

**Office of Medicaid  
BOARD OF HEARINGS**

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Numbers:</b>	1613416-77
<b>Decision Date:</b>	JAN 18 2017	<b>Hearing Date:</b>	11/22/16
<b>Hearing Officer:</b>	Stanley Kallianidis	<b>Record-Open Date:</b>	01/03/17

**Appellant Representative:**

Brian Barreira, Esq.

**MassHealth Representative:**

Lindsay Gallant, Taunton



*Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Office of Medicaid  
Board of Hearings  
100 Hancock Street, 6<sup>th</sup> Floor  
Quincy, MA 02171*

## APPEAL DECISION

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	Trust Assets
<b>Decision Date:</b>		<b>Hearing Date:</b>	11/22/16
	JAN 18 2017		
<b>MassHealth Rep.:</b>	Lindsay Taunton	Gallant,	

### Authority

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

### Jurisdiction

Notice dated 08/11/16 was sent to the appellant stating that MassHealth had denied her application for MassHealth benefits due to excess assets (Exhibit 1). Subsequent denial letters were revised and sent on 09/22/16 (Exhibit 2). The appellant filed an appeal on 09/08/16 and, therefore, it is timely (see Exhibit 3 and 130 CMR 610.015). A denial of MassHealth benefits is grounds for appeal (130 CMR 610.032).

### Action Taken by MassHealth

MassHealth denied the appellant's MassHealth application due to excess assets.

### Issue

Pursuant to 130 CMR 520.023(C), was MassHealth correct to count the assets of a Realty and Irrevocable Trust in determining the appellant's eligibility?

## Summary of Evidence

The MassHealth representative testified that the appellant's July 7, 2016 re-application for MassHealth long-term benefits was denied due to excess assets (Exhibit 4). The total assets of \$190,103.00 were over the \$2,000.00 limit for the appellant. The assets included two trusts valued at \$188,200.00. Excluding the trusts, the assets were within allowable limits. Therefore, the only issue and dispute is over whether or not real estate held in a nominee and irrevocable trust was countable. The trusts in question are the WS Realty Trust (Realty Trust) and the M Irrevocable Trust (Irrevocable Trust) (Exhibit 5).

The MassHealth representative submitted the Realty Trust and Irrevocable Trust into evidence (Exhibit 5). On June 18, 2004, the appellant and her spouse, as Donors, established the Realty Trust, and on the same day, funded it with a deed to their home. Under the deed, they reserved, "the right to the use and occupancy of the premises during their respective lifetimes, without power of partition..." Also, on June 18, 2004, the appellant and her spouse as Donors established the Irrevocable Trust (Exhibit 5)

The appellant and her spouse are Trustees of the Realty Trust. The beneficiaries of the Realty Trust are the Trustees of the Irrevocable Trust: the appellant, her spouse and their daughter. The beneficiaries of the Irrevocable Trust are the Donors' daughter and other issue (Exhibit 5).

### The Realty Trust:

According to Article 1, "Any Trustee may without impropriety become a beneficiary hereunder and exercise all rights of a beneficiary." According to Article 4, "the Trust may be terminated at any time by the holders of that percentage of the beneficial interests herein specified." However, "The percentage of the beneficial interests required to terminate the Trust shall be not less than 100%." According to Article 5, "This declaration of Trust may be amended from time to time by an instrument in writing signed by the holders or holders of that percentage herein specified." However, "The percentage of the beneficial interests required to amend the Trust shall be not less than 100%." According to Article 12, neither the appellant nor her spouse may terminate or amend the Realty Trust without the "explicit instruction" from the Trustees of the Irrevocable Trust.

The Schedule of Beneficiaries lists the appellant, her spouse and their daughter as Trustees of the Irrevocable Trust as beneficiaries. The Schedule of Beneficiaries states that "Under no circumstances shall the principal" of the Realty Trust or Irrevocable Trust "ever be available for distribution" to the appellant or her spouse (Exhibit 5).

## The Irrevocable Trust:

According to Article 3.1, the appellant and spouse, "each reserve the power, exercisable by will or any codicil thereto, to appoint any part or all of the principal of the Trust Fund,... to charitable or non-profit organizations other than governmental entities, or to any one or more of the Legatees..."

According to Article 3.5, the appellant and spouse "shall have the right to live rent-free in any house which is owned by the Trust," while paying for the expenses related to the premises. According to Article 3.7, neither the appellant nor her spouse has authority to amend or revoke the Trust. According to Article 4.1, the appellant and spouse are entitled to the net income from the Trust. According to Articles 4.2, the appellant and her spouse have a power of appointment of the principal where they can appoint it to their daughter and son-in-law and under 4.3, they have a general power of appointment if both their daughter and son-in-law pre-decease them (Exhibit 5).

The decision to count the assets of the Realty Trust and Irrevocable Trust was based upon a memo from MassHealth's legal division, which held that, even though the Trusts are irrevocable, there are circumstances where their principal is available to the appellant and therefore they are countable assets. Under the Articles of the Realty Trust, the appellant and spouse can become beneficiaries and can terminate the Trust. Subsequently, the appellant and her spouse would receive 50% of the property.

Also, under Articles 3.1 and 4.1 of the Irrevocable Trust, the Donors have a power of appointment to charities and their daughter and son-in-law, and under 4.3 they have a general power of appointment. Finally, under Article 3.5 of the Irrevocable Trust, the appellant and spouse have the right to use and occupy the property and to receive rental income from such property. In support of her argument, the MassHealth attorney cited Doherty v. Director of Medicaid, 74 Mass. App. Ct 439, (2009). She also referenced the State Medicaid Manual, HCFA Transmittal 64, section 3259.1(A)(8): Payment: "A payment [from a trust] may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property." Finally, she pointed to two Superior Court cases, Daley v. Sudders, Civil Action No. 15 CV-0188-D, Worcester, December 23, 2015 and Nadeau v. Thorn, Civil Action No. 14-02278C; Worcester, December 29, 2015 as to why the right to occupy a home held in trust renders the property countable (Exhibit 6).

The record was left open for a period of time for the appellant to submit its own brief on the topic (Exhibit 7).

According to a memo from the appellant's attorney, because MassHealth's denial notice failed to specify the reasons for the denial, the appeal should be approved on due process grounds. He argued that neither the Realty Trust nor the Irrevocable Trust were countable assets as the principal involved, the appellant's home, could not be accessed by the appellant or her spouse. He explained that the Realty Trust is a nominee trust, and unlike a true trust, the trustees have no power of their own, but rather, act on behalf of the beneficiaries. Also, the Schedule of Beneficiaries of the Realty Trust specifically prohibits the distribution of principal to the appellant or her spouse. As for the Irrevocable Trust, its terms do not allow the Trustees under any circumstances to pay Trust principal to or for the appellant unlike in Doherty.

Furthermore, because the appellant can control the property in the trust by way of testamentary or investment powers does not mean she may access the principal. The general power of appointment will only occur when the appellant's daughter and son-in-law pre-deceases her and her husband, and this has not happened.

Finally, while the Trust allows the appellant to live in and use the property, the property cannot be distributed to her or her spouse by the Trustees. Because the term "available" is not currently defined by MassHealth regulations, MassHealth is incorrect to consider the right to use and occupy property as an "available" asset. The attorney cited several Board of Hearings which approved appeals on cases where the issue was use and occupancy of homes held in trust. He contended that MassHealth's refusal to ignore these decisions was a violation of the duty of administrative consistency. Moreover, according to SSI guidelines and MassHealth regulation 130 CMR 520.015, the right of the appellant to use and occupy the property is income-in-kind and should neither be characterized as principal nor an income payment. The attorney cited Heyn v. Director of the Office of Medicaid, Massachusetts Court of Appeals, Slip Opinion No. 15-P-166 (April 15, 2016), and other case law in his memo in support of his argument (Exhibit 8).

## **Findings of Fact**

The record shows, and I so find:

1. The appellant filed a re-application for MassHealth long-term care benefits on July 7, 2016 (Exhibit 4).
2. The appellant's application was denied due to excess assets over the \$2,000.00 limit for the appellant (Exhibit 1).
3. The countable assets at issue are from two trusts valued at \$188,200.00, a Realty Trust and Irrevocable Trust (Exhibit 1).

4. On June 18, 2004, the appellant and her spouse, as Donors, established the Realty Trust, and on the same day, funded it with a deed to their home (Exhibit 5).
5. Under the deed, they reserved, "the right to the use and occupancy of the premises during their respective lifetimes, without power of partition..." (Exhibit 5).
6. Also, on June 18, 2004, the appellant and her spouse as Donors established the Irrevocable Trust (Exhibit 5)
7. The appellant and her spouse are Trustees of the Realty Trust. The beneficiaries of the Realty Trust are the Trustees of the Irrevocable Trust: the appellant, her spouse and their daughter. The beneficiaries of the Irrevocable Trust are the Donors' daughter and other issue (Exhibit 5).
8. The Realty Trust: According to Article 1, "Any Trustee may without impropriety become a beneficiary hereunder and exercise all rights of a beneficiary (Exhibit 5).
9. The Realty Trust: According to Article 4, "the Trust may be terminated at any time by the holders of that percentage of the beneficial interests herein specified." However, "The percentage of the beneficial interests required to terminate the Trust shall be not less than 100%" (Exhibit 5).
10. The Realty Trust: According to Article 5, "This declaration of Trust may be amended from time to time by an instrument in writing signed by the holders or holders of that percentage herein specified." However, "The percentage of the beneficial interests required to amend the Trust shall be not less than 100%" (Exhibit 5).
11. The Realty Trust: According to Article 12, neither the appellant nor her spouse may terminate or amend the Realty Trust without the "explicit instruction" from the Trustees of the Irrevocable Trust" (Exhibit 5).
12. The Irrevocable Trust: According to Article 3.1, the appellant and spouse, "each reserve the power, exercisable by will or any codicil thereto, to appoint any part or all of the principal of the Trust Fund,... to charitable or non-profit organizations other than governmental entities, or to any one or more of the Legatees..." (Exhibit 5).
13. The Irrevocable Trust: According to Article 3.5, the appellant and spouse "shall have the right to live rent-free in any house which is owned by the Trust," while paying for the expenses related to the premises (Exhibit 5).
14. The Irrevocable Trust: According to Article 3.7, neither the appellant nor her spouse has authority to amend or revoke the Trust (Exhibit 5).
15. The Irrevocable Trust: According to Article 4.1, the appellant and spouse are entitled to the net income from the Trust (Exhibit 5).

16. The Irrevocable Trust: According to Articles 4.2, the appellant and her spouse have a power of appointment of the principal where they can appoint it to their daughter and son-in-law and under 4.3, they have a general power of appointment if both their daughter and son-in-law pre-decease them (Exhibit 5).

## **Analysis and Conclusions of Law**

MassHealth regulation 130 CMR 520.023(C)(1), Irrevocable Trusts states.

(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).

In the instant appeal, I have found that the appellant filed a re-application for MassHealth long-term care benefits on July 7, 2016. The appellant's re-application was denied due to excess assets. The countable assets in question were from two trusts valued at \$188,200.00, a Realty Trust and Irrevocable Trust that MassHealth has deemed countable.

On June 18, 2004, the appellant and her spouse, as Donors, established the Realty Trust, and on the same day, funded it with a deed to their home. Under the deed, they reserved, "the right to the use and occupancy of the premises during their respective lifetimes, without power of partition..." Also, on June 18, 2004, the appellant and her spouse as Donors established the Irrevocable Trust. The appellant and her spouse are Trustees of the Realty Trust. The beneficiaries of the Realty Trust are the Trustees of the Irrevocable Trust: the appellant, her spouse and their daughter. The beneficiaries of the Irrevocable Trust are the Donors' daughter and other issue.

According to Article 1 of the Realty Trust, "Any Trustee may without impropriety become a beneficiary hereunder and exercise all rights of a beneficiary." MassHealth believe that under this clause the appellant and spouse can become beneficiaries and can terminate the Trust. Subsequently, the appellant and her spouse would receive 50% of the property.

Even though it is true that the appellant and her spouse can become beneficiaries of the Realty Trust, I disagree that they can unilaterally access principal. Under the terms of the Realty Trust, they can neither terminate nor amend it, nor can they take possession of a percentage of the property. The appellant's daughter is also a beneficiary of the Realty Trust, and no action to terminate or amend may be taken without her assent. Pursuant to Article 4, "The percentage of the beneficial interests required to terminate the Trust shall be not less than 100%." Under Article 5, "The percentage of the beneficial interests required to amend the Trust shall be not less than 100%," and under Article 12 neither the appellant nor her spouse may terminate or amend the Realty Trust without the "explicit instruction" from the Trustees of the Irrevocable Trust." Accordingly the Realty Trust is a non-countable asset.

MassHealth further believes that because the appellant and spouse have a power of appointment under the Irrevocable Trust, this renders it countable. I again disagree. Under Article 3.1, the Donors have a power of appointment to charities; under Article 4.1 of the Irrevocable Trust, the Donors have a power of appointment to their daughter and son-in-law, and under Article 4.3 they have a general power of appointment. First of all, the court in Heyn v. Director of the Office of Medicaid, ruled that a power of appointment to a specific entity was not a valid basis for rendering trust principal available. Secondly, as far as the general power of appointment, this power only takes effect if the appellant's daughter and son-in-law pre-decease her and her husband, and they are still living.

Finally, MassHealth believes that because the appellant and her spouse can use and occupy the property held in the Realty Trust for the Irrevocable Trust, the property is "available" to them and therefore it is a countable asset. However, based upon the clear, unequivocal language of the Trust, the Donors are entitled to income only. There is nothing in the Trust that contradicts this limitation. Contrary to MassHealth's assertions, nowhere to be found is there a clause which allows principal to be paid to the appellant or her spouse.



According to Article 3.7, neither the appellant nor her spouse has authority to amend or revoke the Irrevocable Trust. According to Article 4.1 of the Irrevocable Trust, the appellant and spouse are entitled to the net income from the Trust. MassHealth ignores the above, however, choosing instead to focus on Article 3.5, where the appellant and spouse "shall have the right to live rent-free in any house which is owned by the Trust," while paying for the expenses related to the premises. Based upon this latter clause of the Irrevocable Trust, the MassHealth attorney cited the State Medicaid Manual, HCFA Transmittal 64, section 3259.1 (A)(8) in support of her decision to count the Trust principal.

I find it is that MassHealth's reliance on the State Medicaid Manual's rule deeming use and occupancy of trust real estate payment<sup>1</sup> as justification to count principal to be misplaced and a clear misreading of the regulations. Pursuant to 130 CMR 520.023(C)(1)(b), "**Payments** (emphasis added) from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are **countable income** (emphasis added)." I conclude therefore that the right to use and occupy property should not be characterized as access to principal, but, rather, as a potential source of income. While the appellant's attorney argued that the use and occupancy right of the Donors is not a source of countable income based upon SSI rules, I decline to address this particular argument as the only issue before me was one of excess assets and not one of available income.

The MassHealth attorney also pointed to the Doherty case and Daley and Nadeau as to why the right to occupy a home held in trust renders the property countable. The Doherty ruling does not apply to this case because there is no trustee discretion to distribute principal as there was in that case. The latter two cases are lower-level Superior Court rulings and not authority, and while they have the potential to be persuasive, I do not conclude that the rulings are of pertinent relevance to the instant case.

In summary, by the terms of the Realty and Irrevocable Trusts, the appellant as Donor cannot unilaterally terminate or amend the Trusts, pay herself principal or have her Trustees pay her any portion of the principal. The appellant's mere control over the property through powers of appointment and her use and occupancy do not gain her access to any portion of the principal. Accordingly, the Trusts are non-countable assets.

The appeal is therefore approved.

---

<sup>1</sup> HCFA Transmittal 64, section 3259.1(A)(8): Payment: "A payment [from a trust] may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property"

## Order for MassHealth

Re-open application and determine appellant's eligibility for MassHealth exempting assets of Realty and Irrevocable Trusts.

### Implementation of this Decision

If this decision is not implemented within 30 days after the date of this notice, you should contact your local office. 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.



---

Stanley Kallianidis  
Hearing Officer  
Board of Hearings

cc:

Brian Barreira, Esq.  
118 Long Pond Road, Suite 206  
Plymouth, MA 02360

