

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1401798
Decision Date:	5/15/14	Hearing Dates:	April 04, 2014
Hearing Officer:	B. Padgett	Record Open:	April 25, 2014

Appellant Representative:

MassHealth Representative:

E. Daniel



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, 6th floor
Quincy, MA 02171*

APPEAL DECISION

Appeal Decision:	Approved	Issue:	130 CMR 520.023
Decision Date:	5/15/14	Hearing Dates:	April 04, 2014
MassHealth Rep.:	E. Daniel	Appellant Rep.:	
Hearing Location:	Springfield		

Authority

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

Jurisdiction

The appellant received a notice dated January 27, 2014 stating: "The Division has denied your application for MassHealth Standard benefits... This is because your countable assets are over the program limit. The limit is \$119,240.00 for you and your spouse. 130 CMR 520.003, 520.016(B)." (Exhibit 1).¹

The appellant filed this appeal timely on May 10, 2013. (130 CMR 610.015(B); Exhibit 2).

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

Action Taken by MassHealth

The appellant's long term care application was denied.

Issue

Is the appellant over the asset limit for long term care eligibility?

¹ The appellant also appealed a notice dated January 06, 2014 denying benefits due to incomplete verifications, however that issue was resolved prior to the hearing.

Summary of Evidence

MassHealth testified the 90 year old appellant entered a nursing facility on September 18, 2013 and applied for long term care benefits on November 18, 2013 requesting coverage beginning October 23, 2013. A request for verification was made on November 21, 2013. On January 27, 2014 the appellant's application was denied for being over the \$2,000.00 asset limit for MassHealth long term care benefits. MassHealth maintains the appellant has countable assets contained in a trust consisting of a multi family residence valued at \$155,638.00. MassHealth submitted the following into evidence: application, VC-1, Trust document (Exhibit 4) and legal memorandum (Exhibit 5).

The appellant's representative argued the assets consist of a multifamily home in which the community spouse currently resides and which have been placed in an irrevocable trust. The home generates income; however the appellant has no access to any of the Trust assets. The appellant's representative submitted a memorandum in support (Exhibit 6) and argued that she is unaware of the legal reasoning behind the MassHealth memorandum and requested time to review and respond.

At the appellant's request the record remained open until April 25, 2014 to submit a Memorandum in Support responding to the submission by the MassHealth legal division (Exhibit 7).

The MassHealth legal memorandum dated April 04, 2014 argued the income and principal of the Boudreau Realty Trust (Realty Trust) and the Irrevocable Trust are countable under 130 CMR 520.203(C). The memorandum states that on November 13, 2006 the appellant and her husband transferred to themselves, for no consideration, real estate located in Southbridge, Massachusetts, as Trustees of the Realty Trust. The Realty Trust indicates the trustees are to hold the trust property for the benefit of the beneficiaries. The trustees are to make a distribution of income and principal as the beneficiaries direct. The Realty Trust also indicates the beneficiaries may terminate the Realty Trust at any time and the property shall be conveyed to the beneficiaries. The Schedule of Beneficial Interest dated November 13, 2006 states 100% of the beneficial interest in the Realty Trust is held by the "Boudreau Family Irrevocable Trust" (the Irrevocable Trust) which was also established on November 13, 2006 by the appellant and her husband. On November 07, 2013 the appellant resigned as Trustee of the Irrevocable Trust assigning all her interest to her spouse. MassHealth concludes that prior to this transfer, which occurred within the look back period, the appellant and her spouse had the authority to transfer trust assets or terminate the Realty Trust therefore this assignment is a disqualifying transfer.

The MassHealth memorandum argues applicants for MassHealth have the burden to prove their eligibility including total countable assets are below \$2,000.00. 130 CMR 520.007 states countable assets include assets to which the applicant would be entitled whether or not these assets are actually received when the failure to receive such assets results from the action or inaction of the applicant or person acting on his or her behalf. Medicaid is a statutory program governed by regulations and is not a program in equity and cannot be trumped by common law, state law or equitable principals and is designed to provide health care for the poor, and that individuals are expected to deplete their own resources before obtaining assistance from the government. This

sentiment is echoed by the Supreme Judicial Court in *Cohen v. Comm'r of the Div. of Med. Assistance*, 423 Mass. 299, 403 (1996). The SJC stated when evaluating a trusts under Medicaid eligibility determination, the common law of trusts and general trust laws principals cannot be used to circumvent the Medicaid statute "for the purpose of having your cake and eating it too." "The purpose of the statute is to prevent individuals from using trust law to ensure their eligibility for Medicaid coverage, while preserving their assets for themselves or their heirs." *Lebow v. Comm'r of the Div. of Med. Assistance*, 433 Mass. 171, 172 (2001). "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 trust assets to the grantor, those assets count in calculating the grantor's Medicaid eligibility." *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009).

MassHealth asserts all assets in the Realty Trust and the Irrevocable Trust are countable in determining the Appellant's eligibility as they are self-settled inter vivos trusts. In accordance with 42 U.S.C. §1396p(d)(2)(B) the portion of the Trust attributed to the assets of the applicant and/or their spouse shall be considered available. Since the Appellant established and funded both Trusts then all the assets in the Trusts are considered available. The federal Medicaid statute provides that the countability of a self-settle inter vivos trust is made without regard to whether the Trustee can exercise discretion under the trust or whether distributions may be made from the trust. MassHealth asserts federal Medicaid law effectively "creates a presumption that trusts containing the assets of an applicant and/or spouse are countable for eligibility determination." 42 U.S.C. §1396p *et seq.* The federal Medicaid statute dictates that in the case of an irrevocable trust "if there is *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." (42 U.S.C. §1396p(d)(3)(B)(i)).

MassHealth maintains the circumstances under which the value of the Irrevocable Trust can be made available to the Appellant (Paragraph 4.4 gives the Trustees broad powers and authority to deal with Trust assets, including the to (d) invest principal and income; (e) sell, exchange or otherwise dispose of or encumber property; (i) determine what part of Trust property is income or principal; and (k) borrow or lend. Paragraph 5.2 allows any beneficiary to disclaim his or her interest in the Trust. Paragraph 6 the Trustee has the authority to pay the appellant's estate or taxing authority). These are the "any circumstance" or "peppercorn of discretion" which allow the Trustee to use the principal could be used for the benefit of the Appellant and pursuant to the Medicaid statute the trust principal is therefore countable. As a result the Boudreau Realty Trust and the Boudreau Family Irrevocable Trust are fully countable in MassHealth eligibility determination 130 CMR 520.023, 42 U.S.C. §1396p(d).

MassHealth concludes the appellant cannot credibly claim the real estate held in the Trust is available for her to: (1) reside in it; (2) use countable assets to pay expenses and maintenance for its upkeep; (3) claim payment of real estate taxes as deductions; (4) obtain a more favorable tax basis, but then state it is not available because she seeks taxpayer funded nursing facility care. The claim that she is only entitled to Trust income, which the Trust has never produced, while

simultaneously claiming she is not entitled an access principal when she was and her spouse were living in the Trust principal since it was transferred in 2006, demonstrates the incongruity of finding the Trust principal unavailable. Such an arrangement is an example of "having your cake and eating it to" *Cohen v. Comm'r of the Div of Med Assistance*, 423 Mass. 399, 403 (1996). MassHealth concludes that if the Trust is found to be not countable the matter should be remanded to assess and evaluate regarding a disqualification of resources (*See Exhibit 5*).

The appellant's memorandum argues that the property is not countable in determining eligibility for the following reasons: (i) The real estate is held in Trust and the appellant has no access to the principal in the Trust; and there are no circumstances under which the real property could be distributed to the appellant or community spouse; (ii) The community spouse derives rental income from the Trust property; (iii) The real estate is business property essential to the community spouse for self-support because of the rental income it generates, (iv) The community spouse is entitled to retain the "excess" assets as part of an increased community spouse resource allowance; (v) The denial notice does not cite the specific grounds upon which the denial is based and therefore is defective on its face; (vi) The appellant claims hardship, since she has and had no control over the asset once she conveyed her income interest from the Trust to her husband. The representative concludes to deny long term care benefits, places the appellant at grave risk as set forth in 130 CMR 520.19 (L) (*See Exhibit 6*).

The appellant submitted an additional memorandum within the required time limits arguing that MassHealth is singling out Trust provisions and taking them out of context to fabricate a "circumstance" that would make the Trust assets countable. MassHealth states that Medicaid law requires only one circumstance to find the principal countable, and refers to paragraphs pertaining to a beneficiary's power of appointment. These provisions do not expand in any way the income interest of the beneficiary which now belongs to the community spouse, but simply allows a beneficiary to appoint the interest he may have. In fact, the income interest terminates at death so the power of appointment cannot, in any way, expand the beneficiary's right to access principal. The appellant and her spouse retained the income interest only and divested the right to principal when the Trust was created in 2006. The general Trust provisions regarding power of appointment are a nullity and hence no basis for asserting the "any circumstance" required to render the Trust assets countable. MassHealth refers to paragraph 4.4 as the "circumstance" which renders the Trust assets countable. Paragraph 4.4 refers to the "General" powers and authority of the Trustee. Again, MassHealth has selectively ignored the actual language of the Trust. The actual wording of the Trust provision includes the words "except as otherwise provided herein". "Except as otherwise provided herein" means that if the substantive Trust provisions limit the beneficiary's interest to income only, then, the Trust has already "otherwise provided herein" that the applicant or her spouse have no interest in the principal of the Trust. If a Trust provision is limited in scope, it cannot be used to expand the authority of the Trustee beyond its own limits. The regulations recognize that there are situations where irrevocable Trusts may not be countable. See 130 CMR 520.023(C)(2). (*Exhibit 8*).

Findings of Fact

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

1. The appellant entered the nursing facility on September 18, 2013 and applied for long term care benefits on November 18, 2013 requesting coverage beginning October 23, 2013.
2. On January 27, 2014 the appellant's application was denied for being over the \$2,000.00 asset limit for MassHealth long term care benefits as MassHealth maintains the appellant has access to countable trust assets in the amount of \$155,638.00.
3. On November 13, 2006 the appellant and her husband created a Realty Trust transferring real estate located in Southbridge, Massachusetts, to the realty trust.
4. The Realty Trust states "The trust may be terminated at any time by the Beneficiaries... In case of any such termination, the Trustees shall transfer and convey the entire Trust property to the Beneficiaries in proportion to their respective interests."
5. On November 13, 2006 the appellant and her husband created an Irrevocable Trust.
6. The Schedule of Beneficial Interest of the Realty Trust states 100% of the beneficial interest in the realty trust is held by the Irrevocable Trust.
7. On November 07, 2013 the appellant resigned as Trustee of the Irrevocable Trust assigning all her interest to her spouse.

Analysis and Conclusions of Law

The appellant is a 90 years old resident of a nursing facility who applied for MassHealth benefits on December 03, 2012. On November 13, 2006, the appellant and her husband established a Realty Trust and an Irrevocable Trust; therefore, regulations at 130 CMR 520.023 (Trusts or Similar Legal Devices Created on or after August 11, 1993) are controlling.

MassHealth maintains the property contained in the Realty Trust is countable when determine eligibility for the appellant's nursing home stay and as a result the appellant is over the asset limit for MassHealth long term care benefits. MassHealth's argument focuses on the language contained in sections 1.2., 2, 3.1., 4.4., 5.3., and 6.5., of the Irrevocable Trust² maintaining those provisions

² 1. **The Trust Fund** 1.2. The Trust created by this agreement shall be irrevocable. I may not revoke or amend this agreement in any way. My trustee, however, may at any time, or from time to time, amend any administrative provisions of this trust by any instrument in writing signed and acknowledged by my trustee. For purposes of the foregoing, the term "administrative provision" refers to any provision of the trust dealing with the management and administration of the trust, and in no event shall any such amendment affect, enlarge, or shift any beneficial interests created hereunder. 2 **Payment of Income and Principal** If any property is place in trust during my life, my trustees

allow access to the principal of the Irrevocable Trust under 130 CMR 520.023(C)(1)(d)³, however I do not agree.

MassHealth has the obligation to scrutinize trust documents as the long term care program is designed to assist in providing health care for the poor and as a result those individuals are expected to deplete their own resources before obtaining assistance from the government. However while there are individuals and trusts which go to great lengths to appear to transfer funds out of their control while administering the trust in a manner that they maintain authority over the funds, there are also legitimate trusts that have been drafted to provide for a family member in life as well as preserving and protecting assets for beneficiaries upon the family member's death that are not an attempt of the applicant/beneficiaries to "have their cake and eat it to."

The appellant was a trustee of the Realty Trust and the Irrevocable Trust and was limited to and bound by the fiduciary obligations set forth in each trust document. The Realty Trust holds title to the real estate for the benefit of the beneficiaries, who as listed on The Schedule of Beneficial Interest as the Irrevocable Trust. There is no provision which allows the appellant to revoke the Realty Trust as only the beneficiary of the Realty Trust, which is the Irrevocable Trust, can terminate the Realty Trust.

As for the Irrevocable Trust, Paragraph two of the trust indicates the appellant is an income beneficiary only and shall have no right to the principal of the trust. While MassHealth alleges access to the trust principle through a number of provisions within the Irrevocable Trust (See sections 3.1., 4.4., 5.3., and 6.5), these conditions do not allow the appellant to circumvent the

may pay me or may pay on my behalf as much of the income of the trust as it shall determine its sole and nonreviewable discretion to be necessary for my care and well-being. Any income not so paid may be accumulated and added to the principal. The principal may be distributed to or for the benefit of my daughter ... at any time and from time to time as the trustees may in their sole discretion determine. Any principal not distributed shall be held until the termination of the trust. **3 Distribution of Trust Assets** 3.1. Disposition upon my death (a) Pay the undistributed income to or for the benefit of any one or more of my spouse, my children, their spouses and issue, or to my siblings or their spouses and issue, as I shall appoint by will; and (b) Pay the remaining principal and undistributed income to my daughter **4. The Trustee** 4.4. General powers of trustee In addition to all common law and statutory authority, my trustee, except as otherwise provided, shall have the power without approval of any court and in any manner it considers advisable: (d) to invest income and principal without subject to the legal limitations on investment by fiduciaries; (e) to sell, mortgage, exchange, lease, or otherwise dispose of or encumber any property on any terms, no purchaser being bound to see to the application of any proceeds and whether or not the effect thereof extends beyond the terms of this trust; (i) determine what part of the trust property is income and what part is principal; (k) to borrow or lend any amount; ... **5. Beneficiaries' Interests and Powers** 5.3. Payment for beneficiaries (a) income payable to a person and income or principal that in the discretion of my trustee may be paid to a person may be used by my trustee for the person's benefit whether or to that person is legally competent or under conservatorship or guardianship. **6. Taxes and Other Payments** 6.5. Right of substitution I retain the right to reacquire the principal of this trust by substituting property of an equivalent value therefore.

³ (C) Irrevocable Trusts. (1) Portion Payable. (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).

purpose of the Irrevocable Trust. The provisions highlighted by MassHealth contain the usual language which details the fiduciary obligation of a trustee and grants customary authority to the administration of a trust, and do not constitute the “peppercorn” which MassHealth is claiming. Further these provisions do not eliminate language which definitively denies the appellant access to principal and affirmatively state the Trust is irrevocable as MassHealth suggest. Lastly, because the appellant is not a beneficiary of the Irrevocable Trust, she has no authority to compel the Trustees of the Irrevocable Trust to take any such actions. As a result I find nothing in either the Realty Trust or the Irrevocable Trust documents which allows either Trust to be revoked or allow trust principal to be distributed to the appellant and this appeal is approved.

Regarding Appellant’s counsel argument that on November 07, 2013 the appellant transferred her income interest in the Irrevocable Trust to her community spouse under 130 CMR 520.016(b)(3)⁴ and MassHealth’s request that if the Trust is found not to be countable the matter should be remanded to evaluate potential disqualification; the transfer of the appellant’s trust income interest to her spouse has no effect on the countability of the asset which is the subject of this appeal. Further although any transfer of a resource within the look back period potentially effects eligibility, this issue may be moot as all income including spousal income must be considered when determining the countable income of the household under 130 CMR 520.023(C)(1)(b)⁵ and 130 CMR 520.009.⁶ In addition there is no need to remand the issue to MassHealth as they will be required to redetermine the appellant’s long term care eligibility after disregarding assets contained in the Realty Trust and can make a determination as whether it will take any additional action with regard to the appellant’s income and or eligibility they deem appropriate at that time.

Order for the MassHealth

Redetermine long term care eligibility as of date of application after disregarding assets contained in The Boudreau Realty Trust.

⁴ 130 CMR 520.016(b)(3) concerns Post-Eligibility Transfer of Assets⁴ and not income and is therefore not applicable. 130 CMR 520.016(b)(3) Post-Eligibility Transfer of Assets. (a) To meet the needs of the community spouse and to allow the continuing eligibility of the institutionalized spouse, the MassHealth agency allows the institutionalized spouse, after he or she has been determined eligible for MassHealth Standard, to transfer assets to or for the sole benefit of the community spouse in accordance with 130 CMR 520.016(B)(1) and (2).

⁵Trusts or Similar Legal Devices Created on or after August 11, 1993 (C) Irrevocable Trusts. (1) Portion Payable. (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.

⁶ Countable-Income Amount (A) Overview. (1) An individual’s and the spouse's gross earned and unearned income less certain business expenses and standard income deductions is referred to as the countable-income amount. In determining gross monthly income....

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 you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, Division of Medical Assistance, at the address on the first page of this decision.

Brook Padgett
Hearing Officer
Board of Hearings

cc: Springfield MEC