

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1602142
Decision Date:	6/1	Hearing Date:	04/06/2016
Hearing Officer:	Sara E. McGrath		

Appearances for Appellant:

Appearance for MassHealth:
Nereida Mercado, Chelsea MEC



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

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Long-term care eligibility
Decision Date:	6/1	Hearing Date:	04/06/2016
MassHealth Rep.:	Nereida Mercado	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 February 4, 2016, MassHealth denied the appellant's application for benefits due to a transfer of assets (Exhibit 1).¹ The appellant filed this appeal in a timely manner on February 18, 2016 (130 CMR 610.015(B); Exhibit 2). Denial of an application for benefits is a valid basis for appeal (130 CMR 610.032).

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?

¹ MassHealth clarified at hearing that the notice should have been an excess asset notice, and acknowledged that the issue on appeal involves the countability of assets, not a disqualifying transfer (testimony). MassHealth has issued a revised notice (Exhibit 5).

Summary of Evidence

A MassHealth representative appeared at the hearing and testified as follows: The appellant was admitted to a nursing facility on October 9, 2015. On November 12, 2015 appellant submitted a MassHealth long-term care application. On February 4, 2016, 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 April 30, 2008.² The trust documents were forwarded to the MassHealth legal unit, which determined that the trust assets are countable to the appellant (Exhibit 3).

A copy of the trust instrument was submitted into evidence (Exhibit 4). The parties agree that the grantors of the trust are appellant and her spouse. The trustee of the trust is WF, one of appellant's children. By deed dated April 30, 2008, appellant and her spouse transferred to the trustee, for nominal consideration, real property located in Brighton, Massachusetts. The appellant and her spouse reserved a life estate interest in the real property (Exhibit 5). The parties agree that appellant's spouse died on May 24, 2008. The relevant trust provisions are set forth as follows:

ARTICLE II

Administration During the Lives of the Donors

During their lives, it is the Donors' intention to occupy the House as their personal residence pursuant to their reserved life estate. The Donors shall be responsible for the payment of all maintenance, taxes, special assessments and utilities on the House for the duration of their life estate interest. At such time as neither Donor is occupying the House as his or her personal residence, the Donors will, pursuant to the reserved life estate, be entitled to all of the net rental income derived from the House. To the extent the Trust property shall consist of property other than the House, or if the Donors shall have relinquished or otherwise terminated their life estate interest, the Trustees shall pay all of the net income derived from such other property to the Donors or to the survivor of them. Under no circumstances shall the Trustees distribute any amount of principal of the Trust to the Donors at any time during their lifetimes, with or without the consent of the Donors. The Trustees shall distribute so much or all of the principal of the Trust as the Donors shall direct in

² The MassHealth notice also identifies other assets of the appellant. The parties clarified at hearing that the only issue on appeal are the assets held in trust (Exhibit 1). MassHealth also identified another family trust (the special trust) that is noncountable (Exhibit 3). Further, there exists a Sun Life Assurance Annuity, and MassHealth has indicated that payments from this annuity would be countable to appellant (Exhibit 3). Appellant has indicated that she does not dispute MassHealth's position (Exhibit 7).

writing to and among the class consisting of their children [son] and [son], and their respective descendants, in such amounts and in such proportions as the Donors, of the survivor of them, shall in their sole discretion determine.

ARTICLE IV

Trustees' Powers

A. Subject to the provisions of Articles II and III hereof, the Trustees shall have the following powers exercisable in the discretion of the Trustees:

2. To sell at public or private sale, wholly or partly for cash or on credit, contract to sell, grant or exercise options to buy, convey, transfer, exchange, or lease (for a term within or extending beyond the term of the trust) any real or personal property of the trust, and to partition, dedicate, grant easements in or over, subdivide, improve, and remodel, repair, or raze improvements on any real property of the trust, and in general to deal otherwise with the trust property in such manner, for such prices, and on such terms and conditions as any individual might do as outright owner of the property.

4. To invest in bonds, common or preferred stocks, notes, real estate mortgages, common trust funds, shares of regulated investment companies, currencies, partnership interests (whether general, special, or limited), or other securities or property, real or personal, domestic or foreign, including partial interests, such as life estate, term or remainder interests, without being limited by any statute or rule of law governing investments by Trustees.

ARTICLE V

Resignation and Succession of Trustees

G. At any time and from time to time, the Donors, or the survivor of them, may remove a Trustee by a writing delivered to such Trustee; and the Donors, or the survivor of them, shall appoint such one or more individuals (other than themselves) or institutional Trustee, to fill the vacancy thereby created. The removal of a Trustee shall be effective upon the acceptance of the trust by a duly appointed successor.

ARTICLE VII

Revocability

This trust is irrevocable and may not be modified or amended during the life of the Donors or either one of them.

(Exhibit 4).

MassHealth submitted a legal memorandum. MassHealth argues that the trust assets are countable because there are several circumstances under which trust income and principal are available, or could be made available, to or for the benefit of the appellant. MassHealth notes that appellant and her spouse are income beneficiaries of the trust. Further, MassHealth argues that the appellant and her spouse have retained power over the trust property. For example, principal may only be distributed to the children if the trustee is directed to do so by the appellant and her spouse. The appellant and her spouse also have the power to name a successor trustee, if their original choice ceases to serve. MassHealth argues that the trust document is structured to conserve the home for the appellant and her spouse during their lifetime and to grant them control over the principal during their lifetime. Further, per the terms of the trust, the trustee has discretionary power to sell and invest the trust property without restriction. MassHealth takes the position that considering the trust as a whole, including the powers of the appellant, her spouse, and the trustee, there are circumstances where trust principal could be paid to or used for the benefit of the appellant, notwithstanding trust language which provides otherwise (Doherty v. Dir. of the Office of Medicaid, 74 Mass. App. Ct. 439, 443 (2009)). MassHealth cites as an example that the trustee could purchase an annuity and receive annuity payments. The trustee could then pay these annuity receipts to the appellant and credit them to income under the trust. This would be permitted and is contemplated within the trust document. (Exhibit 3).

MassHealth cites the State Medicaid Manual, HCFA Transmittal 64 §3259.1(A)(8), which provides that payment from a trust is considered any disbursement from the trust which benefits the party receiving it, and specifically includes the right to use and occupy real property. MassHealth argues that appellant's right to use the trust real property is a payment of principal from the trust, and further argues that this position is consistent with the intent of the Medicaid program (Exhibit 3).

Appellant submitted a memorandum of law in support of her position. Appellant argues that the decision to transfer the family home to the trust was motivated by family values and estate planning concerns. Appellant and her spouse intended to pass the home to one of their children without any probate process, and also intended to benefit from the income tax benefits that would result from a step-up in basis at death. Appellant concedes that she is entitled to the net income from the trust during her lifetime, but argues that the trustee has absolutely no discretion to pay principal to or for her benefit (Exhibit 6).

Appellant argues that the trust does not confer upon the appellant or her spouse any right to use or occupy the trust property during his or her lifetime – any right to use and occupy results from the reservation of the life estate contained in the deed. Appellant argues that in any case, the right to use and occupy the former home does not make the trust asset countable because under the terms of the trust the trustee cannot distribute principal to the appellant. Appellant argues that the special limited power of appointment contained in the trust includes no power or authority to direct the trustee to distribute any principal to anyone other than the donors' children or their respective descendants (Exhibit 6).

Findings of Fact

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

1. On April 30, 2008, appellant and her spouse established an irrevocable family trust. The current trustee is WF, one of appellant's children.
2. By deed dated April 30, 2008, the applicant and her spouse transferred their real property located in Brighton, Massachusetts to the trustee of the trust.
3. The appellant was admitted to a nursing facility on October 9, 2015.
4. On November 12, 2015, appellant submitted a MassHealth long-term care application.
5. On February 4, 2016, 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 Article II, appellant and her spouse indicate that it is their intention to occupy the house as their personal residence pursuant to their reserved life estate.
7. Per Article II, at such time as neither donor is occupying the house as his or her personal residence, the donors will, pursuant to the reserved life estate, be entitled to all of the net rental income derived from the house. To the extent the trust property shall consist of property other than the house, or if the donors shall have relinquished or otherwise terminated their life estate interest, the trustees shall pay all of the net income derived from such other property to the donors or to the survivor of them.
8. Per Article II, under no circumstances shall the trustees distribute any amount of principal of the trust to the donors at any time during their lifetimes, with or without the consent of the donors. The trustees shall distribute so much or all of the principal of the trust as the donors

shall direct in writing to and among the class consisting of their children, and their respective descendants, in such amounts and in such proportions as the donors, or the survivor of them, shall in their sole discretion determine.

9. Per Article V, at any time and from time to time, the donors, or the survivor of them, may remove a trustee by a writing delivered to such trustee; and the donors, or the survivor of them, shall appoint such one or more individuals (other than themselves) or institutional trustee, to fill the vacancy thereby created.
10. Per Article VII, the trust is irrevocable and may not be modified or amended during the life of the donors or either one of them.

Analysis and Conclusions of Law

At issue in this case is MassHealth's determination 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, but that the trustee has no discretion to distribute principal to her.

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.

(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).

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)).

Appellant argues that appellant has absolutely no access to trust principal and takes the position that the trust does not confer upon the appellant or her spouse any right to use or occupy the trust property during his or her lifetime – any right to use and occupy results from the reservation of the life estate contained in the deed. Appellant argues that in any case, the right to use and occupy the former home does not make the trust asset countable because under the terms of the trust the trustee cannot distribute principal to the appellant. Appellant argues that the special limited power of appointment contained in the trust includes no power or authority to direct the trustee to distribute

any principal to anyone other than the donors' children or their respective descendants (Exhibit 6).

First, I am persuaded by the appellant's argument that neither appellant's status as an income beneficiary of the trust, nor her reservation of the right to use and occupy the property in the deed, makes the former home "available" to her such that it should be considered a countable asset. I find that whether a trust asset is a countable asset is determined by analyzing whether any portion of the principal or income from the principal can be paid under any circumstances (130 CMR 520.023(C)(1)(a)). The relevant portion of the State Medicaid Manual, HCFA Transmittal 64 §3259.1(A)(8) cited by MassHealth provides as follows: "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." I find that while the right to use and occupy may well be considered a payment, it is a right to a payment of income, not principal.

Further, I am persuaded by appellant's argument, which MassHealth did not specifically dispute, that special limited power of appointment contained in the trust includes no power or authority to direct the trustee to distribute any principal to anyone other than the donors' children or their respective descendants.

I am not persuaded by MassHealth's argument regarding the trustee's power to purchase an annuity, and do not agree that this power does not make trust principal available to the appellant. If the trustee were to use trust principal to purchase an annuity, she would be permitted per the terms of the trust to distribute to the appellant only the annuitized interest, not the full annuity payment (comprised of both principal and income) (Heyn v. Dir. of the Office of Medicaid, Mass. App. Ct. No. 15-P-166, slip. op. at 10 (February 5 – April 15, 2016)). Further, I am not persuaded by MassHealth's argument that because appellant has discretion as to when and to what extent her children and their respective descendants receive distributions of principal, this control over principal somehow confers access for herself. I conclude that it does not.

I have reviewed the trust as a whole and I find that the trust assets are not available to the appellant. I find that the trust provisions present in the Doherty case cited by the parties are distinguishable from the trust provisions here. Despite language purporting to prohibit distributions of principal to the donor, the court in Doherty concluded that when considered as a whole, the trust evidenced the donor's expectation or intent that the trustees would invade assets when necessary to ensure the donor's comfort. Doherty, at 442. The Doherty court focused on several aspects of the trust, one of which was a trust provision that gave the trustee discretionary power to distribute principal to trust "beneficiaries" if the trustee determined it inadvisable or unnecessary to continue the trust. The court interpreted the term "beneficiaries" to potentially include the donor (because she was a trust beneficiary), notwithstanding the fact that other trust provisions expressly prohibited distribution of

principal to the donor. Importantly, such discretionary power does not exist in the trust at issue here. The Doherty court also noted that “embedded in the trust’s governing recitation is not only an explicit assessment that public or other charitable benefits will likely be insufficient to provide the donor the quality of life she might desire, but the corollary implicit direction for the trustees, in such case, to invade assets to make up that difference.” Doherty, at 442.³ The trust at issue here contains no explicit assertion that public benefits will likely be insufficient for appellant. Rather, this trust contains many provisions that clearly state that the trustee may not distribute principal to appellant (Exhibit 4, Article II). Further, despite the appellant’s retention of some control over the trust, I do not find that “implicit direction” referenced in Doherty.⁴ The Doherty court specifically stressed that it had “no doubt that self-settled, irrevocable trusts may, if so structured, so insulate trust assets that those assets will be deemed unavailable.” I conclude that the trust here does exactly that. Accordingly, I conclude that appellant as demonstrated by a preponderance of the evidence that the trust assets are not countable to appellant for MassHealth purposes (130 CMR 520.023(C)).

This appeal is APPROVED.

Order for MassHealth

Rescind notice dated February 4, 2016 and do not count trust assets in eligibility determination. Notify appellant.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact

³ For example, the donor in Doherty also directs the trustee to accumulate the trust principal to the extent feasible, due the unforeseeability of the donor’s future needs, and without regard to the interest of the remaindermen.

⁴ The retention of some control includes appellant’s limited power of appointment and her ability to appoint and remove trustees (Exhibit 4, Article III and V).

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, Office of Medicaid, at the address on the first page of this decision.

Sara E. McGrath
Hearing Officer
Board of Hearings

cc:

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