STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 19,765
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Economic Services Division denying her Medicaid benefits for long-term care. The issue is whether the petitioner and her husband transferred non-exempt resources for less than fair market value prior to their application within the meaning of the pertinent regulations. In lieu of an oral hearing the parties have stipulated to the following facts, which are supported by uncontested documentary evidence.

FINDINGS OF FACT

1. On January 6, 2005, [petitioner] signed an application for Vermont long-term care Medicaid Waiver benefits, which was submitted on January 18, 2005.

2. The Vermont Department for Children and Families denied [petitioner's] application by notice issued June 6, 2005.

3. [Petitioner and her husband] owned a property at 5091 Middle Ridge Road, Perry, Ohio, each of them with a right of survivorship. On January 6, 2005, a deed was executed transferring the property from their joint ownership to [petitioner's husband], only, for life, and upon his death to their daughter, [W]. [Petitioner's husband's] life estate was not accompanied by the power to sell. [Petitioner's husband] did retain the power to mortgage and lease the property. M232.16. M440.3(g).

A. According to a property tax bill submitted with [petitioner's] application, the tax value of this property as of January 6, 2006, was $36,570.

B. The Department for Children and Families determined that fair market value for this property was $104,470, based upon a discussion between an employee of the Department and a person in the Perry, Ohio Town Clerk's Office concerning the legal relationship between tax value and fair market value in Ohio property tax law.

C. This property was vacant as of January 6, 2005, and had been vacant since 2003.

D. This property was being advertised for rent as of January 6, 2005.

E. According to the budget submitted with the Medicaid application, taxes and insurance on this property for 2004 totaled $553.28.

4. [Petitioner and her husband] owned a property at 377 White Road, Eden, Vermont. On November 10, 2004, by warranty deed, ownership was transferred to [petitioner's husband] alone. On the same date, [petitioner's husband] transferred ownership to his son, [K]. [Petitioner's husband] retained a life estate with no power of sale, and retained the right to receive rental income from the property. [Petitioner's husband] did retain the power to mortgage and lease the property. M232.16, M440.3(g).

A. The fair market value of this property as of November 10, 2004, based upon the property's listed tax assessment value in the records of the Town of Eden, Vermont, as submitted with the Application, was $72,000.

B. According to the [petitioners'] 2004 tax returns, Schedule E, the property generated $6,900 in gross rental income, with $5,198 in expenses, comprising expenses for auto and travel of $140, insurance of $420, repairs of $247, taxes of $1648 and utilities of $2743. Said Schedule E was not submitted as part of the Medicaid application.

C. According to the [petitioners'] 2004 tax return, Schedule E, taxes and insurance for the property totaled $2,068. Said Schedule E was not submitted as part of the Medicaid application.

D. According to the budget submitted with the Medicaid application, taxes and insurance on this property for 2004 totaled $1,451.

5. [Petitioner and her husband] owned a property at 115 Paine Avenue, Morrisville, Vermont. On November 10, 2004, by warranty deed, ownership was transferred to [petitioner's husband], alone. On the same date [petitioner's husband] transferred the property to his daughter, [W]. [Petitioner's husband] retained a life estate with no power of sale, and retained the right to receive rental income from the property. [Petitioner's husband] did retain the power to mortgage and lease the property. M232.16, M440.3(g).

A. The fair market value of this property as of November 10, 2004 based upon the property's listed tax assessment value in the records of the Town of

Morristown, Vermont, as submitted with the Application, was $102,300.

B. According to the [petitioners’] 2004 tax returns, Schedule E, the property generated $9,100 in gross rental income, with $3,204 in expenses, comprising $187 in auto and travel, $242 in insurance, $300 in legal and other professional fees, $175 in repairs and $2,300 in taxes. Said Schedule E was not submitted as part of the Medicaid application.

C. According to the [petitioners’] 2004 tax returns, Schedule E, taxes and insurance for the property for 2004 totaled $2,542. Said Schedule E was not submitted as part of the Medicaid application.

D. According to the budget submitted with the Medicaid application, taxes and insurance on this property in 2004 totaled $2,631.40.

6. [Petitioner and her husband] owned a property at 115 Wabun Avenue, Morrisville, Vermont. On November 10, 2004, by warranty deed ownership was transferred to [petitioner’s husband], alone. On the same date, [petitioner’s husband] transferred the property to his son, [D]. [Petitioner’s husband] retained a life estate with no power of sale, and retained the right to receive rental

income from the property. [Petitioner's husband] did retain the power to mortgage and lease the property. M232.16, M440.3(g). The fair market value of this property as of November 10, 2004, based upon the property's listed tax assessment value in the records of the Town of Morrisville, Vermont, as submitted with the Application was $69,900.

A. According to the [petitioners'] 2004 tax returns, Schedule E, this property generated $6,575 in gross rental income, with $4,902 expenses, comprising $461 auto and travel, $391 insurance, $2,382 repairs, $1,572 taxes and $96 utilities. Said Schedule E was not submitted as part of the Medicaid application.

B. According to the [petitioners'] 2004 tax returns, Schedule E, taxes and insurance for the property for 2004 totaled $1,963. Said Schedule E was not submitted as part of the Medicaid application.

C. According to the budget submitted with the Medicaid application, taxes and insurance on this property in 2004 totaled $1,962.85.

7. [Petitioners'] 2004 tax returns, including Schedule E described above, were provided to the Department by [petitioner's husband], at the Department's request.

8. Beginning in June, 2004, [petitioner’s husband] gifted the sum of $5,000.00 per month to his son over a period of seven months. The Department assessed a penalty for each of these transfers, which expired in the month of the gift. The last penalty expired at the end of December 26, 2004. M440.41.

9. The parties continue to rely on any other evidence and argument submitted to the Human Services Board, other than what is contained in this stipulation, to the extent that such evidence and argument does not directly conflict with the facts stipulated herein.

ORDER

The Department's decision is affirmed.

REASONS

The parties agree that the above-described real estate transfers (see paragraphs 3-6, *supra*) were much greater than the assets that also factored into the Department's decision (see paragraph 8, supra), and that if the Board upholds the Department on its treatment of the transfers of real estate and affirms the imposition of the disqualification period, further consideration of other eligibility issues may be postponed indefinitely. Inasmuch as this opinion recommends that the Department's decision in this regard be affirmed, no other issue need be considered at this time.

As a general matter regarding initial eligibility, the Medicaid regulations impose penalty periods for certain transfers of resources by applicants prior to application for long-term care. W.A.M. §§ M440 *et seq.* In this case the Department, by letter dated August 2, 2005, informed the petitioner's attorney of its decision as follows:

> The Department assessed a penalty period against your client's application because of transfers of four properties that failed to meet the criteria for exclusion under M232.17, as follows:
>
> 1. **377 White Road, Eden.** The fair market value ("FMV") of this property is $72,400. To be excluded as a resource under M232.17, it must generate at least 6% of FMV, or $4,344 annual net income. According to your client's 2004 tax return, Schedule E, the property generated $6,900 gross rental income, with $5,198 in expenses, creating a net annual income of $1,702 which falls short of the requirement.
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> **2.** **115 Paine Avenue, Morrisville.** FMV of this property is $102,300, so it must produce $6,138 in net annual income to meet the exclusion requirement of M232.17. According to the 2004 Schedule E, the property generated $9,100 in gross rental income and had $3,204 in expenses, creating a net annual income of $5,896, which falls short of the exclusion requirement.
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> 3. **115 Wabun Avenue, Morrisville.** FMV of this property is $69,900, so it must generate $4,194 in net annual income to be excluded. However, the property was vacant when

transferred in November, 2004 and failed to generate net annual income of at least 6% of its FMV, according to the 2004 Schedule E. It had produced $6,575 gross rental income, with expenses of $4,902, for a net annual income of $1,673.

4. **5091 Middle Ridge Road, Perry, Ohio**. FMV of this property is $104,470. The property was vacant when transferred in January, 2005, and failed to generate net annual income of at least 6% of its fair market value, as it has been vacant since sometime in 2003.

> For each of the transferred properties, your client retained a life interest with no power of sale. M440.35(a) excuses from penalty transfers of real estate where a life estate is retained only when the life estate is accompanied by the power of transfer or sell. Otherwise, the ownership interest is deemed to have been reduced or eliminated. Thus, the value of the remainder interest must be assessed. The length of the penalty period for these transfers is based on the total uncompensated remainder interest. This is obtained by multiplying the FMV of each property by the relevant factor from the life estate chart at Medicaid Procedure Manual P-2421 B1. Since your client was 80 in November, 2004, that factor is .56341. This produces an uncompensated remainder interest of $40,790.88 for the White Road property, $57,636.84 for the Paine Avenue property and $39,382.35 for the property on Wabun Avenue, totaling $137,810.07. Dividing that figure by $186 per M440.42, gives a 740 day penalty period. […] The Ohio property was transferred in January, 2005. […] Applying the same calculation as was applied to the properties transferred in November, your client's uncompensated remained interest subject to penalty in the Ohio property was $60,627.07. Dividing that by $186 yields a penalty period of 325 days…

The Department also informed the petitioner's attorney that it calculated the penalty periods from these transfers as follows:

. . .

2. Three of the disallowed property transfers occurred in November, 2004: White Road, Paine Avenue, and Wabun Avenue. The penalty period for these transfers could not begin until the end of the June – December penalty period for the cash transfers to [K]. Thus, the penalty period for these three transfers began on December 27, 2004.

3. For each of the transferred properties, your client retained a life interest with no power of sale. M440.35(a) excuses from penalty transfers of real estate where a life estate is retained only when the life estate is accompanied by the power to transfer or sell. Otherwise, the ownership interest is deemed to have been reduced or eliminated. Thus, the value of the remainder interest must be assessed. The length of the penalty period for these transfers is based on the total uncompensated remainder interest. This is obtained by multiplying the FMV of each property by the relevant factor from the life estate chart of Medicaid Procedure Manual P-2421 B1. Since your client was 80 in November, 2004, that factor is .56341. This produces an uncompensated remainder interest of $40,790.88 for the White Road property, $57,636.84 for the Paine Avenue property, and $39,382.35 for the property on Wabun Avenue, totaling $137,810.07. Dividing that figure by $186, per M440.42, gives a 740 day penalty period. The 740 days will end on January 5, 2007.

4. The Ohio property was transferred in January, 2005. The penalty period for this transfer runs consecutively to the penalty for the November, 2004 transfers. Applying the same calculation as was applied to the properties transferred in November, your client’s uncompensated remainder interest subject to penalty in the Ohio property was $60,627.07. Dividing that by $186 yields a penalty period of 325 days, beginning January 6, 2007 and ending November 26, 2007.

The petitioner does not dispute the Department's valuations of the properties.[1] Nor does she dispute the calculation of the disqualification periods. Rather she argues that the above transfer of resources provisions are inapplicable altogether because the four rental properties should have been considered "exempt" as countable resources in the first place, and thus immune from the above-cited transfer of resources provisions. Specifically, the petitioner disputes the Department's reliance on the so-called "6 percent rule" in determining whether the resources in question were exempt as "income producing property".

In this regard, W.A.M. § M232.17 provides, in pertinent part:

> Real property producing significant income is exempt from consideration as a resource. Real property is considered to produce "significant income" if it generates at least 6 percent of its fair market value in net annual income after allowable expenses related to producing the income are deducted.

[1] The only identified dispute over the evidence is the petitioner’s various assertions that she has been denied “due process” because the Department did not fully notify her of the bases of its valuations of the properties in its initial decision in June 2005. However, in light of the undisputed facts that all hearings before the Board are *de novo*, that the Department made clear all the factual bases of its decision in a letter to petitioner’s counsel dated August 2, 2005, and that both parties have requested and received continuances totaling more than ten months since the petitioner filed her appeal in this matter, any claim of a violation of due process is unavailing.

Under the regulations, all real property that is neither income producing nor used as a home is countable as a resource. W.A.M. § M231.1. As noted above, in its determination that the properties in question did not produce 6 percent of their value as income, the Department relied on Schedule E tax returns filed by the petitioner for 2004. These clearly showed that none of the 4 properties produced net income of 6 percent. (One property was arguably close--about 5 percent, but two of them were less than 3 percent, and one had no income whatsoever). Nonetheless, the petitioner argues that the Department did not have "authority" under federal law to use Schedule E tax returns in determining net income, and that the Department can only count "mortgage payments and taxes" as expenses in determining net income.[2]

The Department concedes that the federal statutes are silent as to methodology to calculate net income from rental properties. However, the petitioner can point to nothing in the federal regulations that expressly *prohibits* the use of tax returns for this purpose. Moreover, as a factual matter, the petitioner does not allege that any of the properties in

[2] As the Department points out, this argument would come back to bite the petitioner in the computation of her husband's *income*, should *this* issue ever be reached.

question *ever* generated more than 6 percent net income in *any* year.[3] Other provisions in the Department's regulations specifically allow the use of tax returns in determining "business expenses". See W.A.M. § M232.84. Inasmuch as the petitioner does not cite or suggest any *alternative* method that would remotely be as practical, accurate, or fair, her arguments in this regard can only be viewed as a tortuous and hyper-technical interpretation of the federal regulations in question.

In the six months immediately before she applied for Medicaid, *claiming to be impoverished*, the petitioner divested herself of, and gave to her husband and children, assets totaling nearly $400,000. Besides being unable to advance a compelling *legal* argument under which it could be concluded that the Department is *required* to find her indigent and, thus, eligible for Medicaid, the petitioner has not even suggested a plausible *policy* argument why the regulations *should* be read in her favor. The Board has consistently noted that Medicaid is a poverty program, and it has repeatedly upheld the Department's right *and duty* under the regulations to carefully scrutinize applications to

[3] In light of this, the petitioner's argument regarding vacancies in two of the properties are factually unavailing.

ensure that relatively affluent individuals do not use legal contrivances to voluntarily impoverish themselves for no discernable reason other than to take advantage of a welfare program in order to preserve estates for their heirs. See e.g., Fair Hearing No. 18,821. Courts and Congress have specifically noted the obvious--that when relatively well off applicants use such "techniques", they are "diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children". See Lebow v. Commissioner of Division of Medical Assistance, 433 Mass. 171, 172 (2001). If this case can be viewed in any light other than the above, the petitioner has not articulated it.

Based on the above undisputed facts of this case, it must be concluded that the Department correctly followed all pertinent federal and state regulations in determining that the petitioner transferred nonexempt resources for less than fair market value, and that it correctly determined the amount of her disqualification period according to the regulations it cited in its rationale (*supra*).

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