

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,609

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying her application for medicaid for long term care. The issue is whether assets held in trust for the petitioner and her husband constitute a resource available to the petitioner within the meaning of the pertinent regulations.

FINDINGS OF FACT

The facts are not in dispute, and are taken from the written memoranda filed by the parties. On September 27, 1990, the petitioner's husband entered into a trust agreement transferring to a trustee a sizeable portion of his assets. The general terms of the trust are set out as follows:

FIRST: During the lifetime of the donor and donor's wife, [F.], the trustee may pay so much or all of the income and principal of the Trust to the donor and the donor's wife or for their benefit, in equal or unequal proportions and at such times as the trustee deems best, considering the needs, other income and means of support and best interest of the donor and the donor's wife and any other circumstances and factors which the trustee deems pertinent.

SECOND: Upon the death of donor and donor's wife the trustee shall pay from the trust estate all expenses of the last illness and funeral, costs of administration, claims allowable against the estate, and estate and inheritance taxes, if any, assessed by reason of death.

In September of 1993, the petitioner entered a nursing home, where she has resided ever since. The petitioner's husband then applied for medicaid in his wife's behalf. At the time of the petitioner's application the Department determined the petitioner's husband's assets to be over \$66,000.00 in his own name, and over \$118,000.00 in the trust--a total of over \$184,000.00. Subtracting the "spousal allocation" of \$70,740.00 allowable under the regulations, the Department determined that the petitioner still had available to her as a resource over \$113,000.00--well over the combined resource limitation under the regulations of \$3,000.00 (see Procedures Manual § 2420C).

ORDER

The Department's decision is affirmed.

REASONS

The petitioner (through her husband) argues that none of the assets in the trust agreement should be considered a resource available to her because at the time the trust was created the Department's regulations allowed for a "transfer of resources" without penalty if it was made more than thirty months before an application for medicaid. This argument grossly misconstrues the applicable regulations.

First, it completely overlooks the specific regulations that have always been in existence regarding the treatment of assets held in trust. Those regulations--now contained at Medicaid Manual (MM) § M237, but previously (prior to October 1, 1990) found at § M234(10)--have always defined trust assets as being "counted" as a resource if, according to the terms of the trust, they can be used (i.e., they are "available") to pay the applicant's medical expenses.

Indeed, the very existence of specific regulations regarding "trusts" demonstrates a clear intent on the part of the Department (following federal guidelines) to treat trusts separately and distinctly from the other provisions regarding resources--including those governing "transfers of resources". On the other hand, the obvious intent of the "transfer of resources" rules is to create a "penalty" of ineligibility in situations--unlike the case herein--where applicants have intentionally rendered their assets no longer "available".

The petitioner's reading of the regulations--i.e., that the "transfer of resources" rules can be used to protect assets (including trusts) that are currently available to pay for medical care--renders completely meaningless the basic inquiry under all the resource regulations (including those governing trusts, see supra) into the present "availability" of applicants' assets. It also stands the

clear intent of the transfer of resources regulations completely on its head.

Under the terms of the trust in this case there is no question (the petitioner admits that the trust is not an "excluded resource") that the trustee has full and unfettered authority to use the assets of the trust to pay the medical expenses of the petitioner and his wife during their lifetimes. The petitioner's argument that the creation of the trust constituted "a complete divestiture of title or ownership" of the assets in question--though correct as a general statement of law--is simply irrelevant. Regardless of the timing of the petitioner's application for medicaid vis-a-vis her husband's creation of the trust, those assets have always been "available" to meet the petitioner's medical expenses within the meaning of the regulations--past and present--pertaining to trusts. Thus, they clearly and unequivocally meet (and always have met) the definition of a countable resource. The Department's decision is, therefore, affirmed.

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