

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Denied	Appeal Number:	1509106
Decision Date: 10/30		Hearing Date:	09/10/2015
Hearing Officer:	Sara E. McGrath	Record Open to:	09/24/2015

Appearance for Appellant:

Appearance for MassHealth:
Paul Keegan, Chelsea MEC

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Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street
Quincy, MA 02171*

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APPEAL DECISION

Appeal Decision:	Denied	Issue:	Long-term care eligibility
Decision Date:	10/30	Hearing Date:	09/10/2015
MassHealth Rep.:	Paul Keegan	Appellant Rep.:	
Hearing Location:	Chelsea MassHealth Enrollment Center	Aid Pending:	No

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 June 15, 2015, MassHealth denied the appellant's application for benefits because of excess assets (Exhibit 1). The appellant filed this appeal in a timely manner on June 24, 2015 (130 CMR 610.015(B); Exhibit 2). Denial of an application for benefits is a valid basis for appeal (130 CMR 610.032).

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Action Taken by MassHealth

MassHealth denied the appellant's application for benefits because it determined she has more countable assets than are allowable under MassHealth regulations.

Issue

The appeal issue is whether the assets in a trust are countable to the appellant?

Summary of Evidence

A MassHealth representative appeared at the hearing and testified as follows: The appellant was admitted to a nursing facility on March 11, 2015. On March 19, 2015 appellant submitted a MassHealth long-term care application and although the nursing facility did not specify a requested coverage date, MassHealth assumes appellant seeks coverage as of March 11, 2015. On June 15, 2015, MassHealth denied the application because of a determination that the appellant has countable assets in excess of the permissible limit under MassHealth regulations. Specifically, MassHealth found that the appellant retains access to trust assets contained in a family trust created on March 19, 2009. The trust documents were forwarded to the MassHealth legal unit, which determined that the trust assets are countable to the appellant (Exhibit 7).

A copy of the trust instrument was submitted into evidence (Exhibit 3). The parties agree that the donors of the trust are appellant and her spouse. The appellant and her spouse are the trustees of the trust. By deed dated March 19, 2009, appellant and her spouse transferred to the trustees, for nominal consideration, real property located at 2 Woodland Road, Malden, Massachusetts. The appellant and her spouse reserved a life estate in said real property. There are five listed beneficiaries in paragraph five of the trust document (the list does not include appellant or her spouse). The trust provisions are set forth as follows:

First Paragraph

Declaration of [Family] Irrevocable Trust

We, [appellant and spouse], of Malden, County of Middlesex, Commonwealth of Massachusetts, do hereby create the following Irrevocable Trust to be known as the [Family] Irrevocable Trust and do hereby declare that all real estate that we may acquire under this Declaration of Trust we shall hold as Joint Trustees, upon

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the following terms and conditions, to wit:

Second Paragraph

To hold, manage control, improve said premises, collect and receive rentals, pay all necessary and reasonable expenses for the maintenance, care and management of the same, including interest and principal and (sic) any and all mortgages on said premises, and any and all other necessary and proper charges, and collect and receive all income and profits therefrom.

Third Paragraph:

We, the said Trustees, without applying to any court for authority thereof may sell, assign, transfer and convey, mortgage, exchange, and otherwise dispose of the said trust property, enter into any and all contracts or other negotiations to do the same, and to invest or re-invest the proceeds thereof.

Fourth Paragraph.

We, the said Trustees, may sign, acknowledge, execute and deliver any and all contracts, notes, leases, mortgages, deeds, receipts and any and all instruments or documents as may be required of we, the said Trustees, or may be instrumental in the management of said Trust Estate. All deeds, mortgages, receipts, leases, agreements, notes, assignments, and any and all other instruments so executed by us shall be valid both of law and equity, and any person or party taking such deeds, mortgages, receipts, leases, agreements, notes, assignments, contracts and all other instruments for us, the Trustees, shall not be held to see to the application of the purchase or mortgage money, or the proceeds of the transaction, and shall take said property or interest so transferred or conveyed free from all trusts. The net income from said premises is to be used by us for the maintenance and upkeep of said premises and for any other purposes for which we may deem necessary in our discretion. In the event of both Trustees (sic) death we appoint [one of the listed beneficiaries] as Successor Trustee.

Fifth Paragraph

The Successor Trustee shall sell the trust property in the event the majority of the beneficiaries want to sell the trust property. The proceeds will then be distributed

to the beneficiaries. The beneficiaries of this trust are as follows: [one, two, three, four, and five] in equal shares, share and share alike with the issue of any deceased child taking by right of representation that which their parent would have taken had they survived us.

Sixth Paragraph.

This Trust is irrevocable and cannot be amended by us.

Seventh Paragraph

The interest of the beneficiaries under the foregoing Trust, whether principal or income, shall not be subject to assignment or other alienation by them nor shall it be attachable or otherwise reached by their creditors.

Eighth Paragraph

We further declare that we shall not be liable for any negligence on our part, or for any contracts entered into by us, beyond the value of the trust property.

Ninth Paragraph

Checks by former Trustees which would have been valid but for their termination of their authority by death, removal, or otherwise and checks drawn by a Trustee payable to his-self/herself, shall be conclusively deemed to be valid in favor of any person who shall have had prior valid dealings with such Trustee and who shall have had no actual notice of such termination.

Tenth Paragraph.

Neither shall I nor any beneficiary, under this declaration of Trust, be liable to any beneficiary except for willful misconduct, of any agent, servant or attorney appointed by us, to represent the Trust, nor shall any Trustee be required to give bond for the proper and faithful performance of his own duties or acts, nor for the duties or acts of any agents, servants, or attorney appointed by us, or him or her.

Eleventh Paragraph.

The Trustee shall have the power to determine what monies or things shall under this Trust be considered as capital or income, also what shall constitute gross income and what net income, also to determine the mode in which any expenses or outgo shall be borne as between capital and income, and every such determination (whether made upon a questions actually raised or implied in the acts, proceedings of the Trustee, as shown in any statement or account by him made or rendered) shall be binding and conclusive upon all parties interested in the Trust.

[Appellant and spouse] hereby retain a life estate in the trust property.

No assessment shall ever be made upon the cestuis que trustent.

All distributions or divisions of income or principal hereunder shall be made in cash or kind at values determined by the Trustee.

(Exhibit 3).

MassHealth submitted a legal memorandum. MassHealth notes that appellant and her spouse

established the trust with their own funds (the Malden real estate) during their lifetimes. MassHealth argues that the appellant and her spouse have been residing in the corpus of the trust. MassHealth argues that the trust assets are countable because as trustees of the trust, appellant and her spouse have had total control over the trust, and may sell, mortgage, transfer and convey the real estate held in the trust. Thus, the appellant and her spouse have had the full benefit of the trust corpus. Additionally, the couple reserved a life estate interest in the trust property, making them beneficiaries of the trust during their lifetimes. MassHealth also argues that appellant's and her spouse's power to make all determination as to income and principal is further evidence of their ability to access trust principal (Exhibit 5).

Appellant submitted a memorandum of law, and argues that the trust assets are not countable to appellant. Appellant argues that the provisions of the trust do not allow for payment of principal; rather, only payment of income to for the maintenance and upkeep of the premises. Appellant argues that the trust may not be terminated. Appellant points out that while the trustees may sell, assign, transfer and convey, mortgage, exchange, or otherwise dispose of the trust property, paragraph three requires the trustees to "invest or re-invest the proceeds" of the trust property. Appellant further argues that the trustees have a fiduciary duty to their beneficiaries, and removing the real estate from the trust would breach the trustees' fiduciary duty to the beneficiaries (Exhibit 7).

Findings of Fact

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

1. On March 19, 2009, appellant established an irrevocable family trust. The trustees are appellant and her spouse.
2. By deed dated March 19, 2009, the applicant and her spouse transferred their real

property located at 2 Woodland Road, Malden, Massachusetts to the trustees of the trust, reserving a life estate interest.

3. The appellant was admitted to a nursing facility on March 11, 2015.
4. On May 19, 2015, a MassHealth long-term care application was submitted on the appellant's behalf, presumably seeking coverage as of March 11, 2015.
5. On June 15, 2015, MassHealth denied the application because it determined that the trust property was a countable asset and that the appellant was over the \$2,000 asset limit for MassHealth benefits (Exhibit 1).
6. Per paragraph three of the trust, the trustees "may sell, assign, transfer and convey, mortgage, exchange, and otherwise dispose of the said trust property, enter into any and all contracts or other negotiations to do the same, and to invest or re-invest the proceeds thereof."
7. Per paragraphs four and five of the trust, in the event of both trustees' death, they appoint [one of the listed beneficiaries] as successor trustee. "The Successor Trustee shall sell the trust property in the event the majority of the beneficiaries want to sell the trust property. The proceeds will then be distributed to the beneficiaries. The beneficiaries of this trust are as follows: [one, two, three, four, and five] in equal shares, share and share alike with the issue of any deceased child taking by right of representation that which their parent would have taken had they survived us."
8. Per paragraph six of the trust, the trust is irrevocable and cannot be amended by the trustees.

9. Per paragraph ten of the trust, “neither shall I nor any beneficiary, under this declaration of Trust, be liable to any beneficiary except for willful misconduct, of any agent, servant or attorney appointed by us, to represent the Trust, nor shall any Trustee be required to give bond for the proper and faithful performance of his own duties or acts, nor for the duties or acts of any agents, servants, or attorney appointed by us, or him or her.”
10. Per paragraph eleven of the trust, the trustees have the power to determine what monies or things shall under this Trust be considered as capital or income, also what shall constitute gross income and what net income, also to determine the mode in which any expenses or outgo shall be borne as between capital and income, and every such determination (whether made upon a questions actually raised or implied in the acts, proceedings of the Trustee, as shown in any statement or account by him made or rendered) shall be binding and conclusive upon all parties interested in the Trust.

Analysis and Conclusions of Law

MassHealth determined that the appellant has available assets in excess of the allowable limit under MassHealth regulations. Specifically, MassHealth determined that the appellant retained access to property in an irrevocable family trust. The appellant contends that under the terms of the trust she is entitled to trust income only and has no access to trust principal.

42 USC §1396p provides in part as follows:

(d) Treatment of trust amounts

(1) For purposes of determining an individual’s eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)

(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

(3)

(A) In the case of a revocable trust -

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust -

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income -

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(42 USC §1396p).

130 CMR 520.023 applies to trusts or similar legal devices created on or after August 11, 1993, and provides in part as follows:

(C) Irrevocable Trusts.

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(1) Portion Payable.

(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.

(b) Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income.

(c) Payments from the income or from the principal of an irrevocable trust made to another and not to or for the benefit of the nursing-facility resident are considered transfers of resources for less than fairmarket value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(d) The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).

(2) Portion Not Payable. Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could not be paid under any circumstances to or for the benefit of the nursing-facility resident will be considered a transfer for less than fairmarket value and treated in accordance with the transfer rules at 130 CMR 520.019(G).

MassHealth regulations provide that 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. Payments from the income or from the principal of

an irrevocable trust made to or for the benefit of the individual are countable income. The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset (130 CMR 520.023(C)).

MassHealth argues that a review of the whole of the trust document reveals that the appellant retained substantial control over all trust assets, including the principal. MassHealth cites as an example the appellant's reservation of a life estate interest in the trust property, as well as the trustees' power to sell or otherwise dispose of the trust property and their power to make all determinations as to income and principal. Appellant disagrees with the MassHealth position, and argues that appellant has no access to trust principal, as she has a fiduciary duty to the beneficiaries and must reinvest the proceeds if the real estate is sold.¹

The issue is whether, considering the document as a whole, any portion of the principal held by the trust could under any circumstances be paid to or for the benefit of the appellant (Doherty v. Dir. of the Office of Medicaid, 74 Mass. App. Ct. 439, 443 (2009). “[I]f there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility” Cohen v. Commissioner of the Division of Medical Assistance, 423 Mass. 399, 413 (1996). My review of the trust as a whole leads to a conclusion that trust principal could be paid to the appellant. Notably, there is no trust provision stating that principal cannot be paid to appellant. Appellant reserved a life estate interest in the trust property and is thus a lifetime beneficiary of the trust. Per paragraph three of the trust, the trustees may sell, mortgage or otherwise dispose of the trust property. As a beneficiary, appellant could use the mortgage or sale proceeds for her benefit.² Alternatively, per paragraph eleven, the trustees have the power to

¹ Appellant submitted a Board of Hearing's fair hearing decision in support of her position (Exhibit 8). I have reviewed the decision, find that it is factually dissimilar, and note that a fair hearing decision is not in any way binding on my decision here.

² Appellant argues that the trustees are required to invest or reinvest the proceeds after the sale, assignment,

make determinations as to capital and income, and thus appellant could arguably determine that proceeds from a mortgage or sale constitute income to be used for her benefit. Five beneficiaries are named in the trust, but not until paragraph five the trust document. In this paragraph, the grantors set forth that proceeds from the sale of the trust property will be distributed to these five individuals after a series of events has occurred - the death of appellant and her spouse, the appointment of a successor trustee, and the sale of the trust property upon majority agreement. The trust is silent as to which beneficiaries would receive a distribution of proceeds should the property be sold or mortgaged during the lifetime of appellant and her spouse, further support for my conclusion that appellant could receive trust principal during her lifetime.

Accordingly, I conclude that the trust assets are countable to appellant for MassHealth purposes (130 CMR 520.023(C)).

This appeal is DENIED.

Order for MassHealth

None.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

mortgaging, or other disposition of the trust property (see paragraph three of trust). I disagree with that interpretation, and find that investment and/or reinvestment is discretionary per paragraph three (Exhibit 3).

Sara E. McGrath
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Nancy Hazlett, Chelsea MassHealth Enrollment Center Appeals Coordinator

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