS issued a letter to petitioner stating that the reformation of the trust constituted an impermissible transfer. On January 24, 2008, the SCBSS denied Medicaid eligibility for petitioner, citing N.J.A.C. 10:71-4.10, again basing its decision on the grounds that the reformation of the testamentary trust on March 29, 2007, constituted a transfer of resources. But for the inclusion of the trust assets as a resource, E.C. would be Medicaid eligible.

LEGAL DISCUSSION

Medicaid Eligibility and Standards

Medicaid is a program established by Title XIX of the Social Security Act. 42 U.S.C.A. §§ 1396 et seq. A cooperative state and federal effort, its purpose is "to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." L.M. v. Div. of Med. Assistance and

Health Servs., 140 N.J. 480, 484 (1995) (quoting Atkins v. Rivera, 477 U.S. 154, 156, 106 S. Ct. 2456, 2458, 91 L. Ed. 2d 131, 137 (1986)). New Jersey's Medicaid program derives its authority from the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5, and the regulations promulgated pursuant thereto, N.J.A.C. 10:49 et seq. Consistent with the recognized policy that Medicaid is designed for needy individuals, the Legislature has directed that Medicaid benefits "shall be last resource benefits notwithstanding any provisions contained in contracts, wills, agreements or other instruments." N.J.S.A. 30:4D-2. In the application process for benefits, the applicant bears the burden of establishing program eligibility. Alford v. Somerset County Welfare Bd., 158 N.J. Super. 302, 310 (App. Div. 1978).

Medicaid Only

Regulations governing New Jersey's Medicaid Only Program are found at N.J.A.C. 10:71-1.1 to -9.5. The resource criteria and eligibility standards set forth in those regulations apply to all applicants and recipients, and benefits will be denied or terminated if an individual's resources exceed certain prescribed limits. N.J.A.C. 10:71-4.1(a); N.J.A.C. 10:71-4.5(c), (d). A resource is defined as any real or personal property which is owned by the applicant and which could be converted to cash to be used for his/her support and maintenance. N.J.A.C. 10:71-4.1(b). The resource must also be "available." 42 U.S.C.A. § 1396a(a)(17)(B); N.J.A.C. 10:71-4.1(c). A resource is considered available to an individual when the person has the right, authority, or power to liquidate real or personal property, or his or her share of it. N.J.A.C. 10:71-4.1(c)(1).

The transfer of an available resource during the "look back" period set forth in N.J.A.C. 10:71-4.7 is subject to review. The regulation imposes a rebuttable presumption that such transfers are undertaken to establish Medicaid eligibility. If the applicant demonstrates that the transfer was for fair market value, the transfer will not interfere with Medicaid eligibility. The regulation provides that certain factors, such as a court-approved transfer, may indicate that the transfer was for a purpose other than establishing Medicaid eligibility.

Trusts as Exempt Medicaid Resources

Unless specifically excluded, all liquid and non-liquid resources are considered countable in the determination of Medicaid Only eligibility. N.J.A.C. 10:71-4.1(b); N.J.A.C. 10:71-4.2(a). The kinds of resources that qualify as excludable are limited. N.J.A.C. 10:71-4.4. Among the specified excludable resources are the “value of resources which are not accessible to an individual through no fault of his or her own,” including “irrevocable trust funds.” N.J.A.C. 10:71-4.4(b)(6); see 42 U.S.C.A. § 1382b.² Specifically, “where the trust is irrevocable and where the trustee has sole discretion to invade the principal, those funds may not be considered an accessible asset unless explicitly made available for medical expenses by the trust agreement.” McKenna v. Div. of Med. Assistance and Health Servs., 97 N.J.A.R.2d (DMA) 42, 44-45. “Even where a trust’s stated intent is to supplement public assistance, as long as it is within the trustee’s discretion whether to invade the principal, the assets are not available for purposes of determining Medicaid eligibility.” Id. at 44 (citation omitted). “The test is whether the individual [beneficiary] has the ‘right, authority or power’ to [access] the resource pursuant to N.J.A.C. 10:71-4.1(c).” I.L. v. Div. of Med. Assistance and Health Servs., HMA 4713-04, Final Decision (January 27, 2005) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

Applying the above regulatory framework to this matter, the first issue to be addressed is whether the original trust constituted an available asset or was an exempt trust under Medicaid regulations. If the original trust was exempt, the issues raised by the subsequent reformation need not be reached. If, however, the original trust was not an exempt resource, the effect of the reformation must be considered.

² Although petitioner at times refers to the reformed trust as a “supplemental needs trust,” such a description in the Medicaid context can be misleading. The phrase “supplemental needs trust” can refer generally to a trust that supplements governmental assistance. However, this term is used by the Medicaid rules to apply to trusts governed by 42 U.S.C.A. § 1396p(d)(4)(A) and N.J.A.C. 10:71-4.11. The parties agree that the trust at issue here does not qualify as a special needs trust as defined by Medicaid regulations.

Original Trust

The original trust was not created by petitioner, nor was it funded by petitioner's assets. Upon the death of the testators it became irrevocable. Respondents argue, however, that the trustee did not have "unfettered" discretion to disperse the funds. According to respondents, the duty of the trustee to provide for the benefit of the petitioner is mandatory under the trust, not discretionary, rendering the trust funds "available" to petitioner. In essence, respondents are asserting that the original trust was a support trust of the type that has been held to constitute a resource under Medicaid regulations, rather than an exempt discretionary trust.

The courts have explored the differences between a discretionary trust and a support trust. "The latter mandates distributions which are always considered resources for Medicaid purposes," while the former can qualify as an exempt resource. In re Lennon, 294 N.J. Super. 303, 312 n.4 (Ch. Div. 1996). A discretionary trust is "[a] trust in which the trustee alone decides whether or how to distribute the trust property or its income to the beneficiary." Black's Law Dictionary 1515 (7th ed. 1999). In other words, where the trustee has "absolute" or "unfettered" discretion, the trust is deemed a discretionary trust and is Medicaid exempt. A support trust is "[a] trust in which the trustee pays to the beneficiary only as much trust income as the trustee believes is needed for the beneficiary's support." Id. at 1518. Support trusts generally direct the trustee to use the trust assets for beneficiary's "support, welfare, and maintenance" or similar provisions. "A support trust allows a beneficiary to compel distributions of income, principal, or both, for expenses necessary for the beneficiary's support, and an agency may consider the support trust as an available asset when evaluating eligibility for assistance." Eckes v. Richland County Soc. Servs., 621 N.W.2d 851, 855 (N.D. 2001).

Here, the original trust language both grants the trustee discretion³ and places a standard on the trustee to apply that discretion towards the “support” of the beneficiary.⁴ Some jurisdictions refer to these “hybrid” trusts as “discretionary support trusts.” Strojek v. Hardin County Bd. of Supervisors, 602 N.W.2d 566, 570 (Iowa Ct. App. 1999). “The effect of a discretionary support trust is to establish the minimal distributions a trustee must make in order to comport with the settlor’s intent of providing basic support, while retaining broad discretionary powers in the trustee.” Ibid.

While it does not appear that New Jersey courts have addressed Medicaid eligibility with respect to discretionary support trusts, other jurisdictions have dealt with the issue. Several decisions from other jurisdictions support respondents’ argument that the original trust here was not an exempt resource.⁵ In Corcoran v. Department of Social Services, 859 A.2d 533 (Conn. 2004),⁶ the Connecticut Supreme Court held that trust assets were available to the Medicaid applicant where the trust provided that the funds would be expended as the trustees, “*in their sole discretion, shall deem proper for her health, support in reasonable comfort, best interests and welfare*” Corcoran, supra, 859 A.2d at 547. The court held that the “trustees’ ‘sole discretion’ is limited by the ascertainable standard of the plaintiff’s ‘health, support in reasonable comfort, best interests and welfare’” Ibid. Based on this limitation in the trustee’s discretion, the court found that the trust was a general support trust, not a supplemental needs trust, and thus available to the applicant for the purpose of Medicaid eligibility. Ibid.; see also In re Trust of Barkema, 690 N.W.2d 50 (Iowa 2004) (a trust which provided that “if necessary for [the Medicaid applicant’s] proper support and maintenance, then the corpus of said trust may be invaded to the extent said trustees deem necessary” was held to be available for Medicaid purposes); Kryzsko v. Ramsey County Soc. Servs.,

³ “[A]s my trustee believes desirable.” Exhibit P-B, Article IV, ¶ A.

⁴ “[M]y trustee **shall** distribute . . . for the support in reasonable comfort, best interest, and welfare of my wife and children.” Exhibit P-B, Article IV, ¶ A (emphasis added).

⁵ Respondents do not cite any authority for their arguments in either of their briefs from this or any other jurisdiction.

⁶ The Corcoran case was cited by counsel for petitioner in their Brief in Support of Reformation submitted to the Chancery Division. Exhibit P-K. Counsel’s position in the brief was that the trust should be reformed to avoid an agency challenge to the trust similar to that in Corcoran. Exhibit P-K at 10.

607 N.W.2d 237 (N.D. 2000) (trustee authorized to invade principal "in sole discretion" as she "thinks necessary or advisable" for support of beneficiary, therefore trust available for Medicaid purposes).⁷

Each of the above-cited cases holding that discretionary support trusts are not Medicaid exempt have one factor in common: the trusts at issue had only one beneficiary. However, the Pennsylvania Supreme Court has held that where there are multiple beneficiaries of a discretionary support trust, the trust will not be found to be available for the purpose of determining Medicaid eligibility. Lang v. Commonwealth of Pennsylvania, 528 A.2d 1335 (Pa. 1987). The Lang court began with the same starting point required of New Jersey courts in interpreting wills, that the aim is to ascertain the testator's intent. Id. at 1342; In re Estate of Payne, 186 N.J. 324, 335 (2006). The court stated that the grantor "chose to set up a discretionary support trust" rather than a simple support trust, and that "[t]he addition of discretionary language indicates an intent that trustee exercise greater latitude in her distributive decisions than would be the case in the absence of such discretionary language." Lang, supra, 528 A.2d at 1343. In finding that the trust was an exempt resource, the court placed weight on the fact that all four of the grantor's children were beneficiaries under the trust, not just the son who was disabled and seeking Medicaid. Ibid.

If he had intended the entire principal of the trust to be available for the support of his one handicapped son, so that the entire principal would have to be exhausted before his son could receive state-provided care in the form of medical assistance, he would likely have created a trust for that son alone and separate trusts for his other children.

[Estate of Rosenberg v. Dep't of Pub. Welfare, 679 A.2d 767, 769 (Pa. 1996) (citing Lang, supra, 528 A.2d 1335.)]

The Pennsylvania Supreme Court also held that a discretionary support trust created for two disabled siblings could not be held against them as an available resource in determining Medicaid eligibility in Snyder v. Commonwealth, Dep't of Pub. Welfare, 598

⁷ North Dakota Medicaid regulations specifically provide that "discretionary support trusts" are not exempt resources. N.D. Admin. Code 75-02-02.1-31.

A.2d 1283 (Pa. 1991). “By creating a trust with two life beneficiaries, the testator displayed an intention to provide care for both of her children, neither of whose needs were to be considered dominant.” Rosenberg, supra, 679 A.2d at 769.

In ascertaining the intent of a testator, New Jersey courts can utilize the doctrine of probable intent to construe “the language of a will in a fashion contrary to its literal, technical, or settled meaning.” In re Estate of Branigan, 129 N.J. 324, 331 (1992). “Courts are enjoined to ‘strain’ toward effectuating the testator’s probable intent ‘to accomplish what he would have done had he envisioned the present inquiry.’” Id. at 332. “The basic principle underlying the doctrine of probable intent is that it is reasonable to impute to the decedent a general intent that reflects ‘impulses . . . common to human nature,’” including the “widely-accepted intent on the part of most testators to save taxes.” Id. at 335. Even where the “settled meaning” of the will shows the creation of a trust with hybrid elements, the doctrine of probable intent can be applied to determine whether the testator would have instead created a discretionary trust had the testator considered the possibility of Medicaid benefits.

In this matter, the original will and trust provided for multiple beneficiaries, including petitioner, petitioner’s two siblings, and her mother. The terms of the trust provide that the trustee shall distribute the corpus of the trust for the support of the beneficiaries as the trustee believes desirable. Exhibit P-B, Article IV, ¶ A. Thus, the trust contains both discretionary language and a standard that the trustee should apply the trust for the support of the beneficiaries. It therefore has the characteristics of a discretionary support trust, the hybrid between a discretionary trust where beneficiaries cannot compel payments, and a support trust where beneficiaries can compel payments.

As discussed above, courts in several jurisdictions have differed on the treatment of these hybrid trusts in determining Medicaid eligibility. In this matter, however, the analysis set forth on that issue by the Pennsylvania Supreme Court in the Lang and Snyder cases, both of which dealt with trusts created for multiple beneficiaries, is

persuasive. As a discretionary support trust created for multiple beneficiaries, the original trust at issue in this matter was an exempt trust for purpose of the Medicaid regulations and should not have been taken into consideration in determining petitioner's Medicaid eligibility.

Reformation of the Trust

Respondents' argument that the reformation of the trust constituted an improper transfer of assets for Medicaid purposes was based on an assumption that the original trust was an available resource in determining E.C.'s Medicaid eligibility. Although the finding that the original trust was an exempt trust for purposes of Medicaid negates respondents' argument, it is instructive to discuss the assumption that the reformation changed the character of the trust at issue. Implicit in respondents' argument is that the original trust constituted an available asset which was transferred for less than fair market value by the court-ordered reformation. Yet, reformation is "[a]n equitable remedy by which a court will modify a written agreement to reflect the actual intent of the parties." Black's Law Dictionary 1285 (7th ed. 1999). "For a court to grant reformation there must be "clear and convincing proof" that the document in its reformed, not original, form is that which the parties understood it to be." St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 580-81 (1982) (quoting Central State Bank v. Hudik-Ross Co., 164 N.J. Super. 317, 323 (App. Div. 1978)). Here, the Superior Court's reformation of the will and trust merely established the intent of the testator to create a discretionary trust for E.C. rather than a discretionary support trust.

A review of the reformed trust to which petitioner is the beneficiary shows that it too qualifies as an exempt resource under N.J.A.C. 10:71-4.1 and -4.4 because petitioner was not the grantor, did not fund the trust with any of her assets, a trustee other than petitioner was given sole discretion to disburse the funds, petitioner cannot compel any distribution, and petitioner is not the beneficiary of any remaining funds when the trust is terminated.

CONCLUSION

The original trust, as well as the reformed trust, should not have been counted against petitioner in determining her eligibility for Medicaid. The original trust was an irrevocable discretionary support trust and its court-ordered reformation merely served to clarify the testator's intent to form an irrevocable discretionary trust. As petitioner was eligible for Medicaid benefits but for respondents' decision to treat the trusts at issue as available resources, petitioner should be granted Medicaid benefits as of the date of her application.

ORDER

I therefore **ORDER** that the decision to deny Medicaid eligibility to petitioner is **REVERSED**.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 6, 2009
DATE

Date Received at Agency:

FEB 10 2009

DATE

/bdt

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

February 6, 2009

Mailed to Parties:

Patricia M. Kerins
OFFICE OF ADMINISTRATIVE LAW

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

Joint:

J-1 Joint Stipulation of Facts

For petitioner:

- P-A Last will and testament of C.C.
- P-B Last will and testament of A.J.C.
- P-C Certificate of Thomas R. Moore
- P-D Order to Show Cause, In the Matter of the Estate of C.C.
- P-E Verified Complaint, In the Matter of the Estate of A.J.C.
- P-F Proposed substitute paragraph B of article IV of the last will and testament of C.C., dated March 3, 1993
- P-G Verified Complaint, In the Matter of the Estate of A.J.C.
- P-H Proposed substitute paragraph B of article IV of the last will and testament of A.J.C., dated March 3, 1993
- P-I Resignation of PNC Bank, N.A., as trustee in both the matter of the estate of C.C. and the matter of the estate of A.C.
- P-J Waiver release and approval in both the matter of the estate of C.C. and the matter of the estate of A.C.
- P-K Brief in support of the Order to Show Cause in both In the Matter of the Estate of C.C. and In the Matter of the Estate of A.C.
- P-L Certification of J.A.C.

- P-M Letter dated March 23, 2007, to the surrogate from Frederick H. Allen III, Esq.
- P-N In the Matter of the Estate of C.C. judgment, dated March 29, 2007
- P-O In the Matter of the Estate of A.J.C. judgment, dated March 29, 2007
- P-P Letter dated September 19, 2007, from Somerset County Board of Social Services
- P-Q Letter dated October 1, 2007, from Shirley B. Whitenack, Esq.
- P-R Letter dated January 24, 2008, from Somerset County Board of Social Services
- P-S Somerset County Board of Social Services file regarding E.C.
- P-T January 19, 2009, letter from petitioner's counsel

For Respondents:

None