DATE: 03-11-91

CITATION: VAOPGCPREC 44-91
Vet. Aff. Op. Gen. Couns. Prec. 44-91

TEXT:

SUBJECT: Guardianship Policy, Advice Given by VA Social Workers.

(This opinion, previously issued as Opinion of the General Counsel 1-86, dated October 24, 1985, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTION PRESENTED:

Whether it is proper for Veterans Administration (VA) social worker to advise the spouse of an incompetent beneficiary, who is to be placed in a nursing home, to have the spouse appointed guardian of the beneficiary and then obtain a court order to utilize all income, including veterans' benefits, for such spouse's own support so as to shield the income from being counted for Medicaid eligibility purposes.

COMMENTS:

For reasons to be stated, the answer to the above question is no. Your staff recently brought to our attention the concerns expressed by a county veterans' affairs officer in a letter to a member of the Ohio House of Representatives dated December 10, 1984, taking issue with certain advice being given by VA social workers to spouses of veterans. The service officer's complaints were supported with a copy of a letter from a VAMC, Chillicothe, social worker dated July 18, 1984, written to a veteran's spouse. We are also aware that an official of the Health Care Financing Administration raised the same issue with the then-Acting Chief Benefits Director by letter of June 6, 1985, in the context of veterans' guardians.

A recent master record indicates that the veteran about whom the social worker's letter was concerned in this instance has countable annual income for pension purposes of $6,684; is entitled to $279 monthly disability pension; has a $2,405 overpayment to his account; is qualified for aid and attendance, but is receiving the housebound rate while hospitalized; and is rated incompetent.

Payments are being made to the spouse as a Federal fiduciary (one administratively appointed by the Agency as distinguished from one appointed by a court).

The Administrator is vested with broad authority to select payees and supervise benefit payments made on behalf of incompetent beneficiaries. 38 U.S.C. § 3202, et. seq. That authority is delegated by regulation primarily to the Veterans Services Officers (VSO's) in the various VA regional offices, 38 C.F.R. § 13.55, et seq., though legal support and supervision rest with the District Counsels (DC's), 38 C.F.R. § 14.700, et seq.. The VSO may authorize supervised direct payment (SDP), appoint a Federal fiduciary (a spouse payee in this instance) recognize an existing court-appointed fiduciary, or instigate the appointment of such fiduciary. See, e.g., 38 C.F.R. § 13.55. The beneficiary's interest is the sole determining factor in choosing the type of payee needed and in choosing the specific person or institution to serve. 38 U.S.C. § 3202(a). Where payment is by SDP or to a Federal fiduciary, the VA exercises exclusive supervision over the management of veterans' benefit funds. See, e.g., 38 C.F.R. §§ 13.58, 13.100(A), 13.102, 13.103, 13.105, 13.107. On the other hand, where a court-appointed fiduciary is recognized, primary supervision rests with the appointing court, see, e.g., 38 U.S.C. § 3202(b), and secondary supervision rests with the VA, see, e.g., 38 C.F.R. §§ 13.59, 13.1000(b), 13.104, 14.705, 14.709. There is no authority for Department of Medicine and Surgery (DM & S) personnel to perform these functions.

It might be suggested that the social worker's advice in this instance was not to make arrangement for VA benefit payments, but to enhance the veteran's eligibility for Medicaid. Nevertheless, such advice could undercut the ability of the VSO and DC to perform their responsibilities in the fiduciary program and could result in unnecessary expenses for an incompetent veteran. To advise a fiduciary to obtain a court order for all monies belonging to the veteran, which in this instance would include veterans' benefit payments, to be utilized to meet the support needs of the spouse, is to exercise authority belonging to the VSO. Furthermore, advice such as that given in the social worker's letter would, in most States, result in the spouse's obtaining services of a private attorney and payment of court and other costs by the veteran's estate when such might not be necessary. For example, there are instances in which the DC may provide legal services and authorize payment of costs when a court-appointed fiduciary is needed and there are insufficient estate funds to pay for such services. See, e.g., 38 C.F.R. § 14.705. Additionally, it is Agency policy not to seek appointment of a fiduciary by a court unless no other arrangement will suffice. VA Manual M27- 1, Part III, par. 6.10.

The matter of shifting the income of an institutionalized veteran to a dependent so as to entitle the veteran to Medicaid raises complex questions. Here, we defer to the Department of Health and Human Services (HHS) and the State of Ohio in setting and applying the standards for determining an individual's entitlement to

Medicaid. We would not condone actions that would be a subterfuge to enable a veteran to receive Medicaid when he or she should not qualify. However, it would appear proper to seek means of aligning complex and overlapping Federal and State benefit programs so as to maximize the resources available to provide for needy institutionalized veterans and their lawful dependents.

Veterans' monetary benefits are bounties of the United States Government; incompetent beneficiaries are wards of the Government; and Congress has the power to attach whatever conditions it sees fit concerning the time and manner in which the property shall finally pass to the beneficiary. United States v. Hall, 98 U.S. 343, 353, 357 (1878). Such benefits are intended to provide for needy veterans and their lawful dependents. Ziviak v. United States, 411 F.Supp. 416, 423 (D.Mass.), aff'd 429 U.S. 801 (1976). As stated, the VA is authorized by Federal law to pay benefits to a fiduciary appointed by State court (with the court exercising primary supervision), or to administratively appoint and directly supervise a Federal fiduciary.

In Ohio, the dependent spouse/fiduciary of an incompetent, institutionalized ward is entitled to support from the ward's assets, even though the spouse may have some income from other sources. Martin v. Martin, 88 N.E.2d 59 (Ohio 1949). Ohio probate courts sitting in equity have the authority even to permit a guardian to go beyond the traditionally powers of guardians so as to exercise for the incompetent a right which would otherwise be lost because of the incompetent's mental condition, if such would benefit the incompetent. Toledo Trust Co. v. Nat. Bank of Detroit, 362 N.E.2d 273, 281 (Ohio 1976). Ordinarily it would be a benefit to an incompetent ward to have the ward's assets utilized to the fullest extent necessary to meet the needs of a dependent spouse while the ward is institutionalized, unless to do so would serve to deprive the ward. It would appear to be well within the equity power of a probate court to authorize the full amount of a needy ward's monthly income to provide for a dependent spouse if the spouse's needs so justify and if other resources are lawfully available to meet the ward's needs while institutionalized.

On the other hand, we do not believe such order by a State court could be used to override the standards established by State law pursuant to Federal statutes and regulations, approved by appropriate Federal agencies, to determine the amount, if any, of Medicaid funds that would be paid toward a ward's institutional care. As a Federal program, Medicaid governs in the event of any conflict with State law. U.S. Const. art VI, cl. 2. In this regard, we note the Health Care Financing Administration (HCFA) regulations provide that the amount that a person receiving Medicaid must otherwise contribute to the cost of institutional care may be reduced by a reasonable amount to meet the needs of the spouse at home. 42 C.F.R. § 435.725(c)(2).

We are advised by HCFA that the amounts to be deducted under this provision would vary according to each State's plan. We are also advised that regardless

of how a State probate court orders income to be apportioned between the institutionalized ward and the spouse, the HCFA has adopted the policy that the State agency administering the Medicaid program must consider all of the income to the ward as being available to meet the ward's needs, and must apply the section 435.725 standard in determining how much may be deducted from the amount the ward must pay for institutional care to meet the needs of the spouse. VA employees making financial arrangements for such persons would do well to be thoroughly familiar with their particular State's plan in this regard.

In view of this stated policy, it would appear that the amount of income of a VA beneficiary entitled to Medicaid that the VA would recommend to the court to be furnished to meet the spouse's needs should ordinarily be equal to that permitted the spouse under pertinent HCFA regulations. Each case, however, must be evaluated in the light of the individual needs of all parties, as well as the interacting programs available to meet those needs. There must not be a categorical approach where, for example, the Agency would recommend to courts in such cases that all income be diverted to each spouse's needs, with the expectation that the Medicaid program will pay the entire cost of the beneficiary's institutional care. We believe a similar approach should be followed in determining how a "Federal fiduciary" is to be allocate funds under such circumstances.

It might well be that the HCFA would treat VA "apportionments" differently. This Agency may, in making equitable arrangements to meet the needs of beneficiaries and dependents, apportion all or any part of such benefits to meet a dependent's needs. 38 U.S.C. § 3107(a) C.F.R. § 13.70. A separate entitlement, then, is created in the apportionee to the amount apportioned, the net effect of which is to reduce the amount to which the principal beneficiary is entitled. State v. Wallace, 651 P.2d 201 (Wash.1982). See also Op.G.C. 4-79. Under such arrangement, it could be that the HCFA would not consider income to the apportionee as being available to an institutionalized beneficiary. Perhaps the Chief Benefits Director would wish to ascertain the HCFA's current policy concerning this question.

Finally, the HCFA's application of its regulations regarding income may not be the same as its policy regarding a beneficiary's accumulated assets. In 1980 this Agency raised questions concerning application of laws in the State of Massachusetts that would permit a guardian to place a ward's estate monies in irrevocable trusts for the specific purpose of removing them from SSI and Medicaid eligibility determinations. In this regard, the Regional Attorney for HEW, Region I, in a memorandum to the Regional Commissioner, Social Security Administration (SSA), dated October 29, 1980, declared, inter alia, that "it would be reasonable for SSI to conclude that the property validly and legally placed in such trust can be view as having been disposed of and not countable as resources for purposes of determining SSI eligibility and thereby Title XIX Medicaid eligibility." This policy may still be followed. The Chief Benefits

Director may also wish to ascertain the current policy of the SSA and the HCFA in this regard.

HELD:

Even though DM & S is vitally interested in the financial resources available to meet the needs of an incompetent beneficiary upon de- institutionalization from a VA facility, the authority and responsibility for payee selection, as well as the administrative oversight of the management of funds by the fiduciary recognized or appointed, rest primarily with the VSO's and secondarily with the District Counsels. Each case must be evaluated on its own merits, and, while the VA must make every effort to lawfully maximize all resources available to meet the needs of beneficiaries and their dependents, it must not encourage the undermining of standards set by other agencies. We suggest that social workers and other DM & S employees involved in planning for an incompetent beneficiary's care upon release from a VA institution provide pertinent information and recommendations to the VSO, or designee, regarding payment arrangements needed.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec**.** 44-91