

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
OFFICE OF MEDICAID
BOARD OF HEARINGS

Appeal No. 1407381

[REDACTED] v. Office of Medicaid

Appeal No. 1409671

[REDACTED] v. Office of Medicaid

AFFIDAVIT OF STEVEN WEISS

Now comes Steven Weiss, Esquire ("Affiant") and submits this affidavit as an expert opinion on behalf of [REDACTED], as co-Trustees of the [REDACTED] Irrevocable Trust and the [REDACTED] Irrevocable Trust (referred to herein as the "Trusts").

1. Affiant is a shareholder of the law firm of Shatz, Schwartz and Fentin, P.C., with an address of 1441 Main Street, Springfield, Massachusetts 01103. I am admitted to practice before the Supreme Judicial Court of Massachusetts, the United States District Court for the District of Massachusetts, and the Court of Appeals for the First Circuit. I am a member of the American Bankruptcy Institute, the National Association of Bankruptcy Trustees, the Massachusetts Bar Association, and the Hampden County Bar Association. I am also a member of the standing committee on Local Rules for the Massachusetts Bankruptcy Court.
2. My educational background is as follows. I attended Massachusetts Institute of Technology from September 1976 to December, 1977. I attended Michigan State University from September, 1978 to June, 1980, and received a Bachelor of Arts degree at

that time. I attended Boston University School of Law and received a Juris Doctor degree in 1984.

3. My professional background is as follows. From August, 1984 to July, 1986 I served as a law clerk to the Hon. Arthur J. Spector, Bankruptcy Judge for the Eastern District of Michigan. From August, 1986 through February, 1994 I was an associate, and then a shareholder at the firm of Cooley, Shrair, P.C. (f/k/a Cooley, Shrair, Alpert, Labovitz & Dambrov, P.C.), located in Springfield, Massachusetts. From February, 1994 to present I have been at my current firm. When I joined in 1994 I was initially "of counsel", but have been a shareholder since approximately 1996.
 4. I have been on the panel of Chapter 7 Trustees for Region 1 of the United States Trustee program since 1987. I have also been appointed to serve as a Chapter 11 trustee in a number of cases, and I am the Chapter 12 Trustee for cases filed in central and western Massachusetts.
 5. In addition to my service as a bankruptcy trustee, my practice consists primarily of representation of parties in bankruptcy, insolvency and reorganization matters. My practice includes representation of debtors, secured and unsecured creditors, creditors' committees, plaintiffs and defendants in bankruptcy litigation, and buyers and sellers of assets in bankruptcy cases.
 6. I speak regularly at conferences and seminars for attorneys on business and consumer bankruptcy matters. Over the last several years I have spoken at programs for the American Bankruptcy Institute, the National Association of Bankruptcy Trustees, Massachusetts Continuing Legal Education, the Massachusetts Bar Association, the Boston Bar Association Bankruptcy Section, and the Hampden and Worcester County Bar
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Associations. In addition, I have authored or co-authored a number of articles on bankruptcy-related topics, including "Resolved: A Chapter 7 Trustee May File Proofs of Claim on Behalf of Unsecured Creditors", Journal of the National Association of Bankruptcy Trustees, Summer 2014, co-authored with L. Alexandra Hogan; "Terminating an ERISA Retirement Plan: Can a Bankruptcy Trustee Serve Two Masters?", Journal of the National Association of Bankruptcy Trustees, Fall 2010, co-authored with David K. Webber; "Undoing the IRS Wrongful Levy," 106 Banking Law Journal 336 (July-August, 1989); "Bankruptcy Court Power to Enjoin the Internal Revenue Service from Collecting the Debtors' Taxes from its Officers: An Analysis of Recent Developments," Annual Survey of Bankruptcy Law, 1986; and "Post-Petition Tax Claims," Norton Bankruptcy Law Advisor, Issue 7, July 1985.

7. As a Chapter 7 Trustee, one of my most significant duties under Bankruptcy Code § 704(a) is to determine if there is property of the bankruptcy estate that can be administered, i.e., reduced to money, so creditors' claims can be paid.
8. From time to time debtors have interests as grantors, trustees or beneficiaries in trusts. To the extent that debtors have rights or powers under such trusts, and to the extent that they are not subject to an applicable exemption or enforceable "spendthrift" provision, those interests constitute property of the bankruptcy estate under Bankruptcy Code § 541(a), which generally encompasses all legal and equitable interests of the debtor. Essentially, the rights of a bankruptcy trustee to control assets of a trust are defined by the trust instrument. A bankruptcy trustee can exercise the rights held by a grantor or beneficiary, but by the same token, the trustee cannot ignore or disregard the terms of a trust. Similarly,

if a creditor were to seek equitable relief to "reach and apply" a grantor's interest, that interest is defined by the terms of the trust.

9. In this matter, I have reviewed copies of the [REDACTED] Irrevocable Trust and the [REDACTED] Irrevocable Trust, both dated May 10, 2007 (collectively referred to herein as the "Trusts"). To my knowledge, there have not been any changes to the Trusts. Both Trusts are essentially identical, except for the differences in names. I have been asked to provide an opinion as to whether a creditor of the Grantors, [REDACTED] and [REDACTED], can satisfy claims against them by reaching the principal of the Trusts.
10. Generally speaking, a grantor's right to exercise power to amend or revoke a trust, or to exercise dominion over trust property, constitutes a general power of appointment under Massachusetts law. A number of bankruptcy court opinions have held that to the extent that a grantor of a trust holds an exercisable general power of appointment, that right may be exercised by a bankruptcy trustee to satisfy creditors' claims. Conversely, if there is no general power of appointment, a bankruptcy trustee cannot reach trust assets. Having reviewed these Trusts thoroughly, it is my opinion that the assets in the Trusts do not constitute property of the grantors, and the limited rights that the grantors retained in the Trusts could not be used by creditors or a bankruptcy trustee to obtain control over those assets. It is my opinion that creditors of the grantors could not reach the assets of the Trust to satisfy their claims, nor could a bankruptcy trustee reach those assets in any bankruptcy case filed by or against the grantors, for the following reasons:
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- (1) The Trusts are irrevocable (see Article IX). While the "Trust Protector" (see Article XIII) has rights to amend the Trusts, it is only for purposes of correcting ambiguities or of responding to changes in the law.
 - (2) The right to substitute assets (see Article II) does not affect the revocability of the Trust. While the grantor's right to substitute assets of an equivalent value is a limited right that a bankruptcy trustee could theoretically exercise, it would require the Trustee to substitute "property of an equivalent value", so it has no value to creditors of the Settlers.
 - (3) The settlor of each Trust has limited rights to: change the percentage allocation amongst the three listed beneficiaries [Article III(E)] and to replace trustees [Article VI(F)], but these rights would have no value to creditors or a bankruptcy trustee. While a bankruptcy trustee could theoretically exercise those rights, there is no right to name new beneficiaries, and any successor trustee is subject to the terms of the Trusts.
 - (4) Article V of the Trusts grants to the trustees (but not the Grantors) wide discretion to buy, sell and invest Trust property. However, nothing in Article V grants any rights to the grantor to exercise any dominion or control over Trust property for the benefit of the grantor or the grantor's spouse, so there are no rights that could be exercised by a bankruptcy trustee.
11. I have been asked by the trustees to respond to 12 specific questions:
- (1) Under bankruptcy law, would the bankruptcy trustee make every attempt to include self-settled irrevocable trusts in the bankrupt person's estate by disregarding (i) the purposes for which a trust is established, (ii) whether the trustees have or exercise any
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discretion under a trust, and (iii) any restrictions on when or whether distributions may be made from a trust? Answer: One of a bankruptcy trustee's roles is to locate non-exempt assets that can be liquidated to satisfy the claims of creditors. Thus, a trustee would *attempt* to include self-settled trusts in the bankruptcy estate, without regard to the purposes for which trusts are established, and without regard to the rights a trustee may have or any rights or restrictions under the declarations of trust.

(2) Is the settlor's power to substitute assets under ARTICLE II (C) the same as an option to make a purchase at fair market value? Answer: It is similar to an option, but it has no value, because a bankruptcy trustee would have to have otherwise non-exempt assets of equivalent value to exchange in order to exercise that power.

(3) Would the settlor's power to substitute assets under ARTICLE II (C) affect the includability of trust principal in a bankrupt settlor's estate or availability of trust principal to the settlor's creditors? Answer: No, for the reasons set forth above. The settlor could not receive any financial benefit from such a power.

(4) Does the ability of the Trust Protector under ARTICLE VIII to amend the Trusts render the Trusts revocable in any manner? Answer: No. The Trust Protector's rights are limited to amending the Trusts for technical reasons or to address a subsequent change in the law. The Trust Protector has no ability to change the beneficiaries of the trust or to obtain access to trust principal for the settlor. See Article IX of the Trusts, which specifically state that the Grantors have no power to revoke or amend the Trusts.

(5) Does the ability of the Trust Protector under ARTICLE VIII to amend the Trusts affect the includability of trust principal in a bankrupt settlor's estate or availability of trust principal to the settlor's creditors? Answer: No, for the reasons set forth above.

(6) Does the factual issue of the settlors' using the real estate rent-free after transferring it to the trusts affect the includability of trust principal in a bankrupt settlor's estate or availability of trust principal to the settlor's creditors? Answer: No. There is no requirement in either Trust that the settlor be permitted to live in the real estate rent-free, such as a life estate. Mere usage of the real estate by a Grantor cannot possibly be the equivalent of ownership, and I do not see how any valid argument could be made that using the real estate somehow makes the principal available to the Grantor where the terms of these Trusts specifically state otherwise.

(7) Would any of the settlors' reserved rights under the Trusts, including ARTICLE III (A) (ability of settlors to refuse consent to principal distributions to three specifically named beneficiaries), ARTICLE III (E) (right to change remainder percentages among beneficiaries), or ARTICLE VI (F) (right to replace trustees) affect the includability of trust principal in a bankrupt settlor's estate or availability of trust principal to the settlor's creditors? Answer: No; there is no right to name new beneficiaries, and any successor trustees are subject to the terms of the Trusts and have fiduciary duties thereunder.

(8) Do the trustees have fiduciary duties under these Trusts to the holders of the remainder interests that prevent usage of principal for the settlors and prevent conversion of principal to income? Answer: Yes, and the Trustees could incur personal liability under Massachusetts law for violation of their fiduciary duties.

(9) Do the trustee's powers in ARTICLE V to deal with Trust assets affect the includability of trust principal in a bankrupt settlor's estate or availability of trust principal to the settlor's creditors? Answer: No. All trusts grant powers to trustees, and those powers are meant to allow the trustee to perform his/her duties. The trustees have discretion to deal


with trust assets, not the settlor. In attempting to bring the principal of these Trusts into the bankruptcy estate, the rights of a bankruptcy trustee are no greater than the rights held by the settlor. In these Trusts, the settlors have no rights to obtain any access to principal of the Trusts, and the powers of the Trustee under ARTICLE V, even added to the reserved rights of the Grantors, do not provide such access.

(10) Would the trustees' powers under Massachusetts law to make investments such as immediate annuities affect the includability of trust principal in a bankrupt settlor's estate or availability of trust principal to the settlor's creditors? Answer: No. The nature of the trustees' investments of trust assets is irrelevant, due to the trustees' fiduciary duties to all beneficiaries.

(11) Considering all of the trust details specified in the previous questions, and reading each Trust as a whole under Massachusetts law, are these irrevocable Trusts fluid instruments that give the settlors and trustees any flexibility to give principal to the settlors or use principal for the settlor's benefit? Answer: No. The Settlers have no discretion or authority to control Trust principal for the Settlor's benefit. There is no provision which can override the limitation of the Grantor or his/her spouse to receive no more than the income of the trusts, and there are no provisions in the aggregate which can allow usage or recharacterization of the principal for the Grantor or his/her spouse.

(12) Could a creditor of either settlor or the settlor's spouse, or a bankruptcy trustee if a settlor or a settlor's spouse filed for bankruptcy, reach the principal of the Trusts to satisfy unpaid debts of the settlors or their spouse? Answer: No. I am not aware of any reported case in Massachusetts in which a bankruptcy trustee has successfully reached assets in any trust with provisions similar to these Trusts.

Executed under pains and penalties of perjury this 10th day of November, 2014.

By: 
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