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To: Debbie Farias – Springfield MEC
From: Amy Dybas – Director Member Services Policy Implementation
By: Katy Schelong, Assistant General Counsel
Date: April 1, 2014
Re: [redacted] Appeal No. 1402348

RECOMMENDATION:
The income and principal of the [redacted] Irrevocable Trust are countable in a Medicaid eligibility determination. 42 U.S.C. §1396p(d) *et seq.*; 130 CMR 520.023(C)(1)(a).

FACTS:
The applicant, [redacted], is [redacted] years old, a resident of a long-term care facility and applied for MassHealth long-term care benefits.

The [redacted] Irrevocable Trust ("Trust") was established by the applicant on December 7, 2007. The applicant is the Grantor, and the Trustee is the applicant's son, [redacted] is also the applicant's attorney-in-fact. The Trust is designated as irrevocable in Paragraph C of the First Article. The Second Article, concerning Beneficial Interest, provides in part:

A) During the life of the Grantor, the Trustees shall periodically distribute as much of the net income only of the Trust property as they in their sole discretion deem necessary to or for the benefit of [redacted]. There shall be no distribution of principal to or for the benefit of the Grantor during her lifetime.
B) The Grantor reserves to herself the right to reacquire particular Trust assets by substitution assets of equal value.
C) (1) The Grantor shall have the right to reside at [redacted] FL, owned by the Trust, for the rest of her life; PROVIDED, however, that she is mentally, physically and financially able to maintain the property and voluntarily chooses to do so.
(2) The Trustees shall not sell or otherwise dispose of or encumber said residence without written consent of the Grantor or her personal representative which may include her guardian, conservator or agent serving with a valid Power of Attorney.

D) (1) In lieu of paying rent to the Trust, said [redacted] shall be solely responsible for the payment of all home equity and mortgage loans, utilities, insurance, real estate taxes and normal maintenance and cosmetic repairs for as long as she shall occupy the property....

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[1] *See generally* Health Insurance Portability and Accountability Act ("HIPAA"), P.L. 104-191; 42 U.S.C. § 1320d-2; 42 USC §1396a(a)(7); 42 USC §1320d-2, -4; Privacy Act of 1974, 5 U.S.C. § 552a Act; 42 C.F.R. § 164.508; 42 CFR §431.300-307; 42 CFR §483.10; 42 CFR §435.945(f)(4); 45 CFR 164 *et seq.*; 20 CFR §401.100; G.L. c. 118E § 49; G.L. c. 214 §1B; G.L. c. 66A §2; 130 CMR 515.007(B); 130 CMR 517.006(B).

E) I n the event that the Trustees sell the above-referenced property and purchase a subsequent residential property, the Grantor shall have the right to reside in that property upon the same terms and conditions...
F) Upon the death of the Grantor, the Trustees shall administer and distribute the principal, accumulated and undistributed net income of the Trust property according to then current Schedule of Beneficial Interest executed and filed with the Trustees...
G) The Grantor herein shall have a special power of appointment of the Trust principal. This power may be exercised only in favor of Grantor's children and other issue, and the spouses of such children and other issue, in such amounts, proportions and manner, in Trust or otherwise, as the holder of the power may designate....Such power may be exercised by Will, Trust or a separate writing duly signed by Grantor, and duly notarized...

The Third Article gives the Trustee broad power and authority to deal with Trust assets. The Trustee may, among other things, under Paragraph (A): sell, convey, assign, mortgage, loan or otherwise dispose of all or any part of the Trust (1); invest income and principal whether or not of a kind or in proportion ordinarily considered suitable for Trust property but any changes in the form or type of Trust investments shall be made with the consent of the Grantor (2); make any payment or distribution, whether or not competent, directly to a beneficiary of for his or her benefit (4); and, make allocations as to income (5). Pursuant to the Ninth Article, the Trustee is required to render accounts of the administration of the Trust annually.

The Tenth Article states that the applicant-Grantor waives all right to alter, amend or revoke the Trust, but the applicant has the right to change the Schedule of Beneficial Interests at any time.

The Schedule of Beneficial Interests dated December 7, 2007 states that upon the death of the applicant, the Trustee shall distribute the Trust assets outright and free of Trust to the applicant's children: [redacted] and [redacted]

The applicant transferred for no consideration, the condominium she individually owned located on [redacted], FL to the Trustee of the Trust. Only the first page of the deed was provided to the legal unit so it is not known the date the deed was executed. The tax assessed value of the real estate is $25,116.

A Transamerica Annuity is also titled in the name of the Trust, which has an approximate value of $32,379.31. Withdrawals from the annuity have been made and transferred to an Irrevocable Trust bank account [redacted] with Westfield Savings Bank with an approximate value of $9,700.

ANALYSIS:
Applicants for MassHealth benefits have the burden to prove their eligibility. 130 CMR 520.007; G.L. c. 118E, §§ 20, 47A; *see generally Goldberg v. Kelly,* 397 U.S. 254 (1970). In order to be approved for such benefits, among other things, the total value of countable assets or resources owned by or available to the applicant may not exceed $2,000. 130 CMR 520.003(A)(1). 130 CMR 520.007 provides that "Countable assets are all assets that must be included in the determination of eligibility. Countable assets include assets to which the applicant or member or their spouse would be entitled whether or not these assets are actually received when failure to receive such assets results from the action or inaction of the applicant,

member, spouse, or person acting on his or her behalf..." *See also* 130 CMR 520.009 (countable income); 42 U.S.C. § 1396p(h)(1); *Reinholdt v. North Dakota Dept. of Human Services,* 760 N.W.2d 101 (2009)(If a Medicaid applicant has a colorable legal action to obtain assets through reasonable legal means, the assets are available, for purposes of determining eligibility.); *see generally, Matter of Addington v. Dowling*, 213 A.D.2d 1080, 1081, 624 N.Y.S.2d 499 (1995)("it has been observed that '[t]he word "needy" does not encompass a person who may create that need by failing or refusing to provide for her own needs" (citations omitted)).

Medicaid is a statutory program, governed by Medicaid statutes and case law interpreting the same. Medicaid is not a program in equity and common law principles do not override Medicaid statutory provisions or the policies and purposes underpinning the program. *See generally Nissan Motor Corp. v. Comm'r of Revenue,* 407 Mass. 153, 162 (1990) (there is no equity where a statute expresses a clear rule of law); G.L. c. 118E § 48 (the Board of Hearings is expressly not granted any sort of "equitable" authority, and further, does not allow any disregard of controlling Medicaid law). Since Medicaid is a statutory program, it cannot be trumped by common law, state law or equitable principles. *See generally Lebow v. Comm'r of Div. of Med. Assistance,* 433 Mass. 171, 172 (2001)("The purpose of the statute is to prevent individuals from using trust law to ensure their eligibility for Medicaid coverage, while preserving their assets for themselves or their heirs."); *Doherty v. Dir. of the Office of Medicaid,* 74 Mass. App. Ct. 439, 443 (2009) (stating that trusts should be evaluated in light of Congress' intent "...that Medicaid benefits be made available to only those who genuinely lack sufficient resources to provide for themselves."); *Shelales v. Dir. of the Office of Medicaid,* 75 Mass. App. Ct. 636, 640-641 (2009) (in affirming the Agency's interpretation of federal Medicaid law in light of the clear purpose and intent of the Medicaid program, the Court stated "MassHealth's interpretation more reasonably comports with the Federal and State legislative and regulatory scheme for providing a needs-based program aimed at maximizing the use of personal funds for long-term care before relying on public funds."); *Centennial Health Care Investment Corp. v. Comm'r. of the Div. of Med. Assistance,* 61 Mass. App. Ct. 320, 327 (2004)(a party cannot rely on common law contract concepts to circumvent "the overriding design and purpose of the medical assistance laws and the broad authority afforded the division in implementing the Legislative objectives....").

The Medicaid program is designed to provide health care for those with insufficient resources in accordance with Medicaid law, and "[i]ndividuals are expected to deplete their own resources before obtaining assistance from the government." *Lebow v. Com'r of Div. of Med. Assistance*, 433 Mass. 171, 172 (2000). As the court observed in *Lebow*, however:

> The unfortunate reality is that some individuals with significant resources devise strategies to appear impoverished in order to qualify for Medicaid benefits. One such strategy is to transfer assets into an inter vivos trust, whereby funds appear to be out of the individual's control, yet generally are administered by a family member or loved one.

This sentiment is echoed by the Supreme Judicial Court in the case of *Cohen v. Comm'r of the Div. of Med. Assistance,* 423 Mass. 399, 403 (1996)(explaining that the rule for self-settled trusts is addressed to an arrangement "concocted for the purpose of having your cake and eating it too"). The SJC has stated that in an evaluation of trusts under a Medicaid eligibility determination, the common law of trusts and general trust laws or principles cannot be used to circumvent the Medicaid statute. *Lebow v. Comm'r of Div. of Med. Assistance,* 433 Mass. 171, 172 (2001)("The purpose of the [Medicaid trust] statute is *to prevent individuals from using trust*

law to ensure their eligibility for Medicaid coverage, while preserving their assets for themselves or their heirs." (Emphasis added)); *see also Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009)(failure to include provision in trust allowing for principal distributions to the applicant did not render the principal as non-countable in a Medicaid eligibility determination).

For Medicaid purposes, treatment of trusts established on or after August 11, 1993 are governed by 42 U.S.C. §1396p(d) *et seq.* as codified in 130 CMR 520.023. Federal Medicaid law, 42 U.S.C. §1396p(d), trust states:

> (d) Treatment of trust amounts
> (1)For purposes of determining an individual's [applicant's] eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.
>
> (2)
> (A)For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:
>
> > (i)The individual.
> > (ii)The individual's spouse.
> > (iii)A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.
> > (iv)A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.
>
> (B)In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.
>
> (C)Subject to paragraph (4)[2], this subsection shall apply without regard to—
>
> > (i)the purposes for which a trust is established,
> > (ii)whether the trustees have or exercise any discretion under the trust,
> > (iii)any restrictions on when or whether distributions may be made from the trust, or
> > (iv)any restrictions on the use of distributions from the trust.
>
> (3)
> (A)In the case of a revocable trust—
>
> (i) the corpus of the trust shall be considered resources available to the individual,...
>
> (B)In the case of an irrevocable trust—

[2] Paragraph 4 addresses special needs trusts and pooled trusts and is not relevant in the instant matter.

> (i)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...(emphasis added)

The current statute, 42 U.S.C. §1396p(d), tracks exactly the SJC's language, reasoning and ultimate holdings in *Cohen* and *Lebow*, as affirmed in *Doherty*, that a trustee's discretion, any restrictions and limiting provisions in a trust are disregarded when determining whether a trust is countable in a Medicaid eligibility determination. *Cohen v. Comm'r of the Div. of Med. Assistance* 423 Mass. 399, 416, 418, 419-420, 424 (1996) (Countable assets in Plaintiff's trusts included all amounts available to the applicant, assuming exercise of the full discretion of the trustees, while disregarding any limitation on discretion); *Lebow v. Comm'r of Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2000)("The issue is not whether the trustee has the authority to make payments to the grantor at a particular moment in time. Rather, if there is *any* state of affairs, at *any* time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets count in calculating the grantor's Medicaid eligibility." (Emphasis in original); *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009) (Provision purporting to cut off applicant's ability to access the trust principal was disregarded); *see also Ford v. Comm'r Div. of Med. Assistance*, Mass. App. Ct. 1:28 Decision 08-P-2091 (October 19, 2009)(Upholding the Agency's determination that all trust assets were countable and rejecting plaintiff's argument that the trust principal was not countable because the trustee did not currently have discretion to distribute principal); *Victor v. Massachusetts Executive Office of Health & Human Services*, Mass. App. Ct. 1:28 Decision 09-P-1361 (July 21, 2010)(Court upheld the Agency's determination that a trust established by the applicant's husband during his lifetime but funded by the husband's Last Will & Testament, was nonetheless countable to the applicant in an eligibility determination); *see also generally Hedlund v. Wisconsin Dept. of Health Services*, Wis. Ct. App., No. 2010AP3070, Oct. 12, 2011) (Medicaid applicant who, seventeen years prior, transferred assets to her children and the children funded the assets into an irrevocable trust for the applicant's benefit was available for Medicaid purposes). As applied to this matter, all assets in the [redacted] Irrevocable Trust are countable in a Medicaid eligibility determination. 130 CMR 520.023; 42 U.S.C. §1396p(d).

Under 42 U.S.C. §1396p(d)(2)(A), an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if the trust was created other than by Will. [redacted] Irrevocable Trust was created by the applicant other than by Will on December 7, 2007. The Irrevocable Trust was funded with the applicant's Florida real estate and other liquid assets. In accordance with 42 U.S.C. §1396p(d)(2)(B) the portion of the Trusts attributable to the assets of the applicant (and/or spouse) shall be considered available. When, as here, only the assets of an applicant were transferred into the trusts, then all assets of the trusts shall be considered available under federal Medicaid law. 42 U.S.C. §1396p(d)(2)(B).

The federal Medicaid statute mandates that the countability of an applicant's (or spouse's) self-settled inter vivos Trust(s) is made without regard to the purpose of the Trust, whether the trustee has discretion, any "restrictions," and "when or whether distributions may be made from the trust." 42 U.S.C. §1396p(d)(2)(C)(i) - (iv). Thus, federal Medicaid law effectively creates a presumption that trusts containing the assets of an applicant (or spouse) are countable in an

eligibility determination. 42 U.S.C. § 1396p *et seq.*; *see generally Family Trust of Massachusetts, Inc. v. United States*, __ U.S. App. D.C. __, No. 12-5360 (June 28, 2013) ("Under statutory 'trust-counting' rules, a trust corpus is generally counted as an asset for the purpose of the eligibility limits." (Citations omitted)); *see also generally* BOH Appeal No. 1307250, 1208209, 1211060, 1217298.

As to the [redacted] Irrevocable Trust, the Irrevocable Trust was established by the applicant on December 7, 2007. The applicant is the Donor and is the vested lifetime Beneficiary of her self-settled inter vivos Trust. The interests of those listed on the Schedule of Beneficial Interests are, at best contingent Beneficiaries. Their interest vests, if at all, only upon the death of the applicant, and provided she does not, pursuant to her power under the Tenth Article, revise the Schedule of Beneficial Interests and/or exercise her power of appointment reserved under Paragraph G of the Second Article. Thus, the applicant is the current sole vested Beneficiary of her Trust.

Pursuant to Paragraph A of the Second Article, the applicant is entitled to distributions of income. Accordingly, the income is clearly countable in an eligibility determination.[3] 130 CMR 520.023(C)(1)(a).

Although Paragraph A of the Second Article states that there shall be no distributions of principal to or for the benefit of the applicant, for Medicaid purposes, the countability of Trust principal is not based on a single provision, or the failure to include a provision stating principal may be distributed to an applicant; rather, as Medicaid law requires, the whole of the instrument of Trust must be reviewed. *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439 (2009). Provisions purporting to give a trustee no discretion to distribute principal to the applicant do not control whether the principal is countable an eligibility determination for Medicaid welfare benefits.[4] *Id.* In addition, when there are provisions in a trust that attempt to limit the Trustee's discretion to make payments to, or on behalf of, an applicant, these are disregarded because they are meant to "defeat Medicaid ineligibility standards." *Cohen v. Comm'r of the Div. of Med Assistance*, 423 Mass. 399, 416 (1996). Thus, any triggering or limiting event or condition enumerated in a trust, and/or other provision attempting to cut off a

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[3] If during the past five years income was paid to someone other than the applicant, or if the principal were actually not countable and the income was added to the principal, this would be a disqualifying transfer. 130 CMR 520.023(C)(1)(c) and 130 CMR 520.019.

[4] To the extent the applicant may cite to the case of *Guerriero v. Commissioner of the Division of Medical Assistance*, 433 Mass. 628 (2001), to support a claim that the principal of the Trust is not countable, such comparisons are unavailing, not merely because the facts are wholly distinguishable, but also because under that case the pre-1993 Medicaid statute was applied. The statute was originally codified in 1986 at 42 U.S.C. § 1396a(k)(1). In 1993, the statute was amended, and the statute as amended was codified at 42 U.S.C. § 1396p(d). The statute as amended applies to all trusts created after 1993. *Cohen v. Commissioner of Div. of Med. Assistance*, 423 Mass. 399, 406 (1996). Nonetheless, On June 18, 1987, Guerriero (the applicant) established an irrevocable inter vivos trust. *Id.* at 629. In the trust, Guerriero designated herself and her living issue as beneficiaries of the trust. *Id.* Almost four years later, Guerriero signed a waiver by which she irrevocably waived and renounced all of her interest in the Trust. *Id.* By this document, Guerriero effectively divorced herself from the trust and was no longer a beneficiary of the trust. On May 15, 1998, seven years after she executed the waiver, Guerriero applied for Medicaid benefits, which was denied based on the countability of the trust. *Id.* The Court found that it was error for the Agency to count the assets in the trust because Guerriero had irrevocably waived and renounced any right to future payment under the trust. *Id.* at 635. In the instant matter, no such waiver or disclaimer was signed by the applicant. The applicant has at all times been a vested lifetime Beneficiary of the Trust she established in 2007.

Trustee's discretion are, as a matter of law disregarded, rendering the whole Trust countable.[5] Likewise, the disregard of a trustee's discretion and limiting provisions is also not predicated on whether the trust explicitly references Medicaid eligibility. *Lebow v. Comm'r of Div. of Med. Assistance*, 433 Mass. 171, 177 (2000); *see also generally Bisceglia v. Comm'r Massachusetts Div. of Med. Assistance*, 1996 WL 655713, 4 (Mass.Super.) ("If the grantor's intent to shelter assets for other than Medicaid purposes is viewed as a legitimate device for preserving plaintiff's eligibility for Medicaid benefits, then the result would have a disastrous effect on the future of Medicaid. Other applicants would be able successfully to argue that their trusts were not disqualifying because the grantor had harbored a purpose distinct from Medicaid eligibility preservation. The trust would once again become an effective tool permitting an otherwise ineligible person to hide assets and therefore qualify for benefits. This court declines to breathe life into a device so inconsistent with the legislative purpose.").

The Medicaid statute dictates that if there are if there are *any circumstances* under which the income and/or principal could be made available to or used for the benefit of the individual, the trust is countable. 42 U.S.C. §1396p(d)(3)(B)(i). Such "any circumstances" are found in several provisions of the Trust. For example, pursuant to Paragraph B of the Second Article, the applicant can reacquire Trust assets by substituting assets of an equivalent value. Under the plain language of the applicant's Trust, this is a circumstance under which principal may be made available to the applicant. 42 U.S.C. §1396p(d)(3)(B)(i). It is irrelevant whether the Trustee or applicant needs to, is able to, or wants to utilize this option, the mere fact that such option exists renders the value of the principal available and therefore countable. *See generally Edholm v. Minnesota Dept. of Human Services, et.al.,* A12-1623 Minn. App. Ct. A12-1623 (June 17, 2013) (unpublished) (Although Medicaid applicant was not a beneficiary of her self-settled trust, Court found trust resources available because, among other things, the applicant was designated as the "owner" of her Grantor trust under the Internal Revenue Code) (attached hereto as Exhibit A). *See also Lebow v. Comm'r of Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2000)("The issue is not whether the trustee has the authority to make payments to the grantor at a particular moment in time. Rather, if there is *any* state of affairs, at *any* time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets count in calculating the grantor's Medicaid eligibility." (Emphasis in original)).

While Medicaid law only requires one "any circumstance" to find the principal countable, here there are additional "any circumstances" under which the value of the principal can be made available to, or used for the benefit of, the applicant, and has in fact been made available to the applicant. 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a).

Under Paragraph C of the Second Article, the applicant has the right to reside in Florida condominium, which is Trust principal. This Article further provides that the real estate may not be sold without the applicant's written consent. Paragraph E of the Second Article also gives the applicant the right to reside in any real estate titled in the name of the Trust. 130 CMR 520.023(C)(1)(d) states: "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

[5] Courts in other jurisdictions likewise disregard provisions that seek to cut off trustee discretion in order to render assets not countable. *See In re Ruby Owen*, 2012 Ark. App. 381 (2012); *Roscke v. County of Carver*, 783 N.W.2d 220, 225 (2010); *Vincent v. Department of Human Services*, 331 Ill. Dec. 314, 322 (2009).

130 CMR 520.007(G)(2) or 520.007(G)(8)." Here, according to the terms of the Trust, the real estate is available to the applicant.

A review of the Trust also reveals that the applicant, as Grantor, retained control over, and rights in, the principal and the administration of the Trust. For example, the applicant retained a power of appointment exercisable during her lifetime and/or by Will. *See* Trust, Second Article, Paragraph G. Had the applicant-grantor divested herself of ownership and control of the Trust principal, such power of appointment would be a nullity. Likewise, the applicant must provide consent to the sale of any real estate and investment of Trust assets, and may reside in any real estate. Pursuant to the Tenth Article, the applicant can revise the Schedule of Beneficiaries at any time. It is not credible to find that the applicant has divested herself of all interest in the principal when the plain language of the Trust demonstrates the substantial control and interest she retains in its assets.

Additionally, pursuant to the Third Article, the Trustee also has wide latitude and authority to deal with Trust assets. The Trustee may, invest and reinvest Trust property with the consent of the applicant, make distributions directly to, or for the benefit, of the applicant-Beneficiary, make allocations of income and principal, and under the Fourth Article the Trustee may execute deeds, mortgages or other instruments. Thus, the Trustee is free to use the value of the principal to invest in an income producing product, such as an annuity, and pursuant to Paragraph A of the Second Article, the income is countable. Massachusetts General laws specifically provide that "The trustee under a will or other instrument may, if the trust does not otherwise provide, invest the income or principal of the trust fund in policies of life or endowment insurance or annuity contracts, issued by a life insurance company duly authorized to transact business in the commonwealth pursuant to chapter one hundred and seventy-five, on the life of any beneficiary of the trust or on the life of any person in whose life such beneficiary has an insurable interest." G.L. c. 203, §25A. The latitude given the Trustee to deal with the Trust assets, including the ability to convert the value of all of the principal to income, demonstrates that there are several circumstances under which the value of the principal can be made available to, or used for the benefit of, the applicant. 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a); 130 CMR 520.009(D) (unearned income includes annuities); 20 CFR § 416.1121. Again, whether the Trustee chooses to exercise discretion, and/or claims that such actions would be a breach of fiduciary duties have no bearing on, and are not controlling in, a Medicaid eligibility determination. 42 U.S.C. §1396p(d) *et seq.; Lebow* at 172. Under the Medicaid statute and Medicaid case law interpreting the same, the fact that such circumstances exist renders the value of the principal countable. Here, some of the liquid resources in the Trust are already in the form of the applicant's annuity. The Trustee has authority to annuitize that instrument, name the Commonwealth as the remainder beneficiary, and distribute its monthly payments to the applicant. 130 CMR 520.007(J)(1) and (2); 42 U.S.C. § 1396p(c)(1)(F)[6] and (G).

While Medicaid law only requires one "any circumstance" to find the principal countable, here there are several "any circumstances" under which the real estate, i.e. principal, and the value of the principal can be made available to, or used for the benefit of, the applicant, and has in fact been made available to the applicant despite the failure to include such a provision in the Trust. 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a).

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[6] Subsec. (c)(1)(F)(i). Pub.L. 109-432, Div. B, Title IV, § 405(b)(1), struck "annuitant" and inserted "institutionalized individual".

An applicant cannot credibly claim that real estate (principal) and liquid resources in an irrevocable trust are available to her while she wants to, among other things, (1) reside in the real estate, (2) control its sale, (3) take advantage of tax abatements or property tax deductions, and (4) use her individually owned countable assets to pay expenses related to the real estate (principal), but then suddenly claim the trust principal is not available because she seeks Medicaid long-term care nursing home welfare benefits. "It is against public policy to permit a man to tie up his own property in such a way that he can still enjoy it but prevent his creditors from reaching it." *U.S. v. Murray,* 217 F.3d 59, 65 (2000)(*quoting* 2A Scott & Fletcher, *The Law of Trusts* § 156, at 167 (4th ed. 1987). An applicant's claim that she is only entitled to Trust income, which the Irrevocable Trust has never produced for the applicant, while simultaneously claiming she is not entitled to access principal even though she lived in the principal (real estate) after it was transferred into the Irrevocable Trust in 2007, demonstrates the incongruity of finding the Trust principal as unavailable and non-countable. Such an arrangement is an example of "having your cake and eating it too." *Cohen v. Comm'r of the Div. of Med. Assistance,* 423 Mass. 399, 403 (1996)(explaining that the rule for self-settled trusts is addressed to an arrangement "concocted for the purpose of having your cake and eating it too").

Any suggestion that because the assets were transferred beyond the look-back period somehow the Irrevocable Trust assets are insulated is simply wrong, and presupposes, without legal authority to make such determinations, that the Trust is non-countable under the Medicaid statute. *See generally* 42 USC §1396a(a)(5)(single state agency is entity charged with making Medicaid eligibility determinations); M.G.L. c. 6A § 16; G.L. c. 118E, §§ 1, 2, 7(g), 7(h); 42 CFR § 431.10; *Cohen v. Comm'r of Div. of Medical Assistance*, 423 Mass. 399, 419-421 (1996)(finding that a probate court order stating trust assets were not accessible by an applicant for Medicaid did not render those trust assets inaccessible or non-countable in an eligibility determination); *Tarin v. Comm'r Massachusetts Div. of Medical Assistance*, 424 Mass. 743 (1997) (income subject to child support order was deemed available and countable to Medicaid recipient); *In The Matter of A.N.* 430 N.J.Super. 235, 63 A.3d 764 (2013) (Chancery Court lacks subject matter jurisdiction to make Medicaid eligibility determinations). *Clark v. Comm'r of Income Maintenance*, 209 Conn. 390, 551 A.2d 729 (1988) (income was subject to a Probate Court order requiring it to be paid to spouse nonetheless deemed available for Medicaid purposes). Regardless of when assets are transferred into a Trust, the Agency is obligated to determine whether any of its assets are, or were, countable in an eligibility determination. That an applicant established and funded her Trust beyond the look-back period is irrelevant in assessing its countability. 42 U.S.C. §1396p(d) *et seq.*; 42 U.S.C. §1396p(c) *et seq.*; *State Medicaid Manual* §3259.6(G)(trust rules take precedence over transfer of assets provisions).

Significantly as well, the Medicaid Act and Medicaid case law <u>does not</u> equate availability and countability with the right of an applicant to possession of a resource or receipt of distributions of trust principal. 42 U.S.C. §1396p(h)(1)("The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive..."); *see also* 130 CMR 520.007 (countable assets); 130 CMR 520.003 ("The total value of countable assets owned by *or available to individuals*..."). Rather, as federal Medicaid law and MassHealth regulations dictate, countable resources are all income and assets that must be included in an eligibility determination whether or not the resource is actually received or is subject to payment to someone else. *See generally Cohen v. Comm'r of Div. of Medical*

Assistance, 423 Mass. 399, 419-421 (1996)(finding that a probate court order stating trust assets were not accessible by an applicant for Medicaid did not render those trust assets inaccessible or non-countable in an eligibility determination); *Tarin v. Comm'r Massachusetts Div. of Medical Assistance*, 424 Mass. 743 (1997) (income subject to child support order was deemed available and countable to Medicaid recipient); *see also Clark v. Comm'r of Income Maintenance*, 209 Conn. 390, 551 A.2d 729 (1988) (income was subject to a Probate Court order requiring it to be paid to spouse nonetheless deemed available for Medicaid purposes). This is because, among other things, Medicaid is the payor of last resort and applicants are expected to deplete their resources before qualifying for benefits. 42 U.S.C. §1396p(h); 130 CMR 520.007; Medicaid Act, § 1901 *et seq.*, 42 U.S.C.A. § 1396 *et seq.; see generally* G.L. c.118E, §23 [4th para.]; *Reinholdt v. North Dakota Dept. of Human Services*, 760 N.W.2d 101 (2009)(If a Medicaid applicant has a colorable legal action to obtain assets through reasonable legal means, the assets are available, for purposes of determining eligibility.); *Lebow v. Comm'r of Div. of Med. Assistance*, 433 Mass. 171 (2000).

To accept the applicant's apparent position that the value of the principal is not available due to Paragraph A of the Second Article, while ignoring the provisions of the Trust that are inconsistent with Article as well as the administration of the trust, would mean that federal Medicaid law governing the treatment of trusts is to be read as *any circumstances except...* This is not what the law states. That there are provisions in applicant's Irrevocable Trust that are at odds with each other does not change the analysis. While the *Doherty* Court stated that it had "no doubt that self-settled, irrevocable trusts may, if so structured, so insulate trust assets that those assets will be deemed unavailable to the Settlor," such was not the case in the Doherty Trust, which contained an explicit provision disallowing distributions of principal to the applicant, nor is it the case in the applicant's Trust. This is because, as the Court in *Doherty* instructs, the instrument of trust must be read as a whole through the lens of Medicaid law, the purpose and policies underpinning the program, and without reliance on a single trust provision. *Doherty v. Dir. of the Office of Medicaid*, 74 Mass. App. Ct. 439 (2009)(Medicaid applicants are prohibited from receiving public health care assistance while also preserving assets for their heirs through the use of a trust which purported to cut off applicant's ability to access the trust principal); *Lebow v. Commissioner of Div. of Med. Assistance*, 433 Mass. 171, 172 (2000) (Under the Medicaid program, "[i]ndividuals are expected to deplete their own resources before obtaining assistance from the government."). Since there are numerous circumstances where the value of the Irrevocable Trust principal is available, could be made available and has been made available, Medicaid law requires the Agency to consider the principal countable. 42 U.S.C. §1396p(d) *et seq.*; 130 CMR 520.023(C).

Accordingly, the [redacted] Irrevocable Trust is fully countable in an eligibility determination. 42 U.S.C. §1396p(d) *et seq.*; 130 CMR 520.023(C)(1)(a); 130 CMR 520.023(C)(1)(d). However, 130 CMR 520.024 provides:

> (C) Home in Trust: Cure.
> (1) If the MassHealth agency has denied or terminated MassHealth because the home or former home in trust is considered an excess asset, the MassHealth agency will rescind that action if the home or former home has been removed from the trust and returned to the nursing-facility resident in accordance with the full cure rules at 130 CMR 520.019(K).

(2) When the home or former home is removed from a trust, as determined by the MassHealth agency, the MassHealth agency will redetermine eligibility using the rules at 130 CMR 520.007(G)(8) and the full cure rules at 130 CMR 520.019(K).
(3) When the home or former home has been removed from the trust, the MassHealth agency may place a lien in accordance with 130 CMR 515.012.

The Agency may want to consider whether the Florida real estate would be subject to an Agreement to Sell upon the Agency receiving a duly recorded deed showing it was removed from the trust and titled in the applicant's name alone.[7] 130 CMR 520.008(A); 130 CMR 520.007(G); 130 CMR 515.012.

[7] Countable illiquid resources are exempted only: (1) upon an applicant signing an agreement to sell; (2) the applicant must repay the Agency from the sale proceeds benefits for the benefits it paid on her behalf (*see* 20 C.F.R. § 416.1244, upon the sale of the real estate, the net proceeds are "...available to repay that portion of the payments that would not have been made had the disposition occurred at the beginning of the period for which payment was made."); and (3) the exclusion applies only if the Agency finds an applicant is making a good faith effort to the sell the property and provides proof establishing the same. 130 CMR 50.007(G); SI 01150.201(B)(1)("The individual must make reasonable efforts to sell excess nonliquid property by taking all necessary steps to sell it through media serving the geographic area in which the person lives or, if different, where the property is located."); POMS SI 01150.205.

Exhibit A

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1623

Mary Edholm,
Appellant,

vs.

Minnesota Department of Human Services, et al.,
Respondents.

Filed June 17, 2013
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CV-11-23237

Brian P. Farrell, Brian P. Farrell, P.A., Maple Grove, Minnesota (for appellant)

Lori Swanson, Attorney General, Corrie A. Oberg, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Department of Human Services)

Mike O. Freeman, Hennepin County Attorney, Carla J. Hagen, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges the district court's order affirming respondent department of human services' order denying appellant medical-assistance benefits, arguing that the department erred by calculating her assets to include the contents of an irrevocable trust. We affirm.

FACTS

Appellant Mary Edholm created the Mary Edholm Irrevocable Trust on September 16, 2004. The trust designated two of Edholm's sons as the trustees and her five children as the beneficiaries. A provision in the trust provides: "The Trustmaker hereby reserves the right to borrow income or principal of the trust without providing adequate interest and/or without providing security for the loan. The purpose of this provision is to cause this trust to be a Grantor Trust under I.R.C. Section 675(3) and the applicable Treasury regulations." The trust contains approximately $124,000 in assets.

At some point after Edholm created the trust, she applied for medical assistance. In July 2011, respondent Hennepin County Human Services and Public Health Department sent Edholm written notice that the trust's assets were deemed available assets and, as a result, she was ineligible for medical-assistance benefits. Edholm appealed to respondent Minnesota Department of Human Services.

In October, a human-services judge (HSJ) held an evidentiary hearing. Shortly afterward, the HSJ issued an order recommending that the commissioner of human services affirm the county's determination that the trust assets are available to Edholm for

the purpose of determining her medical-assistance eligibility. The HSJ determined that the terms of the trust establish that interest-free payments could be made to Edholm from the trust at any time. The commissioner adopted the HSJ's recommendation.

Edholm appealed to the district court pursuant to Minn. Stat. § 256.045, subd. 7 (2012). Following a hearing, the district court affirmed the commissioner's order. This appeal follows.

D E C I S I O N

In an appeal from a district court's review of an agency decision, this court "independently evaluate[s] the administrative decision in light of the agency's record." *In re Kindt*, 542 N.W.2d 391, 398 (Minn. App. 1996) (emphasis omitted). In doing so, we accord the agency's decision a presumption of correctness. *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39 (Minn. 1989). We may reverse or modify the agency's decision only if the petitioner's substantial rights have been prejudiced because the agency's decision contains errors of law, is unsupported by substantial evidence, or is arbitrary and capricious. Minn. Stat. § 14.69 (2012).

Whether assets in a trust are available for the purpose of determining whether an individual is eligible for medical-assistance benefits is a question of law, which this court reviews de novo. *Rosckes v. Cnty. of Carver*, 783 N.W.2d 220, 224 (Minn. App. 2010). This court usually is not bound by an agency's decision when reviewing issues of law, but we give considerable deference to an agency's interpretation when the agency's construction of its own regulation is at issue. *St. Otto's Home*, 437 N.W.2d at 39-40.

"The Medicaid program is a jointly financed federal-state program designed to provide health care to needy individuals." *In re Carlisle Trust*, 498 N.W.2d 260, 263 (Minn. App. 1993). In Minnesota, the Medicaid program is referred to as "medical assistance" and is governed by Minn. Stat. §§ 256B.001-.84 (2012). *Id.* at 263 & n.1. The medical-assistance program "was intended to ensure medical care for persons who lacked the resources to pay for it, and to be the payor of last resort." *Rosckes*, 783 N.W.2d at 224 (quotation omitted). To be eligible, an individual must not own more than $3,000 in assets. Minn. Stat. § 256B.056, subd. 3. Only assets that are "available to the applicant or recipient" are considered to determine an individual's eligibility. 42 U.S.C. § 1396a(a)(17) (Supp. V 2011).

Before 1986, some individuals exploited a loophole in the federal Medicaid law by placing assets in irrevocable trusts to preserve their eligibility for Medicaid and their assets for their heirs. *Rosckes*, 783 N.W.2d at 225; *Kindt*, 542 N.W.2d at 395. In 1986, Congress passed a statute to address its concern about this practice. *Rosckes*, 783 N.W.2d at 225. Congress later repealed the statute and then recodified an amended version of the statute at 42 U.S.C. § 1396p(d) (2010). *Id.* As currently codified, the statute provides that, 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 . . . payment to the individual could be made shall be considered resources available to the individual." 42 U.S.C. § 1396p(d)(3)(B)(1) (2006). Under Minnesota law, this provision applies to trusts established after August 10, 1993. Minn. Stat. § 256B.056, subd. 3b(b).

Here, the terms of the irrevocable trust that Edholm created give her the right to borrow from the trust's income or principal "without providing adequate interest and/or without providing security for the loan." Edholm acknowledges that the trust leaves her the power to *borrow* from the income or principal of the trust, but argues that this does not constitute a *payment* from the trust because she has an obligation to repay any loan she receives from the trust. However, the federal Medicaid statute provides that "if there are *any circumstances* under which payment from the trust *could* be made to or for the benefit of the individual," then those resources are considered to be available to the individual. 42 U.S.C. § 1396p(d)(3)(B)(i) (emphasis added). This language is very broad and inclusive. Because Edholm's trust gives her an unlimited ability to access the trust's assets, it is encompassed by the broad terms of the statute. In addition, as the district court found, this interpretation of the statute is consistent with Congress's intent to limit Medicaid benefits to the needy and prevent individuals from transferring their assets to irrevocable trusts to qualify for Medicaid. *See Rosckes*, 783 N.W.2d at 225.

Edholm further argues that the provision allowing her to borrow from the trust was included in the trust for tax purposes. The trust provides that the purpose of the provision is "to cause this trust to be a Grantor Trust under I.R.C. Section 675(3) and the applicable Treasury regulations." Under that statute, "[t]he grantor shall be treated as the owner of any portion of a trust" when "[t]he grantor has directly or indirectly borrowed the corpus or income and has not completely repaid the loan, including any interest, before the beginning of the taxable year." I.R.C. § 675(3) (2006). According to this provision, the statute treats Edholm as the owner of any portion of the trust's assets that she borrows

from the trust for tax purposes. This provision provides support for the commissioner's determination that the trust's assets are resources that are available to Edholm because it demonstrates that Edholm retains some control over the trust.

Affirmed.