

TO: Local Commissioners, Medicaid Directors

FROM: Betty Rice, Director
Division of Consumer and Local District Relations

SUBJECT: Verdow and Spetz Court Decisions - Availability of Assets Held in Irrevocable Trusts

EFFECTIVE DATE: Immediately

CONTACT PERSON: Local District Support:
Upstate (518) 474-8216 NYC (212) 268-6855

This is to advise social services districts of adverse decisions in the cases of Verdow v. Sutkowy (USDC/NDNY) and Spetz v. New York State Department of Health (Supreme Ct., Chautauqua Co.). In these cases, the courts ruled that assets in an irrevocable trust created by a Medicaid applicant/recipient (A/R) or the A/R's spouse cannot be considered available based on the creator's retention of a limited power of appointment. As a result of the Verdow decision, any A/R whose Medicaid eligibility was denied or discontinued from September 1998 onward solely because the A/R or the A/R's spouse was the beneficiary of a self-settled trust granting them a limited power of appointment, must have his or her Medicaid eligibility redetermined.

Typically, trust instruments providing for a limited power of appointment allow the A/R to add or change the beneficiaries of the trust, other than to the A/R, the A/R's spouse, their estates or their creditors. In the Spetz and Verdow cases, the Department and the social services districts argued that, given the fact that Section 7-1.9 of the Estates, Powers and Trusts Law (EPTL) allows any trust to be revoked if the consent of all beneficiaries is obtained, the retention of a power to remove beneficiaries would allow the A/R to exercise control over the beneficiaries, and thus over the trust itself. Both courts strongly rejected this argument.

The following is a summary of the holdings in the two cases. Please note that these principles should be applied by districts in reviewing all trusts, not merely those involving the retention of a limited power of appointment.

1. An ostensibly irrevocable trust cannot be considered to be revocable, nor can the trust's assets be considered available to the A/R, based on the speculative possibility of a revocation pursuant to EPTL Section 7-1.9.
2. A revocable trust is one that can be terminated by the grantor. If the trust cannot terminate without the consent of the trust beneficiaries, the trust is not revocable.

3. In the absence of evidence that the A/R is acting fraudulently or in bad faith, assets in an irrevocable trust cannot be considered available to the A/R based on the remote possibility of collusion among the grantor, the trustee, and the beneficiaries.
4. The extent to which trust assets are resources in the control of the A/R, according to the Medicaid statutes and regulations governing the treatment of trusts, corresponds to the trustee's authority, under the specific terms of the trust agreement, to make payments to or for the benefit of the A/R. Under these statutes and regulations, any portion of the trust principal, and the income it generates, that can be paid to or for the benefit of the A/R under any circumstances is a countable resource.
5. The statutory right of revocation under EPTL Section 7-1.9, and the possibility of collusion among the parties to the trust, do not represent the "circumstances" contemplated by the aforementioned Medicaid statutes and regulations, and thus cannot be the basis for counting trust assets as available resources.