

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 17,021
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of PATH denying his application for long-term care Medicaid. The issue is whether the petitioner has available resources through a trust that are in excess of the program maximum. The following facts are not in dispute and are taken from the parties' memoranda.

FINDINGS OF FACT

1. The petitioner created an irrevocable trust in 1996. The trust consumed a large portion of his assets at that time. As of March 2001 its value was in excess of \$331,000.00.

2. According to the petitioner's attorney the petitioner's intent at the time he created the trust was "to preserve the assets accumulated for the named beneficiaries, and by securing the Trust as Irrevocable (sic), he cemented his voluntary commitment to do so".

3. According to the language of the trust (paragraph Third, pp. 2-3) the trustees have the discretion to spend the

income and principal of the trust as they "deem necessary or advisable for the health, support, and maintenance of the grantor".

4. The trust also provides (paragraph Fifth, pp. 3-4): "The interest of beneficiaries in principal or income of any trust held hereunder or any share thereof shall not, in any way during the term of the Trust, be subject to the claim of their creditors, claim for costs that could be borne by the medicaid programs, Federal or State, private and public assistance programs, nor to legal process. . ."

5. The petitioner lived independently from 1996 until January 2001. In January he was placed in a long-term care facility with a diagnosis of dementia. His family applied for Medicaid in his behalf in February 2001. By notice dated March 28, 2001 the Department denied the application after it determined that the petitioner's resources, largely those in the trust (\$331,000), were in excess of the \$2,000 program maximum.

ORDER

The Department's decision is affirmed.

REASONS

Under Medicaid the combined resources limitation for an individual in long-term care (without a spouse living in the community) is \$2,000. Medicaid Manual (MM) § M230, Procedures Manual § 2420 C. Trusts are specifically addressed in the regulations. Section M237.2 applies to trusts established after January 1, 1994, and includes the following:

Irrevocable trusts are treated as follows:

Portion Available

- any portion of the trust from which payments could be made to or for the benefit of the individual shall be counted as a resource, and
- any income on the portion of the trust from which payments could be made to or for the benefit of the individual is counted as income if paid to or for the benefit of the individual and is considered a transfer of assets if paid for any other purpose.
- any portion from which no payment could under any circumstances be made to the individual shall be considered a transfer of assets as of the date no payments could be made. The amount to be considered transferred includes any payments made after it became unavailable to the individual.

The above provisions were mandated by a 1993 change in federal law. 42 U.S.C. § 1396p(d)(2) includes the following:

(A): An individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus to the trust and if any

of the following individuals established such trust other than by will:

. . .

(C): Subject to paragraph (4), this subsection shall apply without regard to (i) the purpose for which the trust is established; (ii) whether the trustees have or exercise any discretion under the trust; (iii) any restrictions on when or whether distributions may be made from the trust; or (iv) any restrictions on the use of distributions from the trust. . .

42 U.S.C. § 1396(d)(3)(B) includes the following:

(i): In the case of an irrevocable trust, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income from the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income (I) to or for the benefit of the individual, shall be considered income of the individual, and (II) for any other purpose shall be considered a transfer to assets to the individual subject to subsection (c) of this section,

(ii): and any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstance be made to the individual shall be considered as of the date of establishment of the trust . . . to be assets disposed by the individual for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

The obvious purpose of the above provisions is to prevent individuals with significant assets from impoverishing themselves in order to qualify for Medicaid so that they may preserve their estates for their heirs. See McKenzie v. State of Missouri, Dept. of Social Services, Div. Of Family

Services, 983 S.W.2d 196 (1998). The petitioner in this matter is at least candid in stating that this was precisely his intention when he created the trust in question.

The petitioner's argument that the assets in question should be considered "unavailable" to him is flawed on at least two counts. First, even if by the terms of the trust they could be considered presently unavailable, the above regulations make clear that this must be treated as a voluntary transfer of resources by the petitioner subject to specific penalties set forth in the regulations. See MM §§ M416 et seq.

Second, however, and more simply, by the terms of the trust itself the assets in question cannot be considered unavailable to the petitioner to pay for his medical expenses. The trust prevents the trustees from invading the trust to pay for "claims for costs that could be borne by the medicaid programs". However, because the above regulations make clear that the petitioner is not eligible for Medicaid, his trustees are not prevented from using the trust to support his long-term care needs.

The express terms of a trust may be binding on its trustees insofar as carrying out the grantor's intent. However, the power of a grantor at the time of the creation of

a trust is not unlimited. No trust instrument empowers a grantor to alter federal and state laws; and Medicaid law is clear that an individual who attempts to contrive his impoverishment in such a manner is ineligible for these benefits. See Lebow v. Commissioner of the Div. Of Medical Assistance, 740 N.E.2d 978 (Mass. 2001). Inasmuch as the Department's decision in this matter is fully in accord with the pertinent law and regulations the Board is bound by law to affirm. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 17.

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