

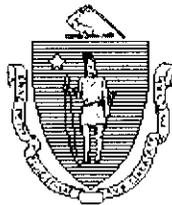
**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1403093
Decision Date:	8/6/14	Hearing Date:	04/04/2014
Hearing Officer:	Samantha Kurkji	Record Open:	05/01/2014

Appellant Representative:

MassHealth Representative:
Paul Keegan



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Long-term care eligibility
Decision Date:	8/6/14	Hearing Date:	04/04/2014
MassHealth Rep.:	Paul Keegan	Appellant Rep.:	
Hearing Location:	Chelsea MassHealth Enrollment Center	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 February 7, 2014, MassHealth denied the appellant's application for MassHealth long-term care benefits because MassHealth determined that the appellant's assets held in trust are countable and exceed the limits of the MassHealth program (Exhibit 1). The appellant filed this appeal in a timely manner on March 10, 2014 (130 CMR 610.015(B); Exhibit 2). The record was held open until May 1, 2014 to give the parties an additional opportunity to submit materials in support of their respective positions. Denial of assistance is valid grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth long-term care benefits because it determined that she has more countable assets than are allowable under MassHealth.

Issue

Whether MassHealth was correct in determining that the appellant was over assets and therefore ineligible, pursuant to 130 CMR 520.003, for MassHealth long-term care benefits.

Summary of Evidence

The MassHealth representative appeared in person and testified that the appellant submitted a long-term care application on September 25, 2013, requesting a benefit start date of September 9, 2013. The application was denied for missing verifications. The appellant appealed the denial, the missing verifications were submitted, and MassHealth preserved the September 25, 2013 application date.

On February 7, 2014 MassHealth issued a notice denying the appellant's application for excess countable assets. Specifically, the notice referenced real estate located at 1 Cove Ave., Beverly, MA, which was conveyed to the Osborne Family Trust by the appellant and her spouse via quitclaim deed on March 10, 1990. The notice states that MassHealth "will rescind this action if the property is removed from the Trust and returned to the applicant within the next sixty days." The notice stated that MassHealth would redetermine the appellant's eligibility for benefits if the property is removed from the Osborne Family Trust. The MassHealth representative testified that whenever MassHealth issues a denial for property in a trust, MassHealth allows the applicant to cure.

At hearing, the MassHealth representative submitted a copy of the Osborne Family Trust instrument, a Quitclaim Deed, and a memorandum from MassHealth Legal. The trust instrument indicates that the appellant and her spouse are both the settlors and the beneficiaries of the trust. The appellant's spouse and two other people are trustees. The relevant portions of the trust instrument are as follows:

Article 1. The title of this trust shall be the OSBORNE FAMILY TRUST. The initial Trustees of this trust shall be [the appellant's spouse], a Settlor hereof...Any trustee may without impropriety be a beneficiary hereof and exercise all rights of a beneficiary with the same effect as though he or she was not a Trustee.

Article 2. The trustees shall receive, hold and manage all assets of the trust and shall invest and reinvest the same and shall pay over to the Settlers, [the appellant's spouse] and [the appellant], or for their respective benefit, during their lifetime and the lifetime of the survivor of them, at reasonable intervals, such portion of the income and/or such portion of the intangible Trust Assets, (but not including any portion of the realty or realty income, if any, owned by the trust), as the Trustees in their sole discretion, deem to be appropriate for the comfort, maintenance and support of each such beneficiary or the survivor of them. The Settlers/Beneficiaries, [the appellant's spouse] and [the appellant], and the survivor of them, shall have the exclusive right to use, occupy and enjoy the home at 1 Cove Avenue, Beverly, Massachusetts as long as they, or either of them, shall live, providing they or the survivor of them during their occupancy pay the costs of taxes, insurance, utilities, and ordinary current maintenance thereon.

The MassHealth Legal memorandum was prepared by an attorney in the agency's legal unit. MassHealth contends that there is no limit on the amount of income or principal that may be distributed to the appellant and that the full value of the trust is therefore countable to the appellant as the trust is a Medicaid Qualifying Trust (hereinafter "MQT"). In support of its position,

MassHealth points to 42 U.S.C. §1396a(k), which reads as follows:

(1) In the case of a medicaid qualifying trust, the amounts from the trust deemed available to a grantor...is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For the purposes of the previous sentence, the term "grantor" means the individual referred to in paragraph (2).

(2) For the purposes of this subsection, a "medicaid qualifying trust" is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.

MassHealth relies on 130 CMR 520.022 and Cohen v. Comm'r of the Div. of Medical Assistance, 423 Mass. 399 (1996) in determining that the trust assets are countable. Specifically, MassHealth asserts that Article 2 indicates that when the appellant's spouse died, the appellant "became the sole vested lifetime Beneficiary of the Trust." MassHealth argues that the trustees have the discretion to distribute both principal (termed "intangible Trust Assets") and income to the appellant/beneficiary, and that an application of Medicaid law compels inclusion of the entirety of the trust assets at issue as countable to the appellant. MassHealth argues that "[i]f 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 as available for Medicaid eligibility" (Cohen, 423 Mass. at 413). MassHealth cites Cohen, *inter alia*, in support of its position that Article 2's limitation as to the distribution of realty or realty income should be disregarded.

The appellant's representative appeared in person and stated he views the legal issue in the same manner as MassHealth but he has a different interpretation of the law. He stated that the trust instrument allows the trustees to distribute income but not principal. There is no discretion to distribute realty or realty income. The trustees have discretion to distribute intangible assets, but there is no definition as to what comprises an intangible asset. However, case law suggests that intangible assets include things such as interest in a closely-held business and goodwill of a company. The trustees in this case have no power to convert the assets of the trust into intangible assets, thereby giving them the ability to distribute principal. Cohen, Doherty v. Dir. of the Office of Medicaid, 74 Mass. App. Ct. 439 (2009), and Guerriero v. Comm's of the Div. of Medical Assistance, 433 Mass. 628 (2001) address whether trustees have discretion to distribute principal, and there is no discretion in this case.

The appellant's representative noted that MassHealth considered the Osborne Family Trust when the appellant's spouse applied for MassHealth benefits around 2004 and determined that the trust did not allow for a distribution of principal. It would be unfair to the appellant to consider the principal countable now, and may raise constitutional issues as to her access to long-term care benefits.

The record was left open until April 17, 2014 for the appellant to submit a written response to MassHealth's memo. MassHealth was given until May 1, 2014 to respond. The appellant did not submit any further documentation during the record open period.

Findings of Fact

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

1. The appellant submitted an application for MassHealth long-term care benefits on September 25, 2013 and requested a benefit start date of September 9, 2013 (testimony).
2. The application was denied for missing verifications and the appellant appealed the denial. The missing verifications were submitted and the September 25, 2013 application date was preserved (testimony).
3. On February 7, 2014 MassHealth denied the application for excess assets. MassHealth stated that the real estate at 1 Cove Ave., Beverly, MA, which is held in the Osborne Family Trust, is a countable asset (Exhibit 1; see Exhibit 5).
4. The trust at issue was established on March 10, 1990 and is irrevocable (Exhibit 3).
5. The appellant and her spouse are the settlors of the trust (Exhibit 5).
6. The appellant's spouse and two other people are the trustees of the trust (Exhibit 5).
7. The appellant and her spouse are the beneficiaries of the trust (Exhibit 5).
8. Article 1 of the trust provides as follows:

The title of this trust shall be the OSBORNE FAMILY TRUST. The initial Trustees of this trust shall be [the appellant's spouse], a Settlor hereof...Any trustee may without impropriety be a beneficiary hereof and exercise all rights of a beneficiary with the same effect as though he or she was not a Trustee.

9. Article 2 of the trust provides as follows:

The trustees shall receive, hold and manage all assets of the trust and shall invest and reinvest the same and shall pay over to the Settlers, [the appellant's spouse] and [the appellant], or for their respective benefit, during their lifetime and the lifetime of the survivor of them, at reasonable intervals, such portion of the income and/or such portion of the intangible Trust Assets, (but not including any portion of the realty or realty income, if any, owned by the trust), as the Trustees in their sole discretion, deem to be appropriate for the comfort, maintenance and support of each

such beneficiary or the survivor of them. The Settlers/Beneficiaries, [the appellant's spouse] and [the appellant], and the survivor of them, shall have the exclusive right to use, occupy and enjoy the home at 1 Cove Avenue, Beverly, Massachusetts as long as they, or either of them, shall live, providing they or the survivor of them during their occupancy pay the costs of taxes, insurance, utilities, and ordinary current maintenance thereon.

10. On March 10, 1990 the appellant and her spouse conveyed the property at 1 Cove Ave., Beverly, MA to the Osborne Family Trust via quitclaim deed (Exhibit 6).

Analysis and Conclusions of Law

MassHealth regulations at 130 CMR 520.022 pertain to trusts or similar legal devices created before August 11, 1993. Regulation 130 CMR 520.522(B), which pertains to MQTs, reads as follows:

(B) Medicaid Qualifying Trust.

(1) A Medicaid qualifying trust is a revocable or irrevocable trust or similar legal device, created or funded by the individual or spouse, other than by a will, under which

(a) the individual is a beneficiary of all or part of the discretionary or required payments or distributions from the trust; and

(b) a trustee or trustees are permitted to exercise any discretion to make payments or distributions to the individual.

(2) The maximum amount of payments or fair-market value of property that may be permitted under the terms of the trust to be distributed to the individual assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the individual is countable in the determination of eligibility.

(3) The fair-market value of the home or former home of the nursing-facility resident in a Medicaid qualifying trust is a countable asset and is not subject to the exemptions described at 130 CMR 520.007(G)(2) or 520.007(G)(8).

In a 1996 decision, the Supreme Judicial Court discussed MQTs and the extent to which assets in such a trust are considered available to a MassHealth applicant:

[An MQT is] any trust established by a person (or that person's spouse) under which that person may receive any payments. This general definition is qualified only by the requirement that trustees must be permitted to exercise some discretion—that is, the conditions for distribution may not be completely fixed for all circumstances. If there is an MQT, then [the amount of money deemed to be available] is the greatest amount that the trustees in any set of circumstances might have discretion to pay out to the beneficiary. Thus, 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 as available for Medicaid eligibility.

(Cohen v. Commissioner of Division of Medical Assistance, 423 Mass. 399, 413 (1996)).¹

The trust in this case meets the definition of an MQT; the appellant is a trust beneficiary, and the trustee has discretion to make payments or distributions to her. MassHealth contends that the property at 1 Cove Ave., Beverly, MA is a countable asset and that Article 2's limitation as to the distribution of realty or realty income should be disregarded. The appellant contends that the Beverly property is not a countable asset because the property cannot be considered an intangible trust asset and therefore subject to distribution. I find the appellant's argument persuasive.

The trust instrument does not define "intangible Trust Assets." Black's Law Dictionary offers the following definition of "intangible asset":

Property that is a 'right' such as a patent, copyright, trademark, etc., or one which is lacking physical existence, such as goodwill. A nonphysical, noncurrent asset which exists only in connection with something else, such as the goodwill of a business....

(Black's Law Dictionary (6th ed. 1990)).

Realty, and specifically the property located at 1 Cove Ave., Beverly, MA, is not subject to this definition. The trustees in this case have discretion to distribute intangible trust assets but not realty or the income of realty.² I find no circumstance under which the beneficiaries would have discretion to distribute the property or proceeds from the property to the appellant. Therefore, I find that the property in question is not an asset that is countable to the appellant.³ Accordingly,

¹ The Cohen decision concerned four consolidated cases in which the respective trusts limited trustee discretion to the extent that the exercise of such discretion would render the settlor ineligible for public assistance. As to each of the four cases, the Court found that the trust funds (principal and/or income) were countable for purposes of determining MassHealth eligibility.

² MassHealth contends the limiting provision should be disregarded. I do not agree. In the Cohen decision cited by MassHealth, the Court stated the following:

In each of these cases, the grantor of an irrevocable trust, of which the grantor (or spouse) is a beneficiary and to which the grantor has transferred substantial assets, claims eligibility for Medicaid assistance because the trust...explicitly seeks to deny the trustee any discretion to make any sums available to the grantor if such availability would render the grantor ineligible for public assistance. Thus, all these trusts seek to limit the trustees' discretion just insofar as the exercise of that discretion may make the grantor ineligible for public assistance.

Cohen, 423 Mass. at 407. There is no provision in the Osborne Family Trust that explicitly denies the trustee discretion to distribute sums to the appellant if those sums would put the appellant over the asset limit for MassHealth benefits (see Exhibit 5).

³ Appellant's argument that MassHealth previously determined that the trust did not allow for a distribution of principal when the appellant's spouse was applying for benefits is not persuasive. The appellant produced no evidence at hearing to support this argument.

the appeal is approved.

Order for MassHealth

Rescind the notice dated February 7, 2014 and redetermine long-term care eligibility in accordance with this decision.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

Samantha Kurkja
Hearing Officer
Board of Hearings

cc:
MassHealth Representative: Paul Keegan