

**OP. NO. 05-092**

**PROFESSIONS AND OCCUPATIONS: FUNERAL SERVICES – PRENEED FUNERAL CONTRACTS.**

**Funds placed in certain 1989 trust are subject to law in effect in 1989 and are exempt in calculating available resources under Virginia Medicaid Program. Funds placed in certain 2005 trust are exempt in calculating available resources under Program, provided that funds transferred to trust do not exceed value of funeral services and supplies purchased by person designated in preneed agreement as trustor.**

The Honorable Harvey B. Morgan  
Member, House of Delegates  
January 12, 2006

**Issues Presented**

You ask whether assets held in trust, as described in two fact situations, are exempt resources in calculating the medically needy resource limit in an application for Medicaid assistance in Virginia.

**Response**

It is my opinion that the funds that were placed in a trust in 1989 are subject to the law in effect in 1989 and are exempt in calculating available resources under the Virginia Medicaid Program. It is further my opinion that the funds placed in a trust in 2005 are exempt in calculating available resources under the Virginia Medicaid Program, provided that the funds transferred to the trust do not exceed the value of funeral services and supplies purchased by the person designated in the preneed agreement as the trustor.

**Background**

You present two fact situations. First, you state that a Virginia resident has entered into a preneed trust agreement that complies with §§ 54.1-2820 through 54.1-2825, of the *Virginia Code*. You further relate that by agreement dated July 11, 1989, on a standard trust agreement preprinted form, Mr. S<sup>1</sup> was named as "trustor" and a bank was listed as "trustee." The 1989 trust agreement appointed the ABC Funeral Chapel as funeral director to provide funeral services in accordance with the terms of the trust. The trustor funded the trust with a check, payable to the bank, which he gave to the funeral director to forward to the bank.

Secondly, you relate that by power of attorney a Virginia resident has entered into a preneed trust agreement that also complies with §§ 54.1-2820 through 54.1-2825. By agreement dated February 16, 2005, on a standard burial trust agreement, a preprinted form provided by an association, Ms. R was listed as "trustor" and a bank was listed as "trustee." The trust agreement appointed XYZ Funeral Home as "funeral director" to provide funeral services in accordance with the terms of the trust. The trustor funded the trust with a check payable to the

bank. Pursuant to the 2005 trust agreement, the bank purchased noncash-value term life insurance from a life insurance company licensed to issue life and health insurance policies in Virginia. The insurance company forwarded the policy to the bank to be held in trust pursuant to the 2005 trust agreement.

### **Applicable Law and Discussion**

You indicate that the 1989 trust agreement was dated July 11, 1989. Therefore, evaluation of the arrangement for purposes of determining Medicaid eligibility is governed by the substantive Medicaid law and regulations in effect in 1989. Before August 11, 1993, the penalty period for uncompensated transfers of assets under the Medicaid program, including transfers to irrevocable trusts, expired no later than thirty months after the date of transfer.<sup>2</sup> Significant amendments to the Federal Social Security Act, relative to treatment of trusts under the Medicaid program,<sup>3</sup> were enacted in 1993 under the Omnibus Budget Reconciliation Act of 1993.<sup>4</sup> The amendments became effective August 11, 1993, and were prospectively applied from that date.<sup>5</sup>

Further, you indicate that the Medicaid applicant, as trustor, wrote a check payable to the bank, as trustee, and delivered the check to the funeral director to forward to the bank. You do not indicate that the funeral director established the trust.<sup>6</sup> In 1989, assets placed directly in a trust by the purchaser of a preneed funeral arrangement were not deemed to be a countable resource, provided that the amount placed in trust was commensurate with the value of the services and supplies contracted for under the preneed arrangement. Therefore, under the 1989 trust agreement, the assets transferred by check payable to the trustee are exempt.

The second situation is distinguishable because the 2005 trust agreement is subject to the amendments of 42 U.S.C. § 1396p, which became effective on August 11, 1993, under the Omnibus Budget Reconciliation Act of 1993. Pursuant to 42 U.S.C. § 1396p(d), evaluation of both revocable and irrevocable trusts is required to determine Medicaid eligibility. Assets transferred into trust by individuals for the purpose of funding preneed funeral contracts, however, are not exempt under § 1396p(d). Thus, after August 11, 1993, assets in trusts used to fund preneed funeral contracts were deemed to be countable resources, subject to the federal exclusion for burial space items and certain other exclusions adopted by the states under their individual medical assistance plans.<sup>7</sup>

In 1995, the Health Care Financing Administration<sup>8</sup> issued guidance to the states indicating that, where an individual pays the funeral director for services and supplies, and the funeral director in turn places the preneed payment into a trust or escrow arrangement, the trust assets are not subject to the requirements of 42 U.S.C. § 1396p(d).<sup>9</sup> This procedure commonly is referred to as the "two-step" process.<sup>10</sup> After August 11, 1993, an individual could not exempt assets transferred directly into a trust to fund a preneed funeral arrangement. At the same time, under Virginia law, a funeral director could not establish an irrevocable trust for that purpose.<sup>11</sup> The 1999 Session of the General Assembly of Virginia, however, amended § 54.1-2820(A)(7)<sup>12</sup> to allow any person, which would include funeral directors, to establish irrevocable trusts for the purpose of paying for funeral and burial expenses.<sup>13</sup>

Under the facts you present regarding the 2005 trust agreement, it is implicit that the trustor delivered a payment directly to the funeral director. The funeral director then forwarded the funds to the trustee to be placed in a trust that was

established by a person other than the individual purchasing the funeral supplies and services. Therefore, notwithstanding the fact that the individual purchasing the funeral services and supplies is the "trustor" on the preneed trust agreement, such individual transferred the funds to the funeral director rather than directly to the trustee.

In a recent unpublished circuit court order,<sup>14</sup> the court held that an arrangement with a bank met the requirements of the "two step" process where the preneed trust agreement indicated that the Medicaid applicant was the "grantor" or trustor.<sup>15</sup> The court cited a finding by the Administrative Hearing Officer that the trust was established by the funeral director although the preneed trust agreement listed the plaintiff/Medicaid applicant as the trustor, rather than the funeral director.<sup>16</sup> Virginia Medicaid Policy does not require the funeral director to actually establish the trust, but does require transfer of the cash asset to the funeral director, who must in turn place the asset in a trust "*established by a person other than the individual.*"<sup>17</sup> The Medicaid Policy does not prohibit payment to the funeral home in the form of a check made payable to the trust.

The foregoing Medicaid Policy, read in conjunction with the holding of the recent circuit court that the naming of the Medicaid applicant as the trustor is not dispositive, supports a conclusion that the 2005 trust agreement meets the requirements of the "two step" process set forth in the Virginia Medicaid Policy Manual.<sup>18</sup> Therefore, under the 2005 trust agreement, the assets held in trust are exempt, provided that the value of the assets does not exceed the value of the supplies and services purchased by the Medicaid applicant.

### **Conclusion**

Accordingly, it is my opinion that the funds that were placed in a trust in 1989 are subject to the law in effect in 1989 and are exempt in calculating available resources under the Virginia Medicaid Program. It is further my opinion that the funds placed in a trust in 2005 are exempt in calculating available resources under the Virginia Medicaid Program, provided that the funds transferred to the trust do not exceed the value of funeral services and supplies purchased by the person designated in the preneed agreement as the trustor.

<sup>1</sup>For purposes of this opinion, the names of the trustors and funeral homes have been given fictitious identities.

<sup>2</sup>Virginia Department of Social Services, Medicaid Eligibility Manual, Vol. XIII, ch. 14 § M1450.200, at \*105, *available at* [http://www.dss.virginia.gov/files/division/bp/me\\_famis/policy/manual/m14.pdf](http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf) [hereinafter Medicaid Manual].

<sup>3</sup>See 42 U.S.C.S. § 1396p(d) (LexisNexis 2001).

<sup>4</sup>See Pub. L. No. 103-66, 107 Stat. 312 (1993) (codified as amended in scattered sections),

<sup>5</sup>See Medicaid Manual, *supra* note 2, ch. 11, §§ M1120.201, M1140.404, at \*44, \*184, respectively, *available at* [http://www.dss.virginia.gov/files/division/bp/me\\_famis/policy/manual/s11.pdf](http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf).

<sup>6</sup>A 1987 opinion of the Attorney General concludes that it is a violation of § 11-24 for a funeral director, in providing a preneed burial service contract, to offer a trust agreement in which the contracting party may elect to make the trust irrevocable. See 1986-1987 Op. Va. Att'y Gen. 78, 79. The 1989 Session of the General Assembly repealed § 11-24 and enacted Article 5, Chapter 28 of Title 54.1, §§ 54.1-2820 to 54.1-2825). See 1989 Va. Acts ch. 684, at 1582, 1587-89.

<sup>7</sup>See 42 U.S.C.S. § 1382b(a)(2)(B) (LexisNexis 2005); Va. Code Ann. § 32.1-325(A)(2) (2004).

<sup>8</sup>On June 14, 2001, Secretary Tommy G. Thompson announced that the Health Care Financing Administration was renamed the Centers for Medicare & Medicaid Services. See United States Department of Health & Human Services website, CMS Press Office (archive), at <http://www.hhs.gov/news/press/2001pres/20010614a.html> (last visited Jan. 11, 2006).

<sup>9</sup>See Letter from Sally K. Richardson, Director, Medicaid Bureau, Health Care Financing Administration, to State Medicaid Directors (Feb. 21, 1995).

<sup>10</sup>See Medicaid Manual, *supra* note 5, ch. 11, § M1140.404(B), at \*184-85.

<sup>11</sup>See Op. Va. Att'y Gen.: 1997 at 160; 1986-1987, *supra* note 6, at 78.

<sup>12</sup>See 1999 Va. Acts ch. 819, at 1494, 1494.

<sup>13</sup>Section 54.1-2820 permits a funeral director, residing or doing business within the Commonwealth, to establish an irrevocable trust for a Medicaid applicant for the purpose of holding payment made pursuant to a preneed funeral contract. See 2000 Op. Va. Att'y Gen. 170.

<sup>14</sup>See *Vanderwielen v. Va. Dep't of Med Assistance Servs.*, No. CH02-02-0522-00 (Bedford Cty. Va. Cir. Ct. Feb. 3, 2003).

<sup>15</sup>*Id.* at \*1-2.

<sup>16</sup>*Id.* at \*1.

<sup>17</sup>See Medicaid Manual, *supra* note 5, § M1140.404(B)(1)(b)(2), at \*185.

<sup>18</sup>The facts you present regarding the 2005 trust agreement indicate that the funds transferred to the funeral director were used by the trustee to purchase a noncash-value term life insurance policy. Section 32.1-325.01 imposes certain requirements relative to the level of benefits payable in relation to the premiums, for purchases of term life insurance policies. Section 32.1-325.01, however, also excludes "term life insurance policies for pre-need funerals pursuant to § 54.1-2820, except that any benefits paid under such policy in excess of such actual expenses shall be subject to recovery by the Department of Medical Assistance Services for Medicaid payments made on behalf of the deceased insured." Therefore, the fact that the trustee elected to hold the assets as a term life insurance policy does not control the analysis in this opinion relative to the transfer of assets from the Medicaid applicant to the funeral director.

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