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To: JoAnn Araujo Moniz – Taunton MEC
From: Amy Dybas – Director Member Services Policy Implementation
By: Katy Schelong, Assistant General Counsel
Date: September 20, 2014
Re: [redacted] Appeal No. 1408932

SUMMARY:
The [redacted] real estate titled in the [redacted] Trust is countable in an eligibility determination. 42 U.S.C. §1396p(d); 130 CMR 520.023.

Under an application of the Medicaid statute governing the treatment of self-settled inter vivos trusts, the applicant and spouse are the Grantors of the Nominee Trust. The applicant and spouse are the Trustees of the Nominee Trust. The Schedule of Beneficiaries, which under Paragraph 4 may be revised, designates the [redacted] Income Only Trust as holding 100% of the beneficial interest in the Nominee Trust. The Schedule was executed by the applicant and spouse as Trustees of the Nominee Trust, and was "approved by" the applicant and spouse as Trustees of the Irrevocable Trust. Paragraph 7 dictates that the Trustees of the Nominee Trust are to take direction from the applicant and her husband as Trustees of the Irrevocable Trust.[2] Under Paragraph 3, the Nominee Trust may be terminated by any *one* Beneficiary of the Irrevocable Trust *or* the Trustees of the Nominee Trust. Pursuant to Paragraph 2, with direction from the applicant and spouse as Trustees of the Irrevocable Trust, the Trustees of the Nominee Trust may transfer or dispose of the Nominee Trust property. Paragraph 6 allows the Nominee Trust to be amended. Arguably the Nominee Trust is revocable by the applicant and community spouse, and assets in a revocable trust are fully countable. 42 U.S.C. §1396p(d)(3)(A)(i); 130 CMR 520.023(B). Even if considered an irrevocable trust, these provisions are circumstances under which the Nominee Trust assets are available and countable. 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a).

MassHealth regulations dictate that the home or former home of a nursing-facility resident or spouse held in a revocable or irrevocable trust that is available according to the terms of the trust is a countable asset. 130 CMR 520.023(B)(4); 130 CMR 520.023(C)(1)(d). If the applicant provides a duly recorded deed showing the [redacted] real estate has been removed from the Nominee Trust and titled in the applicant's and/or community spouse's name, MassHealth should evaluate the real estate under relevant MassHealth regulations concerning real estate. 130 CMR 520.008(A); 130 CMR 520.007(G); 130 CMR 515.012.

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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).
[2] The applicant and her husband are also the Donors and Beneficiaries of the Irrevocable Trust.

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FACTS:

The applicant, [redacted], is 77 years old, a resident of a nursing care facility and applied for MassHealth long-term care benefits. The applicant's husband, [redacted] is apparently living in the community.

By a deed dated April 26, 2006, the applicant and his wife transferred, for no consideration, their real estate located at [redacted] Massachusetts to themselves as Trustees of the [redacted] Nominee Trust. The applicant and his wife reserved life estates under this deed as well as Declarations of Homestead.

On April 26, 2006, the applicant and his wife established the "[redacted] Nominee Trust" (the "Realty Trust"). The applicant and his wife are the Trustees. Under Article 2, the Trustees may act at the direction of the Beneficiaries, and with such direction may assign, transfer, sell, mortgage or otherwise dispose of any part or all of the trust property. Paragraph 3 states: "This Trust may be terminated at any time by the Beneficiaries or any one of them (if there should be more than one), by a notice in writing to the Trustees, or by the Trustees notice in writing to the current Beneficiaries..." Paragraph 4 allows for revisions to the Schedule of Beneficiaries. Paragraph 6 states that the Nominee Trust may be amended by the Trustees and "all of the current" Beneficiaries. Paragraph 7 provides that: "If any Beneficiary listed in the aforesaid Schedule of Beneficiaries is a Trust, the rights and powers of said Beneficiary shall be exercised by all of the Trustees under said Trust or by such of them as are empowered by the Trust instrument to act on behalf of the Trust."

The Schedule of Beneficiaries designates the [redacted] Irrevocable Income Only Trust as holding 100% of the beneficial interest in the Nominee Trust. The Schedule was executed by the applicant and her husband as Trustees of the Nominee Trust, and "approved" under the signatures of the applicant and her husband as Trustees of the Irrevocable Trust.

The applicant and her husband established the "[redacted] Irrevocable Income Only Trust" (the "Irrevocable Trust") on April 26, 2006. The applicant and her husband are the Donors and Trustees. Pursuant to Article 2, the applicant and her husband are Beneficiaries of the Irrevocable Trust during their lifetimes, and are entitled to income distributions. Under Article 3.1(a), the applicant and her husband retained a Power of Appointment over Trust assets. In accordance with Article 4, the applicant and spouse may appoint and remove Trustees. Pursuant to Article 4.4, the Trustees have broad power and authority over Irrevocable Trust assets. Article 6.2 defines the Irrevocable Trust as a "grantor trust," and pursuant to Article 6.3, the applicant and her husband may reacquire Irrevocable Trust principal by substituting property of an equivalent value.

The legal unit has no evidence that there are any assets in the Irrevocable Trust.

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, and the community spouse is allocated a community spouse resource allowance. 130 CMR 520.003(A)(1); 130 CMR 520.016. 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.).

Likewise, the Agency 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 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); 130 CMR 610.082(C)("The decision must be rendered in accordance with the law."). The state Medicaid statute and regulations are to be construed as showing a primary intent that the MassHealth agency comply with federal law in order to receive federal financial reimbursement. *Youville Hospital v. Commonwealth,* 416 Mass. 142, 146 (1993); *Cruz v. Commissioner of Public Welfare,* 395 Mass. 107, 112 (1985); *see also* G.L. c. 118E, § 11; 130 CMR 515.002(B). The MassHealth regulations themselves make this point. "These regulations are intended to conform to all applicable federal and state laws and will be interpreted accordingly." 130 CMR 515.002(B). *See also* 130 CMR 520.018; 130 CMR 520.021. In particular, federal law provides that the federal agency administering Medicaid can deny some of the federal funding to a state if the state commits eligibility errors that exceed a specified threshold. 42 U.S.C. §1396b(u). As the single state agency, MassHealth is charged with ensuring that all federal and state laws that govern the Medicaid program are followed. *See generally* 42 U.S.C. § 1396 (setting forth Medicaid's purpose to provide medical assistance "on behalf of" those "whose income and resources are insufficient to meet the costs...."); G.L. c. 6A, § 16 (designating the Agency as the state Medicaid entity charged with developing policies and programs to implement shared federal-state program); G.L. c. 118E, §§ 1, 2, 7(g), 7(h). Thus, MassHealth's interpretation and implementation of Medicaid law must be undertaken in light of both the federally mandated purpose of the Medicaid program and the clear federal policies supporting that mandate. *See generally Alves Case,* 451 Mass. 171, 182 (2008) (internal citations omitted) (reaffirming principal of deference to agency especially where agency acts based on its policy expertise); *Dowell v. Comm'r of Transitional Assistance,* 424 Mass. 610, 613 (1997). Since Medicaid is a statutory program, it cannot be trumped by common law, state law or equitable principles.

The Medicaid program is designed to provide health care for the poor 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. Assist.,* 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. Assist.*, 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. Assist.*, 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 Sands v. Commonwealth of Massachusetts, EOHHS, Office of Medicaid* SUCV2013-3537-A, p.p. 8, 9 (April 28, 2014) (Wilkins, J.) (The Court found unpersuasive Plaintiff's citations to trust cases unrelated to the interpretation of self-settled inter vivos trusts under the Medicaid statute); *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."); *see also generally 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.").

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)[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. Assist.* 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. Assist.*, 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. Dir. 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. Assist.*, 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*

[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 seek to cut off discretion in order to render trust assets not countable. *See In re Ruby Owen*, 2012 Ark. App. 381 (2012); *Roscoes v. County of Carver*, 783 N.W.2d 220, 225 (2010); *Vincent v. Department of Human Services*, 331 Ill. Dec. 314, 322 (2009).

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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). Likewise, a trust does not have to explicitly reference Medicaid eligibility in order to fall within the strictures of Medicaid law. *Lebow v. Comm'r of Div. of Med. Assist.*, 433 Mass. 171, 177 (2000); 42 U.S.C. §1396p(d)(2)(C)(i)(without regard to the purpose the trust was established); *see also generally Bisceglia v. Comm'r Massachusetts Div. of Med. Assist.*, 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 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.").

As applied to this matter, the real estate in the [redacted]Nominee Trust is countable in a Medicaid 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, on April 26, 2006, the applicant and his wife established the Nominee Trust and funded it with their [redacted] Massachusetts real estate. [5] Thus, this is a self-settled, inter vivos trust. 42 U.S.C. §1396p(d)(2)(B) dictates that the portion of the Trust attributable to the assets of the applicant shall be considered available. When, as here, only the assets of the applicant and/or spouse were transferred into a trust, then all assets shall be considered available under federal Medicaid law.

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[5] Any suggestion that because the real estate was transferred beyond the look-back period somehow the Trust assets are forever 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 Med. Assist.*, 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 Med. Assist.*, 424 Mass. 743 (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 an applicant and/or spouse established and funded a 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).

The federal Medicaid statute provides that the countability of an applicant's (or spouse's) self-settled inter vivos Trust(s) is made without regard to, among other things, whether the Trustees "have or exercise any discretion under the trust" and "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 (or spouse) are 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.

Despite the failure to identify them as such, under Medicaid law, the applicant and her husband are the Grantors of the Nominee Trust. 42 U.S.C. §1396p(d)(2)(A). The applicant and her husband are the Trustees of the Nominee Trust. *See* Nominee Trust, ¶ 1. Although there are specific provisions allowing the Trustees of the Nominee Trust to act on their own accord, as a general matter the Trustees of the Nominee Trust are to act at the direction of the Beneficiaries of the Nominee Trust. *See* Nominee Trust, ¶ 2; Nominee Trust, ¶ 3(Trustees of Nominee Trust have authority to terminate the Nominee Trust).

Paragraph 7 states: "If any Beneficiary listed in the aforesaid Schedule of Beneficiaries is a Trust, the rights and powers of said Beneficiary shall be exercised by all of the Trustees under said Trust or by such of them as are empowered by the Trust instrument to act on behalf of the Trust." The Schedule of Beneficiaries for the Nominee Trust designates the [redacted] Irrevocable Income Only Trust as holding 100% of the beneficial interest in the Nominee Trust. The applicant and her husband are the Trustees of the Irrevocable Trust and approved the Schedule of Beneficiaries in that capacity. In accordance with Paragraph 7 of the Nominee Trust, the direction of the Beneficiaries of the Nominee Trust to the Trustees of the Nominee Trust is to be provided by the applicant and her husband as Trustees of the Irrevocable Trust. Thus, the applicant and her husband, either as Trustees of the Nominee Trust or as Beneficiaries of the Nominee Trust and Trustees of the Irrevocable Trust, have full control and authority over the Nominee Trust and real estate contained therein.

As a result, the applicant and her husband may, among other things: (1) pursuant to Paragraph 6, amend the Nominee Trust; (2) under Paragraph 4, revise the Schedule of Beneficiaries inherent in which is the power to designate themselves individually as the Beneficiaries of the Nominee Trust; (3) pursuant to Paragraph 2, transfer, including to themselves, the Nominee Trust property; and, (4) terminate the Nominee Trust under Paragraph 3 as: (a) Trustees of the Nominee Trust or (b) pursuant to an application of Paragraph 7, as the current Beneficiaries of the Nominee Trust in their capacity as Trustees of the Irrevocable Trust. Pursuant to Paragraph 3, if the Nominee Trust is terminated, the Trust assets are to be transferred to the Beneficiaries designated on the Schedule of Beneficiaries, or to the Beneficiaries on any revised Schedule of Beneficiaries. Accordingly, the [redacted] Nominee Trust is revocable by the applicant and her husband because they can regain the property they transferred into the Nominee Trust. 130 CMR 520.023(B); 130 CMR 515.001 (Revocable Trust is defined as "a trust whose terms allow the grantor to take action to regain any of the property or funds in the trust."). *See also generally* BOH No. 1401264. Federal Medicaid and MassHealth regulations provide that the

assets in a revocable trust are countable. 42 U.S.C. §1396p(d)(3)(A)(i); 130 CMR 520.023(B); 130 CMR 520.023(B)(4) ("The home or former home of a nursing-facility resident or spouse held in a revocable trust is a countable asset...").

Even if the Nominee Trust were considered irrevocable, each of the provisions discussed *supra* are circumstances under which the real estate can be made available to or for the benefit of the applicant and spouse.[6] 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a); *see also* 130 CMR 520.023 ("...resources held in a trust are considered available if under *any circumstances* described in the terms of the trust, any of the resources *can be made available to the individual.*"). (Emphasis added). MassHealth regulations provide: "(d) The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8)."

Since the Nominee Trust in and of itself is countable, and there is no evidence there are any assets in the Irrevocable Trust, there is no need to examine the terms of the [redacted] Irrevocable Trust.[7]

Pursuant to 130 CMR 520.024(C) , if the applicant provides a duly recorded deed showing the [redacted] real estate has been removed from the Nominee Trust and titled in the applicant's name and/or the community spouse's name, MassHealth could evaluate the property under relevant MassHealth regulations concerning real estate. 130 CMR 520.008(A); 130 CMR 520.007(G); 130 CMR 515.012.

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[6] The Medicaid Act and Medicaid case law does not equate availability and countability with the right of an applicant to receive distributions of trust principal or possession of an asset. 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 Med. Assist.*, 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 Med. Assist.*, 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 the 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. Assist.*, 433 Mass. 171 (2000).

[7] Even if such examination were to occur, under an application of federal Medicaid statute, Medicaid case law and MassHealth regulations to the terms of the Irrevocable Trust, there are circumstances under which both the income and principal are, or can be made, available to or for the benefit of the applicant and community spouse. 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a); 130 CMR 520.023(C)(1)(d). *See* Irrevocable Trust Articles 1.2, 2, 3.1(a), 4.1, 4.2(a), 4.4(d), 4.4(e), 4.4(j), 4.6, 4.9, 5.2, 5.3, 5.4, 6.2, and 6.3.