

**Office of Medicaid  
BOARD OF HEARINGS**

**Appellant Name and Address:**

[REDACTED]  
Ellis Nursing Home  
135 Ellis Avenue  
Norwood, MA 02062

<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	1507042
<b>Decision Date:</b>	AUG 13 2015	<b>Hearing Date:</b>	July 2, 2015
<b>Hearing Officer:</b>	Stanley Kallianidis	<b>Record-Open Date:</b>	July 16, 2015

**Appellant Representative:**

Brian Barreira, Esq.

**MassHealth Representative:**

Paul Keegan, Chelsea



**Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Office of Medicaid  
Board of Hearings  
100 Hancock Street, 6<sup>th</sup> Floor  
Quincy, MA 02171**

# APPEAL DECISION

Appeal Decision:	Approved	Issue:	Trust Assets
Decision Date:	AUG 13 2015	Hearing Date:	July 2, 2015
MassHealth Rep.:	Paul Keegan		

## Authority

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

## Jurisdiction

Notice dated May 1, 2015 was sent to the appellant stating that MassHealth had denied her application for MassHealth benefits due to a disqualifying transfer of assets (Exhibit 1). The appellant filed this appeal on May 4, 2015 and, therefore, it is timely (see Exhibit 2 and 130 CMR 610.015). A denial of MassHealth benefits is grounds for appeal (130 CMR 610.032).

## Action Taken by MassHealth

MassHealth denied the appellant's MassHealth application.

## Issue

Pursuant to 130 CMR 520.013(C), was MassHealth correct to count the assets of a trust in determining the appellant's eligibility?

## Summary of Evidence

The MassHealth representative testified that the appellant filed a MassHealth application on March 29, 2015 (Exhibit 3). The appellant's application was denied due to a disqualifying transfer of assets. According to the denial letter, the appellant transferred real estate into a "non-qualifying trust/Revocable" resulting in an ineligibility period through January 2018. The MassHealth representative stated, however, that the denial should have been for excess assets and not a disqualifying transfer as the transfer happened before the five-year look back period. The correct reason for the denial is that there is \$335,500.00 in an irrevocable trust that MassHealth has deemed countable (Exhibits 4 & 5).

The MassHealth representative explained that, on June 10, 2008, the appellant and her spouse created the MIHT Irrevocable Trust (Irrevocable Trust). They transferred their home into the trust on June 16, 2008, and reserved a joint life estate for themselves. According to the terms of the Irrevocable Trust, the appellant's children are the beneficiaries and two of the appellant's children are trustees. Pursuant to Article 16 of the Irrevocable Trust,

In order to comply with Internal Revenue Code Section 121 and Sections 671-679 the following is made part of this Trust. "Notwithstanding any other provisions of this Trust, the Donor shall have the power, exercisable by the Donor in a nonfiduciary capacity, without the approval or consent of any person in a fiduciary capacity, to acquire any assets of the trust by substituting other property of an equivalent value." (Exhibit 4).

According to MassHealth's legal division, this clause allows the appellant and her spouse to regain the property without substituting property of equivalent fair market value. For instance, because they are non-fiduciaries, they can replace the home with something of family sentimental value. Thus, because there are circumstances whereby the appellant and her spouse can regain the property, the Irrevocable Trust is a countable asset pursuant to 130 CMR 520.023(B)(1) (Exhibit 5).

The attorney who drafted the Irrevocable Trust testified that the purpose of Article 16 is for tax planning purposes and not to allow the appellant and his spouse access to the principal.

The record was left open for two weeks to allow for the appellant's response to MassHealth's legal opinion (Exhibit 6).

The appellant's attorney contended in his memorandum that the power to substitute assets does not make the Irrevocable Trust assets countable. This power under Article 16 is an option to buy back the property at fair market value, and where transfers for fair market value are not prohibited under Medicaid law, the trust assets should not be counted. The language of Article 16 is purely for tax planning purposes. Even if the transaction were to occur, the donor and Irrevocable Trust would end up with the same amount of assets as previous to the transaction. According to MGL c 203E, s 808, "a person who holds a power to direct is presumptively a fiduciary who is required to act in good faith." Thus the donor would be subject to fiduciary law as would the trustee. Moreover, the power to substitute assets has been approved by the Board of Hearings in prior appeals (Exhibit 7).

## **Findings of Fact**

The record shows, and I so find:

1. The appellant filed a MassHealth application on March 29, 2015 (Exhibit 3).
2. The appellant's application was denied due to a disqualifying transfer. The denial should have been for excess assets over the \$2000.00 limit (Exhibit 1 and testimony).
3. The countable assets in question assets totaled \$335,500.00 and were from an Irrevocable Trust (Exhibit 1).
4. On June 10, 2008, the appellant and her spouse created the Irrevocable Trust. They transferred their home into the Trust on June 16, 2008, and reserved a joint life estate for themselves (Exhibit 4).
5. The appellant's children are the beneficiaries and two of the appellant's children are trustees (Exhibit 4).
6. Pursuant to Article 16 of the Irrevocable Trust, "the Donor shall have the power, exercisable by the Donor in a nonfiduciary capacity, without the approval or consent of any person in a fiduciary capacity, to acquire any assets of the trust by substituting other property of an equivalent value" (Exhibit 4).

## **Analysis and Conclusions of Law**

130 CMR 520.023 states:

Generally 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(B)(1) states:

The entire principal in a revocable trust is a countable asset.

130 CMR 520.023(C)(1), Irrevocable Trusts states.

(a) Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset.

130 CMR 520.024(A)(1) pertains to all trusts regardless of their creation or funding and states as follows:

The assets and income held in an irrevocable trust established by the individual or spouse that the trustee is required to distribute to or for the benefit of the individual are countable.

In the instant appeal, I have found that the appellant filed a MassHealth application on March 29, 2015. While a notice was sent out indicating that the appellant's application was denied due to a disqualifying transfer, as per the MassHealth representative, the denial should have been for excess assets over the \$2000.00 limit. Accordingly, the issue before me is whether or not real estate assets of \$335,500.00 held in an Irrevocable Trust are countable as MassHealth currently maintains.

On June 10, 2008, the appellant and her spouse created the Irrevocable Trust. They transferred their home into the Trust on June 16, 2008, and reserved a joint life estate for themselves. The appellant's children are the beneficiaries and two of the appellant's children are trustees.

The whole crux of the appeal centers on Article 16 of the Irrevocable Trust. Pursuant to that clause, "the Donor shall have the power, exercisable by the Donor in a nonfiduciary capacity, without the approval or consent of any person in a fiduciary capacity, to acquire any assets of the trust by substituting other property of an equivalent value. "

In MassHealth's opinion, this clause allows the appellant and her spouse to regain the

property without substituting property of equivalent fair market value. Where they are non-fiduciaries, they can replace the home with something that has sentimental value, but no fair market value. Thus, because there are circumstances whereby the appellant and her spouse can regain the property, the Irrevocable Trust is a countable asset pursuant to 130 CMR 520.023(B)(1). According to the appellant's attorney, the language of Article 16 is purely for tax planning purposes. Even if the transaction were to occur, the donor and Irrevocable Trust would end up with the same amount of assets as previous to the transaction.

I conclude that MassHealth's opinion that the trust property is countable for the reason that the real estate may be substituted by something of sentimental, but no fair market value, is unsupported by both fact and law. The key, clear unambiguous language of the clause is that the donors may "acquire any assets of the trust by substituting other property of an equivalent value." There is nothing in this clause or any in any other section of the Irrevocable Trust that redefines equivalent to mean something other than equal. It is a stretch, therefore, not only of the reading of the Irrevocable Trust, but also of the imagination to suggest that something purely sentimental with no tangible value may be substituted for the real estate without violating the Irrevocable Trust's provisions.

Likewise, MassHealth's view that the property may be substituted for something of no value has no legal basis. MassHealth cites no law, either statute or case, that states that the substitution of trust assets of equal value is a violation of either Trust or Medicaid rules. Whether or not the donor in this case is a fiduciary is largely immaterial. The trustees are the real fiduciaries and they would be breaching their duty if the donor were to take the trust property without making an equal substitution. Such an act, whether it is considered theft or fraud, would be actionable by the trustees and/or beneficiaries.

In summary, the Irrevocable Trust property is not available to the donors. Pursuant to Article 16, it can only be swapped with something of equal value. The net result of such a hypothetical action is no change to the asset value of the Irrevocable Trust. Accordingly, the Irrevocable Trust is not countable under 130 CMR 520.023(C)(1).

The appeal is therefore approved.

## **Order for MassHealth**

Re-open application. Rescind transfer penalty. Determine appellant's eligibility for MassHealth disregarding assets of Irrevocable Trust.

## Implementation of this Decision

If this decision is not implemented within 30 days after the date of this notice, you should contact your local office. 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.



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Stanley Kallianidis  
Hearing Officer  
Board of Hearings

cc:

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