

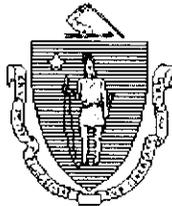
**Office of Medicaid  
BOARD OF HEARINGS**

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	1308251
<b>Decision Date:</b>	9/13/13	<b>Hearing Date:</b>	07/01/2013
<b>Hearing Officer:</b>	Sara E. McGrath	<b>Record Closed:</b>	08/12/2013

**Appearances for Appellant:**

**Appearances for MassHealth:**  
Helene Marcum, Chelsea MEC



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

## APPEAL DECISION

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Long-term care eligibility
<b>Decision Date:</b>	9/13/13	<b>Hearing Date:</b>	07/01/2013
<b>MassHealth's Rep.:</b>	Helene Marcum	<b>Appellant's Rep.:</b>	
<b>Hearing Location:</b>	Chelsea MassHealth Enrollment Center	<b>Aid Pending:</b>	No

### Authority

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

### Jurisdiction

Through a notice dated May 6, 2013, MassHealth denied the appellant's application for benefits because of excess assets (Exhibit 1). The appellant filed this appeal in a timely manner on May 22, 2013 (130 CMR 610.015(B); Exhibit 2). After hearing, the record was held open for the purpose of accepting a memorandum from the appellant, and a response from MassHealth (Exhibits 7 and 8). Denial of an application for benefits is a valid basis for appeal (130 CMR 610.032).

### Action Taken by MassHealth

MassHealth denied the appellant's application for benefits because it determined she has more countable assets than are allowable under MassHealth regulations.

### Issue

The appeal issue is whether the assets in a trust are countable to the appellant?

## Summary of Evidence

A MassHealth representative appeared at the hearing and testified as follows: The appellant was admitted to a nursing facility on December 17, 2009. On December 6, 2012, a MassHealth long-term care application was submitted on her behalf, seeking coverage as of April 1, 2013. On May 6, 2013, MassHealth denied the application because of a determination that the appellant has countable assets in excess of what is allowed under MassHealth regulations. MassHealth found that the appellant retains access to trust assets; specifically property in Needham that she deeded to a family trust in October 2007 and subsequently sold in June 2010. The trust documents were forwarded to the MassHealth legal unit, which determined that the trust assets are countable to the appellant.

A copy of the trust instrument was submitted into evidence (Exhibit 5). The relevant provisions (as referred to by the parties) are set forth as follows:

Art. III. I This trust is irrevocable.....

Art. III. I Notwithstanding the foregoing, the Grantor specifically reserves the right at any time and from time to time . . . to eliminate any one or more persons otherwise included herein as a then current or future beneficiary (including the Grantor) and thereby treat such person(s) as if such person(s) had died . . . and/or to reallocate part or all of the interest of any one or more then current or future beneficiaries of any one or more shares hereunder, whether such interests are vest or contingent, to one or more other persons who would otherwise have a beneficial interest in the trust after the death of the Grantor . . . .

Art. VI The Trustee shall render, at least annually, a statement of properties in the trust and of receipt and disbursements during the period covered, to the Grantor....

Art. VII During the lifetime of the Grantor, the Trustee shall pay to the Grantor all the income of this trust in quarterly or more frequent installments. . . . No principal of the trust shall be distributed to the Grantor. The Trustee may at any time pay to or apply for the benefit of such persons as would then be the remaindermen if the Grantor were then to die, as much of the principal of the trust as the Trustee, in its sole discretion, deems advisable (in whatever proportions the Trustee deems advisable if there are more than one such person). No amounts shall be distributed to persons other than the Grantor (other than for the Grantor's benefit) without the asset of the Grantor . . . .

Art. XI Any interest in the trust property, including any interest of the Grantor, may, at any time, be disclaimed in whole or in part. . . .

Art. XIV.I The Trustee under each trust herein created and any other successor trustee shall have, possess and at any time or from time to time may exercise in whole or in part, without order or license of court or advertisement, the following specific rights, powers, authority and/or immunities as well as all other rights, powers and authority permitted by law to trustees:

(A) To make any allocation . . . of the trust estate. . .

(C) To sell or offer to sell for cash or for creditor installments, at public or private sale, to grant options to purchase, and to convey or exchange, any and all of the property at any time forming a part of the trust asset. . .

(I) To invest, reinvest or refrain from investing the trust estate. . . in annuities. . .

(M) To determine whether any receipts shall constitute principal or income. . .

(Exhibit 5).

The MassHealth attorney who reviewed the trust argues that the power retained by appellant in Article III to eliminate beneficiaries and to reallocate part or all of the interest of any beneficiary demonstrates that appellant is the sole, vested, lifetime beneficiary of the trust. Under Article VII, paragraph 1, appellant is entitled to distributions of trust income, and she is a vested beneficiary of the trust. The income is countable. Although Article VII, paragraph 1 states that the trustee is prohibited from making any distributions of principal to the appellant, Medicaid law requires that the analysis focus on whether there are any circumstances under which trust assets can be deemed available to the appellant. MassHealth argues that here, trust principal was used for the benefit of the appellant. Specifically, the appellant resided in the trust property prior to her nursing facility admission in 2009. Further, when the property sold in 2010, over \$90,000 of the proceeds were used to pay off appellant's mortgage (Exhibit 3).

MassHealth further argues that there are additional circumstances under which the value of the principal can be made available to, or used for the benefit of the appellant. Specifically, Article XIV gives the trustee wide power to deal with trust assets, including the authority to buy, sell, exchange, or mortgage trust property on any terms, to determine what part of the trust is income versus principal, invest and reinvest trust property, and purchase annuities and life insurance. There is nothing that precludes the trustee from converting the principal to an income producing product, such as an annuity. MassHealth argues that these constitute circumstances in which both income and principal can be made available to the appellant. Consequently, all trust assets are countable in an eligibility determination (130 CMR 520.023(C)(1)(a); Exhibit 3).

Appellant argues that this irrevocable trust does not allow the appellant to access trust principal, and provides that no principal of the trust shall be distributed to the appellant. Appellant argues, therefore, that MassHealth should not count the trust principal in appellant's eligibility determination (Exhibit 4).

After the hearing, the appellant's attorney requested that the record be held open to enable him to submit a response to the MassHealth legal memorandum provided at hearing (Exhibit 6). Appellant argues that there are no circumstances under the trust that would allow a distribution of trust principal to the appellant. Appellant states that the right to eliminate beneficiaries and reallocate part of all of the interest of any beneficiary under Article III does not demonstrate that the appellant is the sole, vested, lifetime beneficiary. Appellant argues that Article III, paragraph II provides that "[i]n no event shall the powers reserved by the Grantor in this or any other paragraph be exercised directly or indirectly for her own benefit." Appellant states that MassHealth raises the issue of the appellant's right to occupy the trust property, arguing that the property was used for the benefit of the appellant. Appellant argues that the only right appellant had was to use and occupy, which is not a life estate. Appellant argues that when appellant conveyed her home to the trust in 2007, she conveyed her equity interest in the home. Cambridge Savings held a mortgage on the home and therefore owned that portion of it. When the home was sold, the trustee satisfied the mortgage agreement to release the mortgage encumbrance. Appellant argues this is not the equivalent of appellant's use of trust principal. Appellant further argues that the trustee powers to manage trust assets also do not in any way permit access to trust principal by appellant (Exhibit 7).

MassHealth's legal department responded to appellant's supplemental memorandum of law (Exhibit 8). MassHealth argues that appellant's claim that principal cannot be made available to the appellant without violating the trustee's fiduciary duties or a trustee's discretion is irrelevant in a Medicaid eligibility determination. MassHealth argues that under Article XIV, paragraph V, the trustee may lend principal or income of the trust estate to a beneficiary, which is another circumstance whereby principal can be made available or used for the benefit of the appellant (Exhibit 8).

### **Findings of Fact**

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

1. On October 4, 2007, the appellant established an irrevocable trust. On the same date, the appellant deeded property in Needham to the trust.
  - a. The trustee is mandated to pay the grantor all of the income of the trust in quarterly or more frequent installments. No principal of this trust shall be distributed to the grantor. (§VII.1)
  - b. The trust gives the appellant the right to occupy for her lifetime any realty contributed to the trust if at the time of the contribution appellant was using such realty as a primary or secondary personal residence. (§VII.1)

- c. The trust provides that the trustee shall have the authority to terminate appellant's interest in the trust income if, at its sole discretion, the trustee determines that the continuation of the trust would jeopardize the appellant's eligibility for assistance from any governmental entity program. (§VII.II)
  - d. Upon the appellant's death, the remaining trust property shall be divided into as many equal shares as there are living siblings of the appellant and deceased siblings' living issue. (§VII.IV)
  - e. The trustee is authorized to (C) to sell or offer to sell for cash or for creditor installments, at public or private sale, to grant options to purchase, and to convey or exchange, any and all of the property at any time forming a part of the trust asset. . . (I) to invest, reinvest, or refrain from investing the trust estate wholly or partially in common stocks or in any other type of assets, including, but not limited to, bonds, notes, debentures, mortgages. . . annuities. . . ; and (M) to determine whether any receipts shall constitute principal or income and whether expenses are properly charged as income or principal. . . (§ XIV.I)
2. The appellant was admitted to a nursing facility on December 17, 2009.
  3. On December 6, 2012, a MassHealth long-term care application was submitted on the appellant's behalf, seeking coverage as of April 1, 2013.
  4. On May 6, 2013, MassHealth denied the application because it determined that the trust assets were countable assets and that the appellant was over the \$2,000 asset limit for MassHealth benefits.

### **Analysis and Conclusions of Law**

Under MassHealth regulations, 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. Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income. 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 (130 CMR 520.023(C)).

At issue in this case is MassHealth's determination that the appellant has available assets in excess of the allowable limit under MassHealth regulations. Specifically, MassHealth determined that the appellant retained access to assets that was placed in an irrevocable trust

(prior to the look-back period). The appellant contends that under the terms of the trust she is entitled to trust income only, but that the trustee has no discretion to distribute principal to her (Exhibits 4 and 7).

I find that the trust assets are available to the appellant. Under Article XIV.I, the trustee has authority "to sell or offer to sell for cash or for creditor installments, at public or private sale, to grant options to purchase, and to convey or exchange, any and all of the property at any time forming a part of the trust asset." Also under that provision, the trustee is empowered to determine what part of the trust property is income and what part is principal. Taken together, these provisions authorize the trustee to convert trust assets into a stream of income for the appellant's benefit. The trustee could, for example, purchase an annuity, and construe the annuity payments as income for the benefit of the appellant.<sup>1</sup>

Notwithstanding the language in trust purporting to prevent distribution of principal to the appellant, I find that when read as a whole, there are circumstances under which the trustee could use the trust assets for her benefit. Accordingly, all of the trust assets and income are considered countable to her for MassHealth purposes (130 CMR 520.023(C)).

This appeal is DENIED.

### **Order for MassHealth**

None.

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<sup>1</sup> The appellant also retained substantial control over trust property, including the right to occupy for her lifetime any realty contributed to the trust if used as her primary or secondary personal residence, and to reallocate part or all of the interest of any one or more then current or future beneficiaries (see Doherty v. Office of Medicaid, 74 Mass. App. Ct. 439, 441 (2009)).

## **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.

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Sara E. McGrath  
Hearing Officer  
Board of Hearings

cc:

MassHealth Representative: Nancy Hazlett, Chelsea MassHealth Enrollment Center Appeals Coordinator