STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 7720
	)	
Appeal of	)	

INTRODUCTION

The petitioner applied for Medicaid coverage for a closed period on May 15, 1986, and was found to be medically eligible but was denied for having resources exceeding the Medicaid resource maximum. The petitioner requested a ruling on the value and "availability" of a particular asset--namely a vacation cottage--which the department maintains places the petitioner over the resource maximum for Medicaid eligibility.

FINDINGS OF FACT

The facts in this case are essentially undisputed:

1. At all times relevant to this matter the petitioner and his wife have owned a cottage located at 64, 66 and 68 Clinton Avenue in Oak Bluffs, Massachusetts in an area known as the Martha's Vineyard Campmeeting Association.

2. The cottage was conveyed to the petitioner and his wife in December of 1984 by way of a "bill of sale for personal property" in which it was recited that "said home is considered personal property as the lots on which it is situated are rented from the said Martha's Vineyard Campmeeting Association."

3. The Campmeeting Association is the record owner of the realty under the cottage and although the town of Oak Bluffs prepares individual tax bills for each cottage owner, it is only as a courtesy to the Association and the town does not consider the cottage owners as having any ownership interest in the land or taxable real estate. Neither does the town record the transfer of the cottages as real estate transfers in the town registry.

4. The Campmeeting Association leases the lots on a yearly basis and may refuse to renew the lease and require the removal of the cottage. The Association has also set up rules for transfer of the cottages which require among other things prior approval by a lease committee based upon letters of reference attesting that prospective buyers subscribe to the values and goals of the Association.

5. The current market value of the cottage is estimated at $65,000.

6. On September 15, 1984, the petitioner and his wife executed a promissory note in favor of the sellers of the cottage for $27,500 to be paid in monthly installments of $597.92 for 60 months. The note stated that it was "secured by first collateral interest in cottage located at 66 Clinton Avenue, Oak Bluffs, Mass."

7. On August 12,1985, The petitioner and his wife executed a promissory note in favor of K.W.S., a friend who lent them money while petitioner's health was failing, for $50,773.14 plus $1,669.25 in interest within 120 days of

the date of execution (December 12, 1985). The note stated that it was "secured by a second collateral interest in a cottage located in the Methodist Campmeeting Association, 66 Clinton Avenue, Oak Bluffs, Mass."

8. On December 10, 1985, a new promissory note was executed by the petitioner and his wife in favor of K.W.S. for $71,952.01 plus interest of $2,365.55, to be paid by April 9, 1986. That note also reflected that it was "secured by a second collateral interest in a cottage located in he Methodist Campmeeting Association, 66 Clinton Avenue, Oak Bluffs, Mass."

9. None of the above promissory notes are recorded with the town clerk or "perfected" by any other method of recording.

10. The petitioner was unable to make the "due date" on either of the notes and they are both still outstanding and payable on demand with accrued interest.

11. If the entire value of the property at issue is countable as a resources to the petitioner, he will be over-income for Medicaid.

ORDER

The decision of the department to treat the petitioner's property (the cottage) as unencumbered is upheld.

REASONS

The Medicaid regulations require that:

> All resources of the aged, blind or disabled applicant(s) for Medicaid and those of his/her responsible relatives must be counted, except those resources specifically excluded . . . an individual or couple passes the resource test for Medicaid eligibility if the total value of the countable resources of the individual or couple does not exceed the applicable resource maximum. Medicaid Manual ə M230.
>
> . . . The maximum allowable resources, including both liquid and non-liquid assets, of all members of the household shall not exceed $1,000 for the household. The total equity value of all real and personal property, excepting excluded items, may not exceed the above amount. W.A.M. ə 2261 (emphasis added).

The regulations emphasize that all liquid and non-liquid (real and personal property which cannot be converted to cash within 20 working days):

> Are evaluated according to their equity value. Equity value is defined as the price an item can be reasonably expected to sell for on the open market minus any encumbrances. Medicaid Manual ə M231.

The parties agree that the property can be reasonably expected to sell on the open market for about $65,000. If that market value is totally countable to the petitioner, his resources, based on the value of the cottage alone, exceed the maximum by $64,000. The petitioner asserts, however, that his equity value in the cottage, the value which is critical under the Medicaid regulations, is zero

because the property is "encumbered" by secured loans amounting to over $75,000.

Under Massachusetts law, an article attached to the land is usually considered realty but that presumption can be overcome by a factual showing that the parties intended the article to remain personalty. Hannah v. Frawley 138 N.E. 385 (1933), Nadien v. Bazata 22 N.E. 2d 1 (1939). This distinction is potentially important because there may be different criteria for creating ownership interests in the two types of property. In this case, the facts tend to show, as the petitioner urges, that the parties intended that the cottage be considered personal property. The cottage was passed by a bill of sale, not a deed, and the rules and regulations of the campmeeting association make it clear that the cottage is subject to removal for violation of camp rules. Therefore, ownership interests will be analyzed as if the cottage were a form of personalty.

The term "encumbered" is not defined in the department's regulations. However, any interpretation of that term must be consistent with the principle of "actual availability" which, stated simply, means that the asset must be "available to meet need" of the recipient. W.A.M. ə 2260, Fair Hearing Nos. 6710, 6838, 6935 and 6966. In terms of a piece of real or personal property it must be determined whether the recipient can actually convert the market value of the property at issue into cash which he

could use to meet his needs. The ability to so convert the property usually depends upon whether he has a paramount and exclusive ownership interest in the property at issue such that he does not need the legal agreement of another party to alienate the property.

In order to determine who might have a legal ownership interest in the petitioner's property for Medicaid purposes, it is necessary to look to state law. See Cannuni v. Schweiker, 740 F2d 206, 264 (3rd Cir. 1984). Where property attached to land is involved, the law of the place where the property is located will govern.[1]

> It is a well established principle that the law of the state in which the land is situated must be looked to for the rules which govern its descent, alienation, and transfer, and for the effect and construction of the conveyances. International Paper Co., et al v. Bellows Falls Canal Co., 91 Vt. 350, 367-368 (1917). (citations omitted).

The petitioner concedes that neither of the "secured" loans at issue followed requirements of "perfecting" under article 9 the Massachusetts Uniform Commercial Code. What that means is that the petitioner clearly could legally sell the cottage to a third party (a "bona fide purchaser") without the acquiescence of his two note holders and the sale would be binding on all parties. The petitioner argues, however, that the lack of perfection does not mean that the two note holders have no legal interest in the property. The promissory notes, he argues, create an expectation of security in the creditors, which expectation

can be protected by judicial action as set forth by statute at A.L.M.C. 109 A ɔɔ 7 and 9, including restraining or setting aside any sale of the property, particularly if intent to defraud is proven.

While the two loan holders have an impressive array of legal remedies at their disposal if the petitioner conveys the property, nevertheless, the mere existence of those remedies does not create an ownership interest in the property which would prevent its conversion to cash by the petitioner. He (and his wife) clearly have the sole and exclusive right to sell this property unless and until one of the note holders goes to Court and invokes the provisions of the U.C.C. and can prove an intent to defraud on the part of the petitioner so as to persuade a Court to intervene. At best, it could be said that the note holders have a potential future ownership interest in the property which interest must be created by Court decree.

As judicial intervention is necessary to create an ownership interest in the property for the note holders, they are really no different from other creditors who may obtain judicial attachments or liens on property. Although many property owners have debts which may be reduced to judgement and which may be collected by liens, their property is not, therefore, generally thought to be already "encumbered". Certainly the regulations of the Department of Social Welfare cannot be read so broadly as to exclude from resource consideration the assets of those who have

debts which might be reduced to judgement. To do so would be extremely speculative because there are any number of reasons why a collection action may never be undertaken. It certainly is not clear in this case, even though both loans are large and in serious default, that either loan will ever be collected through a judicial encumbrance and forced sale.

It must be concluded, therefore, that the petitioner's cottage is not at present encumbered and that the petitioner has the legal ability at present to sell the property and get $65,000 for it ($65,000 representing his equity value). As this application is for a closed period, it appears that at no time during his period of claimed eligibility, did the petitioner have an "encumbrance", as that term is used in the regulations, on the vacation cottage and, so, the entire market value of the cottage must be counted against him. Only if the note holders' claims had been judicially established through liens or otherwise, could an encumbrance be found to exist.

FOOTNOTES

[1]The Department argues, quite incorrectly, that Vermont law must govern the question of whether the property in Massachusetts is encumbered because the petitioner is a Vermont citizen and Vermont benefits have been applied for. Under Vermont law, the Department argues, the petitioner's property would be treated as real estate that could only be encumbered by a mortgage. The Department cites no authority for its urging a radical departure from a well settled common rule of law. As an alternative, the department urges that Massachusetts welfare law be used to characterize the petitioner's property. As the Massachusetts Department of Public Welfare is in no way involved in this matter, that suggestion

cannot be entertained.

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