



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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

N.U.,
PETITIONER,
v.
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES AND
MORRIS COUNTY BOARD OF
SOCIAL SERVICES,
RESPONDENTS.
ADMINISTRATIVE ACTION
FINAL AGENCY DECISION
OAL DKT. NO. HMA 7715-2016

As Director 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 Agency Decision in this matter is October 31, 2016 in accordance an Order of Extension.

The matter arises regarding Petitioner's October 2015 Medicaid application wherein Morris County Board of Social Services determined Petitioner was eligible as of March 1, 2016. Petitioner is contesting the inclusion of \$653.46 in annuity income on

the post-eligibility calculation of cost share. The Initial Decision determined that the annuity income should not be considered Petitioner's income as the annuity payments "are payable only to [her] Special Needs Trust trustee" and the State of New Jersey is "the primary beneficiary" of funds remaining at the time of Petitioner's death. ID at 3 and 7. For the reasons that follow, I hereby REVERSE the Initial Decision. While the Initial Decision correctly states what is required to remove annuity income from available income, the language of the annuity contract does not meet those requirements.

Petitioner is a disabled individual under the age of sixty-five which permits her to establish a Special Needs Trust (SNT) so as to allow her to have assets that would normally preclude Medicaid eligibility. As a result of two separate accidents, Petitioner received two settlements. Only the settlement that purchased a Hartford annuity on Petitioner's behalf is at issue here. That annuity is a structured settlement that permits payments of \$653.46 a month for Petitioner's life time with guaranteed payments for 40 years. Morris County determined that annuity payments paid to Petitioner should be included in her contribution to her care.

By way of background, Congress has long tried to balance the practice of using trusts to shelter assets that would be otherwise available to pay for medical care and the desire to have disabled individuals, especially children, protect assets that could only be used for the special needs. 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.

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).

However, Congress also made exceptions to this rule, with three types of "special needs trusts" or "supplemental needs trusts," which must meet specific requirements, including most importantly, a pay-back provision. 42 U.S.C.A. § 1396p(d)(4)(A), (d)(4)(B), and (d)(4)(C). The pay-back provision requires that "the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan." 42 U.S.C.A. § 1396p(d)(4)(A); see also (d)(4)(B) and (d)(4)(C) (which also require a pay-back provision). In furtherance of OBRA, New Jersey enacted legislation in 2000 to also permit SNTs for disabled Medicaid beneficiaries. N.J.S.A. 3B:11-36, -37. The assets in the SNT may only be excluded if the trust satisfies certain specific requirements. N.J.A.C. 10:71-4.11(g)xii; 42 U.S.C.A. § 1396p(d)(4)(A); see also J.B. v. W.B., 215 N.J. 305, 322-24 (2013).

Any property acquired by the SNT must be titled solely in the name of the trust. In accordance with Social Security Administration's Program Operations Manual ("POMS") SI 01120.203B 1 c, if the Trust contains the irrevocable right to receive

payments from a structured settlement annuity in effect prior to a beneficiary attaining the age of 65, then payments from the annuity shall not be considered additional funding. For this to be effective in excluding the annuity and making it part of the trust, the trust must also be the irrevocable remainder beneficiary of the annuity and it should commute at death and be payable to the trust.

The Initial Decision found that “[t]here is no dispute that the Special Needs Trust and the Hartford annuity instrument have been amended to designate the State of New Jersey as the primary beneficiary to the extent any funds expended on behalf of petitioner by Medicaid, if the funds remain at the time of her death.” ID at 3. The decision also found that the “Court ordered that the annuity payments be irrevocably assigned to the Trust”. ID at 7. I FIND this to be directly contradicted by the court order and the annuity documents produced in a letter dated January 25, 2016. R-1 at C.

Based on that 2016 letter from Hartford, Petitioner’s annuity is not titled in the name of her 42 U.S.C.A. § 1396p(d)(4)(A) special needs trust nor is the State of New Jersey the primary beneficiary. The documents clearly demonstrate that Petitioner, herself, is the payee on the annuity and has designated her sister to be the primary beneficiary should she not receive the 40 years of guaranteed payments. R-1 at C. There are no irrevocable designations in the annuity documents.

Additionally, I FIND no language in the order to support the finding that “the annuity payments [are] irrevocably assigned to the” SNT. ID at 7. The court order filed April 5, 2007, three years after the annuity was funded, does not use the word irrevocable in paragraph 5 which is the only section that mentions the Hartford annuity. Rather the April 5, 2007 Superior Court order merely orders that the annuity payments be paid into the SNT, “notwithstanding any contrary provision” in the annuity.

Petitioner's SNT does not have any right to receive the annuity payments while Petitioner is living and the guaranteed payments will pass to Petitioner's sister after her death. See R-1 at B and C.

As the January 25, 2016 letter shows, Hartford's annuity clearly has contrary provisions as the annuity income is still payable to Petitioner and names her sister as beneficiary upon her death. The fact that it is deposited into the SNT does not make the SNT the payee of the annuity and upon death Hartford will pay her sister in accordance with the terms of the annuity. Petitioner has provided no evidence that the annuity payments are wholly and irrevocably owned by her SNT. As a result, Morris County correctly included the annuity income when determining the post-eligibility treatment of income.

Thus, I hereby REVERSE the Initial Decision's finding that Petitioner's annuity income was incorrectly included in the post-eligibility treatment of income. Should Petitioner take the steps to change the payee and the primary beneficiary of the annuity, she should provide proof of those changes to Morris County. Until that time, Petitioner's income of \$653.46 is included to determine Petitioner's cost of care

THEREFORE, it is on this ^{4th} day of OCTOBER 2016,

ORDERED:

That the Initial Decision is hereby REVERSED.



Meghan Davey, Director
Division of Medical Assistance
and Health Services