The MassHealth application filed on behalf of (the “Appellant”) should be approved because the principal in the Irrevocable Trusts in question do not constitute countable or available assets. The Irrevocable Trusts at issue allow for the Appellant or the Appellant’s wife to receive income only. The principal of the Irrevocable Trusts has always been unavailable to the Appellant and the Appellant’s wife, and could not be given to the Appellant or the Appellant’s wife.

The memorandum prepared by the Office of Medicaid attacks specific provisions of the Irrevocable Trusts, but fails to demonstrate that the Appellant or the Appellant’s wife has the right to withdraw principal or the trustee has the power to distribute principal from the Irrevocable Trusts to the Appellant or the Appellant’s wife. To the extent that the Office of Medicaid argues certain provisions provide access to the principal, the arguments of the Office of Medicaid reflect a reckless misinterpretation of the Irrevocable Trusts and a reckless misinterpretation, based largely on dicta, of federal Medicaid trust law and Massachusetts trust law.

The Irrevocable Trusts were involved in a MassHealth application by the Appellant’s wife, , in 2009 that was approved in 2010 without the Irrevocable Trusts being treated as countable or available assets. Thus, the Office of Medicaid is now taking an inconsistent position on the Irrevocable Trusts, and the principles of res judicata should prevent such inconsistency by the Office of Medicaid.
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(1) **Income-only Irrevocable Trusts Are Allowed under Federal Medicaid Laws, MassHealth Regulations and Massachusetts Case Law**

Even though federal Medicaid law at 42 U.S.C. §1396a(a)(19) requires that each state Medicaid program be administered “in a manner consistent with simplicity of administration and the best interests of the recipients,” the Office of Medicaid now appears to take the position that all assets held in trust, regardless of when the transfers into trust were made and regardless of the trust terms, should be counted for MassHealth purposes. Despite writing that Medicaid is “a statutory program and not a program in equity,” the Office of Medicaid has based part of its reason for counting the assets of the irrevocable trusts on any dicta it can find in cases. The Office of Medicaid has cited Lebow for the principle that individuals should not deplete assets in order to qualify for MassHealth, but the statement that the Office of Medicaid relies on from that case is simply dicta. The federal Medicaid law does not make such a gross overgeneralization and does allow individuals to do as they wish with their assets during their lifetime, albeit with restrictions.

The law in general allows individuals to do as they wish with their property while alive and does not impose restrictions on an individual’s property rights. The transfer of assets is a right of every property owner, with two key exceptions being Medicaid and bankruptcy law. The Medicaid law provides strict rules for asset transfers prior to applying for Medicaid. The federal Medicaid law was crafted with legislative knowledge that some persons transfer assets in order to qualify for Medicaid, and was meant to balance an individual’s property rights with governmental interests.

Throughout the memorandum the Office of Medicaid relies heavily on its own misstatements of law in drawing the conclusion that the assets of the Irrevocable Trusts are countable. The memorandum of the Office of Medicaid suggests that all trusts are disallowed, but there is no federal Medicaid law that states that all irrevocable trusts are disallowed; rather, only irrevocable trusts that have certain characteristics are disallowed. In **Guerriero v. Commissioner of the Division of Medical Assistance**, 433 Mass. 628, 635 (2001), the Court pointed out: “Although we concluded in **Cohen** the limitations on discretion should be disregarded, we noted that "[i]t is true that a trust might be written to deprive the trustee of any discretion (for instance allowing the payment only of income) and that such a limitation would be respected.” It was the role of the federal government, when it passed federal Medicaid law, to
determine what is allowable or not allowable in the trust realm, and the federal government has passed no blanket prohibition against trusts. The Office of Medicaid appears to rely heavily on dicta and recklessly misinterprets several cases as well as provisions of the Irrevocable Trusts in this appeal in attempting to argue that the Appellant and the Appellant’s wife somehow have access to the principal of the Irrevocable Trusts. The Appellant and the Appellant’s wife gave up access to the principal of the Irrevocable Trusts, and neither the relevant statutes and regulations nor case law support the Office of Medicaid’s contention that MassHealth may count the principal of any irrevocable trust that is beyond the reach of the Appellant and the Appellant’s wife and that may not be distributed to the Appellant or the Appellant’s wife.

In an effort to draw parallels between the Irrevocable Trusts in this appeal with each of the trusts that were involved in the cases of Cohen v. Comm'r of Div. of Med. Assistance, 423 Mass. 399 (1996), Lebow v. Comm'r of Div. of Med. Assistance, 433 Mass. 171 (2001) and Doherty v. Commissioner, 74 Mass. App. Ct. 439 (2009), the Office of Medicaid misconstrues these decisions. On page 4 of its memorandum, the Office of Medicaid cites the Lebow decision as standing for the proposition that “the common law of trusts and general trust laws and principles cannot be used to circumvent the Medicaid statute,” arguing that Massachusetts trust law should be ignored if its application would render the MassHealth applicant eligible for MassHealth benefits, but such a holding is nowhere to be found in the Lebow decision. Further, Doherty does not stand for the prohibition against the use of irrevocable trusts to shelter assets, as the Court makes the point that the decision was limited to the facts in that case and concludes: "we have no doubt that self-settled, irrevocable trusts may, if so structured, so insulate trust assets that those assets will be deemed unavailable." Doherty at 442.

(2) The Massachusetts Legislature Has Prohibited MassHealth Estate Recovery Against Trusts, and Therefore Has Approved Their Existence

Under federal Medicaid law, one state option available since 1993 has been to make post-death claims for estate recovery against trusts. In 2004, the Massachusetts legislature voted overwhelmingly not to allow estate recovery against trusts. Thus, the governmental branch in charge of establishing and changing laws in Massachusetts has legislatively expressed its acceptance of the use of irrevocable trusts to qualify for MassHealth.
Current MassHealth regulations require recovery from the probate estates of MassHealth members who received Medicaid while age 55 or over and those who, regardless of age, received Medicaid while institutionalized. All MassHealth expenses incurred for such members, with certain exception, are counted toward the total recovered amount. An exception from estate recovery is made in cases where recovery would cause hardship, and only partial recovery is required from the estate of members who had long-term care insurance policies that met the Massachusetts Division of Insurance requirements. Estate recovery is deferred while there is a surviving spouse or child who is blind, permanently and totally disabled, or under age 21.

In 2004, the Massachusetts legislature was presented with voting on the option, allowed to the states by federal Medicaid law since 1993, of allowing estate recovery against trusts. The bill it passed limited estate recovery to the probate estate, but was vetoed by Governor Romney. The Massachusetts legislature then voted to override the veto, unanimously in the House and with only one dissenting vote in the Senate. The existing law, M.G.L. c. 118E, s. 31(c), does not allow estate recovery against trusts and shows that there is no Massachusetts legislative policy against trusts in the MassHealth context.

(3) Case of Lewis v. Alexander Held That Federal Medicaid Law Does Not Direct That State Trust Laws Be Ignored

The Office of Medicaid claims that Massachusetts trust laws should be ignored, but the United States Court of Appeals for the Third Circuit has already examined Congressional intent in the context of Medicaid trust laws and concluded otherwise. “Congress rigorously dictates what assets shall count and what assets shall not count toward Medicaid eligibility. State law obviously plays a role in determining ownership, property rights, and similar matters.” Lewis v. Alexander, 685 F.3d 325, 334 (3d Cir. 2012). “Trusts are, of course, required to abide by a State’s general law of trusts.” Lewis at 335, footnote 15. “[T]here is no reason to believe [Congress] abrogated States’ general laws of trusts. … After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues.” Lewis at 343.

The same conclusion that state laws must control trust interpretation has been reached in Dana v. Gring, 374 Mass. 109 (1977). by the Supreme Judicial Court of Massachusetts with regard to the treatment of irrevocable trusts under another federal statute, the Internal Revenue

Even though the Lewis case is quoted in one of the cases cited in the memorandum of the Office of Medicaid, the Office of Medicaid has chosen not to mention the Lewis case in its memorandum. The holdings in Lewis and Dana undercut much of what is claimed in the memorandum of the Office of Medicaid, especially the arguments about how state trust laws are to be ignored in Medicaid trust analysis. “An incorrect interpretation of a statute by an administrative agency is not entitled to deference.” Kszepka’s Case, 408 Mass. 843, 847 (1990).

(4) Federal Medicaid Law Specifies Only Four Aspects of State Trust Law That May Be Ignored in Determining Eligibility

No statutory or case law provides that all state trust law is to be ignored in the determination of eligibility for Medicaid benefits for long term care. The case language quoted by the Office of Medicaid does not mean that trusts may not be used effectively to protect assets. Federal Medicaid law (42 USC §1396p(d)) and Massachusetts MassHealth regulations (130 CMR 520.021-520.024) address the treatment of trusts in the Medicaid arena, and they do not state or imply that all trusts are presumed Medicaid ineligible or that all trust law is to be ignored. In reality, federal Medicaid law at 42 USC 1396p(d)(2)(C) specifies only four aspects of trust law that may be ignored in determining eligibility.

The first condition in federal Medicaid law is that the purpose of the trust may not be used to restrict the exercise of a power granted by the trust instrument to the trustee. If the language of the trust instrument gives to the trustee power to distribute principal from the irrevocable trust to the settlor of the trust, then, in the Medicaid context, it may not be
successfully argued by a MassHealth applicant that the purpose of the irrevocable trust was to protect the trust principal from countability for Medicaid eligibility purposes. Federal Medicaid law allows the Office of Medicaid to disregard the purpose of the irrevocable trust as an effective limitation, under trust law, to bar the trustee from making a principal distribution to the settlor. If, however, the trust instrument contains a general prohibition against trustee distribution of principal to the settlor, then the Office of Medicaid cannot simply ignore that provision of the irrevocable trust.

The second condition in federal Medicaid law is that any discretion of the trustees may be ignored by the Office of Medicaid. If the trustees have discretion now or in the future to distribute principal to the settlor, then trust principal is countable to the full extent that the terms of the irrevocable trust allow such distribution, disregarding any limitation otherwise placed upon the exercise of that discretion by the terms or purpose of the irrevocable trust.

The third condition in federal Medicaid law is that any restrictions on when or whether distributions may be made from the irrevocable trust to the settlor may be ignored. Once again, this provision in the law must be read in context of the Medicaid statute and in light of Massachusetts trust law, which is not to be disregarded in its entirety. A transfer into trust that allows absolutely nothing back to the settlor cannot be properly argued to contain assets “available” to the settlor, as in that situation the trustee has no present or future power or authority to distribute principal to the settlor. The Office of Medicaid is required to recognize that, under the terms of such an irrevocable trust, there is no lawful way for the trustee to make distribution to the settlor, and the federal Medicaid law does not conjure ways to find opportunity for a trustee to breach fiduciary duties to cause disqualification of the settlor for MassHealth benefits. The court in Doherty said it clearly at the end: “Finally, we take this opportunity to stress that we have 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.” Id at 442-443. If, by way of contrast, the trustee is given present or future discretion to distribute principal to the settlor, any restriction on the exercise of that power, as to when or how or under what circumstances, may be ignored in the Medicaid context; that is what was at issue in the Cohen case and its companion cases.
Fourth, any restrictions on the use of distributions from the irrevocable trust may be ignored in the Medicaid eligibility context, for not even a trustee may control trust property once it is distributed into the hands of the beneficiary as his or her own property.

The “any circumstances” test in federal Medicaid trust law is limited to these four conditions. The State Medicaid Manual at 3259.6 E. provides guidance to all states in describing the circumstances under which payments can or cannot be made: “In determining whether payments can or cannot be made from a trust to or for an individual, take into account any restrictions on payments, such as use restrictions, exculpatory clauses, or limits on trustee discretion that may be included in the trust. For example, if an irrevocable trust provides that the trustee can disburse only $1,000 to or for the individual out of a $20,000 trust, only the $1,000 is treated as a payment that could be made under the rules in subsection B. The remaining $19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual. On the other hand, if a trust contains $50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this full amount is considered as payment that could be made under some circumstances, even though the likelihood of payment is remote. Similarly, if a payment cannot be made until some point in the distant future, it is still payment that can be made under some circumstances.” Note that the State Medicaid Manual does not even come close to hinting that state trust laws be ignored, as the Office of Medicaid has stated, or that an irrevocable trust be scrutinized for details (while ignoring provisions to the contrary) that could be twisted into an “any circumstances” test, as the Office of Medicaid has attempted to do in this case.

(5) This Is Not a “Cohen” Case

In Cohen and its companion cases, the trustee had the authority to distribute principal to the settlor, but there were limited restrictions on the trustee’s authority. “In each of these cases [the four cases decided under Cohen], 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, while according the trustee substantial discretion in a number of respects, explicitly seeks to deny the trustee any discretion to make any sums available to the grantor if (emphasis added) 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 at 407.

Cohen and its companion cases stand for disqualifying an irrevocable trust when the trustee’s ability to pay income and/or principal to or for the benefit of the settlor terminates upon a specified event or may arise under certain circumstances. In Cohen, for example, a clear provision existed in the trust for distribution of principal or income; thus, there was in the trustee “under the terms of the trust the discretion to pay to the beneficiary the full amount in the trust.” Cohen at 416 (emphasis added). None of these types of provisions are found in the Irrevocable Trusts in this appeal. To be more specific, the offending language in the Cohen trust was:

“The Trustees may, from time to time and at any time, distribute to or expend for the benefit of the beneficiary, so much of the principal and current or accumulated net income as the Trustees may in their sole discretion, determine.... The Trustees, however, shall have no authority whatsoever to make any payments to or for the benefit of any Beneficiary hereunder when the making of such payments shall result in the Beneficiary losing her eligibility for any public assistance or entitlement program of any kind whatever. It is the specific intent of the Grantor hereof that this Trust be used to supplement all such public assistance or entitlement programs and not defeat or destroy their availability to any beneficiary hereunder.” Cohen at 415.

In the Comins trust, the offending language was:

“(c) Principal with respect to Settlor. Until the later to occur of (1) the passage of thirty months from the date of the establishment of this trust and (2) the date upon which either beneficiary is first institutionalized, and also thereafter during any periods of time during which the first beneficiary to be institutionalized is not then institutionalized, the Trustee shall apply on behalf of such first beneficiary so much of the principal of the Trust as is necessary and appropriate to provide him/her with those benefits and services, and only those benefits and services, which are not otherwise available to him/her from other sources as or when needed for his/her welfare.
“(d) Withdrawal of Principal. The Trustee shall also pay over or apply for the benefit of each primary Beneficiary an amount of principal as either primary Beneficiary shall direct in writing, not exceeding the lesser of $5,000 or 5% of the principal ... provided, however, that the Trustee shall make no distributions of principal under this paragraph to a primary Beneficiary during or with respect to any time during which such primary beneficiary is institutionalized....” Cohen at 417.

In the Walker trust, the offending language was:

“The Trustee is prohibited from spending sums of interest or principal to [Walker] for her benefit for services which are otherwise available under any public entitlement program of the United States of America, the Commonwealth of Massachusetts, or any political subdivision thereof. The exercise of a discretionary power to make a distribution for [Walker’s] health care, which would result in trust assets being used in substitution of public entitlement benefits is a breach of the fiduciary duties imposed on the Trustees [sic] under this indenture.”

In the Kokoska trust, the offending language read:

“The Trustee ... may make payment from time to time of so much of the principal of the Trust as is advisable in the discretion of the Trustee to meet the needs of the Primary Beneficiary as set forth in article two.”

Under the Irrevocable Trusts in this appeal, no such offending language exists, and the trustee has never had the authority to distribute principal to the Appellant or the Appellant’s wife and has never done so. None of the offending language from any of the four trusts in Cohen is contained in the Irrevocable Trusts in this appeal.

(6) This Is Not a “Lebow” Case

In Lebow, the trustee had the authority to distribute principal to the settlor, but the person who was trustee, wearing his other hat as beneficiary, needed to consent before he as trustee could do so. He initially granted his blanket consent, then years later withdrew it. Although the consent requirement in the trust instrument supposedly limited the trustee's discretion, it did not
completely deprive the trustee of discretion because the co-beneficiary, who was also trustee, held the power to modify the terms of the trust.

In Lebow, the applicant could always have received distributions of principal. The court classified this trust as a Medicaid-qualifying trust (“MQT”) authorizing the trustee to distribute trust assets to the settlor in his discretion and ruling the trust assets to be available in determining the applicant’s eligibility for MassHealth. In its decision, the Lebow court makes reference to the MQT statute, 42 U.S.C. §1396a(k), the 1985 federal Medicaid law trust changes, stating “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…” and the amount of a MQT that is 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.” §1396a(k), Lebow at 172 (emphasis added). The court in Lebow then goes on to state that “it does not matter whether a right in a trust has vested under traditional trust concepts.” Lebow at 177. This language does not mean that state trust law is to be ignored, but that, consistent with the Cohen decision, assets will be considered available whether or not they may be distributed today if they may be distributed under any circumstances in the future under the terms of the trust. Thus, the proper analysis in this appeal is whether the trustee is allowed to distribute the principal of the Irrevocable Trusts to the Appellant or the Appellant’s wife under the terms of the Irrevocable Trusts without breaching the trustee’s fiduciary duties to the remainderpersons of the Irrevocable Trusts.

Under the Irrevocable Trusts in this appeal, no maneuver even remotely similar to the Lebow machinations has been made, and the trustee has never had the authority to distribute principal to the Appellant or the Appellant’s wife. Neither the trustee nor anyone else has, has had, or ever could have the authority to grant permission to the trustee to distribute principal to the Appellant or the Appellant’s wife from the Irrevocable Trusts.

(7) The Position of the Office of Medicaid in the Doherty Case Was That the Trust Must Be Read as a Whole, and the Trustee Had No Fiduciary Duties to the Remainderpersons

The correct legal position about trust interpretation was stated on page 12 in the September 28, 2007 brief entitled “Defendant’s Opposition to Plaintiff’s Motion for Judgment on the Pleadings” filed in Essex Superior Court by Carolann Mitchell, Assistant General
Counsel of the Executive Office of Health and Human Services in the Doherty case: “In reviewing contracts, the courts have found that a contract must be read in such a way that no part of the agreement is left meaningless. See Starr v. Fordham, 420 Mass. 178, 190 (1995); see also S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc., 343 Mass. 635, 640 (1962). In other words, contracts must be construed to give “reasonable effect” to each provision contained therein. See State Line Snacks Corp. v. Town of Wilbraham, 28 Mass. App. Ct. 717 (1990). …To allow the one sentence … to control the whole of this document would render the Settlor’s stated intent … completely meaningless. Such an interpretation of this trust is … against the weight of the law.”

On that same page in the brief, the Office of Medicaid recognized and stressed the importance of fiduciary duties in trust analysis under Massachusetts trust law and federal Medicaid law. The Office of Medicaid took the position that the Trustee in the Doherty case had fiduciary duties, but not to the remainderpersons, but rather to the Settlor: “The unambiguous language of Article II demonstrates the Trustees’ fiduciary duty runs to Muriel, and dictates that they can use all assets of the Irrevocable Trust for her care and benefit.” The opposite is true in this case, where the Trustee has fiduciary duties to the remainderpersons, and cannot distribute principal to or for the benefit of the Appellant or the Appellant’s wife from the Irrevocable Trusts without violating those duties. Nowhere in the Irrevocable Trusts in this appeal is there any provision even slightly similar to the trust provision in Doherty that permitted the trustee to take action “without regard to the interests of the remaindermen.” Doherty at 441.

(8) The Trusts in This Case Must Be Read as a Harmonious Whole

It has been a fundamental tenet of trust interpretation in Massachusetts for generations that the intention of the settlor is to be respected, that the trust is to be read as a whole, and that any ambiguous or conflicting provisions are to be interpreted in a harmonious manner. The MassHealth denial received in this case treats the principal of the Irrevocable Trusts as available and countable, yet there is no reasonable way of interpreting the Irrevocable Trusts in this appeal as providing for principal distributions to or for the benefit of the Appellant or the Appellant’s wife.
First, in Clause 4 of the Irrevocable Trusts, which controls disposition during the lifetime of the Appellant or the Appellant’s wife, there is a provision that allows for distribution of net income to them, but there is no provision that allows for distribution of principal to them.

Second, paragraph 6.5 of the Irrevocable Trusts requires that “the Trustees shall in all events apply reasonable accounting principles” in making allocations between income and principal, no matter what the investment is.

Third, the Irrevocable Trusts each have a Committee in Clause 10 that can make minor administrative revisions, but each Committee is specifically prohibited from adding the Appellant or the Appellant’s wife “to the class of persons who may receive distributions of principal from this trust.”

Fourth, the trusts were funded with real estate via a nominee trust, named the 85 RINALDO ROAD REALTY TRUST, and the Irrevocable Trusts were the only beneficiaries of the nominee trust. The three trusts were executed on the same day, constitute a single estate plan, and therefore must be read together as a whole. Clymer v. Mayo, 393 Mass. 754, 765 (1985). The Schedule of Beneficial Interests of the nominee trust unambiguously states: “Under no circumstances shall the principal of REALTY TRUST, 2003 IRREVOCABLE TRUST or 2003 IRREVOCABLE TRUST ever be available for distribution to or .”

The Office of Medicaid, in the last paragraph on page 5 of its memorandum, argues that “the entire Trust instrument must be reviewed,” then proceeds to ignore all of these specific provisions that show the intended unavailability of principal in the Irrevocable Trusts. The Office of Medicaid attempts to isolate other phrases in the Irrevocable Trusts out of context, but under Massachusetts law phrases in trusts must not be read independently; rather, the entire trust must be read as a whole, and the Office of Medicaid pushed that very point in the Doherty case: “[A]s MassHealth strongly presses upon us, this clause may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole.” Doherty at 441.

two expressions in the trust deed must not be so construed as to impair or destroy the whole scheme of the trust, when another and more reasonable construction is possible.” Shirk v. Walker, 298 Mass. 251, 261 (1937). If two provisions of the trust are in apparent contradiction to each other when each is read in isolation, construction must be found that will allow meaning to both provisions to resolve the apparent contradiction, as it is presumed that all provisions in a trust were intended by the settlor to have meaning. Watson v. Baker, 444 Mass. 487 (2005).

(9) This Is Not a “Doherty” Case

The Office of Medicaid is incorrect in attempting to draw similarities between this case and Doherty v. Commissioner, 74 Mass. App. Ct. 439, 442-43 (2009), in which the assets of a trust were found to be countable because the applicant in Doherty was considered to be part of a class of beneficiaries who could receive the trust principal. In Doherty, the trustee had the power “in its sole discretion” and notwithstanding “anything contained in this Trust Agreement” to the contrary, “pay over and distribute the entire principal of [the] Trust fund to the beneficiaries thereof, free of all trusts,” so long as the trustees, “in [their] sole judgment,” determine that the “fund created . . . shall at any time be of a size which . . . shall make it advisable or unnecessary to continue such Trust fund.” Similarly, the trustee had the power to “determine all questions as between income and principal and to credit or charge to income or principal or to apportion between them any receipt or gain . . . notwithstanding any statute or rule of law for distinguishing income from principal or any determination of the Courts.” (emphasis added) … In addition, the settlor had directed the trustee to “accumulate the Trust principal to the extent feasible, due to the unforeseeability” of [the settlor’s] “future needs” and “without regard to the interests of the remaindermen.” (emphasis added)

A reading of the whole of the trust in Doherty made it appear that the trustee had no fiduciary duties at all to the remainderpersons, and, as noted earlier, the Office of Medicaid argued that the trustee had fiduciary duties to the settlor instead. The Irrevocable Trusts in this appeal does not include similar language, and instead display the intention to limit the distributions to the Appellant or the Appellant’s wife to income only.
Note that in the Doherty case, the court found the implicit authority to invade principal; the court wrote about language in the trust indicating an intent to administer the trust so as to address the settlor’s changing life needs. “[E]mbedded in the trust's governing recitation is not only an explicit assessment that public or other charitable benefits will likely be insufficient to provide Muriel the quality of life she might desire, but the corollary implicit direction for the trustees, in such case, to invade assets to make up that difference. Which is not to say that specific trust provisions do not confer this authority, but is rather simply to observe that the trust vehicle, considered as a whole, evidences Muriel's expectation or intent that the trustees will invade trust assets when necessary to ensure Muriel's comfort.” Doherty at 442. By way of contrast, in the Irrevocable Trusts in this appeal there is no such intention expressed.

The class of beneficiaries who may receive principal from the Irrevocable Trusts in this appeal explicitly does not include the Appellant or the Appellant’s wife. Further, unlike the trust in Doherty, there is no provision in the Irrevocable Trusts in this appeal which indicates that principal should be accumulated for the future needs of the Appellant or the Appellant’s wife, that legal distinctions between principal and income may be ignored, or that the interests of the remainderpersons are to be ignored. Thus, the trustee has fiduciary duties to the remainderpersons.

(10) The Memorandum of the Office of Medicaid Ignores Massachusetts Case Law on Proper Interpretation of Trusts

For the principal of the Irrevocable Trusts in this appeal to be available, either the distribution of the principal must be mandatory pursuant to the terms of the trust instrument, or the trustee must have discretion to make the distribution of principal. Any other distribution by the trustee would constitute a breach of the trustee’s fiduciary duty, warranting removal from office and personal financial responsibility. E.g., see In the Matter of the Trusts Under the Will of Lotta M. Crabtree, 449 Mass. 128, 136 (2007). To determine whether a trustee is mandated or given discretion to distribute property out of the Irrevocable Trusts, each trust instrument must be construed as a whole to derive the settlor’s intention, giving meaning to all provisions of the trust instrument and the entire estate plan as a whole. As the court noted in Hillman v. Hillman, 433 Mass. 590 (2001), when interpreting trust language, words should not be read in isolation and out of context; rather every effort should be
made to ascertain “the settlor’s intent from the trust instrument as a whole and from the circumstances known to the settlor at the time the instrument was executed.” Id. at 593. "A fair reading of the whole of most trust instruments will reveal a judicially enforceable, external, and ascertainable standard for the exercise of even broadly expressed fiduciary powers.” Dana v. Gring, 374 Mass. 109, 116 (1977).

Even if a trust is ambiguous with respect to any particular issue or matter, such ambiguity would not cause the principal of a trust to be available to a MassHealth applicant. It is well established that any matter relating to the rights created by a trust instrument is a question of law that turns on the Settlor's intent as reflected in the words of the instrument. Steele v. Kelley, 46 Mass. App. Ct. 712, 731 (1999). See also Harrison v. Marcus, 396 Mass. 424, 429 (1985); Atwood v. First Natl. Bank, 366 Mass. 519, 523-24 (1974); Berry v. Kyes, 304 Mass. 56, 59 (1939); 4 Scott, Trusts §§ 329A, 334.1 and 335 (Fratcher 4th ed. 1989). This rule of construction applies to the nature and extent of a Trustee's discretion and to the issue of whether a trust can be terminated. "In a written trust, the nature and extent of a trustee's discretion as to any issue is defined by (1) the terms of the trust instrument and (2) in the absence of any provision in the terms of the trust, by the rules governing the duties and powers of the trustee. Restatement (Second) of Trusts s. 164 (1959)." Guerriero at 632. See also West v. Third National Bank of Hampden County, 11 Mass. App. Ct. 577, 580 (1981); Steele v. Kelley, supra at 731 ("[t]he issue of termination, like any other matter relating to rights created by a trust instrument, including the extent of a trustee's discretion, initially is a question of law that turns on the settlor's intention as reflected in the words of the instrument."). (Citations omitted).

The Office of Medicaid Ignores that Trustees Have Fiduciary Duties to the Remainderpersons, and Cannot Use Powers to Skew Beneficial Interests

As a fiduciary, a trustee has the dual duties of loyalty and impartiality. See Johnson v. Witkowski, 30 Mass. App. Ct. 697, 705 (1997), and more generally, Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 529 (1997) quoting Judge Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 463-464 (1928) “(n)ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” The duty of loyalty to the beneficiaries requires of the trustee that he or she act solely in accordance with the terms of the trust instrument construed so as to carry out the intent of the settlor. Watson v. Baker, 444 Mass. 487, 491 (2005). Therefore, a trustee may not commit any act that would harm the interest of any beneficiary of the trust, that would waste any trust property, that would give trust property to anyone not entitled thereto, or that would otherwise be contrary to the intent of the settlor in entrusting the settlor’s property to the management of a trustee. See King v. Nazzaro, 78 Mass. App. Ct. 1128 (2011). If the trust instrument provides that no distribution of principal shall be made to the settlor of the trust, then the trustee is forbidden to do so. To do otherwise would do harm to the beneficial interests of the other beneficiaries, where here, the Appellant and the Appellant’s wife are the only income beneficiaries of the Irrevocable Trusts, and to do otherwise would therefore be a breach of fiduciary duty. See Anderson v. Bean, 272 Mass. 432, 447-448 (1930). Such a prohibition against distribution of principal to the Appellant and the Appellant’s wife from the Irrevocable Trusts is absolute. The Court in Guerriero made clear that if the Trustee violated his duty to a beneficiary, the Trustee would be liable for a "breach of trust." Guerriero at 632. A trustee has "the burden of showing that he ha[s] discharged the duties of trustee with reasonable skill, prudence, and judgment." Rugo v. Rugo, 325 Mass. 612, 617 (1950).

The Office of Medicaid attempts to argue that the purpose of a trust may not be used as a limitation on trustee discretion to make a distribution of principal to the Donor, but ignores that it is the responsibility of the trustee to understand all provisions of the trust instrument and construe them so as to give meaning and efficacy to all of them. As the Court stated in Dana v. Gring, 374 Mass. 109, 116 (1977), it is a fundamental principle of Massachusetts law "to ascertain the intention of the testator from the whole instrument,
attributing due weight to all its language . . . and to give effect to that intent unless some positive rule of law forbids."

Another duty of a trustee, the duty of impartiality as between and among the beneficiaries, requires that the trustee not favor one beneficiary over another; instead, the trustee is bound to treat all beneficiaries equitably in accordance with the terms of the trust instrument construed as a whole. See King v. Nazzaro, 78 Mass. App. Ct. 1128 (2011). Thus, a power that allows a trustee to make a particular type of investment is not authority to override the intentions of the trust. "Even when there are broad discretionary powers, a trustee may not exercise his or her discretion so as to shift beneficial interests in the trust." Fine v. Cohen, 35 Mass. App. Ct. 610, 617 (1993). The trustee of the Irrevocable Trusts in this appeal must balance risk and return in the trustee’s management of the trust estate so as to be fair to both the life income beneficiaries and the remainderpersons. "[I]n the absence of instructions to the contrary [a trustee is bound] to administer his trust with an eye to the remainder interest" as well as to the interest of the life beneficiary. Blodgett v. Delaney, 201 F.2d 589, 593 (1st Cir. 1953).

Trustee duties of loyalty and impartiality are not contrived limitations on the exercise of broadly given trustee powers, but rather are the very core and essence of what a trust is. A trust is a relationship wherein a trustee manages property for the benefit of others. The trustee is imbued with certain powers to carry out assigned duties, but those powers must be understood in the context of the beneficial interests that are bestowed upon the income beneficiary or life tenant and remainderpersons of the Irrevocable Trusts. For every interest that a beneficiary has under a trust instrument, the trustee has a correlative duty to safeguard and provide that interest to the beneficiary. Thus, trustee powers are made available to the trustee only to the extent necessary to provide the trust beneficiaries with their rightful beneficial interests under the Irrevocable Trusts. If a beneficial interest is denied to a beneficiary, then the trustee has no authority or discretion to make it available to the beneficiary. The power to purchase annuities, life insurance or any other investment is granted to the trustee only to the extent that the exercise of that power will secure to the beneficiaries their respective beneficial interests. Such a power may not be used to divert one beneficiary's interest to another beneficiary without breach of fiduciary duty. The conversion of principal to income, or vice versa, to redirect trust resources from one

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beneficiary to another is not allowed due to the trustee’s duty of impartiality. “Even when there are broad discretionary powers, a trustee may not exercise his or her discretion so as to shift beneficial interests in the trust. Old Colony Trust Co. v. Silliman, 352 Mass. at 10. The trustee must use his or her "best informed judgment in good faith in the light of what the established rules suggest to the trustee is consistent therewith." Ibid. In making this determination … consideration should be given to such factors as the extent of discretion intended to be conferred upon the trustees by the terms of the trust; the existence or nonexistence of an external standard by which the reasonableness of the trustees' conduct can be judged; the circumstances attending the exercise of the power; and the existence or nonexistence of an interest in the trustees conflicting with that of the beneficiaries. 3 Scott & Fratcher, Trusts § 187 (4th ed. 1988). See also Copp v. Worcester County Natl. Bank, 347 Mass. 548, 550-551 (1964).” Fine v. Cohen, 35 Mass. App. Ct. 610, 617 (1993).

MassHealth regulations do not require that the fiduciary duties of a trust be ignored; rather, the fiduciary duties of a trustee are specifically recognized in the definition of “trust” at 130 CMR §515.001: “a legal device satisfying the requirements of state law that places the legal control of property or funds with a trustee. It also includes, but is not limited to, any legal instrument, device, or arrangement that is similar to a trust, including transfers of property by a grantor to an individual or a legal entity with fiduciary obligations so that the property is held, managed, or administered for the benefit of the grantor or others. Such arrangements include, but are not limited to, escrow accounts, pension funds, and similar devices as managed by an individual or entity with fiduciary obligations.” (emphasis added). The Office of Medicaid fails to explain why it recognized the trustee’s fiduciary duties in MassHealth regulations and in its brief in the Doherty case but not in its memorandum in this appeal.

(12) The Office of Medicaid Does Not Even Get Its Cites Correct on Federal Medicaid Trust Law

The memorandum of the Office of Medicaid misrepresents the federal law on the treatment of trusts at 42 USC 1396p(d); it ignores (d)(1) and attributes the words “available” and “countable” to (d)(2)(B) and (d)(2)(C) when in fact neither word appears in those sections of the statute. Only in 42 USC 1396p(d)(3)(A) and 42 USC 1396p(d)(3)(B) is there a determination of what portion of a revocable or irrevocable trust is to be considered “countable” or “available.”
The memorandum refers to 42 USC 1396p(d)(3)(B) as the “any circumstances” test while in fact it is really the “portion of” test (emphasis added). Further, the memorandum totally ignores the fact that what “…shall be considered resources available to the individual ……” is the “portion of the corpus from which……payment to the individual could be made……”. (emphasis added)

On page 5 of the memorandum of the Office of Medicaid, in the first full paragraph, the last two sentences are simply wrong about what 42 USC 1396p(d)(2)(B) states. The Office of Medicaid erroneously states that “in accordance with 42 U.S.C. 1396p(d)(2)(B), the portion of the Trust attributable to the assets of the applicant (and/or spouse) shall be considered available.” That cite is inaccurate and disingenuous because 42 U.S.C. 1396p(d)(2)(B) does not make any such statement and by no means does it state or even imply that all property attributable to the applicant in an irrevocable trust is available. Any such interpretation would completely ignore the next paragraphs of the statute that deal with property in revocable and irrevocable trusts.

(13) Trust Law Presumes That Principal Is Not Available to the Current Beneficiary

Charles E. Rounds, Jr. & Charles E. Rounds, III, in their treatise on trust law, state that trustees are limited to paying only income to the settlor unless distributions of principal are specifically authorized: “Nowadays, it is default law that the current beneficiary of a trust is entitled to the net trust accounting income. It is also default law that a trust is income only, i.e., the current beneficiary is not entitled to principal, unless the governing instrument indicates that the settlor intended otherwise. Thus, a trust for the “benefit” of C, remainder to D is normally income only absent additional language suggesting the contrary. Without such additional language, the trustee would have no power to invade principal for the income beneficiary.”


Note that in the Irrevocable Trusts in this appeal, only income is authorized to be paid to the Appellant or the Appellant’s wife, and there is no language anywhere which indicates that the purpose of the Irrevocable Trusts was the support of the Appellant or the Appellant’s wife. Trust law presupposes that the income beneficiary is entitled only to income, even if, for example, an annuity were to be purchased by the trustee for purposes of increasing the income of the trust above the rates provided at banks by certificates of deposit.
Potential Annuity Purchases by the Trustee Do Not Provide the Appellant with Access to Principal

The memorandum of the Office of Medicaid betrays a fundamental ignorance of basic annuity principles. When a payment is received from an annuity, the portion of the payment that represents a return of principal is nontaxable, and reasonable accounting principles require the trustee to allocate the return of principal to the corpus or principal of the trust. M.G.L. c.203D, s. 3(a)(4), states that, in allocating receipts and disbursements to or between principal and income, a trustee “shall add a receipt or charge a disbursement to principal if the terms of the trust … do not provide a rule for allocating the receipt or disbursement to or between principal and income.” Thus, the legal presumption in Massachusetts is that any amount received is not income, but rather principal. In the absence of explicit contrary powers in the Irrevocable Trusts, the trustee has no power to deviate from generally accepted practices of fiduciary accounting when determining what is income or principal. See Restatement (Third) of Trusts §233, comment p.

Under the Massachusetts Principal and Income Act, “[i]f a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.” M.G.L. c. 203D, § 18(a). The Massachusetts Principal and Income Act also provides that “[a]n amount received as interest, whether determined at a fixed, variable or floating rate on an obligation to pay money to the trustee, including an amount received as consideration for prepayment of principal, shall be allocated to income without any provision for amortization of premium.” M.G.L. c. 203D, § 15(a). Thus, annuity distributions cannot be treated solely as income under Massachusetts law, where most of such payments are factually a return of principal.

A legal argument similar to the one made by the Office of Medicaid in this case about potential investments in annuities (as well as life insurance) was made by the Internal Revenue Service and rejected in the federal estate tax case of United States v. Powell, 307 F.2d 821 (10th Cir., 1962), which was cited in Old Colony Trust Co. v. Silliman, 352 Mass. 6 (1967): “Counsel for the United States assert that the investment power, with respect to life insurance, annuities and income bearing contracts, authorized the trustees … to invest the corpus in annuities for the
term of the wife's life and thereby deprive the remaindermen, the daughters, of all benefits of the trust.” The court decided otherwise: “It is well settled that where there are two or more beneficiaries of a trust, it is the duty of the trustee to administer the trust impartially, as between the beneficiaries (see Scott on Trusts, 2nd Ed., Vol. II, § 183; Redfield v. Critchley, 252 App. Div. 568, 300 N.Y.S. 305, 310, affirmed, 277 N.Y. 366, 14 N.E.2d 377; Restatement of the Law of Trusts, § 183), and where a trustee under a trust is directed to pay the income to a beneficiary during his life and on his death to pay the income from the trust or the corpus to another beneficiary, it is the duty of the trustee so to administer the trust as to preserve a fair balance between them. (See Pennsylvania Co., Etc. v. Gillmore, 137 N.J.Eq. 51, 43 A.2d 667, 670, 671; Security Trust Co. v. Mahoney, 307 Ky. 661, 212 S.W.2d 115, 119; In re Simpson's Will, Sur., 33 N.Y.S.2d 614, 616; Restatement of the Law of Trusts, § 232; Scott on Trusts, 2nd Ed., Vol. III, § 232, p. 1744.) Accordingly, it was the duty of the trustees in the exercise of their discretion to invest the corpus for the benefit of the trust estate and in such a manner as to preserve a fair balance between the life tenant and the remainder beneficiaries.” United States v. Powell, 307 F.2d 821, 824-825 (10th Cir., 1962) (footnotes included). The memorandum of the Office of Medicaid fails to demonstrate or even discuss why it should be accorded more authority in trust interpretation than the Internal Revenue Service in applying its law.

The Office of Medicaid’s cite to M.G.L. c. 203, § 25A, a section of the Massachusetts Uniform Trust Code (“MUTC”), is pointless. The MUTC simply codifies the rather uncontroversial point that a trustee’s authority includes the power to invest in annuities. That power, however, is irrelevant to the question of whether the trustee of the Irrevocable Trust in this appeal has the discretion to distribute principal to the Appellant or the Appellant’s wife. The Office of Medicaid cites regulations in support of its position that all payments from annuities are “income,” but the Irrevocable Trusts do not make reference to those regulations, and are instead governed by their express terms, common law and statutory authority, including the Massachusetts Principal and Income Act. In making determinations of principal and income, the trustee of the Irrevocable Trusts in this appeal is required “in all events” under paragraph 6.5 to apply “reasonable accounting principles” under Massachusetts law.

The Office of Medicaid completely ignores the Massachusetts Principal and Income Act in its memorandum, even though “Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing
such issues.” Lewis v. Alexander, 685 F.3d 325, 347 (3d Cir. 2012). The Office of Medicaid may not unilaterally impose its own definition of “income” from another context and create unintended definitions of terms and phrases within the Irrevocable Trusts in this appeal. Allowing any state agency to do so would wreak havoc on well-established trust doctrine, upset settled legal expectations of grantors, trustees and beneficiaries, and be in violation of the Lewis holding and the Massachusetts Principal and Income Act.

(15) History of Federal Medicaid Law Indicates the Term “Available” Is to Be Narrowly Construed When Determining Applicant’s Income

In State of Washington v. Bowen, 815 F. 2d 549 (9th Cir., 1987) the Court delved into the term “available” as utilized in the context of Medicaid law, and determined that the term must be narrowly construed. “As used in public assistance statutes, the term "available" typically functions as a restrictive term defining a subcategory of "income." See, e.g., Heckler v. Turner, 470 U.S. 184, 200, 105 S.Ct. 1138, 1147, 83 L.Ed.2d 138 (1985); Gray Panthers, 453 U.S. at 48, 101 S.Ct. at 2642; Schrader v. Idaho Dept. of Health and Welfare, 768 F.2d 1107, 1110 (9th Cir.1985); Young v. Schweiker, 680 F.2d 680, 682 (9th Cir.1982). The legislative history of the Medicaid statute also indicates that "available" should be read as a limiting term. The Senate report accompanying the Medicaid legislation provided: States [are required] to take into account only such income and resources as ... are actually available to the applicant or recipient.... States [are] not [to] assume the availability of income which may not, in fact, be available or overevaluate income and resources which are available. S.Rep. No. 404, 89th Cong., 1st Sess. 78 (1965), reprinted in 1965 U.S. Code Cong. & Ad. News pp. 1943, 2018.”

The Connecticut Supreme Court has analyzed the availability principle in federal law, and concluded: [U]nder applicable federal law, only assets actually available to a medical assistance recipient may be considered by the state in determining eligibility for public assistance programs such as title XIX [Medicaid] … A state may not, in administering the eligibility requirements of its public assistance program pursuant to title XIX … presume the availability of assets not actually available.” Zeoli v. Commissioner of Social Services, 179 Conn. 83, 94 (1979).

The case of Reinholdt v. N.D. Department of Human Services, 2009 ND 17, 760 N.W.2d 101 (2009), cited by the Office of Medicaid in many of its other memoranda in Medicaid trust
denial cases, is instructive on the level of inquiry needed in this case: "Determining whether an asset is 'actually available' for purposes of Medicaid eligibility is largely a fact-specific inquiry depending on the circumstances of each case. An asset to which an applicant has a legal entitlement is not unavailable simply because the applicant must initiate legal proceedings to access the asset. Rather, if an applicant has a colorable legal action to obtain assets through reasonable legal means, the assets are available. The 'actually available' requirement must be interpreted reasonably, and the focus is on the applicant's actual and practical ability to make an asset available as a matter of fact, not legal fiction." (emphasis added)

The Office of Medicaid fails to demonstrate or even discuss whether the Appellant or the Appellant’s wife has a colorable legal action to obtain principal from the Irrevocable Trusts. If the trustee in this case were to have the discretion to make principal available, only then would the Appellant or the Appellant’s wife have a “colorable legal action” to receive principal from the Irrevocable Trusts. Thus, the Irrevocable Trusts in this appeal should be viewed as a whole, as the Office of Medicaid urged and the Massachusetts Appeals Court ruled in the Doherty case, and Massachusetts trust law must be utilized in interpreting the Irrevocable Trusts, as the United States Court of Appeals for the Third Circuit held in the Lewis v. Alexander case, and Massachusetts debtor-creditor law must be utilized to determine, as described in Reinholdt, whether the Appellant or the Appellant’s wife have a colorable legal action to receive principal from the Irrevocable Trusts.


The countability of irrevocable trusts for Medicaid purposes is governed by 42 U.S.C. §1396(p)(D)(3)(B), which states: “(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, and payments from that portion of the corpus or income, (I) to or for the benefit of the individual shall be considered income of the individual, and (II) for all other purposes shall be considered a transfer of assets by the individual subject to a look back period.” Massachusetts was required to put that federal law into effect, and did so via the regulation at 130 CMR 520.023(C)(1)(C)(a), which states: “In the case of a self-settled
trust... 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.”

Before 1985, a settlor could place the settlor’s assets in trust for the settlor (referred to as
the “Donor” in the Irrevocable Trusts in this appeal), and grant the trustee complete discretion to
distribute principal back to the settlor. For some reason, the assets held in that type of trust were
not counted as assets of the Medicaid applicant before 1985. Such a trust, however, would not
have been effective against a creditor under state debtor-creditor laws. To eliminate this obvious
loophole in the law, Congress changed federal Medicaid law to allow states to implement their
existing debtor-creditor laws against that type of trust. Many of the quotes erroneously relied
upon by the Office of Medicaid in its memorandum were discussing these types of trusts, not the
Irrevocable Trusts involved in this case, yet the Office of Medicaid deviously chooses not to
explain the context of the quotes.

Justice Charles Fried of the Supreme Judicial Court concluded that Congress was effectively
implementing state debtor-creditor laws when it enacted Medicaid trust laws: “We are
confirmed in this reading by something akin to legislative history: a consideration of the source
from which the legislative language appears to have been taken. See Comey v. Hill, 387 Mass.
11, 15 (1982), quoting 2A Sands, Sutherland Statutory Construction s. 50.03, at 277-278 (4th ed.
1973) ("Words and phrases having well-defined meanings in the common law are interpreted to
have the same meanings when used in statutes dealing with the same or similar subject matter as
that with which they were associated at common law"). Restatement (Second) of Trusts s. 156
(1959) provides: "Where the Settlor is a Beneficiary . . . (2) Where a person creates for his own
benefit a trust for support or a discretionary trust, his transferee or creditors can reach the
maximum amount which the trustee under the terms of the trust could pay to him or apply for his
benefit." The plaintiffs suggest that this provision was a likely model for the Congressional
enactment, and a comparison of the purpose and the language of the provision confirms their
suggestion. Section 156 of the Restatement deals with a device, like the MQT, concocted for the
purpose of having your cake and eating it too: the self-settled, spendthrift trust. Under such a
trust, a grantor puts his assets in a trust of which he is the beneficiary, giving his trustee
discretion to pay out monies to gratify his needs but limiting that discretion so that the trustee
may not pay the grantor's debts. Thus, the grantor hopes to put the trust assets beyond the reach of his or her creditors. Like the MQT statute, s. 156 defeats this unappetizing maneuver by providing that, even if those assets are sought to be shielded by the discretion of a trustee, or if the trust simply declares assets unavailable to creditors, the full amount of the monies that the trustee could in his or her discretion "under the terms of the trust" pay to the grantor, is the amount available to the grantor and thus to his or her creditors. Not only the courts of this State, but those of many other jurisdictions have long followed this Restatement principle. See Ware v. Gulda, 331 Mass. 68 , 70 (1954); Merchants Nat'l Bank v. Morrissey, 329 Mass. 601 , 605 (1953). See also Scott, Trusts s. 156 n.1 (3d ed. 1967 & Supp. 1985) (compiling cases). We do not innovate here, nor do we see any reason to be the least bit squeamish about interpreting the analogous Federal statute in an analogous way to accomplish an analogously just result.” Cohen at 413-415 (emphasis added).

The Iowa case of Strand v. Rasmussen, 648 N.W.2d 95, 101 (2002), mentioned by the Office of Medicaid in many of its other memoranda in trust denial cases, explains the evolution of Medicaid trust law: “Prior to 1986, an irrevocable trust was not considered to be an asset in determining whether an applicant was sufficiently needy to qualify for Medicaid benefits. … Yet, Congress and the states participating in the joint federal-state Medicaid program began to realize that many individuals with irrevocable trusts that otherwise would have made them ineligible for public assistance were receiving Medicaid benefits. … As a result, these individuals were permitted "to have [their] cake and eat it too," at the expense of those who were truly unable to financially care for themselves. … In 1986, Congress attempted to close the "loophole" in the federal Medicaid act. … The amendment created an exception to general trust law by including certain trusts with an individual's assets for the purpose of determining whether an applicant's resource level exceeded the maximum limits. … These prohibitive trusts were called Medicaid qualifying trusts.” It is apparent that the quotes in this case apply to self-settled irrevocable trusts where there were explicit provisions whereby principal could always have been distributed to the settlor.

As explained in the Cohen and Strand cases, the federal Medicaid trust laws since 1985 have simply allowed states to implement their existing debtor-creditor laws against trusts, established in Massachusetts under Merchants Nat'l Bank v. Morrissey, 329 Mass. 601 (1953), which held that under Massachusetts law, where the settlor is also the beneficiary of a self-settled
trust, the settlor cannot keep property beyond reach of creditors by placing it in a spendthrift trust for the settlor’s own benefit. Also see Ware v. Gulda, 331 Mass. 68 (1954), where the Court stated: “The rule we apply is found in Restatement: Trusts, Section 156 (2): "Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.".” Note, as Justice Fried did in Cohen, that this language is similar to the language in the federal laws regulating irrevocable trusts in the Medicaid context.

What the Cohen holding means is that, for trust interpretation purposes, MassHealth stands in the same shoes as a creditor of the Appellant or the Appellant’s wife. Under Ware, a creditor could sue a self-settled trust and reach the maximum amount capable of distribution to the settlor, and under Cohen, the maximum amount capable of distribution to the settlor is treated as an available asset. If a creditor could successfully sue the Irrevocable Trusts in this appeal for a debt of the Appellant or the Appellant’s wife and reach the principal, then those are the circumstances under which the principal of the Irrevocable Trusts would be treated as a countable asset under federal Medicaid law, and only to the extent that the creditor could do so.

The trusts in question in Cohen and its companion cases had been so-called “trigger” trusts, which allowed the trustee to pay principal to or for the benefit of the Medicaid applicant but had that discretion terminated upon an event such as institutionalization. In Cohen and its companion cases, and in Lebow, the principal was explicitly available for distribution to the settlor, and there was a thin veil of language protecting the principal so that it arguably was not distributable if Medicaid eligibility was threatened. None of the trusts in Cohen or Lebow could have passed muster under a debtor-creditor analysis; a creditor of the settlor could always have reached the assets of these self-settled trusts. The trustee in those cases could always make distributions of principal to the settlor, yet the thin veil of language allowed the trustee to attempt to claim later on that the discretion was no longer there; that is why the courts issued dicta along the lines of “having your cake and eating it too.”

The memorandum of the Office of Medicaid puts the reader of the Irrevocable Trusts in this case through mental gymnastics to claim the principal is available, yet the case law under Cohen and Lebow was about principal distributions that could have unquestionably been made by the trustee to the settlor or to the settlor’s creditors without breaching any duty to the
remainderpersons. These factors are not present in the Irrevocable Trusts in this appeal, so this line of cases does not apply.

(17) **A Denial of This Appeal Would Result in the Nursing Home Having No Recourse for Payment**

The memorandum of the Office of Medicaid describes the Irrevocable Trusts as if the principal were directly payable to the Appellant or the Appellant’s wife, and callously ignores the financial consequences to the nursing home where care is being provided. If a MassHealth application in this case is denied due to the existence of the Irrevocable Trusts, and if the nursing home could reach the Irrevocable Trusts as a creditor of the denied MassHealth applicant under Massachusetts debtor-creditor laws, then the nursing home could eventually be made whole by suing the denied MassHealth applicant and the Irrevocable Trusts. Where, however, a creditor of the Appellant in this case cannot reach the principal of these Irrevocable Trusts and the trustee cannot be forced to pay the nursing home, then the nursing home would be left with no payment source if this MassHealth application and appeal are denied. “If the settlor-beneficiary creates a remainder interest in another person, then the settlor-beneficiary's creditors will not be able to reach the remainder interest if the trustee cannot reach the corpus for the settlor-beneficiary's benefit.” In re Shurley, 115 F.3d 333 (5th Cir. 1997), citing G. Bogert & G. Bogert, Trusts and Trustees (2d rev. ed. 1992), § 223, at 453. “Where the settlor retains only a limited interest in a trust, the portion thereof not retained is afforded some protection even though it is self-settled. The settlor's creditors can reach trust assets to the maximum extent that the trustee could distribute or apply such assets for the settlor-beneficiary's benefit.” Peter Spero, Asset Protection: Legal Planning, Strategies and Forms, 6.08[2] (Warren Gorham & Lamont, 2007), citing 2 A. Scott & W. Fratcher, The Law of Trusts (4th ed. 1987), §156.2, at 175.

The nursing home could end up being the true financial victim in this case if it is required to provide nursing home care, and MassHealth will not cover the applicant’s costs, and the Irrevocable Trusts cannot be successfully sued to pay the Donor’s bills. It is highly unlikely that Congress could have intended such a potentially disastrous financial result for the nursing home industry when it changed the federal Medicaid trust laws. If the Irrevocable Trusts in this appeal cannot be sued to provide for the Donor’s support, then the principal of the Irrevocable Trusts
cannot be deemed an available asset under Medicaid trust law and corresponding MassHealth regulations.

(18) The Spousal Testamentary Trust Exception Also Reflects the Interplay of Federal Medicaid Law and State Debtor-Creditor Laws

When the federal Medicaid trust laws were changed in 1985, Congress was, for the first time, simply allowing state Medicaid programs to be treated the same as creditors under state laws. So that trustees of irrevocable trusts could no longer hide behind a spendthrift clause or a thin veil of language protecting the trust from countability, Congress changed the definition of trusts. In so doing, Congress defined the type of offensive trusts. Trusts that were self-settled and those that a spouse set up during lifetime for the other spouse were targeted by the federal law. Creditors could reach those trusts under state debtor-creditor laws.

State debtor-creditor laws could not easily be applied to trusts established in a decedent’s will, and the spousal testamentary trust exception ended up in the federal Medicaid law. Certain trusts established by a spouse “other than by will” can be considered countable assets, yet testamentary trusts established for the benefit of the surviving spouse are exempted from consideration. See 42 U.S.C. 1396p(d)(2)(A). The Commonwealth of Massachusetts was required to place the spousal testamentary trust exception in place as part of its implementation of federal Medicaid trust law, and has done so. Under 130 CMR 520.022(B)(1), which deals with “Trusts or Similar Legal Devices Created before August 11, 1993” a so-called Medicaid Qualifying Trust is defined in the following manner: “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.” (emphasis added) Further, 130 CMR 520.022(B)(1), which deals with “Trusts or Similar Legal Devices Created on or after August 11, 1993” states: “The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will.” (emphasis added) If Congress had been attempting in 1985 and 1993 to eliminate the usage of all trusts to qualify for Medicaid, as the Office of Medicaid argues, and not just allowing state debtor-creditor laws to be implemented, then there would have been no reason for Congress to define trusts in such a way as to allow the spousal testamentary trust exception.
A Limited Power of Appointment Does Not Allow the MassHealth Applicant or the Trustee to Distribute Principal to the MassHealth Applicant

The Office of Medicaid argues that a limited power of appointment reserved by the MassHealth applicant somehow makes the principal of the Irrevocable Trusts countable, but the MassHealth applicant is prohibited from exercising the power of appointment in favor of the Appellant or the Appellant’s wife. This provision does not allow the trustees, either expressly or impliedly, to distribute the principal of the Irrevocable Trusts to the Appellant or the Appellant’s wife, nor for the Appellant or the Appellant’s wife to withdraw trust principal. Since the Appellant and the Appellant’s wife cannot access the principal, that provision does not create a circumstance in which the principal of the Irrevocable Trusts would be a countable resource. 130 CMR 520.023(C)(1)(a). “The law of Massachusetts is plain that a valid trust, once created, cannot be revoked or altered except by the exercise of a reserved power to do so, which must be exercised in strict conformity to its terms. Viney v. Abbott, 109 Mass. 300, Leahy v. Old Colony Trust Co., 326 Mass. 49, 52, and cases cited. Scott, Trusts (1939), Section 330.8.” Phelps v. State St. Trust Co., 330 Mass. 511, 512 (1953). “Because a nongeneral power of appointment is not an ownership-equivalent power, the donee’s creditors have no claim to the appointive assets, irrespective of whether or not the donee exercises the power. Restatement (Third) of Property § 22.1, comment a. Where the powerholder has only a special power of appointment, the power is not beneficial to the powerholder and cannot be reached by his creditors.” In re Shurley, 171 B.R. 769, 786-87 (Bankr. W.D. Tex. 1994).

In Prescott v. Wordell, 319 Mass. 118, 65 N.E.2d 19 (1946), the executors contended that, because the donee exercised her non-general power in her will, the will had the effect of making the appointed property assets of her estate insofar as her creditors were concerned. The court, pointing to §326 of the first Restatement of Property, held that since the donee had no power to appoint the property to her own estate or for the benefit of her creditors, her exercise of the power did not subject the appointed property to the payment of her debts.

In a Maryland case, the Court held that a settlor’s retained limited power of appointment was not sufficient to allow the creditor to seize the assets of the trust. In United States v. Baldwin, 283 Md. 586, 391 A.2d 844 (1978), Baldwin had transferred property to a trust, reserving to himself the right to receive the income from the trust property for life and a power of appointment by will to designate those persons who would receive and enjoy the remainder after
his death. The Maryland Court of Appeals held that the power of appointment under Maryland law was a special or limited power which did not permit Baldwin to appoint the principal to his own estate or to his creditors. Even coupled with the life estate, the limited power of appointment did not give Baldwin such a property interest in the principal as to subject it to the claims of his creditors.

In Verdow v. Sutkowy, 209 F.R.D. 309, 316 (N.D.N.Y. 2002), the Federal District Court held that although the settlor had reserved a limited power of appointment over an irrevocable trust, in the absence of bad faith or fraud, the remote possibility of collusion between the settlor and beneficiaries should not be considered in determining whether the assets of the trust are available or Medicaid purposes.

As noted earlier in this memorandum, if a creditor cannot reach it, then the principal of the Irrevocable Trusts is not “available” to the Appellant or the Appellant’s wife. According to the Restatement (Third) of Trusts, § 56, comment b (2003): “The rights of creditors with respect to trust property over which the debtor has a power of appointment depend on the nature of the power. For example, the creditors of the donee of a nongeneral power of appointment (one that cannot be exercised for the economic benefit of the power holder), whether or not presently exercisable, cannot reach the property subject to the power for the satisfaction of their claims; nor is the property subject to the expenses of administering the donee’s estate.” American Law Inst. Restatement: Property, Section 326, reads: "Property covered by a special power of appointment cannot be subjected to payment of the claims of creditors of the donee or the expenses of administration of his estate, except as required by the rules relating to fraudulent conveyances." In addition, Restatement (Second) of Property § 13.6(2) (1986) states that “Section 541(b)(1) of the Bankruptcy Code of 1978 (11 U.S.C. § 541) provides that ‘[p]roperty of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor.’”

(20) The Trustee’s Authority to Define Income and Principal under “Reasonable Accounting Principles” under Massachusetts Law in No Way Allows Principal to be Distributed to the Appellant or the Appellant’s Wife

The Office of Medicaid misconstrues paragraph 6.5, a standard administrative provision in virtually all trusts, empowering the trustee to determine what is principal or income “in
accordance with reasonable accounting principles,” as empowering the trustee to determine what part of the Irrevocable Trusts is income and what part is principal. In doing so, the Office of Medicaid is claiming this provision permits the trustee to call the principal of the Irrevocable Trust “income” and distribute it to the Appellant or the Appellant’s wife. In reality, this provision does not permit the trustee to play fast and loose with concepts of principal and income accounting.

Section 103(a)(4) of the Uniform Principal and Income Act, as adopted in Massachusetts as M.G.L. c.203D, s. 3(a)(4), states that, in allocating receipts and disbursements to or between principal and income, a trustee “shall add a receipt or charge a disbursement to principal if the terms of the trust … do not provide a rule for allocating the receipt or disbursement to or between principal and income.” Thus, the legal presumption in Massachusetts is that any amount received is not income, but rather principal. In the absence of explicit contrary powers in the trust, the trustee of the Irrevocable Trusts in this appeal has no power to deviate from generally accepted practices of fiduciary accounting when determining what is income or principal. See Restatement (Third) of Trusts §233, comment p.

In Old Colony Trust Co. v. Silliman, 352 Mass. 6 (1967), the Massachusetts Supreme Judicial Court interpreted the extent of a trustee's authority under a similar provision, holding it was "primarily an administrative power authorizing the trustee in instances of doubt to use its best informed judgment in good faith in the light of what the established rules suggest..." and that such a "power may not be used to shift beneficial interests." Id at 9. Provisions granting "even very broad discretionary powers are to be exercised in accordance with fiduciary standards and with reasonable regard for usual fiduciary principles." Id at 10. See also Worcester County Nat. Bank v. King, 359 Mass. 231, 234-235, 268 N.E.2d 838 (1971) and Fine v. Cohen, 35 Mass. App. Ct. 610, 617 (1993), which interpret similar provisions and hold that even with broad discretionary powers, a trustee may not exercise his or her discretion so as to shift beneficial interests in trust.

(21) The Memorandum of the Office of Medicaid Is Misleading

In general, the memorandum of the Office of Medicaid dated December 9, 2013 is misleading. Inapt quotes are strung together and broad, conclusory statements about laws,
regulations and cases are made in lieu of actual analysis of Medicaid trust case law and regulations.

Cherry-picked dicta taken out of context is no substitute for actual case analysis. Many of the cases cited in the memorandum of the Office of Medicaid seem to be there for no other reason than for the quote, or for the purpose of misleading the hearing officer into believing that there are many cases on point. Neither the details of the trust nor its funding details nor the actual case are provided to back up the applicability of many of the quotes. Thus, this section of the appellant’s memorandum will attempt to point out some of the more deceptive statements in the memorandum of the Office of Medicaid.

On page 3 of the memorandum of the Office of Medicaid, in the first paragraph, the memorandum begins with dicta from trust cases, then jumps to a Shelales quote. These quotes were about different subjects, but, due to the manner of the construction of the paragraph, the hearing officer could easily be misled into believing they are all about Medicaid trust cases. The insertion of the quote from Shelales directly after quotes from trust cases was done without explanation that the Shelales case did not involve a trust in any way, and the hearing officer is allowed the opportunity to conclude erroneously that “MassHealth’s interpretation more reasonably comports with the Federal and State legislative and regulatory scheme …” was about Medicaid trust law.

On page 3 of the memorandum of the Office of Medicaid, in the first full paragraph, both quotes are from cases where the principal was available for distribution by the trustee to the settlor, not impliedly, but explicitly, but the Office of Medicaid chooses not to mention the context for these quotes. The emotionally charged comment in cases about an arrangement being “concocted for the purpose of having your cake and eating it too” was about a trust whereby the principal could always have been given back to the settlor by the trustee, not impliedly, but explicitly. The Lebow quote (“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.”) was similarly about the implementation of the 1985 Medicaid-qualifying trust statute, which targeted trusts whereby the principal could always be given back to the settlor by the trustee, not impliedly, but explicitly. In short, the Office of Medicaid is deviously utilizing quotes that were about the reasons for the 1985 changes in federal Medicaid trust laws, and hoping that the hearing officer will draw the erroneous
conclusion that no trusts are permissible under federal Medicaid trust laws and concomitant MassHealth regulations.

On page 4, the full paragraph contains cites to irrelevant cases: the Ford decision does not specify what the details were about the trust, so the citation is of no analytical use; the Victor decision pertained to whether the trust was exempt from the trust law due to the method of funding, where a testamentary trust is exempt from normal Medicaid/MassHealth trust laws, so that case is irrelevant here and of no analytical use; the non-precedential Wisconsin Hedlund case involved a trust that was immediately established as part of an overall plan by the recipients of a gift for the benefit of the gift-giver, and no facts are present here that are even close to that situation, so we need to wonder why the Office of Medicaid even bothered to bring up that case in its memorandum; the Family Trust case was a tax case that involved whether a particular Massachusetts pooled trust met federal tax-exempt qualifications; and the Murray case is an income tax lien case where the trust seems to have been similar to Lebow, where the person being pursued by the Internal Revenue Service for tax debts could always have been given principal but other persons could remove that right. (It seems that debtor-creditor analysis was present in the Murray case, as the appellant has shown is the proper level of analysis of the Irrevocable Trusts in this case.) If the hearing officer would take a brief moment to scan these cases, the hearing officer will see that the memorandum of the Office of Medicaid consists largely of smoke and mirrors, and that these cases were included for their illusory effect.

On page 5 of the memorandum of the Office of Medicaid, in the second full paragraph, the Office of Medicaid is simply wrong. There is no such presumption about all trusts being countable assets. As previously mentioned, Lewis v. Alexander held that “[T]here is no reason to believe [Congress] abrogated States’ general laws of trusts. … After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues.” Thus, whether principal is available for distribution by the Trustee of the Irrevocable Trusts in this appeal to the Appellant or the Appellant’s wife is an issue of Massachusetts trust law, without any federal Medicaid law presumption. (The Office of Medicaid has had a duty to bring the Lewis case to the attention of the hearing officer, but has chosen not to do so at many fair hearings.)

On the top of page 6 of the memorandum of the Office of Medicaid, in the spillover paragraph, the Bisceglia quote is about a trust where the principal was always explicitly available
for distribution to the settlor’s wife, so the quote offered by the Office of Medicaid is completely irrelevant to the facts of this case.

In the last paragraph on page 6 of the memorandum of the Office of Medicaid, in the second full paragraph, the Office of Medicaid appears to mention that the trustee of the Irrevocable Trusts in this appeal is given powers to fulfill the trustee’s role as if that point were controversial, yet trustees are usually given detailed powers in trusts. In this paragraph, the memorandum also makes reference to Edholm, an unpublished Minnesota case, which is completely irrelevant because in that trust, the settlor had specifically reserved the unfettered right to borrow back the trust principal without adequate interest or adequate security. No such provision exists in the Irrevocable Trusts in this appeal, so the case is irrelevant. Not only is the Edholm case not a precedent usable in Massachusetts, since it is from Minnesota, but where it is an unpublished opinion about specific facts it is not even considered precedential in Minnesota, as explained in the attached Minnesota law.

In the spillover paragraph on page 8 of the memorandum of the Office of Medicaid, there are more misleading quotes, and the Office of Medicaid chooses not to mention the context for these quotes. The one from the Murray case is not about a Medicaid case, but rather about a tax case where the principal of the trust was always explicitly available for distribution to the taxpayer by the trustee, and the details of the trust seem similar to the trust in the Lebow case. The “having your cake and eating it too” quote is also utilized by the Office of Medicaid again (having already appeared in the first full paragraph on page 3), without mentioning that it was about a trust whereby the principal could always be given back to the settlor by the trustee, not impliedly, but explicitly, and also whereby the trust could be reached by the settlor’s creditors under state law.

(22) The Office of Medicaid Must Construe Federal Medicaid Law to Favor Applicants, and Cannot Be More Restrictive Than SSI

The Medicaid Act at 42 U.S.C. §1396a(a)(19) requires that each state Medicaid program be administered in the """in a manner consistent with simplicity of administration and the best interests of the recipients," and both the federal Medicaid law and its implementing regulations must be construed in favor of the Medicaid beneficiary. "The Social Security Act, of which
Medicaid is a part, is in the nature of remedial legislation and is to be liberally construed.” See Cristy v. Ibarra, 826 P.2d. 361 (Court of Appeals, Co. 1991).

The MassHealth fact-finding process and trust law interpretation in this case is more restrictive than Supplemental Security Income (SSI) Program procedures and federal law interpretation in the Program Operations Manual System (“POMS”) of the Social Security Administration. The Office of Medicaid cannot utilize a methodology that is more restrictive than that used by SSI. See Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012) and 42 U.S.C. § 1396a(a)(10)(C)(i)(III). A methodology is “considered to be ‘no more restrictive’ if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.” 42 U.S.C. §1396a(r)(2)(B).

The arguments made by the Office of Medicaid regarding “any circumstances” are more restrictive than the directives in the POMS. Section SI 01120.201D – Treatment of Trusts of the POMS reads, in relevant part:

“b. Circumstance under which payment can or cannot be made

In determining whether payments can or cannot be made from a trust to or for the benefit of an individual (SI 01120.201F.1.), take into consideration any restrictions on payments. Restrictions may include use restrictions, exculpatory clauses, or limits on the trustee's discretion included in the trust. However, if a payment can be made to or for the benefit of the individual under any circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. in this section applies (i.e., the portion of the trust that is attributable to the individual is a resource, provided no exception from SI 01120.203 applies).

c. Examples

An irrevocable trust provides that the trustee can disburse $2,000 to, or for the benefit of, the individual out of a $20,000 trust. Only $2,000 is considered to be a resource under SI 01120.201D.2.a. in this section. The other $18,000 is considered to be an amount which cannot, under any circumstances, be paid to the individual and may be subject to the transfer of resources rule in SI 01120.201E in this section and SI 01150.100.
If a trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday, the entire $50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource.

An individual establishes an irrevocable trust with $10,000 of his assets. His parents contribute another $10,000 to the trust. The trust only permits distributions to, or for the benefit of, the individual from the portion of the trust contributed by his parents. The trust is not subject to the rules of this section. The portion of the trust contributed by the individual is subject to evaluation under the transfer of resources rules in SI 01150.100 (see also SI 01120.201E in this section). The portion of the trust contributed by his parents is subject to evaluation under SI 01120.200."

The POMS contains extensive sections regarding trusts that are meant to give guidance on how trusts should be treated for SSI (and, concomitantly, Medicaid or MassHealth) purposes, and the Office of Medicaid is legally bound by it. The POMS contains no provision that directs or even hints that state trust law be ignored. The POMS contains no provision that a termination provision whereby a trustee can distribute assets to the remainderpersons results in an income-only irrevocable trust being treated as available to the applicant. The POMS contains no provision that the possible investment by the trustee of an income-only irrevocable trust in annuities, life insurance or other investments renders the principal available to the settlor or the settlor’s spouse. The POMS contains no provision that the reservation of a limited power of appointment or special power of appointment in an income-only irrevocable trust renders the principal of the trust to be deemed available to the settlor or the settlor’s spouse. In short, the POMS contains no provision that directs or even hints that anything other than the right of a settlor or the settlor’s spouse to withdraw principal or the power of a trustee to distribute principal to the settlor or the settlor’s spouse matters in the review of an income-only irrevocable trust.
The Latest Positions of the Office of Medicaid on Trust Interpretation Are Not Entitled to Deference

Throughout the Doherty case, it was the official position of the Office of Medicaid that a trust must be read as a whole, but in this case, the Office of Medicaid appears to have backed away from that correct legal position, because to do so necessitates an entirely different result from what it is trying to get away with in this case. (See the first full paragraph on page 9 of its memorandum, where the Office of Medicaid argues: “That there are provisions in the applicant’s trust that are at odds with each other does not change the analysis.”)

In addition, the Office of Medicaid appears to have created a new definition of the term “sole.”

These new positions of the Office of Medicaid regarding how a trust should be viewed or treated are not entitled to deference. The Supreme Judicial Court, in Cohen v. Commissioner of the Division of Medical Assistance, 423 Mass. 299 (1996), footnote 18, stated why it chose not to give deference to the MassHealth agency’s position in that case, and the same point applies here: “The Commonwealth urges us to give deference to the division's administrative interpretation of the statute. Although there is some merit to the argument, it is not served up in its most appetizing form in this case. … It is usually the initial not the changed interpretation of a statute that earns the kind of deference the Commonwealth would need here. See Barnett v. Weinberger, 818 F.2d 953, 960-961 n.74 (D.C. Cir. 1987), and cases cited (deference depends on consistency of interpretation).”

Appellant Is Entitled to Reasoned Consistency by Office of Medicaid

The MassHealth application filed on behalf of (the “Appellant”) should be approved because the principal in the Irrevocable Trusts in question already have a history of not being treated by the Office of Medicaid as countable or available assets. The Irrevocable Trusts were involved in a MassHealth application by the Appellant’s wife, , in 2009 that was approved in 2010 without the Irrevocable Trusts being treated as countable or available assets. Thus, the Office of Medicaid is now taking an inconsistent position on the Irrevocable Trusts.

In 2009, the Appellant’s wife, , applied for and was eventually approved for MassHealth long term care benefits. The Irrevocable Trusts involved in this appeal
were disclosed to MassHealth at that time, and the Office of Medicaid had an opportunity to include the Irrevocable Trusts as assets, but Office of Medicaid chose not to do so. Once the MassHealth application was approved, was deemed a MassHealth Member, defined in 130 CMR 515.001 as "a person deemed by the MassHealth agency to be eligible for MassHealth.” The initial determination of eligibility was made by the MassHealth Enrollment Center, and she had satisfied her burden of establishing her eligibility upon her initial application. Now, with the same Irrevocable Trusts being included in the MassHealth application of her husband, , the Office of Medicaid has reversed its previous position on the Irrevocable Trusts, on what is apparently claimed to be numerous offending provisions in the Irrevocable Trusts in question. The memorandum of the Office of Medicaid displays a sharp turn in policy that is wholly inconsistent with prior policy.

A party is entitled to "reasoned consistency" in agency decision-making. Boston Gas Co. v. Department of Pub. Util., 367 Mass. 92, 104 (1975). In Davila–Bardales v. Immigration and Naturalization Service, 27 F.3d 1 (1994) the First Circuit of the United States Court of Appeals stated that the law prohibits an agency “from adopting significantly inconsistent policies that result in the creation of conflicting lines of precedent governing the identical situation. …[T]he law demands a certain orderliness.”

The Doherty case did not change trust law; in fact, the court went out of its way to state that Guerriero is still good law. ("[W]e take this opportunity to stress that we have 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. See and compare Guerriero v. Commissioner of the Div. of Med. Assistance, 433 Mass. 628, 633, 745 N.E.2d 324 (2001).") Further, MassHealth regulations have not changed as a result of Doherty. The standard during 2009-2010, when the Office of Medicaid concluded that the assets of the Irrevocable Trusts were unavailable, remains the same: whether the principal is available to the settlor or the settlor’s spouse. Where the Office of Medicaid concluded in the past that the principal of the Irrevocable Trusts was not available as a matter of law, the reasoned consistency rule applies.
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(25) **New Position of Office of Medicaid on Appellant’s Previously-Approved Irrevocable Trusts Is Not Entitled to Deference**

The new position of the Office of Medicaid regarding the Irrevocable Trusts in this appeal is not entitled to deference. The Supreme Judicial Court, in *Cohen v. Commissioner of the Division of Medical Assistance*, 423 Mass. 299 (1996), footnote 18, stated why it chose not to give deference to the MassHealth agency’s position in that case, and the same points apply here: “The Commonwealth urges us to give deference to the division's administrative interpretation of the statute. Although there is some merit to the argument, it is not served up in its most appetizing form in this case. First, there are no Federal or State regulations to which we may defer. The State regulations recast the words of the statute but do not address the difficulty we face here any more directly than does the statute itself. ... Likewise, the State Medicaid Manual does not expand on the words of the statute. .... Second, the administrative interpretation which resulted in the denials of eligibility in this case dates only from [a recent time], before which these beneficiaries of trusts such as these were treated as eligible. It is usually the initial not the changed interpretation of a statute that earns the kind of deference the Commonwealth would need here. See *Barnett v. Weinberger*, 818 F.2d 953, 960-961 n.74 (D.C. Cir. 1987), and cases cited (deference depends on consistency of interpretation).”

(26) **Principles of Res Judicata Prevent the Office of Medicaid from Taking a New Position on Appellant’s Previously-Approved Irrevocable Trusts**

Decisions of administrative agencies are entitled to preclusive effect, so the 2010 MassHealth approval of should prevent the Office of Medicaid from now treating the principal of the Irrevocable Trusts in this appeal as countable assets. The doctrine of res judicata bars relitigation of claims that were (or could have been) determined in an earlier action. *Restatement (Second ) of Judgments* 17-19 and 24. The “principles of claim preclusion [res judicata] and issue preclusion [collateral estoppel] … apply both to administrative boards and to courts.” *Lopes v. Board of Appeals of Fairhaven*, 27 Mass. App. Ct. 754, 755, 543 N.E.2d 421, 422 (1989); see *Restatement (Second ) of Judgments* 83 (1982). “Courts routinely apply collateral estoppel to issues resolved by agencies.” Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* 13.4 at 260 (1994).
MassHealth regulations recognize the principle of res judicata. In particular, the Massachusetts fair hearing regulation at 130 C.M.R. 610.035(A)(7) states that the Board of Hearings will dismiss a request for a fair hearing when it “has conducted a hearing and issued a decision on the same appealable action arising out of the same facts that constitute the basis of the request.” Thus, if the principal of the Irrevocable Trusts in this appeal had been adjudicated to be available to the MassHealth applicant in a previous application, the Appellant would have no right to challenge the countability of the principal in this case. The same treatment should apply to the Office of Medicaid in this appeal.

In the “MANUAL FOR CONDUCTING ADMINISTRATIVE ADJUDICATORY PROCEEDINGS, 2012 EDITION” available on the mass.gov site, edited by Robert L. Quinan, Jr., Managing Attorney of the Administrative Law Division, Government Bureau, Office of the Attorney General, Commonwealth of Massachusetts, on page 15, footnote 16, it is stated: “If a factual or legal determination has previously been made in a formal prior adjudication regarding the same party and the same claim or issue, the presiding officer’s latitude to act may be hemmed in by the doctrine of “collateral estoppel.” That is, he may be precluded from issuing a finding or conclusion that is inconsistent with the previous determination.” Accordingly, collateral estoppel should apply here and prevent a different trust interpretation due to the facts of this situation.

A married couple is considered to be a filing unit under MassHealth, and all of their assets, as was done here, are considered in a MassHealth long term care application. In 2009, applied for and was eventually approved for MassHealth long term care benefits. The Irrevocable Trusts involved in this appeal were disclosed to the Office of Medicaid at that time, and the Office of Medicaid had an opportunity to include the principal of the Irrevocable Trusts as countable assets, but the Office of Medicaid chose not to do so. Further, there was a fair hearing decision on April 28, 2010 where a binding finding of fact was made regarding the appellant’s countable assets, and whereby the Appellant was allowed to retain all of the couple’s assets due to exceptional circumstances under 130 CMR 520.017. As a fair hearing is considered to be a final judgment in a MassHealth case, the claim by the Office of Medicaid that the principal of the Irrevocable Trusts in this appeal is now for the first time to be treated as available and countable is barred by the doctrines of res judicata, claim preclusion and issue preclusion.
In *Heacock v. Heacock*, 402 Mass. 21, 24-25 (1988), the Court held: “The doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action. See *Franklin v. North Weymouth Coop. Bank*, 283 Mass. 275, 279-280 (1933), and cases cited. This is so even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies. See *Mackintosh v. Chambers*, 285 Mass. 594, 596-597 (1934), and cases cited; *Restatement (Second) of Judgments* Section 25 (1980). The doctrine is … "based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit." *Foster v. Evans*, 384 Mass. 687, 696 n. 10 (1981), quoting A. Vestal, *Res Judicata/Preclusion* V-401 (1969). See *Franklin*, supra at 279; Cleary, *Res Judicata Reexamined*, 57 Yale L. J. 339, 342-344 (1948). As such, it applies only where both actions were based on the same claim. *Franklin*, supra at 279-280.”

Where MassHealth eligibility was applied for and obtained by in 2009-2010, the Office of Medicaid had a clear incentive to review the Irrevocable Trusts and issue a denial if it was believed that the principal of the Irrevocable Trusts was available and countable. The opportunity for the Office of Medicaid to litigate the matter fully was also present. See *Restatement (Second) of Judgments* 83(2)(a) (prior proceeding must have provided a “right on behalf of a party to present evidence and legal argument in support of the parties contentions and fair opportunity to rebut evidence and argument by opposing parties.”) Further, under 130 CMR 610.091 the Director of the Office of Medicaid could have ordered a new fair hearing for any reason, yet did not do so.

Seventeen years after the *Heacock* decision, in *Kobrin v. Board of Registration in Medicine*, 444 Mass. 837 (2005), the elements of res judicata in Massachusetts were elucidated in more detail: “The term "res judicata" includes both claim preclusion and issue preclusion. See *Heacock v. Heacock*, 402 Mass. 21, 23 n.2 (1988). "Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action." *O'Neill v. City Manager of Cambridge*, 428 Mass. 257, 259 (1998), quoting *Blanchette v. School Comm. of Westwood*, 427 Mass. 176, 179 n.3 (1998). This "is 'based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit.' " *O'Neill v. City Manager of Cambridge*, supra, quoting *Heacock v. Heacock*, supra at 24. The invocation of claim preclusion
requires three elements: "(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." DaLuz v. Department of Correction, 434 Mass. 40, 45 (2001), quoting Franklin v. North Weymouth Coop. Bank, 283 Mass. 275, 280 (1933). “Similarly, issue preclusion "prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." Heacock v. Heacock, supra at 23 n.2. Before precluding a party from relitigating an issue, "a court must determine that (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication." Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 134 (1998), and cases cited. … “Moreover, it is not necessary that the prior adjudication have been before a court. Rather, if the proponent for preclusion proves that the elements for preclusion are met, "[a] final order of an administrative agency in an adjudicatory proceeding . . . precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction." Tuper v. North Adams Ambulance Serv., Inc., supra at 135, quoting Stowe v. Bologna, 415 Mass. 20, 22 (1993).”