

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	1509625
<b>Decision Date:</b>	11/2	<b>Hearing Date:</b>	08/27/2015
<b>Hearing Officer:</b>	Thomas J. Goode	<b>Record Open to:</b>	10/16/2015

**Appellant Representative:**

**MassHealth Representative:**  
Diana Hunter, Tewksbury MEC



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

## APPEAL DECISION

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	130 CMR 520.023
<b>Decision Date:</b>	11/2	<b>Hearing Date:</b>	08/27/2015
<b>MassHealth Rep.:</b>	Diana Hunter	<b>Appellant Rep.:</b>	
<b>Hearing Location:</b>	Tewksbury MassHealth Enrollment Center Room 1	<b>Aid Pending:</b>	No

### Authority

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

### Jurisdiction

Through a notice dated July 10, 2015, MassHealth denied Appellant's application for MassHealth benefits because it determined that assets held in trust are countable and exceed program limits (see 130 CMR 520.003, 520.023 and Exhibit 1). Appellant filed this appeal in a timely manner on July 22, 2015 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032). A hearing was held on August 27, 2015. The hearing record remained open until September 18, 2015 to allow Appellant to submit a response to the MassHealth legal memorandum submitted at hearing (Exhibit 4). Appellant's legal memorandum was timely received (Exhibit 5). MassHealth was instructed to request that the hearing record reopen if a second legal memorandum was to be entered into evidence. On September 24, 2015, MassHealth requested that the hearing record reopen to allow a response. The hearing record was reopened, and the MassHealth response memorandum was timely received on October 1, 2015 (Exhibit 6). Appellant was allowed to submit a final response, which was timely received on October 14, 2015 (Exhibit 7).

## **Action Taken by MassHealth**

MassHealth denied appellant's application for MassHealth long-term care benefits due to assets held in trust deemed countable to Appellant.

## **Issue**

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.023, in determining that assets held in trust are countable to appellant.

## **Summary of Evidence**

The MassHealth representative testified that Appellant entered a skilled nursing facility on June 27, 2013. A MassHealth long term care application was submitted on her behalf on April 10, 2015, seeking MassHealth eligibility beginning January 1, 2015. The MassHealth representative stated that Medicare paid for nursing care through July 10, 2013, Appellant then paid privately through November 9, 2014. On July 10, 2015, MassHealth denied Appellant's MassHealth application due to assets in excess of program limits comprised of property valued at \$230,000 held in trust and deemed countable to appellant (Exhibit 1). At issue is an Irrevocable Trust established by Appellant on April 16, 2009 (Exhibit 8). Appellant is the Donor, and Appellant's son is Trustee. There is no community spouse. Appellant is the income only beneficiary. Appellant's children are the remainder beneficiaries. By a deed dated April 16, 2009, Appellant transferred her primary residence to the Trust, and reserved a right to occupy the property during her lifetime.

### **SUMMARY OF RELEVANT TRUST PROVISIONS**

Section 1.2 reads: "The purpose of this Trust is to manage my assets and to use them to allow me to live in the community for as long as possible."

Section 1.3 reads: "The Trust created by this agreement shall be irrevocable. I may not revoke or amend this agreement in any way. My trustee, however, may at any time, or from time to time, amend any administrative provisions of this trust by an instrument in writing signed and acknowledged by my trustee. For purposes of the foregoing, the term "administrative provision" refers to any provision of the trust dealing with the management and administration of the trust and in no event shall any such amendment affect, enlarge or shift any beneficial interests created hereunder."

Section 2.1 reads: “If any property is placed in trust during my life, my trustee may pay me or may pay on my behalf as much of the income of the trust as it shall determine in its sole and nonreviewable discretion to be necessary for my care and well-being. Any income not so paid may be accumulated and added to the principal. The principal shall be held until the termination of this Trust, unless distributed under the provisions of paragraph 2.2....”

Section 2.2 states that an independent trustee may distribute to Appellant’s children such portions of the Trust principal as the independent trustee in its absolute and uncontrolled discretion may deem advisable.

Section 2.3 reads: “I shall also have the right to use and occupy any residence that may from time to time be held in trust. During my lifetime, the trustee shall not mortgage, encumber, sell or dispose of the principal residence or other real estate held in trust or interest therein without my written consent or the written consent of my personal representative including my attorney-in-fact, it being my intention to retain such residence and real estate for my benefit during my lifetime, and without the right of partition. I reserve the right to the use and occupancy of the real estate during my lifetime and pay for all maintenance and repairs, water and sewer charges, insurance charges, and taxes relating to said premises, if I shall so elect. In addition, for further clarification, during my life, I shall have the right to possession or enjoyment of any real estate, which constitutes the principal residence. Nothing herein shall be construed to limit the ability of the trustee to alienate, sell or convey the real estate or any interest therein, or to lease, mortgage or demise any or all of the premises, so long as the provision stated above are met.”

Section 2.4 states: “My reservation of my right to use and occupancy in the real estate specifically includes the conveyance of real estate located at [property address] in order to conform with the requirements of Kirby v. Board of Assessors of Medford...pertaining to any eligibility requirements for residential abatements offered by the cities and towns of the Commonwealth of Massachusetts.”

Section 4 states that Appellant cannot serve as trustee, but gives Appellant the power to appoint successor and additional trustees as well as the power to remove any trustee.

Section 4.4 states that the Trustee has the power and authority to invest income and principal; sell, mortgage, exchange, lease or otherwise dispose of any property; determine what part of the trust property is income and what part is principal; and to borrow or lend any amounts.

Section 6.1 reads: “My trustee may in its sole discretion pay to my estate or to the tax authorities any taxes payable by reason of my death chargeable against the residue of my estate and any other debts of my estate or expenses of its administration and legacies under my will that, if paid

by my executor, would reduce the residue of my estate. This paragraph shall not be construed to require any such payments by my trustee.”

Section 6.2 reads: “In addition to payments under paragraph 6.1, my trustee may pay or reimburse any person for all or any part of any other tax or expense payable by reason of my death with respect to any property and shall charge the payment against any trusts or shares as my trustee considers equitable.”

Section 6.4 reads: “It is the intent of the grantor that this trust be construed as a “grantor trust” under Internal Revenue Code Section 677(a). All income distributed, held, or accumulated by this trust shall be taxable to me. My trustee may, to the extent that the income of the trust generates a tax liability for me, distribute to the Internal Revenue Service or other tax authority, such amounts of income of the trust as my trustee deems necessary to satisfy such tax obligation.”

Section 6.5 reads: “I retain the right to reacquire the principal of this trust by substituting property of an equivalent value therefor.”

Section 7.1 reads: “Income means net income and accumulated income not added to the principal and does not include capital gain. Income received during the period of administration of my estate shall be treated as income by my trustee if it would have been so treated had it been received directly by my trustee. Undistributed income at the termination of the income interest to which it relates shall be dealt with as if accrued and received thereafter.”

### **SUMMARY OF MASSHEALTH’S POSITION**

MassHealth determined that all assets held by the Irrevocable Trust are countable in a Medicaid eligibility determination under 130 CMR 520.023; 42 U.S.C. §1396p(d). MassHealth asserts that trust assets are countable to Appellant because under the terms of the Trust Appellant has the right to live in her former residence to the exclusion of others, and to pay for all related maintenance, repairs, water and sewer charges, insurance charges, and taxes out of her own bank account just as a true owner would. MassHealth further argues that there are conditions under terms of the Trust that permit the Trustee to distribute income and principal to or for the benefit of Appellant, specifically under Section 6.4 which allows the Trustee to distribute income or principal to pay taxes incurred by Appellant, and to determine what is considered principal versus income. Further, MassHealth asserts that Appellant’s ability to use and occupy the principal of the Trust constitutes a “payment” from the Trust for her benefit, and therefore meets the “any circumstance” test under 42 U.S.C. §1396p(d)(3)(B)(i). MassHealth argues that the State Medicaid Manual, HCFA Transmittal 64 §3259.1(A)(8), provides a definition of payment that includes property disbursements including the right to use and occupy real property.

Therefore, MassHealth concludes that because Appellant has the right to use and occupy her former residence under the terms of the Trust, she has received a payment from the Trust. Thus, the principal of the Trust is countable to Appellant in a Medicaid eligibility determination.

### **SUMMARY OF APPELLANT'S POSITION**

Appellant argues that although Appellant has the right to use and occupy the former residence, she does not have the legal right to waste or sell the residence, and cannot access the equity in the residence. Appellant does not have an unlimited right to use and occupy the property without regard to the interests of the remaindermen, and thus her use of the property is not a payment of principal to Appellant. In return for her ability to use the property, Appellant is obligated to pay rent in the form of paying bills and taxes associated with the property. Absent Trustee discretion to distribute property to Appellant free of trust, retaining the power to use and occupy the former home does not render it countable. The “any circumstances” test at 42 U.S.C. §1396p (d)(3)(B) requires that trust principal be available such that trust principal may be paid to an applicant. Because Appellant does not have legal title to the property, the Trustee cannot make such a principal payment to Appellant. Therefore, if the right to occupy is considered a payment, it would be correctly characterized as a payment of income. Appellant also argues that the ability to substitute assets does not render the principal countable because Appellant would be obligated to substitute assets of equal value. Moreover, the Trustee’s ability to determine what is considered income versus an asset is limited.<sup>1</sup> Appellant argues that MassHealth misread Section 6.4, which does not allow payment of taxes from principal.

## **Findings of Fact**

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

1. Appellant entered a skilled nursing facility on June 27, 2013.
2. A MassHealth long term care application was submitted on her behalf on April 10, 2015, seeking MassHealth eligibility beginning January 1, 2015.
3. Medicare paid for nursing care through July 10, 2013.
4. Appellant paid privately through November 9, 2014.
5. On July 10, 2015, MassHealth denied Appellant’s MassHealth application due to assets

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<sup>1</sup> Citing *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439,441 (2009).

in excess of program limits comprised of property valued at \$230,000 held in trust and deemed countable to Appellant.

6. Appellant established an Irrevocable Trust on April 16, 2009.
7. Appellant is the Donor, and Appellant's son is Trustee.
8. There is no community spouse.
9. By a deed dated April 16, 2009, Appellant transferred her primary residence to the Trust, and reserved a life estate interest in the property.
10. Appellant is the income only beneficiary of the Trust.
11. Appellant's children are the remainder beneficiaries of the Trust.
12. Section 1.2 reads: "The purpose of this Trust is to manage my assets and to use them to allow me to live in the community for as long as possible."
13. Section 1.3 reads: "The Trust created by this agreement shall be irrevocable. I may not revoke or amend this agreement in any way. My trustee, however, may at any time, or from time to time, amend any administrative provisions of this trust by an instrument in writing signed and acknowledged by my trustee. For purposes of the foregoing, the term "administrative provision" refers to any provision of the trust dealing with the management and administration of the trust and in no event shall any such amendment affect, enlarge or shift any beneficial interests created hereunder."
14. Section 2.1 reads: "If any property is placed in trust during my life, my trustee may pay me or may pay on my behalf as much of the income of the trust as it shall determine in its sole and nonreviewable discretion to be necessary for my care and well-being. Any income not so paid may be accumulated and added to the principal. The principal shall be held until the termination of this Trust, unless distributed under the provisions of paragraph 2.2...."
15. Section 2.2 states that an independent trustee may distribute to Appellant's children such portions of the Trust principal as the independent trustee in its absolute and uncontrolled discretion may deem advisable.
16. Section 2.3 reads: "I shall also have the right to use and occupy any residence that may from time to time be held in trust. During my lifetime, the trustee shall not mortgage, encumber, sell or dispose of the principal residence or other real estate held in trust or

interest therein without my written consent or the written consent of my personal representative including my attorney-in-fact, it being my intention to retain such residence and real estate for my benefit during my lifetime, and without the right of partition. I reserve the right to the use and occupancy of the real estate during my lifetime and pay for all maintenance and repairs, water and sewer charges, insurance charges, and taxes relating to said premises, if I shall so elect. In addition, for further clarification, during my life, I shall have the right to possession or enjoyment of any real estate, which constitutes the principal residence. Nothing herein shall be construed to limit the ability of the trustee to alienate, sell or convey the real estate or any interest therein, or to lease, mortgage or demise any or all of the premises, so long as the provision stated above are met.”

17. Section 2.4 states: “My reservation of my right to use and occupancy in the real estate specifically includes the conveyance of real estate located at [property address] in order to conform with the requirements of Kirby v. Board of Assessors of Medford...pertaining to any eligibility requirements for residential abatements offered by the cities and towns of the Commonwealth of Massachusetts.”
18. Section 4 states that Appellant cannot serve as trustee, but gives Appellant the power to appoint successor and additional trustees as well as the power to remove any trustee.
19. Section 4.4 states that the Trustee has the power and authority to invest income and principal; sell, mortgage, exchange, lease or otherwise dispose of any property; determine what part of the trust property is income and what part is principal; and to borrow or lend any amounts.
20. Section 6.1 reads: “My trustee may in its sole discretion pay to my estate or to the tax authorities any taxes payable by reason of my death chargeable against the residue of my estate and any other debts of my estate or expenses of its administration and legacies under my will that, if paid by my executor, would reduce the residue of my estate. This paragraph shall not be construed to require any such payments by my trustee.”
21. Section 6.2 reads: “In addition to payments under paragraph 6.1, my trustee may pay or reimburse any person for all or any part of any other tax or expense payable by reason of my death with respect to any property and shall charge the payment against any trusts or shares as my trustee considers equitable.”
22. Section 6.4 reads: “It is the intent of the grantor that this trust be construed as a “grantor trust” under Internal Revenue Code Section 677(a). All income distributed, held, or accumulated by this trust shall be taxable to me. My trustee may, to the extent that the income of the trust generates a tax liability for me, distribute to the Internal Revenue



Service or other tax authority, such amounts of income of the trust as my trustee deems necessary to satisfy such tax obligation.”

23. Section 6.5 reads: “I retain the right to reacquire the principal of this trust by substituting property of an equivalent value therefor.”

24. Section 7.1 reads: “Income means net income and accumulated income not added to the principal and does not include capital gain. Income received during the period of administration of my estate shall be treated as income by my trustee if it would have been so treated had it been received directly by my trustee. Undistributed income at the termination of the income interest to which it relates shall be dealt with as if accrued and received thereafter.”

## **Analysis and Conclusions of Law**

There are no factual disputes in the case at hand; rather, the issues revolve around the interpretation of the language of the various Trust provisions involved and the applicable regulations. The Trust is properly considered in the context of both state and federal law applying to trusts created after 1993, of which pertinent sections follow:

Federal law at 42 USC §1396p provides:

*(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 of 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.

(emphasis added).

Regulation 130 CMR 520.023 applies to trusts or similar legal devices created on or after August 11, 1993, and follows in pertinent part with emphasis added:

(C) Irrevocable Trusts.

(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 fair-market 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 fair-market value and treated in accordance with the transfer rules at 130 CMR 520.019(G).

First, MassHealth argues that because Appellant reserved the right to use and occupy her former residence, the former residence held in trust is “available” under the terms of the Trust, and is therefore countable under 42 U.S.C. 1396p (d)(2)(A)(B) and (C) and under 130 CMR 520.023(C)(1)(d). I disagree. In the case of an irrevocable trust, 42 U.S.C.1396p(d)(3)(B) imposes the “any circumstances” test that considers available the amount of income or principal that could be *paid* to the individual from income or from the corpus of the trust. The Trust was established in 2009. The Trust cannot be amended or revoked by Appellant, and cannot be substantively amended by the Trustee.<sup>2</sup> Appellant deeded property, specifically, her residence, to the Trust on April 16, 2009. Appellant also reserved the right to use and occupy her former residence.

MassHealth relies on direction from the State Medicaid Manual, HCFA Transmittal 64 §3259.1(A)(8) in determining that the value of the property is available to Appellant:

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<sup>2</sup> Although Section 1.3 allows the Trustee to amend administrative provisions, MassHealth does not argue that the ability to amend administrative provisions could result in principal payments to Appellant.

[f]or purposes of this section a payment from a trust is any disbursement from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as a noncash or property disbursements such as the right to use and occupy real property.

Assuming the right to occupy the property is properly considered a disbursement, and is therefore a payment dated to the Trust's inception, the value of the payment would be limited to the value of the right to occupy the property, i.e., Appellant's equitable interest that she reserved. However, characterizing the right to occupy as a payment to Appellant does not vest in the Trustee the discretion or requirement to make legal title to the property available to Appellant.<sup>3</sup> Moreover, as Appellant is an income only beneficiary, and cannot receive payments from principal, it follows that characterizing the right to occupy the former residence as a payment would result in an income payment and not a payment from principal.

The MassHealth position implies that by retaining a life estate interest, or the right to occupy the former home, the entire value of the former home becomes countable. However, regulation 130 CMR 520.023 (C)(1)(d), read within the context of the "any circumstances" test at 42 U.S.C.1396p(d)(3)(B), requires that Trust property, whether the former home or not, is "available" such that it would result in Trust principal being *paid* to the applicant. The value of the right to occupy notwithstanding as it is not calculated in this case, such payment would require the availability of *legal* title to the former home rather than just the availability of equitable title retained through the right to occupy the former residence. I find no preclusion under either federal law or MassHealth regulations restricting an applicant from retaining a life estate interest in the former residence, or a right to occupy the former home under the terms of Trust. Therefore, it would be inconsistent to determine that the former home held in Trust is countable under 520.023(C)(1)(d) without a finding that, according to the terms of the Trust, the Trustee can sell the property, and pay the proceeds to the individual to be used for her benefit. As a practical matter, the presumption here is that the proceeds could be paid to the individual/applicant free of Trust to pay for the cost of nursing facility care. The availability of an equitable interest only cannot accomplish this goal.

Next, MassHealth deems countable Trust principal because Appellant either derives a benefit

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<sup>3</sup> *Cohen*: "This court construed the provisions of 42 U.S.C. s. 1396(k)(2), defining a Medicaid qualifying trust before the amendment effected by Pub. L. 103-66, s. 13611, 107 Stat. 627 (1993), to encompass any trust established by a person (or that person's spouse) under which that person may receive any payments in the discretion of the trustees, and further, under the provisions of s. 1396a(k)(1), ***the amount of money deemed to be available to the beneficiary is the greatest amount that the trustees in any set of circumstances might have discretion to pay out***"(emphasis added).

from the principal, or retains substantial control over the principal because she must consent to its sale, pay for improvements and costs associated with the property, and retains the power to live in the property as though she were the absolute owner. Appellant's retention of these powers does not render legal title to the property available to her, or allow her to receive payments from principal. Nor does the Trust's stated purpose "to manage my assets and to use them to allow me to live in the community for as long as possible" render the real estate countable absent Trustee discretion to distribute the property to Appellant free of Trust. The federal law at 42 U.S.C. 1396p(d)(3)(B) does not state that retaining substantial control over principal or deriving a benefit from principal renders the assets countable. Rather, it establishes that any *payment* from the trust that could be made *to or for the benefit of the individual* shall be considered resources available to the individual. Similarly, 130 CMR 520.023(C)(1) looks to principal that *could be paid under any circumstances to or for the benefit of the individual*. In both the federal law and MassHealth regulations, payment is the clear prerequisite to the use of principal for the benefit of the individual. I disagree with the MassHealth interpretation that focuses solely on benefits derived from principal or substantial control of principal assets equating to availability. I find no preclusion in the regulations to an individual or spouse deriving a benefit from principal including use of the property, or the attainment of tax benefits. The "any circumstances" test is focused specifically on the Trustee's ability and discretion to make *payment* to the individual. I find no requirement that an individual must demonstrate complete divestment from principal to the exclusion of any benefit to be derived from principal. If the trust regulations are to be interpreted to require an applicant to demonstrate complete divestment from principal, then arguably the income derived from the principal by an income only beneficiary, as is the case here, would not only be counted as income, but would also render the principal available because the individual is not completely divested from the principal that funded the Trust. If trust principal is rendered "available" it is because the Trustee has discretion to make payments from the principal to the individual. There are no circumstances in the instant trust that permit such payments from principal.

Similarly, Appellant's reservation of the right to reacquire the property if she were to substitute assets of equal value does not render the property available in the absence of Appellant actually having other assets of equal value to substitute into the Trust, which would then trigger discretion in the Trustee to distribute the property to her in exchange for the assets of equal value. The discovery of these assets of equal value would clearly result in an excess asset issue, and potentially a resource transfer issue; however, this clause read either in isolation or within the larger context of the Trust document, does not vest in the Trustee the ability or discretion to make a payment or disbursement without first establishing that Appellant actually has assets of equal value to substitute for the corpus of the Trust. Nor does the Trustee's discretion with regard to determinations of income and principal allow the Trustee to make payments from principal in light of the restriction to distribute only income under Section 2.1, the definition of income under

Section 7.1, and general accounting principles that would also apply.<sup>4</sup> Finally, MassHealth's reading of Section 6.4 of the Trust in finding a "peppercorn of discretion" appears to be in error. MassHealth argues that Section 6.4 allows distributions of principal to satisfy Appellant's tax obligations (Exhibit 4, p.3). Section 6.4 allows only distributions of income, not principal, to satisfy tax obligations (Exhibit 8).

Under both federal law and MassHealth regulations regarding the treatment of assets held in an irrevocable trust, it is the Trustee's ability or discretion to make payment from principal that renders resources available, and therefore countable.<sup>5</sup> In the Trust at hand, the Trustee does not have the authority or discretion to make payment from principal to Appellant because she is not, and cannot become, a principal beneficiary of the Trust.

The appeal is APPROVED.

## **Order for MassHealth**

Redetermine eligibility based on the April 10, 2015 application date, and exclude the value of assets held in the Irrevocable Trust established on April 16, 2009.

## **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.

Thomas J. Goode  
Hearing Officer  
Board of Hearings

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<sup>4</sup> See *Doherty*: "We doubt, for example, that the trustees may, willy-nilly, simply characterize a trust asset as "income" and thereby, free of fiduciary fault, convey that asset to Muriel free of trust."

<sup>5</sup> See fn. 3.

cc:

MassHealth Representative: Sylvia Tiar