

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Social Security No.:

Appeal Decision: Denied

Appeal Number: 0608458

Decision Date: 12/14/06

Hearing Date: 09/07/2006

Hearing Officer: Thomas J. Goode

Record Open to: 11/22/2006

Appellant Representative:

MassHealth Representative:

Peter O'Rourke

Sue Osbourne



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
Two Boylston Street
Boston, MA 02116*

APPEAL DECISION

Appeal Decision:	Denied	Issue:	130 CMR 520.023
Decision Date:	12/14/06	Hearing Date:	09/07/2006
MassHealth Rep.:	Peter O'Rourke, Sue Osbourne	Appellant Rep.:	
Hearing Location:	Tewksbury MassHealth Enrollment Center Room 1	Aid Pending:	No

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated July 5, 2006, MassHealth denied appellant's application for MassHealth benefits because MassHealth determined that assets held in trust are countable and exceed program limits (see 130 CMR 520.003, 520.023 and Exhibit A). The appellant filed this appeal in a timely manner on August 4, 2006 (see 130 CMR 610.015(B) and Exhibit B). A hearing was held on September 7, 2006, and the hearing record remained open until October 6, 2006 for the submission of legal memoranda (Exhibit I). Pursuant to 130 CMR 610.081, on October 20, 2006 the hearing officer reopened the hearing record to allow a memorandum submitted after the hearing record had closed (Exhibits L-M). Appellant was allowed equal time to submit a response to the MassHealth memorandum; and appellant's response was timely received at the Board of Hearings (Exhibit O). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied appellant's application for MassHealth long-term care benefits.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.003, 520.023, in determining that assets held in trust are countable to appellant and exceed program limits.

Summary of Evidence

The MassHealth representatives testified that appellant entered a skilled nursing facility in December 2005. A MassHealth long term care application was submitted on her behalf on April 14, 2006, seeking MassHealth eligibility beginning March 15, 2006 (see Exhibit D). A request for verification was sent to appellant on April 18, 2006, and was not returned to MassHealth. The application was denied for failure to verify eligibility on May 18, 2006. No appeal was filed. On June 5, 2006, appellant forwarded verifications to MassHealth, and the application was restamped June 13, 2006. On July 5, 2006, MassHealth denied appellant's MassHealth application due to assets in excess of program limits comprised of \$271,743 in bank accounts held in trust deemed countable to appellant (Exhibit A).

At issue is a trust originally drafted in 1981, with appellant and her now deceased husband as settlors, and trustees, and appellant's nephew also as trustee (Exhibit H). The 1981 trust is an irrevocable trust with provisions allowing the settlors to alter or amend the terms of the trust (Exhibit H, Article III, Sec.2.1). The 1981 trust document was amended and restated by a subsequent trust document dated April 12, 2000 (Exhibit G). The restated trust is an irrevocable trust. Appellant is the settlor of the restated trust, and appellant's niece and nephew are named as trustees. On May 18, 2004, a note with a face value of \$425,000 was executed by the trustees of the restated trust to themselves in their capacity as trustees of a separate nominee trust, promising to repay the restated trust \$425,000 at 6% interest in monthly installments of \$4,718.39 due on the first day of the month, beginning June 1, 2004, and continuing until the note is paid off, except that it must be paid in full by May 1, 2014 (see Exhibit D). A schedule of assets dated March 2, 2006 shows total assets amounting to \$631,365.62, consisting of 6 bank accounts, and \$364,848.24 remaining due on the May 18, 2004 note (see Id.).

MassHealth asserts that the restated trust revoked the original 1981 trust; and that the restated trust is properly analyzed under provisions of 42 USC § 1396p(d), and 130 CMR 520.023(C), 520.024, as the restated trust is irrevocable and dated after 1993. Specifically, MassHealth argues that under 130 CMR 520.023(C)(1)(a), 42 USC § 1396p(d)(3)(B)(i); and 42 USC § 1396p(d)(2)(C)(ii), Article V.A.(2) of the restated trust that precludes the trustee from distributing principal to appellant does not control, because in addition to being the settlor of the restated trust, Article II names appellant as a lifetime beneficiary of the trust and stipulates that trust assets should be used for her benefit. MassHealth further asserts that although Article V.A.(2) states that the trustee shall not distribute trust principal to or on behalf of the appellant/settlor, the provision under this section is inconsistent with the purpose of the trust as announced under Article II, which expressly directs the trustee to use accumulated trust principal to meet appellant's unexpected needs without regard to the interests of the remaindermen, and conflicts with provisions of Articles XIV(H) and XXII. Citing

Cohen v. Comm'r, Division of Medical Assistance, 423 Mass. 399, 416 (1996), MassHealth argues that the prohibition against distribution of principal to the appellant imposed on the trustee in Article V.A.(2) should be disregarded in light of Article II because it represents an effort to defeat Medicaid ineligibility standards, rendering the principal of the restated trust countable under 130 CMR 520.023(C)(1)(a). With regard to income from the note executed on May 18, 2004, MassHealth determined that under Article V.A.(1), appellant is entitled to receive all income during her lifetime; therefore, \$4,718.39 monthly income is countable to appellant under 130 CMR 520.024(A)(1). MassHealth also contends that the note should be characterized as an annuity under 130 CMR 515.001 because the note is a legal instrument that provides for regular payments for a designated period of time, and meets the definition of an annuity. As such, MassHealth contends that the entire monthly payment to the restated trust must be paid to appellant under Article V.A.(1), and the entire \$4,718.39 payment should be characterized as unearned income each month.

Appellant counsel asserts that Article II of the restated trust should be viewed as precatory in nature as defined in Black's Law Dictionary (Exhibit P), and that the trustee's authority is clearly set forth in Article V of the restated trust, which expressly limits the trustee to distribution of income only. Counsel asserts that there is no trust language extending the right or obligation by mandate or discretion to distribute principal to the beneficiary, and that Article II requires that the trustee must manage and distribute the trust principal and net income in accordance with the requirements of the instrument; therefore, provisions of Article II must give way to restrictions imposed in Article V.A.(2). Appellant counsel also asserts that the note executed on May 18, 2004 is not properly characterized as an annuity with the entire \$4,718.39 monthly payment counted as unearned income. Counsel asserts that only the interest portion of the payment is properly characterized as unearned income, while the remaining payment should be characterized as a return of principal. Appellant counsel adds that Article XIV reflects standard trustee powers for the judicious management of trust assets; and Article XXII is a standard trust clause in well drafted trust instruments allowing termination under extreme conditions where trust assets are of such limited amount as to make it economically impractical to continue to administer the trust. Appellant counsel concludes that only the portion of the each monthly payment attributable to interest is countable to appellant as income; and no portion of trust principal is countable to appellant as the Trustee does not have discretion to distribute principal to appellant.

Findings of Fact

Based on a preponderance of the evidence, I find the following:

- 1) Appellant entered a skilled nursing facility in December 2005.
- 2) A MassHealth long term care application was submitted on her behalf on April 14, 2006, seeking MassHealth eligibility beginning March 15, 2006 (see Exhibit D).
- 3) A request for verification was sent to appellant on April 18, 2006, and was not returned to MassHealth. The application was denied for failure to verify eligibility on May 18, 2006. No appeal was filed.

- 4) On June 5, 2006, appellant forwarded verifications to MassHealth, and the application was restamped June 13, 2006.
- 5) On July 5, 2006, MassHealth denied appellant's MassHealth application due to assets in excess of program limits comprised of \$271,743 in bank accounts held in trust deemed countable to appellant (Exhibit A).
- 6) A trust was originally drafted in 1981, with appellant and her now deceased husband as both settlors and trustees, and appellant's nephew also as trustee (Exhibit H).
- 7) The 1981 trust is an irrevocable trust with provisions allowing the settlors to alter or amend the terms of the trust.
- 8) The 1981 trust document was amended and restated by a subsequent trust document dated April 12, 2000 (Exhibit G).
- 9) The restated trust is an irrevocable trust.
- 10) Appellant is the settlor of the restated trust, and appellant's niece and nephew are named as trustees.
- 11) On May 18, 2004, a note with a face value of \$425,000 was executed by the Trustees of the restated trust to themselves in their capacity as trustees of a separate nominee trust, promising to repay the restated trust \$425,000 at 6% interest in monthly installments of \$4,718.39 due on the first day of the month, beginning June 1, 2004, and continuing until the note is paid off, except that it must be paid in full by May 1, 2014 (see Exhibit D).
- 12) A schedule of assets dated March 2, 2006 shows total assets amounting to \$631,365.62, consisting of 6 bank accounts, and \$364,848.24 remaining due on the May 18, 2004 note (see Id.).

Analysis and Conclusions of Law

In the case at hand, there are no factual disputes; rather, the issue revolves around the interpretation of the language of the various documents involved. First, I concur with the MassHealth position that the restated irrevocable trust dated April 12, 2000, replaced the original 1981 irrevocable trust; and therefore, the restated trust is properly considered in the context of both state and federal law applying to trusts created after 1993, of which pertinent sections follow:

Federal law at 42 U.S.C. 1396p (d)(3)(B)(i) states:

In the case of an irrevocable trust, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which,

payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income.

Regulation 130 CMR 520.023 applies to trusts or similar legal devices created on or after August 11, 1993, and follows in pertinent part:

(C) Irrevocable Trusts.

(1) Portion Payable.

(a) Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset.

(b) Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income.

(c) Payments from the income or from the principal of an irrevocable trust made to another and not to or for the benefit of the nursing-facility resident are considered transfers of resources for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(d) The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).

(2) Portion Not Payable. Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could not be paid under any circumstances to or for the benefit of the nursing-facility resident will be considered a transfer for less than fair-market value and treated in accordance with the transfer rules at 130 CMR 520.019(G).

Relevant language of the restated trust follows:

Article II:

The purpose of this Trust is to supplement, but not to supplant, what benefits and services the SETTLOR may from time to time be eligible to receive by reason of her age, disability, or other factors, from federal, state and local governmental, insurance, and charitable sources. This Trust is established with the recognition that the nature and extent of the complex and multiple needs of the SETTLOR are such that her own resources and those of her family would quickly become exhausted if relied upon as a primary resource for her care. It is recognized further that governmental and charitable programs, in themselves, contain many gaps which, if

not addressed, would greatly reduce the possibility of the SETTLOR maintaining herself as independently as possible, and having the capacity to meet her future needs adequately for medical, residential, personal, and other services. With these considerations guiding its decision-making, the TRUSTEE agrees to take control and management of the trust estate, and invest and re-invest the principal, receive the income therefrom, and, after paying the reasonable and proper expenses of the Trust, manage and distribute the principal and net income of the Trust in accordance with the requirements of this Instrument.

Without limiting or enlarging the authority of the TRUSTEE in accordance with the Trust purposes, it is stipulated that the Trust shall be used in ways that will best enable the SETTLOR to lead as normal, comfortable and fulfilling life as possible; that, regardless of future health status, she be cared for at home or in any event in the most normal and home-like environment possible and consistent with her needs for treatment and care; that she have as many opportunities as possible for normal social interaction with members of her family and other persons in the community in a manner consistent with her age and interests; and that she have every reasonable opportunity to be responsible for her own welfare, independent of this Trust, to the extent of her capacities.

The TRUSTEE shall accumulate the Trust principal to the extent feasible, due to the unforeseeability of the SETTLOR'S future needs. However, accumulation or use of the Trust is to be determined without regard to the interests of the remaindermen.

Article V.A.(1):

The Trustee shall pay the entire net income from the (Restated Trust) to or for the benefit of the Settlor, in quarterly or more frequent installments, during her lifetime.

Article V.A.(2):

During the lifetime of the Settlor, the Trustee shall make no distributions of principal from the Trust, to or on behalf of the Settlor.

Article XIV(H): of the restated Trust states that "the Trustee has the power "to determine all questions as between income or principal or to apportion between them any receipt or gain and any charge to income or principal or to apportion between them any receipt or gain and any charge, disbursement or loss as is deemed advisable in the circumstance of each case as it arises, notwithstanding any statute or rule of law for distinguishing income from principal or any determination of the Courts."

Article XXII:

If, in the opinion of the TRUSTEE, any Trust fund created hereunder shall at any time be of a size which in the sole judgment of the TRUSTEE shall make it inadvisable or unnecessary to continue such Trust fund, then anything contained in this Trust Agreement or any amendment thereto to the contrary notwithstanding, the TRUSTEE, in its sole discretion, may pay over and distribute the entire principal of the Trust to the beneficiaries thereof, free of all trusts.

Looking to the plain language of the trust where plain language can be found, I find that Article II at a minimum clearly requires that the trustee accumulate trust principal due to the unforeseeability of the settlor's (i.e., appellant's) future needs. In short, it would make no sense to require the trustee to stockpile principal unless that principal could be accessed to provide for appellant's needs as purported at length under Article II. Article XXII allows the trustee the sole discretion to determine that it is no longer advisable or necessary to continue the trust, and requires that the principal shall be paid over to the beneficiaries. There is no provision tying the Trustee's discretion under Article XXII to extreme conditions where trust assets are limited to amounts that render the trust economically impractical to continue to administer as appellant counsel asserts. If this limitation was intended to provide such a nuance, a well drafted trust document would clearly articulate just that. The discretion is so broad that the trustee, "in its sole discretion," could just as readily determine that trust assets had grown too large to administer, or in the alternative, that appellant's unforeseeable future needs were such that it required the termination of the trust. As appellant is a beneficiary for life as outlined in Article II, the trustee has unfettered discretion to terminate the trust at any time, and for any reason, and pay over the principal to appellant during her life. This is well beyond the "any circumstances" test outlined in regulations above, and certainly provides more than a peppercorn of discretion. No further analysis is necessary. The trust principal consisting of \$271,743 in assets held in bank accounts is countable in an eligibility determination under 130 CMR 520.023(C)(1)(a) as read within the context of 42 U.S.C. 1396p (d)(3)(B)(i).

Regulation 130 CMR 515.001 defines an annuity in broad terms as a legal instrument that makes payments for a designated period of time or for life, regardless if the payments are principal, interest, or both. The note executed on May 18, 2004 by the trustees of the restated trust to themselves in their capacity as trustees of a separate nominee trust, requires payments for a designated time, and the payment schedule is amortized in accordance with appellant's life expectancy. Appellant counsel asserts that the principal portion of each payment is attributable to return on capital, and is therefore non-taxable, and for that reason should be considered an asset each month, rather than part of a stream of income. A stream of income is defined as income received on a regular basis (130 CMR 515.001). No distinction is made in the MassHealth regulations between income from principal payments and income from interest payments (see 130 CMR 520.009). While a bifurcated view may be allowed for purposes of calculating federal income tax liability, there is no provision in the MassHealth regulations that allows a similar dissection when assessing Medicaid eligibility. An applicant's resources are considered either assets, or income; not both. From a MassHealth view, once assets are placed into a financial instrument that returns a stream of payments, the entire payment becomes income, whether or not

the return on principal is taxable to the trust or not. Thus I conclude that the note is properly characterized as an annuity under 130 CMR 515.001, and as such, the entire \$4,718.39 payment is countable as unearned income on a monthly basis.

The appeal is DENIED.

Order for MassHealth

None.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Brian McGuinness