

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

3 OAL DKT. NO. HMA 05523-17

M.K.,

Petitioner,

v.

MORRIS COUNTY BOARD OF SERVICES,

Respondent.

Mark Hontz, Esq., for petitioner (Hollander, Strelzik, attorneys)

Maira Rogers, Paralegal Specialist, appearing pursuant to N.J.A.C. 1:1-5.4(a)3, for respondent

Record Closed: May 23, 2017 Decided: May 25, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.K., challenges the denial by the respondent agency of her application for Medicaid benefits. The agency contends that the corpus of an Income Only Trust is a countable

resource that renders petitioner ineligible for benefits under the Medicaid Only Program. N.J.A.C. 10:71-4.5(c). M.K. replies that the trust is irrevocable, and that its assets are unavailable to her under the terms of the trust agreement. She thus urges that she falls under the resource limit contained in the regulations, and that she has established eligibility for Medicaid benefits.

FINDINGS OF FACT

The relevant facts are not in dispute and I **FIND**:

M.K. is a ninety-six-year-old woman who has resided in a nursing home since March 2015. An application for Medicaid benefits was made on her behalf on February 11, 2017, through which she sought eligibility effective February 1, 2017. Her application was denied by the agency on April 1, 2017. The parties agree that the issue presently before me exclusively concerns a trust established on November 13, 2006, and known as the “M.K. Income Only Trust.” Certain of M.K.’s assets were transferred to the trustees via the trust instrument; the parties disagree as to whether the trust’s assets are a countable resource. M.K.’s resources would exceed \$2000 under the agency view that she continues to have access to these controverted funds. A statement supplied by petitioner to the agency from Thrivent Investment Management indicates that the value of the trust at the close of 2016 was \$251,916.85.

The trust document’s terms speak for themselves. M.K. is the grantor of the trust, which establishes herself and her daughter, M.B., as co-trustees. Section 2.1.1 provides that “[m]y Trustee shall distribute to me as much of the income of the trust as my Trustee shall determine, in my Trustee’s sole discretion, as being necessary for my care and well-being. Any income not paid may be accumulated and added to the principal.” It is thus clear that income generated by the trust’s assets will be available to M.K. during her lifetime.²³ Section 2.1.2 provides that

My Trustee shall not distribute principal of this trust to me. I shall not have the right to compel my Trustee to distribute principal to me. My Trustee may, in my Trustee’s sole and unfettered discretion, distribute principal to one or more of my children or my grandchild. If my Trustee shall distribute all of the principal, the trust will terminate.

Plainly, M.K. may not, under the terms of the trust, at any time demand access to its corpus. Section 4.7 provides that “I hereby relinquish all power to alter, amend, or revoke any provisions of this Trust Agreement. This Trust Agreement shall be irrevocable.” Clearly, the trust agreement cannot be revoked by M.K. in her capacity as grantor at any time.

The agency urges that M.K.'s status as both grantor and trustee is problematic; that indeed, because she is a trustee she has access to the trust's assets. But M.K. points to the following provision of the agreement, found at Section 3.6.17, which provides as follows:

Notwithstanding any of the powers conferred upon my Fiduciary, no individual, acting as Fiduciary hereunder, shall exercise or join in the exercise of discretionary powers over income, principal or termination of any Trust (1) for his or her own benefit or (2) to discharge his or her legal obligation to support any Beneficiary.

This provision stipulates that no trustee, M.K. included, can utilize the assets of the trust, or terminate the trust for "her own benefit." ³

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The Medicaid program is a cooperative federal-state venture established by Title XIX of the Social Security Act. 42 U.S.C. § 1396 et seq. (the Medicaid Act.) It "is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." L.M. v. Division of Medical Assistance & Health Services, 140 N.J. 480, 484 (1995) (quoting Atkins v. Rivera, 477 U.S. 154, 156, 106 S.Ct. 2456, 91 L.Ed. 2d 131 (1986)); See also: Mistrick v. Division of Medical Assistance & Health Services, 154 N.J. 158, 165 (1998). Medicaid eligibility is based upon an applicant's income and resources, and an applicant like M.K. is ineligible for participation in the Medicaid Only Program where the total value of her resources exceeds \$2,000. N.J.A.C. 10:71-4.5(c). Treatment of trusts for purposes of determining resource eligibility is dependent on the characteristics of the trust. N.J.A.C. 10:71-4.11(e). The actual language of the trust is determinative, and my analysis should center upon whether there is any circumstance under which payment from the corpus of the trust could be made to or for the benefit of the individual. L.L. v DMHS and Ocean Cnty. Bd. of Social Services, Final Decision (September 2, 2015), <<http://njlaw.rutgers.edu/collections/oal/>>. 42 U.S.C. §1396p(d)(3)(B)(i).

I **CONCLUDE** that the "M.K. Income Only Trust" is an irrevocable trust, per the provisions of Section 4.7. I moreover **CONCLUDE** that, under the express terms of the trust, payments cannot be made from the principal to or for M.K.'s benefit under any circumstances, per Section 2.1.2. N.J.A.C. 10:71-11(e)(3) provides that, "[i]n the case of an irrevocable trust from which payments from all or a portion of the trust cannot, under any circumstances, be made to or for the benefit of the individual, all of the trust, or any such portion or income thereof, shall be treated as a transfer of assets for less than fair market value..."

This trust was established in 2006; the assets of the trust were transferred to the trustees at

that time. See: N.J.A.C. 10:71-11(e)(3)(i), which provides that the date of transfer “shall be considered to be the date the trust was established, or, if later, the date on which the right of payment to the individual was foreclosed.” Under N.J.A.C. 10:71-4.10, “an individual shall be ineligible for institutional level services through the Medicaid program if he or she (or his or her spouse) has disposed of assets at less than fair market value at any time during or after the 60-month period immediately before...the date the individual applies for Medicaid as an institutionalized individual.” Here, the assets were transferred more than ten years prior to the filing of the application for Medicaid.

The agency decision denying benefits relies exclusively on the fact that M.K. is both the grantor of the trust, and a co-trustee. The rationale behind the regulatory language is that the agency receive adequate assurance that resources are unavailable to an applicant, since Medicaid is a poverty program and should be an avenue of last resort. See: C.S. v Cape May County Bd. of Social Services, 3 HMA 1648-15, Initial Decision (November 6, 2015), <<http://njlaw.rutgers.edu/collections/oal/>>. And M.K.’s status as co-trustee raises the specter of her ability to invade the corpus of the trust for her own use or benefit.

N.J.A.C. 10:71-4.11(e)(5) offers guidance in determining whether this trust is inaccessible to M.K., and it provides that

In determining whether payments can or cannot be made from a trust to or for an individual, the county welfare agency shall take into account any restrictions on payments, such as use restrictions, exculpatory clauses or limits on trustee discretion that may be included in the trust. Any amount in a trust for which payment can be made, no matter how unlikely the circumstance of payment might be or how distant in the future, shall be considered a payment that can be made under some circumstances.

Clear language in the trust document emphasizes the restrictions on M.K.’s power and authority both as grantor and trustee, and readily assuages the agency’s concerns. Under Section 3.6.17 M.K., cannot use the trust’s assets for her own benefit; to reiterate its unequivocal language, M.K., as co-trustee, cannot “exercise or join in the exercise of discretionary powers over income, principal or termination of any Trust ... for his or her own benefit...” And a review of the trust document reveals no other circumstances under which M.K. can access the assets of the trust for her own use or benefit either as a trustee or as the grantor.

I thus **CONCLUDE** that the assets of the “M.K. Income Only Trust,” are not a countable resource, and that M.K. thus meets the eligibility requirements contained in N.J.A.C. 10:71-4.5(c).

ORDER

Based on the foregoing, together with the record as whole, I **ORDER** that the action of the agency in finding M.K. ineligible for Medicaid Only benefits due to excess resources be **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 fortyfive days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B10.

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.

May 25,2017

DATE **ELLEN S. BASS**, ALJ

Date Received at Agency:

Date Mailed to Parties:

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

Maira Rogers

Exhibits

For Petitioner:

P-1 Trust Instrument

For Respondent:

R-1 Agency packet

1 The agency explained at the hearing that this threshold issue caused it to deny eligibility; both parties expressed that they understood that if the trust's assets are deemed excluded via this decision, the agency will then finalize the application process. It was understood that there could, potentially, be other limitations to eligibility.

2 Petitioner stipulated that this income is countable for Medicaid eligibility purposes.

3 Relative to the use of the word “fiduciary,” the agreement specifies at Section 4.11.5 that otherwise undefined terms may be defined by reference to [N.J.S.A. 3B:1-1](#), which provides that a “fiduciary” includes a trustee.

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