

## APPEAL DECISION

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	Financial Eligibility
<b>Decision Date:</b>	FEB 28 2012	<b>Hearing Date:</b>	08/25/2011
<b>MassHealth's Rep.:</b>	Ron Lerner	<b>Appellant's Rep.:</b>	Neal Winston, Esq.
<b>Hearing Location:</b>	Tewksbury MassHealth Enrollment Center	<b>Aid Pending:</b>	Yes

### Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapters 118E and 30A, and the rules and regulations promulgated thereunder.

### Jurisdiction

Through a notice dated January 4, 2011, MassHealth notified the appellant that her MassHealth Standard benefits would be terminated because of her income (Exhibit 1). The appellant filed this appeal in a timely manner on January 11, 2011, and her benefits were protected pending the appeal (Exhibit 2; 130 CMR 610.015(B)). Determination of countable income is a valid basis for appeal (130 CMR 610.032). A hearing was scheduled for July 6, 2011, but was rescheduled subject to good cause at the request of the appellant's attorney (Exhibit 3). At hearing on August 25, 2011, the attorney provided evidence of his unavailability to satisfy the good cause requirement, and the case proceeded to the merits. After the hearing, the record was held open for a MassHealth legal opinion and reply brief from the appellant's attorney (Exhibits 10-12).<sup>1</sup>

### Action Taken by MassHealth

MassHealth determined that the appellant's countable income is too high for her to continue receiving MassHealth Standard benefits.

### Issue

The appeal issue is whether MassHealth correctly calculated the appellant's countable income.

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<sup>1</sup> While this decision was pending, MassHealth issued another termination notice for the same reason. The appellant's attorney filed a timely appeal, which was consolidated with the present case. See Exhibit 14.

## Summary of Evidence

The MassHealth representative testified the appellant, who is under the age of 65 and disabled, was previously eligible for MassHealth Standard. On January 4, 2011, MassHealth determined that the appellant's monthly income exceeds the limit for Standard benefits, and therefore issued a notice of termination. See Exhibit 1.

The record reflects that the appellant and her former husband divorced on July 1, 2009. Pursuant to the separation agreement, which was incorporated into the Judgment of Divorce, the former husband was required to pay alimony in the amount of \$420 per week. *The separation agreement requires that amount be paid into a trust entitled the [CB] Irrevocable Supplemental Needs Trust, which was also created on July 1, 2009.*<sup>2</sup>

MassHealth had previously terminated the appellant's benefits in February 2010 for failure to return an eligibility review form. See Exhibit 13. The termination action was appealed to the Board of Hearings, and hearing was held on May 13, 2010. It appears that prior to the hearing the review form issue had resolved, and MassHealth proceeded to make an eligibility determination. As part of this determination, a copy of the trust was provided to the MassHealth legal unit for review. A MassHealth attorney responded that the trust did not meet the requirements for a special needs trust, and that it was therefore countable to the appellant. The legal opinion included a list of ten items that had to be either verified or modified in the trust document in order for it to be considered a (noncountable) special needs trust. See Exhibit 6.

At the hearing on May 13, 2010 (held before a different hearing officer), the parties signed an agreement as follows:

MassHealth has agreed to reopen the Appellant retroactive to February 17, 2010 without disruption of coverage. MassHealth has given the Appellant's counsel 60 days from today to revise and resubmit the trust to MassHealth Tewksbury Enrollment Center, Attn: [appeals coordinator] who will forward this to Legal for review and decision. MassHealth agrees to maintain Standard coverage on the Appellant until legal decides whether the trust complies. MassHealth will issue an appealable decision to Appellant's counsel once MassHealth has decided the trust compliance issue. MassHealth agrees that the 5/13/10 notice is moot and was hand delivered to appellant's counsel today<sup>3</sup> (Exhibit 7).

At hearing for the current appeal, the appellant's attorney stated that he signed the 2010 stipulation in order to get the appellant's benefits reinstated. He indicated that he planned at that time to consult with the appellant's guardians to determine whether to follow through with the necessary amendments to the trust (per the MassHealth legal opinion). Ultimately, they opted not to revise

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<sup>2</sup> Also on that date, the Probate Court entered a decree placing the appellant under permanent guardianship. See Exhibit 5.

<sup>3</sup> This notice is not part of the record.

the trust and instead to wait until the appellant's next eligibility determination to challenge MassHealth's determination.

The appellant's attorney expressed disagreement with the MassHealth legal opinion from 2010, which indicated that the denial was based on non-compliance with the rules for special-needs trusts. See Exhibit 6. He contended that because the appellant is receiving community-based MassHealth benefits (rather than long-term care benefits), the trust does not need to meet any particular regulatory requirements. He argued that there are no regulatory or policy guidelines that set forth what a trust must look like for a community case. The attorney noted that while long-term care cases require a payback provision, no such requirement exists for community benefits; he pointed out that community benefits for individuals under the age of 55 are not recoverable (such as by lien). He stated that he has drafted many trusts like this one, and that MassHealth has not challenged it until now.

The attorney provided a copy of a letter he sent to the MassHealth attorney who had rendered the legal opinion. The letter, dated June 29, 2010, states as follows:

You may recall that we had prior communications in May regarding this case involving a Supplemental Needs Trust that is receiving spousal support pursuant to Court order. During redetermination, the Tewksbury MEC caseworker had rejected the entire SNT concept as not appropriate for a community case, and I had requested your intervention. You had responded by noting that it was allowable for the Court to assign the spousal support directly to the trust and not be countable income, but you rejected the trust as not meeting the requirements of 130 CMR 523.023(C)(1)(a), et al. . . .

On May 13, a hearing was held at the Tewksbury MEC, and after resolving other issues involving notice, termination, and continuing eligibility, the parties entered into the attached agreement to reactivate benefits and give the recipient 60 days to revise and resubmit the trust with the revisions and amendments that you had requested in your memorandum. . . . Please note that the only ongoing issue is related to the terms of your memorandum opinion and the revisions noted in Paragraphs 4 through 10.

Please note that this matter is a community MassHealth Standard case for and [sic] adult under age 65 and not under any waiver. The sections of the regulations that you have cited relate solely to trusts for long-term care coverage, and are not required for transfers into any trust for community coverage. In particular, your opinion requirements [sic] under Paragraphs 5, 6, 7, and 8 relate to a self-settled OBRA '93 Medicaid compliant trust, which are only required for receipt of long-term care benefits. The community benefit recipient in this case is not required to have an OBRA '93 trust. If she were to request eligibility for long-term care benefits in the future, then I agree that an OBRA '93 trust would be required.

I request that you instruct the Tewksbury caseworker that such amendments are not required for this trust, and that the trust does not need to be so amended in order to maintain ongoing

eligibility beyond the 60 day period as allowed in the stipulated agreement.

In a secondary issue, paragraphs 4, 9, and 10 as noted in your memorandum opinion requires that various administrative terminology be added to the trust. While I agree that these terms may be relatively reasonable if properly promulgated for an OBRA '93 trust, I do not see any present basis whatsoever in statute, regulation, or written policy that requires such terms, whether in an OBRA '93 trust for long-term care, and especially in the case for a self-settled trust for community benefits.

Your review and revised opinion is requested to avoid the necessity of having this trust reviewed after the 60 day period expires, causing a new termination, subsequent appeals, hearing, and waste or [sic] resources to the agency and recipient. Thank you in advance for your attention to this matter. (Exhibit 9).

The appellant's attorney stated that he did not receive a response to this letter.

The record was held open after hearing for the MassHealth eligibility representative to again provide the appellant's attorney's letter to the legal unit to seek a response. On October 24, 2011, another MassHealth attorney submitted a legal memorandum which similarly concludes that the appellant is not financially eligible for benefits. See Exhibit 11. However, this MassHealth attorney contends that the issue is not the countability of the supplemental needs trust, but rather the countability of the alimony income.

In her memorandum, the MassHealth attorney points out that federal regulations specifically list alimony and support payments as types of unearned income. See 42 CFR 416.1211(b) ("For SSI purposes, alimony and support payments are cash or in-kind contributions to meet some or all of a person's needs for food or shelter. Support payments may be made voluntarily or because of a court order. Alimony (sometimes called *maintenance*) is an allowance made by a court from the funds of one spouse to the other spouse in connection with a suit for separation or divorce.")<sup>4</sup> In addition, the MassHealth attorney argues, case law makes clear that alimony income is countable, "whether or not it is received by the member or subject to a Probate Court order." See Tarin v. Commissioner of Div. of Medical Assistance, 424 Mass. 743 (1997). She contends that "the Probate Court's order approving the diversion of the appellant's alimony payments does not bind the Medicaid agency and does not trump federal or state Medicaid law governing the treatment of income in an eligibility determination, or redetermination." She refers to 130 CMR 506.006, which states as follows:

All family group members are required to avail themselves of all potential income.

- (A) If the MassHealth agency determines that income has been transferred for the primary purpose of establishing eligibility for MassHealth, the income is counted as if it were received.

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<sup>4</sup> The MassHealth attorney also cites to 42 USCA 1382a(a)(2)(E) and POMS SI 00810.015(A)(3) (which specifically include alimony and support payments as types of countable unearned income).

- (B) If the MassHealth agency is unable to determine the amount of available income, the family group remains ineligible until such information is made available.

Accordingly, the MassHealth attorney maintains, alimony payments are unearned income to the appellant and must be included in the agency's eligibility determination. See Exhibit 11.

On November 30, 2011, the appellant's attorney filed a response brief. See Exhibit 12. With regard to the legal argument raised in MassHealth's post-hearing brief, the appellant's attorney disagrees that the alimony payments in this case are countable income for MassHealth purposes. He contends that alimony can only be considered income if it is received directly by the individual; "[h]owever, if the income is not paid directly the individual, or the individual has no direct access to it, such as deposit of alimony to an irrevocable trust account, then it is not countable income until such time as it is released or paid directly to the individual." He argues that the regulations cited by the agency only apply to income received or made directly available to the individual.<sup>5</sup>

The appellant's attorney also contends that the SSA's Program Operations Manual System (POMS) reference invoked by the MassHealth attorney applies only to direct payment of alimony to an SSI recipient. He points out that another provision in the POMS "specifically excludes alimony that is irrevocably ordered by a Court to be deposited by the spouse into a trust." That section, SI 01120.200(G)(1)(d), states as follows:

A legally assignable payment...that is assigned to a trust/trustee, is income for SSI purposes unless the assignment is irrevocable. For example, child support or alimony payments paid directly to a trust/trustee as a result of a court order, are not income. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

The attorney argues that "it is fundamental that a state Medicaid system must be consistent with and no more restrictive than the federal system." Specifically, the methodology used to determine income and resource eligibility "can be no more restrictive than the methodology which would be employed under the supplemental security income program." See 42 USC 1396a(10)(C)(i)(III).

As to MassHealth's contention that, under 130 CMR 506.006, family members are required to avail themselves of potential income (and that income will be counted if it has been transferred for the primary purpose of qualifying for MassHealth), the appellant's attorney points out that the appellant's former husband is not considered a "family member." Furthermore, he states, the appellant herself does not have control of the income and has no authority to require that the income be paid directly to herself rather than into the trust.<sup>6</sup>

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<sup>5</sup> The appellant's attorney maintains that the appellant has not received any payments directly from the trust; rather, payments have been made from trust resources to third parties on her behalf. He contends that as such, the benefit she receives is more in the nature of "income in-kind," which is specifically identified as non-countable income at 130 CMR 506.004(D).

<sup>6</sup> The appellant's attorney distinguished the court cases cited in the MassHealth legal memorandum on a number of grounds.

## **Findings of Fact**

Based on a preponderance of the evidence, I find the following:

1. The appellant is under the age of 65.
2. The appellant is disabled and lives in the community.
3. The appellant was previously eligible for MassHealth Standard because of her disability and because her income was under 133% of the federal poverty level.
4. Pursuant to their 2009 separation agreement, the appellant's former husband is required to pay alimony of \$420 per week. The separation agreement requires that amount be paid into a trust, which was created on the same date of the divorce judgment.
5. The separation agreement was incorporated into a Judgment of Divorce entered by the Probate and Family Court on July 1, 2009.
6. In February 2010, MassHealth terminated the appellant's benefits for failure to return an eligibility review form. The appellant filed a timely appeal of the termination notice, and hearing was scheduled for May 13, 2010.
7. At the time of the May 13, 2010, hearing, the issue of the missing review form had been resolved, and MassHealth proceeded to make an eligibility determination. MassHealth found that the appellant's alimony income was countable, resulting in a determination that her total monthly income exceeded the limit for MassHealth Standard.
8. At the May 2010, hearing, the parties agreed that the appellant's counsel would have 60 days to make revisions to the trust and submit it to the MassHealth legal unit for review. MassHealth agreed to reopen the appellant's benefits retroactive to February 17, 2010, and to keep her case open pending the legal unit's review of the revised trust.
9. The appellant's attorney, in consultation with the appellant's guardians after the May 2010 hearing, opted not to revise the trust.
10. On January 4, 2011, MassHealth reviewed the appellant's eligibility and again determined that her monthly income exceeds the limit for MassHealth Standard benefits.
11. The appellant filed a timely appeal, and the appellant's MassHealth Standard benefits have remained in place pending the appeal.

## Analysis and Conclusions of Law

At issue in this appeal is MassHealth's determination that alimony payments made to a trust on the appellant's behalf are considered countable income, thereby rendering her financially ineligible for benefits.<sup>7</sup> MassHealth regulations at 130 CMR 506.003 generally define "countable income" to include the following:

(A) Gross Earned Income.

- (1) Gross earned income is the total amount of compensation received for work or services performed without regard to any deductions.
- (2) Gross earned income for the self-employed is the total amount of business income listed or allowable on a U.S. Tax Return.
- (3) Seasonal income is income derived from an income source that is associated with a particular time of the year. Annual gross income is divided by 12 to obtain a monthly gross income with the following exceptions: if the applicant or member has a disabling illness or accident during or after the seasonal employment period that prevents the person's continued or future employment, only current income will be considered in the eligibility determination.

(B) Gross Unearned Income.

- (1) Gross unearned income is the total amount of income that does not directly result from the individual's own labor before any income deductions are made.
- (2) Unearned income includes, but is not limited to, social security benefits, railroad retirement benefits, pensions, annuities, federal veterans' benefits, and interest and dividend income.

(C) Rental Income. Rental income is the total amount of gross income less any deductions listed or allowable on an applicant's or member's U.S. Tax Return.

The regulations at 130 CMR 506.004 also describe specific types of income that are considered "noncountable" for eligibility purposes:

- (A) Income received by a Transitional Aid to Families with Dependent Children (TAFDC), Emergency Assistance for the Elderly, Disabled and Children (EAEDC), or Social Security Insurance (SSI) recipient;
- (B) Sheltered workshop earnings;

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<sup>7</sup> As described above, the dispute here originally centered around the trust itself, and specifically whether it met (or even needed to meet) the regulatory requirements of a special needs trust. In the post-hearing briefs, the debate drifted away from the contours of the trust and toward the question of whether the alimony *income* is countable. This decision focuses on the latter issue.

- (C) The portion of federal veterans' benefits identified as aid and attendance benefits, unreimbursed medical expenses, housebound benefits, or enhanced benefits;
- (D) Income-in-kind;
- (E) Roomer and boarder income derived from person's residing in the applicant's or member's principal place of residence;
- (F) Any other income that is excluded by federal laws other than the Social Security Act; and
- (G) Income received by independent foster care adolescents described at 130 CMR 505.002(K).

Although MassHealth regulations do not specifically identify alimony as a form of income, the parties agree that, consistent with federal law, alimony payments are typically considered countable income for Medicaid eligibility purposes. The appellant's attorney, however, argues that a distinction must be made between alimony that is paid directly to an ex-spouse and payments that are made indirectly, such as into a trust. While there does not appear to be anything in the MassHealth regulations which addresses this unusual situation, the appellant's attorney pointed to a provision in the Social Security Administration's Program Operations Manual System (POMS) that is on point. Once again, that POMS provision states as follows:

A legally assignable payment . . . that is assigned to a trust/trustee, is income for SSI purposes unless the assignment is irrevocable. For example, child support or alimony payments paid directly to a trust/trustee as a result of a court order, are not income. If the assignment is revocable, the payment is income to the individual legally entitled to receive it. (POMS SI 01120.200(G)(1)(d)).

The second sentence of the paragraph appears to address precisely the circumstances of this case, where alimony payments are paid directly to a trust or trustee as a result of a court order.<sup>8</sup> As the appellant's attorney noted, federal law requires that the methodology used to determine income and resource eligibility for Medicaid can be no more restrictive than the methodology which would be employed under the SSI program. See 42 USC 1396a(10)(C)(i)(III). By the terms of this POMS provision, therefore, the alimony payments made to the trust should not be considered countable income for purposes of her Medicaid eligibility.

This appeal is approved.

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<sup>8</sup> The court order in this case is the Judgment of Divorce issued by the Probate and Family Court, which incorporated the separation agreement executed by the parties to the divorce action. The separation agreement includes a provision under which the alimony payments are made to the trust on the appellant's behalf. See Exhibit 12.

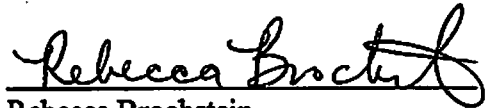


## Order for MassHealth

Deem the alimony payments made to the trust on the appellant's behalf to be non-countable income. Remove aid pending protection, and redetermine her MassHealth eligibility in accordance with this decision.

### Implementation of this Decision

If ~~this~~ decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.



Rebecca Brochstein  
Hearing Officer  
Board of Hearings

cc: Tewksbury MEC

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