

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No.9787
)
Appeal of)

INTRODUCTION

The petitioner appeals the denial of her application for Medicaid based on the Department of Social Welfare's determination that she has resources available for her support in excess of statutory maximums.

FINDINGS OF FACT

The parties stipulated to the following facts:

1. On or about March 28, 1988, petitioner's husband withdrew moneys from bank accounts and transferred stock certificates which were in the joint names of him and his wife and established a management account in his name alone with the Trust Department at Vermont National Bank.
2. On or about July 7, 1988, petitioner's husband executed a revocable Inter Vivos Trust naming Vermont National Bank as trustee. The trust was funded by the moneys and stocks in the Vermont National Bank Management Account which was in petitioner's husband's name alone. So long as the petitioner's husband is alive and able to manage his affairs, he has the power to amend or revoke the trust agreement.
3. The aforesaid stock which was transferred to the management account and subsequently to the trust was

inherited by the petitioner's husband from his father in the 1950s.

4. In 1989 the trust generated approximately \$20,000.00 in income.

5. The value of the trust corpus is approximately \$400,000.00.

6. The current beneficiary of the trust is the petitioner's husband. The petitioner is the beneficiary only upon the occurrence of her husband's death or incompetency, neither of which have happened to date.

7. Petitioner entered a nursing home on May 23, 1989 and has remained there ever since.

8. On November 20, 1989, the petitioner applied for Medicaid benefits and was denied on April 11, 1990 for being over the resource limit. On May 9, 1990 the Commissioner reaffirmed that decision stating that it was grounded upon the fact that the petitioner is the beneficiary of a trust.

ORDER

The Department's decision is affirmed.

REASONS

State Medicaid rules require applicants to demonstrate financial need as one prerequisite to eligibility for the program. The financial need test is not met if \$2,000.00 or more in non-excludible resources is available to the applicant. Medicaid Manual § 230, 235; Procedures Manual § P-2420C. The attribution of resources to applicants (or recipients) turns on whether a resource is "actually

available" to the individual applying for benefits.

The resource at issue here is a \$400,000.00 trust fund which the petitioner's husband claims came from his funds, is revocable only at his behest, and of which he is the sole present beneficiary and the petitioner, a contingent beneficiary. The petitioner's eligibility depends on whether any or all of that trust fund is "actually available" to her at this time for the purpose of providing her long-term care.

The Department initially took, but quickly abandoned, the position that the petitioner is over the resource limit because she is a beneficiary of the trust. That position was legally incorrect because the petitioner has no present interest in the trust proceeds. Her interest is contingent upon the death of her husband, giving here merely a future interest in the annual proceeds of the trust. As a contingent beneficiary of a trust, the petitioner has no money actually available to pay her medical expenses. The Department now takes the position that the petitioner has excess resources actually available to her because her husband owns resources which can and must be used for her support.

The petitioner's husband asserts that he does not "own" the \$400,000.00 in the trust which he set up but that it is "owned" by the legal entity of the trust, a legal entity which was established by a document which has a separate tax identity. As his assets are presently structured, that may

be true. However, the petitioner's husband admits that he has the power to revoke the trust at any time and to take personal ownership of the entire corpus of the trust, the \$400,000.00. The Department's regulations provide that "Trusts are counted as a resource only to the person who can revoke the trust and use the proceeds for his/her own benefit." M   233(5). As the petitioner's husband can revoke the trust and use the proceeds for his own benefit, the \$400,000.00 in the trust must be found to be a resource actually available to the petitioner's husband.

In general, the financial eligibility of Medicaid applicants and recipients is dependent upon resources actually owned by them as individuals.¹ See M   220. However, the regulations make a specific exception to that principle with regard to property owned by spouses. The regulations state that:

In determining the financial eligibility of an individual or a couple, the income and resources of spouses, with certain limits, must be counted as available to the applicant(s) if they are living together in their own home or in the household of mother. . .

M.M.   221

The regulations go on to say:

M211.1 Termination of Spousal Responsibility

"If spouses cease to live with each other, their income and resources must be considered available to each other for the time periods specified below. After the appropriate time periods, only the income and resources actually contributed by one spouse to the other are counted:

When couples cease to live together as a result of:

- (a) the admission to long-term care of one spouse (treat the couple as having ceased to live together only if he/she is likely to reside in long-term care for at least 30 consecutive days), then:
 - The income of both spouses ceases to be combined in the month of separation, and
 - an assessment of resources is made at the time of application for Medicaid.

Note: see Section Special Requirements for Applicants/Recipients Living in Long-Term Care in the M270 and M360 section. . .

- (b) the death or finalization of a divorce or an annulment, then both the income and resources cease to be combined in the first month after the death or finalization of the divorce or annulment.
- (c) any reason other than (a) or (b), then the income and resources of the spouses cease to be combined beginning with the seventh month after the month of separation. However, if the mutual consideration of income and resources causes the individuals to be found ineligible as a couple, then only the income and resources actually contributed by one spouse to the other will be considered, being the month after the month in which separation occurred.

These regulations establish a general obligation of support between spouses who are living together which ceases in most instances shortly after their separation or upon death or divorce. But when the separation is because of the admission of one spouse to "long-term care," special regulations take effect. Those regulations begin at § M270:

M270 Special Requirements for Applicants/Recipients Living in Long-Term Care

This policy applies to an applicant/recipient individual or couple who is residing in a skilled

nursing facility or intermediate care facility (including an intermediate care facility for the mentally retarded), or who is an inpatient in a medical institution but receiving a level of care provided in a nursing facility, or who is a home and community-based services recipient. These living arrangements are referred to in this policy as long-term care.

The regulations go on to provide in pertinent part:

M270.2 Resources

If an individual has no community spouse at time of admission to a long-term care facility, all his/her countable resources at time of application for Medicaid are considered.

If an individual is admitted to long-term care on or after September 30, 1989, and has a community spouse at time of admission to long-term care, two steps are required:

1. An assessment of resources at the time of admission to long-term care is completed. This assessment is completed at the request of either spouse and a copy of the assessment is provided to each spouse. The Department retains a copy. The assessment and notice must include at least:
 - the total value of countable resources in which either spouse has an ownership interest;
 - the basis for determining total value;
 - the spousal share (equal to one-half the total);
 - conclusions as to whether the institutionalized spouse would be eligible for Medicaid based on resources;
 - the highest amount of resources the institutionalized and community spouse may retain and still permit the institutionalized spouse to be eligible;
 - information regarding the transfer of resources policy; and
 - the right of the institutionalized spouse or the community spouse to a Fair Hearing at the time of application for Medicaid.

NOTE: if the assessment is not made at the time of admission, and an application for Medicaid is filed at some subsequent date,

the Department must complete the above assessment by reconstructing the situation at the time of admission based on available information, unless the community spouse has died. If the community spouse dies before an application is filed, only the countable resources in which the long-term care resident has an ownership interest are considered.

NOTE: if an individual is discharged from long-term care and readmitted on or after September 30, 1989, an assessment of resources is again completed at the time of readmission to long-term care.

NOTE: if an individual was admitted to long-term care before September 30, 1989, is not discharged and readmitted on or after September 30, 1989, and applies for Medicaid, no assessment of resources at the time of admission is required. Only the second step of allocating the resources is required.

2. An allocation of resources at the time of application for Medicaid is completed as follows:

- Determine the total countable resources of the couple at the time of application for Medicaid, regardless of which spouse has an ownership interest in the resource.
- Deduct the greatest of the following:
 - Spousal Resource Allocation, or
 - Amount set by a Fair Hearing, or
 - Amount transferred from institutionalized spouse to community spouse under a court order.

Changes that result in an allocation which exceeds the Spousal Resource Allocation in effect on April 1, 1990, will be made via a procedures change. Changes that result in an allocation which is less than the Spousal Resource Allocation in effect on April 1, 1990, will be made via the Administrative Procedures Act.

NOTE: although the community spouse may be allocated up to the Spousal Resource Allocation, the couple should be informed that the spouse in

long-term care may retain up to the Resource Maximum for one (1) in countable resources and still be eligible for Medicaid.

- Compare the resources now available to the institutionalized spouse to the Resources Maximum for one to determine whether or not he/she passes the resource test for Medicaid.
- If he/she does not pass the resource test for Medicaid, see the section on Medical Expense Spend-Down in the M400 section. The resources of the community spouse are considered available to the spouse in long-term care until the month after the month in which the individual becomes eligible for Medicaid.
- If the community spouse fails to make available to the spouse in long-term care the resources determined to be his/her (i.e., the spouse in long-term care) share, you may grant Medicaid to an otherwise eligible individual if he/she has assigned any rights to support from the community spouse to the Department (or lacks the ability to execute the assignment due to physical or mental impairment) or denial would work an undue hardship.
- If resources must be transferred to the community spouse (or to someone else for the sole benefit of the community spouse), provide the community spouse with the amount determined to be his/her share. The spouse in long-term care must complete this transfer within 60 days of notification of the allocation. An extension may be granted if there are good reasons for the delay.

M 3 270.2²

As the petitioner was admitted to long-term care before September 30, 1989, and has resided there continuously, the admission resource assessment set out in the regulation at paragraph 1. above does not apply. Instead, the regulation requires skipping ahead to the second step, which requires

an "allocation of resources" for all Medicaid applicants regardless of the date of admission to the nursing home.

The "allocation" requirement begins with a determination of the "total" countable resources of the couple at the time of application for Medicaid, regardless of which spouse has an ownership interest in the resources.

It has already been determined that the petitioner's husband has a countable resource in the form of \$400,000.00 in a revocable trust. That \$400,000.00 represents the "total countable resource" to be used in determining the petitioner's eligibility. From that amount is deducted the Spousal Resource Allocation amount of \$62,580.00³ (from Procedures Manual § P-2420C) from which the figure of \$337,420.00 is obtained. That figure is the petitioner's countable resource amount. The petitioner, as with any individual applying for Medicaid, cannot have resources available to her of more than \$2,000.00. See M § 230, P-2420B.

As the petitioner obviously has more than \$2,000.00 available, it must be determined, that she is not financially eligible for Medicaid. The Department's decision denying her for financial ineligibility is, thus, correct (although not for the reasons originally given) and must be upheld because it is consistent with the Department's regulations. 3 V.S.A. § 3091(d)

The petitioner may become eligible for Medicaid once

her excess resource of \$335,420.00 is "spent-down" for eligible medical or maintenance expenses. She is referred to her district Social Welfare office for further information thereon.

FOOTNOTES

¹The Department does not argue, as it might have done that the petitioner is the owner of some or all of the trust corpus under some factual or legal theory of marital property. This is because the regulations discussed below make it unnecessary.

²These regulations derive their authority largely from the Medicaid enabling statute at 42 U.S.C. § 1396,-5 regarding "treatment of income and resources for certain institutionalized spouses".

³In this case there is no separate amount established by a fair hearing or a court ordered amount.

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