

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Denied	Appeal Number:	1305018
Decision Date:	9/24/13	Hearing Date:	05/22/2013
Hearing Officer:	Marc Tonaszuck		

Appellant Representative:

MassHealth Representative:
Rosa Volmar



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

APPEAL DECISION

Appeal Decision:	Denied	Issue:	Long Term Care
Decision Date:	9/24/13	Hearing Date:	05/22/2013
MassHealth Rep.:	R. Volmar	Appellant Rep.:	
Hearing Location:	Springfield MassHealth Enrollment Center		

Authority

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

Jurisdiction

Through a notice dated 03/13/2013, MassHealth informed the appellant that it denied her long term care benefits because she did not give MassHealth the information it needed to make an eligibility determination within the required time frame (130 CMR 505.008; Exhibit 1A). The appellant filed a timely appeal on 03/20/2013 (130 CMR 610.015(B); Exhibit 2A).

Through a second notice dated 04/23/2013, MassHealth informed the appellant that it denied her long term care benefits because she did not give MassHealth the information it needed to make an eligibility determination within the required time frame (130 CMR 505.008; Exhibit 1B). The appellant filed a timely appeal on 05/01/2013 (130 CMR 610.015(B); Exhibit 2B).

Through a third notice dated 05/15/2013, MassHealth informed the appellant that it denied her long term care benefits because she had more countable assets than MassHealth benefits allow (130 CMR 520.003; Exhibit 1C). The appellant filed a timely appeal on 05/22/2013 (130 CMR 610.015(B); Exhibit 2C).

Denial of assistance is valid grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth determined that the appellant is not eligible for MassHealth.

Issue

The issue is whether MassHealth was correct in determining that the appellant is not eligible for long term care benefits because her assets exceed the program limit.

Summary of Evidence

The MassHealth representative, from the Springfield MassHealth Enrollment Center, testified that MassHealth received an application for long-term care benefits on 01/28/2013. The appellant is a widow and was admitted into a long-term care facility on 11/12/2012. She is seeking MassHealth benefits to begin on 01/11/2013 (Exhibits 7 and 8). The MassHealth representative testified that the appellant's 01/28/2013 application was denied twice for verifications, but because she appealed those denials, that application date is preserved. All verifications were received and on 05/15/2013, the case was denied because the appellant had assets in excess of the MassHealth limit (\$2,000.00 for a single individual). MassHealth counted the assets as \$92,281.06, which was comprised primarily of a family trust; the principal of which the MassHealth representative testified was countable. The appellant and her late husband were the grantors of the trust. The trust was formed on 11/17/2005 and funded with the couple's 2/3 interest in a piece of real estate. The MassHealth representative testified that that the language of the trust made it countable because there are circumstances under which the appellant may access the principal. As a result, the entire amount of the trust is countable.

The MassHealth representative testified that the trust contains the following terms which allow the appellant the ability to reach the principal:

Article Second:

A. The trustee shall pay to the grantors in equal shares all of the net income of the trust, quarterly or more often. After the death of the first grantor to die, the trustee shall pay to the surviving grantor all of the net income of the trust, quarterly or more often for the remainder of such grantor's life.

B. Until the death of the last surviving grantor the trustee may distribute part or all of the principal of this trust to any persons (other than the grantors) otherwise entitled to the assets of this trust after the deaths of the grantors.

C. The grantors reserve the power, exercisable by either one at any time or from time to time, by written instrument during their lifetimes or by their wills or any codicils thereto, to appoint any part or all of the principal or income of this trust to any one or more of the grantors' issue, free of trust or otherwise,

referring specifically to this special power of appointment in such written instrument, will, and /or codicil.

Article Seventh:

The trustee may apply any or all of the income or principal of any share or portion of the trust to or for the benefit of any beneficiary in such manner and through such agencies as the trustee deems advisable instead of paying it directly to the beneficiary or his or her guardian. The receipt of anyone to whom payments made in this way shall fully protect the trustee.

Article Ninth:

Upon the death of [appellant's husband] and provided that [appellant's husband] is survived by [the appellant], upon the demand of [the appellant], the trustee shall transfer any trust asset in exchange for assets of equivalent value. This power is exercisable by the appellant, solely in a nonfiduciary capacity, and no fiduciary duty is imposed upon the trustee or other person may be asserted as a defense to the exercise of the powers granted under this article.

(Exhibit 5.)

The MassHealth representative argued that the plain reading of the language in the trust shows that the appellant can access the principal; and therefore the entire principal is countable in an eligibility determination.

The appellant's power of attorney was represented at the hearing by an attorney.¹ Counsel explained that the assets at issue in this appeal are 2/3 interest in real estate that was transferred to an irrevocable trust on 11/17/2005, beyond the relevant look back period. The value of the trust principal is \$129,558.00. She argued that the terms of the trust allow the appellant to reach the income only; and there has been no income disbursed. Counsel argued that the terms of the trust make it impossible for the appellant to reach the principal under any circumstances.

Findings of Fact

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

1. The appellant was admitted to a skilled nursing facility on 11/12/2012.
2. The appellant applied for MassHealth long term care benefits on 01/28/2013, seeking a benefit start date of 01/11/2013.

¹ See Exhibits 2A, 2B, 2C and 4.

3. The appellant and her late husband executed an irrevocable trust in November 2005.
4. The appellant and her husband were the grantors of the trust.
5. The appellant is a widow.
6. The principal of the trust is a 2/3 interest in a piece of real estate. The value of the principal is \$129,558.00.
7. MassHealth determined that this trust was a countable asset and determined that the appellant was not eligible for long term benefits due to having excess assets.
8. None of the other assets are at issue in this appeal. Other than the value of the principal of the trust, MassHealth agrees that all other assets are below the \$2,000.00 limit for a single individual.
9. The appellant is entitled to income from the trust. As of the date of the fair hearing, there has been no income from the trust.
10. The relevant language of the trust is as follows:

Article Second:

A. The trustee shall pay to the grantors in equal shares all of the net income of the trust, quarterly or more often. After the death of the first grantor to die, the trustee shall pay to the surviving grantor all of the net income of the trust, quarterly or more often for the remainder of such grantor's life.

B. Until the death of the last surviving grantor the trustee may distribute part or all of the principal of this trust to any persons (other than the grantors) otherwise entitled to the assets of this trust after the deaths of the grantors.

C. The grantors reserve the power, exercisable by either one at any time or from time to time, by written instrument during their lifetimes or by their wills or any codicils thereto, to appoint any part or all of the principal or income of this trust to any one or more of the grantors' issue, free of trust or otherwise, referring specifically to this special power of appointment in such written instrument, will, and /or codicil.

Article Seventh:

The trustee may apply any or all of the income or principal of any share or portion of the trust to or for the benefit of any beneficiary in such manner and through such agencies as the trustee deems advisable instead of paying it directly to the beneficiary or his or her guardian. The receipt of anyone to whom payments made in this way shall fully protect the trustee.

Article Ninth:

Upon the death of [appellant's husband] and provided that [appellant's husband] is survived by [the appellant], upon the demand of [the appellant], the trustee shall transfer any trust asset in exchange for assets of equivalent value. This power is exercisable by the appellant, solely in a nonfiduciary capacity, and no fiduciary duty is imposed upon the trustee or other person may be asserted as a defense to the exercise of the powers granted under this article.

Analysis and Conclusions of Law

MassHealth administers and is responsible for the delivery of health-care services to MassHealth members (See 130 CMR 515.002). The regulations governing MassHealth at 130 CMR 515.000 through 522.000 (referred to as Volume II) provide the requirements for noninstitutionalized persons aged 65 or older, institutionalized persons of any age, persons who would be institutionalized without community-based services, as defined by Title XIX of the Social Security Act and authorized by M.G.L. c. 118E, and certain Medicare beneficiaries (See 130 CMR 515.002). The appellant in this case is an institutionalized person. Therefore, the regulations at 130 CMR 515.000 through 522.000 apply to this case (See 130 CMR 515.002).

Pursuant to 130 CMR 520.023(A)(1)(b), the look-back period for transfers into or from trusts is 60 months for trusts where all or any portion of the trust income or principal cannot under any circumstances be paid to or for the benefit of the nursing facility resident. This trust was created in 2005, well before the 60-month look back period (See 130 CMR 520.023(A)(1)). The appellant does not dispute that she has access to income from the trust; and if there is income from the trust, the appellant did not dispute having MassHealth consider that in calculating a patient paid amount. No evidence was presented at hearing by either party that the appellant has received any such interest income from the trust.

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

In the case of an irrevocable trust, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income.

MassHealth regulations at 130 CMR 520.023 apply to trusts or similar legal devices created on or after August 11, 1993, and follows in pertinent part:

(C) Irrevocable Trusts.

(1) Portion Payable.

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

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

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

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

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

Relevant language of the trust follows:

Article Second:

A. The trustee shall pay to the grantors in equal shares all of the net income of the trust, quarterly or more often. After the death of the first grantor to die, the trustee shall pay to the surviving grantor all of the net income of the trust, quarterly or more often for the remainder of such grantor's life.

B. Until the death of the last surviving grantor the trustee may distribute part or all of the principal of this trust to any persons (other than the grantors) otherwise entitled to the assets of this trust after the deaths of the grantors.

C. The grantors reserve the power, exercisable by either one at any time or from time to time, by written instrument during their lifetimes or by their wills or any codicils thereto, to appoint any part or all of the principal or income of this trust to any one or more of the grantors' issue, free of trust or otherwise,

referring specifically to this special power of appointment in such written instrument, will, and /or codicil.

Article Seventh:

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Article Ninth:

Upon the death of [appellant's husband] and provided that [appellant's husband] is survived by [the appellant], upon the demand of [the appellant], the trustee shall transfer any trust asset in exchange for assets of equivalent value. This power is exercisable by the appellant, solely in a nonfiduciary capacity, and no fiduciary duty is imposed upon the trustee or other person may be asserted as a defense to the exercise of the powers granted under this article.

The trust is irrevocable and dated after 1993 and so it is analyzed under provisions of 42 USC § 1396p(d), and 130 CMR 520.023(C). Specifically, the explicit terms of the trust mandate that the income from the trust is paid to the appellant. Additionally, under 130 CMR 520.023(C)(1)(a), 42 USC § 1396p(d)(3)(B)(i); and 42 USC § 1396p(d)(2)(B), 42 USC § 1396p(d)(2)(C)(ii), there are circumstances under the trust provisions that would allow appellant to access the corpus of the trust, and therefore the resources are considered available and countable to appellant. Also, under Doherty v. Director of the Office of Medicaid, 74 Mass. App. Ct. 439, 443 (2009), although some language of the trust states that the appellant does not retain any interest in trust principal, the countability of trust principal is not predicated on merely one trust provision, and the whole of the instrument must be reviewed. Pursuant to the trust, the appellant is only one of the grantors, but she is also a beneficiary. According to the Article Seventh of the trust, the trustees "may apply any or all of the income or principal of any share or portion of the trust to or for the benefit of any beneficiary in such manner and through such agencies as the trustee deems advisable..." Also, the appellant, as one of the grantors has the power to demand the trustee to transfer any trust asset in exchange of assets of equivalent value. These powers, individually and in combination, render the trust principal within appellant's control. Because there are circumstance under which principal can be made available or used for appellant's benefit, the trust principal is countable in determined appellant's MassHealth eligibility (See Cohen v. Comm'r, Division of Medical Assistance, 423 Mass. 399, 416 (1996)).

The Court in U.S. v. Murray, 217 F.3d 59 65 (2000), states that, "it is against public policy to permit a man to tie up his own property in such a way that he can still enjoy it but prevent his creditors from reaching it." I find that the facts of this instant case are applicable. Thus, this appeal is denied. MassHealth correctly counted the value of the

trust property in an eligibility determination for the appellant's application for long term care benefits.

Order for MassHealth

None.

Notification of Your Right to Appeal to Court

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

Marc Tonaszuck
Hearing Officer
Board of Hearings

cc: MassHealth Representative: Robert Scheer