

**Office of Medicaid  
BOARD OF HEARINGS**

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	1612571
<b>Decision Date:</b>	11/8	<b>Hearing Date:</b>	10/24/2016
<b>Hearing Officer:</b>	Sara E. McGrath		

**Appearances for Appellant:**

**Appearance for MassHealth:**  
Lucy Gucciardi, 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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	Long-term care eligibility
<b>Decision Date:</b>	11/8	<b>Hearing Date:</b>	10/24/2016
<b>MassHealth Rep.:</b>	Lucy Gucciardi	<b>Appellant Rep.:</b>	
<b>Hearing Location:</b>	Chelsea MassHealth Enrollment Center	<b>Aid Pending:</b>	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 August 29, 2016, MassHealth denied the appellant's application for benefits due to excess assets (Exhibit 1). The appellant filed this appeal in a timely manner on September 15, 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 he 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 17, 2016. On April 27, 2016 appellant submitted a MassHealth long-term care application, requesting a coverage start date of April 14, 2016. On June 8, 2016, appellant passed away. On August 29, 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 November 25, 2008.<sup>1</sup> The trust documents were forwarded to the MassHealth legal unit, which determined that the trust assets are countable to the appellant (Exhibit 4).

A copy of the trust instrument was submitted into evidence (Exhibit 5, tab 1). The parties agree that the grantors of the trust are appellant and his spouse. The trustee of the trust is MB, one of appellant's children. The relevant trust provisions are set forth as follows:

### **I. IRREVOCABLE DECLARATION OF TRUST**

This trust shall be irrevocable, and the Settlers shall have no power to alter, amend or terminate this trust; except the special power of appointment described herein.

### **II. DISTRIBUTION PROVISIONS**

During the lifetimes of the Settlers, the Trustee shall pay all of the net income of the trust, but not principal, at least quarterly, to the Settlers, or either of them, or for their benefit. During such period of time as one of the Settlers is a resident of a nursing home, rehabilitation facility, or similar long term health care institution, the Trustee shall pay said income to or for the benefit of that Settlor's spouse, if living. The Trustee is specifically empowered to invest in non-income producing property.

### **III. NO DISTRIBUTION OF PRINCIPAL TO SETTLORS**

With respect to principal, there shall be no distribution of principal to the Settlers, the Settlers' spouse, if any, the Settlers' creditors, the Settlers' estates, or the creditors of the Settlers' estates, nor for his, her or their benefit.

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<sup>1</sup> 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). The parties also identified another trust (the home trust) that is noncountable (Exhibit 4; Exhibit 5, tab 8).

#### **IV. BENEFICIARIES**

The Trustee shall hold the trust property, together with any other property which may be transferred to the Trustee by the Settlers, for the benefit of the Beneficiaries named in Paragraphs VI and VII hereof.

#### **V. ESTABLISHMENT OF SEPARATE ACCOUNTS**

The Trustee may also receive and hold contributions from the Settlers for any designated beneficiary other than the Settlers or other excluded by Article III hereof, in a separate and segregated account or fund.

#### **VI. FINAL DISTRIBUTION OF TRUST ASSETS**

Upon the death of the Settlers, the Trustee shall hold, administer and distribute the trust property as follows:

All trust assets, other than any separate funds described above shall be distributed in shares of equal value to the Settlers' surviving children, including principal and income after the appropriate debts are paid, unless otherwise altered by the exercise of the special power of appointment made herein. Any separate funds shall be held or distributed as designated pursuant to Paragraph V or VII hereof.

#### **VIII. PROVISIONS REGARDING SETTLORS' PRINCIPAL RESIDENCE**

##### **A. Reservation of Life Estate.**

If the trust has title to or control over the principal residence of Settlers at any time, or from time to time, the Settlers, or either of them, shall also and in any event have a life estate in the said principal residence, provided, however, that the Trustee shall have the power to sell, mortgage, encumber or dispose of the principal residence with the written assent of the Settlers then living, or their legal guardian, conservator or attorney in fact, but without license of any court; and provided further, that if the property is sold, the proceeds shall remain subject to the provisions of this trust.

##### **B. Massachusetts Residential Abatement Protection.**

The Settlor's reservation of his right to use and occupancy in the real estate, specifically includes the conveyance of real estate located at 160 Livoli Avenue, Braintree, MA 02184, if an asset of the trust, in order to conform with the

requirements of Kirby v. Board of Assessors of Medford, 350 Mass. 386 (1966) and Bernat v. Kivior, 22 Mass. App. Ct. 957 (1986); and Christopher B. Moscatiello v. Board of Assessors of Boston, 634 N.E.2d 147 (1994) and M.G.L. c. 59, Section 5C, pertaining to any eligibility requirements for residential abatements offered by cities and towns of the Commonwealth of Massachusetts.

#### **IX. SPECIAL POWER OF APPOINTMENT**

The Settlers reserve the power to appoint the premises or any other assets of the trust, or any portion thereof, outright or upon trusts, conditions, or limitation, in accordance with Section 2038 and Section 2036 of the Internal Revenue Code or other applicable provisions, to any one or more of the issue of the Settlers, siblings, or the spouses or surviving spouse of any of the foregoing persons (except the Settlers). This power shall be exercisable during the lifetime of both Settlers or the survivor by notice to the Trustee and, as to real estate, with the recording at the appropriate registry of deeds of the exercise of this power by both Settlers, or by the survivor with written instrument delivered to the Trustee and recorded at the appropriate registry of deeds, making express reference to this power and executed and recorded prior to the death of the Settlers, or after the death of the second to die of the Settlers by a provision of such decedent's will or any codicil thereto making express reference to this power. No exercise of this power shall be deemed to release a Settlor's life estate unless such a release is explicitly made. No exercise of this power shall exhaust it, and unless this power is exercised by the will or codicil of the second Settlor to die, the deed recorded last shall control as to any ambiguities or inconsistencies.

#### **X. TERMINATION OF TRUST BY TRUSTEE**

Notwithstanding any other provisions hereof, the Trustee is granted the power to terminate the trust in whole or in part, and to distribute all of the trust assets to the beneficiaries in accordance with paragraphs VI and VII, for any one or more of the following reasons to be determined by the Trustee in his sole and absolute discretion:

- A. Because it is no longer economical to administer the trust assets in trust.
- B. Because the retention of assets in trust is no longer in the best interests of the beneficiaries due to changes in the tax laws or other legal considerations; or
- C. Because of unforeseen changes in the circumstances applicable to the beneficiaries, or the assets of the trust.

Such distribution under this section shall be made according to Paragraphs V, VI and VII as if the Settlor was then deceased; and in no event shall there be any distribution of income or principal hereunder to the Settlers, the Settlers' creditors, the Settlers' estates, or the creditors of the Settlers' estates, nor for his, her or their benefit.

(Exhibit 5, tab 1).

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. For example, MassHealth notes that the appellant has retained a right to use and occupy any property held in the trust during his lifetime. In the event the trust holds real estate, the trustee can only sell such property with the appellant's consent. MassHealth argues that appellant's children are named as principal beneficiaries upon the death of the appellant, but that appellant has a lifetime and testamentary power to disinherit any of his children from receiving trust property upon his death. The children, as principal beneficiaries, do not have a vested interest in the principal (Exhibit 4).

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 4).

MassHealth notes that under the terms of the trust, appellant reserved the power to convey any trust real estate, specifically including his home when held in trust, in order to conform to residential abatement laws. MassHealth argues that this power would allow the appellant to re-convey the property back to himself, if necessary to receive a tax abatement. This is another circumstance rendering the trust principal accessible to the appellant. MassHealth takes the position that considering the trust as a whole, 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)) (Exhibit 4).

Appellant submitted a memorandum of law in support of his position. Appellant notes that the trust was initially funded with \$190,000 in liquid assets. Appellant argues that there are no circumstances under which the trustee may distribute principal to the applicant, and notes that the trust language specifically and repeatedly precludes the settlors from receiving any form of principal. Appellant cites to Heyn v. Dir. of the Office of Medicaid, Mass. App. Ct. No. 15-P-166, slip. op. (February 5 – April 15, 2016) in support of his position that a properly drafted income only trust which clearly prevents the payment of principal to the applicant should be noncountable for the purpose of determining MassHealth eligibility. Appellant argues that his

right to use and occupy the principal residence (which is not currently an asset of the trust) does not render the trust corpus countable. Appellant argues that even if this right to use and occupy is considered a payment under the trust, it is a payment of income, not principal. Appellant further argue that the settlors' reservation of a power of appointment does not equate to access to the principal (Exhibit 5).

## **Findings of Fact**

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

1. On November 20, 1998, appellant and his spouse established an irrevocable home trust into which they deeded property located at 160 Livoli Avenue, Braintree, MA, reserving for themselves a joint life estate (Exhibit 5, tab 8). MassHealth has determined that appellant has no interest in the trust, and that it is not countable to the appellant (Exhibit 4).
2. On November 25, 2008, appellant and his spouse established an irrevocable family trust. The current trustee is MB, one of appellant's children.
3. On or about November 25, 2008, the irrevocable family trust was funded with approximately \$190,000 in liquid assets (Exhibit 5).
4. The appellant was admitted to a nursing facility on March 17, 2016.
5. On April 27, 2016, appellant submitted a MassHealth long-term care application.
6. On August 29, 2016, MassHealth denied the application because it determined that the trust assets in the family trust was countable and that the appellant was over the \$2,000 asset limit for MassHealth benefits.
7. Per Article I, the family trust is irrevocable and the settlors shall have no power to alter, amend or terminate this trust except through the special power of appointment.
8. Per Article II, the trustee shall pay all net income of the family trust to the settlors.
9. Per Article III, there shall be no distribution of principal to the settlors.
10. Per Article 8A, if the family trust has title to or control over the principal residence of settlors, the settlors shall have a life estate in the said principal residence.
11. Per Article IX, the settlors reserve the power to appoint the premises or any other assets of the family trust, or any portion thereof, outright or upon trusts, conditions, or limitation, in

accordance with Section 2038 and Section 2036 of the Internal Revenue Code or other applicable provisions, to any one or more of the issue of the settlors, siblings, or the spouses or surviving spouse of any of the foregoing persons (except the settlors). This power shall be exercisable during the lifetime of both settlors or the survivor of the two, or after the death of the second to die of the settlors by a provision of such decedent's will.

### **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 funds in an irrevocable family trust. The appellant contends that under the terms of the trust he is entitled to trust income only, but that the trustee has no discretion to distribute principal to him.

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)).

MassHealth argues that a review of the whole of the trust document reveals that applicant retained substantial control over all trust assets, including the principal. Appellant disagrees with the MassHealth position, and argues that appellant has absolutely no access to trust principal, as set forth in more detail above (Exhibits 4 and 5). I agree with appellant's position, and conclude that appellant has no access to trust principal (Exhibit 5).

First, I am not persuaded by the MassHealth argument that the trust property is countable pursuant to 130 CMR 520.023(C)(1)(d). I find that neither appellant's status as an income beneficiary of the trust, nor his reservation of a life estate interest and/or the right to use and occupy property makes the trust assets accessible to the appellant. Rather, 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 agree with appellant's argument 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 not persuaded by the MassHealth argument that appellant's retention of a power of appointment makes the trust assets countable. As noted by the court in Heyn, "a provision making trust principal available to persons other than the grantor does not by its nature make it available to the grantor, any more than if the grantor had gifted the same property to such person when she created the trust, rather than placing it in the trust" (Heyn v. Dir. of the Office of Medicaid, Mass. App. Ct. No. 15-P-166, slip. op. (February 5 – April 15, 2016)). Here, the appellant is specifically excluded as a donee under the power of appointment provision, and thus has no access to principal via this provision (Exhibit 5, tab 1, Article IX).

MassHealth argues that trust principal is available to the appellant via the provisions of Article VIII(B) of the trust. This trust provision has to do with Massachusetts residential abatement protection, and states that the settlors' right to use and occupancy in real estate specifically includes the conveyance of real estate located at 160 Livoli Avenue, Braintree, MA (Exhibit 5, tab 1, Article

VIII(B)).<sup>2</sup> MassHealth argues that this trust provision would allow the appellant to re-convey this property back to himself if necessary to receive a tax abatement, and thus is a circumstance where trust principal is distributable to the appellant. I disagree. As noted in my findings above, this property was deeded to a trust in 1998. While appellant has reserved a life estate in this property, MassHealth has determined that appellant has no interest in this trust property (Exhibit 4). Further, as a life estate holder, appellant would not have the power to alone convey this property for any purpose, including a conveyance to take advantage of a tax exemption.

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” (Doherty, at 443). I conclude that the trust here does exactly that. Accordingly, I find that appellant has demonstrated by a preponderance of the evidence that trust assets are not distributable to him. I therefore conclude 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 August 29, 2016 and do not count trust assets in eligibility determination. Notify appellant.

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<sup>2</sup> This trust provision cites case law, all of which I have reviewed: Kirby v. Board of Assessors of Medford 350 Mass. 386 (1966) (real estate which had been placed by its owner in trust during his life was not entitled to an age-related tax exemption because such beneficial owner was not the holder of legal title); Bernat v. Kivior 22 Mass. App. Ct. 957 (1986) (remaindermen who hold their title subject to a life estate cannot have partition because they do not have a present possessory interest in land, which partition requires); and Moscaticello v. Board of Assessors of Boston, 634 N.E.2d 147 (1994) (the term “taxpayer” as used in the statute which allows a residential exemption to reduce the assessed valuation of real estate refers to the person to whom taxes are assessed, that is, the person who is the holder of record title).

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

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Sara E. McGrath  
Hearing Officer  
Board of Hearings

cc:

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