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To: Peter O'Rourke – Tewksbury MEC
From: Amy Dybas – Director Member Services Policy Implementation
By: Katy Schelong, Assistant General Counsel
Date: January 29, 2014
Re: [redacted] ; Appeal No. 1318543

RECOMMENDATION:
Under the deed dated October 7, 2002, the applicant holds a life estate in the West Roxbury, Massachusetts real estate; the countability of this interest should be evaluated under relevant regulations. 130 CMR 520.008(A); 130 CMR 520.007(G); 130 CMR 515.012. The remainder interest in the West Roxbury real estate and any other assets held in the [redacted] Irrevocable Trust are fully countable in a Medicaid eligibility determination. 130 CMR 520.023; 42 U.S.C. §1396p(d) *et seq.* Additionally, the [redacted] Nominee Trust, [redacted] Irrevocable Trust and [redacted] Irrevocable Trust are all countable. 130 CMR 520.023; 42 U.S.C. §1396p(d) *et seq.*

FACTS:
The applicant, [redacted], is [redacted] years old, a resident of a nursing facility and applied for long-term care benefits. The applicant's husband, [redacted], is deceased. The applicant and her husband owned three properties, two located in Massachusetts and one in Florida. Each of these properties was transferred into trusts the applicant and her husband established. The trusts at issue were apparently all drafted by the same attorney, and their provisions are substantially identical.

[redacted] Roslindale, MA Real Estate and Trusts:
On August 27, 1992, the applicant and her husband executed a deed transferring their real estate located at [redacted] Roslindale, MA to themselves as Trustees of the [redacted] Realty Trust. The deed incorrectly referred to the property address as "[redacted]"

A deed titled "Confirmatory Deed" transferred the property from the applicant and her husband as Trustees of the [redacted] Realty Trust dated August 27, 1992 to the applicant and her husband as Trustees of the [redacted] Nominee Trust dated January 15, 1996.[2] No life estate was reserved under this deed.

On January 15, 1996, the applicant and her husband established the [redacted] Nominee Trust. The applicant and her husband are the Trustees. Section 3.1 defines Beneficiaries as those listed on the Schedule of Beneficiaries and further allows for revisions to the Schedule of Beneficiaries. Section 3.3 allows any Trustee to become a Beneficiary of the Nominee Trust. Section 4.1 states that the Trustees shall hold the principal and pay over the principal and income as directed by the Beneficiaries; in the absence of such direction, the Trustee shall pay the income to the Beneficiaries. Section 5.1 states that

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[1] *See generally* Health Insurance Portability and Accountability Act ("HIPAA"), P.L. 104-191; 42 U.S.C. § 1320d-2; 42 USC §1396a(a)(7); 42 U.S.C. §1320d-2, -4; Privacy Act of 1974, 5 U.S.C. § 552a Act; 42 C.F.R. § 164.508; 42 C.F.R. §431.300-307; 42 CFR §483.10; 42 C.F.R. §435.945(f)(4); 45 CFR 164 *et seq.*; 20 CFR §401.100; G.L. c. 118E § 49; G.L. c. 214 §1B; G.L. c. 66A §2; 130 CMR 515.007(B); 130 CMR 517.006(B).

[2] Since the evidence suggest the [redacted] Realty Trust dated August 27, 1992 was de-funded by the so-called "Confirmatory Deed" dated January 15, 1996, no analysis of this instrument is necessary.

the [redacted] Nominee Trust may be terminated by *any* Beneficiary. Pursuant to Section 5.2, upon termination, the assets are to be distributed to the Beneficiaries as tenants in common unless the Beneficiaries dictate a different distribution. Section 6.1 allows for amendments to the [redacted] Nominee Trust. The Schedule of Beneficiaries, also executed on January 15, 1996, designates the applicant and her husband as Trustees of the [redacted] Irrevocable Trust as holding 100% of the beneficial interest in the [redacted] Nominee Trust.

The [redacted] Irrevocable Trust was established by the applicant and her husband on January 15, 1996. The applicant and her husband are the Settlors and Trustees. Article II provides that the applicant and her husband, as Settlors, have no right to alter, amend or revoke the Trust. Article III states:

> During the lifetime of the Settlors, the Trustee shall pay to the Settlors or apply for the Benefit of the Settlors all of the net income of the Trust not less often than quarterly. The Settlors shall also have the right to occupy, enjoy, and possess any real estate that may constitute part or all of the corpus of this Trust during their lifetime.

Pursuant to Article IV, the applicant and her husband reserved the right, without consent or approval of the Trustee to sell, assign or hypothecate any policies of insurance upon the life of the applicant or her husband. The rights the applicant and her husband reserved include, the right to change any beneficiary, borrow any sum under the policy and "to receive all payments, dividends, surrender values, benefits or privileges if any kind..." Section II of Article IV also gives the Trustee these rights if the applicant is incapacitated.

Article V provides that Trust assets may be used to pay the administrative expenses, taxes and other costs and liabilities related to the applicant's probate estate. Article VI provides for annual accountings of Trust assets to the applicant by the Trustees. Article VII governs the administration of the Trust after the death of the applicant and her husband. Article IX allows any beneficiary to disclaim, by written instrument, all or part of his or her interest in the Trust.

Article XII gives the Trustees broad power and authority to deal with Trust assets, including but not limited to, the authority to: (I)(A) invest, reinvest in any securities and to make secured and unsecured loans; (I)(D) sell, lease, pledge, mortgage, transfer, exchange, or otherwise dispose of any real or personal Trust property; however, the Trustees may not sell the applicant's principal residence or any equitable interest held in the Trust without the written consent of the applicant or her representative; (I)(E) borrow money "from itself individually or from others, upon such terms and conditions as it deems advisable and to mortgage or pledge trust property as security..."; (I)(L) use Trust funds to pay the applicant's burial and funeral expenses; (I)(M) make allocations of income and principal; (I)(O) purchase assets or lend money to the applicant's estate; (I)(P) make distributions to beneficiaries for the purpose of mitigating the effects of taxes; (I)(Q) purchase or maintain any real estate as a residence for any one or more of the current income beneficiaries without charging rent to the occupants.

Article XII, Paragraph I(N) authorizes the Trustee to deal with policies of insurance and reads:

> To apply any income *or principal* of the trust property to the purchase of additional life insurance on the life of the SETTLOR (applicant), or on the life of any person in whom any beneficiary shall have an insurance interest (including the life of any beneficiary); to designate as policy beneficiary of any such policy, the Trustee, a current income beneficiary, the spouse

of a current income beneficiary, or child of a current income beneficiary. To hold and deal with any policy of insurance (or any interest therein) as owner thereof *for the benefit of the trust estate, or individual beneficiary*, or family member, with the following powers by way of illustration and not of exclusion of other powers:

1. To execute any automatic premium loan agreement with respect to any policy or to elect that any such automatic premium loan agreement provision thereof shall be effective or to cancel the same;
2. To borrow money with which to pay premiums due on any policy...;
3. To exercise any option contained in which policy...;
4. To reduce the amount of such policy or to convert or exchange the same;
5. To elect paid-up insurance or extended term insurance nonforfeiture option...;
6. To surrender such policy for its cash value;
7. To sell such policy to the insured or to anyone having an insurable interest in the insured or to any other person;
8. To elect in respect to any policy of insurance payable hereunder any mode or option of settlement...and to make payments of interest and principal to or in accordance with the written instruction of the Trustee; and
9. To exercise any other right, option, or benefit contained in the policy or permitted by the insurance company issuing the policy. (Emphasis added).

GB Life

Under Article XIV, the applicant has the power to substitute Trustees. Article XV(I) provides: "If at any time during the term of any trust created hereunder the Trustee shall determine, in its sole discretion, that the value of the principal of said trust does not warrant the continuance thereof, the Trustee shall pay over, transfer and convey the principal (including any accumulated, undistributed and accrued income and additions from any source) of said trust free and discharged of all trust to the beneficiaries, if any, who are then entitled to receive income thereon and in the proportions that they are entitled to receive such income..."

Naples, Florida Real Estate and Trust:

By a deed dated January 15, 1996, the applicant and her husband executed a deed transferring their real estate located in Naples, Florida to themselves as Trustees of the [redacted] Irrevocable Trust. No life estate was reserved under this deed.

The [redacted] Irrevocable Trust was established by the applicant and her husband on January 15, 1996. The applicant and her husband are identified as Settlors and Trustees. The terms of the [redacted] Irrevocable Trust are the same as the terms of the [redacted] Irrevocable Trust, and therefore, will not be repeated.

[redacted] West Roxbury, MA Real Estate and Trusts:

By a deed dated January 15, 1996, the applicant and her husband transferred, for no consideration, the real estate they individually owned located at [redacted] West Roxbury, MA to themselves as Trustees of the [redacted] Nominee Trust dated January 15, 1996.[3] No life estate was reserved under this deed.

[3] Since apparently there are no longer any assets in the [redacted] Nominee Trust dated January 15, 1996, no analysis of this instrument is necessary.

On October 7, 2002, the applicant, as Trustee of the [redacted] Nominee Trust, executed a deed transferring the West Roxbury real estate to [redacted] and [redacted] as Trustees of [redacted] Irrevocable Trust. The deed also recites that:

> Reserving to the Grantor, [redacted], a life estate in the above said Premises during the reminder of her lifetime, during which the said [redacted] shall have the exclusive right to occupy, enjoy and possess the Premises, to lease, let or license the same, and shall be entitled to all rents, fees or profits generated from said life estate, but without the legal right to partition. During the Grantor's lifetime, she shall bear the cost of all insurance, maintenance, fees, charges and expenses relating to the Premises and she shall pay all taxes assessed or impose, with respect thereto, and all principal and interest on any mortgages thereon.

On October 7, 2002, the [redacted] Irrevocable Trust was established by the applicant, who is designated as the Settlor. The Trustees are [redacted] and [redacted]. The provisions of the [redacted] Irrevocable Trust and virtually identical to the applicant's [redacted] Irrevocable Trust and [redacted] Irrevocable Trust, and therefore, will not be repeated.

ANALYSIS:

Applicants for MassHealth benefits have the burden to prove their eligibility. 130 CMR 520.007; G.L. c. 118E, §§ 20, 47A; *see generally Goldberg v. Kelly,* 397 U.S. 254 (1970). In order to be approved for such benefits, among other things, the total value of countable assets or resources owned by or available to the applicant may not exceed $2,000. 130 CMR 520.003(A)(1). 130 CMR 520.007 provides that "Countable assets are all assets that must be included in the determination of eligibility. Countable assets include assets to which the applicant or member or their spouse would be entitled whether or not these assets are actually received when failure to receive such assets results from the action or inaction of the applicant, member, spouse, or person acting on his or her behalf..." *See also* 130 CMR 520.009 (countable income); 42 U.S.C. § 1396p(h)(1); *Reinholdt v. North Dakota Dept. of Human Services,* 760 N.W.2d 101 (2009)(If a Medicaid applicant has a colorable legal action to obtain assets through reasonable legal means, the assets are available, for purposes of determining eligibility.).

Medicaid is a statutory program and not a program in equity. *See generally Nissan Motor Corp. v. Comm'r of Revenue,* 407 Mass. 153, 162 (1990) (there is no equity where a statute expresses a clear rule of law); G.L. c. 118E § 48 (the Board of Hearings is expressly not granted any sort of "equitable" authority, and further, does not allow any disregard of controlling Medicaid law). Since Medicaid is a statutory program, it cannot be trumped by common law, state law or equitable principles. *See generally Lebow v. Comm'r of Div. of Med. Assistance,* 433 Mass. 171, 172 (2001)("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."); *Doherty v. Dir. of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009)(recognizing that trusts should be evaluated in light of Congress' intent "...that Medicaid benefits be made available to only those who genuinely lack sufficient resources to provide for themselves."); *Shelales v. Dir. of the Office of Medicaid,* 75 Mass. App. Ct. 636, 640-641 (2009) (in affirming the Agency's interpretation of federal Medicaid law in light of the clear purpose and intent of the Medicaid program, the Court stated "MassHealth's interpretation more reasonably comports with the Federal and State legislative and regulatory scheme for providing a needs-based program aimed at maximizing the use of personal funds for long-term care before relying on public funds."); *Centennial Health Care Investment Corp. v. Comm'r. of the Div. of*

Med. Assistance, 61 Mass. App. Ct. 320, 327 (2004)(a party cannot rely on common law contract concepts to circumvent "the overriding design and purpose of the medical assistance laws and the broad authority afforded the division in implementing the Legislative objectives....").

The Medicaid program is designed to provide health care for those with insufficient resources in accordance with Medicaid law, and "[i]ndividuals are expected to deplete their own resources before obtaining assistance from the government." *Lebow v. Com'r of Div. of Med. Assistance*, 433 Mass. 171, 172 (2000). As the court observed in *Lebow*, however:

> The unfortunate reality is that some individuals with significant resources devise strategies to appear impoverished in order to qualify for Medicaid benefits. One such strategy is to transfer assets into an inter vivos trust, whereby funds appear to be out of the individual's control, yet generally are administered by a family member or loved one.

This sentiment is echoed by the Supreme Judicial Court in the case of *Cohen v. Comm'r of the Div. of Med. Assistance*, 423 Mass. 399, 403 (1996)(explaining that the rule for self-settled trusts is addressed to an arrangement "concocted for the purpose of having your cake and eating it too"). The SJC has stated that in an evaluation of trusts under a Medicaid eligibility determination, the common law of trusts and general trust laws or principles cannot be used to circumvent the Medicaid statute. *Lebow v. Comm'r of Div. of Med. Assistance*, 433 Mass. 171, 172 (2001)("The purpose of the [trust Medicaid] 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."); *see also Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009)(failure to include provision in trust allowing for principal distributions to the applicant did not render the principal as non-countable in a Medicaid eligibility determination).

For Medicaid purposes, the treatment of trusts established on or after August 11, 1993 are governed by 42 U.S.C. §1396p(d) *et seq.* as codified in 130 CMR 520.023. Federal Medicaid law, 42 U.S.C. §1396p(d), trust states:

> (d) Treatment of trust amounts
> (1)For purposes of determining an individual's [applicant'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)[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,...

(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...(emphasis added)

The current statute, 42 U.S.C. §1396p(d), tracks exactly the SJC's language, reasoning and ultimate holdings in *Cohen* and *Lebow*, as affirmed in *Doherty*, that a trustee's discretion, any restrictions, and limiting provisions in a trust are disregarded when determining whether a trust is countable in a Medicaid eligibility determination.[5] *Cohen v. Comm'r of the Div. of Med. Assistance* 423 Mass. 399, 416, 418, 419-420, 424 (1996) (Countable assets in Plaintiff's trusts included all amounts available to the applicant, assuming exercise of the full discretion of the trustees, while disregarding any limitation on discretion); *Lebow v. Comm'r of Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2000)("The issue is not whether the trustee has the authority to make payments to the grantor at a particular moment in time. Rather, if there is *any* state of affairs, at *any* time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets count in calculating the grantor's Medicaid eligibility." (Emphasis in original); *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009) (Provision purporting to cut off applicant's ability to access the trust principal was disregarded); *see also Ford v. Comm'r Div. of Med. Assistance*, Mass. App. Ct. 1:28 Decision 08-P-2091 (October 19, 2009)(Upholding the Agency's determination that all trust assets were countable and rejecting plaintiff's argument that the trust principal was not countable because the trustee did not currently have discretion to distribute principal); *Victor v. Massachusetts Executive Office of Health & Human Services*, Mass. App. Ct. 1:28 Decision 09-P-1361 (July 21, 2010)(Court upheld the Agency's determination that a trust established by the applicant's husband during his lifetime but funded by the husband's Last Will & Testament, was nonetheless countable to the applicant in an eligibility determination); *see also generally Hedlund v. Wisconsin Dept. of Health Services*, Wis. Ct. App., No. 2010AP3070, Oct. 12, 2011) (Medicaid applicant who, seventeen years

[4] Paragraph 4 addresses special needs trusts and pooled trusts, and is not relevant in the instant matter.
[5] Courts in other jurisdictions likewise disregard provisions in trusts that seek to cut off a trustee's discretion. *See In re Ruby Owen*, 2012 Ark. App. 381 (2012); *Roscke v. County of Carver*, 783 N.W.2d 220, 225 (2010); *Vincent v. Department of Human Services*, 331 Ill. Dec. 314, 322 (2009).

prior, transferred assets to her children and the children funded the assets into an irrevocable trust for the applicant's benefit was available for Medicaid purposes).

As applied to this matter, all assets in all of the applicant's Trusts are fully countable in a Medicaid eligibility determination. 130 CMR 520.023; 42 U.S.C. §1396p(d). The applicant is the Settlor of all the Trusts she established, into which she and her husband funded their properties located in West Roxbury, MA,[6] Roslindale, MA and Naples, FL; thus, these are all self-settled inter vivos trusts. 42 U.S.C. §1396p(d)(2)(B) dictates that the portion of the Trust attributable to the assets of the applicant (and/or spouse) shall be considered available. When, as here, only the assets of an applicant (and/or spouse) were transferred into the trusts, then all assets of the trust shall be considered available under federal Medicaid law. 42 U.S.C. §1396p(d) *et seq.*

The federal Medicaid statute provides that the countability of an applicant's (or spouse's) self-settled inter vivos Trust is made without regard to, among other things, whether the Trustees "have or exercise any discretion under the trust" and "when or whether distributions may be made from the trust." 42 U.S.C. §1396p(d)(2)(C)(ii) and (iii). Thus, federal Medicaid law effectively creates a presumption that a Trust containing the assets of an applicant and/or spouse is countable in an eligibility determination. 42 U.S.C. § 1396p *et seq.*; *see generally Family Trust of Massachusetts, Inc. v. United States,* _ U.S. App. D.C. _, No. 12-5360 (June 28, 2013) ("Under statutory 'trust-counting' rules, a trust corpus is generally counted as an asset for the purpose of the eligibility limits." (Citations omitted)); *see also generally* BOH Appeal No. 1307250, 1208209, 1211060, 1217298.

With regard to the [redacted] Nominee Trust, the applicant is the Trustee and Settlor. Section 3.3 allows a Trustee to become a Beneficiary. The Nominee Trust may be amended under Section Six and terminated by any Beneficiary under Section Five. Upon termination, its assets are to be distributed to the Beneficiary designated on the Schedule of Beneficiaries or as directed by all Beneficiaries. The Schedule of Beneficiaries, executed on January 15, 1996, designates the applicant and her husband as Trustees of the [redacted] Irrevocable Trust as holding 100% of the beneficial interest in the Nominee Trust. Based on the husband's death, the applicant is the sole Settlor, Trustee and lifetime Beneficiary of the [redacted] Irrevocable Trust. The applicant may, therefore, provide instruction to terminate the [redacted] Nominee Trust and also direct its assets be distributed to her; therefore, the Nominee Trust is revocable by the applicant. 130 CMR 520.023(B). 42 U.S.C. §1396p(d)(3)(A)(i) states for revocable trusts, "the corpus of the trust shall be considered resources available to the individual..." Since the Nominee Trust is revocable, all its assets are *per se* countable in an eligibility determination, irrespective of the terms of the [redacted] Irrevocable Trust. 130 CMR 520.023(B); 42 U.S.C. §1396p(d)(3)(A)(i). Real estate held in trusts is not subject to non-countable exemptions. 130 CMR 520.023(B)(4); 130 CMR 520.023(C)(1)(d); 130 CMR 520.007(G); 130 CMR 520.008(A). Accordingly, regardless of any of the other trusts, the applicant does not meet the $2,000 asset limit because the Roslindale, Massachusetts real estate in the [redacted] Nominee Trust is countable. 130 CMR 520.023(B).

Even if the Nominee Trust were simply terminated under Section 5.1 without further direction from the applicant, upon its termination, the Roslindale, MA real estate is to be distributed to the [redacted] Irrevocable Trust and become subject to its terms. *See generally Montgomery v. Harris, Director of the Office of Medicaid,* BECV2012-00344 (May 8, 2013) (Kinder, J.) (upholding Agency's determination

[6] The rights granted the applicant under the October 7, 2002 deed transferring [redacted] West Roxbury arguably renders her the owner of all of the real estate and not merely a life estate.

that the assets in the applicant's self-settled nominee trust and irrevocable trust were countable in a Medicaid eligibility determination); *see also generally* BOH No. 1119248; 1211060; 1211362.

As to the three Irrevocable Trusts, the applicant is the Settlor and vested lifetime Beneficiary of all Irrevocable Trusts; she is also the Trustee of [redacted] Irrevocable Trust and the [redacted] Irrevocable Trust.[7] There is no provision in any of the Irrevocable Trusts naming anyone other than the applicant as a Beneficiary of her Trusts during her lifetime. Thus, the applicant is the sole vested Beneficiary, and the interest of anyone named in Article VII is at best that of contingent beneficiaries. Pursuant to Article III the applicant is entitled to distributions of income. Accordingly, the income of all Irrevocable Trusts is clearly countable in an eligibility determination.[8] 130 CMR 520.023(C)(1)(a).

With regard to the principal, for Medicaid purposes, the countability of Trust principal is not predicated on a provision purporting to disallow distributions of principal or, in this case, the failure to include a provision providing for principal distributions during the applicant's lifetime; rather, the entire Trust instrument must be reviewed. *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439 (2009). The lack of a provision allowing for distributions of principal to the applicant, or provisions purporting to give a trustee no discretion to distribute principal to the applicant, do not control whether principal is countable in an eligibility determination for Medicaid welfare benefits.[9] *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009). Likewise, when there are provisions in a trust attempting 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." *Cohen v. Comm'r of the Div. of Med Assistance*, 423 Mass. 399, 416 (1996). The disregard of a trustee's discretion, restrictions and limiting provisions is not based on whether the trust explicitly references Medicaid eligibility. *Lebow v. Comm'r of Div. of Med. Assistance*, 433 Mass. 171, 177 (2000); *see also generally Bisceglia v. Comm'r Massachusetts Div. of Med. Assistance*, 1996 WL 655713, 4 (Mass.Super.) ("If the grantor's intent to shelter assets for other than Medicaid purposes is viewed as a legitimate device for preserving plaintiff's eligibility for Medicaid benefits, then the result would have a disastrous effect on the future of Medicaid. Other applicants would be able successfully to argue that their trusts were not disqualifying because the grantor had harbored a purpose distinct

[7] Generally, if a sole Trustee and Beneficiary is the same person, legal and equitable title merge as a matter of law.

[8] If during the past five years income was paid to someone other than the applicant, or if the principal were actually not countable and it was added to the principal, these would be disqualifying transfers because the diversion of income would be gifts to the remaindermen. 130 CMR 520.023(C)(1)(c) and 130 CMR 520.019.

[9] To the extent the applicant may cite to the case of *Guerriero v. Comm'r of the Div. of Med. Assistance*, 433 Mass. 628 (2001), to support a claim that the principal of the Trust is not countable, such comparisons are unavailing, not merely because the facts are wholly distinguishable, but also because under that case the pre-1993 Medicaid statute was applied. The statute was originally codified in 1986 at 42 U.S.C. § 1396a(k)(1). In 1993, the statute was amended, and the statute as amended was codified at 42 U.S.C. § 1396p(d). *Cohen v. Comm'r of Div. of Med. Assistance*, 423 Mass. 399, 406 (1996) The statute as amended applies to all trusts created after 1993 and has been recognized by courts as being far stricter than the prior MQT statute. *Ford v. Comm'r Div. of Med. Assistance*, Mass. App. Ct. 1:28 Decision 08-P-2091 (October 19, 2009)("The new rules, which the parties agree are stricter than the old ones, apply only to trusts created after the effective date of the 1993 act...We agree with the Superior Court judge that we need not decide which rules apply, because the applicant's argument fails even under the more forgiving pre-1993 standard."). Nonetheless, on June 18, 1987, Guerriero (the applicant) established an irrevocable inter vivos trust. *Id.* at 629. In the trust, Guerriero designated herself and her living issue as beneficiaries of the trust. *Id.* Almost four years later, Guerriero signed a waiver by which she irrevocably waived and renounced all of her interest in the Trust. *Id.* By this document, Guerriero effectively divorced herself from the trust and was no longer a beneficiary of the trust. On May 15, 1998, seven years after she executed the waiver, Guerriero applied for Medicaid benefits, which was denied based on the countability of the trust. *Id.* The Court found that it was error for the Agency to count the assets in the trust because Guerriero had irrevocably waived and renounced any right to future payment under the trust. *Id.* at 635. In the instant matter, no such waiver or disclaimer was signed by the applicant. The applicant has at all times been a vested lifetime beneficiary of all of the Trusts she established.

from Medicaid eligibility preservation. The trust would once again become an effective tool permitting an otherwise ineligible person to hide assets and therefore qualify for benefits. This court declines to breathe life into a device so inconsistent with the legislative purpose.").

Although there is no provision stating that the Trustee must distribute principal to the applicant, it is clear that the applicant alone has access to, possession of, and control over the principal, that is, the applicant's three properties, and, if applicable, any life insurance policies. *See* Article III and IV. The principal in all the Trusts is already available to the applicant because according to Article III, the applicant alone has "...the right to occupy, enjoy, and possess any real estate that may constitute part or all of the corpus of this Trust during her lifetime" and the real estate may not be sold without her written consent. *See also* Article XII(I)(D). In addition, pursuant to Article IV, the applicant also reserved the right, without consent or approval of the Trustees the right to: "...sell, assign, or hypothecate any policies of insurance upon the life of the SETTLOR made payable to the Trustees, to exercise any option or privilege granted by such policies, including, but not limited to, the right to change the beneficiary, to borrow any sum in accordance with the provisions of said policies and to receive all payments, dividends, surrender values, benefits or privileges of any kind which may accrue in account of such policies during the SETTLOR'S lifetime." Similarly, under Articles V and XII(I)(L), after the applicant's death, Trust principal may be used to satisfy her debts, estate liabilities, funeral and administrative expenses. Each of these provisions shows that the principal is available to applicant, and may be used for her benefit, both now and in the future.

It is not reasonable to find that the applicant has no interest or rights in the Trust, other than income distributions, when she clearly retains abundant, meaningful control and access to trust principal. An applicant cannot credibly argue that real estate in a trust is available to her while she wants to: (1) reside in it; (2) have exclusive possession of it; (3) take advantage of tax credits or abatements; (4) use countable assets to pay for its expenses and upkeep; (5) and/or limit its disposal, and then claim the trust property is suddenly not available because the applicant seeks Medicaid coverage. "It is against public policy to permit a man to tie up his own property in such a way that he can still enjoy it but prevent his creditors from reaching it." *U.S. v. Murray*, 217 F.3d 59, 65 (2000)(*quoting* 2A Scott & Fletcher, *The Law of Trusts* § 156, at 167 (4th ed. 1987); *also citing Cohen v. Comm'r of the Div. of Med. Assistance*, 423 Mass. 399, 668 N.E.2d 769, 777 (1996)(explaining that the rule for self-settled trusts is addressed to an arrangement "concocted for the purpose of having your cake and eating it too"); *see also Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009) (Medicaid applicants are prohibited from receiving public health care assistance while also preserving assets for their heirs through the use of a trust which purports to cut off applicant's ability to access the trust principal); *Lebow v. Commissioner of Div. of Med. Assistance*, 433 Mass. 171, 172 (2000) (Under the Medicaid program, "[i]ndividuals are expected to deplete their own resources before obtaining assistance from the government.").

In addition to the factors discussed *supra*, there are several other circumstances supporting a finding that the value of the principal can be made available to the applicant or used for her benefit as the vested lifetime Beneficiary of her Trusts. 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a). For example, Article XV(J) provides that "...at any time during the term of any trust created hereunder, the Trustee shall determine, in its sole discretion, that the value of the principal of said trust does not warrant the continuance thereof, the Trustee shall pay over, transfer and convey the principal...of said trust free and discharged of all trust to the beneficiaries, if any, who are then entitled to receive the income thereon..." Under Article III, the applicant is the income beneficiary. The

provision of Article XV(I) constitutes an "any circumstance" under the Medicaid statute. 42 U.S.C. §1396p(d)(3)(B)(i).

Likewise, Article XII gives the Trustee wide power to deal with trust assets. The Trustee may (1) invest and reinvest in any securities; (2) make secured and unsecured loans; (3) mortgage the real estate; (4) make allocations of income and principal; and, (5) apply principal to the purchase of life insurance on the life of the applicant or any beneficiary, and to surrender any policies. The Trustee is fully empowered to use the value of the principal to, for example, invest in an income producing product, such as an annuity, and pursuant to Article III, the Trust income is clearly countable. 130 CMR 520.009(D) (unearned income includes annuities); 20 CFR § 416.1121; 42 U.S.C. §1396p(d); 130 CMR 520.023(C)(1)(a); *see generally* G.L. c. 203, §25A ("The trustee under a will or other instrument may, if the trust does not otherwise provide, invest the income or principal of the trust fund in policies of life or endowment insurance or annuity contracts, issued by a life insurance company duly authorized to transact business in the commonwealth pursuant to chapter one hundred and seventy-five, on the life of any beneficiary of the trust or on the life of any person in whose life such beneficiary has an insurable interest."). This is another example of how the principal can be used for the benefit of the applicant and is exactly the type of "peppercorn of discretion" envisioned by the *Cohen* Court supporting a finding that an applicant's Trusts are fully countable. 423 Mass. at 413 ("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."). Whether the Trustee chooses to exercise its authority is irrelevant and not controlling.[10] In accordance with the Medicaid statute and Medicaid case law interpreting the same, that such circumstances are enumerated in the instruments is sufficient to find the principal countable in a Medicaid eligibility determination. 42 U.S.C. §1396p(d)(3)(B)(i). While the *Doherty* Court stated it had "no doubt that self-settled, irrevocable trusts may, if so structured, so insulate trust assets that those assets will be deemed unavailable to the Settlor," such was not the case in the Doherty Trust, which explicitly contained a provision disallowing distributions of principal to the applicant, nor is it the case in the three Irrevocable Trusts here. Like *Doherty,* the applicant's instruments are drafted in a way to give her as much benefit from, and access to her trust property as possible while also giving the Trustee "maximum flexibility." *Doherty*, 442. As the Court in *Doherty* instructs, an instrument of trust must be read as a whole through the lens of Medicaid law, the purpose and policies underpinning the program, and without reliance on a single trust provision. *Doherty v. Dir. of the Office of Medicaid*, 74 Mass. App. Ct. 439 (2009).

Moreover, Medicaid law does not require that a trust explicitly state the principal distributions may be made to an applicant in order to find principal countable. The Medicaid statute does not equate availability and countability with distributions. 42 U.S.C. §1396p(d)(2)(C)(iii) ("...this subsection shall apply without regard to...whether distributions may be made from the trust..."); *see also generally Edholm v. Minnesota Dept. of Human Services, et.al.*, A12-1623 Minn. App. Ct. A12-1623 (June 17, 2013) (unpublished) (Although Medicaid applicant was not a beneficiary of her self-settled trust, Court found trust resources available because the applicant was, among other things, designated as the "owner" of her Grantor trust under the Internal Revenue Code) (attached hereto as Exhibit A).

Here, both the individual terms of the Trusts as well as the cumulative effect of the provisions of applicant's Trusts demonstrates that at all times the principal has been available to the applicant and

[10] Whether any policy of insurance or annuity is available for purchase by the Trustee on the life of the applicant has no bearing on the countability, that such option exits under the terms of the trusts is sufficient to find the principal countable.

remains so. Accordingly, the income and principal of the [redacted] Irrevocable Trust, the [redacted] Irrevocable Trust, the [redacted] Irrevocable Trust, and the [redacted] Nominee Trust are countable in an eligibility determination.[11] 42 U.S.C. §1396p(d); 130 CMR 520.023.

Finally, 130 CMR 520.024 provides:

> (C) Home in Trust: Cure.
> (1) If the MassHealth agency has denied or terminated MassHealth because the home or former home in trust is considered an excess asset, the MassHealth agency will rescind that action if the home or former home has been removed from the trust and returned to the nursing-facility resident in accordance with the full cure rules at 130 CMR 520.019(K).
> (2) When the home or former home is removed from a trust, as determined by the MassHealth agency, the MassHealth agency will redetermine eligibility using the rules at 130 CMR 520.007(G)(8) and the full cure rules at 130 CMR 520.019(K).
> (3) When the home or former home has been removed from the trust, the MassHealth agency may place a lien in accordance with 130 CMR 515.012.

An applicant can only have one principal place of residence and real estate located outside of Massachusetts does not qualify for any exemption at 130 CMR 520.008(A). If the Agency receives duly recorded deeds showing all real estate has been removed from the Trusts and titled in the applicant's name alone, the real estate could be evaluated under relevant regulations governing real estate, Agreements to Sell,[12] liens, etc. 130 CMR 520.024(C); 130 CMR 520.008(A); 130 CMR 520.007(G); 130 CMR 515.012.

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[11] To the extent the applicant claims the real estate held in trust is subject to 130 CMR 520.008(D), such argument is unavailing. 130 CMR 520.008(D) states: "Business and nonbusiness property essential to self-support and property excluded under an SSA-approved plan for self-support are considered noncountable assets." *See also* 20 C.F.R. § 416.1222-1227. Here, there is no SSA-approved plan for self-support, also referred to as "PASS", for the applicant. 20 C.F.R. §§ 416.1225 - .1227. Moreover, there could not be an approved plan for self-support because the Social Security Administration allows such plans only for the blind or disabled, and not for the aged. SI 01130.500(D)(2); 130 CMR 520.008(D). Thus, that portion of the regulation is inapplicable. There is no evidence that the property is the applicant's business property or that she is engaged in any business. The legal unit has no evidence that the applicant files Business Tax Returns, including a Schedule C, Profit or Loss from Business or Profession. Thus, none of the properties are used in the applicant's "trade or business." SI 01130.500; SI 01130.501. The mere fact that real estate may be rented is not enough to satisfy 130 CMR 520.008(D) and automatically convert real estate from a countable asset to a non-countable asset. Property does not qualify as non-countable under 130 CMR 520.008(D) unless, in accordance with 20 C.F.R. §416.1222, the property produces a "net annual income to the individual of at least 6 percent of the excluded equity." 20 C.F.R. § 416.1222; *see also* POMS SI 01130.500-.503. There is no evidence that any of the properties provide the applicant a 6% return on the value of the resources; thus, the real property, even if removed from the trusts, would not be exempt. 20 C.F.R. § 416.1222; *see also* 20 C.F.R. § 416.1224 ("Nonbusiness property is considered to be essential for an individual's (and spouse, if any) self-support if it is used to produce goods or services necessary for his or her daily activities. This type of property includes real property such as land which is used to produce vegetables or livestock only for personal consumption in the individual's household (for example, corn, tomatoes, chicken, cattle)..."). Finally, the operative language in 130 CMR 520.008(D) is that the property is "essential to self-support." Real estate that produces no meaningful income is not essential for self-support, and also ignores that if an applicant is living in a nursing home and applying for MassHealth to pay for her care, she is no longer attempting to be self-supporting. 130 CMR 520.008(D).

[12] In accordance with 20 CFR §416.1244, upon the sale of the real estate, the net proceeds are treated as "... available to repay that portion of the payments that would not have been made had the disposition occurred at the beginning of the period for which payment was made." Likewise, under 130 CMR 515.010, the Agency has "...the right to recover payments of benefits to which the member was not entitled at the time the benefit was received, regardless of who was responsible and whether or not there was fraudulent intent."

Exhibit A

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1623

Mary Edholm,
Appellant,

vs.

Minnesota Department of Human Services, et al.,
Respondents.

Filed June 17, 2013
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CV-11-23237

Brian P. Farrell, Brian P. Farrell, P.A., Maple Grove, Minnesota (for appellant)

Lori Swanson, Attorney General, Corrie A. Oberg, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Department of Human Services)

Mike O. Freeman, Hennepin County Attorney, Carla J. Hagen, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges the district court's order affirming respondent department of human services' order denying appellant medical-assistance benefits, arguing that the department erred by calculating her assets to include the contents of an irrevocable trust. We affirm.

FACTS

Appellant Mary Edholm created the Mary Edholm Irrevocable Trust on September 16, 2004. The trust designated two of Edholm's sons as the trustees and her five children as the beneficiaries. A provision in the trust provides: "The Trustmaker hereby reserves the right to borrow income or principal of the trust without providing adequate interest and/or without providing security for the loan. The purpose of this provision is to cause this trust to be a Grantor Trust under I.R.C. Section 675(3) and the applicable Treasury regulations." The trust contains approximately $124,000 in assets.

At some point after Edholm created the trust, she applied for medical assistance. In July 2011, respondent Hennepin County Human Services and Public Health Department sent Edholm written notice that the trust's assets were deemed available assets and, as a result, she was ineligible for medical-assistance benefits. Edholm appealed to respondent Minnesota Department of Human Services.

In October, a human-services judge (HSJ) held an evidentiary hearing. Shortly afterward, the HSJ issued an order recommending that the commissioner of human services affirm the county's determination that the trust assets are available to Edholm for

the purpose of determining her medical-assistance eligibility. The HSJ determined that the terms of the trust establish that interest-free payments could be made to Edholm from the trust at any time. The commissioner adopted the HSJ's recommendation.

Edholm appealed to the district court pursuant to Minn. Stat. § 256.045, subd. 7 (2012). Following a hearing, the district court affirmed the commissioner's order. This appeal follows.

DECISION

In an appeal from a district court's review of an agency decision, this court "independently evaluate[s] the administrative decision in light of the agency's record." *In re Kindt*, 542 N.W.2d 391, 398 (Minn. App. 1996) (emphasis omitted). In doing so, we accord the agency's decision a presumption of correctness *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39 (Minn. 1989). We may reverse or modify the agency's decision only if the petitioner's substantial rights have been prejudiced because the agency's decision contains errors of law, is unsupported by substantial evidence, or is arbitrary and capricious. Minn. Stat. § 14.69 (2012).

Whether assets in a trust are available for the purpose of determining whether an individual is eligible for medical-assistance benefits is a question of law, which this court reviews de novo. *Roeckes v. Cnty. of Carver*, 783 N.W.2d 220, 224 (Minn. App. 2010). This court usually is not bound by an agency's decision when reviewing issues of law, but we give considerable deference to an agency's interpretation when the agency's construction of its own regulation is at issue. *St. Otto's Home*, 437 N.W.2d at 39-40.

"The Medicaid program is a jointly financed federal-state program designed to provide health care to needy individuals." *In re Carlisle Trust*, 498 N.W.2d 260, 263 (Minn. App. 1993). In Minnesota, the Medicaid program is referred to as "medical assistance" and is governed by Minn. Stat. §§ 256B.001-.84 (2012). *Id.* at 263 & n.1. The medical-assistance program "was intended to ensure medical care for persons who lacked the resources to pay for it, and to be the payor of last resort." *Roscoes*, 783 N.W.2d at 224 (quotation omitted). To be eligible, an individual must not own more than $3,000 in assets. Minn. Stat. § 256B.056, subd. 3. Only assets that are "available to the applicant or recipient" are considered to determine an individual's eligibility. 42 U.S.C. § 1396a(a)(17) (Supp. V 2011).

Before 1986, some individuals exploited a loophole in the federal Medicaid law by placing assets in irrevocable trusts to preserve their eligibility for Medicaid and their assets for their heirs. *Roscoes*, 783 N.W.2d at 225; *Kindt*, 542 N.W.2d at 395. In 1986, Congress passed a statute to address its concern about this practice. *Roscoes*, 783 N.W.2d at 225. Congress later repealed the statute and then recodified an amended version of the statute at 42 U.S.C. § 1396p(d) (2010). *Id.* As currently codified, the statute provides that, 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 . . . payment to the individual could be made shall be considered resources available to the individual." 42 U.S.C. § 1396p(d)(3)(B)(I) (2006). Under Minnesota law, this provision applies to trusts established after August 10, 1993. Minn. Stat. § 256B.056, subd. 3b(b).

Here, the terms of the irrevocable trust that Edholm created give her the right to borrow from the trust's income or principal "without providing adequate interest and/or without providing security for the loan." Edholm acknowledges that the trust leaves her the power to *borrow* from the income or principal of the trust, but argues that this does not constitute a *payment* from the trust because she has an obligation to repay any loan she receives from the trust. However, the federal Medicaid statute provides that "if there are *any circumstances* under which payment from the trust *could* be made to or for the benefit of the individual," then those resources are considered to be available to the individual. 42 U.S.C. § 1396p(d)(3)(B)(i) (emphasis added). This language is very broad and inclusive. Because Edholm's trust gives her an unlimited ability to access the trust's assets, it is encompassed by the broad terms of the statute. In addition, as the district court found, this interpretation of the statute is consistent with Congress's intent to limit Medicaid benefits to the needy and prevent individuals from transferring their assets to irrevocable trusts to qualify for Medicaid. *See Roscke*s, 783 N.W.2d at 225.

Edholm further argues that the provision allowing her to borrow from the trust was included in the trust for tax purposes. The trust provides that the purpose of the provision is "to cause this trust to be a Grantor Trust under I.R.C. Section 675(3) and the applicable Treasury regulations." Under that statute, "[t]he grantor shall be treated as the owner of any portion of a trust" when "[t]he grantor has directly or indirectly borrowed the corpus or income and has not completely repaid the loan, including any interest, before the beginning of the taxable year." I.R.C. § 675(3) (2006). According to this provision, the statute treats Edholm as the owner of any portion of the trust's assets that she borrows

from the trust for tax purposes. This provision provides support for the commissioner's determination that the trust's assets are resources that are available to Edholm because it demonstrates that Edholm retains some control over the trust.

Affirmed.