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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. SUCV 2013-3537-A

NOTICE SENT
05.16.14
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A.L.

RITA E. SANDS,

Plaintiff,

vs.

COMMONWEALTH OF MASSACHUSETTS, EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES, OFFICE OF MEDICAID,

Defendant.

Corrected

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

This is an appeal under G. L. c. 30A, § 14 from a final decision ("Decision") of the Commonwealth of Massachusetts, Executive Office of Health and Human Services, Office of Medicaid ("HHS") denying the application of plaintiff Rita E. Sands ("Sands") for long-term care Medicaid benefits. After HHS filed the administrative record ("AR"), the plaintiff filed her Motion for Judgment on the Pleadings ("Motion") pursuant to Superior Court Standing Order 1-96 as amended, supported by Plaintiff's Memorandum in Support of Her Motion for Judgment on the Pleadings ("Pl. Mem."). Based upon the court's review of the administrative record, motion and memorandum and upon consideration of oral arguments, the Motion is **DENIED**. HHS's Cross-Motion for Judgment on the Pleadings is **ALLOWED** and the complaint shall be dismissed.

BACKGROUND

Sands is an individual residing at 836 Central Street, Framingham, Massachusetts. On October 4, 2007, she established the Rita E. Sands Irrevocable Trust ("Trust"). Her sister, Esther C. Demeo and her nephew James P. Demeo accepted appointments as the trustees of the Trust (collectively, "Trustee"). On October 4, 2007, Sands conveyed to the Trust her interest in the real property located at 134 Linden Street in Needham ("Real Property"), Massachusetts for nominal consideration. At the time, her interest in the Real Property was subject to a mortgage held by the Cambridge Savings Bank of more than $90,000.

Article III of the Trust provides:

> This trust is irrevocable and the Grantor [Sands] relinquishes all right to alter, amend, revoke or terminate this agreement or to otherwise deal with the trust property (whether originally made a part of the trust or later acquired by the Trustee), in whole or in part, except as specifically set forth herein (with respect to the removal and appointment of Trustees and with respect to the retained income interest).

Under Article III.1 of the Trust, Sands "hereby relinquish[es] absolutely all rights to regain [Trust] principal." That article goes on to state:

> Notwithstanding the foregoing, the Grantor specifically reserves the right at any time and from time to time, by an instrument in writing, acknowledged before a notary public, and delivered to the Trustee during the Grantor's lifetime:
>
> A. To eliminate any one or more persons otherwise included herein as a then current or future beneficiary (including the Grantor) and thereby treat such person(s) as if such person(s) had died at the time the Trustee delivered such writing to the Trustee, and/or
>
> B. To reallocate part or all of the interest of any one or more then current or future beneficiaries of any one or more shares hereunder, whether such interests are vested or contingent, to one or more other persons who would otherwise have a beneficial interest in the trust after the death of the Grantor and/or to add as a beneficiary of any interest in this trust, whether as a current

or future beneficiary, any charitable institution exempt from taxation under § 501(c)(3) of the Internal Revenue Code.

Article III.II states that "[i]n no even shall the powers reserved by the Grantor in this or any other paragraph be exercised directly or indirectly for her own benefit."

Under Article VII.1 of the Trust:

> During the lifetime of the Grantor, the Trustee shall pay to the Grantor all the income of this trust in quarterly or more frequent installments. . . No principal of the trust shall be distributed to the Grantor. The Trustee may at any time pay to or apply for the benefit of such persons as would then be the remaindermen if the Grantor were then to die, as much of the principal of the trust as the Trustee, in its sole discretion deems advisable (in whatever proportions the Trustee deems advisable if there are more than one such person). No amounts shall be distributed to persons other than Grantor (other than for the Grantor's benefit) without the assent of the Grantor, if legally competent . . . In addition to the foregoing rights to income, the Grantor shall have the right to occupy for her lifetime any realty contributed to this trust if at the time of the contribution the Grantor was using such realty as a primary or secondary personal residence. Such right shall not be terminable by the Trustee under the terms of the next paragraph, but such right shall be personal to the Grantor to the end that at any time she does not occupy said realty the Trustee may treat such realty as income producing property (and the Trustee may terminate her interest in the income of such realty – but may not terminate her right of occupancy – in accordance with the provisions of the next paragraph).

Under Article VII.IV, "[a]fter the death of [Sands], the trust property shall be divided into as many equal shares as there are siblings of [Sands] then living and deceased siblings leaving issue then living . . .." Article XIV provides in part:

> The Trustee under each trust herein created and any successor trustee shall have, possess and at any time or from time to time may exercise in whole or in part, without order or license of court or advertisement, the following specific rights, powers, authority and/or immunities as well as all other rights, powers and authority permitted by law to trustees:
>
> * * *
>
> C. To sell or to offer to sell for cash or for creditor installments, at public or private sale, to grant options to purchase, and to convey or exchange, any and all of the property at any time forming a part of the trust estate . . .

* * *

I. To invest, reinvest or refrain from investing the trust estate wholly or partially in . . . annuities . . .

* * *

M. To determine whether any receipts shall constitute principal or income and whether expenses are properly chargeable to principal or income . . ..

Sands was admitted into the St. Patrick's Manor skilled nursing facility in Framingham on December 17, 2009. Since that time, she has paid approximately $406,355 to St. Patrick's Manor for her care.

On June 10, 2010, the Trust conveyed the Property to a third party. After paying off Sand's liability of more than $90,000 on the Cambridge Savings Bank's mortgage note, the Trust realized $391,710.27 from the sale. It then invested the sales proceeds in certificates of deposit in the name of the Trust.

On December 4, 2012, Sands submitted an application for long-term care Medicaid benefits for coverage effective April 1, 2013. On May 6, 2013, the Board of Hearings denied Sands' Medicaid application on the ground that she had "more countable assets [$391,985.58] than MassHealth Benefits allows."

On May 22, 2013, Sands filed an appeal of the decision denying her application and requested a fair hearing pursuant to 130 Code Mass. Regs. § 610.034. After a hearing on July 1, 2013, the Office of Medicaid issued a decision on September 12, 2013, denying Sands' appeal and stating in relevant part:

> I find that the trust assets are available to the appellant. Under Article XIV.I the trustee has authority "to sell or offer to sell for cash or for creditor installments, at public or private sale, to grant options to purchase, and to convey or exchange, any and all of the property at any time forming a part of the trust asset." Also under that provision, the trustee is empowered to determine what part of the trust property is income and what part is principal. Taken together, these provisions

> authorize the trustee to convert trust assets into a stream of income for the appellant's benefit. The trustee could, for example, purchase an annuity, and construe the annuity payments as income for the benefit of the appellant.
>
> Notwithstanding the language in trust purporting to prevent distribution of principal to the appellant, I find that when read as a whole, there are circumstances under which the trustee could use the trust assets for her benefit. Accordingly, all of the trust assets and income are considered countable to her for MassHealth purposes.

The hearing officer also cited (in footnote 1) Sand's right to occupy the trust real estate for her lifetime "and to reallocate part or all of the interest of any one or more then current or future beneficiaries (see Doherty v. Office of Medicaid, 74 Mass. App. Ct. 439, 441 (2009)."

Sands filed the complaint seeking judicial review in this case on October 7, 2013.

DISCUSSION

I.

Under Section 14(7) of G. L. c. 30A, this Court has limited powers. It may reverse, remand, or modify an agency decision if the substantial rights of any party may have been prejudiced because the agency decision is based on an error of law or on unlawful procedure, is arbitrary and capricious or unwarranted by facts found by the agency, or is unsupported by substantial evidence. G. L. c. 30A, § 14(7)(c)-(g). The appealing party bears the burden of demonstrating the invalidity of the agency decision. See Bagley v. Contributory Ret. Appeal Bd., 397 Mass. 255, 258 (1986). The appellant's "'burden is heavy.'" Springfield v. Dep't of Telecomms. & Cable, 457 Mass. 562, 568 (2010) (citation omitted).[1]

[1] Under G.L. c. 30A, a "person . . . aggrieved" by an agency decision, is entitled to challenge the decision in court. See Wilczewski v. Commissioner of the Department of Environmental Quality Engineering, 404 Mass. 787, 793 (1989) (". . . if the plaintiffs should be aggrieved by the [DEP's] order they would be entitled to judicial review.").

The Court "may set aside the decision of an administrative agency if it is not supported by substantial evidence." Cobble v. Commissioner of Social Services, 430 Mass. 385, 390 (1999). See G. L. c. 30A, § 14(7)(e). "[S]ubstantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1(6). When reviewing an agency decision, the court must give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7).[2]

An arbitrary and capricious decision is an unreasoned decision willfully made "'without consideration and in disregard of facts and circumstances.'" Long v. Comm'r of Pub. Safety, 26 Mass. App. Ct. 61, 65 (1988) (citation omitted). "In reviewing the [HHS's] decision [the court's] standard is 'to determine whether the agency conformed with the controlling statute.'" Tarin v. Comm'r of the Div. Med. Assistance, 424 Mass. 743, 750 (1997) (citation omitted). The court examines whether the Department "gathered, identified, and applied" the facts logically to the statutory standards and had sufficient reasonable grounds to support its decision. See Allen v. Boston Redev. Auth., 450 Mass. 242, 257, 259 (2007) (citations omitted) (discussing arbitrary and capricious standard).

II.

Sands contends that HHS erred in determining that the Trust principal of $391,985.58 was a countable asset in determining her eligibility for Medicaid benefits. While the Appeals Court has stated there is "no doubt that self-settled, irrevocable trusts

[2] "[T]o determine whether an agency's decision is supported by substantial evidence, we examine the entirety of the administrative record and take into account whatever in the record fairly detracts from the supporting evidence's weight." Cobble, 430 Mass. at 390, citing New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981).

may, if so structured, so insulate trust assets that those assets will be deemed unavailable to the settlor", Doherty v. Director of the Office of Medicaid, 74 Mass. App. Ct. 439, 442-443 (2009), federal and state statutes and regulations relating to the countability of trust assets for Medicaid eligibility purposes direct that the terms of a trust must be closely scrutinized to determine the amount of assets a Medicaid applicant could potentially access.

Massachusetts regulations, which mirror the applicable federal statute,[3] provide that "[a]ny **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". 130 CMR 520.023(C) (emphasis added). The court must ensure that settlors of irrevocable trusts are not permitted to "to have [their] cake and eat it too" by becoming eligible for Medicaid while retaining access to their assets. See Cohen v. Commissioner of Division of Medical Assistance, 423 Mass. 399, 403 (1996).

Citing Articles III.I and VII.I of the trust instrument, Sands asserts that "[t]he plain terms of the irrevocable Trust...prohibit the trustee from distributing principal to" her, but case law indicates that such provisions are not to be read in isolation when determining Medicaid eligibility. See Doherty v. Director of the Office of Medicaid, 74. Mass. App. Ct. 439, 441 (2009) (regarding a similar provision, stating "this clause may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole"). To determine whether Sands could potentially gain access to the trust principal, HHS correctly looked beyond the language in the trust purporting to

[3] The federal statute provides that "[i]n 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 of the corpus from which, payment to the individual could be made, shall be considered resources available to the individual..." 42 U.S.C. 1396c(d)(3)(B).

prevent distribution of principal to her.

Considering the Trust as a whole, HHS found that it contained a number of provisions that suggest that the trustees have the discretion to use trust principal for Sands' benefit. These provisions, located in Article XIV, state that the trustee has the power to invest trust principal in various investment vehicles, including annuities, and to determine "whether any receipts shall constitute principal or income". It was logical for HHS to conclude that "[t]he trustee could [...] purchase an annuity, and construe the annuity payments as income for the benefit of the appellant".

Sands cites a number of cases unrelated to Medicaid eligibility in which the Supreme Judicial Court invoked principles of fiduciary duty and found that terms granting trustees the power to allocate assets between principal and income did not confer unfettered discretion upon them. See Dumaine v. Dumaine, 301 Mass. 214 (1938) (power to allocate receipts between principal and income was not conferred on trustee-life tenant as an "absolute and uncontrolled discretion"); Old Colony Trust Co. v. Silliman, 352 Mass. 6 (1967) (provision in testamentary trust granting trustee such power of allocation "not a grant of 'absolute' or 'uncontrolled' discretion); Worcester County National Bank v. King, 359 Mass. 231 (1971) (trustee's power to allocate between principal and income, granted by testamentary trust, could "not be used to shift beneficial interests" and did "not authorize favoring either the charitable or the private beneficiaries."). She says that these cases support her sweeping claim that "[a] trustee cannot use a power of allocation to extinguish a remainder beneficiary's interest in Trust principal or otherwise shift beneficial interests." Pl. Mem. at 9. The holdings in these cases were, however, more limited. In each of them, the court found that the intent of the grantor, construed from the

particular facts and circumstances at hand, ultimately controlled the determination of how much discretion the trustee had. Furthermore, unlike the matter before the court at present, none of these cases involved a self-settled inter vivos trust, and none concerned the interpretation of the Medicaid statute here at issue.

Sands is undoubtedly correct that a trustee may not "extinguish" a remainder interest. That means that the trustee may not, by exercising the discretion granted in the Trust, pay Sands the entire principal. It is, however, an overstatement to say that the trustee may not "shift beneficial interests" (id.) by exercising her power of allocation in favor of present beneficiaries over future ones.

In evaluating self-settled trusts to determine whether an individual is eligible for Medicaid, the first question is whether the trust terms grant the trustee a "peppercorn" of discretion to invade trust assets for the beneficiary's benefit; "if there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted for Medicaid eligibility." See Cohen, 423 Mass. 399 at 413. In cases where such a peppercorn is found, courts do not then apply fiduciary principles to determine the outer limits of what the beneficiary might equitably be entitled to receive. See, e.g., Lebow v. Commissioner of Division of Medical Assistance, 433 Mass. 171 (2001) (entire trust corpus countable; trustee-beneficiary had "irrevocably" withdrawn consent to distributions to settlor, his grandmother, but retained power to amend trust and therefore had discretion to distribute its assets to her). See also Cohen, 423 Mass. 399 (1996); Doherty v. Director of Office of Medicaid, 74 Mass. App. Ct. 439 (2009).

It is true that the Appeals Court in Doherty did allude to fiduciary principles in

dicta, stating "[w]e doubt, for example, that the trustees may, willy-nilly, simply characterize a trust asset as "income" and thereby, free of fiduciary fault, convey that asset to [the settlor] free of trust." The Sands Trust also bears some resemblance to the trust at issue in Doherty; like the grantor in Doherty, Sands retained the right to live in the Real Property until it was sold, and the right to reallocate interests in trust assets among beneficiaries. But Doherty ultimately held for the Director of the Office of Medicaid, finding that the instrument as a whole evidenced the settlor's intent that the trustees might invade trust principal if necessary for her benefit. Doherty, 74 Mass. App. Ct. 439 at 442-443. A reasoned decision to classify receipts from an annuity as interest fo r the benefit of the grantor – as opposed to a "willy-nilly" one – is not necessarily an impermissible breach of fiduciary duty. In other words, the existence of discretion suggests a range of reasonableness within which a trustee may permissibly determine to distribute funds that might have been characterized as principal.

III.

The hearing officer concentrated upon the Trust provisions allowing sale of the Trust assets and authorizing the Trustee to allocate receipts between principal and income. She pointed out that, for instance, the Trustee could purchase an annuity.

Sands' primary response focuses upon the common law and statutory limits upon the trustee's power to allocate between principal and income. Pl. Mem. at 11-12. For instance, the Principal and Interest Act, G. L. c. 203D, § 3(b), states in relevant part:

> [A] fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor 1 or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

She also cites G. L. c. 203D, § 18(b) for the proposition that "a 90/10 principal/income division" is "the standard for an impartial allocation." Id. at 12.[4] She is correct that these provisions "prevent[] the trustee from deeming all of an annuity payment as income and shifting the entire benefit of the Trust to Sands." Pl. Mem. at 11.

The problem is that Sands needs to prove more. The question is not whether Sands may receive "the entire benefit," but whether her interest in the Trust (i.e., "assets . . . available to" her) exceeds the countable asset threshold of $2,000. See 130 Code Mass. Regs. § 520.003 ("[t]he total value of countable assets owned by or available to individuals applying for or receiving MassHealth . . . may not exceed . . . for an individual -- $2,000"). Sands addresses this point by noting that "both parties agree that the income generated from the Trust is available to Sands as being the income beneficiary and must be used by her for her current medical costs before MassHealth will make up any deficit." Pl. Mem. at 6. This concession does not carry the day, because the problem is not so easy.

The question is not what income is actually "generated from the Trust," but what Sands "might under any state of affairs receive in the full exercise of" the trustee's "discretion." See Cohen, 423 Mass. 399 at 413. Here, the Trustee could select an annuity (or other investment) that, to quote G. L. c. 203D, § 18(a), "characterize[s] as interest" an amount exceeding 10%, in which case, the statute does not limit income to

[4] That section provides:

> (b) If no part of a payment is characterized as interest, a dividend or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income 10 per cent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not required to be made if it is made because the trustee exercises a right of withdrawal."

10%. Even if the Trustee chooses an investment that characterizes 10% of an annuity as interest, she can affect the dollar amount of income in any given eligibility period by choosing an annuity shorter or longer term of payment. Sands, who had the burden before the hearing officer, did not address or quantify the maximum amount that the Trustee could pay to Sands if she used her full discretion. It is apparent, however, that the Trustee has the power to provide Sands with substantial funds, given that the Trust had more than $391,000 in assets. Even 10% per year would be $39,100, and shopping for a favorable annuity would undoubtedly yield a higher return to Sands. The plaintiff has provided no basis for calculating what the market might provide her. While the Trust provisions quoted by the hearing officer (Article XIV.I) may not support her inclusion of the entire Trust in countable assets, the Trustee certainly has discretion to pay Sands substantially more than the maximum $2,000 allowed. Sands' arguments have some merit – particularly as to inclusion of the entire trust corpus – but do not succeed in reducing her countable assets to "income generated by the Trust." On that basis alone, the decision must be affirmed.

There is also a value to Sands' ability to eliminate or reallocate the interests of beneficiaries and to approve or veto distribution by the Trustee to remaindermen who would be entitled to such distributions if she were to die at the dime of the distribution. It is hard, if not impossible, to place a dollar value on those powers. Nor is it necessary to do so, in light of the considerations just stated in the preceding paragraph of this Memorandum. Still, Sands' powers regarding beneficiaries and lifetime distributions are increasingly important as age advances and need for long-term care increases. It is not enough to state that Article III.II prohibits Sands from exercising these powers "directly

or indirectly for her own benefit." Pl. Mem. at 12. The fact that Sands has these powers in the first place is a benefit to her in and of itself, as they give her some dominion over the trust corpus. As the hearing officer noted, a similar provision was present in the trust considered in Doherty, 74 Mass. App. Ct. at 441. In that case, the court viewed the trust as a whole as "constitut[ing] a remarkably fluid legal vehicle, intelligently structured to provide both [the grantor] and the trustees maximum flexibility to respond to [the grantor's] changing life needs." Id. at 442.

The ability to exercise such powers may make the trust funds partially available to the income beneficiary. In practice, many people at Sand's age and stage of life may have little desire to make any other type of decisions regarding their assets beyond those reserved to Sands in the Trust. Whatever Sands' own situation (on which the record is appropriately silent), the Medicaid eligibility rules were designed to prevent people from attaining Medicaid eligibility by setting up trusts that impaired their ownership only in minor or immaterial ways, while preserving the significant incidents of ownership. Cohen, 423 Mass. at 403. While the hearing officer did not fully discuss Articles III.I.A&B or the lifetime distribution provisions of Article VII.I, it may well be that those Trust provisions in fact do require counting the entire Trust corpus as assets for Medicaid purposes.

It follows that the hearing officer's decision was supported by substantial evidence, consistent with law, and neither arbitrary nor capricious.

CONCLUSION

For the above reasons:

1. The Plaintiff's Motion for Judgment on the Pleadings (Docket #7) is **DENIED**.

2. The Defendant's Decision dated September 13, 2013 is **AFFIRMED**.

3. Final Judgment shall enter for the defendants, dismissing the complaint.

(Wilkins, J.)

Douglas H. Wilkins
Justice of the Superior Court

Dated: April 28, 2014

Attest: [illegible]
Assistant Clerk