2003 WL 22290975

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Britain.

Harland HAZELTON et al.,
v.
Patricia W. WILSON-COKER, Commissioner of Social Services.

No. CV020517111S. | Sept. 19, 2003.

Attorneys and Law Firms

Tinley Nastri Renehan & Dost, Waterbury, for Harland Hazelton and Shirley Hazelton.

AAG Richard Lynch, AAG Michael McKenna, AAG Hugh Barber, Atty Gen-Health, Hartford, for Patricia W. Wilson-Coker, Commissioner of Social Service.

Opinion

STUART DAVID BEAR, J.

INTRODUCTION

***1** This is an appeal by applicant Harland Hazelton (the "Applicant") and his wife Shirley Hazelton (the "Community Spouse") from a decision by the State of Connecticut Department of Social Services ("Department") denying Harland Hazelton Title XIX ("Medicaid') benefits because Mr. Hazelton's share of "non-excluded available assets" as determined by the Department exceeded the $1600 Title XIX eligibility ceiling. At issue is whether a 1985 testamentary trust where the principal is not "available" to pay Mr. Harland's expenses because Mr. Harland is *not* a beneficiary should have been included in Mr. and Mrs. Harland's assets based on certain "community spouse" rules to determine Mr. Harland's lack of eligibility for Title XIX benefits.

FACTS

On June 5, 1985, Ray Moore, great uncle of Shirley Hazelton, established a testamentary trust with Fleet National Bank as trustee and Mrs. Hazelton as beneficiary (the "Trust"). Mr. Moore died in 1985. As beneficiary Mrs. Hazelton is entitled to and receives the entire net income of the Trust. Her receipt of income is not at issue in this appeal. She may also receive "as much of the principal of said Trust ... as the Trustee from time to time determines to be required for [her] health, support in reasonable comfort, and maintenance ..." Applicant Harland Hazelton was not named as and is not a beneficiary of the Trust.

In the Hearing Decision, the Hearing Officer stated that "[t]he trustee refused to distribute from the principal [of the Trust] to pay for the Applicant's cost of care because to do so would breach fiduciary duty ... There is no dispute that the Applicant is not a beneficiary of the Trust. The value of the Trust is not included in the spousal assessment because it is available to him; it was included because it is available to the Community Spouse ..."

During oral argument defendant's counsel asserted that the standard to be applied to the Trust corpus was "availability" of that corpus instead of "actual availability" as alleged by plaintiffs in their complaint. However, defendant Commissioner has admitted that:

> 10. In considering an Application for Title XIX assistance of an "institutionalized" individual who is married to a spouse living in the community ("community spouse"), the Department is required to determine the amount of assets actually available to both the applicant and his or her spouse as of the applicant's date of institutionalization.

Complaint, ¶ 10 and Answer.

In its complaint on appeal, Applicant alleges that the Commissioner's decision violated Connecticut Uniform Policy Manual ("UPM") §§ 4015.05 and 4030.80 pertaining to "inaccessible assets" and §§ 1570.05(D)(4), 4025.67(D)(3)(c) and § 1570.25 pertaining to determination of the Community Spouse protected amount; §§ 17b-80, 17b-261 and 17b-264 of the

Connecticut General Statutes; and Title 42 U.S.C. §§ 1396a(a)(17)(B) and 1396r-5.

Plaintiff seeks:
***2** 1. review of the decision of defendant Department;

2. either (a) a judgment reversing such decision and ordering defendant Commissioner to grant plaintiff's application for Title XIX benefits; or

(b) an order directing defendant Commissioner, on remand, "to process the application and to act on the application for increase in [the] Community Spouse protected amount without regard to the principal of the Ray Moore Testamentary Trust"; and

3. Reasonable costs and fees pursuant to § 4-184a.

Defendant Department admits that plaintiffs have exhausted all administrative remedies. Complaint and Answer, ¶ 21.

STANDARD OF REVIEW

This court's review is generally limited to whether the Department acted unreasonably, arbitrarily, illegally or in abuse of its discretion in reaching its decision. Section 4-183(j). The standard of review is less restrictive in matters involving "pure questions of law."

> Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered to carry out the statute's purposes ... Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion ...

Connecticut Light & Power Co. v. Texas-Ohio Power. Inc., 243 Conn. 635, 642, 708 A.2d 202 (1998), quoted in *MacDermid, Inc. v. Department of Environmental Protection*, 257 Conn. 128, 138, 778 A.2d 7 (2001).

DISCUSSION

Approximately 27 years ago, in *Buckner v. Maher*, 424 F.Sup. 366, 372 (D.Conn.1976), aff'd., 434 U.S. 898, 98 S.Ct 290, 54 L.Ed.2d 184 (1977), the U.S. District Court for the District Court of Connecticut cited several federal court decisions

> which stand for the proposition that a state may not, in administering federally sponsored welfare programs, either presume the availability of income or resources not actually available, nor add eligibility criteria not expressly authorized by Congress. [Citations omitted.] Such presumptions and conditions conflict with federal law in violation of the Supremacy Clause.

See *Harrison v. Commissioner, Department of Income Maintenance*, 204 Conn. 672, 681, 529 A.2d 188, 193 (1987); *Probate of Marcus*, 199 Conn. 524, 536, 509 A.2d 1, 7 (1986); and *Rivera v. Heintz*, 21 Conn.App. 678, 684, 575 A.2d 1054, 1055 (1990).

Neither the constitutional requirements of the Supremacy Clause nor the teaching of those cases that federal law must be implemented and obeyed by officials such as defendant Commissioner have changed during such approximately 27 year period.

"The medicaid act specifically provides ... that in determining eligibility for medicaid benefits, states may consider *only* income and resources that are available to the applicant. 42 U.S.C. § 1396a(a)(17)(B); see also H.R.Rep. No. 99-453, p. 538 (1985) ("[u]nder § 1396a(a)(17), only income and resources actually available to an individual are considered in determining eligibility") ..."

***3** *Ahern v. Thomas*, 248 Conn. 708, 741, 733 A.2d 756, 776 (1999); see also *id.*, 248 Conn. at 716-17, 733 A.2d at 763:

> Prior to 1986, however, the "availability" requirement of 42 U .S.C. § 1396a(a)(17)(B) provided a loophole by which individuals anticipating the need for expensive long-tern nursing facility care could impoverish themselves and qualify for medicaid assistance while preserving their resources for their heirs. An individual could establish an

> irrevocable trust that permitted, but did not require, the trustee to disburse the income, but not the principal of the trust to the individual. The trustee would pay the income from the trust to the grantor until the medicaid transfer "look back period" had expired and the grantor's transfer of assets to the trust, therefore, would no longer affect his eligibility for medicaid benefits. Thereafter, the trustee would exercise his discretion to withhold payments of trust income from the grantor. As a result, neither the trust principal nor the trust income would be resources "available" to the grantor within the meaning of § 1396a(a)(17)(B), and the grantor would qualify for medicaid assistance. See H.R.Rep. No. 99-265, pt. 1, pp. 71-72 (1985); see also *Forsyth v. Rowe, supra*, 226 Conn. at 829.

In *Ahern*, after plaintiff applicant's admission into a nursing facility she created an irrevocable inter vivos trust in which she placed her assets. Under the pre-1986 federal law applicable on the date of the creation of the trust, although no payment from the trust could be made to the grantor applicant, her creation of the trust did not disqualify grantor applicant from Medicaid eligibility.

In *Skindzier v. Commissioner of Social Services*, 258 Conn. 642, 656-57, 784 A.2d 323, 333 (2001), the Supreme Court concluded that the testamentary trust established by the spouse of plaintiff Title XIX applicant was exempt from the Medicaid prohibition of an applicant's transfer of assets to qualify under the Medicaid threshold. The date applied by the Supreme Court to determine eligibility was the date of the creation of the trust instead of the date of the application for Title XIX benefits. The law applied to determine eligibility was the federal law existing on the date of the creation of the trust instead of on the application date. Thus, in *Skindzier*, the corpus of the trust created by the spouse was not "available" to the applicant and could not be considered by the Department in the determination of Applicant's Title XIX eligibility. Quoting extensively from its *Ahern* decision, the Supreme Court explained its conclusion as follows:

As we previously have noted in this opinion, 42 U.S.C. § 1396p(d)(3)(B)(ii) provides that "any portion of the [irrevocable] trust from which ... no payment could under any circumstances 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 subsection (c) ..." Section 1396p(d)(2)(A), however, provides that subsection (d) applies only to trusts established "other than by will." Thus, subsection (d) specifically provides that the establishment of a trust may constitute a disqualifying disposal of assets, and also specifically exempts testamentary trusts from that provision. We cannot conclude that, having exempted testamentary trusts from the specific transfer of assets rules pertaining to trusts, Congress intended for the more general transfer of assets provisions of subsection (c) to apply. See *Sullivan v. State*, 189 Conn. 550, 555-56 n. 7, 457 A.2d 304 (1983) ("when general and specific statutes conflict they should be harmoniously construed so the more specific statute controls" [internal quotation marks omitted]).

***4** Our conclusion that testamentary trusts are not governed by the general transfer of assets provisions of 42 U.S.C. § 1396p(c) is bolstered by the federal health care financing administration's implementing regulations dealing with the establishment of trusts. Section 3259.6(G) of the State Medicaid Manual, "a publication of the Department of Health and Human Services that explains to the states how the health care financing administration applies statutory and regulatory provisions in administering the medicaid program"; *Ahern v. Thomas, supra*, 248 Conn. at 720-21; provides in relevant part: "When a nonexcluded asset is placed in a trust, a transfer of assets for less than fair market value generally takes place. An individual placing an asset in a trust generally gives up ownership of the asset to the trust. If the individual does not receive fair compensation in return, you can impose a penalty under the transfer of assets provisions. *However, the trust provisions contain specific requirements for treatment of assets placed in trusts* ... [T]hese requirements deal with counting assets placed in trusts as available income, available resources, and/or a transfer of assets for less than fair market value, depending on the circumstances of the particular trust. Application of the trust provisions, along with imposition of a penalty for the transfer of the assets into the trust, could result in the individual being penalized twice for actions involving the same asset. To avoid such a double penalty, application of one provision must take precedence over application of the other provision. Because the trust provisions are more specific and detailed in their requirements for dealing with funds placed in a trust, the trust provisions are given precedence in dealing with assets placed in trusts. *Deal with assets placed in trusts exclusively under the trust provisions* (which, in some instances, require that trust assets be

treated as a transfer of assets for less than fair market value).” (Emphasis added.) State Medicaid Manual § 3259.6(G).

The department argues, however, that because subsection (c) specifically exempts certain trusts from its disqualifying transfer of assets provisions, the fact that a specific exemption for testamentary trusts is not included in that section indicates an intent to subject them to the transfer provisions. We disagree. Rather, we conclude that Congress did not need to include a specific exemption for testamentary trusts in subsection (c) because it had already specifically exempted them from subsection (d), which section subjects trusts to the disqualifying transfer of assets rules of subsection (c) in the first instance.

Nor are we persuaded by the department’s argument in its brief that, “while testamentary trusts are treated more favorably than inter-vivos trusts in terms of deeming their funds available and countable, [all] transfers by will or otherwise are treated the same .” First, we note that, as it applies to testamentary trusts, this interpretation simply is contradicted by the plain language of § 1396p(d)(2)(A), which, as we have noted, specifically exempts testamentary trusts from *all* of the provisions of subsection (d), including the disposal of assets provisions of § 1396p(d)(3)(B)(ii). We also note that, although technically distinct, the availability provisions and the transfer of assets provisions have essentially identical functions, namely, to ensure that certain assets that, in fact, are not available to an individual will nevertheless be considered as if they were available in determining the individual’s medicaid eligibility. We can perceive no reason for Congress to have exempted testamentary trusts from the rule that trust assets that could have been, but were not, paid to an individual are to be considered available to the individual, but *not* to have exempted them from the rule that when trust assets cannot be paid out under any circumstances, they are to be considered assets disposed of by the individual.

***5** *Id.*, at 258 Conn. at 654-57, 784 A.2d at 331-33 (footnotes omitted).

The Ray Moore Trust was created in 1985. The Hearing Officer and the Department should have applied pre-1986 standards and rules of “availability:”
Prior to 1986, however, the “availability” requirement of 42 U .S.C. § 1396a(a)(17)(B) provided a loophole by which individuals anticipating the need for expensive long-term nursing facility care could impoverish themselves and qualify for medicaid assistance while preserving their resources for their heirs. An individual could establish an irrevocable trust that permitted, but did not require, the trustee to disburse the income, but not the principal, of the trust to the individual. The trustee would pay the income from the trust to the grantor until the medicaid transfer “look back period” had expired and the grantor’s transfer of assets to the trust, therefore, would no longer affect his eligibility for medicaid benefits. Thereafter, the trustee would exercise his discretion to withhold payments of trust income from the grantor. As a result, neither the trust principal nor the trust income would be resources “available” to the grantor within the meaning of § 1396a(a)(17)(B), and the grantor would qualify for medicaid assistance. See HR. Rep. No. 99-265, Pt. 1, pp. 71-72 (1985) ...

Congress, however, tightened the “availability” loophole provided by § 1396a(a)(17)(B) of the medicaid act by enacting the medicaid qualifying trust provisions set forth at 42 U.S.C. 1396a(k) (1988). See H.R.Rep. No. 99-265, pt. 1, pp. 71-72 (1985) ...”[A] ‘medicaid qualifying trust’ is a trust ... established (other than by will) by an individual ... under which the individual may be the *beneficiary of all or part of the payments from the trust* and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the *distribution to the individual.*” ... 42 U.S.C. § 1396a(k)(2) (1988). The amount of a medicaid qualifying trust considered “available” to an applicant for purposes of determining eligibility for medicaid benefits “is the maximum amount of payments that may be permitted under the terms of the trust to be *distributed to the grantor*, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum *amount to the grantor* ... 42 U.S .C. § 1396a(k)(1) (1988), ... Thus, pursuant to § 1396a(k)(1), all possible distributions that a medicaid applicant is capable of receiving from a trust (i.e., trust assets that actually are distributed to the grantor and trust assets that could be, but are not, distributed to the grantor) are considered in determining eligibility for medicaid benefits.”

Ahern v. Thomas, 248 Conn. 708, 713-17, 733 A.2d 756 (1999). (Citations omitted; emphasis in original.)

Id., at 258 Conn. at 651-52, 784 A.2d at 330 (footnotes omitted). See also *id.*, 258 Conn. at 658-60, 784 A.2d at 334-35 (because the trust under consideration in *Bezzini* had been established before August 11, 1993, the Appellate Court correctly applied the relevant provisions of Title XIX as they existed before that date).

***6** In *Skindzier* the Supreme Court explained that testamentary trusts are generally exempt from the transfer of asset prohibitions applied to applicants and their

spouses. The principal of such a trust, when intended for the benefit of a person other than an applicant, or when restricted by the terms of such a trust, is not "available" to an applicant:
The provisions set forth at 42 U.S.C. § 1396p(d), governing treatment of trust assets, "were enacted in 1993 in an effort to further tighten the 'availability' loophole of 42 U.S.C. § 1396a(a)(17)." *Id.*, at 720. Section 1396p(d)(3)(A)(i), pertaining to revocable trusts, provides that "the corpus of the trust shall be considered resources available to the individual ..." See also Uniform Policy Manual, *supra*, § 3028.11(B). Section 1396p(d)(3)(B)(ii), pertaining to irrevocable trusts, provides in relevant part that "any portion of the trust from which ... no payment could under any circumstances 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 *Social Services, supra,* 49 Conn.App. at 438.

The court concluded that, under 42 U.S.C. § 1396p(c)(1)(1988), the distribution of the assets in the inter vivos trust at the time of the plaintiff's husband's death constituted a disqualifying transfer of assets. *Id.*, at 442. The court determined that, before his death, when the plaintiff's husband could have revoked the trust, the trust assets could have been "deemed" to the plaintiff under the governing regulations. *Id.*, at 440, citing Uniform Policy Manual (1992) § 4025.65(A). It further determined that, because title to the assets passed irrevocably at the time of death, a disqualifying transfer occurred at that time. *Bezzini v. Dept. of Social Services, supra,* 49 Conn.App. at 440. The court reasoned that exempting such trusts from the transfer of assets rules would run counter to "the legislative concern that the medicaid program not be used as an estate planning tool. The medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving medicaid benefits from the state." (Internal quotation marks omitted.) *Id.*, at 441-42, citing *Forsyth v. Rowe*, 226 Conn. 818, 828-29, 629 A.2d 379 (1993) (settlement trust established by applicant's conservator is medicaid qualifying trust).

The court also noted that the creation of a revocable trust was not a testamentary act, which it appears to have assumed would not be subject to the transfer of assets rules. *Bezzini v. Dept. of Social Services, supra,* 49 Conn.App. at 442-43. Although the department relies on *Bezzini* for the proposition that medicaid should not be used as an estate planning tool, it argues that the court's assumption in *Bezzini* that dispositions by will, including testamentary trusts, are not subject to transfer of assets rules was both dicta and incorrect.

***7** We conclude that the appellate Court's conclusion in *Bezzini* that inter vivos trusts that become irrevocable because of the death of the settlor are subject to the general disqualifying transfer of assets rules does not support the department's position in this case. That conclusion was based on the Appellate Court's interpretation of the provisions of the 1988 amendments, specifically, 42 U.S.C. § 1396p(c)(1) 1988, which are inapplicable here. In the absence of a specific statute providing that the establishment of an irrevocable inter vivos trust may be treated as a transfer of assets, the Appellate Court relied on the legislative policy underlying the transfer of assets rules to reach its conclusion that such trusts are subject to general transfer of assets rules. That conclusion, however, was codified in the 1993 revisions to the medicaid eligibility rules, specifically, 42 U.S.C. § 1396p(d)(3)(B)(ii). As we already have concluded, testamentary trusts are specifically exempted from that provision. See 42 U.S.C. § 1396p(d)(2)(A). Accordingly, even if we were to agree with the department that, contrary to the court's statement in *Bezzini*, dispositions by will and, specifically, testamentary trusts are, under the 1988 amendments, subject to general transfer of assets rules, and that the exemption of testamentary trusts from those rules in the 1993 revisions created a loophole whereby an individual may preserve assets for his or her heirs at the expense of the medicaid program, we have no authority to impose a different rule simply because, in our opinion, it would better implement the legislative policy of minimizing the fiscal risk to that program. "[This] court is precluded from substituting its own ideas of what might be a wise provision in place of a clear expression of legislative will." (Internal quotation marks omitted.) *Fernandes v. Rodriguez*, 255 Conn. 47, 58, 761 A.2d 1283 (2000).

Id., at 258 Conn. at 652-61, 784 A.2d at 330, 336 (footnotes omitted).

After *Ahern*, defendant Commissioner knew or should have known that she was required to determine and apply federal law as it existed on the date of the creation of an irrevocable *inter vivos* trust. After *Skindzier*, defendant Commissioner knew or should have known that she was required to determine and apply federal law as it existed on the date of the creation of a testamentary trust e.g., the testator's date of death.

In this case the applicable federal law was that existing in 1985. This law was not applied by the Hearing Officer or the Department. After *Skindzier*, defendant Commissioner knew or should have known that 1985 testamentary trusts were exempted from the prohibition on Medicaid qualifying trusts.

By including the corpus of the 1985 Trust in plaintiffs' assets to determine Applicant's lack of eligibility for Title XIX benefits and to determine Community Spouse's protected amount, the Department did not follow applicable federal law or the rulings of the Connecticut Supreme Court in *Skindzier* and *Ahern*.

***8** Section 1396a(a)(17) requires defendant Commissioner reasonably to evaluate an applicant's resources and to consider "only such income and resources" that are "available to the applicant." Whether "available" or "actually available" refer to the same standard or to different standards need not be decided in this appeal because it was not reasonable, as a matter of law, for the Hearing Officer and the Department, to conclude that the corpus of the Trust was "available" or "actually available" either to Applicant or the Community Spouse to determine Applicant's eligibility for Title XIX benefits. See *Skindzier, id., Ahern, id.;* compare *Forsyth v. Rowe*, 226 Conn. 818 (1993).

These decisions were available to defendant Commissioner and the Hearing Officer prior to the first administrative hearing on Applicant's application. The Department and the Hearing Officer either ignored or refused to follow these Supreme Court decisions in denying the Applicant Title XIX benefits.

CONCLUSION

Because the Hearing Officer committed errors of law, the appeal is sustained. Pursuant to § 4-183(j), it is ORDERED that the case is remanded to defendant for further proceedings, to take place immediately and without further delay, to determine Applicant's eligibility and the Community Spouse protected amount without regard to any of the principal of the Ray Moore Testamentary Trust. See *Chaterdon v. Wilson-Coker*, 2001 WL 132992 (Conn.Super.2001).

If plaintiff Applicant complies with the requirements of § 4-184a, the court will consider Applicant's claim for reasonable costs and attorneys fees.

Parallel Citations

35 Conn. L. Rptr. 505