



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. HMA 9252-17

**A.M.,**

Petitioner,

v.

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

Respondent.

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**John W. Callinan, Esq.,** for petitioner

**Patrick J. Boyle, Esq.,** for respondent

Record Closed: February 16, 2018

Decided: March 2, 2018

BEFORE: **MARY ANN BOGAN, ALJ**

**STATEMENT OF THE CASE**

In this matter, the petitioner, A.M., appeals the imposition of a transfer penalty by respondents, Monmouth County Board of Social Services (MCBOSS) and the Division of Medical Assistance and Health Services (DMAHS), due to \$100,000 in distributions

made to the beneficiaries of an irrevocable trust established by petitioner with her own assets. Petitioner asserts that a transfer penalty is inappropriate because she established the trust prior to the applicable five-year look-back period for the evaluation of asset transfers. MCBOSS contends that the distributions are subject to a penalty because they were made during the look-back period.

### **PROCEDURAL HISTORY**

On March 22, 2017, MCBOSS received a Medicaid application for MLTSS-Nursing Home Program (Medicaid Only) filed by J.R., Designated Authorized Representative (DAR) on behalf of the petitioner. The application disclosed the existence of a trust entitled, The A.M. Living Trust Under Agreement dated June 21, 2005 (Trust). On May 9, 2017, the petitioner was notified that a transfer penalty was imposed for three-hundred days due to the transfer of \$100,000 to her children, as beneficiaries of the Trust, during the five-year look-back period. On June 7, 2017, the petitioner was notified that Medicaid eligibility benefits were approved effective December 26, 2017, and ancillary services were granted effective March 1, 2017.

The matter was transmitted to the Office of Administrative Law as a contested case on June 29, 2017. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A motion for summary judgment, filed by the petitioner, was denied. A hearing was held on December 11, 2017. After receiving closing statements and supplemental information, the record closed on February 16, 2018.

### **FACTUAL DISCUSSION AND FINDINGS**

The following facts were undisputed and, I therefore **FIND** the following **FACTS**:

1. On June 21, 2005, petitioner executed the Trust. Petitioner was a widow when she executed the Trust. The Trust identifies petitioner as grantor, and her four children, D.D., R.M., L.S. and R.S., as beneficiaries, with D.D. and

R.M. to serve as Co-Trustees. On the same day, the petitioner transferred into the Trust the remainder interest of her home, and retained a life tenancy. (P-3.) (R-3.)

2. Section 2.1.1 of the Trust requires the Trustees to pay the income of the Trust to the petitioner to or for her benefit during her lifetime only, "in quarterly or other convenient installments; provided, however, that capital gains/losses shall be allocated to principal and governed by the provisions of Section 2.1.2." Section 2.1.2 of the Trust states "my Trustee shall not distribute any or all of the principal of this Trust to me or to my spouse under any circumstances whatsoever." Section 4.4 of the Trust provides that the Trustees in their "sole discretion" may "terminate any or all of the Trust shares under this Trust if the amount thereof does not warrant the cost of continuing said trust or if its administration would be otherwise impractical." Upon termination, the Trustees "shall pay the principal and any accumulated or undistributed income of such trust to the person or persons entitled to distributions on my death in the manner set forth in Section 2.2." Under Section 4.7 petitioner relinquishes all power to amend or revoke any provisions of this Trust, and states that this Trust shall be irrevocable. (P-2.) (R-3.)
3. On April 23, 2010, the remainder interest, and the life tenancy were sold, and the proceeds totaling \$250,452, which included the portion of the proceeds for the extinguishment of the life tenancy, were deposited into an account with Santander Bank, titled A.M. Living Trust, D.D. Trustee R.D. Trustee. (P-4,5.)
4. The Trustees distributed a total of \$50,000 to the beneficiaries on January 2, 2013 and on January 2, 2014, the Trustees distributed a total of \$50,000 to the beneficiaries. (R-2.)

5. On January 2, 2014, the Trustees distributed to petitioner \$16,387 of income, and \$2,519 of capital gains. At that time, the Trustees terminated the Trust. (P-8, P-9.)
6. Petitioner is ninety-three years old. In 2014, petitioner moved into assisted living, and in October 2015, petitioner moved to a nursing home. (R-1.)
7. On March 22, 2017, petitioner applied for Medicaid Only. The application disclosed the existence of the Trust. (R-1.)
8. By notification dated May 9, 2017, MCBOSS informed petitioner that because of the transfer totaling \$100,000 to her children during the five-year look back period, March 2012 to March 2017, she would be subject to a transfer of assets penalty for three-hundred days pursuant to N.J.A.C. 10:71-4.10. (R-2.)
9. By notification dated June 7, 2017, MCBOSS issued an eligibility decision informing petitioner that MLTSS-NH Medicaid was granted effective March 1, 2017 for ancillary services only, and granted effective December 26, 2017 for MLTSS-NH. (P-1.) (R-4.)

### **Testimony**

**Lauren Townsend**, (Townsend), is the Supervisor for the MCBOSS Medicaid Unit, and is responsible for determining Medicaid eligibility. She reviewed the Medicaid application submitted on behalf of the petitioner, and acknowledged that the application was complete. She determined that all of the principal and income was available to the petitioner for the purposes of determining Medicaid eligibility because petitioner engaged in Medicaid planning when she used her own assets to fund the Trust, thereby shielding her assets in order to become eligible for Medicaid which Townsend found prohibitable. Townsend specifically found that the income distributed from Trust rendered the entire corpus that generated the income, available to the petitioner.

Townsend also determined that under any circumstance, a home is always an available resource.

**D.D.** is a co-trustee of the Trust and petitioner's daughter. The petitioner lived with her in 2008. In and around January 14, 2014, she paid her mother the balance of the undistributed income, totaling \$18,907, from the Santander Trust account and the Oppenheimer Trust account. (P-7,8.) D.D. explained, instead of making incremental payments to her mother, the interest that accrued over the four years was deposited into the Santander and Oppenheimer accounts on her mother's behalf, and paid to assisted living, and to the nursing home until petitioner applied for Medicaid benefits. D.D. acknowledged that in order to determine the amount of income earned, she performed a simple calculation by subtracting the original amount deposited from the total account balance, then distributed the balance of the interest income to her mother. D.D. believed that all of the income distributed to her mother was income. She did not realize that monies held in an investment account could be considered capital gains.<sup>1</sup> (P-7, P-8.)

### **LEGAL ANALYSIS AND CONCLUSION**

Medicaid is a program established by Title XIX of the Social Security Act, 42 U.S.C.A. 1396 et seq., designed "to provide medical assistance to persons whose income and resources are not sufficient to meet the costs of necessary care and services. Atkins v. Rivera, 477 U.S. 154, 156 (1986). Benefits are governed through a combination of federal and state law. New Jersey's Medicaid program derives its authority from the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1.2 to -19.1, and has opted to provide Medicaid coverage to "optionally categorically needy" individuals receiving long term care in a medical institution through

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<sup>1</sup> At the hearing, and post-hearing conference, the parties were uncertain as to whether a capital gains distribution was made to the petitioner. Evidence subsequently submitted sets forth that the trust earned \$2,519 in capital gains from 2010 to 2012. (P-10.)

the Medicaid Only program. Mistrick v. Div. of Med. Assistance & Health Servs., 154 N.J. 158, 165 (1998).

Medicaid eligibility is based upon an applicant's income and resources. N.J.A.C. 10:71-4.1 et seq.; N.J.A.C. 10:71-5.1 et seq. Resources are 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 or her support and maintenance." N.J.A.C. 10:71-4.1(b). However, "[i]n order to be considered in the determination of Medicaid eligibility, a resource must be available." N.J.A.C. 10:71-4.1(c). A resource is available "[i]f the person has the "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). Additionally, the resource must be "countable." For purposes of determining Medicaid eligibility, a "countable" resource is "[a]ny resource which is not specifically excludable under the provisions of N.J.A.C. 10:71-4.4." N.J.A.C. 10:71-4.2(a).

Under N.J.A.C. 10:71-4.10(a)(2), "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[.] . . . [i]n the case of an individual not already eligible for Medicaid benefits, the date the individual applies for Medicaid as an institutionalized individual."

Treatment of trusts, for purposes of determining Medicaid eligibility, is dependent upon the characteristics of the trust. N.J.A.C. 10:71-4.11(e). An "irrevocable trust" is defined as "a trust which cannot, in any way, be revoked by the grantor." N.J.A.C. 10:71-4.11(c)(3). A "revocable trust" is:

A trust which can, under State law, be revoked by the grantor. A trust, which provides that the trust can be only modified or terminated by a court, is considered to be a revocable trust, since the grantor (or his or her

representative) can petition the court to terminate the trust. Also, a trust that declares itself to be irrevocable, but which terminates upon conditions relating to the grantor during his or her lifetime, shall be, for purposes of this section, considered to be revocable. For example, a trust may require a trustee to terminate a trust and disburse the funds to the grantor if the grantor leaves a nursing facility. Such a trust shall be considered revocable.

[N.J.A.C. 10:71-4.11(C)(2).]

There is no provision in the Trust that grants the power of revocation to the petitioner, and there are no provisions that state the Trust can only be modified or terminated by a court. Section Four provides for the Trustees to decide in their sole discretion when to terminate the Trust, at any time, if they determine that the size of the principal is such that it would be inadvisable or unnecessary to continue the Trust. This decision to terminate the Trust is entirely within the Trustees' discretion, and not dependent on any conditions relating to petitioner. Moreover, the petitioner relinquished all of her power to alter, amend, or revoke any provisions of this Trust Agreement in Section 4.7.

As such, I **CONCLUDE** the Trust is irrevocable.

Even though the trust meets the definition of "irrevocable", Medicaid laws and regulations show that assets placed in trust established by the individual may "count" for purposes of an individual's Medicaid eligibility. The trust, even when defined as irrevocable, is subject to further analysis imposed by the "any circumstances test" and the five-year look-back rule.

Where, as in this case, the applicant has created an irrevocable trust and transferred assets to that Trust, N.J.A.C. 10:71-4.11(e)(5) provides that "[a]ny 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." L.L. v. Div. of Med. Assistance & Health Servs.,

HMA 3611-14, Final Decision (September 2, 2015)  
<[http://www.state.nj.us/humanservices/dmahs/info/decisions/2015/LLvDMAHSandOCB\\_OSS.pdf](http://www.state.nj.us/humanservices/dmahs/info/decisions/2015/LLvDMAHSandOCB_OSS.pdf)>.

MCBOSS urges that the transfer of petitioner's home into the Trust created a de facto standard for trust assets that are available and countable. Placement of a primary residence into trust does create a greater risk to the applicant for Medicaid ineligibility especially since the value of the home would not be a countable asset if the applicant continued to own it. "The home whether excluded or not, when transferred into trust shall be presumed to have been transferred for purposes of qualifying for Medicaid", and becomes subject to the constraints of the any circumstances test, and is subject to the five-year look back rule. N.J.A.C. 10:71-4.11(e)(6).

Under the terms of the Trust in this case, I **CONCLUDE** that payment cannot be made from the principal to or for the petitioner's benefit under any circumstances. Section 2-2.1.2 of the Trust states "my Trustee shall not distribute any or all of the principal of this Trust to me or to my spouse under any circumstances whatsoever." The Trustees did not, under any circumstances, have any legal discretion, to pay any part of the principal to petitioner, and the Trustees' retained discretion to pay income on the Trust to the petitioner for her benefit did not render the principal of the trust available as an asset.

N.J.A.C. 10:71-4.11(e)(3) provides "[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 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. (See, N.J.A.C. 10:71-4.10)." Furthermore, the date of transfer shall be "the date the trust was established, or, if later, the date on which the right of payment to the individual was foreclosed." N.J.A.C. 10:71-4.11(e)(3)(i).



In this case, the petitioner created an irrevocable Trust in 2005, and deeded her primary asset, her home, to the Trust at that time, but retained the right to reside in the home for the remainder of her life. Five years later the home was sold, along with petitioner's life estate and petitioner transferred her net proceeds into the Trust. For purposes of determining a penalty period, the regulations provide for the transfer of property, "shall be considered to have occurred the date the title is recorded or registered with the appropriate office." N.J.A.C. 10:71-4.10(m)(1)(i). However, the Supreme Court in H.K. v. State of New Jersey, 184 N.J. 367 relied upon common law property principles for purposes of determining the transfer of property for Medicaid eligibility, and held, for Medicaid eligibility purposes, the transfer of property date shall be the date of the execution and delivery of the deed. Here the evidence indicates that the deed transferring the remainder interest and the subsequent deed transferring the life estate were executed and delivered on the same date, respectively.

I **CONCLUDE** that the date of transfer for the remainder interest of the property is June 21, 2005, the date of the execution of the deed and the date of transfer of the life estate is April 23, 2010, the date of the execution of that deed.<sup>2</sup> I therefore **CONCLUDE** that the transfers of the assets were made beyond the 60-month look-back period for petitioner's March 22, 2017, Medicaid application.

Therefore, I **CONCLUDE** that a transfer penalty cannot be imposed on the distributions made to the beneficiaries on January 2, 2013, and January 2, 2014.

The Trust provisions do not specifically address a situation in which an applicant receives a payment to which she was not entitled under the terms of a trust. Here, the petitioner received as part of her income distribution capital gains that were supposed to be added to the principal of the Trust.

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<sup>2</sup> In addition to the HUD settlement statement this date is consistent with the records of the Monmouth County Clerk.

The most fitting provision for the treatment of the capital gains received by petitioner is N.J.A.C. 10:71-4.11(e)(2)(i), which provides that, “[i]n an irrevocable trust from which payment can be made under the terms of the trust to or for the benefit of the individual from all or a portion of the trust . . . [p]ayments from income or from the corpus made to or for the benefit of the individual shall be treated as income to the individual unless otherwise excludable.”

I therefore **CONCLUDE**, while the terms of the Trust forbade the distribution of capital gains to the petitioner, N.J.A.C. 10:71-4.11(e)(2) should apply because petitioner, in fact, received the money despite the prohibition. The capital gains distribution should be treated as income because capital gains are, under normal circumstances, income. See N.J.S.A. 54:4-8.40 (defining income, for tax purposes, as “all income from whatever source derived including, but not limited to, realized capital gains”). Furthermore, because the Trustee never added the capital gains to the principal of the Trust before she distributed them to petitioner, the capital gains should not be characterized as principal. Even if the capital gains could be considered principal, the entire corpus of the Trust is not somehow rendered available to petitioner. She did not have any right to the principal of the Trust, and the Trustee did not have any discretion to pay her any principal. The petitioner received the capital gains due to an inadvertent error by the Trustee, who apparently failed to separate the capital gains from the other income generated by the Trust prior to the one-time distribution to petitioner.

While the beneficiaries of the principal of the Trust may have an action against the Trustee for a breach of duty as a result of the improper distribution, see generally N.J.S.A. 3B:31-54 to -81 (setting forth the duties, powers, and liabilities of trustees), any actionable breach by the Trustee does not change the conclusion that, for Medicaid purposes, the capital gains, upon distribution to petitioner, were income to petitioner. And since, generally, “[i]ncome received during a calendar month is considered income for that entire month,” while “[t]he unspent income in the following month counts towards resources,” any portion of the \$18,906, including the capital

gains, that remained in the month after petitioner received the distribution would be considered resources. J.G. v. Div. of Med. Assistance & Health Servs., HMA 14423-15, Final Decision (May 12, 2016), <[http://www.state.nj.us/humanservices/dmahs/info/fads\\_2016.html](http://www.state.nj.us/humanservices/dmahs/info/fads_2016.html)> (citing N.J.A.C. 10:71-4.1(c) and N.J.A.C. 10:71-5.2(b)(1)). However, petitioner spent that money down prior to submitting her Medicaid application. Accordingly, I **CONCLUDE** that any portion of the \$18,906, including capital gains, does not affect petitioner's Medicaid eligibility.

Lastly, while petitioner acknowledged that the income generated by the Trust assets was available to the petitioner during her lifetime, MCBOSS did not consider the foreclosure of the stream of income caused by the termination of the Trust in its eligibility determination that occurred within the five-year penalty period.

I therefore **CONCLUDE** that a penalty based on the transfer of the stream of income caused by the termination of the Trust shall be assessed on the total projected amount of income that was transferred, in accordance with N.J.A.C. 10:71-4.10(n)(3).

### **ORDER**

I **ORDER** that the imposition of a transfer penalty be **AFFIRMED** and **MODIFIED**. I **ORDER** that the decision of the Monmouth County Board of Social Services imposing a three-hundred-day penalty shall be **MODIFIED** to only include the assessment of the transfer penalty for the closure of the stream of income. MCBOSS shall recalculate the transfer penalty accordingly.

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

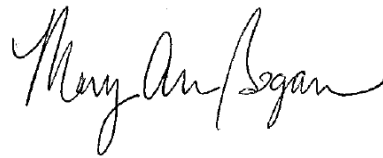
This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services,

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.

March 2, 2018

DATE



MARY ANN BOGAN, ALJ

Date Received at Agency:

March 2, 2018

Date Mailed to Parties:

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MAB/cb

**APPENDIX**

**WITNESSES**

**For petitioner:**

D.D., petitioner's daughter

**For respondent:**

Lauren Townsend, Supervisor

**EXHIBITS**

**For petitioner:**

- P-1 Eligibility Decision, dated June 7, 2017
- P-2 The A.M. Living Trust under Agreement, dated June 21, 2005
- P-3 Deed
- P-4 Settlement Statement, dated April 23, 2010
- P-5 Santander Statement
- P-6 Oppenheimer Statement
- P-7 Oppenheimer Statement
- P-8 Santander Statement
- P-9 Santander Statement
- P-10 2001 Form 1099-DIV

**For respondent:**

- R-1 Medicaid Application, dated March 22, 2017
- R-2 Notification from MCBOS
- R-3 Letter from John J. Ross, Esq. to MCBOS
- R-4 Eligibility Determination, dated June 7, 2017