STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. T-11/17-606
	)	
Appeal of	)	
	)	

INTRODUCTION

Petitioner, through his estate, appeals a denial of long-term care Medicaid based on excess resources. The following facts are adduced from several telephone status conferences and the filings of the parties, with the record closing on December 20, 2019.

FINDINGS OF FACT

1. Petitioner applied for long-term care Medicaid in October 2017. At the time, petitioner's primary financial asset was a life insurance policy with a cash value of $35,685.40.

2. On October 30, 2017 the Department issued a notice denying petitioner long-term care Medicaid eligibility for

being $33,685.40 over the program's $2,000 resource limit. This appeal followed.[1]

3. When the appeal was filed, petitioner was alleged to lack the legal competence to convert his life insurance policy to cash. In addition, petitioner had a power of attorney (his daughter) who also lacked the competence to convert the policy to cash, on his behalf.

4. For these reasons, an involuntary guardianship was pursued for petitioner in the Probate Division of Superior Court. The parties were initially in agreement to await the outcome of the guardianship action before moving forward with this appeal.

5. In August of 2018, while still awaiting the outcome of the guardianship action, petitioner's counsel at the time requested that the Board reverse the Department's decision on the grounds that the life insurance policy should have been deemed "unavailable" to petitioner, due to his alleged lack of legal competence to convert it to cash.

6. However, in conjunction with filing this request, petitioner's counsel reported that petitioner had passed away

[1] At the time, petitioner's nursing home had also notified him of its intent to involuntarily discharge him, for lack of payment. This action was also appealed to the Board, although petitioner was never evicted from the home and that appeal is no longer an issue.

on July 15, 2018 and would be withdrawing as his attorney.[2] Petitioner passed away before any determination of his need for guardianship had been made by the Probate Division.

7. This appeal remained pending for several months to allow the opportunity for petitioner (through any appropriate representative) to maintain this appeal; eventually an estate was opened and an administrator (petitioner's son-in-law) was appointed.

8. A status conference was then convened by the hearing officer in November 2018, during which it was reported that petitioner's son had also passed away and his estate (opened in another state, where the son resided) was also in the process of being settled; once settled, any assets in the son's estate (because he had pre-deceased petitioner) would pass through petitioner's estate.

9. Status conferences were held in the months following with the expectation that the son's estate would be settled which would then allow for a final accounting of petitioner's estate. This has yet to occur – potentially because petitioner's son had real estate which must be sold –

[2] Petitioner was represented by a non-profit legal advocacy corporation, which had presumably been representing him for the ultimate purpose of preventing his nursing home discharge; it is further presumed that this scope of representation terminated upon petitioner's passing.

and in the interim petitioner has reprised his request that the Board reverse the Department's denial of eligibility.

10. The Department maintains that the denial of eligibility at the time of the application was appropriate and consistent with the rules; in addition, the Department indicates that if petitioner's estate were to utilize the life insurance funds to meet at least a portion of his obligation to the nursing home (i.e. "spend down" the excess resources), then he would be deemed Medicaid eligible at the point those funds would have been spent on his care, so that the remainder of his nursing home obligation would be covered by Medicaid.

11. It is also the case that the proceeds from petitioner's life insurance policy have been released and are currently being held as part of the estate; there is no legal barrier to access by petitioner to these funds, but the administrator of petitioner's estate would prefer to wait until the son's estate is settled and/or petitioner's tax obligations are known (presumably later this year), before spending the life insurance proceeds on anything. In this respect petitioner (through his estate) is making a strategic decision about accessing these funds.

12. The only known (at this point) creditor making a claim against petitioner's estate is the nursing home. Assets from the estate of petitioner's son may come into petitioner's estate, but the administrator of petitioner's estate acknowledges that petitioner's estate will not be subject to any debts of the son.

13. The Department has formally notified petitioner's estate that it will not seek to recover any Medicaid payments made on his behalf, because petitioner's daughter – who is a beneficiary of the estate – is disabled.[3]

ORDER

The Department's decision is affirmed.

REASONS

Review of the Department's determination is de novo. The Department has the burden of proof at hearing if terminating or reducing existing benefits; otherwise the petitioner bears the burden. *See* Fair Hearing Rule 1000.3.O.4.

There is no dispute here that, at the time of his application, petitioner (at the very least in name) held a

[3] To the extent it is an issue, there can be no question that petitioner has an interest in the outcome of this appeal, by and through his estate.

life insurance policy which had a cash value in excess of the $2,000 Medicaid resource threshold. The parties' dispute, and briefing, principally revolves around the Department's interpretation of the following provisions of Vermont's Medicaid rules:

> (a) In general
>
> (1) Resources are cash and other property, real or personal, that an individual (or their spouse, if any):
>
> (i) Owns;
>
> (ii) *Has the right, authority or power to convert to cash (if not already cash*); and
>
> (iii) Is available for their support and maintenance.
>
> (2) Resources are treated in different ways depending on the rules of the coverage group involved and the type and liquidity of the resource.
>
> *(3) Resources are counted based upon their availability and the ease with which they can be converted into cash.* Availability is often affected when more than one person has an ownership interest in the same resource.

Health Benefits Eligibility and Enrollment ("HBEE") Rules § 29.07 ("Resources").

In addition, the rules in general do not make a distinction between "liquid" and "non-liquid" resources with respect to whether the value of the resource is counted against the Medicaid limit. Rather, the rules apply criteria

as to the "countability" of the resource (as quoted above) or excludability of the resource e.g., under HBEE Rule 29.08(a), real property "up for sale" is excluded as a resource, until it is sold. There is no rule excluding – as a category – the life insurance policy at issue here, and in fact the rules contemplate counting such policies as a resource if they have a "cash value" of $1,500. *See* HBEE Rules § 29.08(b).

As such, there can be no dispute that the resource at issue here is the type of resource normally counted with respect to Medicaid eligibility in Vermont. It had a "cash value" and was a financial instrument capable of being converted to cash with relative ease. However, petitioner argues that his lack of legal competence rendered the insurance policy "not available" to him at the time of application. In support of this argument, petitioner cites *I.L. v. New Jersey of Human Services, Division of Medical Assistance and Health Services*, 389 N.J. Super. 354, 913 A.2d 122 (2006), in which the court held that a legally incompetent applicant for long-term care Medicaid did not possess "accessible" resources "until the guardian's appointment, a circumstance that existed 'through no fault of her own.'". *Id.* at 366, 913 A.2d at 130. However, while elements of New Jersey's rules are essentially identical to

Vermont's, the New Jersey court decision rests in substantial part on a rule that is *not* present in Vermont, one that allows the exclusion of "[t]he value of resources which are not accessible to an individual through no fault of his or her own." *Id.* Moreover, at least one other state has determined that lack of legal competence does not preclude counting resources that are the legal right of the applicant to control and liquidate, under nearly identical rules as Vermont's. *See McGovern v. Arizona Health Care Cost Containment System Administration*, 241 Ariz. 115, 384 P.3d 329 (2016) In that case, the Court reviewed both the state and federal Medicaid rules, finding that:

> The text of 20 C.F.R. § 416.1202(a)(1) focuses on an individual's *right, authority, and power* over a resource; under that provision, any practical inconvenience or accessibility difficulties are not relevant to determining whether assets are to be counted...We additionally hold McGovern's assets were "available" to him even though he lacked the mental capacity to exercise his power to liquidate them and would have needed to obtain a conservator to access the assets, particularly the bank accounts, on his behalf.

Id. at 118-119, 384 P.3d at 332-333 (emphasis added).

Additionally, while the Board's prior precedent does not specifically address the issue of whether legal competence allows for the exclusion of a resource under Medicaid rules, previous cases do not support petitioner's basic contention

that the need to take a step such as seeking appointment of a guardian necessarily renders a resource "unavailable." *See* e.g. Fair Hearing No. 8501 (requirement that applicant must request disbursement of funds held in trust, and that the funds must actually be disbursed, does not render those funds "unavailable"); *see also* Fair Hearing No. R-09/14-966 (restrictions on use of funds held in account do not render those funds unavailable). There can be no dispute that petitioner (or his estate) has been the sole and legal owner of the life insurance policy throughout this process and that even if he needed a guardian (an "agent"), he would remain "the principal" with the basic right to convert the policy to cash – the appointment of a guardian was a procedural not substantive step towards activating that right. Furthermore, the policy itself was a financial instrument with a "cash value" and of a type easily convertible to a liquid resource.

However, it is not necessary to reach the question of whether, *in every case*, the need to seek a guardian for a putatively incompetent applicant renders a resource "unavailable," given the specific facts and circumstances here. For one, petitioner's death effectively made his lack of competence a non-issue, given the opening of his estate and appointment of an administrator to access the life

insurance funds at issue.[4] Secondly, and perhaps of most significance, the Department's decision now includes an assurance that petitioner will be allowed to "retroactively" apply the disputed life insurance funds to the costs of his care and determine his eligibility at the point in time he would have "spent down" these funds if he had converted the policy to cash at the time of his application. In this respect, the Department's decision addresses any potentially negative consequences of the delay in converting the policy to cash and using the funds for his care.[5]

As such, the Department's decision is consistent with the rules and must be affirmed by the Board. *See* 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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[4] Even accepting the argument that petitioner's life insurance policy should not have counted as a resource at the time of application, it would have been countable if and once a guardian had been appointed to convert it to cash. By way of example, even when the rules do allow for an owned resource to be excluded, such as with real property up for sale, that resource would be countable once it is sold. Petitioner's estate now has access to the funds at issue.

[5] To the extent petitioner's estate may dispute the methodology by which the excess life insurance resources may be "spent-down," they are free to appeal that decision. At this point, petitioner requests outright reversal of the Department's decision, meaning petitioner would be eligible at least as of the date of application (if not for a retroactive period), without regard to the now-undisputed access to the proceeds of his life insurance policy.