



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., Ph.D.
Cabinet Secretary

September 28, 2011

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held September 8, 2011. Your hearing request was based on the Department of Health and Human Resources' denial of Aged/Disabled Waiver Medicaid based on the imposition of a transfer of assets penalty.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Eligibility for the Aged/Disabled Waiver Program is based on current policy and regulations. Some of these regulations state as follows: Burial trusts are totally excluded as assets – and their establishment is not treated as an uncompensated transfer of resources - when they meet specific policy criteria. Otherwise, burial trusts are considered as any other trust funds. (West Virginia Income Maintenance Manual Chapters 11.4 and 11.5)

Information presented during the hearing reveals that the burial trusts established through Unity Financial Life Insurance Company cannot be excluded as assets under Medicaid policy. Therefore, your transactions are treated as an uncompensated transfer of resources and a transfer of assets penalty should be applied.

It is the decision of the State Hearing Officer to **uphold** the Department's denial of Aged/Disabled Waiver Medicaid.

Sincerely,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Eva Marie Dawson, WVDHHR

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES
BOARD OF REVIEW**

IN RE: -----,

Claimant,

v.

Action Number: 11-BOR-1590

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing for ----- . This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700 of the West Virginia Department of Health and Human Resources. This fair hearing was convened via videoconference on September 8, 2011 on a timely appeal filed July 21, 2011.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

Under Section 2176 of the Omnibus Budget Reconciliation Act of 1981, states were allowed to request a waiver from the Health Care Financing Administration (HCFA) so that they could use Medicaid (Title XIX) funds for home and community-based services. The program's target population is individuals who would otherwise be placed in an intermediate or skilled nursing facility (if not for the waiver services). Services offered under the Waiver Program will include: (1) chore, (2) homemaker and (3) case management services. West Virginia has been offering the Waiver Services Program since July, 1982 to those financially eligible individuals who have been determined to need ICF level care but who have chosen the Waiver Program services as opposed to being institutionalized.

III. PARTICIPANTS:

-----, Claimant's husband
-----, Claimant's representative
-----, Chief Marketing Officer and owner, [REDACTED] Life Insurance Company
-----, President, [REDACTED] Financial Services
-----, Case Manager, [REDACTED] Corporation
Eva Marie Dawson, Economic Service Worker, WVDHHR
Tina Elza, Economic Service Worker, WVDHHR

Presiding at the hearing was Pamela L. Hinzman, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether the Agency was correct in its denial of the Claimant's Aged/Disabled Waiver Medicaid application.

V. APPLICABLE POLICY:

West Virginia Income Maintenance Manual Chapters 11.4 and 11.5

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Notice of Decision dated July 25, 2011
- D-2 West Virginia Income Maintenance Manual Chapters 11.4 and 11.5
- D-3 Copy of [REDACTED] Life Insurance Company Burial Trusts
- D-4 Fair Hearing Request

Claimant's Exhibits:

- C-1 Letter from Department (asset assessment) dated July 25, 2011
- C-2 DHS-2
- C-3 Trust agreement information
- C-4 Case comments

VII. FINDINGS OF FACT:

- 1) The Claimant's husband, -----, applied for Aged/Disabled Waiver Medicaid benefits for the Claimant on May 20, 2011.

- 2) West Virginia Department of Health and Human Resources (WVDHHR) Economic Service Worker Eva Marie Dawson testified that the Claimant's application was denied as the Claimant and her husband had transferred funds for the purchase of burial trusts through [REDACTED] Life Insurance Company. According to Ms. Dawson, the plans fail to meet the State's definition of Irrevocable Burial Trust Fund. Exhibit D-3 indicates that the Claimant transferred \$11,500 to [REDACTED] Life Insurance Co. via a \$6,592.21 personal check and \$4,907.79 via 1035 exchanges from [REDACTED] General Life. The Claimant's husband, -----, transferred \$11,500 to [REDACTED] via personal check. Ms. Dawson contended that the burial plan was not made through a funeral home and is not an actual goods and services contract.

Ms. Dawson testified that – as the trusts established through [REDACTED] Financial are not excluded burial assets - a transfer of assets penalty is applicable and would go into effect should the Claimant enter a skilled nursing facility

- 3) The Department sent a Notice of Decision (D-1) to the Claimant on July 25, 2011, which states, in pertinent part:

ACTION: Your 05/20/11 application for Home and Community Based Waiver Medicaid has been DENIED.

REASON: The amount of assets is more than is allowed for this benefit.

- 4) -----, the Claimant's representative, testified that the Claimant does not dispute information provided by Ms. Dawson concerning the transfers, but believes the burial trusts are exempt assets because they are irrevocable and inaccessible to the Claimant and her husband. He maintained that funds for goods and services specified within the trust can only be paid to a funeral home and only used for funeral costs. In addition, ----- contended that the trust meets all Social Security Administration regulations and is an insurance policy specifically designated for funeral expenses.

-----, Chief Marketing Officer and owner of [REDACTED] Life Insurance Co., testified that the policy was designed explicitly to comply with Medicaid regulations in as many states as possible. As part of the plan, he stated that ----- permanently renounced control of the cash surrender and/or loan value of the policy, as well as beneficiary rights. ----- indicated that the plan is sold in 33 other states and has worked well, and that the company wants to be on Medicaid's side in the matter, as incidences of fraud are greatly reduced under the plan. Excess funds remaining in the policy – following burial – can be paid to the deceased's estate or made payable to the State of West Virginia.

- 5) Exhibit D-3 includes an Irrevocable Assignment of Ownership to [REDACTED] Funeral Trust, and states that the change in ownership is permanent, that the individual assigning ownership renounces his power to control ownership of the policy, that the individual gives up the right to change the policy beneficiary, and that

any proceeds received by the trust in excess of the amount required to cover the cost of any goods and services listed on the reverse side will be paid to the estate of the insured. This agreement includes a “List of possible good and services qualifying for reimbursement.” The lists specifies various costs associated with embalming and care of the deceased, viewing/visitation and funeral services, and merchandise and cemetery costs. The agreement states that the policy does not provide “specific funeral services and merchandise” and “is not an agreement with a funeral establishment.” Furthermore, it states, “No representations were made that specific merchandise and/or services have been purchased or will be provided at the time of death” and “My ability to qualify for state and federal public assistance programs is not guaranteed.”

6) West Virginia Income Maintenance Manual Section 11.4, TT, 2, (D-2), states:

Generally, all trusts are counted as assets, regardless of their purpose, restrictions on distributions or on the trustee’s discretion to distribute the funds, whether acted on or not. There are exceptions to this general rule and there is a difference in the treatment of trusts established by a will and those not established by a will. In addition, sometimes revocable and irrevocable trusts are treated differently.

If a trust is made up of the client’s resources and those of one or more other persons, only the amount established with the client’s resources is counted.

For purposes of this item (item 2), the terms “individual” or “client” include:

- Individual
- Individual’s spouse
- Any person, including a court or administrative body, with legal authority to act in place of, or on behalf of, the individual or individual’s spouse
- Any person, including a court or administrative body, acting at the direction of, or upon the request of, the individual or the individual’s spouse...

b. Trusts Not Established By Will

When the following two conditions are met, the trust policy contained below in this item is applied. If the two conditions are not met, the fund is treated as any other bank account.

- An individual has established a trust if his resources were used to form all or part of the corpus of the trust.

- Any of the following persons established the trust for the individual by any vehicle other than by will:

- Individual
- Individual's spouse
- Any person, including a court or administrative body, with legal authority to act in place of, or on behalf of, the individual or individual's spouse
- Any person, including a court or administrative body, acting at the direction of, or upon the request of, the individual or the individual's spouse...

This policy section goes on to state that burial trusts are totally excluded as assets – and their establishment is not treated as an uncompensated transfer of resources - when the following conditions have been met:

- The individual signs a contract with the funeral director promising pre-payment in return for specific funeral merchandise and services.
- The contract is irrevocable.
- The individual pays the agreed upon amount to the funeral director in the form of a direct cash payment, purchase or transfer of a life insurance policy or annuity which is assigned to the funeral director.
- The funeral director, in turn, places the preneed payment or device into a trust or escrow account which the funeral director established himself. If the client establishes the trust or other device himself, the amount may be considered a transfer of resources.

7) West Virginia Income Maintenance Manual Section 11.5, C, 7, states:

Beginning with applications processed on 8/11/93, a client may retain a maximum of \$3,000 in burial funds for himself. He may also retain the same amount for his spouse. These funds may be in the form of money set aside for burial (maximum of \$1,500 not comingled with other funds), face value of life insurance policies, revocable or some irrevocable burial trusts or prepaid funeral contracts, etc.

This section stipulates that burial trusts are treated like any other trust funds, unless the same conditions listed in Section 11.4, TT, 2, b, are met.

III. CONCLUSIONS OF LAW:

- 1) Policy states that burial trusts are totally excluded as assets – and their establishment is not treated as an uncompensated transfer of resources - when the individual signs an irrevocable contract with a funeral director promising pre-payment in return for specific funeral merchandise and services; pays the agreed upon amount to the funeral director in the form of a direct cash payment, purchase or transfer of a life insurance policy or annuity which is assigned to the funeral director; and the funeral director, in turn, places the preneed payment or device into a trust or escrow account which the funeral director established himself. If the client establishes the trust or other device himself, the amount may be considered a transfer of resources.
- 2) The Claimant and her husband transferred \$23,000 to [REDACTED] Life Insurance Co. on May 11, 2011. While these monies/insurance policy exchanges were placed in what the company has distinguished as Irrevocable Burial Trust accounts, the trusts cannot be excluded as assets for West Virginia Medicaid purposes because they contain no irrevocable contract with a **funeral director for prepayment of specific funeral merchandise and services [emphasis added]**. In addition, the agreement indicates that excess funds remaining in the trusts – following burial – can be paid to the estate of the deceased. Since there is no existing contract for specific, pre-selected services/merchandise, there is no way to determine how much the estate could potentially recover from the trusts.
- 3) As the trusts established by the Claimant and her husband do not meet the definition of Irrevocable Burial Trusts for West Virginia Medicaid purposes, the financial transactions made to establish the trusts must be treated as uncompensated transfers of resources. Therefore, a transfer of assets penalty applies.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Agency's action in denying the Claimant's Aged/Disabled Waiver Medicaid application and apply a transfer of assets penalty.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 28th Day of September, 2011.

**Pamela L. Hinzman
State Hearing Officer**