**Restrictive Fair Hearing Decision on Medicaid Trust Vacated**

A recent fair hearing decision denying a home care application, based on language in a trust that New York City Medicaid previously had routinely approved, has been vacated.

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Elder Law
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A recent fair hearing decision denying a home care application, based on language in a trust that New York City Medicaid previously had routinely approved, has been vacated.

The original rejection involved an irrevocable trust that permitted the trustee to allow the applicant to reside in trust real property; allowed the trustee to improve real property; and allowed the trustee to pay the expenses of real property.

With no warning, and in contradiction to prior fair hearing decisions, the agency had taken the position that the inclusion of such language makes the entire principal of the trust an available resource. Upon reconsideration that original decision was found to be incorrect and reversed.

The agency was ordered to authorize Medicaid for the applicant.

**Medicaid Eligibility**

The current average cost of home care is $35 per hour. An individual who has had a stroke, for example, and needs assistance 24 hour a day, would spend $840 a day or $25,200 per month or $302,000 per year. Medicare and traditional supplemental health insurance do not cover the cost of such home care because the care is classified as "custodial" and not "skilled."

The Medicaid program covers the cost of custodial care, but it is a means tested program. An applicant may have nonretirement resources no greater than $30,182.

If an older individual spent all their available funds on home care and became destitute, they could no longer pay the cost of housing and would be forced into a nursing home. Therefore, some older individuals choose to transfer their assets so they can remain at home. A Medicaid home care applicant is permitted to transfer assets with no penalty, although this rule will change next year.

**Irrevocable Trust**

The use of a Medicaid Qualifying Trust (MQT) is specifically authorized by Medicaid's own regulations and must be fully revealed in the application. The assets held within the trust are not counted by Medicaid as an available resource if the trustee is prohibited from making trust principal payments to, or on behalf of, the grantor.

To ensure that the grantor can remain in the home or cooperative apartment or condominium unit, it is common for the trust to include language such as "The grantor is allowed to reside in

residential property owned by the trust. The trustee may use trust principal for the improvement of real property owned by the trust and the trustee may pay expenses of trust property."

**Original Fair Hearing Decision #8461099Q**

A Medicaid application was filed for an 86-year-old who had created an MQT. The agency determined that the assets within the trust were an "available resource for the purpose of determining Medicaid eligibility" and denied the application. A fair hearing was held challenging the agencies decision.

The agency quoted 18 NYCRR Section 360-4.5 (b)(1)(ii) which states "any portion of the trust principal ... which can be paid to or for the benefit of applicant/recipient, under any circumstances, must be considered to be an available resource."

Even though the trust contained a provision prohibiting the trustee from making principal distributions on behalf of the grantor, the Medicaid agency pointed to the sections allowing the grantor to reside in the trust property; allowing trust principal to be used for improvements and allowing the trust to pay for expenses of trust property. The agency argued that this language permitted the trustee to pay trust principal for the benefit of the applicant and therefore making the entire assets of the trust available and countable (causing the applicant to be considered to have assets above the Medicaid limit).

In opposition, the applicant quoted the trust provision prohibiting the trustee from making trust principal available to or for the benefit of the grantor. "... trustee shall have no right, power privilege or authority to invade or distribute principal of the trust to or for my [grantor/appellant's] benefit, under any circumstance ..."

Sworn affidavits from the trustees were submitted, attesting to the fact that they did not intend to use any part of the principal for the benefit of the grantor and that to do so would be a breach of their fiduciary duty.

The applicant argued that the position of the agency was speculative and in contravention to the decision in *Verdow v. Sutkowy,* 209 F.R.D. 309 (N.D.N.Y. 2002), "Absent evidence of bad faith or fraud, the decision of whether or not to provide Medicaid benefits should not be based upon the remote possibility of collusion."

The denial was also challenged as arbitrary and capricious, based upon the fact that there are contradictory fair hearing decisions on the same fact pattern and the agency provided no explanation for the sudden reversal of its policy.

In a decision dated Dec, 28, 2022, the administrative law judge upheld the agency's denial of the Medicaid application. The decision held that the trust language was ambiguous and the specific language (the power of the trustee to allow the grantor to reside in the trust property and the authority of the trustee to pay for improvements or expenses) took precedence over the general expressions of intent and upheld the agency decision to deny the application. Oddly, the administrative law judge held:

"Since Regulations at 18 NYCRR 360-4.5(b)(1)(ii) provides that 'improving and paying the expenses of residential real property in which the Grantor/Appellant resides would be utilizing the Trust principal for the benefit of the Grantor/Appellant,'" The problem is that the quoted language does not appear at all in the regulation.

**Amended Fair Hearing Decision**

The amended fair hearing decision dated April 27, determined that the applicant had no control over the trust principal and did not have the authority to use trust principal for maintaining or improving the property. The specific language of the trust prohibiting the trustee from paying trust principal for the benefit of the grantor was found to be unambiguous. The Medicaid agency was ordered to disregard the principal of the trust and not to count it as an available resource.

**Conclusion**

The reversal of the abrupt, and unexplained change in long-standing agency policy in the original fair hearing decision is welcome. The amended decision has administrative stare decisis effect, *Long v. Perales,* 568 N,Y,S2d 657, (App. Div. 2nd Dept., 1991).

For applications that have not been filed, in an excess of caution, the drafting attorney has the option of removing the specific provisions identified in the original fair hearing decision. If the applicant is living in a rental apartment or otherwise does not have an interest in real property, this would be a simple solution.

For applications that have already been filed, but no denial has been received, attorneys should consider supplementing the application with a copy of the amended fair hearing decision.

If a Medicaid application has already been denied because of the provisions identified above, the drafting attorneys should consider requesting a fair hearing and if that is not successful, reconsideration by the New York State Office of Temporary and Disability Assistance or filing an Article 78. Amending the trust or decanting to a trust that does not contain the specific provisions identified in the fair hearing decision are also alternatives.

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