

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-042

JUNE TERM, 2005

In re Appeal of Wendell Brigham	}	APPEALED FROM:
	}	
	}	
	}	Human Services Board
	}	
	}	
	}	DOCKET NO. FH No. 19,319

In the above-entitled cause, the Clerk will enter:

Petitioner appeals a decision of the Human Services Board upholding the Department of Children and Families= determination that an investment account owned by petitioner=s wife was countable as a resource in determining his initial eligibility for long-term Medicaid benefits. We affirm.

Petitioner entered a nursing home in November 2003 and applied for long-term Medicaid benefits on July 29, 2004. At the time of his application, his wife owned a revocable trust that included shares in a prime rate investment account worth \$172,000. Under the agreement governing the investment account, the account could be liquidated only during four designated periods each year. The last liquidation period before petitioner=s Medicaid application ended on May 24, 2004, and the next period following the application was from August 2 to August 23, 2004.

The Department notified petitioner that he was not eligible for long-term Medicaid benefits because his wife=s investment account was a countable resource, and thus his resources exceeded the \$2000 limit by \$170,000. Petitioner appealed the Department=s decision to the Board, arguing that although the corpus of his wife=s trust was available to him at the time of his application, the investment account was not because its shares were not redeemable during the calendar month in which he applied for Medicaid benefits. The Board rejected this argument, reasoning that (1) petitioner=s wife owned the investment account outright in July 2004; (2) there were no restraints on her ability to alienate the property as she saw fit; and (3) and she had the right to liquidate her shares in accordance with the agreed schedule of payouts. The Board compared this case to another one in which the Second Circuit Court of Appeals ruled that funds from a personal injury settlement were not unavailable merely because the SSI recipient had to petition the court to use them. See Frerks v. Shalala, 52 F.3d 412, 414 (2d Cir. 1995) (A[T]he fact that Frerks may neither draw on nor dispose of the funds at will does not negate the fact that the funds can be released and used for his support and maintenance as the need arises.@).

Petitioner contends that the Board=s decision is plainly inconsistent with federal law governing Medicaid eligibility. In support of this argument, he relies primarily on a federal regulation and a provision in a federal statute. The regulation provides that if an individual has a right to liquidate certain property, it is considered a countable resource for determining Medicaid eligibility, but if the property cannot be liquidated, it will not be considered a resource. 20 C.F.R. ' 416.1201(a)(1); see also Medicaid Manual ' M230. Petitioner challenges the Board=s finding that his wife had the right to liquidate the investment account, citing a federal law providing that no resources of a community spouse shall be countable starting with the month after the recipient is deemed eligible for benefits and throughout the period in which the recipient is institutionalized. See 42 U.S.C. ' 1396r-5(c)(4). In making this argument, petitioner contends that we owe no deference to the Board=s interpretation of federal law. See Dutton v.

Dept of Social Welfare, 168 Vt. 281, 284 (1998).

Irrespective of whether we owe the Board deference, petitioner=s argument is unavailing. At the time of petitioner=s application for long-term Medicaid benefits, his wife owned an investment account containing funds that were available to her, albeit during certain designated time periods each year. Nothing in federal or state law suggests that the investment account should be excluded merely because it could not be liquidated during the calendar month in which the application for Medicaid benefits occurred. Petitioner notes that no federal provision requires counting all resources that are not explicitly excluded, but his argument in support of excluding his wife=s investment account because it could not be converted to cash during the month he applied for long-term Medicaid benefits does not hold up. The federal statutory provision upon which petitioner relies does not apply in determining initial eligibility; rather, it concerns exclusion of the community spouse=s resources after the eligibility for benefits has been established. See Houghton v. Reinertson, 382 F.3d 1162, 1174 (10th Cir. 2004) (42 U.S.C. ' 1396r-5(c)(4) was intended to protect against reclassification of community spouse=s resources that were not included in initial classification). Here, the issue is whether the Board erred in upholding the Department=s decision to deny long-term Medicaid eligibility by counting his wife=s investment account. Section 1396r-5(c)(4) does not come into play because petitioner=s initial eligibility was not established. In short, the Board=s determination that the investment account owned by petitioner=s wife must be counted as a resource in determining Medicaid eligibility is completely consistent with state and governing federal law.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Geoffrey W. Crawford, Superior Judge