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To: Mary Alice Baker -- Springfield MEC
From: Amy Dybas – Director Member Services Policy Implementation
By: Katy Schelong, Assistant General Counsel
Date: March 26, 2014
Re: [redacted], Appeal No. 1401492

RECOMMENDATION:
All assets of the [redacted] Irrevocable Trust are countable in an eligibility determination. 130 CMR 520.023. Real estate titled in a Trust is not subject to non-countable exemptions regarding real estate. 130 CMR 520.008(A); 130 CMR 520.007(G). The Lease executed on January 23, 2014 between [redacted], individually as Lessee and [redacted] as Trustee of the Trust and Lessor is irrelevant in the applicant's eligibility determination. If the applicant provides a duly recorded deed showing the Canton real estate is titled in the applicant's name alone, the Agency should evaluate the property under relevant MassHealth regulations governing real estate. 130 CMR 520.008(A); 130 CMR 520.007(G); 130 CMR 515.012.

FACTS:
The applicant, [redacted], is [redacted] years old, a resident of a long-term care facility and applied for MassHealth long-term care benefits.

On September 24, 2003, the applicant established the "[redacted] Irrevocable Trust" (the "Trust). The applicant is the Donor and the Trustee is identified [redacted] (Trust, ¶ 1). Article 1.2 states: "The purpose of this trust is to manage my assets and to use them to allow me to live in the community for as long as possible." (Trust, ¶ 1.2). The Trust is designated as irrevocable, and the applicant has no authority to revoke or amend the Trust; however, the Trustee has authority to amend any administrative provision. (Trust, ¶ 1.3).

Pursuant to Article 2.1, the Trustee is required to distribute income to the applicant. Article 2.2 states that the applicant has the right to use and occupy any real estate in the Trust, and reserved the right to appoint any or all of the Trust property to a charitable or non-profit organization. There is no provision in the Trust concerning distributions of Trust principal during the applicant's lifetime. Article 3, concerning termination of the Trust states:

> This trust shall terminate upon the earlier of (a) my death or (b) a determination by my trustee, at its sole discretion, that the continuation of the trust would jeopardize my eligibility for assistance from any federal, state, or local governmental program, provided, however, that no distribution of the trust estate shall be made under this

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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 U.S.C. §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 C.F.R. §483.10; 42 C.F.R. §435.945(f)(4); 45 C.F.R. 164 *et seq.*; 20 C.F.R. §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).

> paragraph during my lifetime except upon review and written certification on attorney with expertise in the fields of estate planning, elder law, and public benefits that such distribution is appropriate under this paragraph and is otherwise in my best interests.

Article 4.1 states that upon termination of this trust, the Trustee is to (a) pay the trust property and undistributed income as the applicant may appoint by will; and (b) pay the balance of the trust principal in equal shares to the applicant's sons, [redacted] and [redacted]

The applicant has the power to appoint successor or additional Trustees. (Trust ¶ 5.1(b)). The applicant may also remove any Trustee by written notice. (Trust ¶ 5.2(a)). Under Paragraph 5.4, the Trustee has broad power and authority to, among other things: invest income and principal (Paragraph d); sell, mortgage, exchange, lease or otherwise dispose of any property (Paragraph e); determine what part of the trust property is income and what is principal (Paragraph h); and, to borrow or lend any amounts (Paragraph j).

Pursuant to Article 6.2, any beneficiary may disclaim his or her interest in the Trust. Article 6.3(a) states income that is payable to a person, and income or principal that in the discretion of the Trustee may be paid to a person, may be used by Trustee for that person's benefit even if the person is incompetent or under a guardianship or conservatorship. Article 6.4 reiterates the applicant's power of appointment over the Trust property.

Under Article 7.1, the Trustee has authority and discretion to pay to the applicant's estate or to the taxing authority any taxes payable by reason of the applicant's death or any other expenses arising from the applicant's death or debts of her estate.

On September 24, 2003, the applicant executed a deed transferring, for nominal consideration, the real estate she individually owned, located in Canton, MA to the Trustee of Trust. The applicant did not reserve a life estate under the deed.

On November 29, 2011 a document entitled "First Change of Appointment to the Successor Trustee and Beneficiary to the [redacted] Irrevocable Trust" was executed by the applicant as Donor and [redacted] as Trustee. By this instrument, Paragraph 4(b) of the Trust was deleted in its entirety and substituted a new Paragraph 4(b) which provides that the balance of trust principal is to be distributed only to [redacted]. If [redacted] predeceases the applicant, the balance of the trust principal shall pass to the applicant's grandson, [redacted]. The instrument also appoints [redacted] Successor Trustee if [redacted] is unable to serve as Trustee.

The MassHealth Representative received a letter from the applicant's attorney dated January 23, 2014. The attorney states she is providing a copy of a "...Lease entered into by and between the [redacted] Irrevocable Trust (Lessor) and [redacted] (Lessee) to cure the transfer of the Applicant's home." This letter also states:

> The Donor's intent in creating the Trust u/d/t September 24, 2003 was to make a complete Transfer of the property to the Trust for the future benefit of her children alive at her passing. The Donor had no intent to retain any powers or access to principle (sic) or income in connection with the property Transfer. The Trust document was

> inadvertently and incorrectly worded and did not and does not reflect the Donor's (now Applicant) intent at the time of its creation. In an attempt to cure and correct this error, the Lease has been entered into which reflects a monthly rent to the Trust in the amount of One Thousand Six Hundred and NO/100 ($1,600.00) Dollars. As stated in the Lease, all taxes, insurance, utilities and maintenance costs. Any excess monies will be applied to the PPA;..."

The attorney also provided a copy of the Lease which is dated January 23, 2014. The term of the Lease is one year, automatically renewing for successive one year terms until the Lessor and/or Lessee terminates the lease by providing written notice served by the Lessor or Lessee on the other party.

Finding the Trust fully countable, by a notice dated January 24, 2014, the Agency denied the applicant's MassHealth application for long-term care benefits due to excess assets.

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..."[2] *See also* 130 CMR 520.009 (countable income); *see generally, Matter of Addington v. Dowling*, 213 A.D.2d 1080, 1081, 624 N.Y.S.2d 499 (1995)("it has been observed that '[t]he word "needy" does not encompass a person who may create that need by failing or refusing to provide for her own needs" (citations omitted)).

The Agency too is bound by federal Medicaid law and its sub-regulatory guidance reflected in MassHealth regulations, and relevant Medicaid case law. Medicaid is a statutory program, governed by Medicaid statutes and regulations, and case law interpreting the same. Medicaid is not a program in equity and common law principles do not override Medicaid statutory provisions or the policies and purposes underpinning the program. *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) (stating 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

[2] This includes the actions of a Trustee who has a fiduciary duty to the applicant.

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 statutory intent of Medicaid is: "For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services. . . ." 42 U.S.C. § 1396. Thus, the Medicaid program is designed to provide health care for the poor. *Lebow v. Commissioner of Div. of Med. Assistance*, 433 Mass. 171, 172 (2000). Under the program, "[i]ndividuals are expected to deplete their own resources before obtaining assistance from the government." *Id.* 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 and 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 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)(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).

For Medicaid purposes, 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)[3], 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 and limiting provisions in a trust are disregarded when determining whether a trust is countable in a Medicaid eligibility determination.[4] *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

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

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 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). Nor can general trust laws and principles or general case law interpreting trusts be invoked to avoid or circumvent the Medicaid statute. *Lebow* , 172.

As applied to this matter, all assets in the [redacted] Irrevocable Trust are countable in an eligibility determination. 130 CMR 520.023; 42 U.S.C. §1396p(d). Under 42 U.S.C. §1396p(d)(2)(A), 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 the trust was created other than by Will. Here, the applicant is Donors of the Trust which she funded with her real estate; thus, this is a self-settled inter vivos trust. In accordance with 42 U.S.C. §1396p(d)(2)(B), 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 were transferred into the trust, then all assets of the trust(s) shall be considered available under federal Medicaid law.

The federal Medicaid statute provides that the countability of an applicant'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 trusts containing the assets of an applicant and/or spouse are countable in an applicant's Medicaid 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. BOH Appeal No. 1308151, 1208209, 1211060, 1217298, 1211362.

The applicant-Donor, states in Paragraph 1.2 that: "The purpose of this trust is to manage *my assets and to use them to allow me to live in the community for as long as possible*." (Emphasis added.) This establishes that the applicant is the sole, vested lifetime beneficiary of the Trust, that the assets in the Trust are hers to be used for her benefit, and the interests of anyone else identified in the Trust, including anyone named Trust, is that of, at best, a contingent beneficiary. The Trust further provides in Article 2.1 that the applicant is entitled to income distributions, which is clearly countable in an eligibility determination. [5] 130 CMR 520.023(C)(1)(a).

[5] If during the past five years income was paid to someone other than the applicant and/or added to the principal, and the principal was not countable, these would be disqualifying transfers. 130 CMR 520.023(C)(1)(c) and 130 CMR 520.019(C).

Under Article 3.1, the Trust may be terminated if its existence would jeopardize the applicant's eligibility to receive Medicaid benefits; arguably, therefore, and despite its titling, this is a revocable trust. The federal Medicaid statute dictates that for revocable trusts, "the corpus of the trust shall be considered resources available to the individual..." 42 U.S.C. §1396p(d)(3)(A)(i). 130 CMR 520.023(B)(1). MassHealth regulations further provide that real estate held in a trust that is available, is a countable asset not subject to any exemptions for real estate. 130 CMR 520.023(B)(4); 130 CMR 520.023(C)(1)(d). Even if the [redacted] Irrevocable Trust is deemed irrevocable, there are several circumstances where the value of the principal is available for the benefit of the applicant and as such is countable. 130 CMR 520.023(C); 42 U.S.C. §1396p(d); *see generally Burns v. Harris et al.* ESCV2012-02096 (April 9, 2013) (Cornetta, J.) (upholding the Agency's determination that the "any circumstances test" had been satisfied); *Montgomery v. Harris, Director of the Office of Medicaid,* BECV2012-00344 (May 8, 2013) (Kinder, J.) (upholding the Agency's finding that the assets in the applicant's self-settled nominee trust and irrevocable family trust were available and therefore countable in a Medicaid eligibility determination).

For Medicaid purposes, the countability of Trust principal is not predicated on provisions purporting to disallow distributions of principal to an applicant or the failure to include a provision stating that principal may be distributed to an applicant; rather, the whole of the instrument of Trust must be reviewed. *Doherty v. Director of the Office of Medicaid,* 74 Mass. App. Ct. 439 (2009). Moreover, provisions purporting to give a trustee no discretion to distribute principal to the applicant does not control whether the principal is countable for MassHealth purposes.[6] *Doherty*, 443. Likewise, when there are provisions in a trust that attempt to limit the Trustee's discretion to make distributions to, or on behalf of, an applicant, these are disregarded under Medicaid law, because they are meant to "defeat Medicaid ineligibility standards." *Cohen v. Comm'r of the Division of Medical Assistance,* 423 Mass. 399, 416 (1996). The disregard of a trustee's discretion and limiting provisions is also not predicated 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

[6] To the extent the applicant may cite to the case of *Guerriero v. Commissioner of the Division of Medical 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). The statute as amended applies to all trusts created after 1993. *Cohen v. Commissioner of Div. of Med. Assistance*, 423 Mass. 399, 406 (1996). 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 lifetime beneficiary of the Trust she established.

grantor had harbored a purpose distinct 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.").

Here, a review of the instrument reveals the applicant, as Donor, retained substantial control over the Trust and the assets contained therein. For example, the applicant retained a Power of Appointment, which is mentioned several times in the instrument. *See* Trust, ¶¶ 2.2, 4.1(a), 6.4. If the applicant had no interest in the Trust principal, the power of appointment would be a nullity and is further evidence of a lack of divestment by the applicant. The power of appointment also underscores that the interest of anyone other than the applicant is that of a contingent beneficiary, leaving the applicant the sole vested beneficiary of the Trust. Likewise, under Article 7, the principal may be used to satisfy the debts of the applicant's estate, taxes and other liabilities after her death. Thus, the principal is available to the applicant and may be used on her behalf.

In addition, under Paragraph 5.4, the Trustee has broad power and authority to, among other things: invest income and principal (Paragraph d); sell, mortgage, exchange, lease or otherwise dispose of any property (Paragraph e); determine what part of the trust property is income and what is principal (Paragraph h); and, to borrow or lend any amounts (Paragraph j). Thus, there is nothing precluding the conversion of the value of the principal of the Family Trust to an income producing investment such as an annuity, and pursuant to Article 2.1, the applicant is entitled to distributions of income. 130 CMR 520.023(C)(1)(a); *see also 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."). To the extent the applicant claims these are merely administrative provisions, such argument is unavailing because, among other things, general trust law and case law interpreting trusts for other than a Medicaid eligibility determination are not controlling, have no bearing on, and cannot be used to avoid Medicaid statutes. M.G.L. c. 212, §§ 3, 4; M.G.L. c. 215, § 3; M.G.L. c. 118E, §§ 1, 9A; M.G.L. c. 215, § 6; *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); *Centennial Health Care Investment Corp. v. Comm'r. of the Div. of Medical 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...."). Thus, any claim by the applicant that finding her Trust countable is contrary to general trust law should not be deemed relevant or persuasive. *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."). Here, under the Medicaid statute, the latitude given the Trustee to deal with the Trust assets, demonstrates that there are circumstances under which the value of the principal can be used for the benefit of the applicant, rendering it countable in a Medicaid eligibility determination. 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a).

Moreover, the corpus-principal of the Trust is applicant's Canton, Massachusetts home, in which she resided, and to which she has the exclusive right to "use" and occupy under Article 2.2.[7] MassHealth regulations state that real estate held in a trust that is available to the nursing facility resident or spouse is a countable asset not subject to any exemptions for real estate. 130 CMR 520.023(C)(1)(d). Similarly, given that the applicant was apparently living in the real estate held in trust until her admission to the nursing facility, the principal was actually available for her benefit, and remains so under the plain language of the Trust. 130 CMR 520.023.

An applicant cannot credibly claim that real estate held in a trust is available to her while she wants to, among other things,: (1) reside in it; (2) have full use and beneficial interest in it; (3) use countable assets to pay for expenses and taxes related to the property she purportedly does not own and is not available to her; (4) take advantage of tax credits or savings; (5) use it to pay her tax obligations upon death; and/or (6) re-direct its distribution by the power of appointment, but simultaneously claim the real estate held in the Trust is not available because she 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). *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 purported to cut off applicant's ability to access the trust principal). It is irrelevant whether or not an applicant desires or is able to continue to reside in the real estate or if a trustee chooses to exercise its discretion or authority under a trust to use the value of the principal for the applicant's benefit. The *Cohen* Court specifically and unequivocally stated that countable assets in trusts include all assets available to the applicant, while disregarding any limitation on discretion. *Cohen, supra* at 416, 418, 419-420, 424. An applicant's claim that she is only entitled to Trust income, while simultaneously claiming she is not entitled to access principal when she was living in the principal from the time it was transferred into the Trust on September 24, 2003, presumably until her admission to a facility demonstrates the incongruity of finding the Trust principal as unavailable and non-countable. Such an arrangement is an example of "having your cake and eating it too." *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").

Any suggestion that because the real estate was transferred beyond the look-back period somehow the Irrevocable Trust assets are insulated is simply wrong, and presupposes, without legal authority to make such determinations, that the Agency would have found the Trust as non-countable. *See generally* 42 USC §1396a(a)(5)(single state agency is entity charged with making Medicaid eligibility determinations); M.G.L. c. 6A § 16; G.L. c. 118E, §§ 1, 2, 7(g), 7(h); 42 CFR § 431.10; *Cohen v. Comm'r of Div. of Medical Assistance*, 423 Mass. 399, 419-421 (1996)(finding that a probate court order stating trust assets were not accessible by an applicant for Medicaid did not render those trust assets inaccessible or non-countable in an eligibility determination); *Tarin v. Comm'r Massachusetts Div. of Medical Assistance*, 424 Mass. 743

[7] If the applicant claims that the provisions of the Trust created a "life estate" in the property, such argument is unavailing and contrary to the plain language of the Trust. Moreover, a life estate in real estate is created under a deed. The applicant did not reserve a life estate in the real estate she transferred into her Trust.

(1997) (income subject to child support order was deemed available and countable to Medicaid recipient); *In The Matter of A.N.* 430 N.J.Super. 235, 63 A.3d 764 (2013) (Chancery Court lacks subject matter jurisdiction to make Medicaid eligibility determinations). *Clark v. Comm'r of Income Maintenance*, 209 Conn. 390, 551 A.2d 729 (1988) (income was subject to a Probate Court order requiring it to be paid to spouse nonetheless deemed available for Medicaid purposes). Regardless of when assets are transferred into a Trust, the Agency is obligated to determine whether any of its assets are, or were, countable when making an eligibility determination. That the applicant established and funded her Trust beyond the look-back period is irrelevant in assessing countability. 42 U.S.C. §1396p(d) *et seq.*; 42 U.S.C. §1396p(c) *et seq.*; *State Medicaid Manual* §3259.6(G)(trust rules take precedence over transfer of assets provisions).

To accept an applicant's position that the value of the principal is not available while ignoring provisions of a trust that are inconsistent would mean that federal Medicaid law governing the treatment of trusts is to be read as *any circumstances except...* This is not what the law states. That there are provisions in the applicant's trust that are at odds with each other does not change the analysis. While the *Doherty* Court stated that 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 contained an explicit provision disallowing distributions of principal to the applicant, nor is it the case in the applicant's Trust. This is because, as the Court in *Doherty* instructs, the 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 isolated trust provisions. *Doherty v. Dir. of the Office of Medicaid*, 74 Mass. App. Ct. 439 (2009). "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"). The cumulative effect of the provisions of applicant's Trust demonstrates that at all times the principal has been available to the applicant and remains so. Like *Doherty*, the applicant's instrument is drafted in a way to give the applicant as much control and access to her trust property as possible while also giving the Trustee "maximum flexibility." *Doherty*, 442.

Significantly as well, the Medicaid Act and Medicaid case law does not equate availability and countability with the right of an applicant to possession of a resource or Trust distributions. 42 U.S.C. §1396p(h)(1)("The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive..."); *see also* 130 CMR 520.007 (countable assets); 130 CMR 520.003 ("The total value of countable assets owned by *or available to individuals*..."). Rather, as federal Medicaid law and MassHealth regulations dictate, countable resources are all income and assets that must be included in an eligibility determination whether or not the resource is actually received or is subject to payment to someone else. *See generally Cohen v. Comm'r of Div. of Medical Assistance*, 423 Mass. 399, 419-421 (1996)(finding that a probate court order stating trust assets were not accessible by an applicant for Medicaid did not render those trust assets inaccessible or non-countable in an eligibility determination); *Tarin v. Comm'r Massachusetts Div. of Medical Assistance*, 424 Mass. 743 (1997) (income subject to child support order was deemed available and countable to

Medicaid recipient); *see also Clark v. Comm'r of Income Maintenance*, 209 Conn. 390, 551 A.2d 729 (1988) (income was subject to a Probate Court order requiring it to be paid to spouse nonetheless deemed available for Medicaid purposes). This is because, among other things, Medicaid is the payor of last resort and applicants are expected to deplete their resources before qualifying for benefits. 42 U.S.C. §1396p(h); 130 CMR 520.007; Medicaid Act, § 1901 *et seq.*, 42 U.S.C.A. § 1396 *et seq.; see generally* G.L. c.118E, §23 [4th para.]; *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.); *Lebow v. Comm'r of Div. of Med. Assistance*, 433 Mass. 171 (2000).

Accordingly, the value of the income and principal of the [redacted] Irrevocable Trust are countable in an eligibility determination. 130 CMR 520.023. MassHealth regulations state that the home or former home of an applicant or spouse held in trust is a countable asset and not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).

As to the letter from the applicant's attorney dated January 23, 2014, the representation that the applicant had no intention to retain any powers or access to the Trust principal or income is not supported by the plain language of the Trust. The instrument clearly states in Article 1.2 that the purpose of the Trust is to manage the *applicant's assets* and to use them to allow her to live in the community for as long as possible. Likewise, under Article 2.2, the applicant has the right during her lifetime to use and occupy any real estate held in the Trust. Further, the applicant has the right to income distributions pursuant to Article 2.1. Based on these provisions alone, it strains credulity to believe that the applicant had no intent to retain any interest in the Trust assets or that the "Trust document was inadvertently and incorrectly worded and did not and does not reflect the Donor's (now Applicant) intent at the time of its creation."[8] Rather, the letter merely confirms and effectively concedes the countability of the Trust as drafted.

With regard to the Lease between the applicant's son, [redacted] as Lessee and [redacted] as Trustee of the Trust, this instrument is irrelevant and without merit. The Agency's notice is a denial based on the countability of the Trust, and not a disqualifying transfer of resources. The Lease does not insulate the value of the real property held in the Trust. 130 CMR 520.023(B)(4); 130 CMR 520.023(C)(1)(d). The "cure" for real estate in a Trust is governed by 130 CMR 520.024, which 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

[8] The Trust and deed executed by the applicant on September 24, 2003 were apparently drafted by Attorney [redacted] If only the applicant's current attorney appears at the hearing, she cannot credibly be a fact witness or attest to what occurred at the time the Trust was created and the transfer occurred because that attorney obviously has no first hand personal knowledge of the events. In addition, the attorney's duty clearly conflicts with the obligations of a fact witness, and detracts from the credibility of an attorney purporting to act as a fact witness. *See generally* Rule 3.7 of the Rules of Professional Conduct, Comment [2] ("A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.").

> 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.

Only upon the Agency receiving a duly recorded deed showing the real estate is titled in the applicant's name alone would the Trust no longer be countable, and then the Agency would apply the relevant MassHealth regulations governing real estate.

Aside from the obvious and numerous conflicts of interest of the son as Lessor and Lessee, the countability of real estate held in a Trust is not cured by a Lease or the son paying himself as Trustee $1,600 per month for as long as he decides to keep the Lease in effect. Likewise, the close familial relationship between the applicant and the recipients, or potential beneficiaries, of the applicant's assets is a factor the hearing officer is free to consider in making the requisite credibility determination. *Number Three Lounge, Inc. v. Alcoholic Beverages Control Commission*, 7 Mass. App. Ct. 301, 309-310 (1979) (agency is the sole judge of credibility and weight of the evidence before it, and it is permissible to question intra-familial transactions and look to direct and circumstantial evidence to make a judgment and/or finding); *Andrews v. Civil Serv. Comm.*, 446 Mass. 611(2006); *Maguire v. Dir. of the Office of Medicaid* No. 82 Mass. App. Ct. 549 (2012)(Assessments of the credibility of the witnesses and the weight to be given to their testimony are matters committed to the discretion of the hearing examiner). That the expenses related to the real estate will now be paid as a result of a Lease executed on January 23, 2014 with the purported rental income merely underscores the countability of the applicant's real estate held in Trust. This is because, among other things, if the Agency or a hearing officer found the Trust principal was not countable, the Agency would have to determine the value of the applicant's assets used to maintain or pay for expenses related to the real estate owned by the Trust and purportedly not available to the applicant during the look-back period, as these would be disqualifying transfers of resources because the applicant has no duty to pay for real estate purportedly owned by the Trust. 130 CMR 520.019; *see also* POMS SI 01150.007(A)(2) (specifically providing that a transferor (applicant or spouse) does not get fair market value in return when he or she gives away cash or uses cash to purchase something for another).

If as her attorney's letter seems to suggest, the applicant believes the matter is one of a disqualifying transfer of resources, again the Lease is not a valid cure of the transfer. Federal Medicaid law and sub-regulatory guidance requires that in order for a cure to be valid, the transferred resources must be returned to the applicant. 42 U.S.C. §1396p(c)(2)(C)(iii)("...all transferred resources transferred for less than fair market value have been returned..."). The Social Security Administration's Program Operations Manual System ("POMS") provides in SI 01150.124(A)(1):

> 1. Returned Resources — General
> To meet this exception, the individual (applicant) *must reacquire the same percentage of ownership interest in the resource that existed prior to the original transfer. Reacquiring a lower ownership interest is not sufficient to meet this exception.* Merely reacquiring

> physical possession of the resource is not sufficient. It is necessary to reacquire legal ownership. (Emphasis added).

Likewise, the Code of Federal Regulations dictates that the return of transferred resources is not cured through a purported income stream. 20 C.F.R. §416.1246(2) "If the transferred resource (asset) is returned to the individual...No income will be charged as a result of such returns...). Accordingly, the Lease is irrelevant as to the countability of the Trust and any purported cure.[9]

Unless and until the applicant provides a duly recorded deed showing the Canton real estate is titled in the applicant's name alone, the real estate in the Trust is countable, the applicant is not eligible due to excess assets, and other issues are not ripe for consideration by the Agency or a hearing officer. 130 CMR 520.023(c)(1)(d); 130 CMR 520.024(C); 130 CMR 520.019(K).

[9] If the applicant is seeking to invoke the 130 CMR 520.008(D), such claim is without merit. 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. The property is not the applicant's business property because it is not titled in her name and she is not engaged in any business. There is no evidence the applicant files Business Tax Returns, including a Schedule C, Profit or Loss from Business or Profession. Thus, the property is not used in the applicant's "trade or business." SI 01130.500; SI 01130.501. The mere fact real estate may be rented is not enough to satisfy 130 CMR 520.008(D) and automatically convert it 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 the property provides the applicant a 6% return on the value of the resource; thus, there is no evidence supporting that it would not be exempt even if it were titled in her name as opposed to the Trust. 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)..."). Likewise, the operative language is that the property is "essential to self-support." It is unclear how an applicant residing in a nursing home and applying for MassHealth long-term care benefits is attempting to be self-supporting. 130 CMR 520.008(D)(8).