

Re: [REDACTED] Appeal No. 1019523

Appellant's Response to MassHealth Legal Opinion

[REDACTED]'s MassHealth application seeking eligibility for long term care benefits was denied on September 8, 2010 for a disqualifying transfer of assets. A timely Appeal was filed and a Hearing on that issue was held at the Taunton MEC on January 13, 2011.

THE ORIGINAL ISSUE: The date the transfer took place and the applicable penalty period.

The evidence introduced by MassHealth and the Appellant at the Hearing produced the following uncontested facts:

1. [REDACTED] is the grantor/settlor of the [REDACTED] Realty Trust which she executed on February 20, 1992. The trust document is part of the Record.
2. The grantor/settlor did not reserve the power to revoke or amend the trust in the trust instrument.
3. The Schedule of Beneficiaries of the trust signed by the grantor/settlor on February 20, 1992 names [REDACTED] (50%) and [REDACTED] (50%) as beneficiaries of the trust.
4. By Deed dated February 20, 1992, [REDACTED] conveyed her home to the trust reserving to herself a life estate.
5. The trust and deed were recorded with the Barnstable Registry of Deeds on February 20, 1992 in Book [REDACTED], Pages [REDACTED] and [REDACTED].
6. A four-page narrative from Dr. Walter T. Rymzo, Jr. documents [REDACTED] medical history between July 18, 1995 and October 2, 2009 and indicates that she was incapacitated in July, 2004.
7. [REDACTED] executed a written resignation as trustee on December 6, 2006.
8. The trust (Article 10.) provides that the trustee may alter, add to, amend or terminate the trust. Upon termination the trustee is required to distribute the trust property to the beneficiaries. (Article 9.)

The MassHealth representative stated that a disqualifying transfer of assets took place in December 2006 when [REDACTED] resigned as trustee. Neither the case worker nor her supervisor referred the case to the legal unit for an opinion. Counsel for the Appellant argued that the transfer took place in 1992 when the trust and deed were signed, well beyond the applicable look-back period. To the extent that the Hearing

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Officer agreed with MassHealth's position as expressed at the Hearing, Appellant's medical evidence proved that [REDACTED] was incapacitated in July, 2004 and therefore pursuant to Article 8. of the trust, vacated the office of trustee at that time.

At the close of the Hearing, pursuant to 130 CMR 610.065(B)(11), the Hearing Officer directed MassHealth Legal to brief arguments as to when the transfer occurred, the Begin Date of any applicable penalty period and the regulation relied upon in its determination. Within the time allowed in the Record Open Notice MassHealth Legal Counsel has instead submitted a legal opinion addressed to the MassHealth case worker in a form consistent with what could have been provided during the eligibility process. The legal opinion states that the conveyance of the remainder interest to the trust took place in 1992, "beyond the look-back period for assessing penalty periods for transfers for less than fair market value", that the "notice assessing a penalty period based on the applicant's resignation as trustee was incorrect" and that the Agency should "rescind the notice of a disqualifying transfer". The agreement of the parties that there is no disqualifying transfer is dispositive of that issue and the Hearing Office should so rule.

THE NEW ISSUE: Whether this a Medicaid Qualifying Trust making the assets in the trust countable.

The MassHealth legal opinion takes the position that the trust is a Medicaid Qualifying Trust (MQT) and therefore the remainder interest in the real estate held by the trust is a countable asset in the eligibility determination.

Rather than engage in the protracted procedural process of remand to the Agency to rescind the notice of disqualifying transfer and issue a new denial for excess assets which denial would then be appealed and bring us back to exactly where we are now, (but many months later) this response will address the new issue raised by the MassHealth legal opinion. Appellant respectfully requests that the Hearing Officer render a final decision on this issue.

ANALYSIS AND LEGAL ARGUMENT:

Countable assets are all assets that must be included in the determination of eligibility. The countable value of the principal and income of a revocable or irrevocable trust is determined in accordance with the regulations at 130 CMR 520.021 through 520.024. Since the [REDACTED] Realty Trust was created before August 11, 1993, the regulations at 130 CMR 520.022(A)&(B) are applicable to the present case and provide as follows:

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

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The [REDACTED] Realty Trust is not a revocable trust. The applicable regulations at 130 CMR 515.001 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. The grantor is defined as an individual or spouse who creates a trust. In this case, [REDACTED] established the subject trust with her property. She is the grantor/settlor of the trust. If the settlor does not by the terms of the trust reserve the power to alter, amend or revoke it, he or she cannot do so. Restatement 2d Trusts §331(2) and §330(2). Therefore, by definition at 130 CMR 515.001 and as a matter of law, this trust is irrevocable.

MassHealth now contends that this is a Medicaid Qualifying Trust and that the remainder interest in the property held by the trust is therefore countable. This is simply not true. The applicable regulations at 130CMR 520.022(B)(1) define a Medicaid Qualifying Trust:

(B) Medicaid Qualifying Trust

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

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

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

(Emphasis added.)

[REDACTED] is not a beneficiary of all or part of the discretionary or required payments or distributions from the trust. The [REDACTED] Realty Trust does not fall within the definition of a Medicaid Qualifying Trust and therefore the property interest it holds is not countable pursuant to this regulation. The Appellant should prevail on this issue.

However, after acknowledging that [REDACTED] is "not currently named as a beneficiary of the trust" the MassHealth legal opinion advances the specious argument that the language of Article 10, allowing the trustee to alter or amend the trust gives the trustee the "authority and discretion to designate the applicant as the beneficiary of [the] trust". The legal opinion cites no authority for this conclusion while basic trust law and rules of construction found in the Restatement of Trusts 2d and 3d, as well as numerous cases, are overwhelmingly to the contrary.

[REDACTED] created and funded the trust with a conveyance of her own property, named herself as trustee, her daughter as successor trustee and designated her daughter and son as the beneficiaries. Had the grantor/settlor reserved an unrestricted power to amend the trust she would have been able to make such modifications as changing the

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powers and duties of the trustee, diminishing or increasing the beneficiaries' interests or substituting beneficiaries. 2 Belknap, Newhall's Settlement of Estates and Fiduciary Law in Massachusetts §21.161 (5th ed. 1997) However, she did not, thus irrevocably giving up all such rights. The fact that [REDACTED] retained a life estate in the property, with all its legal rights and benefits, further underscores the fact that she intended to irrevocably transfer the remainder interest for the sole benefit of the named beneficiaries.

While MassHealth asserts that "there is no provision in the trust that precludes the applicant from being named as the sole beneficiary" the instrument provides no specific authority or mechanism for doing so. This begs the larger question of who, if anyone, has the right to change the beneficiary of an irrevocable trust? The rules of construction and cases cited below make it clear that the broad administrative power to amend or alter the [REDACTED] Realty Trust does not give the trustee the authority to change the beneficiary.

Any trustee serves in a fiduciary capacity with an absolute duty of good faith and loyalty to the beneficiaries and an obligation to carry out the terms of the trust as directed by the settlor. A trustee has a duty to administer the trust solely in the interest of the beneficiaries. Restatement 3d Trusts § 78(1). It has often been said that the requirements of undivided loyalty and its mandates are so fundamental to trust fiduciary law that they are unyielding and not to be eroded by exceptions. While acknowledging some qualifications to the general rule the Restatement goes on to say that these qualifications or exceptions do not eliminate the trustee's duty to act fairly, in good faith and in the interest of the beneficiaries. §78 Comment b. and c.

The trustee of a trust has only such power to terminate the trust or to change its terms as is granted by the terms of the trust. Restatement 3d Trusts §64(1). Unless otherwise provided by the terms of the trust, a power of termination or modification that runs with the office of trustee is held by the trustee in a fiduciary capacity. §64 Comment b. A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control...to prevent...abuse of discretion by the trustee. Restatement 3d. Trusts §50(1). An abuse of discretion occurs when a trustee, even in good faith, exercises a power in a manner that is inconsistent with the duty of loyalty. Restatement 3d Trusts §87 Comment c.

The trustee of the [REDACTED] Realty Trust has an absolute duty of loyalty and a fiduciary obligation to the beneficiaries of the trust. The broad administrative power to alter or amend the trust does not allow the trustee to change the beneficiaries. For the trustee to give away that which has been irrevocably entrusted to her by the settlor would be a complete violation of her duty of loyalty to the beneficiaries and a breach of her fiduciary obligations.

These basic tenets of trust law and construction are supported by the courts which have consistently applied the highest fiduciary standards to cases involving a trustee's discretionary power to affect the beneficial interest of the trust. Broad discretionary

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powers must be exercised in accordance with fiduciary standards. In Copp v. Worcester County National Bank (1964) 347 Mass 548, 199 NE2d 200 the Court stated that the power given to the trustee is not unrestricted if the trustee unreasonably disregards usual fiduciary principles or the purposes of the trust. The power is to be exercised after serious and responsible consideration, prudently and in accordance with fiduciary standards. Even where the trust instrument seemed to allow the trustee uncontrolled discretion in determining the extent of the beneficiaries' interest in the trust, the Court held that the trustee's discretion was limited by the fiduciary obligations inherent in a trustee-beneficiary relationship. Ventura v. Ventura (1990) 407 Mass.724, 555 NE2d 872.

In Upham v. Siskind (1983) 16 Mass App. 588, 453 NE2d 1065 the trustee's "sole and absolute discretion" in determining the values of residuary shares was held to be limited to the extent that the exercise of discretion must be consistent with the settlor's intent. Perhaps most on point and dispositive of the issue is Old Colony Trust Co. v. U.S. (1st Cir. 1970) 423 F.2d 601 in which the Federal Court adopted the Massachusetts rule set forth in Old Colony Trust Co v. Silliman (1967) 352 Mass 6, 223 N.E.2d 504 that broad discretionary administrative powers must be exercised in accordance with fiduciary standards and not for the purpose of shifting beneficial interests.

It is clear from the Restatement and case law that the trustee's broad discretionary power to alter or amend the [REDACTED] Realty Trust, when exercised in accordance with fiduciary standards, does not give the trustee authority to change the beneficiary of the trust. To do so would be an egregious breach of the trustee's fiduciary duty of loyalty to the beneficiaries and completely undermine the clear intent of the settlor.

CONCLUSION

In 1992 [REDACTED] conveyed her home to an irrevocable trust of which she was the grantor and original trustee and named her son and daughter as the beneficiaries. In the deed to the trust [REDACTED] reserved to herself a life estate preserving an ownership interest in her home for the rest of her life.

Since the grantor did not reserve the power to amend or revoke the trust the conveyance by [REDACTED] to the trust was complete and final. It was exactly as if she had conveyed the remainder interest in the property outright to her two children. [REDACTED] is not a beneficiary of the [REDACTED] Realty Trust so it is not a Medicaid Qualifying Trust as defined in the regulations at 130 CMR 520.022(B)(1). Therefore, the remainder interest in the property at [REDACTED], MA held by the trust since 1992 is not a countable asset.

MassHealth's unsubstantiated assertion that [REDACTED] could somehow become the sole beneficiary of the trust has no merit. The trustee of the [REDACTED] Realty Trust has absolutely no authority under the terms of the instrument or applicable trust law to

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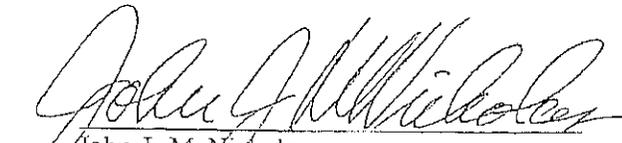
name [REDACTED] as the sole beneficiary of the trust. For the trustee to do so would be the ultimate breach of fiduciary duty. [REDACTED]'s two children have been the equitable owners of the remainder interest in the property, as she intended, for over nineteen years. There is no law or MassHealth regulation that would compel them to return the property to her. For MassHealth to suggest a breach of fiduciary duty on the part of the trustee is unconscionable.

[REDACTED] has been eligible for MassHealth since February 23, 2010 and the facility providing her care deserves to be paid. Appellant respectfully requests that the Hearing Officer find that:

- there is no disqualifying transfer or penalty;
- the [REDACTED] Realty Trust is not a Medicaid Qualifying Trust;
- the asset in the trust is therefore not countable;
- [REDACTED] is eligible for MassHealth.

Appellant further requests that the Agency be ordered to approve the case, establish the appropriate start date and place a lien on the applicant's life estate interest in the property.

Respectfully submitted,


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