

STATE OF VERMONT  
HUMAN SERVICES BOARD

In re ) Fair Hearing No. 11,304  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a determination by the Department of Social Welfare that she is disqualified from receiving long-term Medicaid coverage for thirty months due to the transfer of \$270,070 in assets.

FINDINGS OF FACT

1. The petitioner is a ninety-six-year-old woman who lives in a nursing home. She is represented in this matter by her daughter and only child who has her power of attorney.

2. In July of 1991, the petitioner moved from her home in Connecticut to a nursing home near her daughter's home in Vermont.

3. In May of 1992, after her personal funds were exhausted, the petitioner applied for payment of her long-term care through Medicaid.

4. The petitioner's application was denied based on the fact that she had transferred property valued at \$270,070 in March of 1991.

5. The petitioner does not deny that she owned and transferred property valued at \$270,070 in March of 1991. She claims, however, that the property was transferred to avoid estate taxes and probate costs and not to become eligible for

Medicaid.

6. In support of her contention, the petitioner presented the testimony of her daughter and the tax attorney who handled her property transfer. Both witnesses are found to be entirely credible and the following findings of fact are based on their uncontroverted testimony.

7. Before moving to the nursing home in Vermont where she now lives, the petitioner, who is widowed, lived in her long-time home in Connecticut which consisted of a house and forty-four acres in a suburb of Hartford. Since 1985, the petitioner who is in poor health, has been personally assisted in her home either by family members or home health care workers. She had made it clear to her daughter that she wanted to stay in her home and not be hospitalized if her health should deteriorate.

8. In the Fall of 1988, the petitioner's grandson, who is a carpenter, came to live with her and care for her. He, like other members of the family, expected that his grandmother, who was then ninety-two and in poor health, would likely die in the very near future. He discussed with his mother his concern that her home, her sole asset, was likely a very valuable commodity which would subject the family to a large inheritance tax shortly after her death which could probably only be paid by sale of the property. He discussed this concern with his mother, the petitioner's representative herein, who agreed to consult a tax attorney about the matter.

9. In late 1988, the petitioner's daughter, along with four other family members, met with an attorney who is an estate and tax planning expert to express her concern about the potential tax consequences in relation to her mother's property. The tax attorney confirmed that there would be significant tax consequences for all amounts over \$600,000 and agreed to structure a property transfer to avoid the inheritance tax. The petitioner, who wished to give her property to her children, agreed to the plan which called for putting the property, which was valued at about \$800,000, in a revocable living trust (in lieu of a will) and slowly transferring it to take advantage of the \$10,000 per year per grantee exemption under the gift tax laws. Under that arrangement, a \$167,000 parcel of land was transferred in December of 1988 to eight of the petitioner's descendants. \$87,000 of that amount was a taxable transfer. In February of 1989, another parcel of land worth the same amount was transferred to the same persons with the same \$87,000 tax consequence.

10. In December of 1989, the petitioner was hospitalized for a broken hip, but returned to her home to recuperate. In February of 1990, the petitioner became bedridden and her physician told the family at that time that she would likely die soon and that funeral arrangements should be made.

11. In May of 1990, a \$75,000 half-interest in the

petitioner's home and surrounding property was transferred to seven of her descendants. In September of 1990, the remaining one-half interest in the house and surrounding property valued at \$75,000 was purchased by the petitioner's grandson for that same amount. What remained from the estate was a single parcel of land valued at \$270,070.

12. After the transfer in September, the petitioner's estate was theoretically below that \$600,000 taxable level because she owned only the \$270,070 parcel and had only \$174,000 attributable to her in taxable gifts from the former transfers. Even so, the petitioner's attorney decided to go ahead and transfer the remaining parcel of land to nine descendants which was accomplished in March of 1991 with the petitioner's consent. The attorney made the decision to transfer the last parcel for two principal reasons: the first, was to avoid trouble from possible rulings by the I.R.S. that any of the transfers from the revocable trust were not excludible, a genuine concern for the first two transfers which may have violated a three year rule, and to avoid trouble with possible undervaluation of the property; the second, was the attorney's belief that the petitioner, because of her advanced age and poor health, would probably not live much longer and would not need the property and his understanding that she wished to give her property to her descendants as soon as practicable, not necessarily after her death.

13. At no time did the petitioner or the petitioner's daughter and tax attorney ever discuss the petitioner's need for long-term care. This is because they all believed that she would continue to live in and be cared for in her home and that her death was, due to her age and the fact that she was bedridden, likely imminent. Planning was done in anticipation of the petitioner's death, not in anticipation of her life needs. At some point, probably early in 1991, the petitioner's grandson asked the tax attorney a generalized question concerning Medicaid eligibility. The attorney explained the thirty-month rule but was not asked to take any action with regard to the information he gave and did not change his course of action based on that request. The petitioner's grandson never discussed his inquiry with the petitioner's daughter, who had the power to act for the petitioner. The tax attorney stated that had he been asked to plan for Medicaid eligibility, he most likely would have transferred all her assets as soon as possible. He added, however, that if the concern had been to plan for the petitioner's long-term care, he most likely would have preserved and structured her assets in a way which would have provided her with money for medical care and would not have depleted her assets.

14. In spite of the prediction in February of 1990 that the petitioner was on the verge of death, she stabilized and continued to be cared for in her home by her family

(especially her grandson and daughter) and hired health aides.

In July of 1991, a few months after the last transfer, the petitioner's daughter decided that she could no longer continue to care for her mother from such a distance because her mother was beginning to become disoriented and did not even know where she was. Her daughter, therefore, moved the petitioner to a nursing home near her home in Vermont where her mother paid for her own care until May of 1992 when her resources were depleted.

15. The petitioner's daughter has no assets other than the property deeded her by her mother which has not been placed on the market due to a weak demand for real estate. The petitioner's only option for payment should Medicaid be denied is to try to borrow from the bank using the land as collateral.

16. Based on the above, it cannot be found that the petitioner transferred her assets in order to become eligible for Medicaid. The sole discernible motivation for the transfer was the avoidance of considerable estate taxes and probate costs which would fall on the petitioner's family after her death and which would have necessitated a sale of the property which the petitioner wished to go to her descendants. There is no evidence that the petitioner or her daughter contemplated at the time of the transfer that she would need long-term care in a nursing facility. The evidence shows, on the contrary, that the petitioner had been thought

to be near death for some time and all planning for her estate has been consistent with that expectation. The resource eligibility for Medicaid which resulted from the total transfer of her assets was no more than a coincidental by-product of the estate planning carried out by her attorney.

ORDER

The decision of the Department of Social Welfare denying the petitioner long-term Medicaid coverage is reversed.

REASONS

Regulations governing Medicaid eligibility provide that individuals who are admitted to "long-term care will have all transfers of non-excluded resources for less than fair market value within a period immediately prior to the admission (or immediately prior to date of application for Medicaid, if later) to long-term care evaluated in terms of whether or not a penalty period of restricted Medicaid coverage is to be imposed." M236 That same regulation requires that transfers made after January 1, 1989 be considered for thirty months before the date of application for Medicaid.

The transfer in question here is the \$270,070 parcel of land which the petitioner gave to nine relatives (seven directly and two minors via trusts) in March of 1991, fourteen months before she applied for Medicaid. The Department takes the position that the land transfer is a non-excluded resource which was transferred for less than fair market value within

thirty months of her application for Medicaid and as such triggers the imposition of a thirty month period of restricted long-term Medicaid coverage commencing with March of 1991. See M 236.22. The petitioner does not argue that the land is an excluded resource, nor that she gave it away for less than fair market value.<sup>1</sup> The petitioner does argue, however, that she should not be penalized by imposition of the thirty-month exclusion because the transfer falls under the following exception to the transfer rule:

No Penalty for Transfer

An individual who lives in a long-term care living arrangement as defined in this section (M236) or his/her spouse will have no penalty period of ineligibility if:

...

4. the individual can rebut by a preponderance of evidence the presumption that the resource was given away or sold for less than fair market value primarily to qualify or remain eligible for Medicaid; ...

M236.1

The above regulation provides the Department with a legal presumption that non-excluded resources given away or sold for less than fair market value are done so primarily to qualify for Medicaid. That presumption effectively relieves the Department of proving in every case that such a transfer was

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<sup>1</sup>. At one point the petitioner argued in her memo that her home was an excluded resource. While that may be true, the only transfer at issue here is land owned by the petitioner which contained no buildings

made for the purpose of qualifying for Medicaid. However, if that presumption is rebuttable, as the regulation makes clear it is, the introduction of any evidence on that subject causes the presumption to disappear and the evidence must then be weighed in the usual way as to its sufficiency. The presumption itself provides no evidence. See Rocque v. Co-op. Fire Ins. Assn. Of Vt., 140 Vt. 321 (1981).

The petitioner produced credible and persuasive evidence that the sole purpose of the March 1991 land transfer was to avoid possible estate taxes and probate costs. While it could be argued that the petitioner's attorney did not need to make the final transfer in March of 1991 to avoid a taxable event because she was theoretically under the \$600,000 amount excludible under the IRS gift and estate tax unified credit (See IRS Code Secs. 2001, 2010, 2502, 2505), there was ample evidence in the form of the attorney's expert and credible testimony that such a transfer was a judgement call and that in his opinion it was cautious to do so.

The evidence was consistent, credible, and uncontroverted that the last transfer was part of a plan to avoid estate taxes and probate costs to the petitioner's family and to give the property to them and was not made with any intention to qualify for long-term Medicaid coverage. The petitioner's attorney's sworn testimony was that there was no discussion of Medicaid eligibility between himself and the petitioner or the petitioner's representative, her daughter. His candid

admission that the petitioner's grandson had asked him about the Medicaid program on one occasion does not establish a plan to obtain Medicaid eligibility, particularly in light of that same attorney's statement that the inquiry did not affect his planning.

There is also ample evidence that the petitioner was elderly and in a state of health which was expected to lead to her imminent death, not long-term care. The petitioner was left with a sum of money, \$75,000, which her family realistically expected would last for the rest of her life which they expected to be quite short. Hindsight being 20/20, the petitioner, her daughter, and their attorney no doubt wish at this point that they had spent more time planning for her life needs instead of focusing solely on the consequences of her death. It should be noted, however, that the petitioner was able to pay for her own nursing care, including long-term residential care, for over a year subsequent to the transfer, further rebutting any presumption that she was attempting to "dump" all her assets to become Medicaid eligible.

The end result of these transfers is that a person who should have been able to pay for her medical care until her death, was impoverished while her relatives were enriched and must now be cared for through public health programs. While justice might require that she now be supported by her relatives, there is no such requirement in the Medicaid regulations or indeed in any law of the State of Vermont. As

the petitioner did not transfer her assets to become Medicaid eligible, she is entitled to the exemption from penalty granted her by the regulation at M236.1.

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