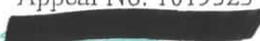


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REQUEST FOR REHEARING

TO: Executive Office of Health and Human Services
Office of Medicaid
Julian Harris, Director
FROM: John J. McNicholas, Esq.
DATE: October 3, 2011
RE: Appeal No. 1019523


The above-referenced Appeal was filed on 10/7/10 and heard on 1/13/11. The Decision is dated 9/21/11. Appellant's application was denied for a disqualifying transfer of assets and this was the sole issue at the Hearing. At the close of the Hearing, the Hearing Officer directed MassHealth Legal to "Brief arguments re: trigger event for transfer, when did it occur." Pursuant to a Record Open Notice MassHealth Legal was given until 2/24/11 to do so and Appellant's Counsel was given until 3/25/11 to respond. MassHealth's submission and Appellant's Response were both timely filed.

The case involves a transfer of the applicant's home to a Trust in 1992 reserving to herself a life estate. The applicant was the Grantor and original Trustee and her two children were the beneficiaries. The applicant resigned as Trustee in December, 2006 and there was medical evidence submitted at the Hearing confirming that the applicant was incapacitated in 2004 and therefore, by the terms of the Trust, could no longer act as Trustee.

The MassHealth submission was a legal opinion substantially similar in form to what would be rendered upon request from the case worker at the Taunton MEC during the eligibility process. In its opinion, MassHealth agreed with Appellant's counsel that the transfer to the Trust took place in 1992, beyond any applicable look back period and thus not subject to the imposition of a penalty period. That issue being resolved with the rescinding of the denial and resulting penalty period as more fully set forth in the Hearing Decision, the Hearing Officer DISMISSED the original issue on appeal.

The Appellant is not requesting a Re-Hearing on that issue.

THE ISSUE:

The MassHealth legal opinion raised a new issue claiming that the Trust in question was a Medicaid Qualifying Trust (MQT) and therefore the remainder interest in the applicant's home held by the Trust was a countable asset. In the absence of any oral argument, the entire matter was decided by the Hearing Officer's review of the Trust document, the MassHealth legal opinion and the Appellant's Response.

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The facts are not in dispute:

- The applicant created a Trust in 1992.
- The applicant was the Grantor and Trustee.
- Her two children were the beneficiaries.
- The applicant deeded her home to the Trust in 1992 reserving to herself a life estate.
- At some point the applicant ceased to be the Trustee either through incapacity (2004) or written resignation (2006).
- The applicant's daughter became, and still is, the Trustee.
- The Trust document speaks for itself.

A Hearing decision must be rendered in accordance with the law 130 CMR 610.082(C). This case is controlled and must be decided by applicable trust law and rules of construction. The Hearing Officer failed to consider or even acknowledge basic trust law, choosing instead to embrace and elaborate upon MassHealth's unsubstantiated assertion that the Trust (1) is revocable; (2) is a Medicaid Qualifying Trust, and (3) the Trustee can amend the Trust to name the applicant as beneficiary, then terminate the Trust and distribute the Trust asset back to the applicant.

This decision is contrary to the law in all three (3) regards as follows:

1. The Trust in this case is not revocable. The powers and duties retained by the Grantor are separate and distinct from those given to the Trustee, even if they are one and the same person. Any discretionary power given to a Trustee runs with the office and is not personal to whoever may be serving as Trustee.

- only the Grantor can revoke ("To annul or make void by recalling or taking back, cancel, rescind, repeal, reverse" Black's Law Dictionary) the Trust and only if he or she reserves the power to do so in the Trust instrument
- a Trustee may be given, as in this case, the power to terminate ("to put an end to; to make to cease; to end" Black's Law Dictionary) the Trust but must then distribute the assets to the beneficiaries
- if the Grantor does not retain the power to amend or revoke, the trust is irrevocable
- the Trustee's power to terminate is not the same as the Grantor's power to revoke and does not in this case result in a return of the asset to the Grantor
- the MassHealth regulations properly define a revocable trust as "... a trust whose terms allow the grantor to take action to regain any of the property or funds in the Trust" 130 CMR 515.001 (Emphasis added)

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- it is not “disingenuous hair splitting” to understand and correctly apply the law to the language of the trust instrument and to properly distinguish between the Grantor and the Trustee

The Hearing Officer’s conclusion that the Trust is revocable is contrary to the law and the MassHealth regulations.

2. The trust in this case is not a Medicaid Qualifying Trust (MQT):

- a MQT is “a revocable or irrevocable trust ... funded by the individual ... under which the individual is a beneficiary ...” and the trustee has any discretion to distribute trust property to the individual as a beneficiary ...” (Emphasis added)
- the applicant is not, and never has been, a beneficiary of the trust so the maximum amount of the trust assets that may be distributed to the applicant assuming the full exercise of the trustee’s discretion is zero.
- if the applicant is not a beneficiary of the trust it cannot by definition be a MQT.

3. The broad power to amend given to the Trustee does not allow the Trustee to change the Trust beneficiary without breaching her fiduciary duty.

- a trustee holds assets for the sole benefit of the beneficiaries
- in order to be a MQT the applicant must be a beneficiary
- the broad discretionary administrative powers given to the Trustee must be exercised solely in the interest of the beneficiaries
- the Hearing Officer’s conclusion that “the trustee had the discretion conferred by the ... trust instrument to ... change the Schedule of Beneficiaries ...” is completely erroneous
- the misapplication of the language of the Cohen case to this false conclusion is further error
- a finding that the trust asset is countable would require the return of the property to the applicant in order to establish MassHealth eligibility
- this would require the Trustee to breach her fiduciary duty to the beneficiaries by making the applicant the beneficiary, thereby giving away that which was irrevocably entrusted to her for their sole benefit and exposing the Trustee to civil liability

Where the sole issue on appeal is whether or not the trust is a MQT, the Decision hinges on a proper interpretation of the Trust document. In order to render a Decision in accordance with the law, the Hearing Officer must fully understand basic trust law, the fiduciary relationship among the grantor, the trustee and the beneficiary and be able to distinguish between the powers and duties reserved to the grantor and those given to the trustee.

This Decision closely tracks the unsubstantiated conclusions expressed in the MassHealth legal opinion and dismisses out of hand the well-settled rules of construction and trust law set forth in the Restatement of Trusts and other authorities cited in the Appellant's Response. The Decision fails to address the trustee's fiduciary duty to the beneficiaries and the Hearing Officer's analysis misapplies the "peppercorn" language of the Cohen case (which is clearly distinguishable on its facts) conveniently substituting "applicant" for "beneficiary" in order to justify her conclusion.

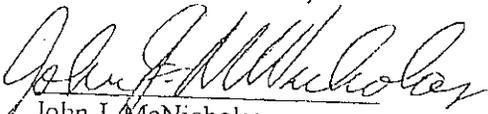
The conclusions of law drawn by the Hearing Officer in this case

- that the trust is revocable
- that the trustee can change the beneficiary
- that the trust is a MQT
- that the trust asset is countable for MassHealth eligibility

are all contrary to the law and the applicable MassHealth regulation.

Pursuant to the provisions of 130 CMR 610.091, the Appellant respectfully requests a Rehearing.

Respectfully submitted,


John J. McNicholas
Attorney for [REDACTED]