

executed an "Agreement" whereby he placed in trust the house in which the petitioner was living at that time¹ and other assets that he owned, most notably shares of stock now worth in excess of \$30,000.00, to be used for the "benefit" of himself and the petitioner during their lifetimes.

The petitioner's husband died in 1991. Also around that time the petitioner entered the nursing home where she has resided ever since. At all times since the husband's death the trustee has used the income generated by the stocks primarily to maintain the petitioner's home. However, since the petitioner has been in the nursing home, her home has been used exclusively by her children and other relatives to stay in when they come to visit the petitioner. The trustee maintains that without the income generated by the stocks he would be unable to pay the taxes and maintenance on the home and would be forced to sell it. The petitioner's children and relatives maintain that without the use of the home they would be unable to visit the petitioner as often as they now do.

The petitioner does not maintain, nor has she produced any evidence, that either she or her family have any plans whatsoever to have her leave the nursing home and be cared for

¹Actually, the house itself has not been specifically identified as being included in the trust. It is not known whether the house was jointly owned by the petitioner and her husband (in which case, presumably, it is not part of the trust) or whether it was solely in the husband's name. At any rate, it appears that the same trustee is responsible for maintaining the house. Under the regulations, however, none of this is crucial (see *infra*).

at home. She did, however, produce the following letter from her physician, dated January 13, 1993, indicating that such a situation was at least "conceivable":

This is a follow-up letter that I wrote on September 28, 1992 to better clarify what was stated. Even though it is doubtful that [petitioner] will be discharged from the nursing home, there is always the potential that this could happen with the adequate amount of nursing care at her home. If this were able to be set up, she could conceivably go home in a situation like that.

Also, since I last wrote, her status has remained the same. She has no longer had any deterioration in her condition. If you have any further questions concerning this, please feel free to contact me.

The Department has determined that under the circumstances involving the trust assets to pay for the petitioner's long term care would not pose an "undue hardship" (see infra) on the petitioner or her family. Based on the assets in the trust, the Department terminated the petitioner's Medicaid coverage effective April 1, 1992.

ORDER

The Department's decision is affirmed.

REASONS

Medicaid Manual (MM) § M230 provides that all resources except those specifically excluded by the regulations must be considered in determining an individual's eligibility for Medicaid. Currently the maximum resource amount is \$2000.00.

Procedures Manual § P-2420 C.

Under MM § 234(1), a person's "home" is excluded as a

resource only under the following conditions:

- a. it is occupied as the individual's(s') principal place of residence (temporary absences, such as for hospitalization or convalescence with a relative, do not affect the determination of what is an individual's principal place of residence; an individual's absence from home which results from institutionalization, no matter how long, does not affect this determination, provided the individual(s) intends to return to the home); or
- b. the individual(s) is institutionalized and his/her spouse or dependent relative resides in the home; or
- c. the individual(s) is making a good faith effort to sell the home for fair market value.

As noted above, although it is medically "conceivable" that the petitioner could again live in the home if nursing care could be provided, there has been no showing or allegation in this matter that either the petitioner or her family "intends" for the petitioner to return to live in her home.

Indeed, it appears that the home is being maintained at this time primarily for the benefit of the petitioner's heirs.

The only alleged benefit to the petitioner herself is that having the home makes it easier for the petitioner's relatives to visit her in the nursing home.

The Medicaid resource regulations include the following section, M237, regarding "trusts":

Trusts (or similar legal devices) which have been established by an individual or his/her spouse with applicant/recipient as the beneficiary are counted only to the extent that the trustee could disburse the assets if he/she exercised his/her full discretion under the terms of the trust. The assets are counted whether or not the trustee exercises his/her full discretion. The amount which could be dispersed from these "Medicaid qualifying trusts" has no use

limitation in federal law so "Medicaid qualifying trusts" includes trusts such as irrevocable burial trusts, educational trusts, etc. An exception to the rule described above is a trust which was established by the will of the individual's deceased spouse. A second exception is that if the sole beneficiary of a trust is a mentally retarded individual who resides in an ICF-MR and the trust was established prior to April 7, 1986, it is not considered a "Medicaid qualifying trust".

Medicaid should not be denied in cases where the counting of such a trust would cause undue hardship. Undue hardship includes situations where the individual would be forced to go without life-sustaining services because the trust funds could not be made available to pay for the services. Undue hardship also includes situations where a trust has been established with awards paid to disabled children under the Zebley decision. These trusts are permanently excluded. If an exception has been made because it would cause undue hardship, only amounts actually distributed from the trust are counted as income and/or resources under the regular rules of the Medicaid program.

Trusts established by persons other than the applicant/recipient or his/her spouse are not "Medicaid qualifying trusts" and are counted as a resource only if the terms of the trust permit the applicant/recipient to revoke the trust or to have access to the trust without trustee intervention.

Although the examples given in § M237 are not exclusive, they clearly contemplate situations where the life or continued health of the individual is directly threatened. Based on the evidence presented it cannot be concluded in this matter that the loss of the convenience and economy of a free place for the petitioner's relatives to stay while they visit her (as beneficial as that may be for the petitioner) is sufficient under the above regulation to establish "undue hardship".

Inasmuch as the petitioner has not alleged a legally-

sufficient basis to exclude any of the assets in question from consideration as a resource under Medicaid, the Department's decision is affirmed. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 19.

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