

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Denied	Appeal Number:	1306280
Decision Date:	10/8/13	Hearing Date:	06/20/2013
Hearing Officer:	Thomas J. Goode	Record Open to:	07/24/2013

Appellant Representative:

MassHealth Representative:
Peter O'Rourke



*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:	Excess Assets
Decision Date:	10/8/13	Hearing Date:	06/20/2013
MassHealth Rep.:	Peter O'Rourke	Appellant Rep.:	
Hearing Location:	Tewksbury MassHealth Enrollment Center Room 1	Aid Pending:	No

Authority

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

Jurisdiction

Through a notice dated March 27, 2013, MassHealth terminated appellant's MassHealth benefits because MassHealth determined that assets held in Trust are countable and exceed program limits (see 130 CMR 520.003, 520.023 and Exhibit 1). The appellant filed this appeal in a timely manner on April 16, 2013 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032). The hearing record remained open until July 24, 2013 to allow the parties to submit legal memoranda, which were timely received (Exhibits 8, 9).

Action Taken by MassHealth

MassHealth terminated appellant's MassHealth benefits because MassHealth determined that assets held in Trust are countable and exceed program limits.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.023, in determining that assets held in Trust are countable to appellant.

Summary of Evidence

The MassHealth representative testified that appellant entered a skilled nursing facility on November 4, 2011. MassHealth long term care benefits were approved retroactive to June 1, 2011. Appellant had reported to MassHealth the existence of an irrevocable Trust established by the appellant in 2003. As part of a MassHealth asset verification project, the Trust was reviewed; and assets held in Trust were deemed countable to appellant. As a result, MassHealth issued notice terminating appellant's MassHealth long term care benefits.

On April 28, 2003, for consideration of \$100, appellant conveyed title of her former residence to an irrevocable Trust. Appellant retained a life estate in the real estate. Appellant is the Grantor, and her daughter is the Trustee. Appellant is the income beneficiary of the Trust. There is no community spouse. The assessed value of the property held in the Trust is \$212,423.

The Trust provides the following:

Article Second A. reads: "The Trustee shall pay to the Grantor all of the net income of the Trust, quarterly or more often, for the remainder of the Grantor's life.

Article Second B. reads: "During the life of the Grantor the Trustee may distribute part or all of the principal of this Trust to any persons (other than the Grantor) otherwise entitled to the assets of this Trust after the death of the Grantor."

Article Second C. reads: "The Grantor reserves the power, exercisable at any time or from time to time, by written instrument during the Grantor's lifetime or by the Grantor's will or any codicil thereto, to appoint any part or all of the principal or income of this Trust to any one or more of the Grantor's issue, free of trust of (sic) otherwise, referring specifically to this special power of appointment in such written instrument, will, and/or codicil."

Article Eighth reads: "In addition to the powers given to the Trustee in this Trust Agreement or by law, the Trustee shall have the following powers in each case to be exercised in his, her or its sole discretion, upon such terms as he, she or it deems advisable and without leave of any court" and enumerates in part the following Trustee powers:

- (A) to make or retain any investment, without notice to or the consent of any interested third party;
- (D) to make secured and unsecured loans;
- (F) to buy, sell, pledge, lease or mortgage any real or personal property and to borrow money, whether for the purpose of paying premiums or making distributions;
- (J) to purchase life insurance;
- (M) to borrow money for any purpose and to pledge securities or other property to secure the

loan;

(O) to determine issues as to income and principal;

(T) to do any other act which in the judgment of the Trustee is necessary or desirable for the administration of the Trust.

Article Ninth reads: The Grantor intends that this trust be a grantor trust for federal income tax purposes and all provisions of this trust shall be construed so as to effectuate this intent.

- A. Upon the demand by (Appellant's name), the Trustee shall transfer any trust assets in exchange for assets of equivalent value. This power is exercisable by (Appellant's name) solely in a nonfiduciary capacity, and no fiduciary duty imposed upon the Trustee or any other person may be asserted as a defense to the exercise of the powers granted under this Article.
- B. (Appellant's name) may waive this power by a writing delivered to a Trustee and such waiver shall bind (Appellant's name), the Trustee, and all other persons.

Article Tenth allows the Trustee to pay all or any portion of estate, inheritance or other death taxes, both federal and state, which are payable by reason of the Grantor's death.

Article Fourteenth allows any Trustee to resign. Following the death, resignation, or incapacity of the Trustee, a successor Trustee shall be appointed by a majority of the income beneficiaries at the time of such appointment; provided however, that any successor Trustee shall not be the Grantor or the Grantor's spouse.

MassHealth analyzed the Trust under provisions of 42 USC §1396p(d), and 130 CMR 520.023(C), as the Trust is irrevocable and dated after 1993. Specifically, MassHealth argues that 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. Pursuant to 130 CMR 520.023(C)(1)(d), appellant's former home is held in an irrevocable trust that is available to appellant as the income beneficiary; and therefore at a minimum, the home held in Trust is countable to appellant. Citing *Cohen v. Comm'r, Division of Medical Assistance*, 423 Mass. 399, 416 (1996), and *Lebow v. Commissioner of Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2000): MassHealth argues that because there are circumstances under which principal can be made available or used for appellant's benefit, the Trust principal is countable in determining appellant's MassHealth eligibility.

Also citing *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009), MassHealth concludes that the Trust is countable because the Trustee and the appellant as Grantor have broad powers to deal with Trust assets. MassHealth argues that under Paragraph C. of the Second Article, appellant retained a power of appointment exercisable during her life or by Will to appoint any part or all of the income and principal, and that such a provision demonstrates that appellant as Grantor did not divest herself of the Trust corpus. Moreover, under the Ninth Article, appellant retained the right to reacquire any Trust assets by substituting property of an equivalent value; and under the Tenth Article, principal may be used for the appellant's estate or inheritance

taxes. Under the Eighth Article, MassHealth asserts that there is no restriction on the Trustee's ability to convert the Trust principal to income producing property such as an annuity, which would then be payable to appellant as the income beneficiary. MassHealth further asserts that pursuant to Paragraph A of the Second Article, appellant as Grantor is entitled to distributions of Trust income, which is countable in an eligibility determination. Therefore, pursuant to 130 CMR 520.023(C)(1)(d), MassHealth asserts that the availability of Trust income renders the former home a countable asset.

In a response memorandum, appellant asserts that there are no circumstances under 42 U.S.C. §1396p(d)(3)(B)(i), and §1396p(d)(3)(B)(i), and in contrast with *Cohen* and *Lebow*, that would allow appellant access to Trust principal, because the Trustee, appellant's daughter, lacks discretion to pay principal to appellant, and because under Article Fourteenth, appellant as Grantor is specifically precluded from serving as a Trustee.¹ Appellant counsel argues that appellant is specifically precluded from receiving Trust assets under the Second Article. In addition, the only asset received by the Trust was appellant's former residence, which has never been sold. No income has been generated by Trust assets' and there have been no income distributions from the Trust. Appellant argues that were the Trustee to distribute Trust assets to appellant, she would be in violation of her fiduciary obligations as Trustee to act in accordance the purpose of the Trust to preserve Trust assets for the remainder beneficiaries. Appellant further argues that appellant retained a life estate interest in the property and transferred the remainder interest to the Trust. Therefore, appellant's ability to reside in the residence during her lifetime is controlled by the terms of the life estate deed and has no bearing on whether the assets of the Trust, which would consist of the remainder interest in the residence, are a countable asset. Moreover, counsel asserts that appellant has a limited power of appointment to appoint Trust assets to her issue only, and does not allow appellant to appoint Trust assets to herself. Appellant also argues that under Article Ninth, appellant's ability to exchange assets does not allow the Trustee to transfer assets to appellant for her use as it would result in a breach of the Trustee's fiduciary obligations to the reminder beneficiaries. Similarly, the Trustee's ability to utilize Trust assets after appellant's death to pay estate or inheritance taxes does not allow appellant to access Trust assets during her lifetime. Appellant argues that Trustee powers enumerated under Article Eighth do not allow the Trustee to convert Trust assets to income producing investments such as an annuity because such a conversion would result in a breach of the Trustees fiduciary obligations to the reminder beneficiaries because an annuity would benefit only appellant as the income beneficiary.

Citing 42 U.S.C. 1396(d)(3)(B)(i) and 130 CMR 520.023(C)(1)(a), appellant concludes that federal law and MassHealth regulations speak strictly to the ability of the Trustee to pay principal to a MassHealth applicant as the determining factor of whether a trust is countable. Under the terms of the Trust, the Trustee has no authority to make payments of principal to appellant. Therefore, MassHealth benefits should be restored.

¹ Counsel also outlines distinctions between the instant appeal and two Board of Hearings decisions in Appeal No. 1205462 and Appeal No. 1215864. Neither hearing decision was included with appellant's brief.

In a response memorandum, MassHealth argues that the analysis of the Trust is governed by the federal Medicaid statute dictating the treatment of trusts, case law interpreting the statute, as well as the policy and purpose of the Medicaid program, as opposed to the common law of trusts. MassHealth asserts that federal Medicaid law mandates a presumption that a self-settled, inter vivos trust established by an applicant or spouse or funded with an applicant's assets is countable in an eligibility determination. MassHealth also notes that appellant's analysis relies on previous Board of Hearings decisions which may be informative and provide some guidance, but have no precedential value.²

Findings of Fact

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

- 1) Appellant entered a skilled nursing facility on November 4, 2011.
- 2) MassHealth long term care benefits were approved retroactive to June 1, 2011.
- 3) Appellant had reported to MassHealth the existence of an irrevocable Trust established by the appellant in 2003.
- 4) As part of a MassHealth asset verification project, the Trust was reviewed; and assets held in Trust were deemed countable to appellant.
- 5) On April 28, 2003, for consideration of \$100, appellant conveyed title of her former residence to an irrevocable Trust.
- 6) Appellant retained a life estate in the real estate.
- 7) Appellant is the Grantor, and her daughter is the Trustee of the Trust.
- 8) Appellant is the income beneficiary of the Trust.
- 9) There is no community spouse.
- 10) The assessed value of the property held in the Trust is \$212,423.
- 11) Article Second A. reads: "The Trustee shall pay to the Grantor all of the net income of the Trust, quarterly or more often, for the remainder of the Grantor's life.
- 12) Article Second B. reads: "During the life of the Grantor the Trustee may distribute part or all of the principal of this Trust to any persons (other than the Grantor) otherwise entitled to

² Citing *Ford v. Comm'r of Division of Medical Asst.*, 74 Mass. App. Ct. 1:28 Decision 08-P-2091 (October 19, 2009).

the assets of this Trust after the death of the Grantor.”

- 13) Article Second C. reads: “The Grantor reserves the power, exercisable at any time or from time to time, by written instrument during the Grantor’s lifetime or by the Grantor’s will or any codicil thereto, to appoint any part or all of the principal or income of this Trust to any one or more of the Grantor’s issue, free of trust of (sic) otherwise, referring specifically to this special power of appointment in such written instrument, will, and/or codicil.”
- 14) Article Eighth reads: “In addition to the powers given to the Trustee in this Trust Agreement or by law, the Trustee shall have the following powers in each case to be exercised in his, her or its sole discretion, upon such terms as he, she or it deems advisable and without leave of any court” and enumerates in part the following Trustee powers:
- (A) to make or retain any investment, without notice to or the consent of any interested third party;
 - (D) to make secured and unsecured loans;
 - (F) to buy, sell, pledge, lease or mortgage any real or personal property and to borrow money, whether for the purpose of paying premiums or making distributions;
 - (J) to purchase life insurance;
 - (M) to borrow money for any purpose and to pledge securities or other property to secure the loan;
 - (O) to determine issues as to income and principal;
 - (T) to do any other act which in the judgment of the Trustee is necessary or desirable for the administration of the Trust.
- 15) Article Ninth reads: The Grantor intends that this trust be a grantor trust for federal income tax purposes and all provisions of this trust shall be construed so as to effectuate this intent.
- A. Upon the demand by (Appellant’s name), the Trustee shall transfer any trust assets in exchange for assets of equivalent value. This power is exercisable by (Appellant’s name) solely in a nonfiduciary capacity, and no fiduciary duty imposed upon the Trustee or any other person may be asserted as a defense to the exercise of the powers granted under this Article.
 - B. (Appellant’s name) may waive this power by a writing delivered to a Trustee and such waiver shall bind (Appellant’s name), the Trustee, and all other persons.
- 16) Article Tenth allows the Trustee to pay all or any portion of estate, inheritance or other death taxes, both federal and state, which are payable by reason of the Grantor’s death.
- 17) Article Fourteenth allows any Trustee to resign. Following the death, resignation, or incapacity of the Trustee, a successor Trustee shall be appointed by a majority of the income beneficiaries at the time of the such appointment; provided however, that any successor Trustee shall not be the Grantor or the Grantor’s spouse.

Analysis and Conclusions of Law

There are no factual disputes in the case at hand; rather, the issues revolve around the interpretation of the language of the various Trust provisions involved and the applicable regulations. The Trust is properly considered in the context of both state and federal law applying to trusts created after 1993, of which pertinent sections follow:

Federal law at 42 USC §1396p provides:

(d) Treatment of Trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a Trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a Trust if assets of the individual were used to form all or part of the corpus of the Trust and if any of the following individuals established such Trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a Trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the Trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to—

(i) the purposes for which a Trust is established,

(ii) whether the Trustees have or exercise any discretion under the Trust,

(iii) any restrictions on when or whether distributions may be made from the Trust, or

(iv) any restrictions on the use of distributions from the Trust.

(3) (A) In the case of a revocable trust—

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust—

(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 any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

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 (emphasis added).

Regulation 130 CMR 520.023 applies to trusts or similar legal devices created on or after August 11, 1993, and follows in pertinent part with emphasis added:

(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).

Following are Trustee powers and provisions pursuant to the Trust:

Article Second A, reads: “The Trustee shall pay to the Grantor all of the net income of the Trust, quarterly or more often, for the remainder of the Grantor’s life.

Article Second B, reads: “During the life of the Grantor the Trustee may distribute part or all of the principal of this Trust to any persons (other than the Grantor) otherwise entitled to the assets of this Trust after the death of the Grantor.”

Article Second C, reads: “The Grantor reserves the power, exercisable at any time or from time to time, by written instrument during the Grantor’s lifetime or by the Grantor’s will or any codicil therto, to appoint any part or all of the principal or income of this Trust to any one or more of the Grantor’s issue, free of trust of (sic) otherwise, referring specifically to this special power of appointment in such written instrument, will, and/or codicil.”

Article Eighth reads: “In addition to the powers given to the Trustee in this Trust Agreement or by law, the Trustee shall have the following powers in each case to be exercised in his, her or its sole discretion, upon such terms as he, she or it deems advisable and without leave of any court” and enumerates in relevant part the following Trustee powers:

- (B) to make or retain any investment, without notice to or the consent of any interested third party;
- (D) to make secured and unsecured loans;
- (F) to buy, sell, pledge, lease or mortgage any real or personal property and to borrow money, whether for the purpose of paying premiums or making distributions;
- (J) to purchase life insurance;
- (M) to borrow money for any purpose and to pledge securities or other property to secure the loan;
- (O) to determine issues as to income and principal;
- (T) to do any other act which in the judgment of the Trustee is necessary or desirable for the administration of the Trust.

Article Ninth reads: The Grantor intends that this trust be a grantor trust for federal income tax purposes and all provisions of this trust shall be construed so as to effectuate this intent.

- C. Upon the demand by (Appellant’s name), the Trustee shall transfer any trust assets in exchange for assets of equivalent value. This power is exercisable by (Appellant’s name) solely in a nonfiduciary capacity, and no fiduciary duty imposed upon the Trustee or any

other person may be asserted as a defense to the exercise of the powers granted under this Article.

- D. (Appellant's name) may waive this power by a writing delivered to a Trustee and such waiver shall bind (Appellant's name), the Trustee, and all other persons.

Article Tenth allows the Trustee to pay all or any portion of estate, inheritance or other death taxes, both federal and state, which are payable by reason of the Grantor's death.

Article Fourteenth allows any Trustee to resign. Following the death, resignation, or incapacity of the Trustee, a successor Trustee shall be appointed by a majority of the income beneficiaries at the time of such appointment; provided however, that any successor Trustee shall not be the Grantor or the Grantor's spouse.

First, this hearing officer has not reviewed the Board of Hearings decisions referred to by appellant. While Board of Hearings decisions involving trusts may be informative, the decisions were not provided, and have no precedential value in the application of law to the facts at hand.³

Second, I disagree in part with the MassHealth position that because appellant is the income beneficiary of a self-settled trust, appellant's former residence is therefore available under 42 U.S.C. 1396p (d)(2)(A)(B) and (C) and 130 CMR 520.023(C)(1)(d). In the case of an irrevocable trust, 42 U.S.C.1396p(d)(3)(B) imposes the "any circumstances" test under which either income or principal can be paid to the applicant, and considers available the amount that could be paid to the individual from income or from the corpus of the trust. Thus, any income generated by the corpus of the Trust that could be paid to appellant would be considered available. However, the fact that appellant is the income beneficiary of the Trust does not inherently render the corpus of the Trust, her former residence, available to her. Absent a finding that appellant can access the Trust corpus under "any circumstances," it is possible that only Trust income is available to appellant while Trust principal remains entirely unavailable to her.⁴

However, I find that the Trust provisions considered collectively allow circumstances in which the appellant can access Trust principal that render her former home available to her.⁵ A straight forward reading of Article Second C. allows appellant as the Grantor, at any time, or from time to time, to appoint any part or all of the principal or income to any one or more of the Grantor's issue, free of trust. Article Second C. creates a very low hurdle to appellant regaining ownership of Trust principal outright by allowing her to effectively terminate the Trust by merely presenting the Trustee with a written instrument instructing the Trustee to convey her former residence to any of her issue *free of Trust*. While the Grantor cannot instruct the Trustee to convey the property directly from the Trust to the Grantor, there is no reason why the Grantor's issue, who would

³ See *Ford v. Comm'r of Division of Medical Asst.*, 74 Mass. App. Ct. 1:28 Decision 08-P-2091 (October 19, 2009).

⁴ See *Doherty*, "... 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 settler.

⁵ See *Doherty*, a "clause may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole."

receive the property free of Trust on appellant's instruction, cannot simply convey the property back to appellant, again, free of Trust. In another scenario plausible under the power of appointment in Article Second C, appellant as Grantor can instruct the Trustee to convey the property to her issue in his or her capacity as Trustee of a revocable Trust that names appellant as beneficiary. The "any circumstances" test codified in both state and federal law is very broad, and under the terms of the Trust, payment from the Trust could be made to or for the benefit of the individual in a simple two-step conveyance that allows the Trustee to distribute Trust principal free of Trust, and circumventing the Trustee's fiduciary duty to the remainder beneficiaries⁶ in an arrangement "concocted for the purpose of having your cake and eating it too."⁷

Similarly, under Article Ninth appellant as Grantor reserved the right to order the Trustee to transfer any Trust assets in exchange for assets of equivalent value in a manner that relieves the Trustee of fiduciary obligations. In terms of Medicaid trust law, the analysis under federal law and MassHealth regulations considers only the applicant's ability to access Trust resources, and the discretion the Trustee has to make those resources available to the applicant. Neither 42 U.S.C. 1396p(d)(3)(B)(i), nor 130 CMR 520.023(C) incorporates issues of valuation and principal substitution. The portion of principal payable to the applicant is countable. Article Ninth clearly allows appellant as Grantor to instruct the Trustee to return her former residence to her without a resulting fiduciary breach purportedly in exchange for other assets.⁸ There is no evidence that this power has been waived. Appellant argues that returning appellant's residence to her under Article Ninth is not allowable because it would result in a breach of the Trustee's fiduciary duty. However, this same Article absolves the Trustee of all fiduciary obligations if the Grantor exercises the power: "and no fiduciary duty imposed upon the Trustee or any other person may be asserted as a defense to the exercise of the powers granted under this Article." While Article Second purports to preclude Trust principal from being returned to appellant, consideration of the Trust document collectively⁹ reveals powers retained by appellant that allow circumstances where Trust assets can be made available to appellant regardless of the prohibition under Article Second.

Last, Trustee powers enumerated under Article Eighth allow the Trustee to convert Trust principal to income producing investments. Accounting issues aside, there is no preclusion

⁶ See *Lebow v. Commissioner of Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2000): "The issue is not whether the trustee has the authority to make payments to the grantor at a particular moment in time. Rather, if there is any state of affairs, at any time during the operation of the trust, that would permit the trustee to distribute the assets to the grantor, those assets count in calculating the grantor's Medicaid eligibility."

⁷ See *Cohen v. Commissioner of Div. of Med Assistance*, 423 Mass. 399, 416 (1996).

⁸ Even if the matter of substitution was somehow incorporated into the analysis of Medicaid eligibility as appellant asserts, appellant would have to have assets valued at \$212,423 which would put her over the \$2,000 asset limit, and transfer those assets to the Trust resulting in a disqualifying resource transfer. As appellant is the only individual who can invoke this substitution order, it is difficult to envision another intended purpose for this provision other than allowing appellant to substitute her own assets in exchange for the return on her former home despite the prohibition under Article Second.

⁹ See fn. 5.

preventing the Trustee from selling the appellant's former home and purchasing an annuity or other income producing investment vehicle. As the Trust fails the "any circumstances" test, analysis of Article Tenth and the Trustee's ability to pay estate, inheritance or other death taxes after the Grantor's death is not necessary.

As the MassHealth attorney notes, "Congress and courts have recognized and rejected the use of trusts as devices to shelter assets for the benefit of the family members while simultaneously obtaining taxpayer funded Medicaid benefits." The Massachusetts Supreme Court and the Appellate Courts have provided guidance in the interpretation of the federal and state laws regarding trusts and the "any circumstances" test mandated by both federal and state law that does effectively create a presumption that a self-settled, inter vivos trust established by an applicant or spouse or funded with an applicant's assets is countable in an eligibility determination. The Trust principal in this case is countable as the Trust fails the "any circumstances" test under 130 CMR 520.023(C)(1)(a) read within the context of 42 U.S.C. 1396p (d)(3)(B)(i). Appellant's former home held in Trust is therefore available to appellant, and is not subject to exemptions at 130 CMR 520.007(G)(2), or 520.007(G)(8).

The appeal is DENIED.

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.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Sylvia Tiar

Appellant Attorney: