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Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	DISMISSED in part; DENIED in part; REMAND	Appeal Number:	1019523
Decision Date:	SEP 21 2011	Hearing Date:	01/13/2011
Hearing Officer:	Jeanne Travers Jabour	Record Open to:	03/25/2011

Appellant Representative:
John J. McNicholas, Jr., Esquire

MassHealth Representative:
Linda Pimentel, Taunton MassHealth
Enrollment Center (MEC)



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings*

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APPEAL DECISION

Appeal Decision:	DISMISSED in part; DENIED in part; REMAND	Issue:	130 CMR 520.022
Decision Date:	SEP 21 2011	Hearing Date:	01/13/2011
MassHealth Rep.:	Linda Pimentel, Taunton MEC	Appellant Rep.:	John J. McNicholas, Jr., Esquire
Hearing Location:	Taunton MassHealth Enrollment Center		

Authority

The Board of Hearings (BoH) conducted the Fair Hearing pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

On 09/08/2010, MassHealth denied the Appellant's application for MassHealth long term care (LTC) skilled nursing facility benefits because MassHealth determined that a \$230,000.00 disqualifying transfer occurred when the Appellant resigned as trustee of the Lakeview Drive Realty Trust (trust) on 12/06/2006, resulting in an 839 day ineligibility period (130 CMR 520.018 and 130 CMR 520.019 and Exhibit 1). The Appellant filed this appeal timely on 10/07/2010 (130 CMR 610.015(B) and Exhibit 2). Denial of assistance is a valid basis for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth intends to count the trust assets in determining the Appellant's eligibility for MassHealth LTC coverage of her skilled nursing facility stay.

Issue

Was MassHealth correct in determining that the [REDACTED] Realty Trust is a Medicaid qualifying trust (MQT), and as such, its assets (the trust res) are countable against the Appellant in

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determining her MassHealth eligibility?

Summary of Evidence

The Appellant was receiving MassHealth benefits as a person over 65 in the community prior to her admission to the skilled nursing facility (Testimony and Exhibit 7, pp. 3-7, Exhibits 13 and 17). While MassHealth was in the process of converting the Appellant from a community case to an institutionalized, long term care case, MassHealth issued a termination notice to the Appellant on 07/16/2010 for her failure to provide information needed to determine LTC eligibility. A timely appeal of the termination notice was filed to protect the LTC start date requested in the application of 02/23/2010, after the Appellant's short-term care coverage expired (Testimony and Exhibit 17, pp. 1-7). That appeal was withdrawn by the Appellant's counsel following MassHealth's issuance of a denial letter for the \$230,000.00 disqualifying resource transfer of 09/08/2010, because MassHealth acknowledged receipt of all information needed to determine LTC eligibility (Testimony and Exhibit 17, pp. 1 and 7).

Part of the information submitted to MassHealth included a copy of the trust instrument, deed conveying the Appellant's former home to herself as trustee of the trust created 02/20/1992 (in which the Appellant reserves a life estate interest, individually), Schedule of Beneficiaries of the trust, and a detailed 4 page letter from the Appellant's physician, Walter T. Rymzo, Jr., MD, establishing the Appellant's incapacity in 07/2004 (Exhibit 7, pp. 14-17, 23, Exhibit 9, and Exhibit 14, pp. §A, §B, and §C).

At hearing, the Taunton MassHealth Enrollment Center (MEC) representative asserted that the act constituting the disqualifying transfer was the Appellant's resignation as trustee of the [REDACTED] Realty Trust (trust) on 12/06/2006, because she had the power to alter, amend, or terminate the trust (Testimony). MassHealth testified that the transfer resulted in an 839 day penalty period (130 CMR 520.018 and 130 CMR 520.019 and Exhibit 1), calculated by counting the full value of the trust property (the Appellant's former residence) and dividing that by the average daily cost of private nursing facility care (\$274.00/daily). The MEC representative was unable to articulate how the Appellant's resignation as trustee constituted the disqualifying transfer in light of the deed conveying the former residence to the trust on 02/20/1992 (beyond the 55 month regulatory look-back period) (130 CMR 520.018 and 130 CMR 520.019) (Testimony and Exhibit 7, pp. 13, 20-21).

Since the MassHealth Legal unit had not been consulted prior to the issuance of the 09/08/2010 notice, and in accordance with 130 CMR 610.065(B)(11), the hearing officer directed the MEC to submit the matter for consideration to the MassHealth Legal unit to brief its arguments as to when the disqualifying transfer, if any, occurred, the begin date of any applicable penalty period and the regulatory authority permitting MassHealth to make such a determination. A Record Open was established for this purpose at hearing (Exhibit 10).

In response to the Record Open, Assistant General Counsel Katy Schelong, Esquire, from the MassHealth Legal unit, determined that the Appellant's 2006 resignation as trustee did not constitute a disqualifying transfer of resources, and that MassHealth erred in assessing the 839-day

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penalty. Attorney Schelong reasoned that because the \$230,000.00 transfer occurred in 1992, it was outside of the regulatory look-back period which permitted MassHealth to assess a penalty for transfers for less than fair market value (130 CMR 520.019). Attorney Schelong determined that the 09/08/2010 notice should be rescinded, and replaced by a finding that no disqualifying transfer occurred (Exhibit 14, pp. 2-4, Exhibit 15, and Exhibit 16, pp. 1-2).

Counsel representing the Appellant reported that rescinding the denial notice would resolve that portion of the Appellant's appeal satisfactorily.

Therefore, MassHealth having agreed to voluntarily rescind the 09/08/2010 denial notice, and redact the penalty imposed having determined no basis existed for the action taken by MassHealth in its issuance, and the Appellant finding such remedy acceptable, in accordance with 130 CMR 610.051(B)¹ the issue of a disqualifying transfer and 839 day penalty are hereby DISMISSED.

After reviewing the case during the record open period, MassHealth Legal counsel raised the issue of the countability of the trust property as belonging to a Medicaid qualifying trust for purposes of the Appellant's eligibility determination for LTC benefits. At the request, and by agreement of the parties, and in accordance with 130 CMR 610.002, the hearing officer hereby takes jurisdiction over the issue of whether the [REDACTED] Realty Trust (trust), is a Medicaid qualifying trust (MQT), and if so, is the trust property countable against the Appellant. Both parties have fully briefed and addressed this issue in their record open submissions (Exhibits 14, 15 and 16) and it remains the sole issue presented by this appeal.

Relying on 130 CMR 520.022(A) and (B), MassHealth argued that the trust is a Medicaid qualifying trust, the kind contemplated by *Cohen v. Commissioner of the DMA*, 423 Mass. 399 (1996) since there are circumstances under which the Appellant "...may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual..."(Exhibit 14, p. 3).

MassHealth asserted that the Appellant is the settlor/grantor establishing the trust, and while not currently named as a beneficiary, is not prevented by any language in the trust instrument from being named as a beneficiary by the current trustee (her daughter who is named as one of two beneficiaries) who has "...absolute control over and disposal of all real estate and other property held by her at any time under" the trust, and who may "...alter or add to this Declaration or amend or terminate the Trust, or convey the Trust funds and property to new or other Trustees or to a new corporation" (Exhibit 14, pp. §A at pages 1-3). In Article 2 of the trust, revisions to the Schedule of Beneficiaries are permitted without the need to obtain consent from existing beneficiaries (Exhibit 14, pp. §A at page 1). MassHealth argues that the trust can be altered, amended, or even terminated

¹ MassHealth may make an adjustment in the matters at issue before or during a hearing. *If the parties agree that the adjustment resolves one or more of the issues in dispute, the hearing officer, by written order, will dismiss the appeal as to all resolved issues, noting as the reason for such dismissal that the parties have reached agreement.* BOH will not delay a fair hearing because a possible adjustment is under consideration unless the appellant requests or agrees to such a delay (130 CMR 610.051(B)).

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at the will of the trustee, which at its inception was the Appellant. Because of these broad powers, the trust cannot be considered irrevocable. Since the Appellant named herself as the sole trustee at the time the trust was established, she conferred upon herself, in that capacity, the absolute power to regain the entire trust corpus if she desired. Therefore, the trust fits the definition of a MQT and is countable.

The Appellant disagrees, because at the time of its creation, the Appellant/settlor was not a beneficiary, and therefore the trust fails to meet the definition of a MQT. Moreover, he averred, the trust is not, by MassHealth regulatory definition, a revocable trust (Exhibit 16, p. 3), which is defined as "...a trust whose terms allow the grantor to take action to regain any of the property or funds in the trust..." (130 CMR 515.001), because there is no specific language in the trust itself that confers any power for the settlor/grantor to regain the trust corpus.

Findings of Fact

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

1. On 02/20/1992, the Appellant established the [REDACTED] Realty Trust (trust), as the grantor/settlor of the trust, naming herself as the sole trustee designated by the trust instrument in Article 1, at the time the trust was established (Exhibit 14, p. §A, ¶1; 42 USC §1396p(d)).
2. Article 2 of the trust provides that the beneficiaries of the trust are those listed on the Schedule of Beneficiaries, which list may be revised, and any trustee may become a beneficiary (Exhibit 14, p. §A, ¶2).
3. The Appellant named her two children as equal beneficiaries of the trust, and to their children should either predecease the Appellant, unless or until the beneficiaries are changed (Exhibit 14, p. §B).
4. On 02/20/1992, the Appellant deeded title to her home to the trust, while retaining a life estate interest, individually, in the property (Exhibit 14, p. §C).
5. On 02/20/1992, the trust and deed were recorded with the Barnstable Registry of Deeds, in Book [REDACTED], at Pages [REDACTED] and [REDACTED] (Exhibit 7, pp. 14-17, 23; Exhibit 14, pp. §A, §B, and §C, and Exhibit 16, p. 1).
6. In Article 3 of the trust, the trustee has absolute power and authority over the trust property, and to occupy the real estate (Exhibit 14, p. §A, ¶3).
7. In Article 7, the trustee may resign, and Article 8 provides that her daughter shall be appointed as the trustee (Exhibit 14, p. §A, ¶7, ¶8).
- ~~8. Article 10 of the trust allows the trustee, in her sole discretion, to alter, amend, add to, or~~

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terminate, the trust, or convey the trust funds and property to new or other trustees or to a new corporation, which becomes effective on the date the action is recorded in the Registry of Deeds for Plymouth County (Exhibit 14, p. §A, ¶10).

9. On 12/06/2006, the Appellant tendered her resignation as trustee, and her daughter became the new trustee (Exhibit 14, p. §D).
10. The transfer of the Appellant's property on 02/20/1992 is beyond the regulatory look-back period for assets transferred for less than fair market value, and is not subject to the imposition of a penalty.

Analysis and Conclusions of Law

For trusts created before 08/11/1993, MassHealth regulations mandate:

130 CMR 520.022: Trusts or Similar Legal Devices Created before August 11, 1993

(A) Revocable Trust. The assets and income of an individual or spouse in a revocable trust are countable. The fair-market value of the home or former home of the nursing-facility resident or spouse in a revocable trust is a countable asset. Where the home or former home is an asset of the trust, the home or former home is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8)..

(130 CMR 520:022(A)).

MassHealth defines a revocable trust as "...a trust whose terms allow the grantor to take action to regain any of the property or funds in the trust" (130 CMR 515.001), and a grantor as "...an individual or spouse who creates a trust" (130 CMR 515.001).

The Appellant argues that the trust is an irrevocable instrument because the Appellant as settlor/grantor did not expressly reserve to herself any power to revoke or amend the trust so that she could regain the property funding the trust, and therefore, because it does not meet the definition of irrevocable, it is thus not countable for eligibility purposes (Exhibit 16, pp. 2-3). The Appellant relies upon the Restatement 2d Trusts §331(2) and §330(2) in averring that she did not establish by the terms of the trust, the power to alter, amend or revoke the trust, and therefore, as a matter of law, and in accordance with MassHealth regulations (130 CMR 515.001), the trust is irrevocable (Exhibit 16, p. 3).

The Appellant's argument fails to recognize the fact that at the time she established the trust, she named herself as the sole and exclusive trustee of the trust. In such capacity, the trust instrument awarded the Appellant exceptionally broad powers over the very existence of the trust itself, its maintenance, and/or the complete disposal and termination of not only the trust instrument, but

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also over every asset in the trust corpus, as well as the individuals named as beneficiaries of the trust (*infra*). It is disingenuous for the Appellant to split hairs by claiming she reserved no power to alter, amend or revoke the trust as settlor when she clearly so empowered and named herself as the sole trustee. For these reasons, and because the terms of the trust can be altered, amended or eliminated at the whim and will of the trustee, it is hereby concluded that the trust is a revocable instrument.

For trusts created before 08/11/1993, MassHealth regulations mandate:

130 CMR 520.022: Trusts or Similar Legal Devices Created before August 11, 1993

(B) Medicaid Qualifying Trust.

(1) *A Medicaid qualifying trust is a revocable or irrevocable trust or similar legal device, created or funded by the individual or spouse, other than by a will, under which:*

(a) *the individual is a beneficiary of all or part of the discretionary or required payments or distributions from the trust; and*

(b) *a trustee or trustees are permitted to exercise any discretion to make payments or distributions to the individual.*

(2) *The maximum amount of payments or fair-market value of property that may be permitted under the terms of the trust to be distributed to the individual assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the individual is countable in the determination of eligibility.*

(3) *The fair-market value of the home or former home of the nursing-facility resident in a Medicaid qualifying trust is a countable asset and is not subject to the exemptions described at 130 CMR 520.007(G)(2) or 520.007(G)(8)..*

(130 CMR 520.022(B)(1)-(3)).

The Appellant states that she is not a beneficiary of all or part of the discretionary or required payments or distributions from the trust. Therefore, the criteria necessary to identify the trust as a MQT, does not exist (Exhibit 16, p. 3). Citing *2 Belknap, Newhall's Settlement of Estates and Fiduciary Law in Massachusetts* §21.161 (5th Edition, 1997), the Appellant avers had she reserved such powers for herself to amend or modify the beneficiaries, she would have had such powers to name herself as a beneficiary, and could have identified herself as the beneficiary. However, because she did not, the Appellant concludes she has now irrevocably given up all of her rights to the property (Exhibit 16, p. 4).

Apart from their being no specific provisions articulating how the beneficiaries could be altered or amended or added to within the four corners of the trust instrument, the Appellant takes the position that in her capacity as trustee, she had fiduciary obligations and an absolute duty of loyalty to the beneficiaries of the trust (citing *Copp v. Worcester County National Bank* (1964) 347 Mass 548, 199 NE2d 200; *Ventura v. Ventura* (1990) 407 Mass. 724, 555 Ne2d 872; *Upham v. Siskind* (1983) 16 Mass App 588, 453 NE2d 1065; and *Old Colony Trust Co. v. US*, (1st Cir.) 423 F2d 601, in which the Federal Court adopted the Massachusetts rule set forth in *Old Colony Trust Co v. Silliman* (1967) 532 Mass 6, 223 NE2d 504). The Appellant concludes that the Restatement and these cases establishing a trustee's fiduciary standards do not confer authority on a trustee to change the beneficiary of the trust because to do so would constitute an egregious breach of her fiduciary duty of loyalty to the beneficiaries and completely undermine the intent of the settlor (Exhibit 16, pp. 4-5).

First, the intent of the settlor, other than to place the remainder interest of her former home into the trust for the benefit of the beneficiaries, who could include herself or any other trustee, is truly difficult to ascertain from the trust instrument. While that document purports to distribute the trust corpus to the beneficiaries, it also permits the trustee, in her sole discretion to terminate the trust at any point in time prior to 20 years from its creation, dispose of all of the trust property as she may see fit at any point in time, and to amend, alter or add to the governing terms of the trust instrument, also at the will and whim of the trustee. These powers are at odds with the settlor's inferred intention to distribute the trust res to the beneficiaries.

When examining trusts funded by a MassHealth applicant, the Massachusetts Supreme Judicial Court has ruled that the amount deemed to be available to the applicant (the Appellant) is the greatest amount of money that the trustee might have discretion to pay the applicant in any set of circumstances (*Cohen v. Commissioner of the Division of Medical Assistance*, 423 Mass. 399, (1996)). Specifically, the Cohen Court settled the notion that:

"...if there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility..."

(*Cohen v. Commissioner of the Division of Medical Assistance*, 423 Mass. 399, at page 413 (1996)).

The Appellant/applicant/settlor/grantor, in her capacity as sole trustee from the time the trust was established on 02/20/1992 through her resignation on 12/06/2006, had the discretion conferred by the trust instrument to alter, add to, or terminate (revoke) the trust; dispose of none, some, or all of the trust corpus; and/or change the Schedule of Beneficiaries to include herself and exclude one, both or none of her children, and their respective beneficial interests (Exhibit 14, p. §A, at pages 1-3). Following her recorded resignation as trustee, her daughter, the successor trustee, now enjoys all of these same powers over the trust, the trust property, and the beneficiaries.

Applying the Court's reasoning in *Cohen*, the most that the trust terms would allow the Appellant/applicant/settlor/grantor as trustee to confer upon herself individually (as the Appellant) was the entirety of the trust res. And now, those powers belong to her daughter.

Therefore, it is hereby concluded that the trust created in 1992 meets the requirements of a Medicaid qualifying trust as follows:

- The trust was created prior to August 11, 1993.
- The Appellant was the settlor/grantor of the trust.
- Pursuant to Article 2 of the trust, any trustee (including the Appellant) can be made a beneficiary without impropriety "...as though he were not a Trustee" (including the sole beneficiary) of the trust; and the existing trustee can name the Appellant as a beneficiary at her discretion.
- Pursuant to Articles 3, 4, 5, and 10 of the trust, the trustee has full discretion to encumber, dispose of, or add to the trust corpus, and may alter, amend, and terminate (effectively revoking) the trust instrument.

The trust corpus is comprised of the remainder interest in the Appellant's former residence following her retention, individually, of a life estate interest (Exhibit 14, p. §C).

The assets of such a trust, if available to a beneficiary applying for MassHealth benefits, must be counted in determining eligibility for those benefits (*Cohen v. Commissioner of the Division of Medical Assistance*, 423 Mass. 399, 413 (1996)). For Medicaid purposes, the countability of the trust assets is not predicated on the trustee actually exercising her discretion to distribute principal and income rather it is based on the maximum amount that could be distributed assuming the full exercise of such discretion (42 USC § 1396a(k)(3)(B)).

For all of the foregoing reasons, this portion of the appeal is hereby DENIED and the matter REMANDED to MassHealth for a determination of the countable assets available to the Appellant in determining her MassHealth eligibility.

Matters as to curing, transferring title back to the Appellant should she intend to return home (130 CMR 520.008(A) making the property non-countable), and MassHealth's ability to lien the property are not ripe for determination in this appeal.

Order for MassHealth

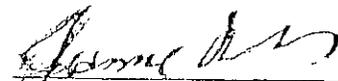
MassHealth will redetermine the Appellant's eligibility for LTC benefits based on the 05/24/2010 conversion date and the countability of the trust corpus and if applicable, the life estate interest retained by the Appellant in her former home. MassHealth will rescind the notice of disqualifying transfer and determine no disqualifying transfer occurred in relation to the establishment, funding,

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and/or resignation of the Appellant as the trustee of the trust. Notify the Appellant, her POA, and her attorney in writing.

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.



Leanne Travers Jabour
Hearing Officer
Board of Hearings

cc:

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