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

Appeal No. 1409671, [redacted] v. Office of Medicaid

Second Memorandum of Appellant

Date: November 12, 2014

To: Paul Moore, Hearing Officer

To: Kim McAvinchey, MassHealth Representative

From: Brian E. Barreira, Appellant's Counsel

This memorandum is submitted in response to the memorandum of the Office of Medicaid filed on October 30, 2014, which is replete with repetitions of statements and quotes despite the request of the hearing officer not to engage in such redundancy. The Appellant will limit this response.

The Appellant notes that the Office of Medicaid has continued its practice of needlessly including the Appellant's Social Security number on its filings, and moves that such number be redacted from all of its filings.

(A) The Impact of the MassHealth Denial on the Nursing Home Providing Care Should Not Be Ignored Because It Gets to the Essence of Federal Medicaid Trust Law

The Office of Medicaid concludes its memorandum with a spin away from what the Appellant was stating about the adverse impact on the nursing home that is providing care to the Appellant. The Appellant was not suggesting that the Medicaid trust law simply be ignored, as the Office of Medicaid seems to suggest. What the Appellant was stating about the impact on the nursing home came at the end of several sections in the Appellant's memorandum about how the changes in federal Medicaid law were made to allow implementation of state debtor-creditor law. The court in Cohen explicitly stated that Congress was attempting to place into Medicaid law the same trust rules that under state law would allow a creditor of the settlor to reach the principal of the trust for payment of a debt of the settlor. Thus, if the nursing home cannot successfully sue the settlor and reach the principal of the trust, then the trust is not problematic under federal Medicaid trust law.

Attorney Steven Weiss, of Springfield, Massachusetts, who for many years has served as a trustee-in-bankruptcy and is an expert in bankruptcy and Massachusetts debtor-creditor law, has provided the Appellant with an affidavit, included as EXHIBIT L, as to how the principal of the trusts cannot be reached by the settlor's creditors. He has been provided with and answered several questions that pertain to the flimsy arguments made by the Office of Medicaid. Where state law must be followed according to Lewis v. Alexander, and where a bankruptcy trustee is trying to reel in as many assets as possible into the debtor's bankruptcy estate, the opinion of Attorney Weiss should be accorded great weight on a factual and legal basis.

(B) In the History of the 1993 Medicaid Trust Law, There Have Been Only Three Reported State Cases Upholding Denials Regarding Self-Settled Irrevocable Trusts

Acting for the benefit of the estate planning, elder law and trust bars after some of us learned earlier this year about the extent of the egregious behavior of the Office of Medicaid in attacking all trusts with a form memorandum, Attorney Alex Moschella, of Winchester, Massachusetts, has recently done legal research into all of the reported cases under 42 U.S.C. 1396p(d) where the term "any circumstances" was found. His affidavit is attached as EXHIBIT M.

Thus, in the 21-year history of the 1993 federal Medicaid trust law, reviewing what has taken place in all 50 states, it appears there have been only three reported cases where self-settled irrevocable trusts were denied under what the Office of Medicaid continually claims is the "broad" any circumstances standard. I have read all ten cases listed in paragraph 3 of Attorney Moschella's affidavit, and hereby confirm the complete accuracy of his report about those cases.

It appears that the 1993 changes made by Congress in federal Medicaid trust law repaired the law to its satisfaction, and the lack of reported cases under the 1993 law shows that the law is narrowly interpreted throughout the nation. Despite making changes to basic Medicaid law in 2005-2006 under the Deficit Reduction Act, Congress has not made any changes to federal Medicaid trust law since 1993. The Office of Medicaid is way out on a limb, where no other state is, in its claims and its continuing actions against trusts.

(C) HCFA Transmittal 64 Is Binding Federal Guidance That Must Be Followed by the Office of Medicaid

The Office of Medicaid does not deny that the State Medicaid Manual 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."

No change has been made in federal Medicaid trust law since 1993, and the State Medicaid Manual, since the publication in November of 1994 of HCFA Transmittal 64, has guided states on how to implement the 1993 federal Medicaid trust law. An explanation is found there on what

"any circumstances" means. Nowhere in the State Medicaid Manual is there even a misreadable implication that there is a presumption that self-settled irrevocable trusts are countable.

Even the "Eligibility" page at medicaid.gov has a different interpretation of federal Medicaid trust law than the Office of Medicaid, where under "Treatment of Trusts," the federal website states: "When an individual, their spouse, or anyone acting on the individual's behalf establishes a trust using at least some of the individual's funds, that trust can be considered available to the individual for purposes of determining eligibility for Medicaid." (emphasis added) No mention of any presumption of countability can be found there.

(D) SSI Comparability

The Office of Medicaid agrees that, as a general rule, the eligibility requirements for Medicaid cannot be more restrictive than SSI, and attempts to deflect attention from that rule by pointing out that Social Security employees are instructed not to make Medicaid eligibility determinations. The Office of Medicaid does not deny that the MassHealth or Medicaid fact-finding process and trust law interpretation can be more liberal, in part due to the availability of waiver programs. Hence, Social Security employees are instructed not to make Medicaid eligibility determinations because they could end up issuing unwarranted denials, not unwarranted approvals.

In Appeal 1102569, attached as EXHIBIT N, the hearing officer concluded that the Office of Medicaid is bound by the doctrine of SSI comparability. That was the final decision of the Office of Medicaid on that issue, and this Appellant is entitled to be treated the same as the approved appellant on the issue of SSI comparability due to the doctrine of administrative consistency.

(E) The Office of Medicaid Continues to Cite Unapologetically or Obliviously to a Repealed Law

The Appellant's first memorandum pointed out that the Office of Medicaid had cited M.G.L. c. 203, § 25A, repealed in 2008, as part of its tortured justification for claiming the trustee could purchase an annuity to get principal to the settlor. The Office of Medicaid has been citing M.G.L. c. 203, § 25A in its misleading memoranda on trust denial cases since at least June 12, 2013. Rather than admitting its mistake and displaying its lack of knowledge regarding Massachusetts trust law, the Office of Medicaid instead chose to cite the repealed M.G.L. c. 203, § 25A again on page 10 of its October 30, 2014 memorandum. Such conduct evinces that the Office of Medicaid either does not know the law it is writing about or is intentionally being untruthful.

When caught in such a misleading misstatement of law, the cavalier response of the Office of Medicaid seems to have been to deflect attention from the issue and state that the issue does not advance the appellant's claim of eligibility, yet the actions of the agency are a central issue in trust denial cases, as the Medicaid Act 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," and it is the duty of the Office of Medicaid not to construe the federal Medicaid law against the Appellant. "The Social Security Act, of which Medicaid is a part, is ... to be liberally construed." Cristy v. Ibarra, 826 P.2d. 361 (Court of Appeals, Co. 1991).

(F) The Office of Medicaid's Memorandum Dated October 30, 2014 Made Untruthful Statements About Its Position on the Doherty Case

The Appellant's first memorandum pointed out that the Office of Medicaid had taken a legal position about trust interpretation on page 12 in its September 28, 2007 brief in Superior Court in the Doherty case. By way of reply, in footnote 9 on page 8 of its October 30, 2014 memorandum, the Office of Medicaid states that the appellant has taken its position out of context, and goes on to claim that '[a]gency counsel was addressing opposing counsel's contract argument in the Plaintiff's Motion for Judgment on the Pleadings." On this point, the Office of Medicaid appears quite simply to be incorrect about its own work, and as proof thereof, its entire brief is attached as EXHIBIT O. On page 10 begins a section of the brief entitled "A. There are provisions in the Irrevocable Trust which allow for principal to be paid to or for the benefit of the Plaintiff as the vested beneficiary of the trust; therefore, the principal is countable in an eligibility determination." That section runs through page 16 of the brief, and deals solely with arguments about the trust. On page 12 you can see the section quoted in the Appellant's first memorandum; it reads: "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. ... In other words, contracts must be construed to give "reasonable effect" to each provision contained therein. ...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." Thus, either the Office of Medicaid made a reckless claim in its October 30, 2014 memorandum when it claimed it was a contract argument that was being addressed, or the Office of Medicaid has chosen to be untruthful. Neither is acceptable.

One might wonder why the Office of Medicaid would choose to be misleading or untruthful about this matter. The reason may well be that the Office of Medicaid does not want the hearing officer to read the trust as a whole, and especially wants the hearing officer to ignore the trustee's fiduciary duties, which the Office of Medicaid stressed the importance of on page 12 of its Doherty brief: "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 or the Appellant's spouse from the Irrevocable Trusts without violating those duties. Nowhere in the Irrevocable Trusts 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."

That the Office of Medicaid does not want the hearing officer to read the trust as a whole, contrary to its official, written position in the Doherty case, is made obvious on page 9 of its July 15, 2014 memorandum, where it states: "That there are provisions in the Trusts that are at odds

with each other does not change the analysis." Thus, any claims for deference that the agency may make in Medicaid trust interpretation are undercut by its blatant and unexplained inconsistency.

It is apparent that the Office of Medicaid is trying to argue that the entire trust must be reviewed, then anything in the trust that can be isolated can be referred to as "any circumstances" and cause a MassHealth denial. Such an argument is a far cry from the official position of the Office of Medicaid in the Doherty case, and may explain why it is attempting to disavow that the part of the Doherty brief quoted by the Appellant was its stated position on proper trust interpretation.

The hearing officer should also take note that nowhere in this 19.5-page brief of the Office of Medicaid in Doherty is there any mention whatsoever of its newly-minted position that "federal Medicaid law effectively creates a presumption that a Trust containing the assets of an applicant (and/or spouse) is countable in an eligibility determination." Moreover, nowhere in the 19.5-page brief is there any argument about the trustee's investment powers, including the power to purchase an annuity, rendering the principal of the trust countable or available. There was an unused half-page of space to include those arguments in the Doherty brief, so we can easily draw the conclusion that those were not the positions of the Office of Medicaid at that time. Despite deflective claims made by the Office of Medicaid in its October 30, 2014 memorandum, the Appellant was accurate in stating that the Office of Medicaid has only recently adopted its current position about irrevocable trusts, and nothing makes that point more clearly than the Office of Medicaid's own written words, as well as the absence of certain arguments, in its Doherty brief.

(G) The Office of Medicaid's Second Memorandum Misleadingly Cuts Out a Key Part of an Explanatory Quote in Lewis v. Alexander

The Appellant has established in its first memorandum that state trust law does matter in a Medicaid trust review, with four exceptions spelled out in 42 USC 1396p(d)(2)(C), i.e., disregarding the purposes for which a trust is established, disregarding whether the trustees have or exercise any discretion under the trust, disregarding any restrictions on when or whether distributions may be made from the trust, and disregarding any restrictions on the use of distributions from the trust. The Lewis court made an extensive review of the 1993 federal Medicaid trust law, and concluded "there 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. The second memorandum of the Office of Medicaid does not deny that the Lewis court made such a finding, but attempts, as it does with almost all of the quotes in its memoranda, to deflect attention from the substance of the case and use a quote out of context to mislead the hearing officer.

There is a paragraph on page 343 in Lewis v. Alexander that explains some of the reasons behind the 1993 changes in Medicaid trust law, and what Congress intended as it transitioned from the 1985 federal Medicaid trust law. The Office of Medicaid does admit that the Lewis court discussed the legislative history and Congressional intent in replacing the 1985 law with the

1993 law, but only provided the first two sentences in that paragraph, yet the remaining sentences in the paragraph provide the true context for what follows in the next paragraph. The full quote, with the portion omitted by the Office of Medicaid being underlined for emphasis, is: "In enacting the trust provisions of OBRA 1993, Congress provided a comprehensive system for dealing with the relationship between trusts and Medicaid eligibility. After limited success with the Medicaid Qualifying Trusts provisions enacted in 1986, Congress made a deliberate choice to expand the federal role in defining trusts and their effect on Medicaid eligibility. Evidence of this can be found throughout the Medicaid statute. For example, the current text of 42 U.S.C. § 1396a(a)(18) requires States to comply with "section 1396p of this title with respect to . . . treatment of certain trusts[.]" Before OBRA 1993, the provision instructed States to "comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, and transfers of assets[.]" 42 U.S.C. § 1396a(a)(18) (1992). It did not mention compliance with 1396p."

Thus, the Lewis court states that under 1985 Medicaid trust law, it was ambiguous as to whether states were even required to implement the federal Medicaid trust law. The next paragraph then goes on to state that, in 1993, "Congress made a specific choice to expand the types of assets being treated as trusts and to unambiguously require States to count trusts against Medicaid eligibility." It is an illogical stretch for the Office of Medicaid to claim that this quote means the Lewis court was stating that the 1993 law created a presumption of a trust's countability, and the Office of Medicaid attempted to mislead the hearing officer by eliminating the context for the quote on which it wants the hearing officer to focus. Before 1993, there was no rule requiring states to count trusts, which is what the part of the quote excluded by the Office of Medicaid had explained, and that is why the Lewis court also states that "[i]n the 1993 amendments, Congress established a general rule that trusts would be counted as assets for the purpose of determining Medicaid eligibility." All that was meant by these quotes, used out-of-context by the Office of Medicaid, was that Congress in 1993 was correcting a drafting error it had made in 1985.

As explained in detail by the Supreme Judicial Court in the Cohen case, trusts where principal was overtly available for distribution, yet had various types of conditional limitations on trustee discretion, were not clearly covered in the 1985 law. The Cohen court explained that the 1993 law eliminated a settlor's ability to utilize such conditional limitations in trusts, as Congress expanded the definitions to pull those trusts in, and that was the extent of the expansion of the Medicaid trust law in 1993. In discussing the Kokoska part of the case, the Cohen court stated that, apart from the special needs trust exceptions, the 1993 law was simply a correction of the gaps left in the 1985 law.

(H) The Office of Medicaid Has Established a Pattern of Attacking All Trusts and Hiding the Details of Its Losses, in Violation of its Duty of Administrative Consistency

On page 9 of its October 30, 2014 memorandum, the Office of Medicaid states: "Trusts, the terms contained therein, the administration of the trusts and facts attendant upon each Medicaid eligibility determination are all unique." The Office of Medicaid apparently believes it has no duty of consistency or disclosure, and it is apparent that the Office of Medicaid intends to repeat issuing its misleading form memoranda as long as the Board of Hearings allows such

misbehavior to continue. While agencies are not bound in perpetuity to repeat an error, they are not entitled to keep slinging the same thing against the wall and hoping it will eventually stick. Unfortunately, the Office of Medicaid has access to and knowledge of what the facts were in the previous fair hearing decisions where its positions were rejected, but does not mention them or make the trusts available on a redacted basis. The MassHealth application of this Appellant may well have been denied with trusts that are substantially similar to or exactly the same as those of previous appellants who had received approvals.

The Office of Medicaid is failing to fulfill the agency's duties, where under 42 CFR 435.901, "[t]he Medicaid agency's standards and methods for determining eligibility must be consistent with the objectives of the program and with the rights of individuals under the United States Constitution, the Social Security Act, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and all other relevant provisions of Federal and State laws." The Office of Medicaid has a duty under all of these laws to treat all MassHealth applicants fairly and consistently, and its lack of transparency and lack of balanced disclosures prevents such required treatment of the Appellant in this case.

In its October 30, 2014 memorandum, the Office of Medicaid appears to be claiming that it can continue ad infinitum to make eligibility determinations that are inconsistent with the results of its own administrative adjudicatory proceedings. In doing so, it seems to show confusion about its own agency structure. The Board of Hearings is a part of the Office of Medicaid, and under M.G.L. c. 118E, s. 48, "[t]he decision of the referee shall be the decision of the division." Thus, a hearing officer's decision represents the final position of the Office of Medicaid, and that is why it is a violation of the duty of administrative consistency to continue to issue eligibility determinations that ignore and are inconsistent with the previous fair hearing decisions of the agency. Such a pattern is capable of repetition, yet evading review.

Besides the cases already cited in the Appellant's first memorandum, there are numerous other cases about how agencies are required to maintain administrative consistency. Agency action is arbitrary and capricious if it departs from agency precedent without explanation. 5 U.S.C.A. § 706(2)(A). American Federation of Labor v. Chertoff, 552 F. Supp. 2d 999 (N.D. Cal. 2007). Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures. City of Colorado Springs v. Solis, 589 F.3d 1121 (10th Cir. 2009). The reviewing court may set aside agency action as arbitrary under the Administrative Procedure Act (APA) if the agency failed to follow its own precedent. 5 U.S.C.A. § 706(2)(A). Capener v. Napolitano, 981 F. Supp. 2d 1119 (D. Utah 2013). Under the Administrative Procedure Act (APA), departing from precedent without explanation is a form of capricious agency action. 5 U.S.C.A. § 706. Kourouma v. F.E.R.C., 723 F.3d 274 (D.C. Cir. 2013). Like a court, normally, an agency must adhere to its precedents in adjudicating cases before it. Jicarilla Apache Nation v. U.S. Dept. of Interior, 613 F.3d 1112 (D.C. Cir. 2010). Agency action is arbitrary and capricious, under Administrative Procedure Act (APA), if the action departs from agency precedent without explanation. 5 U.S.C.A. § 706(2)(A). Singleton v. Babbitt, 588 F.3d 1078 (D.C. Cir. 2009). An agency's unexplained departure from precedent must be overturned as arbitrary and capricious. 5 U.S.C.A. § 706(2)(A). Eagle Broadcasting Group, Ltd. v. F.C.C., 563 F.3d 543 (D.C. Cir. 2009). Reasoned agency decisionmaking necessarily requires consideration of relevant precedent. Williams Gas Processing-Gulf Coast

Co., L.P. v. F.E.R.C., 475 F.3d 319 (D.C. Cir. 2006). Like a court, normally, an agency must adhere to its precedents in adjudicating cases before it. Wilhelmus v. Geren, 796 F. Supp. 2d 157 (D.D.C. 2011). Where an agency departs from established precedent without a reasoned explanation, the agency's decision will be vacated as arbitrary and capricious. Fred Beverages, Inc. v. Fred's Capital Management Co., 605 F.3d 963 (Fed. Cir. 2010). Agencies do not have same freedom as courts to change direction without acknowledging and justifying the change, and agency may not abandon interpretation without explanation. Salameda v. I.N.S., 70 F.3d 447 (7th Cir. 1995). Under Administrative Procedure Act (APA), an agency's decision is arbitrary and capricious if the agency fails to follow its own precedent or fails to give a sufficient explanation for failing to do so. 5 U.S.C.A. § 706(2)(A). Andrzejewski v. F.A.A., 563 F.3d 796 (9th Cir. 2009). Administrative agency acts arbitrarily when it departs from its precedent without giving any good reason. 5 U.S.C.A. § 706(2)(A). Friends of Wild Swan, Inc. v. U.S. Fish & Wildlife Service, 12 F. Supp. 2d 1121 (D. Or. 1997). Agency's divergence from agency precedent demands an explanation. Gas Transmission Northwest Corp. v. F.E.R.C., 363 F.3d 500 (D.C. Cir. 2004). An agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent. Brusco Tug & Barge Co. v. N.L.R.B., 247 F.3d 273 (D.C. Cir. 2001). An administrative agency must either follow or adhere to existing policies and precedents or explain its non-compliance or deviation. Katunich v. Donovan, 599 F. Supp. 985 (1984).

(I) The Office of Medicaid's Second Memorandum Failed to Address Several Points Made by the Appellant

Several points made by the Appellant were unaddressed by the Office of Medicaid in its responsive memorandum dated October 30, 2014, and the Appellant hereby highlights a few of them:

(1) The Office of Medicaid does not deny that, in its memorandum dated July 15, 2014, there was a misleading construction of two paragraphs about federal Medicaid trust law under which it ended with quotes from the non-trust Shelales case.

(2) The Office of Medicaid does not deny that MassHealth regulations recognize the fiduciary duties of trustees.

(3) The Office of Medicaid does not deny that, in its memorandum dated July 15, 2014, it did not get its cites correct on federal Medicaid trust law.

(4) The Office of Medicaid does not deny that the 1993 federal Medicaid trust law specified only four aspects of state trust law that may be ignored in determining eligibility.

(5) The Office of Medicaid does not deny that federal Medicaid trust law has remained unchanged since 1993.

(6) The Office of Medicaid does not deny that the State Medicaid Manual provides interpretive guidance to the states, and that the Office of Medicaid is bound by contract to follow it.

(7) The Office of Medicaid does not deny that its "any circumstances" arguments are more restrictive than the directives in the POMS.

(8) The Office of Medicaid does not deny that the United States Court of Appeals held in Lewis v. Alexander that federal Medicaid law does not direct that state trust laws be ignored.

(9) The Office of Medicaid does not deny that a power of substitution is the same as an option to purchase at fair market value, and that the Trustee's fiduciary duties under Massachusetts law would be relevant to such a transaction and prevent the settlor from gaining any windfall.

(10) The Office of Medicaid does not deny that the Massachusetts legislature has voted overwhelmingly to prohibit estate recovery against trusts.

(11) The Office of Medicaid does not deny that overemphasis on one or two provisions of the trust instrument is not permissible under Massachusetts trust law, and that the Court stated in Dana v. Gring, 374 Mass. 109, 116 (1977), that 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.

(12) The Office of Medicaid does not deny that, under Massachusetts trust law, 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.

(13) The Office of Medicaid does not deny that, 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.

(14) The Office of Medicaid does not deny that, under Massachusetts trust law, 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.

(15) The Office of Medicaid does not deny that 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.

(16) The Office of Medicaid does not deny that, under Massachusetts trust law, the duty of impartiality as between and among the beneficiaries requires that the trustee not favor one beneficiary over another, and that the trustee is bound to treat all beneficiaries equitably in accordance with the terms of the trust instrument construed as a whole.

(17) The Office of Medicaid does not deny that, under Massachusetts trust law, 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, and that such a power may not be used to divert one beneficiary's interest to another beneficiary without breach of fiduciary duty.

(18) The Office of Medicaid does not deny that 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; that such a trust would not have been effective against a creditor under state debtor-creditor laws; that Congress changed federal Medicaid law to allow states to implement their existing debtor-creditor laws against that type of trust; and that many of the quotes relied upon by the Office of Medicaid in its memorandum were discussing these types of trusts.

(19) The Office of Medicaid does not deny that, in the case of Cohen v. Comm'r of Div. of Med. Assistance, 423 Mass. 399 (1996), the Supreme Judicial Court concluded that Congress was effectively implementing state debtor-creditor laws when it enacted Medicaid trust laws.

(20) The Office of Medicaid does not deny that there have been no changes in federal Medicaid trust law since 1993; that the Cohen court in 1996 determined that federal Medicaid trust law implements the provisions of Restatement (Second) of Trusts s. 156; and that 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.

(21) The Office of Medicaid does not deny that if Congress had been attempting in 1985 and 1993 to eliminate the usage of all trusts to qualify for Medicaid, 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.

(22) The Office of Medicaid does not deny that if a creditor of the Appellant in this case cannot reach the principal of these 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 appeal is denied.

(23) The Office of Medicaid does not deny that a party is entitled to reasoned consistency in agency decision-making.

(24) The Office of Medicaid does not deny that in Old Colony Trust Co. v. Silliman, 352 Mass. 6, 10 (1967), the Massachusetts Supreme Judicial Court concluded that "even very broad discretionary powers are to be exercised in accordance with fiduciary standards and with reasonable regard for usual fiduciary principles."

(25) The Office of Medicaid does not deny that, according to Restatement 3rd Property (Wills and Donative Transfers) §22.1 cmt a, "a nongeneral power of appointment is not an ownership-equivalent power."

(26) The Office of Medicaid does not deny that federal law controls the federal consequence of the substance of various arrangements, while state law tells us what the substance of the

arrangement is; that federal law 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.

(27) The Office of Medicaid does not deny that 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; that the 1993 changes in federal Medicaid trust law closed the door of shifting trustee discretion; and that the 1985 Congressional intention of authorizing scrutiny of irrevocable trusts under state debtor-creditor laws remained unchanged when the 1993 changes were made.

(28) The Office of Medicaid does not deny that in proper statutory interpretation of federal laws, Congress is presumed to know about other laws it has passed; that 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; and that 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.

(29) The Office of Medicaid does not deny that 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) by trustees skewing principal to income was rejected in United States v. Powell, 307 F.2d 821 (10th Cir., 1962).

(30) The Office of Medicaid does not deny that the POMS contains no provision that directs or even hints that state trust law be ignored; 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; 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; contains no provision that a life estate in an irrevocable trust renders the principal of the trust to be deemed available to the settlor; 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; 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; and 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.

(31) The Office of Medicaid does not even deny that the Office of Medicaid often routinely makes the claim that irrevocable trusts are revocable or arguably revocable in various situations

that have nothing to do with revocability, and that nothing is ever presented by the Office of Medicaid to support its revocability argument.

(J) The Office of Medicaid Is Not Conducting Itself as an Administrative Agency Should Conduct Itself

Taken as a whole, the memorandum of the Office of Medicaid dated July 15, 2014 was largely a repeat of several other memoranda filed at previous fair hearings. Given the amount of effort put into the boilerplate portions of the memorandum, it seems quite unlikely that any misleading quotes or misstatements of law are unintentional. Rather, the memorandum as a whole may be misleading to hearing officers, who are quite possibly not specialists in trust law and may be deprived of research resources to separate the wheat from the memorandum's boundless chaff. The quotes throughout the memorandum of the Office of Medicaid are selected primarily for how they sound out of context, and do not represent thoughtful case analysis by the Office of Medicaid, and do not comply with the proper role of the agency.

The proper and ethical role of a government lawyer is to see that the law is followed, not simply to win. "Any ethical and procedural obligation of a private attorney to be fair to opponents and candid with the court is enforceable when the litigant is represented by an attorney for the government. As a United States Attorney General put it more than a hundred years ago, "in the performance of . . . his duty . . . he is not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and legal obligations." 6 Ops. Atty. Gen. Office and Duties of Attorney General 326, 334 (1854) (Caleb Cushing to the President)." Zimmerman v. Schweiker, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983). "[C]ounsel for the government, no less than their colleagues in the private sector, are bound by the same obligations to the court. There is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large. Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1981) ("A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.")." Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983). (emphasis added) Unfortunately, the Office of Medicaid has been using its extreme distortion of the Doherty case (as well as its disavowal of its written position in that case) as an excuse to attack all irrevocable trusts, and ignores anything in the trust, as well as any case or any law or even any contrary fair hearing decision, that is favorable to the appellant.

The history of the Office of Medicaid in two recent non-trust cases shows its negative attitude towards the rights of appellants, as well as its primary interest in winning as opposed to the proper application of the law. First, attached as EXHIBIT P, is a 2009 email exchange between a MassHealth representative and the lawyer representing the Office of Medicaid on an appeal. As you can see, the MassHealth representative was in possession of a memorandum from the lawyer, and the appellant was trying to make an appointment to see the appellant's file. The lawyer representing the Office of Medicaid instructs the MassHealth worker to destroy the memorandum. The worker destroyed the memorandum, as she was instructed to do, but

apparently placed a copy of the email exchange in the file. The lawyer representing the Office of Medicaid usually claims that it is up to the worker as to whether to introduce the lawyer's memorandum into the record at a fair hearing, but in that email exchange we see clearly that it is the lawyer calling the shots and trying to deprive the appellant of the ability to prepare for the hearing. Second, attached as EXHIBIT Q, are pages 1 and 8 from a memorandum submitted by the Office of Medicaid to the hearing officer in Appeal 09200923. As was reported to me by a lawyer who played a part in writing the appellant's responsive memoranda in both cases, at the bottom of page 8 the Office of Medicaid cites Appeal decision 0801972 as supporting the position being taken, yet does not choose to indicate to the hearing officer that Appeal decision 0801972 had several months earlier been overturned in Superior Court, with the position of the Office of Medicaid on that issue having been specifically repudiated; see Foley v. Dehner, Hampden Superior Court no. 2008-00850-A.

Both EXHIBIT P and EXHIBIT Q display that the Office of Medicaid has an "end justifies the means" mentality, and its actions and statements of law should be evaluated thusly.

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

Appeal No. 1409671, [redacted] v. Office of Medicaid

Exhibits to Accompany Second Memorandum of Appellant

Date: November 12, 2014

To: Paul Moore, Hearing Officer

To: Kim McAvinchey, MassHealth Representative

From: Brian E. Barreira, Appellant's Counsel

EXHIBIT L – Affidavit of Steven Weiss, establishing that the principal of the Appellant's trusts cannot be reached by the Appellant's creditors or a bankruptcy trustee (9 pages)

EXHIBIT M – Affidavit of Alex Moschella (3 pages)

EXHIBIT N – Fair Hearing Decision 1102569, establishing that the doctrine of SSI comparability has been applied by the Office of Medicaid as the final decision of the agency (9 pages)

EXHIBIT O – Office of Medicaid's brief filed with the Massachusetts Superior Court of Essex County in Doherty case (20 pages)

EXHIBIT P – Office of Medicaid email exchanges dated May 27-28, 2009 (1 page)

EXHIBIT Q – Pages 1 and 8 of Office of Medicaid's memorandum dated February 25, 2010 on Appeal 1215864 (2 pages)

EXHIBIT L – Affidavit of Steven Weiss, establishing that the principal of the Appellant's trusts cannot be reached by the Appellant's creditors or a bankruptcy trustee (9 pages)

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

Appeal No. 1407381
[redacted] v. Office of Medicaid

Appeal No. 1409671
[redacted]. Office of Medicaid

AFFIDAVIT OF STEVEN WEISS

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

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

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

3. My professional background is as follows. From August, 1984 to July, 1986 I served as a law clerk to the Hon. Arthur J. Spector, Bankruptcy Judge for the Eastern District of Michigan. From August, 1986 through February, 1994 I was an associate, and then a shareholder at the firm of Cooley, Shrair, P.C. (f/k/a Cooley, Shrair, Alpert, Labovitz & Dambrov, P.C.), located in Springfield, Massachusetts. From February, 1994 to present I have been at my current firm. When I joined in 1994 I was initially "of counsel", but have been a shareholder since approximately 1996.

4. I have been on the panel of Chapter 7 Trustees for Region 1 of the United States Trustee program since 1987. I have also been appointed to serve as a Chapter 11 trustee in a number of cases, and I am the Chapter 12 Trustee for cases filed in central and western Massachusetts.

5. In addition to my service as a bankruptcy trustee, my practice consists primarily of representation of parties in bankruptcy, insolvency and reorganization matters. My practice includes representation of debtors, secured and unsecured creditors, creditors' committees, plaintiffs and defendants in bankruptcy litigation, and buyers and sellers of assets in bankruptcy cases.

6. I speak regularly at conferences and seminars for attorneys on business and consumer bankruptcy matters. Over the last several years I have spoken at programs for the American Bankruptcy Institute, the National Association of Bankruptcy Trustees, Massachusetts Continuing Legal Education, the Massachusetts Bar Association, the Boston Bar Association Bankruptcy Section, and the Hampden and Worcester County Bar

Associations. In addition, I have authored or co-authored a number of articles on bankruptcy-related topics, including "Resolved: A Chapter 7 Trustee May File Proofs of Claim on Behalf of Unsecured Creditors", Journal of the National Association of Bankruptcy Trustees, Summer 2014, co-authored with L. Alexandra Hogan; "Terminating an ERISA Retirement Plan: Can a Bankruptcy Trustee Serve Two Masters?", Journal of the National Association of Bankruptcy Trustees, Fall 2010, co-authored with David K. Webber; "Undoing the IRS Wrongful Levy," 106 Banking Law Journal 336 (July-August, 1989); "Bankruptcy Court Power to Enjoin the Internal Revenue Service from Collecting the Debtors' Taxes from its Officers: An Analysis of Recent Developments," Annual Survey of Bankruptcy Law, 1986; and "Post-Petition Tax Claims," Norton Bankruptcy Law Advisor, Issue 7, July 1985.

7. As a Chapter 7 Trustee, one of my most significant duties under Bankruptcy Code § 704(a) is to determine if there is property of the bankruptcy estate that can be administered, i.e., reduced to money, so creditors' claims can be paid.

8. From time to time debtors have interests as grantors, trustees or beneficiaries in trusts. To the extent that debtors have rights or powers under such trusts, and to the extent that they are not subject to an applicable exemption or enforceable "spendthrift" provision, those interests constitute property of the bankruptcy estate under Bankruptcy Code § 541(a), which generally encompasses all legal and equitable interests of the debtor. Essentially, the rights of a bankruptcy trustee to control assets of a trust are defined by the trust instrument. A bankruptcy trustee can exercise the rights held by a grantor or beneficiary, but by the same token, the trustee cannot ignore or disregard the terms of a trust. Similarly,

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

9. In this matter, I have reviewed copies of the [redacted] Irrevocable Trust and the [redacted] Irrevocable Trust, both dated May 10, 2007 (collectively referred to herein as the "Trusts"). To my knowledge, there have not been any changes to the Trusts. Both Trusts are essentially identical, except for the differences in names. I have been asked to provide an opinion as to whether a creditor of the Grantors, [redacted] and [redacted] can satisfy claims against them by reaching the principal of the Trusts.

10. Generally speaking, a grantor's right to exercise power to amend or revoke a trust, or to exercise dominion over trust property, constitutes a general power of appointment under Massachusetts law. A number of bankruptcy court opinions have held that to the extent that a grantor of a trust holds an exercisable general power of appointment, that right may be exercised by a bankruptcy trustee to satisfy creditors' claims. Conversely, if there is no general power of appointment, a bankruptcy trustee cannot reach trust assets. Having reviewed these Trusts thoroughly, it is my opinion that the assets in the Trusts do not constitute property of the grantors, and the limited rights that the grantors retained in the Trusts could not be used by creditors or a bankruptcy trustee to obtain control over those assets. It is my opinion that creditors of the grantors could not reach the assets of the Trust to satisfy their claims, nor could a bankruptcy trustee reach those assets in any bankruptcy case filed by or against the grantors, for the following reasons:

(1) The Trusts are irrevocable (see Article IX). While the "Trust Protector" (see Article XIII) has rights to amend the Trusts, it is only for purposes of correcting ambiguities or of responding to changes in the law.

(2) The right to substitute assets (see Article II) does not affect the revocability of the Trust. While the grantor's right to substitute assets of an equivalent value is a limited right that a bankruptcy trustee could theoretically exercise, it would require the Trustee to substitute "property of an equivalent value", so it has no value to creditors of the Settlors.

(3) The settlor of each Trust has limited rights to: change the percentage allocation amongst the three listed beneficiaries [Article III(E)] and to replace trustees [Article VI(F)], but these rights would have no value to creditors or a bankruptcy trustee. While a bankruptcy trustee could theoretically exercise those rights, there is no right to name new beneficiaries, and any successor trustee is subject to the terms of the Trusts.

(4) Article V of the Trusts grants to the trustees (but not the Grantors) wide discretion to buy, sell and invest Trust property. However, nothing in Article V grants any rights to the grantor to exercise any dominion or control over Trust property for the benefit of the grantor or the grantor's spouse, so there are no rights that could be exercised by a bankruptcy trustee.

11. I have been asked by the trustees to respond to 12 specific questions:

(1) Under bankruptcy law, would the bankruptcy trustee make every attempt to include self-settled irrevocable trusts in the bankrupt person's estate by disregarding (i) the purposes for which a trust is established, (ii) whether the trustees have or exercise any

discretion under a trust, and (iii) any restrictions on when or whether distributions may be made from a trust? Answer: One of a bankruptcy trustee's roles is to locate non-exempt assets that can be liquidated to satisfy the claims of creditors. Thus, a trustee would *attempt* to include self-settled trusts in the bankruptcy estate, without regard to the purposes for which trusts are established, and without regard to the rights a trustee may have or any rights or restrictions under the declarations of trust.

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

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

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

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

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

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

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

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

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

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

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

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

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

By: _____

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14\0305\Affidavit.1603

EXHIBIT M – Affidavit of Alex Moschella (3 pages)

Affidavit of Alex L. Moschella

I, Alex L. Moschella, am admitted to practice law in Massachusetts in 1974; an elder law attorney for 30 years; an adjunct professor at Suffolk University Law School teaching elder law for the past 23 years; a partner at Gosselin, Moschella, & Kyriakidis, P.C., concentrating on elder law; a CELA (Certified Elder Law Attorney) by the National Elder Law Foundation; and hereby certify as follows:

1. I have either read or reviewed case summaries prepared by my associate Jillian Wickman, Esq., the 48 cases that cite and/or reference 42 U.S.C. §1396p and include the term "any circumstances," as promulgated by Westlaw Next Keycite.

2. I found only ten cases in the United States in the history of the federal Medicaid trust law (1985-2014) that affirmed a denial of benefits based on the determination that the assets in a self-settled irrevocable trust were considered countable. (I found five additional cases that deemed the irrevocable trust to be countable because the applicant transferred assets to the trust within the look-back period, so those cases are excluded from my analysis.)

3. I analyzed the ten cases that denied benefits based on an irrevocable trust and concluded that in each case, the irrevocable trust was considered countable because the trust's terms gave the trustee discretion to distribute principal directly to the grantor or the grantor had the right to withdraw the principal without adequate substitution of principal. The cases are as follows:
    a. *Edholm v. Minnesota Dept. of Human Services*, 2013 WL 2926468;
    b. *In re Roscke v. County of Carver*, 783 N.W.2d 220 (Minn. 2010);
    c. *Thorson v. Nebraska Dept. of Health & Human Services,* 740 N.W.2d 27 (Minn. 2007);
    d. *Cohen v. Commissioner of Div. of Medical Assistance,* 668 N.E.2d 769 (Mass. 1996);
    e. *Williams for and on behalf of Squier v. Kansas Dept. of Social & Rehabilitation Services,* 899 P.2d 452 (Kan. 1995);
    f. *Vincent ex rel. Reed v. Dept. of Human Services*, 910 N.E.2d 723 (Ill. 2009);
    g. *Doherty v. Director of Office of Medicaid*, 908 N.E.2d 390 (Mass. 2009);
    h. *Gayan v. Illinois Dept. of Human Services*, 796 N.E.2d 657 (Ill. 2003);
    i. *Matter of Kindt*, 542 N.W.2d 391 (Minn. 1996);
    and
    j. *Strand v. Rasmussen*, 648 N.W.2d 95 (Ia. 2002).

Seven of these cases (*Rosckes*, *Thorson*, *Cohen*, *Squier*, *Vincent*, *Strand* and *Kindt*)

applied the pre-1993 law to trusts where the trustee had explicit authority to make distributions of principal to the settlor.

There have only been three (3) reported cases in the history of the 1993 federal Medicaid trust law: (1) *Edholm*, where the settlor explicitly reserved the power to borrow from the trust without the need to provide adequate interest or adequate security, which means the settlor could have received all of the trust assets in exchange for a worthless promissory note, (2) *Gayan*, where the trustee had the power to use principal to pay for the settlor's custodial care expenses, and (3) *Doherty*, a flawed trust instrument where the trustee had ambiguous fiduciary duties.

4. I found four cases that overruled a denial of benefits based on the determination that the assets in a self-settled irrevocable trust were considered non-countable. I analyzed those four cases and the results are as follows:
    a. The restrictions imposed by §1396p(d) do not apply to assets in a testamentary trust for the benefit of the applicant.
        i. *Pohlmann ex rel. Pohlmann v. Nebraska Dept. of Health & Human Services*, 710 N.W.2d 639, 644 (Neb. 2006)
        ii. *Skindzier. Commissioner of the Social Services*, 784 A.2d 323, 336 (Conn. 2001)
    b. "Any circumstances" cannot be interpreted so broadly as to conclude that a limited power of appointment makes an irrevocable trust revocable.
        i. *Verdow ex. Rel. Meyer v. Sutkowy*, 209 F.R.D. 309 (2002)
            1. The United States District Court rejected the argument that "any circumstances" can mean that the trust can be revoked with the beneficiaries' consent because that would then render all trust revocable under Medicaid law. *Id.* at 315-316.
            2. The court also rejected the argument that the applicant could somehow change the beneficiaries amenable to revoking the trust under the limited power of appointment, deeming it speculative absent showing bad faith. *Id.*
    c. The Supreme Judicial Court of Massachusetts ruled that an irrevocable waiver, executed fours year after an irrevocable trust that allowed the settlor access to income and principal, was effective at denying the settlor any right to principal
        i. *Guerriero v. Commissioner of the Div. of Medical Assistance*, 433 Mass. 628 (2001).
            1. The waiver stated that the settlor "renounced and refused" any right to principal; this waiver was not an amendment to the trust, rather the settlor transferred her interest in principal back to the

trust. *Id.* at 633.

2. Settlor applied for Medicaid benefits seven years after execution of the waiver and the irrevocable trust assets were deemed non-countable.

None of the 48 cases reviewed suggested that there is a presumption of the countability of self-settled trusts or that the fiduciary duties of the trustee under state law were irrelevant. Instead, the courts' narrow interpretation of federal Medicaid trust law resulted in decisions that deemed trust assets countable only in instances where the trustee had, or exercised, any discretion under the trust to distribute principal from the trust.

Executed under the pains and penalties of perjury on this 13th day of November, 2014.

Alex L. Moschella

MASSACHUSETTS)
) ss.
COUNTY OF MIDDLESEX)

On this day, November 13, 2014, before me, the undersigned notary public, personally appeared **Alex L. Moschella**, proved to me through satisfactory evidence of identification, which was photo identification, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

Witness my signature and official seal.

[Seal]

JILLIAN A. WICKMAN NOTARY PUBLIC COMMONWEALTH OF MASSACHUSETTS MY COMM. EXPIRES NOVEMBER 20, 2020

Notary Public: Jillian A. Wickman
My commission expires: November 20, 2020

EXHIBIT N – Fair Hearing Decision 1102569, establishing that the doctrine of SSI comparability has been applied by the Office of Medicaid as the final decision of the agency (9 pages)

APPEAL DECISION

Appeal Decision:	Approved	**Issue:**	Financial Eligibility
Decision Date:	FEB 28 2012	**Hearing Date:**	08/25/2011
MassHealth's Rep.:	Ron Lemed	**Appellant's Rep.:**	Neal Winston, Esq.
Hearing Location:	Tewksbury MassHealth Enrollment Center	**Aid Pending:**	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).[1]

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.

[1] 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.[2]

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[3] (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

[2] Also on that date, the Probate Court entered a decree placing the appellant under permanent guardianship. See Exhibit 5.

[3] 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 than 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.")[4] 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.

[4] 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.[5]

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.[6]

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[5] 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).

[6] 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.[7] 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;

---

[7] 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.[8] 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.

[8] 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
Neal A. Winston, Esq., Moschella & Winston, LLP, 440 Broadway, Somerville, MA 02145

EXHIBIT O – Office of Medicaid's brief filed with the Massachusetts Superior Court of Essex County in Doherty case (20 pages)

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

NEWBURYPORT SUPERIOR COURT
CIVIL ACTION NO. 2007-00291-B

MURIEL DOHERTY,
Plaintiff

v.

DIRECTOR OF THE OFFICE OF MEDICAID, EXECUTIVE OFFICE OF HEALTH AND SERVICES, COMMONWEALTH OF MASSACHUSETTS,
Defendants

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

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

Introduction

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

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discretion, and is consistent with federal and state law. Therefore, this Court should deny Plaintiff's motion in its entirety and affirm the Agency's Decision.

Statement of Facts

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.

Plaintiff Muriel Doherty ("Muriel") entered a skilled nursing facility in December 2005. (R., p. 3.) A MassHealth long term care application was submitted on her behalf on April 14, 2006, seeking MassHealth eligibility beginning March 15, 2006. (R., p. 3.) MassHealth requested certain financial verifications which were not provided and so the application was denied on May 18, 2006; no appeal was filed. (R., p. 3.) On June 5, 2006, Muriel forwarded additional documents to MassHealth, and so her application was re-stamped on June 13, 2006. (R., p. 3.) *See also* 130 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."[1] 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

[1]The Settlors, 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.

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the "Muriel S. Doherty Irrevocable Trust" (hereinafter "Irrevocable Trust"). (R., p. 4.) This new trust was irrevocable, and although Muriel was still the settlor and beneficiary, she was removed as a trustee and replaced with her nephew and niece, James Doherty, Jr. ("James"), and Sheila Doherty ("Sheila"). (R., pp. 2-3; R., Exhibit G.)

Article II of the Irrevocable Trust establishes Muriel as the vested beneficiary during her lifetime and sets forth the purpose and criterion by which the trust is to be administered:

> **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.
>
> 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 **Trustees shall accumulate the Trust principal to the extent feasible, due to the unforeseeability 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.

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

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

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

Article V.C. gives Muriel the right to occupy the residence at 15 Chestnut Street, Andover, Massachusetts, or any successor residence for her lifetime, and the Trustee has the power to sell the residence, but only with the written assent of Muriel. The proceeds from the sale are to remain in the Irrevocable Trust. (R., Ex. G.)

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

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

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.)

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.)

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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.

Argument

I. STANDARD OF REVIEW

The scope of review of an Agency's decision is defined by G.L. c. 30A, § 14, which states that a court may: "either affirm, remand, set aside or modify an Agency's decision ... if it determines that the substantial rights of any party may have been prejudiced because the Agency's decision is: (a) in violation of constitutional provisions; or (b) in excess of the statutory authority or jurisdiction of the Agency; or (c) based upon an error of law; or (d) made upon unlawful procedure; or (e) unsupported by substantial evidence; or (f) unwarranted by facts found by the court on the record as submitted ...; or (g) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law." *See Howard Johnson Company v. Alcoholic Beverage Control Comm'n,* 24 Mass. App. Ct. 487, 490 (1987). Substantial evidence, in turn, is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L c. 30A, §1(6). As the party appealing an administrative decision, Plaintiff bears the burden of demonstrating the decision's invalidity. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bds.*, 27 Mass. App. Ct. 470, 474 (1989); *Faith v. Assembly of God v. State Bldg. Code Comm'n,* 11 Mass. App. Ct. 333, 334 (1981).

[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.)

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

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

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

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

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The issue before this Court is whether the principal of the Irrevocable Trust is countable 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 regulations concerning trusts as well as applicable case law, all of which demonstrate an aversion to the use of trusts as Medicaid planning tools to shelter assets. (R., p. 4.)

The Commonwealth's highest court discussed Congress' pre-1993 attempt to make it harder for people of means to shield assets while obtaining Medicaid benefits when it stated:

> "...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 elderly and disabled individuals, and poor women and children."

Cohen v. Commissioner of the Division of Medical Assistance, 423 Mass. 399, 403-4 (1996) (*quoting*, H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1 at 72 (1985)). The Supreme Judicial Court ("SJC") again commented on the evolution of the law regarding the use of trusts as asset-shielding tools and the purpose of the Medicaid program when it acknowledged that Congress acted "...to prevent individuals from using trust law to ensure their eligibility for Medicaid coverage, while preserving their assets for themselves or their heirs." *See LeBow v. Comm'r of the Division of Medical Assistance,* 433 Mass. 171, 172 (2001) (evaluating trust under pre-1993 Medicaid law, 42 U.S.C. § 1396a(k)).

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). *Boruch v. Nebraska Dep't 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

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

Thus, a determination of financial eligibility requires an assessment of "countable assets," and this includes trusts. See 130 CMR 520.001(A); 130 CMR 520.007(I). Consistent with federal law, there are several sections of MassHealth regulations that explain the Agency's treatment of trusts. *See, generally* 130 CMR 130 CMR 520.021 through 520.024. As is the case here, when a trust contains more than $600,000.00 of an applicant's assets but the document is drafted in such a way that it attempts to cut off access to the principal so that the taxpayers who fund the Medicaid program for the benefit of the needy and indigent now must pay for that applicant's nursing home care, particular scrutiny is required. Such scrutiny is especially warranted where it is clear, as here, that if Muriel's funds were not held in trust they would be countable in an eligibility determination. *Strand v. Rasmussen, Director, Iowa Dep't. of Human Services,* 648 N.W.2d 95, 105 (2002) (*citing Forsyth v. Rowe,* 629 A.2d 379, 386 (1993); *Ronney v. Dep't of Soc. Servs.*, 532 N.W.2d 910, 914 (1995). Such a review clearly shows, and as the Hearing Officer correctly found, that Muriel is the vested beneficiary of the Irrevocable Trust and that there are circumstances under which the principal is available; therefore, consistent with federal and state regulations governing Medicaid eligibility requirements, the entire Irrevocable Trust must be considered countable. (R., p. 7.)

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

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

In accordance with 42 U.S.C. § 1396p, MassHealth regulations state that for trusts created after August 11, 1993, as the Irrevocable Trust here was, funded other than by will, "resources held in a trust are considered available if **under any circumstances described in the terms of the trust, any of the resources can be made available to the individual.**" 130 CMR 520.023 (emphasis supplied.) Courts have interpreted the "any circumstances" test to mean that 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) (citing *Forsyth v. Rowe,* 629 A.2d 379, 386 (1993); *Lebow,* 433 Mass. at 176; *Cohen,* 423 Mass at 413; *In re Lennon,* 683 A.2d 239, 241 (1996)). Thus, whether or not trustees choose to exercise their discretion is immaterial to the countability of those assets.

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

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.

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,

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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. (R., p. 7, ¶ 1.)

Article II of the Amendment establishes Muriel /Settlor as the lifetime beneficiary of the Irrevocable Trust, the purpose of the trust is ostensibly to provide for her care, and thus trust assets should be used for her benefit. Article II, ¶ 2 specifies:

> "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."

(R., Ex. G.)

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

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

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). The Agency's Decision is in accordance with caselaw. To allow the one sentence contained in Article V.A.(2), disallowing the use of principal for the benefit of Muriel, to control the whole of this document would render the Settlor's stated intent, as well as all of Article II and provisions of Articles XIV and XXII, completely meaningless. (R., p. 7, ¶ 1.) Such an interpretation of this trust is not only against the weight of the law, but also strains credulity. That the Hearing Officer simply disagreed with Plaintiff's interpretation of the Irrevocable Trust does not make the Agency's Decision arbitrary or capricious.

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,

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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) (*citing 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

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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 *Guerriero v. Commissioner of the Division of Medical Assistance,* 433 Mass. 628, 745 (2001). However, *Gurriero* bears no resemblance to the issue in this case, and so is not instructive. In *Guerriero,* 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 *Guerriero,* 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

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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 G[3]) 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 northing 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.

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confined to "evidence, testimony, materials and legal rules presented at the hearing." 130 CMR 610.610.

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

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

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.

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

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

> 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 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.

(R, Ex. G, Article II, ¶ 1.)

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

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

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 ineligibility standards, and thus the principal of the Irrevocable Trust is deemed countable. 130 CMR 520.023(C)(1)(a).

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.

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).

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

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are legally obligated to pay the Irrevocable Trust $4,718.39 each month beginning on June 1, 2004, until the Note is paid off, and no later than May 1, 2014. The Note is a legal instrument that provides for regular monthly payments for a designated period of time and, as the Hearing Officer correctly found, meets MassHealth's definition of an annuity. (R., p. 7.) 130 CMR 515.001. Payments under an annuity are considered unearned income. 130 CMR 520.009(D). Consequently, the monthly payments of $4,718.39 are classified entirely as income to the Irrevocable Trust, and under Article V.A.(1) of the Irrevocable Trust must be disbursed to Muriel, as it is undisputed that she is the income beneficiary of the Irrevocable Trust; this income as well as any other income the Irrevocable Trust produces are properly countable to the applicant in an eligibility determination. 130 CMR 520.024(A)(1).

Conclusion

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.

Respectfully Submitted,

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

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By its attorneys,

Carolann Mitchell

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First Deputy General Counsel
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One Ashburton Place, 11th Floor
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617-573-1711

Dated: September 28, 2007

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

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EXHIBIT P – Office of Medicaid email exchanges dated May 27-28, 2009 (1 page)

Marcum, Helene (EHS)

From: Schelong, Katy (EHS)
Sent: Thursday, May 28, 2009 7:19 AM
To: Marcum, Helene (EHS)
Subject: RE: Re: [redacted] Harrington

Hi Helene,

Leaving you a voice mail to this effect as well:

1. I reissued the legal opinion today (Dated May 28, 2009) and exhibits and put 3 copies (one for you, one for the hearing officer and on for applicant) in the mail to you today so throw away the documents dated March 12, 2009. [redacted]

2. Applicant's attorneys are not entitled to any legal opinion until the hearing date because up until then the agency has the option whether or not to introduce it into evidence.

3. Lisa Smith can come on in and look at the case file today or tomorrow but you should alert her that it does not contain a legal opinion.

4. If she wants to get her copy say an hour before the hearing on June 2nd I don't have a problem with that.

Katy

CONFIDENTIALITY NOTICE: This message is being sent by or on behalf of a lawyer and/or the Commonwealth of Massachusetts. It is solely and exclusively intended for the individual, trust, corporation and/or entity to which it is addressed. This communication may contain information that is legally privileged, confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any attachment to it. If you have received this message in error, please immediately notify the sender by e-mail and delete all copies of this message and/or any attachments received herewith.

-----Original Message-----
From: Marcum, Helene (EHS)
Sent: Wednesday, May 27, 2009 3:09 PM
To: Schelong, Katy (EHS)
Subject: Re: [redacted] Harrington

I've received a request from Lisa Smith the person handling this case to come into office either tomorrow or friday to look at this case.You sent me a decision dated 3-12-09 can I give her a copy of this before the Hearing 6-2-09 at 3pm.Thanks Helene Marcum

EXHIBIT Q – Pages 1 and 8 of Office of Medicaid's memorandum dated February 25, 2010 on Appeal 1215864 (2 pages)

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
One Ashburton Place, Room 1109
Boston, Massachusetts 02108

DEVALL. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

JUDYANN BIGBY, M.D.
Secretary

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EXHIBIT 5

To: Helene Marcum – Revere MEC
From: Amy Andrade –Director Member Services Policy Implementation
By: Katy Schelong, Assistant General Counsel
Date: February 25, 2010
Re: Ann Lulich #[redacted]
cc: John Hodge, Deputy General Counsel

You have inquired as to the treatment of the applicant's transfer of $198,567.00 to her daughter in an eligibility determination for Ann Lulich.

INTRODUCTION:

On March 16, 2009, when the applicant became a resident of the nursing facility, she had cash valued at $198,567.00 available to pay for her medical and nursing care. 130 CMR 520.007. Transferring ownership and control of these funds to her daughter on May 5, 2009 rendered these assets no longer owned by or available to the applicant, which is a disqualifying transfer of resources. 130 CMR 520.019(C). Receiving what the applicant claims is a "1/3" interest in the daughter and son-in-law's family home on May 11, 2009, is not a cure, rather it is a transaction without fair market value and further violates Medicaid law and policy. 130 CMR 520.019(K); 130 CMR 515.001. Even if the applicant could somehow establish that purchasing a partial interest in real estate owned and encumbered by another under a deed of joint tenancy with rights of survivorship, and while a resident of a nursing facility, is valid under Medicaid law, the value of the real estate is nonetheless countable in an eligibility determination not subject to any exemptions. 130 CMR 520.007(G). Accordingly, the applicant is not eligible for MassHealth.

STATEMENT OF FACTS:

Ann Lulich, the applicant, became a resident of Wingate in Needham on March 16, 2009. (SMBR, p. 1 attached hereto as Exhibit A.) The applicant's date of birth is July 5, 1911. According to the SSA Period Life Table the life expectancy for a ninety-eight year old female is 2.55 years. An application for long-term care benefits was submitted seeking coverage beginning on May 11, 2009. (*Id.*)

The duty to verify assets and income, cooperate and report changes is not predicated on the status of the asset or resource as the applicant believes it to be. Determinations of non-countability, inaccessibility, unavailability or permissible transfers of assets are solely within the purview of MassHealth and the Hearing Officer, and cannot be made by the applicant, her attorney or her representatives. In this case, the applicant was required to provide the after-executed, August 14, 2009 deed, not merely because it is the controlling legal instrument reflecting title to the real property, but also because if the applicant is found to be eligible, the Agency's lien on the real estate must be recorded against the operative deed. 130 CMR 515.011.

Nonetheless, the applicant's attorney is apparently claiming that *per se* this is a valid transaction because: (1) the applicant paid 1/3 of the tax assessed value of the real estate; (2) that the subject real estate qualifies as a principal place of residence; and, (3) that the real estate is non-countable. MassHealth disagrees with all of the applicant's claims.

The applicant's purchase of an interest in the personal residence owned by her daughter and son-in-law is a transaction without fair market value and therefore is disqualifying.[8] 130 CMR 515.001; 130 CMR 520.019; 42 U.S.C. § 1396p. While the whole of the real estate is ascertainable by the real estate tax bill or market analysis, and through mathematical operations *any* percentage interest of the real estate can be calculated, this is not the test for a finding of fair market value or permissible transfer.[9] 130 CMR 515.001. At best, such an analysis merely goes to establishing a price in relation to a percentage ownership an applicant claims to hold but which the facts do not support. It does nothing to establish: (1) that there is a market for the transaction; (2) the actual value of the transaction because the price "paid" fails to factor in costs incurred by the applicant such as premises and personal liability, carrying costs, creditors of the joint owners, the pre-existing mortgage, or the possibility of bankruptcy or foreclosure; or, (3) whether there is actual value and a tangible benefit for a nursing home resident who likely will never live in the real property, apart from the applicant transferring cash to her children and qualifying for Medicaid.

Under MassHealth regulation 130 CMR 515.001 fair market value is: "an estimate of the value of a resource if sold at the prevailing price..." Thus, fair market value is the price that a buyer in an arm's length transaction would be willing to pay on the open market.[10] This interpretation is consistent with the Social Security Administration's Program Operational Management System (POMS), which can properly be used as guidance for determining fair market value and other eligibility factors. POMS Section SI 01150.007, states in part "...when an individual purchases an item or service on the open market, he/she is getting fair market value in return for the cash." It is clear that in this case, the "sale" was not conducted in an open market nor was it an arm's length transaction. However, in order to have fair market value, there first must be a "market."

The applicant has not provided any evidence of a commercially accepted ascertainable fair market value for the purported "purchase" of a "1/3" interest in real estate embodied in a deed as joint tenants with a right of survivorship, wherein the "sellers" immediately receive $198,567.00 in cash and upon the death of the "purchaser" which at the time of transfer was statistically likely to occur in 2 ½ years, the "sellers" will once again own *100%* of the property and retain the full purchase

[8] *See generally,* BOH Decisions 0800509, 0801972.
[9] The deeds at issue do not support the applicant's representation of the ownership interest as it fails to so state, thus, any claim of a % ownership is not legally supportable.
[10] *See generally,* BOH Decision 0712043, p. 7.