

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	APPROVED	<b>Appeal Number:</b>	1314721
<b>Decision Date:</b>	7/1/14	<b>Hearing Date:</b>	11/19/2013
<b>Hearing Officer:</b>	Kenneth Brodzinski	<b>Record Open to:</b>	01/07/2014

**Appellant Representative:**

**MassHealth Representative:**

Karen Ryan and Andrea Pelczar –  
Tewksbury MEC



*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

<b>Appeal Decision:</b>	APPROVED	<b>Issue:</b>	Trust Assets
<b>Decision Date:</b>	7/1/14	<b>Hearing Date:</b>	11/19/2013
<b>MassHealth Rep.:</b>	Karen Ryan	<b>Appellant Rep.:</b>	
<b>Hearing Location:</b>	Tewksbury MEC		

## 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 August 13, 2013, MassHealth denied Appellant's application for MassHealth Long-Term Care Benefits because MassHealth determined that assets held in Trust are countable to Appellant and exceed eligibility limits (Exhibit A). Appellant filed this appeal in a timely manner on September 8, 2013 (see 130 CMR 610.015(B) and Exhibit A). Denial of assistance constitutes valid grounds for appeal (see 130 CMR 610.032). The hearing record remained open until February 11, 2014 to allow the parties to submit additional legal memoranda.

## Action Taken by MassHealth

MassHealth denied Appellant's application for MassHealth Long-Term Care Benefits because MassHealth determined that assets held in Trust are countable to Appellant and exceed eligibility limits.

## Issue

The appeal issue is whether MassHealth properly applied the controlling regulations to accurate facts when it denied Appellant's application for MassHealth Long-Term Care Benefits upon determining that assets held in Trust are countable to Appellant and exceed eligibility limits.

## Summary of Evidence

The MassHealth representative testified that Appellant is a 77-year-old woman who was admitted to a long-term care facility on November 20, 2012. Appellant privately paid the facility \$55,500.00 after her Medicare coverage ended on January 11, 2013.

The MassHealth representative testified that Appellant filed an application for MassHealth Long-term Care Benefits on July 12, 2013. After receiving financial verifications upon written request, MassHealth denied the application upon determining that Appellant had countable assets in excess of the \$2,000.00 asset limit.

The MassHealth representative testified that the application was denied by the subject notice of August 13, 2013 (Exhibit A). This notice was supplanted by a notice of September 3, 2013 which corrects the amount of total excess assets (Exhibit B, Tab D).<sup>1</sup> The MassHealth representative testified that the countable assets are primarily comprised of the principal of a Family Irrevocable Medicaid Qualifying Income Trust (the Trust, Exhibit F) that contains real property located at 21 Walnut Ave., Weymouth, MA valued at \$239,800 in fiscal year 2013. The MassHealth representative testified that the agency's legal department reviewed the Trust and concluded that its principal is countable for MassHealth eligibility purposes (see MassHealth Legal Department's opinion, Exhibit B, Tab H and Exhibit E).

MassHealth's legal opinion sets forth the following facts that were not disputed:

The Trust was established on June 20, 2001. The Settlers of the Trust are Appellant and her husband. On June 20, 2001, Appellant and her husband executed a deed transferring, for no consideration, their individually owned real estate located at 21 Walnut Avenue, Weymouth, Massachusetts to the Trust. No life estate was reserved under this deed transferring the home to the Trust. By the date of Appellant's application to MassHealth, Appellant's husband was already deceased. The Trustee is Appellant's son. Paragraph A of Article Three of the Trust states that Appellant and her husband are entitled to distributions of the net income. Paragraph B provides that the Trustee may not distribute principal to Appellant. Paragraph C states: *"The Settlor(s) are entitled to income only. The exercise of a principal distribution to the Settlers under this Article which would result in Trust assets being used in substitution of public entitlement benefits, including medicaid (sic) benefits, is a breach of fiduciary duties imposed on the Trustee under this indenture."* Article Three Paragraph E provides that the Trustee may sell, convey, transfer, alienate, and mortgage the real estate held in the Trust, and may engage in any transaction necessary to comply with Section 121 of the Internal Revenue Code and Section 1902 of the Social Security Act " . . . . relative to the countability of trust

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<sup>1</sup> The parties' submissions have been marked as lettered exhibits. Where an exhibit has attached documentation which the submitting party has identified as "exhibits", the hearing officer has re-designated these attachments as "Tabs". Accordingly, MassHealth's submission (marked by the hearing officer as Exhibit B) contains "exhibit A" which herein will be referred to as "Exhibit B, Tab A".

*principal for purposes of determining eligibility for public medical assistance, including medicaid (sic) benefits.*" Article Four addresses assets other than Appellant's real estate. Paragraph C of Article Four again states that the Trustee is prohibited from paying principal to or on behalf of Appellant should Appellant become a resident of a nursing home, hospital or other long-term care facility. Article D states: *"The Settlor(s) are entitled to income only. The exercise of a principal distribution to the Settlor( s) under this Article to (sic) which would result in assets being used in substitution of public entitlement benefits, including medicaid (sic) benefits, is a breach of fiduciary duties ... "* Article Five governs the administration after the death of Appellant and her husband. Under Paragraph A of Article Five, the Trustee may use Trust assets to satisfy the debts of Appellant's probate estate and estate taxes. Pursuant to Article Five, Paragraph B Appellant reserved a power of appointment exercisable under her Will. Paragraph C states that after Paragraph A has been satisfied and assuming Appellant does not exercise the power of appointment under Paragraph B, the Trust shall terminate and its assets distributed to the remainder beneficiaries identified as Appellant's children.

The Trustee is given power under Article Six to deal with the Trust assets including, but not limited to, the power to: (A) invest and reinvest trust property without notice to any beneficiary; (C) invest and re-invest property whether real, personal or mixed and mortgage, convey or otherwise transfer any property including selling the Weymouth real estate; (E) make allocations between income and principal; and (G) mortgage, pledge, lease, or convey real estate. Article Twelve states that the Trust is a grantor trust pursuant to Section 671-678 of the Internal Revenue Code and that the property held in the Trust shall be included for estate tax purposes in Appellant's estate in order to receive a step-up in basis.

MassHealth also noted that during the application process, Appellant submitted evidence related to Eastern Bank checking account # ... 4031 showing that it receives the direct deposit of Appellant's Social Security and pension income. The account activity statement for the period of June 4, 2013 through August 30, 2013 shows electronic debts from Appellant's account to pay expenses related to the real estate titled in the Trust, including but not limited to, the Town of Weymouth, Comcast, National Grid, and the Hingham Group.

MassHealth also received a letter dated September 5, 2013 from Appellant's attorney, who drafted the Trust. In his letter, the attorney states that Trust was drafted to protect the real estate if either Appellant or her husband required nursing home care, to avoid probate, and retain tax benefits. The attorney states the real estate was transferred to the Trust *"in order to start the 5 year disqualifying period clock ticking"* and that the use of *"Medicaid Qualifying"* in the title of the Trust should not have been included (Exhibit C).

MassHealth's legal argument is set forth in a written memorandum (Exhibit B, Tab H). It was presented by the MassHealth representative at the time of hearing, but was not presented to Appellant prior to hearing, hence, it was not discussed in any meaningful

detail at the time of hearing.

Appellant was represented by Counsel who appeared with Appellant's son who serves as Trustee of the Trust. Counsel testified that he drafted the Trust. Counsel testified that it was the express intention of Appellant and her husband to have access to only Trust income, but not Trust principal, and that is the way Counsel believes he has drafted the Trust. Appellant's son reiterated this intention and testified that since the creation of the Trust, the Settlers have only received income and have never received any distribution of Trust principal. The son also testified that in his capacity of Trustee, it has always been his understanding that he could, under no circumstances, distribute Trust income to the Settlers. Appellant filed Affidavits prepared by Counsel and Appellant's son (Exhibit G).

Upon questioning by the hearing officer, the MassHealth representative testified that there is no evidence that Trust principal has ever been distributed to Appellant or her now-deceased husband.

The record was held open to allow Appellant time to review and issue a written response to MassHealth's Legal opinion. MassHealth was given time thereafter to file a brief written response. Both parties made timely written submissions (*Post Hearing Memorandum of Appellant*, Exhibit D and MassHealth's post-hearing response, Exhibit E).

The memorandums are self-revelatory and do not need to be summarized here. The salient arguments will be discussed in the "Analysis and Conclusions of Law" section of this decision, below.

## **Facts**

By a preponderance of the evidence, I find the following:

1. Appellant is a 77-year-old woman who was admitted to a long-term care facility on November 20, 2012.
2. Appellant privately paid the facility \$55,500.00 after her Medicare coverage ended on January 11, 2013.
3. Appellant filed an application for MassHealth Long-term Care Benefits on July 12, 2013.
4. After receiving financial verifications upon written request, MassHealth denied the application upon determining that Appellant had countable assets in excess of the \$2,000.00 asset limit.

5. The application was denied by the subject notice of August 13, 2013 (Exhibit A).
6. This notice of August 13, 2013 was supplanted by a notice of September 3, 2013 which corrects the amount of total excess assets (Exhibit B, Tab E).
7. For purposes of Appellant's MassHealth eligibility, MassHealth counted the principal of the Trust that contains real property located at 21 Walnut Ave., Weymouth, MA valued at \$239,800 in fiscal year 2013.
8. MassHealth's legal department reviewed the Trust and concluded that its principal is countable for MassHealth eligibility purposes.
9. The Trust was established on June 20, 2001.
10. The Settlers of the Trust are Appellant and her husband.
11. On June 20, 2001, Appellant and her husband executed a deed transferring, for no consideration, their individually owned real estate located at 21 Walnut Avenue, Weymouth, Massachusetts to the Trust.
12. No life estate was reserved under this deed transferring the property to the Trust.
13. By the date of Appellant's application to MassHealth, Appellant's husband was already deceased.
14. The Trustee is Appellant's son.
15. Article Three, Paragraph A of the Trust states that Appellant and her husband are entitled to distributions of the net income.
16. Article Three, Paragraph B provides that the Trustee "***shall be absolutely prohibited from paying any of the principal (from the 21 Walnut Avenue property or the proceeds generated from any subsequent sale thereof) to the Settlers;***" or to expend on their behalf any of the principal (for any purpose); and the Trustee shall be specifically prohibited from expanding on either Settlers behalf any of the principal should he or she become a "medically needy individual" (defined as becoming a permanent resident of a nursing home, hospital or other long-term care facility). (emphasis in the original).
17. Article Three, Paragraph C states: "*The Settlor(s) are entitled to income only. The exercise of a principal distribution to the Settlers under this Article which would result in Trust assets being used in substitution of public entitlement benefits, including medicaid (sic) benefits, is a breach of fiduciary duties imposed on the Trustee under this*

*indenture.*"

18. Article Three, Paragraph E provides that the Trustee may sell, convey, transfer, alienate, and mortgage the real estate held in the Trust, and may engage in any transaction necessary to comply with Section 121 of the Internal Revenue Code and Section 1902 of the Social Security Act ". . . . *relative to the countability of trust principal for purposes of determining eligibility for public medical assistance, including medicaid (sic) benefits.*"
19. Article Four addresses assets other than Appellant's real estate.
20. Article Four, Paragraph C states: "***The Trustee shall be absolutely prohibited from paying any principal from any such transfer of other assets into this trust to the Settlers; or to expand on their behalf (for any purpose); and the trustee shall be specifically prohibited from expanding on the Settlers' behalf any of the principal should either of the Settlers become a medically needy individual (defined as becoming a permanent resident of a nursing home, hospital, or other long term care facility)***". (Emphasis in the original).
21. Article Four, Paragraph D states: "*The Settlor(s) are entitled to income only. The exercise of a principal distribution to the Settlor( s) under this Article to (sic) which would result in assets being used in substitution of public entitlement benefits, including medicaid (sic) benefits, is a breach of fiduciary duties ... "*
22. Article Five governs the administration after the death of Appellant and her husband.
23. Article Five, Paragraph A provides that the Trustee may use Trust assets to satisfy the debts of Appellant's probate estate and estate taxes.
24. Article Five, Paragraph B reserves for Appellant a power of appointment exercisable under her Will and states: "*This power shall be exercisable by the Settlor alone and in all events, but shall not be exercisable in favor of the Settlor, the creditors of the settler, the Settlor's estate or the creditors of the Settlor's estate.*"
25. Article Five, Paragraph C states that after Article Five, Paragraph A has been satisfied and assuming Appellant does not exercise the power of appointment under Paragraph B, the Trust shall terminate and its assets distributed to the remainder beneficiaries identified as Appellant's children.
26. Article Six empowers the Trustee to deal with the Trust assets including, but not limited to, the power to: (A) invest and reinvest trust property without notice to any beneficiary; (C) invest and re-invest property whether real, personal or mixed and mortgage, convey or otherwise transfer any property including selling the

Weymouth real estate; (E) make allocations between income and principal; and (G) mortgage, pledge, lease, or convey real estate.

27. Article Twelve states that the Trust is a grantor trust pursuant to Section 671-678 of the Internal Revenue Code and that the property held in the Trust shall be included for estate tax purposes in Appellant's estate in order to receive a step-up in basis.

28. Eastern Bank checking account # . . . . 4031 receives the direct deposit of Appellant's Social Security and pension income.

29. The account activity statement for Eastern Bank checking account # . . . . 4031 for the period of June 4, 2013 through August 30, 2013 shows electronic debts from Appellant's account to pay expenses related to the real estate held in the Trust, including but not limited to, the Town of Weymouth, Comcast, National Grid, and the Hingham Group.

## **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).*

MassHealth 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).*

After carefully reviewing the Trust terms and considering the arguments put forth by the parties in their memoranda, I find that MassHealth erred in concluding that the Trust principal is available to Appellant and countable to her for MassHealth eligibility purposes.

The subject Trust was established and funded after 1993. There is no dispute that the income from the Trust is available and countable to Appellant.

As clearly stated in Article Two, the Trust is irrevocable. Nevertheless MassHealth notes that under Article 3, Paragraph B of the Trust the Trustee is given the authority to engage in any transaction in order to comply with section 121 of the Internal Revenue Code, as amended. MassHealth concludes that this authority "could" render the trust revocable and therefore countable (Exhibit B, Tab H page 5). MassHealth makes no

effort, however, to explain how this could be. In the absence of such an explanation and given the clear language of Trust Article Two, I find no basis to conclude that the Trust is the revocable.

MassHealth argues that pursuant to the "any circumstances" test articulated in regulation 130 CMR 520.023 (C) there are several circumstances under the terms of the Trust by which Appellant would have access to Trust principal. Despite the clear Trust language absolutely prohibiting the Trustee from distributing principal to the Settlor (Article Three, paragraph B and Article Four, Paragraph C) MassHealth argues that this prohibiting language should be ignored because "*when there are provisions in a trust that attempt to limit the Trustee's discretion to make payments to, or on behalf of, an applicant, these are disregarded because they are meant to "defeat Medicaid ineligibility standards"*" (Exhibit B, Tab H, page 6 quoting *Cohen v Commissioner of the Division of Medical Assistance*, 423 Mass. 399, 416 (1996)). Applying this element of *Cohen* to the matter at hand misses the mark in that it would improperly disregard any and all Trust language that prohibits the distribution of principal to a Settlor who happens to become a Medicaid applicant. As we know from *Doherty v. Director of the Office of Medicaid*, language in an irrevocable trust can prohibit distribution of principal to a Settlor without jeopardizing Medicaid eligibility ("*... 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*" (74 Mass. App. Ct 439, 442 (2009))).

Language is not disregarded as defeating Medicaid ineligibility because it renders principal unavailable to an applicant (as MassHealth appears to argue). Language is disregarded when it would limit or prohibit a Trustee's existing discretion to make principal payments to a Settlor when exercising that discretion would result in a loss of public assistance to the Settlor (*Cohen*, at 416).

In the case at hand, the Trustee does not have, and never had, discretion to distribute principal to Appellant/Settlor. Article Three B and Article Four C absolutely prohibit distributions of principal to Appellant/Settlor. While both of these sections do contain additional language emphasizing that no expenditures of principal are to be made on the Settlor's behalf should she ever become institutionalized, such language does not limit or prohibit the Trustee's discretion to do otherwise because the Trustee never had such discretion. The same pertains to the language in Article Three C and Article Four D which both emphasize that it would constitute a breach of fiduciary duty by the Trustee if he were to use Trust assets in substitution of public entitlements. Again, both of these sections clearly state that the Settlor is entitled to income only. When the language meant to defeat Medicaid ineligibility is removed from all four of these sections, what remains is language that clearly prohibits distributions of Trust principal to the Settlor and limits her to distributions of income only. By the clear terms of the Trust, the prohibition on distributing anything other than income to Appellant/Settlor is in effect whether or not there is a need for public assistance, as opposed to being in effect only when there is a need for public assistance.

MassHealth argues that the Trust document must be looked at as a whole and a clause must not be read in isolation (*Doherty*, 74 Mass. App. Ct 439, 442 (2009), a “*clause may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole.*”). Here we have four sections that make clear that the Trustee does not have and never had the power to distribute anything other than income to the Settlers regardless of superfluous language concerning public assistance.

MassHealth’s argument that the trustee’s ability to invest the principal into an annuity is not persuasive insofar as it fails to recognize the fact that annuity payments are comprised of interest and principal. So, while the Trustee could purchase an annuity, pursuant the Trust terms, he could only pay over to Appellant that portion of the annuity payment that was comprised of interest.

It is undeniable that Appellant placed the property in Trust to gain certain tax advantages and to avoid having it count for MassHealth eligibility purposes, should she ever need institutionalized care. She did this beyond the look-back period meaning there is no transfer issue (130 CMR 520.019).<sup>2</sup> In the absence of language in the Trust that would, or could under any set of circumstances, allow the Trustee to distribute principal to Appellant, the principal is simply not reachable pursuant to the trust terms; therefore, it is not countable.

For the foregoing reasons, the appeal is APPROVED.

## **Order for MassHealth**

Rescind excess asset denial and re-determine eligibility.

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<sup>2</sup> In footnote 7 of MassHealth’s memorandum (Exhibit B, Tab H), the agency set forth the following argument: *If the principal were not countable then the applicant paying, during the look-back period, to maintain the real estate and for expenses related thereto which she does not own and purportedly does not have access to may be treated as disqualifying transfers of resources. 130 CMR 520.019; see also POMS SI 01150.007(A)(2) (which specifically provides that a transferor (applicant or spouse) does not get fair market value in return when he or she gives away cash or uses cash to purchase something for another).* I disagree. Pursuant to Article Three A, Appellant had the ability to use the property as the principal place of residence during her life with the concomitant obligation to bear the cost of maintaining it. In exchange for payment of such costs, Appellant received a place to live, ergo there is no problem with fair market value if costs were usual and customary in nature and amounts; hence, there is no disqualifying transfer issue arising from such payments.

## Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If the Enrollment Center gives you any problems with implementing this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

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Kenneth Brodzinski  
Hearing Officer  
Board of Hearings

cc:

MassHealth Representative: Sylvia Tiar