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THE COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

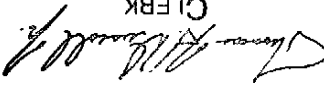
Thomas H. Driscoll, Jr., Esquire
Clerk Of The Courts
and Magistrate

Defendants Director of the Office of Medicaid and the Executive Office of Health and Human Services (collectively "Agency" or "MassHealth"), submit this Memorandum in support of the final Agency Decision ("Decision") and in opposition to Plaintiff's Motion for Judgment on the Pleadings and Memorandum ("Plaintiff's Memorandum"). The Agency is the single state agency authorized to administer Medicaid benefits through the MassHealth program. G.L. c. 118E, §§ 1, 9A. This action is an administrative appeal pursuant to G.L. c. 30A, § 14. Following a fair hearing, and after considering all of the evidence presented, the hearing officer affirmed the Agency's Decision that the Plaintiff is ineligible for MassHealth benefits because her assets exceed the allowable limit as a result of her interest in a trust.

Pursuant to regulations governing MassHealth, the Agency correctly found that the entire trust of which Plaintiff is the vested beneficiary is a countable asset. As set forth below, the Agency's Decision is supported by substantial evidence, is not arbitrary, capricious or an abuse of

Introduction

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

FILED
 IN THE SUPERIOR COURT
 FOR THE COUNTY OF ESSEX
 OCT 1 2007
 Clerk


MURIEL DOHERTY, Plaintiff)
 v.)
 DIRECTOR OF THE OFFICE OF MEDICAID,)
 EXECUTIVE OFFICE OF HEALTH AND)
 SERVICES, COMMONWEALTH OF)
 MASSACHUSETTS,)
 Defendants)

ESSEX, ss. NEWBURYPORT SUPERIOR COURT CIVIL ACTION NO. 2007-00291-B

COMMONWEALTH OF MASSACHUSETTS

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¹The Settors, Trustees and Beneficiaries of the original trust were William A. Doherty (Muriel's now deceased husband) and Muriel S. Doherty. In Plaintiff's Memorandum, Muriel has conceded that the Irrevocable Trust was established on April 12, 2000, so post-1993 Medicaid law applies to the Irrevocable Trust. See Plaintiff's Memorandum, p. 3, ¶ 1.

Doherty and Muriel S. Doherty Family Trust in its entirety and replaced it with a trust entitled and Muriel S. Doherty Family Trust" was executed. This document replaced the William A. Doherty Family Trust. On July 15, 1981, Muriel and her husband established the "William A. Doherty and Muriel S. Doherty Family Trust." Muriel's attorney conceded during the fair hearing that this trust was revocable and therefore, in an eligibility determination for MassHealth benefits, would have been fully countable. (T., p. 15.) In a purported attempt to foreclose a portion of Muriel's trust assets from an eligibility determination, on April 12, 2000, the "Restatement of the William A. Doherty and Muriel S. Doherty Family Trust" was executed. This document replaced the William A. Doherty and Muriel S. Doherty Family Trust in its entirety and replaced it with a trust entitled CMR 516.005; 130 CMR 515.006.

On July 15, 1981, Muriel and her husband established the "William A. Doherty and Muriel S. Doherty Family Trust." Muriel's attorney conceded during the fair hearing that this trust was revocable and therefore, in an eligibility determination for MassHealth benefits, would have been fully countable. (T., p. 15.) In a purported attempt to foreclose a portion of Muriel's trust assets from an eligibility determination, on April 12, 2000, the "Restatement of the William A. Doherty and Muriel S. Doherty Family Trust" was executed. This document replaced the William A. Doherty and Muriel S. Doherty Family Trust in its entirety and replaced it with a trust entitled CMR 516.005; 130 CMR 515.006.

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Statement of Facts

Plaintiff's motion in its entirety and affirm the Agency's Decision. The relevant factual and procedural background derives from the certified Administrative Record and transcript of Proceedings (hereinafter cited as "R., p. ___" or "T., p. ___"); filed with the Court. Judicial review is confined to the record and no additional evidence may be introduced at the hearing. G.L. c. 30A, § 14(5); Superior Court Standing Order 1-96, ¶ 3.

(R., p. 5; R., Ex. G) (emphasis supplied.)

The Trustees shall accumulate the Trust principal to the extent feasible, due to the unforseeability of the Settlor's future needs. However, accumulation or use of the Trust is to be determined without regard to the interest of the remaindermen.

Without limiting or enlarging the authority of the TRUSTEE in accordance with the Trust purposes, it is stipulated that the Trust shall be used in ways that will best enable the SETTLOR to lead as normal, comfortable and fulfilling life as possible; that, regardless of future health status, she be cared for at home or in any event in the most normal and home-like environment possible and consistent with her needs for treatment and care; that she have as many opportunities as possible for normal social interaction with members of her family and other persons in the community in a manner consistent with her age and interests; and that she have every reasonable opportunity to be responsible for her own welfare, independent of this Trust, to the extent of her capacities.

The purpose of the Trust is to supplement, but not to supplant, what benefits and services the Settlor may from time to time be eligible to receive by reason of her age, disability, or other factors, from federal, state and local governmental, insurance, and charitable sources. This Trust is established with the recognition that the nature and extent of the complex and multiple needs of the SETTLOR are such that her own resources and those of her family would quickly become exhausted if relied upon as a primary resource for her care. It is recognized further that governmental and charitable programs, in themselves, contain many gaps which, if not addressed, would greatly reduce the possibility of the SETTLOR maintaining herself as independently as possible, and having the capacity to meet her future needs adequately for medical, residential, personal, and other services. With these considerations guiding the decision-making, the TRUSTEE agrees to take control and management of the trust estate, and invest and re-invest the principal, receive the income therefrom, and, after paying the reasonable and proper expenses of the Trust, manage and distribute the principal and net income of the Trust in accordance with the requirements of this Instrument.

lifetime and sets forth the purpose and criterion by which the trust is to be administered:

Article II of the Irrevocable Trust establishes Muriel as the vested beneficiary during her

(“Shelia”). (R., pp. 2-3; R., Exhibit G.)

a trustee and replaced with her nephew and niece, James Doherty, Jr. (“James”), and Shelia Doherty trust was irrevocable, and although Muriel was still the settlor and beneficiary, she was removed as the “Muriel S. Doherty Irrevocable Trust” (hereinafter “Irrevocable Trust”). (R., p. 4.) This new

of the vested beneficiary, Muriel. (R., Ex. G.) Article VII.A. provides that after Muriel's death, Articles VI and VII govern the distribution of the Irrevocable Trust assets upon the death sale are to remain in the Irrevocable Trust. (R., Ex. G.)

power to sell the residence, but only with the written assent of Muriel. The proceeds from the Andover, Massachusetts, or any successor residence for her lifetime, and the Trustee has the Article V.C. gives Muriel the right to occupy the residence at 15 Chestnut Street, business venture, marriage, etc., as the Trustee deems desirable." (R., p. 6; R., Ex. G.)

Trust for the benefit of such beneficiaries for such matters as opening a professional office, Trustee may in its uncontrolled discretion make such further invasions of the principal of this necessary for their maintenance in health and reasonable comfort and their education...[the Trust to the Settlor's nephew, James D. Doherty, Jr., and his issue as the Trustee deems Settlor [Muriel], the Trustee may pay to or apply such amount or amounts of the principal of this states that "Notwithstanding the provisions of Paragraph A hereof, during the lifetime of the make distributions of principal to or on behalf of Muriel. (R., p. 6; R., Ex. G.) Article V.B., accumulated to the extent possible for her needs, Article V.A.(2) states that the Trustee shall not purpose of the Irrevocable Trust is for the benefit of Muriel and that the principal should be Irrevocable Trust to or on behalf of Muriel. (R., p. 6; R., Ex. G.) Notwithstanding that the stated lifetime. Under Article V.A.(1), the Trustee must distribute the entire net income of the Article V contains the provisions regarding the distribution of the assets during Muriel's R., Ex. G.)

all, of the principal of the Irrevocable Trust to any one or more of her family members. (R., p. 6; authority, by written instrument during her lifetime or by will or codicil to appoint any part, or Other relevant provisions of the Irrevocable Trust include Article IV, giving Muriel the

In support of her application for MassHealth benefits, and in addition to the Irrevocable Trust, Plaintiff provided a document entitled NOTE, dated May 18, 2004, with a face value of \$425,000, executed by James and Sheila, as the Trustees of the Irrevocable Trust, to themselves in their capacity as trustees of a separate nominee trust. (R., Ex. D.) In the Note, James and Sheila promise to repay the Irrevocable Trust \$425,000 at 6% interest in monthly installments of \$4,718.39, due on the first day of the month, beginning June 1, 2004, and continuing until the Note is paid off, except that it must be paid in full by May 1, 2014. (R., Ex. D.)

Article XXII further directs that, "If, in the opinion of the TRUSTEE, any Trust fund created hereunder shall at any time be of a size which in the sole judgment of the TRUSTEE shall make it inadvisable or unnecessary to continue such Trust fund, then anything contained in this Trust Agreement or any amendment thereto to the contrary notwithstanding, the TRUSTEE, in its sole discretion, may pay over and distribute the entire principal of such Trust fund to the beneficiaries thereof, free of all trusts." (R., p. 7-8; R., Ex. G.) Article XXIII states that the Trust is irrevocable and Muriel does not reserve the right to alter, amend, revoke, or terminate the Trust. (R., Ex. G.)

Article XIV enumerates the Trustees' powers. Specifically, Paragraph (H) of Article XIV states that the Trustee has 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 and any charge, disbursement or loss as is deemed advisable in the circumstance of each case as it arises, notwithstanding any statute or rule of law for distinguishing income from principal or any determination of the Courts." (R., Ex. G.)

Sheila; these beneficiaries are also the Trustees of the Irrevocable Trust. (R., Ex. G.) the assets of the Irrevocable Trust are to be distributed to Muriel's nephew, James, and niece,

² The notice explained that Muriel was over assets by \$269,743, consisting of trust assets in a bank account and life insurance. (R., Exhibit A.) At the hearing, Plaintiff's counsel stipulated that this amount was correct, if all of the trust assets were countable. (T., p. 9.)

God v. State Bd. of Code Comm'n, 11 Mass. App. Ct. 333, 334 (1981).

Motor Vehicle Lib. Policies and Bds., 27 Mass. App. Ct. 470, 474 (1989); *Faith v. Assembly of* bears the burden of demonstrating the decision's invalidity. *Merisme v. Board of Appeals on* conclusion." G.L. c. 30A, §1(6). As the party appealing an administrative decision, Plaintiff in turn, is "such evidence as a reasonable mind might accept as adequate to support a *Alcoholic Beverage Control Comm'n*, 24 Mass. App. Ct. 487, 490 (1987). Substantial evidence, discretion, or otherwise not in accordance with the law." *See Howard Johnson Company v.* found by the court on the record as submitted ...; or (g) arbitrary or capricious, an abuse of unlawful procedure; or (e) unsupported by substantial evidence; or (f) unwarranted by facts authority or jurisdiction of the Agency; or (c) based upon an error of law; or (d) made upon Agency's decision is: (a) in violation of constitutional provisions; or (b) in excess of the statutory determines that the substantial rights of any party may have been prejudiced because the states that a court may: "either affirm, remand, set aside or modify an Agency's decision ... if it The scope of review of an Agency's decision is defined by G.L. c. 30A, § 14, which

I. STANDARD OF REVIEW

Argument

In a July 5, 2006 notice, MassHealth denied Muriel's MassHealth application due to excess assets because under MassHealth regulations the Irrevocable Trust is deemed countable to Muriel.² (R., Ex. A.) Muriel timely appealed that decision. (R., p. 1.) A Fair Hearing was held on September 7, 2006, and the hearing record remained open until October 6, 2006, for the submission of legal memoranda by the parties. (R., p. 1.) A Decision upholding MassHealth's denial of benefits was issued on December 14, 2006 (R., p. 1.), and this Chapter 30A appeal followed.

III. BOTH CASE LAW AND STATUTES REVEAL THE AGENCY'S DECISION THAT PLAINTIFF'S TRUST ASSETS ARE SUBJECT TO MEDICAID COUNTERABILITY REGULATIONS IS LEGALLY CORRECT.

maximize the federal financial participation. 107, 112 (1985). The regulations governing the provision of benefits must be interpreted to *Commonwealth*, 416 Mass. 142, 146 (1993); *Cruz v. Commissioner of Public Welfare*, 395 Mass. with federal law in order to receive federal financial reimbursement. *Yonville Hospital v. regulations are to be construed as showing a primary intent that the MassHealth Agency comply Public Welfare*, 383 Mass. 808, 815 (1983). Consequently, the state Medicaid statute and requirements of the federal act and the implementing regulations. *Id.*, *Sargeant v. Commissioner of 466, 467 (1985)*. In order to receive federal funding, the state program must meet all the services to eligible individuals and families. *Haley v. Commissioner of Public Welfare*, 394 Mass. Medicaid is a cooperative federal and state program, which provides payment for medical

II. THE MEDICAID PROGRAM IS A JOINT FEDERAL AND STATE PROGRAM

nor is the review a trial *de novo* on the record that was before the Agency. *Id.* at 420. the matter come before it *de novo*. *Id.* at 420. The court does not act as a *de novo* finder of fact, two conflicting views, even though the court would justifiably have made a different choice had Mass. 414, 420-21 (1982). A court may not dispute an administrative Agency's choice between *Southern Worcester County Regional Vocational School Dist v. Labor Relations Comm'n*, 386 420 (1992). The reviewing court may not substitute its judgment for that of the Agency. authority conferred upon it by statute. *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, Agency's experience, technical competence, specialized knowledge, and the discretionary In reviewing the Agency's decision, the court is required to give due weight to the

In an attempt to further curtail the use of trusts as mechanisms for achieving Medicaid eligibility while at the same time retaining substantial assets, even stricter trust requirements were enacted in 1993 with the passage of 42 U.S.C. § 1396p(d). *Bornuch v. Nebraska Dept of Health*, 659 N.W.2d 848, 853 (2003). "Not only Congress' words but also its amendatory actions have expressed its intent: to eliminate formalistic devices which shelter assets for the Medicaid law, 42 U.S.C. § 1396a(k)).

the Division of Medical Assistance, 433 Mass. 171, 172 (2001) (evaluating trust under pre-1993 coverage, while preserving their assets for themselves or their heirs." *See LeBow v. Comm'r of* acted "...to prevent individuals from using trust law to ensure their eligibility for Medicaid shielding tools and the purpose of the Medicaid program when it acknowledged that Congress Court ("SJC") again commented on the evolution of the law regarding the use of trusts as asset- (*quoting*, H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1 at 72 (1985)). The Supreme Judicial *Cohen v. Commissioner of the Division of Medical Assistance*, 423 Mass. 399, 403-4 (1996) elderly and disabled individuals, and poor women and children."

"...Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar 'techniques' to qualify for the program, they are diverting scarce Federal and State resources from low-income harder for people of means to shield assets while obtaining Medicaid benefits when it stated:

The Commonwealth's highest court discussed Congress' pre-1993 attempt to make it to the use of trusts as Medicaid planning tools to shelter assets. (R., p. 4.)

regulations concerning trusts as well as applicable case law, all of which demonstrate an aversion in an eligibility determination for MassHealth long-term care benefits. (R., p. 2.) For MassHealth purposes, evaluations of trusts are guided by federal and state statutes and The issue before this Court is whether the principal of the Irrevocable Trust is countable

IV. THE AGENCY'S DECISION IS A REASONABLE INTERPRETATION OF ITS OWN REGULATIONS, IS CONSISTENT WITH FEDERAL AND STATE LAW, IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT ARBITRARY OR

Trust must be considered countable. (R., p. 7.)

Federal and state regulations governing Medicaid eligibility requirements, the entire Irrevocable and that there are circumstances under which the principal is available; therefore, consistent with Hearing Officer correctly found, that Muriel is the vested beneficiary of the Irrevocable Trust v. *Dept of Soc. Servs.*, 532 N.W.2d 910, 914 (1995). Such a review clearly shows, and as the *Servics*, 648 N.W.2d 95, 105 (2002) (*quoting Forsyth v. Rowe*, 629 A.2d 379, 386 (1993); *Ronney countable in an eligibility determination. Strand v. Rasmussen, Director, Iowa Dep't. of Human warranted where it is clear, as here, that if Muriel's funds were not held in trust they would be applicant's nursing home care, particular scrutiny is required. Such scrutiny is especially fund the Medicaid program for the benefit of the needy and indigent now must pay for that drafted in such a way that it attempts to cut off access to the principal so that the taxpayers who here, when a trust contains more than \$600,000.00 of an applicant's assets but the document is treatment of trusts. See, generally 130 CMR 130 CMR 520.021 through 520.024. As is the case with federal law, there are several sections of MassHealth regulations that explain the Agency's assets," and this includes trusts. See 130 CMR 520.001(A); 130 CMR 520.007(I). Consistent Thus, a determination of financial eligibility requires an assessment of "countable*

program, that being to provide for those without sufficient resources to care for themselves. MassHealth must comply with not merely with federal Medicaid law but also the objective of the *Rehabilitation Services*, 275 Kan. 349, 362 (2003). Clearly as the single state agency, elderly and disabled individuals, and poor women and children." *Miller v. Dept of Social & potential benefits of heirs and which divert scarce federal and state resources from low-income*

The language of a trust document must be accorded its plain meaning, and extrinsic evidence cannot be used to create ambiguity where none exists. *Flannery v. McNamara*, 432 Mass. 665, 669 (2000). Here, a review of the Irrevocable Trust amply demonstrates that the Agency was correct in finding that, in addition to being the settlor of the Irrevocable Trust,

A. There are provisions in the Irrevocable Trust which allow for principal to be paid to or on behalf of the Plaintiff as the vested beneficiary of the trust; therefore, the principal is countable in an eligibility determination.

(2)(C)(ii); 42 U.S.C. § 1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a).
 under the trust, then the Irrevocable Trust is fully countable to Muriel. 42 U.S.C. § 1396p(d) Muriel, and this determination is made without regard to whether the trustees have any discretion Because there are circumstances under which trust assets can be deemed available to discretion is immaterial to the countability of those assets.

In re Lennon, 683 A.2d 239, 241 (1996)). Thus, whether or not trustees choose to exercise their *Forsyth v. Rowe*, 629 A.2d 379, 386 (1993); *Lebow*, 433 Mass. at 176; *Cohen*, 423 Mass at 413; *v. Rasmussen, Director, Iowa Dep't. of Human Services*, 648 N.W.2d 95, 105 (2002) (citing the beneficiary, regardless of whether the trustee actually exercises his or her discretion." *Strand* the "maximum amount capable of distribution under a trust is deemed an available resource to 520.023 (emphasis supplied.) Courts have interpreted the "any circumstances" test to mean that terms of the trust, any of the resources can be made available to the individual." 130 CMR "resources held in a trust are considered available if under any circumstances described in the created after August 11, 1993, as the Irrevocable Trust here was, funded other than by will, In accordance with 42 U.S.C. § 1396p, MassHealth regulations state that for trusts

CAPRICIOUS BECAUSE THERE ARE CIRCUMSTANCES UNDER WHICH TRUST PRINCIPAL CAN BE MADE AVAILABLE TO THE PLAINTIFF.

The Hearing Officer correctly found that the purpose of the Trust is clear – it is to provide for Muriel's care and comfort. (R., p. 7, ¶ 1.) Thus, Muriel has a vested interest in the Irrevocable Trust, not just as the Settlor, but also as the lifetime beneficiary of all of its assets. (R., p. 7, ¶ 1.) While Article V.A.(2) states that the Trustee shall not distribute Trust principal to or on behalf of the applicant/Settlor, this provision is inconsistent with the purpose of the Trust as established by Article II. Moreover, the final paragraph of Article II specifically directs that the "TRUSTEE shall accumulate the Trust principal to the extent feasible, due to the unforseeability of the SETTLOR'S future needs. However, accumulation or use of the Trust is to be determined without regard to the interests of the remaindermen." (R., Ex. G.) This language demonstrates that it was expected that the Trustee may need to make distributions of principal to or on behalf of the Muriel/Settlor, otherwise there would have been no purpose to (R., Ex. G.)

"Without limiting or enlarging the authority of the Trustee in accordance with the Trust purposes, it is stipulated that the Trust shall be used in ways that will best enable the Settlor to lead as normal, comfortable and fulfilling life as possible; that regardless of future health status, she be cared for at home or in any event in the most normal and home-like environment possible and consistent with her needs for treatment and care; that she have as many opportunities as possible for normal social interactions with members of her family and other persons in the community in a manner consistent with her age and interests; and that she have every reasonable opportunity to be responsible for her own welfare, independent of this Trust, to the extent of her capacities."

assets should be used for her benefit. Article II, ¶ 2 specifies:

Irrevocable Trust, the purpose of the trust is ostensibly to provide for her care, and thus trust

Article II of the Amendment establishes Muriel/Settlor as the lifetime beneficiary of the

(R., p. 7, ¶ 1.)

Muriel is also the vested lifetime beneficiary of the Irrevocable Trust, and there are indeed several circumstances and provisions under which all trusts assets can be used for her benefit.

Clearly, the terms of the document specifically anticipate that the principal of the Irrevocable Trust will be, and should be, used for Muriel's care. (R., p. 7; R., Ex. G.) The fact that Article V.A.(2) purports to disallow distributions of principal to Muriel is in opposition to the express purpose of the Irrevocable Trust, that is Muriel/settlor's intent embodied in Article II that the trust shall provide for her care and comfort, and Muriel/Settlor's status as the lifetime beneficiary of the Irrevocable Trust. Therefore, Article V.A.(2) should not be given greater weight than other authority within the document, and in fact might properly be considered void,

Agency's Decision arbitrary or capricious.

Simply disagreed with Plaintiff's interpretation of the Irrevocable Trust does not make the trust is not only against the weight of the law, but also strains credulity. That the Hearing Officer of Articles XIV and XXII, completely meaningless. (R., p. 7, ¶ 1.) Such an interpretation of this document would render the Settlor's stated intent, as well as all of Article II and provisions Article V.A.(2), disallowing the use of principal for the benefit of Muriel, to control the whole of Agency's Decision is in accordance with caselaw. To allow the one sentence contained in therein. *See State Line Snacks Corp. v. Town of Wilbraham*, 28 Mass. App. Ct. 717 (1990). The other words, contracts must be construed to give "reasonable effect" to each provision contained (1995); *see also S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc.*, 343 Mass. 635, 640 (1962). In that no part of the agreement is left meaningless. *See Starr v. Fordham*, 420 Mass. 178, 190 In reviewing contracts, the courts have found that a contract must be read in such a way

Trust to provide for her care and benefit.

Trustees' fiduciary duty runs to Muriel, and dictates that they use all assets of the Irrevocable of the remaindermen. (R., p. 7, ¶ 1.) The unambiguous language of Article II demonstrates the including this directive in the trust document, and specific instructions to disregard the interests

as to give it any effect would render so many other provisions of the Irrevocable Trust

meaningless..

The Trustee also has the express authority to distribute principal to Muriel under Article

XXII of the Irrevocable Trust:

“If, in the opinion of the TRUSTEE, any Trust fund created hereunder shall at any time be of a size which in the sole judgment of the TRUSTEE shall make it inadvisable or unnecessary to continue such Trust fund, then anything contained in this Trust Agreement or any amendment thereto to the contrary notwithstanding, the TRUSTEE, in its sole discretion, may pay over and distribute the entire principal of the Trust to the beneficiaries thereof, free of all trusts.”

(R., p. 7; R., Ex. G.)

Since, as established *supra*, Muriel is the vested lifetime beneficiary of the Trust, and

Article XXII allows for payment of the entire principal free of trust to the beneficiary, it was

reasonable for the Hearing Officer to conclude that there are indeed circumstances under which

the principal of the Irrevocable Trust can be paid to Muriel. (R., p. 7.) The “maximum amount

capable of distribution under a trust is deemed an available resource to the beneficiary,

regardless of whether the trustee actually exercises his or her discretion.” *Strand v. Rasmussen*,

Director, Iowa Dep’t. of Human Services, 648 N.W.2d 95, 105 (2002) (*quoting Forsyth v. Rowe*,

629 A.2d 379, 386 (1993); *Lebow*, 740 N.E.2d at 982; *Cohen*, 668 N.E.2d at 777; *In re Lennon*,

683 A.2d 239, 241 (1996)). Therefore, regardless of whether the Trustee decides to use his

discretion and authority under Article XXII, the entire principal of the Irrevocable Trust is

countable in an eligibility determination. (R., p. 7, ¶ 1.) 42 U.S.C. § 1396p(d)(2)(C)(ii); §

1396p(d)(3) (B)(i); 130 CMR 520.023(C)(1)(a).

Because, as the Hearing Officer found, there are circumstances under which the principal

of the Irrevocable Trust can be made available to Muriel, the principal is properly countable in

an eligibility determination for long-term care benefits, and the Agency's Decision should be affirmed. 130 CMR 520.023(C).

To advance her argument that the principal of the Trust is not countable, Plaintiff relies on *Guerrero v. Commissioner of the Division of Medical Assistance*, 433 Mass. 628, 745 (2001). However, *Guerrero* bears no resemblance to the issue in this case, and so is not instructive. In *Guerrero*, the plaintiff was the beneficiary of a self-settled trust and, seven years before applying for Medicaid, she executed an irrevocable waiver in which she completely renounced all of her right, title and interest in the trust. *Id.* at 325. The Court found that once plaintiff executed the irrevocable waiver, and the trustee had knowledge of that document, the trustee was deprived of any legal discretion to pay plaintiff any part of the trust principal because the plaintiff had removed herself completely from the Trust. *Id.* at 330. In contrast, here, Muriel has not executed a waiver of her right to principal and income, nor has she done anything else to cut herself off from the Irrevocable Trust, and her interests contained therein. So unlike the plaintiff in *Guerrero*, Muriel remains a beneficiary of the entire Irrevocable Trust. Indeed, Muriel has always been, and remains the vested beneficiary for her lifetime. Because there are circumstances under which Muriel can receive principal, the Agency was correct in deeming the entire Irrevocable Trust is countable to her in an eligibility determination, and the Agency's Decision should be upheld.

Plaintiff's argument that the intent of Muriel, the Settlor, was to create an income-only trust is not controlling in interpreting the document because an income only trust was simply not, in fact, created. While it may be true that the intent of a settlor may have some bearing in the realm of general trust interpretation, such is not the case in the context of a public benefits program. Indeed, the SJC has set forth the standards for trust interpretation in the context of

MassHealth eligibility determinations. As discussed, *supra*, the SJC has clearly stated that if the trustee has even a peppercorn of discretion to distribute trust principal, then whatever is the most that the beneficiary might under any state of affairs receive in full exercise of the that discretion, is the amount that is counted as available for Medicaid eligibility, and the settlor's intent does not control. *Cohen*, 432 Mass. at 415-416.

MassHealth regulations reflect not just this holding but all federal and state law on the matter. 130 CMR 520.023(C); 42 U.S.C. § 1396p(d) (2)(C)(ii); 42 U.S.C. § 1396p(d)(3)(B)(i). The regulations regarding trust assets are clear, and the intent of the parties is **not** a consideration. As the late Judge Toomey so ably observed, if the settlor's intent is viewed as "a legitimate device for preserving plaintiff's eligibility for Medicaid benefits, then the result would have a disastrous effect on the future of Medicaid." *See Bisceglia v. Comm'r*, 6 Mass. L. Rptr. 168 (Mass. Super. Sept. 18, 1996) (Toomey, J.)

Lastly, on pages 4-5 of her Memorandum, Plaintiff argues that a series of 1993 letters (attached to Plaintiff's Memorandum as Exhibit G³) exchanged between the Alzheimer's Association and the then secretary of Health and Human Services, are somehow dispositive in this case. Plaintiff is mistaken. As a threshold matter, not only is this document nothing more than an advocacy group's opinion as to how a law should be interpreted, but this exhibit is not properly before the Court and so may not even be considered. Judicial review of an administrative action is strictly limited to evidence contained in the administrative record. *Southern Worcester County Regional Vocational School Dist v. Labor Relations Comm'n*, 386 Mass. 414, 420-21 (1982); G.L. c. 30A, § 14(5). The contents of the administrative record are

³ This is an entirely separate and distinct document from Exhibit G of the Administrative Record, which is the Irrevocable Trust.

available to individuals and families who do not possess adequate funds for basic health eligibility requirements its assets should be deemed countable. "The Medicaid program is only When provisions of trusts are drafted for the purpose of circumventing Medicaid

B. Provisions of trusts, wherein the purpose is to shield assets for heirs or to create an appearance of indigence should not be given effect.

must be upheld.

its entirety and as such the Plaintiff is not eligible for Medicaid. Thus, the Agency's decision available to Muriel, the Hearing Officer properly found that the Irrevocable Trust is countable in Because the plain language of the Trust at issue confirms that all of the Trust property is considered by the Court.

regarding income only trusts is not relevant to this countable trust, this evidence cannot be that the evidence could not have been presented at the Fair Hearing, and because the evidence does not involve an income only trust. Because the Plaintiff here has not offered any valid reason contained in Exhibit G about income only trusts is accurate, yet not relevant, because this case attempt to make a new argument. In addition, Exhibit G has no relevance here. The information the fair hearing, yet failed to do, and so now seeks to improperly bring it before the Court in an Plaintiff's Memorandum is nothing more than new research that Plaintiff could have introduced at *Enterprises, Inc. v. State Building Code Appeals Bd.*, 20 Mass. App. Ct. 271 (1985). Exhibit G to M.G.L. c. 30A, § 14(6) (emphasis supplied). A showing as to both elements is required. *She and* that there was good reason for failure to present it in the proceeding before the agency..." that the Plaintiff show that the proposed additional evidence is "material to the issues in the case, In order to present evidence beyond the scope of the record, Chapter 30A, § 14 (6) requires

610.610.

confined to "evidence, testimony, materials and legal rules presented at the hearing." 130 CMR

Here it is obvious that the provision of Article V.A.(2) stating the Trustee has no discretion to distribute principal to or on behalf of the applicant, is meant to render the principal of the Irrevocable Trust as not countable so that Muriel could obtain Medicaid benefits, while at the same time preserving substantial assets for her heirs, who also notably are the Trustees. The SJC, however, has specifically found that when there are provisions in a trust that attempt to limit the trustee's discretion to make payments to, or on behalf of, a Medicaid applicant, these are disregarded because they are meant to "defeat Medicaid ineligibility standards." *Cohen, 423 Mass. at 416*. Because of the manner in which this Irrevocable Trust was drafted, it is undeniable that it is a classic Cohen trust, designed to preserve Muriel's assets for her family and herself, while simultaneously rendering her eligible for Medicaid benefits. Muriel's interest in the Trust assets is further evidenced in Article V.C., which states that the Trustee only has the power to sell any real property in the Trust upon the written assent of Muriel. (R., Ex. G.) Like

(R, Ex. G, Article II, ¶ 1.)

The purpose of the Trust is to supplement, but not to supplant, what benefits and services the Settlor may from time to time be eligible to receive by reason her age, disability, or other factors, from federal, state and local governmental, insurance, and charitable sources. This Trust is established with the recognition that the nature and extent of the complex and multiple needs of the SETTLEOR are such that her own resources and those of her family would quickly become exhausted if relied upon as a primary resource for her care. It is recognized further that governmental and charitable programs, in themselves, contain many gaps which, if not addressed, would greatly reduce the possibility of the SETTLEOR maintaining herself as independently as possible, and having the capacity to meet her future needs adequately for medical, residential, personal, and other services.

expenditures:

Irrevocable Trust the notion that governmental programs are available to cover some of these acknowledges the high cost of medical care and places within the purview of the parties to the services." *Forsythe, at 106; citing Cohen, at 772*. In this case, the language in Article II clearly

In addition, in a reasonable exercise of Agency discretion, the Decision finds that under MassHealth regulations the purported "Note" dated May 18, 2004, is properly treated as an annuity. (R., p. 7.) Under 130 CMR 515.001, an annuity is defined as "a legal instrument that makes payments for a designated period of time or for life, regardless if the payments are principal, interest or both." Here the "Note" states that the Trustees of the MTD Nominee Trust

Under Article V.A.(1) of the Irrevocable Trust, during her lifetime, Muriel is entitled to all of the net income. Therefore, Muriel is the beneficiary of the Irrevocable Trust income, and it is countable in an eligibility determination. 130 CMR 520.024(A)(1). If during the past five years this income was paid to an individual other than Muriel, or was reinvested rather than distributed to Muriel, these would be deemed disqualifying transfers. 130 CMR 520.023(C)(1)(c) and 130 CMR 520.019(G).

C. The Hearing Officer properly found income from the Irrevocable Trust is countable in an eligibility determination and for MassHealth purposes payments under the Note are deemed income and countable in their entirety to the applicant.

Thus, the provision of Article V.A.(2) stating that the Trustee may not distribute principal to or on behalf of the applicant, is disregarded because it is clearly meant to defeat Medicaid eligibility standards, and thus the principal of the Irrevocable Trust is deemed countable. 130 CMR 520.023(C)(1)(a).

Trustees can do with a significant asset, namely her home. *Cohen, supra* at 415-416. by saying she is not entitled to income and has no control, while she still controls what the beneficiaries of self-settled trusts cannot have their cake and eat it too, as Muriel attempts to do beyond the reach of MassHealth or other creditors. Medicaid applicants who are vested which, unsuccessfully, seeks to limit the Trustee's discretion in order to place the principal the trusts in the *Cohen* case, this is a self-settled Trust of which Muriel is the beneficiary, and

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

Respectfully Submitted,

As the discussion *supra* makes clear, all of the Irrevocable Trust property is a countable asset for determining Muriel's MassHealth eligibility. The Decision is supported by the weight of the evidence and was not arbitrary or capricious. Further, MassHealth's regulations are proper and should be upheld as a reasonable exercise of the Agency's discretion. Lastly, to allow Plaintiff to prevail here would be to allow a person of means to preserve her estate while avoiding any Medicaid responsibility and forcing the taxpayers to pay for her care, contrary to the carefully crafted federal and state statutory and regulatory scheme.

Because the Agency's Decision was lawful, MassHealth respectfully requests that this Court deny Plaintiff's motion in its entirety, affirm the Agency's Decision and grant such other and further relief as this Court deems just.

Conclusion

applicant in an eligibility determination. 130 CMR 520.024(A)(1).

as well as any other income the Irrevocable Trust produces are properly countable to the Muriel, as it is undisputed that she is the income beneficiary of the Irrevocable Trust; this income Irrevocable Trust, and under Article V.A.(1) of the Irrevocable Trust must be disbursed to Consequently, the monthly payments of \$4,718.39 are classified entirely as income to the 515,001. Payments under an annuity are considered unearned income. 130 CMR 520.009(D). Officer correctly found, meets MassHealth's definition of an annuity. (R., p. 7.) 130 CMR that provides for regular monthly payments for a designated period of time and, as the Hearing 2004, until the Note is paid off, and no later than May 1, 2014. The Note is a legal instrument are legally obligated to pay the Irrevocable Trust \$4,718.39 each month beginning on June 1,

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Carolann Mitchell

By its attorneys,

CERTIFICATE OF SERVICE
 I hereby certify that a true copy of the above
 document was served upon all parties
 by regular mail on September 28, 2007.

Carolann Mitchell

Carolann Mitchell

Dated: September 28, 2007