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To: Stephanie DeSousa – Taunton MEC

From: Amy Dybas – Director Member Services Policy Implementation

From: Pamela Worstell – Assistant General Counsel

Date: August 17, 2016

Re: [REDACTED]

You have asked for a legal opinion regarding the treatment of the [REDACTED] 2006 Irrevocable Trust and the [REDACTED] Realty Trust (“Trust arrangement”) in determining the eligibility of the applicant. [REDACTED]

RECOMMENDATION:

The Trust arrangement is countable.

FACTS:

[REDACTED] Realty Trust (“Realty Trust”)

The applicant established the Realty Trust in 2006 by transferring her home into the Trust. The applicant is the named Trustee. Her spouse is deceased.

Under 1 of the Realty Trust, it states that any Trustee may become a beneficiary and exercise all rights of a beneficiary as though not a Trustee.

Under 4 of the Trust it states that the Trust may be terminated at any time by the beneficiaries. Upon such termination, the Trustee shall transfer the assets to the beneficiaries.

^[1] See generally Health Insurance Portability and Accountability Act (“HIPAA”), P.L. 104-191; 42 U.S.C. § 1320d-2; 42 U.S.C. §1396a(a)(7); 42 U.S.C. §1320d-2, -4; Privacy Act of 1974, 5 U.S.C. § 552a Act; 42 C.F.R. § 164.508; 42 C.F.R. §431.300-307; 42 C.F.R. §483.10; 42 C.F.R. §435.945(f)(4); 45 C.F.R. 164 *et seq.*; 20 C.F.R. §401.100; G.L. c. 118E § 49; G.L. c. 214 §1B; G.L. c. 66A §2; 130 CMR 515.007(B); 130 CMR 517.006(B).

Under 5 it states that in the event the applicant cannot serve as Trustee then each of her children are named as successors in a prescribed order.

The Schedule of Beneficiaries for the Realty Trust lists the [REDACTED] 2006 Irrevocable Trust as its beneficiary. The Schedule also states that, "under no circumstances shall the principal of [REDACTED] Realty Trust or [REDACTED] 2006 Irrevocable Trust ever be available for distribution to [REDACTED]."

The [REDACTED] 2006 Irrevocable Trust ("the Irrevocable Trust")

The applicant/Donor established the Trust in 2006 and is the named Trustee along with one of her sons.

Under 2.1 of the Trust, it names the successor Trustee children, in a prescribed order, in the event the applicant's son is unable or unwilling to serve.

Under 3.1 and 3.2, the applicant reserves a testamentary power to reappoint the Trust principal among her issue and siblings. She also reserves a lifetime power to reappoint any tangible personal property during her lifetime.

Under 3.4, the applicant reserves the right to alter the order and number of the successor Trustees named in 2.1.

Under 3.5, the applicant reserves the right to live rent-free in any house which is owned by the Trust, while paying for all maintenance and repairs, water and sewer charges, ground rent (if any), insurance charges and taxes relating to said premises during such time.

Under 4.1, the Trustees shall distribute to or for the benefit of the applicant, all of the net income of the Trust Fund. If the Trust Fund contains real estate or a mobile home, the income of the Trust Fund shall be applied first to all expenses associated with maintaining or repairing such asset, and the Trustees are only authorized to distribute the net income after such expenses have been paid.

Under 4.2 the Trustees have discretion to distribute principal to the applicant's issue.

Under 6, the Trustee has broad powers including the power to:

Under 6.1 to retain any investments and any property transferred to them by the Donor or any other person, and to invest and reinvest in stocks, shares and obligations, trusts, investment companies or any other kind of personal or real property, as the Trustee deems advisable,

notwithstanding if the investments are of a character or size which, would not be considered proper for Trustees to make or retain.

Under 6.5 to ...generally .. determine all questions as between income and principal and to credit or charge to income or principal ... any receipt or gain and any charge, disbursement or loss as is deemed advisable in the circumstances of each case

Under 6.6 to buy, exchange, sell, lease, give options and make contracts for such consideration and upon such terms as the Trustee determines...

Under 6.9 to hold, purchase, dispose of or otherwise deal with life insurance, annuities, endowment policies or *other forms of insurance on the life or lives of any beneficiary or beneficiaries, or on the life or lives of others, for the benefit of any beneficiary of the Trust Fund or any trust estate thereunder, and to pay the premiums and costs therefor from the principal or income of the Trust Fund*

Under 6.11 to collect rents and other profits from real estate, and to pay all carrying charges thereon and make repairs thereto,

ANALYSIS:

Any portion of the ***principal of or the income from the principal*** 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 520.023(C)(1)(a); 42 USC 1396p(d)(3)(B)(i). Such a Trust is countable ***regardless of any restrictions on when or whether distributions may be made and any restrictions on the use of distributions*** from the Trust. 42 USC 1396p(d)(3)(C).

Under the terms of the Realty Trust, the applicant/Trustee can become a beneficiary at anytime while Trustee. Further, the Realty Trust can be terminated and upon termination the principal would be distributed to its beneficiary. Currently, the beneficiary of the Realty Trust is the Irrevocable Trust. The applicant is the income beneficiary of the Irrevocable Trust. The applicant has the right to live in in any house held by the Irrevocable Trust, while paying any carrying charges on the house when she resides in it. The Trust document then is structured to provide for the needs of the applicant during her lifetime and for a home in the event she can live in the community.

The applicant has also retained considerable power over the Irrevocable Trust property. She has the power to change the ordering of successor Trustees under the Trust. Under the Trust, she can also disinherit her successor Trustee/children at any time with her power of appointment. Also, under the Irrevocable Trust, the Trustee has broad discretionary powers – such as the power to sell, invest, and reinvest the Trust property in any manner. The Trustee

also has the explicit power to purchase annuities, and could purchase these for income if needed. The Trustee also has power to allocate income and principal within "reasonable" accounting principles at the Trustee's determination.

Considering the Trust arrangement above as a whole, including the powers of the applicant and Trustee, there are circumstances where Trust arrangement principal could be paid to or used for the benefit of the applicant, notwithstanding the language in the Realty Trust beneficiary schedule stating the applicant is not to receive principal. See Doherty v. Director of the Office of Medicaid, 74 Mass. App. Ct. 439 (2009). For example, Under the terms of the Realty Trust, the applicant/Trustee can become a beneficiary at anytime while Trustee. Further, the Realty Trust can be terminated and upon termination the principal would be distributed to its beneficiaries - who could include the applicant as stated above. Therefore, through this avenue, the applicant could receive at least 50% of the Trust corpus. This amount would exceed the \$2,000 asset limit for eligibility. The Trust allows for this, and is structured to provide a community house for the applicant, should she need this.

Additionally, as discussed above, the applicant has the right to live in any house held under the Irrevocable Trust and would pay the carrying charges on the home during the period of her residency. The Center for Medicare and Medicaid Services, ("CMS", formerly the Health Care Financing Agency, "HCFA"), the federal agency tasked with administering the Medicaid program issued guidance which specifically states that a "right to use and occupy" property under a Trust is a "payment" within the meaning of the Medicaid law Trust provisions above. Specifically, CMS states at page 3-3-109.25.8 of HCFA Tr # 64 :

"Payment – For 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 noncash or property disbursements, such as the right to use and occupy real property."***

This is consistent with the intent of the Medicaid program, since otherwise, individuals could circumvent Medicaid countability and estate recovery rules pertaining to real property by simply transferring their home into a Trust, while enjoying the usage and ownership rights of such property. Therefore, the applicant's right to occupy her home while held in the Trust arrangement constitutes an additional circumstance where corpus could be paid to or for the benefit of the applicant within the meaning of Medicaid Trust law. Accordingly, since there are circumstances where corpus could be paid to or for the benefit of the applicant, the Trust arrangement is countable for Medicaid eligibility determination purposes. 42 USC 1396p(d)