

3. On October 21, 2004, P.D. created a revocable trust, the "P.D. Revocable Trust". At all times relative to this case, the revocable trust has not been funded.

4. On October 21, 2004, K. D., the son of petitioner and P.D., created an irrevocable trust, "The D. Family Trust", by depositing \$10 and naming Mark Tapper trustee.

5. On October 21, 2004, petitioner's spouse loaned the irrevocable trust the sum of \$163,080; a promissory note was executed that day. The terms of the promissory note provided for .5 percent interest per annum with monthly payments of \$68.01 from January 1, 2005 through December 1, 2007. The note was not assignable. If the petitioner's spouse died during the term of the promissory note, payments would be made to the revocable trust she created. Although, the terms of the promissory note provided that the remaining balance of principal and accrued interest would then be paid in a balloon payment on December 1, 2007; the trustee paid petitioner's spouse the sum of \$163,464.42 from the trust on July 25, 2005 as full payment of the remaining principal and accrued interest.

6. On November 16, 2004, petitioner's spouse loaned the irrevocable trust an additional sum of \$37,200. In a promissory note executed on November 17, 2004, the trustee

agreed to pay .5 percent interest per annum and to make two equal payments of \$18,615.25 with the first due on January 3, 2005 and the second due on February 3, 2005. The promissory note was not assignable. As of February 3, 2005, the trustee had repaid petitioner's spouse the principal and accrued interest.

7. On or about December 13, 2004, petitioner applied for long-term-care Medicaid through the Home and Community Based Waiver Program.

8. On April 22, 2005, the Department mailed petitioner a notice denying his application for long-term-care Medicaid.

9. On April 25, 2005, petitioner requested reconsideration of the denial. The Department agreed to reconsider the denial.

10. On May 20, 2005, the Department mailed petitioner a corrected notice of decision denying his application for long-term-care Medicaid alleging that petitioner was over resource for long-term-care Medicaid. In particular, the Department found that the petitioner had available resources of \$323,193.05 and excess resources of \$228,433.05 after allocating \$2,000 as exempt for petitioner and \$92,760 as exempt for P.D.'s spousal allocation.

11. On or about September 1, 2005, petitioner reapplied for long-term-care Medicaid. Petitioner's spouse used the funds repaid to her from the irrevocable trust in addition to other spousal resources to fund a Single Premium Immediate Annuity.

12. Petitioner was found eligible for long-term-care Medicaid retroactive to August 1, 2005.

ORDER

The Department's decision is affirmed.

REASONS

The Medicaid program was established to provide "medical assistance on behalf . . . of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services. . ." 42 U.S.C. § 1396.

When Vermont chose to participate in the Medicaid program, the legislature authorized the Commissioner of Social Welfare to promulgate regulations as a condition to receipt of federal matching funds. 33 V.S.A. § 1902. These regulations define when an applicant is "medically indigent". In particular, the regulations require that "all resources must be counted except for those specifically exempted."

Medicaid Manual § M230. There are additional rules for counting resources for applicants seeking Medicaid for long-term care. In petitioner's case, the resource limitation is \$2,000 in addition to a community spouse resource allocation for his wife.² M 230, M 234.42, Procedures Manual P-2420C.

Petitioner's case raises the question of how to treat the irrevocable trust created by the petitioner's son but funded by the petitioner's spouse from marital assets. Trusts are specifically addressed. In particular, Congress has repeatedly addressed how to treat trusts for the purposes of Medicaid eligibility.

Current federal law provides:

(2)(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 of the trust and if any of the following established such trust other than by will:

. . .

(C) Subject to paragraph (4), this subsection shall apply without regard to-

(i) the purposes for which a 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

²The community spousal allocation was \$95,100 during the period of January 1, 2005 through December 31, 2005.

- (iv) any restrictions on the use of distributions from the trust.

42 U.S.C. §§ 1396p(d)(2)(A) and (C).

Congress has addressed the treatment of irrevocable trusts when determining whether an irrevocable trust is counted as an available resource. 42 U.S.C. § 1396p(d)(3)(B) states:

(B) In the case of an irrevocable trust-

- (i) **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 corpus from which, payment to the individual could be made shall be considered resources available to the individual . . . emphasis added).

Vermont regulations only consider irrevocable trusts as exempt resources when there are no circumstances in which payment can be made to the individual. M 232.52(e).

The purpose of these regulations is to prevent applicants with significant assets from qualifying as medically indigent by shielding these assets for the benefit of their estate. See Lebow v. Commissioner of the Div. of Medical Assistance, 740 N.E.2d 978 (MA 2001) and McKenzie v. State of Missouri, Dept. of Social Services, Div. of Family Services, 983 S.W.2d 196 (MO 1998).

The trust in question can not be considered an exempt resource as payment could be and, in fact, was made from the trust to the petitioner's spouse.

Petitioner has made a number of arguments regarding the availability of the trust. There is no need to address these arguments as intervening actions have shown that the funds were available.

As the Department's decision is in accord with pertinent law, the Board should affirm. 3 V.S.A. § 3091(d) and Fair Hearing Rule 17.

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