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

Appeal No. 1409671, ZZZZZZZZZZZZZZZ v. Office of Medicaid

Memorandum of Appellant Regarding Irrevocable Trusts

Date: October 9, 2014

To: Hearing Officer

To: MassHealth Representative

From: Brian E. Barreira, Appellant's Counsel

I represent the Appellant in this appeal, and this memorandum is submitted on behalf of the Appellant. Exhibits are being submitted separately.

The MassHealth application filed on behalf of the Appellant should be approved because the principal of the Irrevocable Trusts in question do not constitute countable or available assets. The principal of the Irrevocable Trusts has always been unavailable to the Appellant, and could not be given back to the Appellant.

This memorandum is being written based on having seen previous misleading memoranda of the Office of Medicaid in trust denial cases. The memoranda prepared by the Office of Medicaid in trust denial cases always contain not only a confidentiality notice, but also needlessly include the appellant's Social Security number. This Appellant moves to have the Hearing Officer redact the Appellant's needlessly-included Social Security number on the memoranda and other correspondence of the Office of Medicaid, and requests that you ask the Office of Medicaid to discontinue including Social Security numbers on its memoranda, as the entire memorandum could end up being publicly seen if an appeal to Superior Court is filed under M.G.L. Chapter 30A by the Appellant and the complete record of this hearing is filed as the answer of the Office of Medicaid.

In the memoranda of the Office of Medicaid in trust denial cases, inapt quotes are strung together and broad, conclusory statements about laws, regulations and cases are made in lieu of actual analysis. Neither the details of the trust nor its funding details nor the actual case are provided to back up the applicability of many of the quotes. To the extent that the Office of Medicaid argues certain provisions provide access to the principal, the arguments of the Office of Medicaid reflect an unsupportable misinterpretation of the Irrevocable Trusts, federal Medicaid trust law and Massachusetts trust law. In particular, the Appellant points out (A) there

has never been any presumption that that a self-settled, inter vivos trust established by an applicant or spouse or funded with an applicant's assets is countable in an eligibility determination, as explained in Section (6) of this memorandum; (B) the "any circumstances" test mandated by federal Medicaid trust law and MassHealth regulations is actually very limited, as explained in depth in Sections (7), (8) and (9); (C) control and usage issues are irrelevant, as explained in Sections (10), (11), (12) and (13); and (D) the ability of a creditor to sue the trust successfully is the proper level of analysis under federal Medicaid trust law, as explained in depth in Sections (24), (25), (26), (27) and (28) of this memorandum.

(1) Income-only Irrevocable Trusts Are Allowed under Federal Medicaid Laws, MassHealth Regulations and Massachusetts Case Law

Even though federal Medicaid law at 42 U.S.C. §1396a(a)(19) requires that each state Medicaid program be administered "in a manner consistent with simplicity of administration and the best interests of the recipients," the Office of Medicaid now appears to take the position that all assets held in trust, regardless of when the transfers into trust were made and regardless of the trust terms, should be counted for MassHealth purposes.

The Supreme Judicial Court has not expressed its disapproval of drafting and funding trusts in an attempt to qualify for governmental benefits. "There are … other instances in the law where instruments are specifically drafted to take advantage of available government benefits or facilities, even making explicit reference to the statutory facility which is meant to be enjoyed." Cohen v. Comm'r of Div. of Med. Assistance, 423 Mass. 399, 410 (1996). This seminal case explains a great deal about the actual Medicaid trust law, and should be reviewed by the Hearing Officer in great detail; it is attached as EXHIBIT A.

The memoranda of the Office of Medicaid suggest that all trusts are disallowed, but there is no federal Medicaid law that states that all irrevocable trusts are disallowed; rather, only irrevocable trusts that have certain characteristics are disallowed. In Guerriero v. Commissioner of the Division of Medical Assistance, 433 Mass. 628, 635 (2001), the Court pointed out: "Although we concluded in Cohen the limitations on discretion should be disregarded, we noted that "[i]t is true that a trust might be written to deprive the trustee of any discretion (for instance allowing the payment only of income) and that such a limitation would be respected." It was the role of the federal government when it passed federal Medicaid law to determine what is allowable or not allowable in the trust realm, and the federal government has passed no blanket prohibition against trusts.

In an effort to draw parallels between the Irrevocable Trusts in this appeal with each of the trusts that were involved in the cases of Cohen, Lebow v. Comm'r of Div. of Med. Assistance, 433 Mass. 171 (2001) and Doherty v. Commissioner, 74 Mass. App. Ct. 439 (2009), the Office of Medicaid misconstrues these decisions. In particular, Doherty does not stand for the prohibition against the use of irrevocable trusts to shelter assets, as the Court makes the point that the decision was limited to the facts in that case and concludes: "we have no doubt that self-settled, irrevocable trusts may, if so structured, so insulate trust assets that those assets will be deemed unavailable." Doherty at 442.

(2) United States Court of Appeals Has Held in Case of Lewis v. Alexander that Federal Medicaid Law Does Not Direct that State Trust Laws Be Ignored

The Office of Medicaid claims that Massachusetts trust laws should be ignored, but the United States Court of Appeals for the Third Circuit has already examined Congressional intent in the context of Medicaid trust laws and concluded otherwise. "Congress rigorously dictates what assets shall count and what assets shall not count toward Medicaid eligibility. State law obviously plays a role in determining ownership, property rights, and similar matters." Lewis v. Alexander, 685 F.3d 325, 334 (3d Cir. 2012). "Trusts are, of course, required to abide by a State's general law of trusts." Lewis at 335, footnote 15. "[T]here is no reason to believe [Congress] abrogated States' general laws of trusts. … After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues." Lewis at 343.

(3) Supreme Judicial Court Has Held in Case of Dana v. Gring that Massachusetts Law Must Control in Trust Interpretation

The same conclusion as in Lewis that state laws must control trust interpretation has been reached in Dana v. Gring, 374 Mass. 109 (1977) by the Supreme Judicial Court of Massachusetts with regard to the treatment of irrevocable trusts under another federal statute, the Internal Revenue Code. "Although the decision whether to include the trust property in Gring's gross estate for the purposes of determining tax liability is undeniably a question of Federal tax law, see Morgan v. Commissioner, 309 U.S. 78, 80-81 (1940), a conclusion as to the extent of Gring's power under the terms of the trust involves the interpretation of a testamentary instrument, and, as such, clearly turns on questions of State law. See, e.g., Mazzola v. Myers, 363 Mass. 625, 633 (1973); Old Colony Trust Co. v. Silliman, 352 Mass. 6, 8 (1967); Morgan v. Commissioner, supra at 80; Blair v. Commissioner, 300 U.S. 5, 9-10 (1937); Freuler v. Helvering, 291 U.S. 35, 44-45 (1934); Stedman v. United States, 233 F. Supp. 569, 571 (D. Mass. 1964); Pittsfield Nat'l Bank v. United States, 181 F. Supp. 851, 853 (D. Mass. 1960)." Dana v. Gring, 374 Mass. 109, 113 (1977).

The Dana case, attached as EXHIBIT B, is relevant in that it explains the applicability of federal and state laws to trusts. In every context (whether tax, public benefits or otherwise) federal law controls the federal consequence of the substance of various arrangements, while state law tells us what the substance of the arrangement is. Thus, federal law (whether tax, Medicaid, or otherwise) says how the substance of a trust is treated (e.g., if a payment can be made from a portion of a self-settled trust, that portion is an available asset), but it is state law that tells us, given the terms of the trust and default and mandatory state law, whether such payments can be made.

The memorandum of the Office of Medicaid fails to demonstate or even discuss why the Office of Medicaid should be accorded more authority in trust interpretation than the Internal Revenue Service is accorded in applying federal tax law. The holdings in Lewis and Dana undercut the claims in the memorandum of the Office of Medicaid about how state trust laws are to be ignored in Medicaid trust analysis. "An incorrect interpretation of a statute by an administrative agency is not entitled to deference." Kszepka's Case, 408 Mass. 843, 847 (1990).

(4) MassHealth Regulations Recognize the Fiduciary Duties of Trustees

Despite the claim of the Office of Medicaid that state trust law be ignored in trust denial cases, MassHealth regulations do not require that the fiduciary duties of a trustee be ignored. Rather, the fiduciary duties of a trustee are specifically recognized in the definition of "trust" at 130 CMR §515.001: "a legal device satisfying the requirements of state law that places the legal control of property or funds with a trustee. It also includes, but is not limited to, any legal instrument, device, or arrangement that is similar to a trust, including transfers of property by a grantor to an individual or a legal entity with fiduciary obligations so that the property is held, managed, or administered for the benefit of the grantor or others. Such arrangements include, but are not limited to, escrow accounts, pension funds, and similar devices as managed by an individual or entity with fiduciary obligations." (emphasis added).

(5) Trust Law Presumes That Principal Is Not Available to the Current Beneficiary

Charles E. Rounds, Jr. & Charles E. Rounds, III, in their treatise on trust law, state that trustees are limited to paying only income to the settlor unless distributions of principal are specifically authorized: "Nowadays, it is default law that the current beneficiary of a trust is entitled to the net trust accounting income. It is also default law that a trust is income only, i.e., the current beneficiary is not entitled to principal, unless the governing instrument indicates that the settlor intended otherwise. Thus, a trust for the "benefit" of C, remainder to D is normally income only absent additional language suggesting the contrary. Without such additional language, the trustee would have no power to invade principal for the income beneficiary." Loring and Rounds: A Trustee's Handbook, (2013 Edition), §5.4.1.3 at 376-377.

Note that in the Irrevocable Trusts in this appeal, there is no language anywhere which indicates that the purpose of the Irrevocable Trusts was the support of the Settlors. Trust law presupposes that the income beneficiary or life tenant is entitled only to income, even if, for example, an annuity were to be purchased by the trustee for purposes of increasing the income of the trust above the rates provided at banks by certificates of deposit.

(6) The Office of Medicaid Does Not Even Get Its Cites Correct on Federal Medicaid Trust Law, and There Is No Presumption About the Countability of Trusts

The memoranda of the Office of Medicaid misrepresent the federal law on the treatment of trusts at 42 USC 1396p(d); it ignores (d)(1) and attributes the words "available" and "countable" to (d)(2)(B) and (d)(2)(C) when in fact neither word appears in those sections of the statute. Only in 42 USC 1396p(d)(3)(A) and 42 USC 1396p(d)(3)(B) is there a determination of what portion of a revocable or irrevocable trust is to be considered "countable" or "available." The memorandum refers to 42 USC 1396p(d)(3)(B) as the "any circumstances" test while in fact it is really the "portion of" test (emphasis added). Further, the memoranda totally ignore the fact that what "….shall be considered resources available to the individual ……." is the "portion of the corpus from which…...payment to the individual could be made……". (emphasis added)

The Office of Medicaid is simply wrong about what 42 USC 1396p(d)(2)(B) states. The Office of Medicaid erroneously states that "[u]nder 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." That cite is inaccurate and disingenuous because 42 U.S.C. 1396p(d)(2)(B) does not make any such statement and by no means does it state or even imply that all property attributable to the applicant in an irrevocable trust is available. Any such interpretation would completely ignore the next paragraphs of the statute that deal with assets in revocable and irrevocable trusts.

There is no such presumption about all trusts being countable assets, and nothing resembling such a point was made by the Office of Medicaid in the four major trust cases in which extensive briefs of law were filed at the appellate court level. No such argument was made in Cohen, Lebow, Guerriero or Doherty, so the claim about a presumption about all trusts being countable assets is a new position that is not entitled to deference. All trusts must be interpreted under state law, and only four aspects of state law can be ignored. As previously mentioned, Lewis v. Alexander held that "[T]here is no reason to believe [Congress] abrogated States' general laws of trusts. … After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues." Thus, whether principal is available for distribution by the Trustee of the Irrevocable Trusts in this appeal to the Appellant is an issue of Massachusetts trust law, without any federal Medicaid law presumption, with only four aspects of Massachusetts trust law to be disregarded.

(7) Federal Medicaid Law Specifies Only Four Aspects of State Trust Law That May Be Ignored in Determining Eligibility

The Office of Medicaid makes a misstatement of law when it claims that all state trust law is to be ignored in the determination of eligibility for Medicaid benefits for long term care. Federal Medicaid law (42 USC §1396p(d)) and Massachusetts MassHealth regulations (130 CMR 520.021-520.024) address the treatment of trusts in the Medicaid arena, and they do not state or even imply that all trusts are presumed Medicaid ineligible or that all trust law is to be ignored. The federal Medicaid law at 42 USC 1396p(d)(2)(C) specifies only four aspects of state trust law that may be ignored in determining eligibility. The memoranda of the Office of Medicaid never give proper attention to this key section, which states:

> "(C) …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."

Under the 1985 changes in federal Medicaid trust law, a door had been left open whereby a provision could be placed in the trust limiting trustee discretion in some circumstances. The 1993 changes in federal Medicaid trust law closed the door of shifting trustee discretion. The 1985 Congressional intention of authorizing scrutiny of irrevocable trusts under state debtor-creditor laws remained unchanged when the 1993 changes were made, and there have been no further changes in federal Medicaid trust law since that time.

All Massachusetts trust law applies to the Irrevocable Trusts in this appeal, with the four exceptions in 42 USC 1396p(d)(2)(C). The Office of Medicaid attempts to mislead the Hearing Officer by emphasizing the phrase "any circumstances," when in fact these four circumstances are the only circumstances addressed by the federal Medicaid trust law. The trust must, as a precondition of countability, allow the trustee to make distributions to or for the settlor, and the trust must thereafter make an attempt to limit that discretion. Having the trust initially available, but with an attempt to attach protective strings thereafter, is what was described in Cohen as "concocted for the purpose of having your cake and eating it too."

The first condition in federal Medicaid law, disregarding "(i) the purposes for which a trust is established," is that the purpose of the trust may not be used to restrict the exercise of a power granted by the trust instrument to the trustee. If the language of the trust instrument gives to the trustee power to distribute principal from the irrevocable trust to the settlor of the trust, then, in the Medicaid context, it may not be successfully argued by a MassHealth applicant that the purpose of the irrevocable trust was to protect the trust principal from countability for Medicaid eligibility purposes. Federal Medicaid law allows the Office of Medicaid to disregard the purpose of the irrevocable trust as an effective limitation, under trust law, to bar the trustee from making a principal distribution to the settlor. If, however, the trust instrument contains a general prohibition against trustee distribution of principal to the settlor, then the Office of Medicaid cannot simply ignore that provision of the irrevocable trust.

An example of the first condition in federal Medicaid law was the Bisceglia case, usually quoted in the memoranda of the Office of Medicaid. In Bisceglia, the principal was always explicitly available for distribution from a deceased husband's trust to his wife, and she attempted to argue that the trust should pass muster because it was set up for a non-Medicaid purpose. Those circumstances do not exist in this appeal, so the Bisceglia case is not on point and any quote offered by the Office of Medicaid is completely irrelevant to this appeal.

The second condition in federal Medicaid law, disregarding "(ii) whether the trustees have or exercise any discretion under the trust," is that any discretion of the trustees may be ignored by the Office of Medicaid. If the trustees have discretion now or in the future to distribute principal to the settlor, then trust principal is countable to the full extent that the terms of the irrevocable trust allow such distribution, disregarding any limitation otherwise placed upon the exercise of that discretion by the terms or purpose of the irrevocable trust.

Under this second condition of 42 USC 1396p(d)(2)(C), trustee discretion to distribute principal to or for the settlor cannot be shifted based on the settlor's circumstances. A key example of this second condition is the Cohen case. Trusts that allow distributions to or for the settlor, then state that distributions cannot be made in lieu of Medicaid benefits and allow the trustee to claim that discretion does not exist, are considered countable.

The third condition in federal Medicaid law, disregarding "(iii) any restrictions on when or whether distributions may be made from the trust," is that any restrictions on when or whether distributions may be made from the irrevocable trust to the settlor may be ignored. This is what the court was referring to in Lebow when it wrote: "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. … 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." What the court meant is to look at the trust and see if principal is normally explicitly available, and, if so, then ignore the attempted restrictions.

The third condition in federal Medicaid law must be read in context of the Medicaid statute and in light of Massachusetts trust law, which under Lewis v. Alexander is not to be disregarded in its entirety. A transfer into trust that allows nothing to come back to the settlor cannot be properly argued to contain assets "available" to the settlor, as in that situation the trustee has no present or future power or authority to distribute principal to the settlor. The Office of Medicaid is required to recognize that, under the terms of such an irrevocable trust, there is no lawful way for the trustee to make distribution to the settlor, and the federal Medicaid law does not allow the Office of Medicaid to conjure ways to find opportunity for a trustee to breach fiduciary duties to cause disqualification of the settlor for MassHealth benefits. The court in Doherty said it clearly at the end: "Finally, we take this opportunity to stress that we have 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." Id at 442-443. If, by way of contrast, the trustee is given present or future discretion to distribute principal to the settlor, any restriction on the exercise of that power, as to when or how or under what circumstances, may be ignored in the Medicaid context; that is what was at issue in the Cohen case and its companion cases, as well as the Lebow case.

The fourth condition in federal Medicaid law, disregarding "(iv) any restrictions on the use of distributions from the trust," merely prevents a recipient of assets from a trust being able to argue that the terms of the trust had prevented the recipient from using those funds in lieu of Medicaid.

(8) The State Medicaid Manual Has Provided Binding Guidance on What "Any Circumstances" Means under Federal Medicaid Trust Law

The "any circumstances" test in federal Medicaid trust law is limited to four aspects of state trust law, and the State Medicaid Manual at 3259.6 E. has long provided guidance to all states in describing the circumstances under which payments can or cannot be made: "In determining whether payments can or cannot be made from a trust to or for an individual, take into account any restrictions on payments, such as use restrictions, exculpatory clauses, or limits on trustee discretion that may be included in the trust. For example, if an irrevocable trust provides that the trustee can disburse only $1,000 to or for the individual out of a $20,000 trust, only the $1,000 is treated as a payment that could be made under the rules in subsection B. The remaining $19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual. On the other hand, if a trust contains $50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this full amount is considered as payment that could be made under some circumstances, even though the likelihood of payment is remote. Similarly, if a payment cannot be made until some point in the distant future, it is still payment that can be made under some circumstances."

The State Medicaid Manual was described by the Supreme Judicial Court in footnote 10 of Cohen as "the Federal manual that provides interpretive guidance to the States." Issued by the Centers for Medicare and Medicaid Services, it is binding on the States by contract. The Foreword to the State Medicaid Manual, at B.1., states: "Contents.-- The manual provides instructions, regulatory citations, and information for implementing provisions of Title XIX of the Social Security Act (the Act). Instructions are official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies. This authority is recognized in the introductory paragraph of State plans. Interpretations and instructions relating to common policy under Titles I, IV-A, X, XIV, XVI, and XIX of the Act are also included."

The portion of the State Medicaid Manual known as HCFA Transmittal 64 was specifically issued to provide guidance on the 1993 federal Medicaid law changes. The substance of the federal Medicaid trust law has not changed since then.

Note that the State Medicaid Manual does not even come close to hinting that state trust laws be ignored, as the Office of Medicaid has stated, or that an irrevocable trust be scrutinized for details (while ignoring provisions to the contrary) that could be twisted into an "any circumstances" test, as the Office of Medicaid has attempted to do in this case.

(9) The Office of Medicaid Must Construe Federal Medicaid Law to Favor Applicants, and Cannot Be More Restrictive Than SSI

The Medicaid Act at 42 U.S.C. §1396a(a)(19) requires that each state Medicaid program be administered in the ""in a manner consistent with simplicity of administration and the best interests of the recipients," and both the federal Medicaid law and its implementing regulations must be construed in favor of the Medicaid beneficiary. "The Social Security Act, of which Medicaid is a part, is in the nature of remedial legislation and is to be liberally construed." See Cristy v. Ibarra, 826 P.2d. 361 (Court of Appeals, Co. 1991).

The MassHealth fact-finding process and trust law interpretation in this case is more restrictive than Supplemental Security Income (SSI) Program procedures and federal law interpretation in the Program Operations Manual System ("POMS") of the Social Security Administration. The Office of Medicaid cannot utilize a methodology that is more restrictive than that used by SSI. See Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012) and 42 U.S.C. § 1396a(a)(10)(C)(i)(III). A methodology is "considered to be 'no more restrictive' if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance." 42 U.S.C. §1396a(r)(2)(B).

The arguments made by the Office of Medicaid regarding "any circumstances" are invalid because they are more restrictive than the directives in the POMS. Section SI 01120.201D – Treatment of Trusts of the POMS reads, in relevant part:

> "b. Circumstance under which payment can or cannot be made
> In determining whether payments can or cannot be made from a trust to or for the benefit of an individual (SI 01120.201F.1.), take into consideration any

restrictions on payments. Restrictions may include use restrictions, exculpatory clauses, or limits on the trustee's discretion included in the trust. However, if a payment can be made to or for the benefit of the individual under any circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. in this section applies (i.e., the portion of the trust that is attributable to the individual is a resource, provided no exception from SI 01120.203 applies).

c. Examples
An irrevocable trust provides that the trustee can disburse $2,000 to, or for the benefit of, the individual out of a $20,000 trust. Only $2,000 is considered to be a resource under SI 01120.201D.2.a. in this section. The other $18,000 is considered to be an amount which cannot, under any circumstances, be paid to the individual and may be subject to the transfer of resources rule in SI 01120.201E in this section and SI 01150.100.

If a trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday, the entire $50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource.

An individual establishes an irrevocable trust with $10,000 of his assets. His parents contribute another $10,000 to the trust. The trust only permits distributions to, or for the benefit of, the individual from the portion of the trust contributed by his parents. The trust is not subject to the rules of this section. The portion of the trust contributed by the individual is subject to evaluation under the transfer of resources rules in SI 01150.100 (see also SI 01120.201E in this section). The portion of the trust contributed by his parents is subject to evaluation under SI 01120.200."

The MassHealth or Medicaid fact-finding process and trust law interpretation cannot be more restrictive than that of SSI, but can be more liberal, in part due to the availability of waiver programs. Thus, SSI eligibility workers are instructed in the POMS not to make Medicaid determinations, but such instructions due not affect the overriding federal law that the Medicaid fact-finding process and trust law interpretation in this case cannot be more restrictive than SSI procedures.

The POMS contains extensive sections regarding trusts that are meant to give guidance on how trusts should be treated for SSI (and, concomitantly, Medicaid or MassHealth) purposes, and the Office of Medicaid is legally bound by it. The POMS contains no provision that directs or even hints that state trust law be ignored. The POMS contains no provision that a termination provision whereby a trustee can distribute assets to the remainderpersons results in an income-only irrevocable trust being treated as available to the applicant. The POMS contains no provision that the possible investment by the trustee of an income-only irrevocable trust in annuities, life insurance or other investments renders the principal available to the settlor or the settlor's spouse. The POMS contains no provision that a life estate in an irrevocable trust

renders the principal of the trust to be deemed available to the settlor. The POMS contains no provision that the reservation of a limited power of appointment or special power of appointment in an income-only irrevocable trust renders the principal of the trust to be deemed available to the settlor or the settlor's spouse. The POMS contains no provision that the reservation of a power of substitution of assets in an income-only irrevocable trust renders the principal of the trust to be deemed available to the settlor or the settlor's spouse. In short, the POMS contains no provision that directs or even hints that anything other than the right of a settlor or the settlor's spouse to withdraw principal without consideration or the power of a trustee to distribute principal to the settlor or the settlor's spouse matters in the review of an income-only irrevocable trust.

(10) In Determining Whether the Principal of an Irrevocable Trust Is Available, Control by the Settlor Over the Trust Is Not a Relevant Issue

In determining whether the principal of an irrevocable trust can be withdrawn by the settlor or given to the settlor by the trustee, or is in any way available to the settlor for Medicaid, SSI or MassHealth purposes, the fact that the settlor may reserve some rights or powers over the irrevocable trust is not a relevant factor. If Congress had determined that any facet of a settlor's control over an irrevocable trust should affect its countability, it would have specifically stated so in federal Medicaid and SSI trust laws, yet Congress chose not to do so.

Congress has long known that settlors can reserve different aspects of control over irrevocable trusts. When passing the Internal Revenue Code of 1954, many years before passing the current Medicaid trust laws in 1985 and 1993, Congress had already dealt with control by settlors in the trust taxation area with the so-called grantor trust rules. The provisions in Internal Revenue Code sections 671-679, the grantor trust rules, are very detailed, and indicate that Congress is aware that there are many varieties of trust provisions where settlors can reserve varying degrees of control over irrevocable trusts.

In proper statutory interpretation of federal laws, Congress is presumed to know about other laws it has passed. If in the Medicaid context Congress had been concerned about trust control issues and wanted state Medicaid agencies to make a complicated review of irrevocable trusts, Congress could have simply pointed to the grantor trust rules. When passing federal Medicaid trust laws, Congress did not indicate concern for control issues by making any type of cross-reference to the grantor trust rules, or inserting provisions directly in federal Medicaid trust law prohibiting any degree of control by the settlor. When passing federal Medicaid trust laws, Congress allowed states to implement their own debtor-creditor laws, but chose not to implement any countability, availability or other ineligibility rules due to settlors' control issues.

(11) Power to Substitute Assets Does Not Make an Irrevocable Trust a Countable Asset

One of the reserved powers covered by the grantor trust rules in Internal Revenue Code sections 671-679 is a power "to reacquire the trust corpus by substituting other property of an equivalent value," known as a power of substitution. Such a power is included in the Irrevocable Trusts. Putting it more simply, a power of substitution is the same as an option to purchase at fair market value.

According to Black's Law Dictionary, Fifth Edition, the verb "substitute" means "exchange," and the verb "exchange" means "[t]o part with … or transfer for an equivalent," and the adjective "equivalent" means "[e]qual in value, force, measure, volume, power, and effect or having equal or corresponding import, meaning or significance." Nowhere in these definitions is there even any hint that one side in a transaction can end up with more than the other. Thus, the power of the Grantors of the Irrevocable Trusts in this appeal to "reacquire" any asset in the trust "by substituting property of an equivalent value" is actually an option to buy it back for its fair market value, and where transfers for fair market value are not prohibited under Medicaid law, such a power should pose no problem in the Medicaid trust context. If such a transaction had actually occurred, the trust would have ended up with the same value, and the Grantor would have ended up with the same amount of assets; the result would be a net receipt by the Grantor of nothing in value. Where 42 USC 1396p(d)(3)(B) limits countability of an irrevocable trust to the "portion of the corpus … from which payment … could be made," and where the actual portion receivable by the settlor from the corpus would be nothing, the power of substitution does not result in in the Irrevocable Trusts being treated as countable assets under federal Medicaid law.

To exercise the power of substitution, the Settlor, who is not the Trustee, would have to have assets which can be exchanged for the trust's assets, and would have to prove to the Trustee that the assets being tendered were in fact equivalent in value. Thus, the Trustee's fiduciary duties under state law would be relevant to any such transaction and prevent the Settlor from gaining any windfall from such power. The Trustee would be in breach of the Trustee's fiduciary duties under Massachusetts law and be personally liable to the trust remainderpersons if the Trustee transferred assets out of the trust and the substituted assets were not equivalent in value. Such a transaction would have to pass muster under Massachusetts trust law, which is the controlling law in such a situation, per Lewis v. Alexander.

Such a power results in income taxation of the trust to the Settlor under Internal Revenue Code section 675(4)(c), yet the Internal Revenue Service has ruled in Revenue Ruling 2008-22, attached as EXHIBIT C, that such a power does not cause inclusion of the assets in the Settlor's estate for federal state tax purposes. Thus, the Internal Revenue Service recognizes that power as merely affecting income and has not treated that power as resulting in ownership of the principal, which would have caused estate taxation. Further, Congress has not acted to change this outcome legislatively, so it is apparent that Congress is willing to allow varying results between principal and income based on the details of the trust under state law.

(12) Power to Substitute Assets Has Been Approved by the Office of Medicaid and Worcester Superior Court in Previous Appeals

A fair hearing decision is the final decision of the Office of Medicaid. The Appellant is aware of three fair hearing decisions which approved other irrevocable trusts that contained similar powers of substitution to the ones included in the Irrevocable Trusts in this case: (1) Fair Hearing Appeal 1402145, attached as EXHIBIT D, decided by Stanley Kallianidis on July 10, 2014; see Finding of Fact 10; (2) Fair Hearing Appeal 1401798, attached as EXHIBIT E, decided by Brook Padgett on May 15, 2014; see footnote 2, paragraph 6.5; and (3) Fair Hearing Appeal 1215864, attached as EXHIBIT F, decided by Marc Tonaszuck on March 7, 2013; see

Finding of Fact 8B. It is possible that there are other such decisions. The Appellant in this case is entitled to administrative consistency on the issue of the power to substitute assets, as well as the other issues decided in the appeal.

A fair hearing where the power of substitution resulted in a denial was recently overturned in Worcester Superior Court; the case of O'Leary v. Thorn is attached as EXHIBIT G.

(13) Causing Grantor Trust Treatment When Establishing an Irrevocable Trust Does Not Make the Principal Available or Countable

Provisions such as powers of substitution or special or limited powers of appointment are often included in irrevocable trusts in order to cause grantor trust treatment for income tax purposes. Such provisions do not provide the settlor with access to principal, nor do they provide the trustee with an avenue for distributing principal to the settlor. Two fair hearing decisions known to the Appellant have found that causing grantor trust treatment does not cause the principal of an irrevocable trust to be a countable or available asset: (1) Fair Hearing Decision 1401170, decided by Rebecca Brochstein on June 5, 2014, attached as EXHIBIT H; and (2) Fair Hearing Decision 1314721, decided by Kenneth Brodzinski on July 1, 2014, attached as EXHIBIT I. Both of these decisions represent the final decision of the Office of Medicaid, and this Appellant is entitled to administrative consistency on the issue of tax planning being irrelevant to whether the principal of an irrevocable trust is available or countable, as well as the other issues decided in the appeal.

(14) Usage of the Real Estate in these Irrevocable Trusts Does Not Cause Irrevocable Trusts to Be Countable Assets

The Office of Medicaid often makes the illogical argument that a life estate in a trust provides access to the principal of an irrevocable trust, and in this case builds illogic on top of illogic by making the argument that mere usage of the home on a rent-free basis provides access to the principal of the Irrevocable Trusts. The Office of Medicaid makes that statement in a conclusory fashion, without explaining how that could possibly be. The position of the Office of Medicaid is directly contrary to what the Supreme Judicial Court wrote in Cohen, that trustee power to distribute income is not equivalent to trustee power to distribute principal to the settlor. Further, in the case of United States v. Powell, 307 F.2d 821, 825 (10th Cir., 1962), which was cited by the Supreme Judicial Court in Old Colony Trust Co. v. Silliman, 352 Mass. 6 (1967), the United States Court of Appeals for the Tenth Circuit held: "It is well settled that where there are two or more beneficiaries of a trust, it is the duty of the trustee to administer the trust impartially, as between the beneficiaries. … Accordingly, it was the duty of the trustees in the exercise of their discretion to invest the corpus for the benefit of the trust estate and in such a manner as to preserve a fair balance between the life tenant and the remainder beneficiaries." United States v. Powell, 307 F.2d 821, 824-825 (10th Cir., 1962). (Apparently, the United States Court of Appeals for the Tenth Circuit viewed a life tenant of a trust and an income beneficiary of a trust as one and the same.)

Usage of the real estate in a trust is the equivalent of an income interest in the trust. The Office of Medicaid ignores that the use of a home is the equivalent of receipt of the income generated from rental of the home while not living there. The Settlors had the right to the net income of the Irrevocable Trusts, and if they had rented the real estate from the Irrevocable Trusts, they would be in the exact same position, as all of the net income would be paid right back to them.

The "available" argument made by the Office of Medicaid regarding irrevocable trusts is a dog chasing its own tail. Residing in the property does not mean the principal was "available" to the Appellant as the term is used in 130 C.M.R. 520.023(C)(1)(d), which reads "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." The meaning of "available" as used throughout the federal Medicaid trust laws and MassHealth regulations does not mean physically available; rather, the term "available" refers to whether the trustee has discretion to distribute the trust principal under any circumstances to or on behalf of the Appellant.

The Office of Medicaid simply claims in conclusory fashion that the principal of the Irrevocable Trusts is available, yet usage of an asset is not the same as ownership of it. If living in the home meant that principal was actually available for the life tenant's benefit, as the Office of Medicaid has attempted to claim, then it follows logically that the Office of Medicaid could also attempt to make a similarly silly claim that the principal of an income-only irrevocable trust is also "available" by virtue of being invested for the production of income for the income beneficiary. If we were to extend the Office of Medicaid's argument about usage to an automobile leased from a dealer, the Office of Medicaid could someday also be arguing that the lease of an automobile made the lessor its owner.

The federal Medicaid trust law at 42 USC 1396p(d)(2((B)(i) does not make reference to usage of principal as making the principal available; rather, it deals with actual payment from the trust: "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, and payments from that portion of the corpus or income." (emphasis added) To the extent that the use of the principal could be treated as a payment, it would be an income payment because the principal is not being consumed by the life tenant.

(15) The Massachusetts Legislature Has Prohibited MassHealth Estate Recovery Against Trusts, and Therefore Has Approved Their Existence

Under federal Medicaid law, one state option available since 1993 has been to make post-death claims for estate recovery against trusts. In 2004, the Massachusetts legislature voted overwhelmingly not to allow estate recovery against trusts. Thus, the governmental branch in charge of establishing and changing laws in Massachusetts has legislatively expressed its acceptance of the use of irrevocable trusts to qualify for MassHealth.

Current MassHealth regulations require recovery from the probate estates of MassHealth members who received Medicaid while age 55 or over and those who, regardless of age, received

Medicaid while institutionalized. All MassHealth expenses incurred for such members, with certain exception, are counted toward the total recovered amount. An exception from estate recovery is made in cases where recovery would cause hardship, and recovery can be barred from the estates of members who had long-term care insurance policies. Estate recovery is deferred while there is a surviving spouse or child who is blind, permanently and totally disabled, or under age 21.

In 2004, the Massachusetts legislature was presented with voting on the option, allowed to the states by federal Medicaid law since 1993, of allowing estate recovery against trusts. The bill it passed limited estate recovery to the probate estate, but was vetoed by Governor Romney. The Massachusetts legislature then voted to override the veto, unanimously in the House and with only one dissenting vote in the Senate. The existing law, M.G.L. c. 118E, s. 31(c), does not allow any estate recovery at all against trusts and shows that there is no Massachusetts legislative policy against trusts in the MassHealth context.

In its memorandum, the Office of Medicaid fails to discuss this clear policy position of the Massachusetts state legislature in favor of trusts.

(16) This Is Not a "Cohen" Case

In Cohen v. Comm'r of Div. of Med. Assistance, 423 Mass. 399 (1996), and its companion cases, the trustee had the authority to distribute principal to the settlor, but there were limited restrictions on the trustee's authority. "In each of these cases [the four cases decided under Cohen], the grantor of an irrevocable trust, of which the grantor (or spouse) is a beneficiary and to which the grantor has transferred substantial assets, claims eligibility for Medicaid assistance because the trust, while according the trustee substantial discretion in a number of respects, explicitly seeks to deny the trustee any discretion to make any sums available to the grantor if such availability would render the grantor ineligible for public assistance. Thus, all these trusts seek to limit the trustees' discretion just insofar as the exercise of that discretion may make the grantor ineligible for public assistance." Cohen at 407. (emphasis added)

Cohen and its companion cases stand for treating an irrevocable trust as a countable asset when the trustee's ability to pay income and/or principal to or for the benefit of the settlor terminates upon a specified event or may arise under certain circumstances under the terms of the trust. In Cohen, for example, a clear provision existed in the trust for distribution of principal or income; thus, there was in the trustee "under the terms of the trust the discretion to pay to the beneficiary the full amount in the trust." Cohen at 416 (emphasis added). None of these types of provisions are found in the Irrevocable Trust in this appeal. To be more specific, the offending language in the Cohen trust was:

> "The Trustees may, from time to time and at any time, distribute to or expend for the benefit of the beneficiary, so much of the principal and current or accumulated net income as the Trustees may in their sole discretion, determine.... The Trustees, however, shall have no authority whatsoever to make any payments to or for the benefit of any Beneficiary hereunder when the making of such payments shall

result in the Beneficiary losing her eligibility for any public assistance or entitlement program of any kind whatever. It is the specific intent of the Grantor hereof that this Trust be used to supplement all such public assistance or entitlement programs and not defeat or destroy their availability to any beneficiary hereunder." Cohen at 415.

In the Comins trust, the offending language was:

> "(c) Principal with respect to Settlor. Until the later to occur of (1) the passage of thirty months from the date of the establishment of this trust and (2) the date upon which either beneficiary is first institutionalized, and also thereafter during any periods of time during which the first beneficiary to be institutionalized is not then institutionalized, the Trustee shall apply on behalf of such first beneficiary so much of the principal of the Trust as is necessary and appropriate to provide him/her with those benefits and services, and only those benefits and services, which are not otherwise available to him/her from other sources as or when needed for his/her welfare.
>
> "(d) Withdrawal of Principal. The Trustee shall also pay over or apply for the benefit of each primary Beneficiary an amount of principal as either primary Beneficiary shall direct in writing, not exceeding the lesser of $5,000 or 5% of the principal ... provided, however, that the Trustee shall make no distributions of principal under this paragraph to a primary Beneficiary during or with respect to any time during which such primary beneficiary is institutionalized...." Cohen at 417.

In the Walker trust, the offending language was:

> "The Trustee is prohibited from spending sums of interest or principal to [Walker] for her benefit for services which are otherwise available under any public entitlement program of the United States of America, the Commonwealth of Massachusetts, or any political subdivision thereof. The exercise of a discretionary power to make a distribution for [Walker's] health care, which would result in trust assets being used in substitution of public entitlement benefits is a breach of the fiduciary duties imposed on the Trustees [sic] under this indenture."

In the Kokoska trust, the offending language read:

> "The Trustee ... may make payment from time to time of so much of the principal of the Trust as is advisable in the discretion of the Trustee to meet the needs of the Primary Beneficiary as set forth in article two."

Under the Irrevocable Trusts in this appeal, no such offending language exists, and the trustee has never had the authority to distribute principal to the Appellant. None of the offending

language from any of the four trusts in Cohen is contained in the Irrevocable Trusts in this appeal.

(17) This Is Not a "Lebow" Case

In Lebow, the trustee had the authority to distribute principal to the settlor, but the person who was trustee, wearing his other hat as beneficiary, needed to consent before he as trustee could do so. He initially granted his blanket consent, then years later withdrew it. Although the consent requirement in the trust instrument supposedly limited the trustee's discretion, it did not completely deprive the trustee of discretion because the co-beneficiary, who was also trustee, held the power to modify the terms of the trust.

In Lebow, the applicant could always have received distributions of principal. The court classified this trust as a Medicaid-qualifying trust ("MQT") authorizing the trustee to distribute trust assets to the settlor in his discretion and ruling the trust assets to be available in determining the applicant's eligibility for MassHealth. In its decision, the Lebow court makes reference to the MQT statute, 42 U.S.C. §1396a(k), the 1985 federal Medicaid law trust changes, stating "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…" and the amount of a MQT that is deemed available to a grantor "is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor." §1396a(k), Lebow at 172 (emphasis added). The court in Lebow then goes on to state that "it does not matter whether a right in a trust has vested under traditional trust concepts." Lebow at 177. This language does not mean that state trust law is to be ignored, but that, consistent with the Cohen decision, assets will be considered available whether or not they may be distributed today if they may be distributed under any circumstances in the future under the terms of the trust. Thus, the proper analysis in this appeal is whether the trustee is allowed to distribute the principal of the Irrevocable Trusts to the Appellant under the terms of the Irrevocable Trusts without breaching the trustee's fiduciary duties to the remainderpersons of the Irrevocable Trusts.

Under the Irrevocable Trusts in this appeal, no maneuver even remotely similar to the Lebow machinations has been made, and the trustee has never had the authority to distribute principal to the Appellant. Neither the trustee nor anyone else has, has had, or ever could have the authority to grant permission to the trustee to distribute principal to the Appellant from the Irrevocable Trusts.

(18) The Position of the Office of Medicaid in the Doherty Case Was That the Trust Must Be Read as a Whole, and the Trustee Had No Fiduciary Duties to the Remainderpersons

The correct legal position about trust interpretation was stated on page 12 in the September 28, 2007 brief entitled "Defendant's Opposition to Plaintiff's Motion for Judgment on the Pleadings" filed in Essex Superior Court by Carolann Mitchell, Assistant General Counsel of the Executive Office of Health and Human Services in the Doherty case: "In reviewing contracts, the courts have found that a contract must be read in such a way that no part of the agreement is left meaningless. See Starr v. Fordham, 420 Mass. 178, 190 (1995); see also S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc., 343 Mass. 635, 640 (1962). In other words,

contracts must be construed to give "reasonable effect" to each provision contained therein. See State Line Snacks Corp. v. Town of Wilbraham, 28 Mass. App. Ct. 717 (1990). …To allow the one sentence … to control the whole of this document would render the Settlor's stated intent … completely meaningless. Such an interpretation of this trust is … against the weight of the law."

On that same page in the brief, the Office of Medicaid recognized and stressed the importance of fiduciary duties in trust analysis under Massachusetts trust law and federal Medicaid law; the Office of Medicaid took the position that the Trustee in the Doherty case had fiduciary duties, but not to the remainderpersons, but rather to the Settlor: "The unambiguous language of Article II demonstrates the Trustees' fiduciary duty runs to Muriel, and dictates that they can use all assets of the Irrevocable Trust for her care and benefit." The opposite is true in this case, where the Trustee has fiduciary duties to the remainderpersons, and cannot distribute principal to or for the benefit of the Appellant from the Irrevocable Trust without violating those duties. Nowhere in the Irrevocable Trust in this appeal is there any provision even slightly similar to the trust provision in Doherty that permitted the trustee to take action "without regard to the interests of the remaindermen." Doherty at 441.

(19) The Irrevocable Trusts in This Case Must Be Read as a Harmonious Whole

It has been a fundamental tenet of trust interpretation in Massachusetts for generations that the intention of the settlor (referred to as the Grantor in the Irrevocable Trusts in this appeal) is to be respected, that the trust is to be read as a whole, and that any ambiguous or conflicting provisions are to be interpreted in a harmonious manner. The MassHealth denial received in this case treats the principal of the Irrevocable Trusts as available and countable, yet there is no reasonable way of interpreting the Irrevocable Trusts in this appeal as providing for principal distributions to or for the benefit of the Appellant.

Under ARTICLE II, the Trustee is limited to distributing "net income only."

Under ARTICLE II (A), the Trustee can terminate the trust by making distributions to the remainderpersons.

Under ARTICLE II (B), the Trustee must add undistributed income to principal.

Under ARTICLE V, no power is given to the Trustee to invest in any type of annuity.

Under ARTICLE V (D), loans to the Grantor are prohibited.

Under ARTICLE V (F), the laws of the Commonwealth of Massachusetts apply, and there are no broad waivers of Massachusetts law anywhere in the trust.

Under ARTICLE VIII, a Trust Protector is appointed and is given limited power to amend the trust to correct errors and ambiguities, but the Trust Protector is not given the power to override the Grantor's intentions.

Under ARTICLE IX, the Grantor waives the right to alter, amend or revoke the trust.

The Office of Medicaid tends to argue in its memoranda that "the entire Trust instrument must be reviewed," then proceeds to ignore specific provisions that show the intended unavailability of principal in the Irrevocable Trusts. The Office of Medicaid attempts to isolate phrases in the Irrevocable Trusts out of context, but under Massachusetts law phrases in trusts must not be read independently; rather, the entire trust must be read as a whole, and the Office of Medicaid pushed that very point in the Doherty case: "[A]s MassHealth strongly presses upon us, this clause may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole." Doherty at 441. "Trust instruments must be construed to give effect to the intention of the settlor as ascertained from the language of the whole instrument considered in the light of the attendant circumstances. Groden v. Kelley, 382 Mass. 333, 335 (1981)." Harrison v. Marcus, 396 Mass. 424, 429 (1985). See also Schroeder v. Danielson, 37 Mass. App. Ct. 450, 453 (1994). Overemphasis on one or two provisions of the trust instrument is not permissible under Massachusetts trust law. "One or two expressions in the trust deed must not be so construed as to impair or destroy the whole scheme of the trust, when another and more reasonable construction is possible." Shirk v. Walker, 298 Mass. 251, 261 (1937). If two provisions of the trust are in apparent contradiction to each other when each is read in isolation, construction must be found that will allow meaning to both provisions to resolve the apparent contradiction, as it is presumed that all provisions in a trust were intended by the settlor to have meaning. Watson v. Baker, 444 Mass. 487 (2005).

(20) This Is Not a "Doherty" Case

The Office of Medicaid is incorrect in attempting to draw similarities between this case and Doherty v. Commissioner, 74 Mass. App. Ct. 439, 442-43 (2009), in which the assets of a trust were found to be countable because the applicant in Doherty was considered to be part of a class of beneficiaries who could receive the trust principal. In Doherty, the trustee had the power "in its sole discretion" and notwithstanding "anything contained in this Trust Agreement" to the contrary, "pay over and distribute the entire principal of [the] Trust fund to the beneficiaries thereof, free of all trusts," so long as the trustees, "in [their] sole judgment," determine that the "fund created . . . shall at any time be of a size which . . . shall make it inadvisable or unnecessary to continue such Trust fund." Similarly, the trustee had the power to "determine all questions as between income and principal and to credit or charge to income or principal or to apportion between them any receipt or gain . . . notwithstanding any statute or rule of law for distinguishing income from principal or any determination of the Courts." (emphasis added) … In addition, the settlor had directed the trustee to "accumulate the Trust principal to the extent feasible, due to the unforeseeability" of [the settlor's] "future needs" and "without regard to the interests of the remaindermen." (emphasis added)

A reading of the whole of the trust in Doherty made it appear that the trustee had no fiduciary duties at all to the remainderpersons, and, as noted earlier, the Office of Medicaid argued that the trustee had fiduciary duties to the settlor instead. The Irrevocable Trusts in this appeal do not include similar language, and instead displays the intention to limit the distributions to the Appellant to net income only.

Note that in the Doherty case, the court found the implicit authority to invade principal; the court wrote about language in the trust indicating an intent to administer the trust so as to address the settlor's changing life needs. "[E]mbedded in the trust's governing recitation is not only an explicit assessment that public or other charitable benefits will likely be insufficient to provide Muriel the quality of life she might desire, but the corollary implicit direction for the trustees, in such case, to invade assets to make up that difference. Which is not to say that specific trust provisions do not confer this authority, but is rather simply to observe that the trust vehicle, considered as a whole, evidences Muriel's expectation or intent that the trustees will invade trust assets when necessary to ensure Muriel's comfort." Doherty at 442. By way of contrast, in the Irrevocable Trusts in this appeal there is no such intention expressed or even implied.

The class of beneficiaries who may receive principal from the Irrevocable Trusts in this appeal explicitly does not include the Appellant. Further, unlike the trust in Doherty, there is no provision in the Irrevocable Trusts in this appeal which indicates that principal should be accumulated for the future needs of the Appellant, that legal distinctions between principal and income may be ignored, or that the interests of the remainderpersons are to be ignored. Thus, the trustee has fiduciary duties to the remainderpersons.

(21) The Memorandum of the Office of Medicaid Ignores Massachusetts Case Law on Proper Interpretation of Trusts

For the principal of the Irrevocable Trusts in this appeal to be available, either the distribution of the principal must be mandatory pursuant to the terms of the trust instrument, or the trustee must have discretion to make the distribution of principal. Any other distribution by the trustee would constitute a breach of the trustee's fiduciary duty, warranting removal from office and personal financial responsibility. E.g., see In the Matter of the Trusts Under the Will of Lotta M. Crabtree, 449 Mass. 128, 136 (2007). To determine whether a trustee is mandated or given discretion to distribute property out of the Irrevocable Trusts, each trust instrument must be construed as a whole to derive the settlor's intention, giving meaning to all provisions of the trust instrument and the entire estate plan as a whole. As the court noted in Hillman v. Hillman, 433 Mass. 590 (2001), when interpreting trust language, words should not be read in isolation and out of context; rather every effort should be made to ascertain "the settlor's intent from the trust instrument as a whole and from the circumstances known to the settlor at the time the instrument was executed." Id. at 593. "A fair reading of the whole of most trust instruments will reveal a judicially enforceable, external, and ascertainable standard for the exercise of even broadly expressed fiduciary powers." Dana v. Gring, 374 Mass. 109, 116 (1977).

Even if a trust is ambiguous with respect to any particular issue or matter, such ambiguity would not cause the principal of a trust to be available to a MassHealth applicant. It is well established that any matter relating to the rights created by a trust instrument is a question of law that turns on the Settlor's intent as reflected in the words of the instrument. Steele v. Kelley, 46 Mass. App. Ct. 712, 731 (1999). See also Harrison v. Marcus, 396 Mass. 424, 429 (1985); Atwood v. First Natl. Bank, 366 Mass. 519, 523-24 (1974); Berry v. Kyes, 304 Mass. 56, 59 (1939); 4 Scott, Trusts §§ 329A, 334.1 and 335 (Fratcher 4th ed. 1989). This rule of construction

applies to the nature and extent of a Trustee's discretion and to the issue of whether a trust can be terminated. "In a written trust, the nature and extent of a trustee's discretion as to any issue is defined by (1) the terms of the trust instrument and (2) in the absence of any provision in the terms of the trust, by the rules governing the duties and powers of the trustee. Restatement (Second) of Trusts s. 164 (1959)." Guerriero at 632. See also West v. Third National Bank of Hampden County, 11 Mass. App. Ct. 577, 580 (1981); Steele v. Kelley, supra at 731 ("[t]he issue of termination, like any other matter relating to rights created by a trust instrument, including the extent of a trustee's discretion, initially is a question of law that turns on the settlor's intention as reflected in the words of the instrument.") (Citations omitted).

In cases of ambiguity, the settlor's intentions control the interpretation of the Irrevocable Trusts, and that is why testimony is needed from the drafting attorney in this case. "When interpreting trust language … we do not read words in isolation and out of context. Rather we strive to discern the settlor's intent from the trust instrument as a whole and from the circumstances known to the settlor at the time the instrument was executed. Pond v. Pond, 424 Mass. 894, 897 (1997). Berman v. Sandier, 379 Mass. 506, 510 (1980). Putnam v. Putnam, 366 Mass. 261, 266 (1974). If, read in the context of the entire document, a given word or phrase is ambiguous, we may accept and consider extrinsic evidence showing the circumstances known to the settlor when he or she executed the document. Berman v. Sandler, supra. Putnam v. Putnam, supra at 266-267[8]." Hillman v. Hillman, 433 Mass. 590, 593 (2001).

(22) The Office of Medicaid Ignores that Trustees Have Fiduciary Duties to the Remainderpersons, and Cannot Use Powers to Skew Beneficial Interests

As a fiduciary, a trustee has the dual duties of loyalty and impartiality. See Johnson v. Witkowski, 30 Mass. App. Ct. 697, 705 (1997), and more generally, Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 529 (1997) quoting Judge Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 463-464 (1928) "(n)ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." The duty of loyalty to the beneficiaries requires of the trustee that the trustee act solely in accordance with the terms of the trust instrument construed to carry out the intent of the settlor. Watson v. Baker, 444 Mass. 487, 491 (2005). Therefore, a trustee may not commit any act that would harm the interest of any beneficiary of the trust, that would waste any trust property, that would give trust property to anyone not entitled thereto, or that would otherwise be contrary to the intent of the settlor in entrusting the settlor's property to the management of a trustee. See King v. Nazzaro, 78 Mass. App. Ct. 1128 (2011). If the trust instrument provides that no distribution of principal shall be made to the settlor of the trust, then the trustee is forbidden to do so. To do otherwise would do harm to the beneficial interests of the other beneficiaries, where here, the Appellant is only the income beneficiary of the Irrevocable Trusts, and to do otherwise would therefore be a breach of fiduciary duty. See Anderson v. Bean, 272 Mass. 432, 447-448 (1930). Such a prohibition against distribution of principal to the Appellant from the Irrevocable Trusts is absolute. The Court in Guerriero made clear that an important consideration was that if the Trustee violated the Trustee's duty to a beneficiary, the Trustee would be liable for a "breach of trust." Guerriero at 632. A trustee has "the burden of showing that he ha[s] discharged the duties of trustee with reasonable skill, prudence, and judgment." Rugo v. Rugo, 325 Mass. 612, 617 (1950).

The Office of Medicaid attempts to argue that the purpose of a trust may not be used as a limitation on trustee discretion to make a distribution of principal to the settlor, but ignores that it is the responsibility of the trustee to understand all provisions of the trust instrument and construe them so as to give meaning and efficacy to all of them. As the Court stated in Dana v. Gring, 374 Mass. 109, 116 (1977), it is a fundamental principle of Massachusetts law "to ascertain the intention of the testator from the whole instrument, attributing due weight to all its language . . . and to give effect to that intent unless some positive rule of law forbids."

Another duty of a trustee, the duty of impartiality as between and among the beneficiaries, requires that the trustee not favor one beneficiary over another; instead, the trustee is bound to treat all beneficiaries equitably in accordance with the terms of the trust instrument construed as a whole. See King v. Nazzaro, 78 Mass. App. Ct. 1128 (2011). Thus, a power that allows a trustee to make a particular type of investment is not authority to override the intentions of the Irrevocable Trusts. “Even when there are broad discretionary powers, a trustee may not exercise his or her discretion so as to shift beneficial interests in the trust.” Fine v. Cohen, 35 Mass. App. Ct. 610, 617 (1993). The trustee of the Irrevocable Trusts in this appeal must balance risk and return in the trustee’s management of the trust estate so as to be fair to both the life tenant and the remainderpersons. "[I]n the absence of instructions to the contrary [a trustee is bound] to administer his trust with an eye to the remainder interest" as well as to the interest of the life beneficiary. Blodgett v. Delaney, 201 F.2d 589, 593 (1st Cir. 1953).

Trustee duties of loyalty and impartiality are not contrived limitations on the exercise of broadly given trustee powers, but rather are the very core and essence of what a trust is. A trust is a relationship wherein a trustee manages property for the benefit of others. The trustee is imbued with certain powers to carry out assigned duties, but those powers must be understood in the context of the beneficial interests that are bestowed upon the income beneficiary or life tenant and remainderpersons of the Irrevocable Trusts. For every interest that a beneficiary has under a trust instrument, the trustee has a correlative duty to safeguard and provide that interest to the beneficiary. Thus, trustee powers are made available to the trustee only to the extent necessary to provide the trust beneficiaries with their rightful beneficial interests under the Irrevocable Trusts. If a beneficial interest is denied to a beneficiary, then the trustee has no authority or discretion to make it available to the beneficiary. The power to purchase annuities, life insurance or any other investment is granted to the trustee only to the extent that the exercise of that power will secure to the beneficiaries their respective beneficial interests. Such a power may not be used to divert one beneficiary's interest to another beneficiary without breach of fiduciary duty. The conversion of principal to income, or vice versa, to redirect trust resources from one beneficiary to another is not allowed due to the trustee’s duty of impartiality. “Even when there are broad discretionary powers, a trustee may not exercise his or her discretion so as to shift beneficial interests in the trust. Old Colony Trust Co. v. Silliman, 352 Mass. at 10. The trustee must use his or her "best informed judgment in good faith in the light of what the established rules suggest to the trustee is consistent therewith." Ibid. In making this determination … consideration should be given to such factors as the extent of discretion intended to be conferred

upon the trustees by the terms of the trust; the existence or nonexistence of an external standard by which the reasonableness of the trustees' conduct can be judged; the circumstances attending the exercise of the power; and the existence or nonexistence of an interest in the trustees conflicting with that of the beneficiaries. 3 Scott & Fratcher, Trusts § 187 (4th ed. 1988). See also Copp v. Worcester County Natl. Bank, 347 Mass. 548, 550-551 (1964)." Fine v. Cohen, 35 Mass. App. Ct. 610, 617 (1993).

The Office of Medicaid fails to explain why it recognizes the importance of a trustee's fiduciary duties in MassHealth regulations and in its brief in the Doherty case but not in its memorandum in this appeal.

(23) Even If the Trustee Could Purchase an Annuity, Any Potential Annuity Purchase by the Trustee Does Not Provide the Appellant with Access to Principal

The memoranda of the Office of Medicaid betray a fundamental misunderstanding of basic annuity principles. When a payment is received from an annuity, the portion of the payment that represents a return of principal is nontaxable, and reasonable accounting principles require the trustee to allocate the return of principal to the corpus or principal of the trust. M.G.L. c.203D, s. 3(a)(4), states that, in allocating receipts and disbursements to or between principal and income, a trustee "shall add a receipt or charge a disbursement to principal if the terms of the trust … do not provide a rule for allocating the receipt or disbursement to or between principal and income." Thus, the legal presumption in Massachusetts is that any amount received is not income, but rather principal. In the absence of explicit contrary powers in the Irrevocable Trusts, the trustee has no power to deviate from generally accepted practices of fiduciary accounting when determining what is income or principal. See Restatement (Third) of Trusts §233, comment p.

Under the Massachusetts Principal and Income Act, "[i]f a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment." M.G.L. c. 203D, § 18(a). The Massachusetts Principal and Income Act also provides that "[a]n amount received as interest, whether determined at a fixed, variable or floating rate on an obligation to pay money to the trustee, including an amount received as consideration for prepayment of principal, shall be allocated to income without any provision for amortization of premium." M.G.L. c. 203D, § 15(a). Thus, annuity distributions cannot be treated solely as income under Massachusetts law, where most of such payments are factually a return of principal.

A legal argument similar to the one made by the Office of Medicaid in its memoranda about potential investments in annuities (as well as life insurance) was made by the Internal Revenue Service and rejected in the federal estate tax case of United States v. Powell, 307 F.2d 821 (10th Cir., 1962), which was cited in Old Colony Trust Co. v. Silliman, 352 Mass. 6 (1967): "Counsel for the United States assert that the investment power, with respect to life insurance, annuities and income bearing contracts, authorized the trustees … to invest the corpus in annuities for the term of the wife's life and thereby deprive the remaindermen, the daughters, of

all benefits of the trust." The court decided otherwise: "It is well settled that where there are two or more beneficiaries of a trust, it is the duty of the trustee to administer the trust impartially, as between the beneficiaries (see Scott on Trusts, 2nd Ed., Vol. II, § 183; Redfield v. Critchley, 252 App. Div. 568, 300 N.Y.S. 305, 310, affirmed, 277 N.Y. 366, 14 N.E.2d 377; Restatement of the Law of Trusts, § 183), and where a trustee under a trust is directed to pay the income to a beneficiary during his life and on his death to pay the income from the trust or the corpus to another beneficiary, it is the duty of the trustee so to administer the trust as to preserve a fair balance between them. (See Pennsylvania Co., Etc. v. Gillmore, 137 N.J.Eq. 51, 43 A.2d 667, 670, 671; Security Trust Co. v. Mahoney, 307 Ky. 661, 212 S.W.2d 115, 119; In re Simpson's Will, Sur., 33 N.Y.S.2d 614, 616; Restatement of the Law of Trusts, § 232; Scott on Trusts, 2nd Ed., Vol. III, § 232, p. 1744.) Accordingly, it was the duty of the trustees in the exercise of their discretion to invest the corpus for the benefit of the trust estate and in such a manner as to preserve a fair balance between the life tenant and the remainder beneficiaries." United States v. Powell, 307 F.2d 821, 824-825 (10th Cir., 1962) (footnotes included).

As earlier stated, the memorandum of the Office of Medicaid fails to demonstate or even discuss why the Office of Medicaid should be accorded more authority in trust interpretation than the Internal Revenue Service is accorded in applying federal tax law.

The Office of Medicaid's cite to M.G.L. c. 203, § 25A evinces its lack of knowledge or truthfulness regarding trust law, where such law was repealed in 2008, but even if that law still existed, it would be irrelevant to the question of whether the trustee of the Irrevocable Trusts in this appeal has the discretion to distribute principal to the Appellant. The Office of Medicaid cites regulations in support of its position that all payments from annuities are "income," but the Irrevocable Trusts do not make reference to those regulations, and is instead governed by its express terms, common law and statutory authority, including the Massachusetts Principal and Income Act. In making determinations of principal and income, the trustee of the Irrevocable Trusts is required to apply reasonable accounting principles under Massachusetts law.

The Office of Medicaid completely ignores the Massachusetts Principal and Income Act in its memorandum, even though "Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues." Lewis v. Alexander, 685 F.3d 325, 347 (3d Cir. 2012). The Office of Medicaid may not unilaterally impose its own definition of "income" from another context and create unintended definitions of terms and phrases within the Irrevocable Trusts in this appeal. Allowing any state agency to do so would wreak havoc on well-established trust doctrine, upset settled legal expectations of grantors, trustees and beneficiaries, and be in violation of the Lewis v. Alexander holding and the Massachusetts Principal and Income Act.

(24) History of Federal Medicaid Law Indicates the Term "Available" Is to Be Narrowly Construed When Determining Applicant's Income

In State of Washington v. Bowen, 815 F. 2d 549 (9th Cir., 1987) the Court delved into the term "available" as utilized in the context of Medicaid law, and determined that the term must be narrowly construed. "As used in public assistance statutes, the term "available" typically functions as a restrictive term defining a subcategory of "income." See, e.g., Heckler v. Turner,

470 U.S. 184, 200, 105 S.Ct. 1138, 1147, 83 L.Ed.2d 138 (1985); Gray Panthers, 453 U.S. at 48, 101 S.Ct. at 2642; Schrader v. Idaho Dept. of Health and Welfare, 768 F.2d 1107, 1110 (9th Cir.1985); Young v. Schweiker, 680 F.2d 680, 682 (9th Cir.1982). The legislative history of the Medicaid statute also indicates that "available" should be read as a limiting term. The Senate report accompanying the Medicaid legislation provided: States [are required] to take into account only such income and resources as ... are actually available to the applicant or recipient.... States [are] not [to] assume the availability of income which may not, in fact, be available or overevaluate income and resources which are available. S.Rep. No. 404, 89th Cong., 1st Sess. 78 (1965), reprinted in 1965 U.S. Code Cong. & Ad. News pp. 1943, 2018."

The Connecticut Supreme Court has analyzed the availability principle in federal law, and concluded: [U]nder applicable federal law, only assets actually available to a medical assistance recipient may be considered by the state in determining eligibility for public assistance programs such as title XIX [Medicaid] … A state may not, in administering the eligibility requirements of its public assistance program pursuant to title XIX … presume the availability of assets not actually available." Zeoli v. Commissioner of Social Services, 179 Conn. 83, 94 (1979).

The case of Reinholdt v. N.D. Department of Human Services, 2009 ND 17, 760 N.W.2d 101 (2009), cited by the Office of Medicaid in many of its other memoranda in Medicaid trust denial cases, is instructive on the level of inquiry needed in this case: "Determining whether an asset is 'actually available' for purposes of Medicaid eligibility is largely a fact-specific inquiry depending on the circumstances of each case. An asset to which an applicant has a legal entitlement is not unavailable simply because the applicant must initiate legal proceedings to access the asset. Rather, if an applicant has a colorable legal action to obtain assets through reasonable legal means, the assets are available. The 'actually available' requirement must be interpreted reasonably, and the focus is on the applicant's actual and practical ability to make an asset available as a matter of fact, not legal fiction." (emphasis added)

The Office of Medicaid fails to demonstrate or even discuss how the Appellant could possibly have a colorable legal action to obtain principal from the Irrevocable Trusts. If the trustee in this case were to have the discretion to make principal available to the Appellant, only then would the Appellant have a "colorable legal action" to receive principal from the Irrevocable Trusts. Thus, the Irrevocable Trusts in this appeal should be viewed as a whole, as the Office of Medicaid urged and the Massachusetts Appeals Court ruled in the Doherty case, and Massachusetts trust law must be utilized in interpreting the Irrevocable Trusts, as the United States Court of Appeals for the Third Circuit held in the Lewis v. Alexander case, and Massachusetts debtor-creditor law must be utilized to determine, as described in Reinholdt, whether the Appellant have a colorable legal action to receive principal from the Irrevocable Trusts.

(25) History of Medicaid Trust Law Reflects That Debtor-Creditor Analysis Is the Proper Standard of Review for Self-Settled Irrevocable Trusts

Before 1985, a settlor could place the settlor's assets in trust for the settlor and grant the trustee complete discretion to distribute principal back to the settlor. For some reason, the assets

held in that type of trust were not counted as assets of the Medicaid applicant before 1985. "As we have stated, prior to 1986 some irrevocable trusts simply allowed complete discretion in the trustee without any further specification." Cohen at 409. Such a trust, however, would not have been effective against a creditor under state debtor-creditor laws. To eliminate this obvious loophole in the law, Congress changed federal Medicaid law to allow states to implement their existing debtor-creditor laws against that type of trust. Many of the quotes erroneously relied upon by the Office of Medicaid in its memorandum were discussing these types of trusts, not the Irrevocable Trusts involved in this case, yet the Office of Medicaid chooses not to explain the context of the quotes.

In the case of Cohen v. Comm'r of Div. of Med. Assistance, 423 Mass. 399 (1996), Justice Charles Fried of the Supreme Judicial Court concluded that Congress was effectively implementing state debtor-creditor laws when it enacted Medicaid trust laws: "We are confirmed in this reading by something akin to legislative history: a consideration of the source from which the legislative language appears to have been taken. See Comey v. Hill, 387 Mass. 11 , 15 (1982), quoting 2A Sands, Sutherland Statutory Construction s. 50.03, at 277-278 (4th ed. 1973) ("Words and phrases having well-defined meanings in the common law are interpreted to have the same meanings when used in statutes dealing with the same or similar subject matter as that with which they were associated at common law"). Restatement (Second) of Trusts s. 156 (1959) provides: "Where the Settlor is a Beneficiary . . . (2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit." The plaintiffs suggest that this provision was a likely model for the Congressional enactment, and a comparison of the purpose and the language of the provision confirms their suggestion. Section 156 of the Restatement deals with a device, like the MQT, concocted for the purpose of having your cake and eating it too: the self-settled, spendthrift trust. Under such a trust, a grantor puts his assets in a trust of which he is the beneficiary, giving his trustee discretion to pay out monies to gratify his needs but limiting that discretion so that the trustee may not pay the grantor's debts. Thus, the grantor hopes to put the trust assets beyond the reach of his or her creditors. Like the MQT statute, s. 156 defeats this unappetizing maneuver by providing that, even if those assets are sought to be shielded by the discretion of a trustee, or if the trust simply declares assets unavailable to creditors, the full amount of the monies that the trustee could in his or her discretion "under the terms of the trust" pay to the grantor, is the amount available to the grantor and thus to his or her creditors. Not only the courts of this State, but those of many other jurisdictions have long followed this Restatement principle. See Ware v. Gulda, 331 Mass. 68 , 70 (1954); Merchants Nat'l Bank v. Morrissey, 329 Mass. 601 , 605 (1953). See also Scott, Trusts s. 156 n.1 (3d ed. 1967 & Supp. 1985) (compiling cases). We do not innovate here, nor do we see any reason to be the least bit squeamish about interpreting the analogous Federal statute in an analogous way to accomplish an analogously just result." Cohen at 413-415 (emphasis added).

The Iowa case of Strand v. Rasmussen, 648 N.W.2d 95, 101 (2002), mentioned by the Office of Medicaid, explains the evolution of Medicaid trust law: "Prior to 1986, an irrevocable trust was not considered to be an asset in determining whether an applicant was sufficiently needy to qualify for Medicaid benefits. … Yet, Congress and the states participating in the joint federal-state Medicaid program began to realize that many individuals with irrevocable trusts

that otherwise would have made them ineligible for public assistance were receiving Medicaid benefits. … As a result, these individuals were permitted "to have [their] cake and eat it too," at the expense of those who were truly unable to financially care for themselves. … In 1986, Congress attempted to close the "loophole" in the federal Medicaid act. … The amendment created an exception to general trust law by including certain trusts with an individual's assets for the purpose of determining whether an applicant's resource level exceeded the maximum limits. … These prohibitive trusts were called Medicaid qualifying trusts."

As explained in the Cohen and Strand cases, the federal Medicaid trust laws since 1985 have simply allowed states to implement their existing debtor-creditor laws against trusts, established in Massachusetts under Merchants Nat'l Bank v. Morrissey, 329 Mass. 601 (1953), which held that under Massachusetts law, where the settlor is also the beneficiary of a self-settled trust, the settlor cannot keep property beyond reach of creditors by placing it in a spendthrift trust for the settlor's own benefit. Also see Ware v. Gulda, 331 Mass. 68 (1954), where the Court stated: "The rule we apply is found in Restatement: Trusts, Section 156 (2): "Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit."." Note, as Justice Fried did in Cohen, that this language is similar to the language in the federal laws regulating irrevocable trusts in the Medicaid context.

What the Cohen holding means is that, for trust interpretation purposes, MassHealth stands in the same shoes as a creditor of the Settlor-Appellant. Under Ware, a creditor could sue a self-settled trust and reach the maximum amount capable of distribution to the settlor, and under Cohen, the maximum amount capable of distribution to the settlor is treated as an available asset. If a creditor could successfully sue the Irrevocable Trusts in this appeal for a debt of the Appellant and reach the principal, then those are the circumstances under which the principal of the Irrevocable Trusts would be treated as a countable asset under federal Medicaid law, and only to the extent that the creditor could do so.

The trusts in question in Cohen and its companion cases had been so-called "trigger" trusts, which allowed the trustee to pay principal to or for the benefit of the Medicaid applicant but had that discretion terminated upon an event such as institutionalization. In Cohen and its companion cases, and in Lebow, the principal was explicitly available for distribution to the settlor, and there was a thin veil of language protecting the principal so that it arguably was not distributable if Medicaid eligibility was threatened. None of the trusts in Cohen or Lebow could have passed muster under a debtor-creditor analysis; a creditor of the settlor could always have reached the assets of these self-settled trusts. The trustee in those cases could always make distributions of principal to the settlor, yet the thin veil of language allowed the trustee to attempt to claim later on that the discretion was no longer there; that is why the courts issued dicta along the lines of "having your cake and eating it too."

The memorandum of the Office of Medicaid puts the reader of the Irrevocable Trusts in this case through mental gymnastics to claim the principal is available, yet the case law under Cohen and Lebow was about principal distributions that could have unquestionably been made by the trustee to the settlor or to the settlor's creditors without breaching any duty to the

remainderpersons. These factors are not present in the Irrevocable Trusts in this appeal, so this line of cases does not apply.

(26) The Appellant and the Lawyer Who Drafted the Irrevocable Trusts Are Entitled to Rely on the Plain Language of Federal Medicaid Trust Law Implementing State Debtor-Creditor Laws

The Supreme Judicial Court has concluded that the 1985 changes in federal Medicaid trust law were meant to allow the implementation of "Restatement (Second) of Trusts s. 156 (1959)" by state Medicaid programs. Cohen at 414. The Supreme Judicial Court also concluded that the 1993 changes in federal Medicaid trust law repaired the gaps in the 1985 law and "resolves in favor of the Commonwealth all possibility of argument the issue presented in these cases." Cohen at 406. Where there have been no changes in federal Medicaid trust law since 1993, and where the Cohen court in 1996 has already determined that federal Medicaid trust law implements the provisions of Restatement (Second) of Trusts s. 156, the Appellant and the lawyer who drafted the Irrevocable Trusts are entitled as a matter of law to rely on Restatement (Second) of Trusts s. 156 as the legal standard under which the Office of Medicaid must continue to review all irrevocable trusts. Draftspersons and citizens have relied on the Cohen court's interpretation of the federal Medicaid trust law and continue to be entitled to rely on the Office of Medicaid to enforce it consistently. "Only if the legislative history compelled a different conclusion might we depart from the plain meaning of the statute. … The application of this canon of construction is especially appropriate where the statute is understood to elicit reliance by knowledgeable persons drafting documents in response to it." Cohen at 409.

The fact that the Office of Medicaid has only recently adopted its current position about irrevocable trusts shows that it agreed with the Cohen court's view of the applicability of Restatement (Second) of Trusts s. 156 from the time the 1985 and 1993 laws were implemented in Massachusetts. The long-standing position of the Office of Medicaid regarding irrevocable trusts was established in a legal memorandum dated 4/29/1992, entitled "Transfer and Trust Issues Reconciliation of Department Policy," attached hereto as EXHIBIT K, where the standard of review, similar to Restatement (Second) of Trusts s. 156, was simply that a trust was "countable up to the limit of the trustee's discretion to distribute it to the applicant."

(27) The Spousal Testamentary Trust Exception Also Reflects the Interplay of Federal Medicaid Law and State Debtor-Creditor Laws

When the federal Medicaid trust laws were changed in 1985, Congress was, for the first time, simply allowing state Medicaid programs to be treated the same as creditors under state laws. So that trustees of irrevocable trusts could no longer hide behind a spendthrift clause or a thin veil of language protecting the trust from countability, Congress changed the definition of trusts. In so doing, Congress defined the type of offensive trusts. Trusts that were self-settled and those that a spouse set up during lifetime for the other spouse were targeted by the federal law. Creditors could reach those trusts under state debtor-creditor laws.

State debtor-creditor laws could not easily be applied to trusts established in a decedent's will, and the spousal testamentary trust exception ended up in the federal Medicaid law. Certain trusts established by a spouse "other than by will" can be considered countable assets, yet

testamentary trusts established for the benefit of the surviving spouse are exempted from consideration. See 42 U.S.C. 1396p(d)(2)(A). The Commonwealth of Massachusetts was required to place the spousal testamentary trust exception in place as part of its implementation of federal Medicaid trust law, and has done so. Under 130 CMR 520.022(B)(1), which deals with "Trusts or Similar Legal Devices Created before August 11, 1993" a so-called Medicaid Qualifying Trust is defined in the following manner: "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 a will." (emphasis added) Further, 130 CMR 520.022(B)(1), which deals with "Trusts or Similar Legal Devices Created on or after August 11, 1993" states: "The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will." (emphasis added) If Congress had been attempting in 1985 and 1993 to eliminate the usage of all trusts to qualify for Medicaid, as the Office of Medicaid argues, and not just allowing state debtor-creditor laws to be implemented, then there would have been no reason for Congress to define trusts in such a way as to allow the spousal testamentary trust exception.

(28) A Denial of This Appeal Would Result in the Nursing Home Having No Recourse for Payment

The memorandum of the Office of Medicaid describes the Irrevocable Trusts as if the principal were directly payable to the Appellant, and callously ignores the financial consequences to the nursing home where care is being provided. If a MassHealth application in this case is denied due to the existence of the Irrevocable Trusts, and if the nursing home could reach the Irrevocable Trusts as a creditor of the denied MassHealth applicant under Massachusetts debtor-creditor laws, then the nursing home could eventually be made whole by suing the denied MassHealth applicant and the Irrevocable Trusts. Where, however, a creditor of the Appellant in this case cannot reach the principal of this Irrevocable Trusts and the trustee cannot be forced to pay the nursing home, then the nursing home would be left with no payment source if this MassHealth application and appeal are denied. "If the settlor-beneficiary creates a remainder interest in another person, then the settlor-beneficiary's creditors will not be able to reach the remainder interest if the trustee cannot reach the corpus for the settlor-beneficiary's benefit." In re Shurley, 115 F.3d 333 (5th Cir. 1997), citing G. Bogert & G. Bogert, Trusts and Trustees (2d rev. ed. 1992), § 223, at 453. "Where the settlor retains only a limited interest in a trust, the portion thereof not retained is afforded some protection even though it is self-settled. The settlor's creditors can reach trust assets to the maximum extent that the trustee could distribute or apply such assets for the settlor-beneficiary's benefit." Peter Spero, Asset Protection: Legal Planning, Strategies and Forms, 6.08[2] (Warren Gorham & Lamont, 2007), citing 2 A. Scott & W. Fratcher, The Law of Trusts (4th ed. 1987), §156.2, at 175.

The nursing home could end up being the true financial victim in this case if it is required to provide nursing home care, and MassHealth will not cover the applicant's costs, and the Irrevocable Trusts cannot be successfully sued by the nursing home to pay the settlor's bills. It is highly unlikely that Congress could have intended such a potentially disastrous financial result for the nursing home industry when it changed the federal Medicaid trust laws, especially where in Cohen the Supreme Judicial Court has ruled that Congress was allowing state implementation of debtor-creditor laws when it was passing federal Medicaid trust laws. If the Irrevocable Trusts

in this appeal cannot be sued to provide for the settlor's support, then the principal of the Irrevocable Trusts cannot be deemed an available asset under Medicaid trust law and corresponding MassHealth regulations.

(29) The Trustee's Authority to Define Income and Principal under Massachusetts Law in No Way Allows Principal to be Distributed to the Appellant

The Office of Medicaid usually misconstrues the trustee's powers to determine what is principal or income as empowering the trustee to call the principal of the Irrevocable Trusts "income" and distribute it to the Appellant. In reality, the trustee's powers do not permit the trustee to play fast and loose with concepts of principal and income accounting.

Section 103(a)(4) of the Uniform Principal and Income Act, as adopted in Massachusetts as M.G.L. c.203D, s. 3(a)(4), states that, in allocating receipts and disbursements to or between principal and income, a trustee "shall add a receipt or charge a disbursement to principal if the terms of the trust … do not provide a rule for allocating the receipt or disbursement to or between principal and income." Thus, the legal presumption in Massachusetts is that any amount received is not income, but rather principal. In the absence of explicit contrary powers in the trust, the trustee of the Irrevocable Trusts in this appeal has no power to deviate from generally accepted practices of fiduciary accounting when determining what is income or principal. See Restatement (Third) of Trusts §233, comment p.

In Old Colony Trust Co. v. Silliman, 352 Mass. 6 (1967), the Massachusetts Supreme Judicial Court interpreted the extent of a trustee's authority under a similar provision, holding it was "primarily an administrative power authorizing the trustee in instances of doubt to use its best informed judgment in good faith in the light of what the established rules suggest..." and that such a "power may not be used to shift beneficial interests." Id. at 9. Provisions granting "even very broad discretionary powers are to be exercised in accordance with fiduciary standards and with reasonable regard for usual fiduciary principles." Id. at 10. See also Worcester County Nat. Bank v. King, 359 Mass. 231, 234-235, 268 N.E.2d 838 (1971) and Fine v. Cohen, 35 Mass. App. Ct. 610, 617 (1993), which interpret similar provisions and hold that even with broad discretionary powers, a trustee may not exercise his or her discretion to shift beneficial interests in a trust.

(30) A Limited Power of Appointment Does Not Allow the MassHealth Applicant or the Trustee to Distribute Principal to or for the MassHealth Applicant

The Office of Medicaid argues that a limited power of appointment reserved by the MassHealth applicant somehow makes the principal of the Irrevocable Trust countable, but the Office of Medicaid fails to mention that the MassHealth applicant is prohibited from exercising the power of appointment in favor of the Appellant. This provision does not allow the trustee, either expressly or impliedly, to distribute the principal of the Irrevocable Trust to the Appellant, nor for the Appellant to withdraw trust principal. Since the Appellant cannot access the principal, that provision does not create a circumstance in which the principal of the Irrevocable Trust would be a countable resource. In addition, the power of appointment cannot be stretched in meaning to allow a return of the principal of the trust to the settlor. "The law of

Massachusetts is plain that a valid trust, once created, cannot be revoked or altered except by the exercise of a reserved power to do so, which must be exercised in strict conformity to its terms. Viney v. Abbott, 109 Mass. 300, Leahy v. Old Colony Trust Co., 326 Mass. 49, 52, and cases cited. Scott, Trusts (1939), Section 330.8." Phelps v. State St. Trust Co., 330 Mass. 511, 512 (1953).

The Office of Medicaid invalidly argues in its memorandum that a limited power of appointment reserved by the MassHealth applicant makes it appear that the MassHealth applicant did not make full divestment of the trust assets makes the principal of the Irrevocable Trust countable. The Office of Medicaid states on page 7 of its memorandum that "the applicant and her husband … retained substantial control over all Trust assets, including the principal. … Had the applicant and her husband divested themselves of ownership and control of the principal of the Trusts, this provision of the Trusts would be meaningless." As noted earlier in this memorandum, the issue of control is nowhere in the Medicaid statute as a criterion for the countability or availability of the principal of an irrevocable trust. Further, the ownership point made by the Office of Medicaid is an indefensible misstatement of the law, for, contrary to what the Office of Medicaid asserts (without authority), it is well established that a power of appointment is explicitly not an interest in property.

"A power of appointment is a power that enables the donee of the power to designate recipients of beneficial ownership interests in or powers of appointment over the appointive property." Restatement 3rd Property (Wills and Donative Transfers) §17.1. (The Restatements of Property use the term "donee" to refer to the person to whom the power of appointment is given, not the person in favor of whom a power of appointment is exercised (known as the "appointee"). The "donee" is also referred to as the "Powerholder." The Restatement 3rd of Property often refers to a person who has retained a power of appointment over transferred property as the "donor-donee" of the power of appointment. Restatement 3rd Property (Wills and Donative Transfers) §17.2.) "[A] a power of appointment traditionally confers the authority to designate recipients of beneficial ownership interests in or powers of appointment over property that the donee does not own. … [A] power of appointment can be (and often is) reserved by the former owner of the appointive property. The term "donor-donee" is sometimes used herein to refer to such a person." Restatement 3rd Property (Wills and Donative Transfers) §17.1 cmt c (emphasis added). The Restatement (Third) of Property (Wills and Donative Transfers) even explicitly states that the Powerholder may or may not have some ownership interest in the property, directly contradicting the Office of Medicaid. Restatement 3rd Property (Wills and Donative Transfers) §17.3(f) and (g) (discussing Collateral Powers, Powers Appendant, and Powers in Gross). Finally, "a nongeneral power of appointment is not an ownership-equivalent power." Restatement 3rd Property (Wills and Donative Transfers) §22.1 cmt a. "Where a non-general power has been created, the donee is not in the position of an owner either as a matter of common-law doctrine or the practicalities of the situation." Restatement 2nd (Donative Transfers) 13.6 cmt b.

The Office of Medicaid has also stated in its previous memoranda, regarding the mere existence of a power of appointment: "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." Unfortunately, this is a profoundly

misleading statement of the law. Beneficiaries of a trust include all present and future, vested and contingent beneficiaries. MGL c. 203E §103. It is a rare trust where the remainderpersons are not contingent, if for no other reason than that most trusts are drafted so that a remainderperson must survive the current beneficiary of the trust in order to take. While it is true that the applicant is the sole vested beneficiary of the trust, the Office of Medicaid, once again by sleight of hand and omission, implies that this means that the applicant is the only beneficiary of the trust, which is not true, and further that this means that the trust property belongs to the applicant, which is not the case. The applicant may be the only vested beneficiary, but the applicant is not the sole beneficiary. The interests of any particular remainderperson is contingent, on account of having to survive the applicant, and as the remainderpersons are takers-in-default of the exercise of the applicant's limited power of appointment, the interests of any particular remainderperson is a future interest subject to divestment, but the Office of Medicaid silently makes the illogical leap that that because the principal of the trust is not vested in any particular person, it must not be divested from the applicant and therefore is vested in the applicant.

As noted earlier in this memorandum, if a creditor cannot reach it, then the principal of the Irrevocable Trust is not "available" to the Appellant. Not only can the nongeneral power not be exercised in favor of Powerholder or the Powerholder's creditors, the creditors of the Powerholder cannot reach the assets subject to the power. "The rights of creditors with respect to trust property over which the debtor has a power of appointment depend on the nature of the power. For example, the creditors of the donee of a nongeneral power of appointment (one that cannot be exercised for the economic benefit of the power holder), whether or not presently exercisable, cannot reach the property subject to the power for the satisfaction of their claims; nor is the property subject to the expenses of administering the donee's estate." Restatement (Third) of Trusts, § 56, comment b (2003) "Property subject to a nongeneral power of appointment is exempt from claims of the donee's creditors and from liability for expenses of administering the donee's estate." Restatement 3rd Property (Wills and Donative Transfers) §22.1. In addition, "Section 541(b)(1) of the federal Bankruptcy Code of 1978 (11 U.S.C. § 541(b)(1)) provides that 'Property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor.' This provision excludes from the federal bankruptcy estate property subject to a nongeneral power of the donee-bankrupt." Restatement 3rd Property (Wills and Donative Transfers) §22.1 cmt d. Further, the case law supporting the Restatement on this proposition is also conclusive. "Because a nongeneral power of appointment is not an ownership-equivalent power, the donee's creditors have no claim to the appointive assets, irrespective of whether or not the donee exercises the power. Restatement (Third) of Property § 22.1, comment a. Where the powerholder has only a special power of appointment, the power is not beneficial to the powerholder and cannot be reached by his creditors." In re Shurley, 171 B.R. 769, 786-87 (Bankr. W.D. Tex. 1994). In Prescott v. Wordell, 319 Mass. 118, 65 N.E.2d 19 (1946), the executors contended that, because the donee exercised her non-general power in her will, the will had the effect of making the appointed property assets of her estate insofar as her creditors were concerned. The court, pointing to §326 of the first Restatement of Property, held that since the donee had no power to appoint the property to her own estate or for the benefit of her creditors, her exercise of the power did not subject the appointed property to the payment of her debts. Thus, since the nongeneral power of appointment cannot be used, directly or indirectly, to pay any of the

principal of the irrevocable trust to the applicant, and because the property subject to the power is not reachable by the creditors of the applicant, the power of appointment does not create any circumstance or method whereby the principal of the trust would be available and therefore countable. 42 U.S.C. §1396p(d)(3)(B); 130 CMR 520.023(C)(1)(a).

Further, any claim that the Applicant could exercise the limited power of appointment collusively with an appointee of the property to get trust principal back is an indefensible misstatement of law. "The donor may define the permissible appointees of a nongeneral power by exclusion, by inclusion, or by a combination of the two. If they are defined by exclusion, the donor lists the persons to whom a valid appointment cannot be made. If they are defined by inclusion, the donor lists the persons to whom a valid appointment can be made. If the permissible appointees are defined by exclusion, the list must include the donee, the donee's estate, and the creditors of either; otherwise, the power would be a general power. … If the permissible appointees are listed by inclusion, the list of permissible appointees must not include the donee, the donee's estate, and the creditors of either; otherwise the power would be a general power." Restatement 3rd Property (Wills and Donative Transfers) §19.15 cmt d. In this appeal, the permissible appointees of the nongeneral power are listed by inclusion, and do not include the Appellant or the Appellant's spouse. A nongeneral (i.e., limited) power of appointment is exercisable only in favor of permissible appointees. Any attempt to exercise a nongeneral power in favor of an impermissible appointee is ineffective. Restatement 3rd Property (Wills and Donative Transfers) §§17.2(c) and (d), 19.15. In addition, where an "appointment is made to a permissible appointee, but with the purpose and expectation that some or all of the appointed property or some collateral benefit will pass to an impermissible appointee," the appointment is ineffective. Restatement 3rd Property (Wills and Donative Transfers) Chapter 19 Part D Introduction. "An appointment to a permissible appointee is ineffective to the extent that it was (i) conditioned on the appointee conferring a benefit on an impermissible appointee, (ii) subject to a charge in favor of an impermissible appointee, (iii) upon a trust for the benefit of an impermissible appointee, (iv) in consideration of a benefit conferred upon or promised to an impermissible appointee, (v) primarily for the benefit of the appointee's creditor, if that creditor is an impermissible appointee, or (vi) motivated in any other way to be for the benefit of an impermissible appointee." Restatement 3rd Property (Wills and Donative Transfers) §19.16. Such an attempt is "frequently referred to as a 'fraud on the power.'" Restatement 3rd Property (Wills and Donative Transfers) Chapter 19 Part D Introduction. Further, case law overwhelmingly and conclusively supports the Restatement; in addition to the cases in the Restatement (Third) of Property (Wills and Donative Transfers), cases from around the country on point can be found in Annotation, "Validity of exercise of power of appointment as affected by purpose, request, agreement, or condition that appointee benefit, or knowledge that he intends to benefit, one not an object of the power," 115 ALR 930 (1938) and Annotation, "Validity and effect of agreement by donee of power of appointment respecting its exercise or nonexercise," 163 A.L.R. 1449 (1944). The Supreme Judicial Court of Massachusetts, concerning a fraud on the exercise of a nongeneral power of appointment, wrote: "The exercise of the power was not a thing of barter or bargain, and there is a fraudulent exercise of a power not only where the donee acts corruptly for a pecuniary gain but where he acts primarily for his own personal advantage or that of a third person who is a non-object of the power and thereby abuses the power which the donor conferred on him." Pitman v. Pitman, 314 Mass. 465 (1943). In addition, regarding the intersection of a nongeneral power of appointment and Medicaid, the United States District

Court for the Northern District of New York held that although the settlor had reserved a limited power of appointment over an irrevocable trust, in the absence of bad faith or fraud, the remote possibility of collusion between the settlor and beneficiaries should not be considered in determining whether the assets of the trust are available for federal Medicaid trust purposes. Verdow v. Sutkowy, 209 F.R.D. 309, 316 (N.D.N.Y. 2002).

(31) Memoranda of the Office of Medicaid Routinely Claim that Irrevocable Trusts Are Revocable

The Office of Medicaid often routinely makes the claim that the Irrevocable Trusts are revocable or arguably revocable in various situations that have nothing to do with revocability. In past cases, Office of Medicaid has issued that label without further explanation when the trustee can make distributions to terminate the trust to persons other than the appellant or the appellant's spouse, and once made the stunningly inventive claim that if none of the potential distributees were then living, the trustee could then make the terminating distributions to the settlor. In one case, the Office of Medicaid has made the claim that if a trust protector could amend the trust, it is then revocable.

Nothing is ever presented by the Office of Medicaid to support its revocability argument. The only way the Irrevocable Trusts in this case could be called revocable is if the actual definition of the word "revocable" is ignored. Something that is revoked is recalled, retracted, reversed, rescinded, canceled, nullified or taken back. A distribution from the Irrevocable Trusts in this case to the potential distributees results in the Irrevocable Trusts being terminable, not revocable. A limited power of amendment by the Trust Protector (who is not a trustee, a settlor or a beneficiary) is not a power of revocation, and a right of the trustee to make distributions to persons other than the appellant and the appellant's spouse is also not a power of revocation. An action that is not to the Settlor and that is without the Settlor's involvement cannot possibly meet any definition of the word "revocable." The memorandum of the Office of Medicaid does not ever explain how these limited provisions held by someone other than the Settlor can ever cause an Irrevocable Trust to be revocable.

The Office of Medicaid has certainly displayed that it knows how to find quotes for its memoranda, so it is hard to believe that the Office of Medicaid has not already found that the definition of the term "revocable trust" can be found in the State Medicaid Manual, section 3259.1 A.5., which states: "Revocable Trust.-- A revocable trust is a trust which can under State law be revoked by the grantor." The definition of the word "revocable" can also be found in M.G.L. c. 203E, Section 103 as "a trust that is revocable by the settlor without the consent of the trustee or a person holding an adverse interest," and the definition of the word "settlor" can be found there as "a person ... who creates or contributes property to a trust." M.G.L. c. 203E, Section 112(1) states that a "revocable trust" is a trust that is "revocable by the settlor until the time of the settlor's death." None of these definitions can possibly lead anyone to believe that these Irrevocable Trusts could ever be called revocable.

The Office of Medicaid is not entitled to make up new definitions of common words and phrases. "See Comey v. Hill, 387 Mass. 11, 15 (1982), quoting 2A Sands, Sutherland Statutory Construction s. 50.03, at 277-278 (4th ed. 1973) ("Words and phrases having well-defined

meanings in the common law are interpreted to have the same meanings when used in statutes dealing with the same or similar subject matter as that with which they were associated at common law")." Cohen at 413-414.

The choice of the Office of Medicaid to attempt to claim that Irrevocable Trusts are revocable shows the extreme lengths to which it will now go to try to attack trusts through the fair hearing process, rather than go through the regulatory process that is open to the public and potentially be required to defend the regulations in a declaratory judgment action. If the Office of Medicaid is truly unaware of the obvious difference between a power of revocation held by a settlor and a termination power held by a trustee or a limited power of amendment held by a Trust Protector, then all of its other statements of law, as well as its claims for deference, are necessarily called into question by such an obvious misstatement.

The trusts in this case are quite simply irrevocable.

(32) The Latest Positions of the Office of Medicaid on Trust Interpretation Are Not Entitled to Deference

Throughout the Doherty case, it was the official position of the Office of Medicaid that a trust must be read as a whole, but in this case, the Office of Medicaid appears to have backed away from that correct legal position, because to do so necessitates an entirely different result from what it is trying to get away with in this case. (See its memorandum, where the Office of Medicaid reverses its position and now argues: "That there are provisions in the applicant's trust that are at odds with each other does not change the analysis.")

Similarly, the former position of the agency about how life estates in irrevocable trusts should be treated has apparently also been disavowed without explanation; the previous position was taken in a legal memorandum dated 4/29/1992, entitled "Transfer and Trust Issues Reconciliation of Department Policy," which is attached hereto as EXHIBIT K. In addition, the Office of Medicaid appears to have created a new, inventive definition of the term "revocable trust."

These new positions of the Office of Medicaid regarding how a trust should be viewed or treated are not entitled to deference. The Supreme Judicial Court, in Cohen v. Commissioner of the Division of Medical Assistance, 423 Mass. 299 (1996), footnote 18, stated why it chose not to give deference to the MassHealth agency's position in that case, and the same point applies here: "The Commonwealth urges us to give deference to the division's administrative interpretation of the statute. Although there is some merit to the argument, it is not served up in its most appetizing form in this case. … It is usually the initial not the changed interpretation of a statute that earns the kind of deference the Commonwealth would need here. See Barnett v. Weinberger, 818 F.2d 953, 960-961 n.74 (D.C. Cir. 1987), and cases cited (deference depends on consistency of interpretation)."

(33) The Appellant Is Entitled to Reasoned Consistency in Agency Decision-Making

A party is entitled to "reasoned consistency" in agency decision-making. Boston Gas Co. v. Department of Pub. Utils., 367 Mass. 92, 104 (1975). In Davila–Bardales v. Immigration and Naturalization Service, 27 F.3d 1 (1994) the First Circuit of the United States Court of Appeals stated that the law prohibits an agency "from adopting significantly inconsistent policies that result in the creation of conflicting lines of precedent governing the identical situation. …[T]he law demands a certain orderliness. "

The Doherty case did not change trust law; in fact, the court went out of its way to state that Guerriero is still good law. ("[W]e take this opportunity to stress that we have 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. See and compare Guerriero v. Commissioner of the Div. of Med. Assistance, 433 Mass. 628, 633, 745 N.E.2d 324 (2001).") Further, MassHealth regulations have not changed as a result of Doherty.

The intentional hiding of the previous memoranda of the Office of Medicaid in trust denial cases prevents the Appellant from learning the details of other cases where the final decision of the Office of Medicaid rejected its arguments. The memoranda of the Office of Medicaid cite only fair hearing decisions where appellants lost, but the Office of Medicaid has a duty to provide and explain decisions where appellants prevailed because it has a duty of administrative consistency. An administrative agency must respect its own precedent, and cannot change it arbitrarily and without explanation, from case to case. Mendez-Barrera v. Holder, 602 F.3d 21 (1st Cir. 2010). As a general matter, an agency cannot treat similarly situated entities differently unless it supports the disparate treatment with a reasoned explanation and substantial evidence in the record. Lilliputian Systems, Inc. v. Pipeline and Hazardous Materials Safety Admin., 741 F.3d 1309 (D.C. Cir. 2014).

(34) The Shelales Case, Often Quoted by the Office of Medicaid in Lengthy Paragraphs about Medicaid Trust Law, Was Not Even about a Trust

Many of the cases cited in the memorandum of the Office of Medicaid seem to be there for the purpose of misleading the Hearing Officer into believing that there are many cases on point. Perhaps the worst example of the misleading nature of the Office of Medicaid memoranda is in its quoting from the Shelales case. The memoranda of the Office of Medicaid has paragraphs that end with the following quote from the Shelales case: "MassHealth's interpretation more reasonably comports with the Federal and State legislative and regulatory scheme …". These paragraphs are long descriptions of what the Office of Medicaid wants the Hearing Officer to believe about Medicaid trust law, and the paragraphs seem to end with the Massachusetts Appeals Court stating that the Office of Medicaid is correct in its legal assessments about federal Medicaid trust law. Due to the manner of the construction of the paragraph, the Hearing Officer could easily be misled into believing all of the quotes are about Medicaid trust cases. Unfortunately, the Office of Medicaid intentionally chooses not to mention that the Shelales case had nothing at all to do with a trust, and the Hearing Officer is allowed the opportunity to conclude erroneously that the Shelales quote was about Medicaid trust law.