
In the Matter of the Appeal of

:

Mary Welchner

DECISION

: AFTER

FAIR

HEARING

from a determination by the New York City
Department of Social Services

:

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on April 11, 2005, in New York City, before Scott Nuchow, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Howard Atlas, Attorney for Appellant

For the Social Services Agency

Robert Nartowicz, Fair Hearing Representative

ISSUES

Was the Agency's determination dated February 19, 2004 to deny the Appellant's application for Residential Health Care Medical Assistance because the Appellant's resources exceed the level the Medicaid allows for a household of the Appellant's size correct?

Was the Agency's determination dated November 30, 2004 to deny the Appellant's application for Residential Health Care Medical Assistance because the Appellant's resources exceed the level the Medicaid allows for a household of the Appellant's size correct?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, 89 years old, applied for Residential Health Care Medical Assistance for a household of one consisting of the Appellant on October 6, 2003, seeking a pickup date of October 20, 2003.

2. The Appellant has been residing in a Residential Health Care Facility (RHCH) since August 18, 2000.

3. On May 1, 2000, the Appellant created the "[REDACTED] Irrevocable Trust." Pursuant to the Trust agreement, the Grantor was the Appellant and the Trustee was [REDACTED], the nephew of the Appellant.

4. Paragraph A of the Second Article of the Trust document provides in part that the Trustee shall from time to time, in the Trustee's sole discretion, pay all or part of the net income to or for the benefit of the Settlor, [REDACTED], or to for for the health, education, support or maintenance of the Settlor's nephew, [REDACTED], the Trustee.

5. Paragraph B of the Second Article of the Trust document provides in part that the Trustee shall pay as much of the principal from the Trust as the Trustee shall deem proper, in the Trustee's sole discretion, to or for the health, education, support, or maintenance of the Settlor's nephew.

6. Paragraph B of the Second Article of the Trust document provides in part that the Settlor unequivocally expressed her intention that Section 7-1.6 of the Estates Powers and Trust Laws of the State of New York, or any successor statute, shall not be available to compel an invasion of the trust principal of the Trust principal by the Trustee or by any court for the benefit of the Settlor and that the Trustee shall not have the right to invade principal of the Trust Estate for the benefit of the Settlor.

7. The Sixth Article of the Trust document at paragraph A.2. states that in the administration of this Trust, the Trustee shall have the following power, in addition to powers conferred by law upon Trustees, without limitation by reason of specification:

To lend with security or borrow monies with or without security upon such terms as to rate and maturity and in other respects at the Trustee may deem proper."

8. By a notice dated February 19, 2004, the Agency determined to deny the Appellant's application for Residential Health Care Medical Assistance because the Appellant's resources exceed the level the Medicaid allows for a household of the Appellant's size. "Per the office of Legal Affairs, the Trust Agreement is considered to be Available Resources thereby Determined Barred From Eligibility. See W25 [illegible] clarification."

9. The portion of the form W25 cited in the February 19, 2004 notice by the Agency details the basis of the Agency determination as follows, "ARTICLE VI, POWERS AND DUTIES OF TRUSTEES, paragraph (A)(2), at page 10, grants the Trustee the power 'to lend with security or borrow monies with or

without security upon such terms as to rate and maturity and in other respects as the Trustee may deem proper.' This power is so broadly worded that it can be understood to permit a loan to the A/R at no interest and with indefinite maturity. In this respect, because the A/R has not given up sufficient control over her resources, the entire trust principal must be considered a resource of the A/R."

10. An additional point set forth in the form W25 cited in the February 19, 2004 notice by the Agency contended that the assets in the "[REDACTED] Irrevocable Trust" were considered an available resource because, pursuant to the provision in Article V(B) of the trust agreement, since the Appellant "reserves to the Settlor the power to require the trust principal by substituting other property of an equivalent value ... [a]n unrestricted reserved power to substitute assets in a trust is equivalent to the reservation of a power to revoke, alter or modify the trust." This point was no longer an issue at the instant hearing as the Agency determined at the hearing on April 11, 2005 that it would no longer contest this portion of the trust agreement.

11. On April 8, 2004, the attorney for the Appellant requested reconsideration of the Agency's February 19, 2004 determination. In response, by a notice dated May 6, 2004, the Agency determined to deny the Appellant's application for Residential Health Care Medical Assistance because the Appellant's resources exceed the level allowed by the Medical Assistance Program, stating, "Please [sic] attached W25 history for reconsideration request documentation," which set forth the sources and value of assets that the Agency determined were resources of the Appellant including \$234,527.00 for the sale of a home on October 26, 2000.

12. On May 24, 2004, the Appellant's counsel requested the Agency reconsider its determination dated May 6, 2004. In response, by a notice dated November 30, 2004, the Agency determined to deny the Appellant's October 6, 2003 application holding, "The Office of Review Investigation have [sic] reaffirm [sic] for a second time that the assets of the Mary Welchner Irrevocable trust are an available resource and a bar to eligibility."

13. On April 8, 2004, the Appellant requested this fair hearing.

APPLICABLE LAW

A person who is sixty-five years of age or older, blind or disabled who is not in receipt of Public Assistance and has income or resources which exceed the standards of the Federal Supplemental Security Income Program (SSI) but who otherwise is eligible for SSI may be eligible for Medical Assistance, provided that such person meets certain financial and other eligibility requirements under the Medical Assistance Program. Social Services Law Section 366.1(a)(5).

To determine eligibility, an applicant's or recipient's net income must be calculated. In addition, resources are compared to the applicable resource level. Net income is derived from gross income by deducting exempt income and allowable deductions. The result - net income - is compared to the statutory "standard of need" set forth in Social Services Law Section 366.2(a)(7) and 18 NYCRR Subpart 360-4. If an applicant's or recipient's net income is less than or equal to the applicable monthly standard of need, and resources are less than or equal to the applicable standard, full Medical Assistance coverage is available.

If the applicant's or recipient's resources exceed the resource standards, the applicant or recipient will be ineligible for Medical Assistance until he/she incurs medical expenses equal to or greater than the excess resource standards. 18 NYCRR 360-4.1. The applicant or recipient will be given 10 days from the date he or she is advised of the excess resource amount to reduce the excess resources by establishing either a burial fund. In addition, they will be advised that they may spend excess resources on exempt burial space items during this 10 day period.

Resources are defined in 18 NYCRR 360-4.4(a). It means property of all kinds, including real property and personal property. It includes both tangible and intangible property.

An applicant's/recipient's available resources include:

- (1) all resources in the control of the applicant/recipient. It also includes any resources in the control of anyone acting on the applicant's/recipient's behalf such as a guardian, conservator, representative, or committee;...
- (5) certain resources of an MA-qualifying trust, as explained in 18 NYCRR 360-4.5.

For those subject to resource limits, Regulations at 18 NYCRR 360-4.6 and 360-4.7 provide that certain resources be disregarded in determining eligibility for Medical Assistance.

Section 360-4.5 of the Regulations pertains to the availability of assets held in trust, and provides in part as follows:

- (b) Inter vivos trusts created on or after August 11, 1993. For purposes of this subdivision, an individual will be considered to have created a trust if assets of the individual were used to form all or part of the principal (corpus) of the trust, the trust was established other than by will, and the trust was established by: the individual; the individual's spouse; a person acting at the direction of the individual or the individual's spouse, including a court or administrative body; or a person with the legal authority to act in place of or on behalf of the individual or the individual's spouse, including a court or

administrative body. In the case of a trust which contains the assets of an individual and of another person or persons, the provisions of this subdivision apply to the portion of a trust's assets which are attributable to the individual.

- (1) Irrevocable trusts created by an applicant/ recipient. The availability of assets held in an irrevocable trust to an applicant/recipient depends on the trustee's authority, under the specific terms of the trust agreement, to make payments to or for the benefit of the applicant/recipient.
 - (i) Any portion of the trust principal, and of the income generated by the trust principal, from which no payments may be made to the applicant/recipient under any circumstances, must be considered to be assets transferred by the applicant/recipient for purposes of subdivision (c) of section 360-4.4 of this Subpart. The date of the transfer in such cases is the date the trust is established or, if later, the date on which payment to the applicant/recipient is foreclosed under the terms of the trust agreement.
 - (ii) Any portion of the trust principal, and of the income generated from the trust, which can be paid to or for the benefit of the applicant/recipient, under any circumstances, must be considered to be an available resource.
 - (iii) Payments made from the trust to or for the benefit of the applicant/recipient must be considered to be available income in the month paid.
 - (iv) Any payments from the trust other than those described in clause (iii) of this paragraph must be considered to be assets transferred by the applicant/recipient for purposes of subdivision (c) of section 360-4.4 of this Subpart. . . .
- (d) Any provision of a trust created on or after April 2, 1992 is void if it directly or indirectly limits, suspends, terminates, or diverts the principal, income, or beneficial interest of the grantor or grantor's spouse in the event that the grantor or grantor's spouse applies for MA or requires medical care, without regard to the irrevocability of the trust or the purpose for which the trust was created. The beneficial interest of the grantor or grantor's spouse includes any income or principal amounts to which the grantor or grantor's spouse would be entitled under the terms of the trust, by right or in the discretion of the trustee, assuming the full exercise of discretion by the trustee.

- (e) The provisions of subdivision (b) of this section, with respect to trusts created on or after August 11, 1993, also apply to legal instruments and other devices similar to trusts created on or after August 11, 1993. A legal instrument or other device is similar to a trust if, attendant upon its creation, assets are put under the control of an individual or entity with fiduciary obligations to manage such assets for the benefit of a designated beneficiary or beneficiaries. Legal instruments and devices subject to the provisions of subdivision (b) of this section include, but are not limited to, escrow accounts, investment accounts, and pension funds.

Administrative Directive 96 ADM-8 informs social services districts of changes in the treatment of transfers and trusts in the Medical Assistance (MA) program as a result of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93). As a result of the enactment of OBRA '93 and Chapter 170 of the Laws of 1994, a number of changes and clarifications are being made to the MA rules concerning transfers and trusts. These changes apply to MA applications and recertifications on or after September 1, 1994, and apply to transfers made and trusts created or funded on or after August 11, 1993.

Section 366.5(d) of the Social Services Law and 18 NYCRR 360-4.4(c)(2) govern the treatment of transfers of assets under the Medical Assistance Program when such transfer is made on or after August 11, 1993.

In determining the Medical Assistance eligibility of an institutionalized individual (an in-patient in a nursing facility, including an intermediate care facility for the mentally retarded, an in-patient in a medical facility who is receiving a level of care provided in a nursing facility, or an individual receiving care, services, or supplies pursuant to a waiver under section 1915(c) of the federal Social Security Act), generally, any transfer of assets for less than fair market value made by the individual or the individual's spouse within or after the look-back period will render the individual ineligible for nursing facility services.

Look-back period means the 36-month period, or, in the case of payments to or from a trust which are considered to be assets transferred by an applicant/recipient, the 60-month period, immediately preceding the date that an institutionalized individual is both institutionalized and has applied for Medical Assistance.

A transfer for less than fair market value, unless it meets an exception will cause the applicant/recipient to be ineligible for nursing facility services for a period of months equal to the total, cumulative, uncompensated value of all assets transferred during or after the look-back period divided by the average cost of care to a private patient for nursing facility services in the region in which such individual is institutionalized, on the date the individual first applies or recertifies for Medical Assistance as an institutionalized individual. For purposes of

this, the cost of care to a private patient in the region in which the individual is institutionalized will be presumed to be 120 percent of the average Medical Assistance rate for nursing facility care for the facilities within the region. The average regional rate will be updated each January first. In 2003, the average regional rate for New York City was \$8,157.00.

The period of ineligibility begins with the first day of the first month during or after which assets have been transferred for less than fair market value, and which does not occur in any other period of ineligibility under 18 NYCRR 360-4.4)c) for a transfer for less than fair market value.

Administrative Directive 96 ADM-8 informs social service districts of changes in the treatment of transfers and trusts in the Medical Assistance program as a result of OBRA 1993, and effective for transfers of assets under the Medical Assistance Program when such transfer is made on or after August 11, 1993.

Section IV.G. of Administrative directive 96 ADM-8 provides in part:

Penalty Period

The penalty period is the period of time that an individual is ineligible for MA coverage of nursing facility services as a result of an uncompensated transfer of a non-exempt asset or homestead. As a result of the enactment of OBRA '93 and Chapter 170 of the Laws of 1994, there is no longer a maximum penalty period.

1. Calculation

The length of the penalty period is calculated by dividing the uncompensated value of all assets transferred during or after the look-back period (except as provided in Section IV.G.5. concerning multiple transfers) by the MA regional rate established for the region in which the person is institutionalized. The regional rates are revised by this Department annually in an Administrative Directive. In addition, social services districts must reduce the uncompensated value as necessary to take into account the appropriate MA resource level, any allowable burial funds, and any allowable income deductions or disregards as defined in Section IV.H.1. or 2. of this ADM.

NOTE: Except as provided in Section IV.G.5. concerning multiple transfers, the penalty period begins on the first day of the month following the month of transfer, provided that the date does not occur during an existing penalty period.

2. Multiple Transfers

For **multiple transfers** during the look-back period, where assets have been transferred in amounts and/or frequency that would make the calculated penalty periods overlap, add together the uncompensated value of all assets transferred, and divide by the MA regional rate. The period of ineligibility begins with the first day of the month following the month in which the first transfer occurred.

When a penalty period ends at any time during a month and a subsequent transfer occurs at any time during that same month, the subsequent transfer is considered to have occurred in an overlapping penalty period and would be treated as a multiple transfer.

When multiple transfers are made in such a way that the penalty periods for each do not overlap, treat each transfer as a separate event with its own penalty period.

3. Partial Month

If the uncompensated value of the transferred assets is less than the regional rate, or the penalty period results in a partial month penalty, districts must count the uncompensated value attributable to the partial month as part of the Net Available Monthly Income (NAMI) or, in the case of a person receiving waived services in the community, spenddown liability for the month.

5. Continuity of Penalty

A penalty period imposed for a transfer of assets runs continuously from the first date of the penalty period regardless of whether the A/R continues to receive nursing facility services (except as noted above when a penalty is apportioned between spouses). Thus, if an A/R leaves a nursing facility, the penalty period nevertheless continues until the end of the calculated period.

If during the interview or clearance process it becomes known that the individual had previously applied for MA in another district, contact the former district to determine if it had any knowledge of a possible transfer or to determine whether the A/R is currently in a penalty period.

After the submission of a written application, but before the applicant is notified by the social services district of his/her eligibility determination, the applicant may withdraw his/her request for Medical Assistance. Once the applicant is notified in writing of the MA eligibility determination, the application may not be withdrawn, and any penalty period imposed will remain in effect, even if the applicant subsequently re-applies for MA.

General Information System GIS 04 MA/001 is dated January 20, 2004 and advises of decisions in the cases of Verdow v. Sutkowy (USDC/NDNY), and Spetz v. NYS Department of Health (Supreme Ct., Chautauqua Co.). GIS 04 MA/001 provides in part as follows:

In these cases, the courts ruled that assets in an irrevocable trust created by a Medicaid applicant/recipient cannot be considered available based on the creator's retention of a limited power of appointment....

The following is a summary of the holdings in the two cases. Please note that these principles should be applied by districts in reviewing all trusts, not merely those involving the retention of a limited power of appointment.

1. An ostensibly irrevocable trust cannot be considered to be revocable, nor can the trust's assets be considered available to the A/R, based on the speculative possibility of a revocation pursuant to EPTL Section 7-1.9.
2. A revocable trust is one that can be terminated by the grantor. If the trust cannot terminate without the consent of the trust beneficiaries, the trust is not revocable.
3. In the absence of evidence that the A/R is acting fraudulently or in bad faith, assets in an irrevocable trust cannot be considered available to the A/R based on the remote possibility of collusion among the grantor, the trustee, and the beneficiaries.
4. The extent to which trust assets are resources in the control of the A/R according to the Medicaid statutes and regulations governing the treatment of trusts, corresponds to the trustee's authority, under the specific terms of the trust agreement, to make payments to or for the benefit of the A/R. Under these statutes and regulations, any portion of the trust principal and the income it generates that can be paid to or for the benefit of the A/R under any circumstances is a countable resource.
5. The statutory right of revocation under EPTL Section 7-1.9, and the possibility of collusion among the parties to the trust, do not represent the circumstances contemplated by the aforementioned Medicaid statutes and regulations, and thus cannot be the basis for counting trust assets as available resources.

DISCUSSION

By a notices dated February 19, 2004, and November 30, 2004, the Agency determined to deny the Appellant's October 6, 2003 application for Residential Health Care Medical Assistance because the Appellant's resources exceed the level the Medicaid allows for a household of the Appellant's size. "Per the office of Legal Affairs, the Trust Agreement is considered to be Available Resources thereby Determined Barred From Eligibility....[P]aragraph (a)(2), at page 10, grants the Trustee the power 'to lend with security or borrow monies with or without security upon such terms as to rate and maturity and in other respects as the Trustee may deem proper.' This power is so broadly worded that it can be understood to permit a loan to the A/R at no interest and with indefinite maturity. In this respect, because the A/R has not given up sufficient control over her resources, the entire trust principal must be considered a resource of the A/R."

The uncontroverted evidence establishes that on May 1, 2000, the Appellant created the "Mary Welchner Irrevocable Trust" (hereafter referred as the Trust). The trust agreement stated that the Trust was irrevocable.

The Appellant applied for Residential Health Care Medical Assistance for a household of one consisting of the Appellant on October 6, 2003. The Appellant has been residing in a Residential Health Care Facility (RHCH) as of August 18, 2000 per an October 23, 2003 letter by the Appellant's attorney. The Appellant is seeking a pickup date of October 20, 2003. The record does not establish the trust balances at either the time the Appellant was either institutionalized or applied for Medical Assistance.

The Agency contends that the entire principal of the Trust is an available resource to the Appellant due to the power of the Trustee to "the power 'to lend with security or borrow monies with or without security upon such terms as to rate and maturity and in other respects as the Trustee may deem proper.'" (Article VI, paragraph A.2.) The Agency argues that "the power is so broadly worded that it can be understood to permit a loan to the A/R at no interest and with indefinite maturity," and that "in this respect, because the A/R has not given up sufficient control over her resources, the entire trust principal must be considered a resource of the A/R." In essence, the Agency contention is based solely upon the unarticulated speculation the Appellant and the Trustees could enter into a collusive agreement to establish a sham loan whereby the assets within the Trust would be loaned to the Appellant without consideration as a gift to render the principal an actually available resource to the Appellant.

In Paragraph B of the Second Article of the Trust document, the Settlor unequivocally express her intention that Section 7-1.6(b) of the Estates Powers and Trust Laws of the State of New York, or any successor statute, shall not be available to the Trustee or any court to compel, against the Trustee's discretion, the invasion of the trust principal for the benefit of the Settlor for any reason whatsoever (emphasis added).

In re Newman, the Queens Supreme Court held that the power to make a loan did not make the trust an available resource. (Sup.Ct. Queens Co. June 17, 2002, Index# 2578/98).

The Appellant's attorney argues In re Newman is controlling and that the Agency is only broadly inferring that the Trustee has the power to make a loan to the Settlor. In Verdow v. Sutkowy, the Court held that the State Commissioner cannot speculate as to facts that have not occurred. The uncontested affidavit from the Trustee dated February 24, 2005 establishes that the Trustee has not made a single loan to the Settlor since the Trust was created on May 1, 2000. The Appellant's attorney's arguments are persuasive. The Agency has failed to apply the principals of General Information System GIS 04 MA/001 (January 20, 2004). Therefore, the record does not support the Agency's determination that the "Mary Welchner Irrevocable Trust" is an available resource to the Appellant and that the Agency's determination dated February 19, 2004 cannot be sustained. Further, based on the same facts and law, the Agency's determination dated November 30, 2004 cannot be sustained.

However, it is noted that the record fails to establish the dates and amounts by which the trust was funded. In the April 8, 2004 letter by the Appellant's counsel to the Agency, the Appellant concedes that there will be a penalty period and enumerates several transfers. However, the record fails to establish the extent of all the transfers which occurred in the look-back period prior to the date of the trust execution.

DECISION AND ORDER

The Agency's determination dated February 19, 2004 to deny the Appellant's application for Residential Health Care Medical Assistance because the Appellant's resources exceed the level the Medicaid allows for a household of the Appellant's size is not correct and is reversed.

The Agency's determination dated November 30, 2004 to deny the Appellant's application for Residential Health Care Medical Assistance because the Appellant's resources exceed the level the Medicaid allows for a household of the Appellant's size is not correct and is reversed.

1. The Agency is directed to continue to process the Appellant's application for Residential Health Care Medical Assistance, and to make a new determination thereon.
2. In making its new determination, the Agency is directed to conclude that the principal of the "Mary Welchner Irrevocable Trust" is not to be available as a resource to the Appellant.
3. In making its new determination, the Agency is directed to calculate any penalty arising from a 60 month look-back period.

FH# 4100975R

4. The Agency is directed to advise Appellant and her attorney in writing of its new determination regarding Appellant's application for Residential Health Care Medical Assistance.


Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is required, the Appellant must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
May 17, 2005

NEW YORK STATE DEPARTMENT
OF HEALTH

By


Commissioner's Designee