COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
OFFICE OF MEDICAID
BOARD OF HEARINGS

Appeal No. 1613477, XXXXXXXXXXXXXX v. Office of Medicaid

Memorandum of Appellant Regarding Trusts

Date: December 19, 2016

To: Attorney Stanley Kallianidis, Hearing Officer
(by email to stanley.kallianidis@.state.ma.us, stanley.kallianidis@massmail.state.ma.us)

To: Lindsay Gallant, MassHealth Representative
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From: Brian E. Barreira, Appellant's Attorney

I move that the Appellant's Social Security Number be redacted on the submission at the fair hearing by the lawyer purportedly representing MassHealth (but actually acting as a decision-maker in the policy arm of the agency, as the MassHealth representative testified that she was directed to deny the case). I also move that the Social Security Number be redacted on the inevitable response from that lawyer. Given that the appeal has a number assigned to it, the Social Security Number is obviously only being added to the purported lawyer's submission in an attempt to shield the agency's arguments from public scrutiny, yet I will be placing it online at irrevocabletrust.info as soon as I receive and redact it, so that tactic won't work.

The Nominee Trust in this appeal has as its sole beneficiary an Irrevocable Trust, which is the operative legal instrument in this case. The MassHealth application filed on behalf of Appellant should be approved because the principal of the Irrevocable Trust in question is not countable. The Irrevocable Trust at issue allows for the Appellant to receive net income, but the principal of the Irrevocable Trust has always been unavailable to the Appellant, and could not be given back to the Appellant.

The memorandum prepared by the Office of Medicaid fails to demonstrate that the Appellant has the right to withdraw principal or that the Trustee has the power to distribute principal from the Irrevocable Trust to the Appellant. To the extent that the Office of Medicaid argues certain provisions provide access to the principal, the arguments of the Office of Medicaid reflect a reckless misinterpretation of the Irrevocable Trust and federal Medicaid trust law, as well as its own MassHealth regulations.

(1) The Denial Notice Did Not Give the Reasons for the Denial, so the Appeal Should Be Approved on Due Process Grounds

The Appellant did not know the reasons for the denial until the time of the fair hearing, and could not make any meaningful preparation for the fair hearing. Without knowing the reasons for the denial, the Appellant was unable to arrange for the testimony of factual and expert witnesses. The testimony of the eligibility worker showed that the worker had legal representation and knew the reasons for the denial well in advance of the hearing, but did not provide them to the Appellant until the fair hearing had already begun.

Federal Medicaid law, as implemented via 42 C.F.R. 431.211 (requiring advance notice) and 42 C.F.R. 431.210(b) (requiring notices to include the reasons for action) and 130 CMR 610.026, requires that a state Medicaid agency not issue a Medicaid denial unless the applicant is provided with "the reasons," yet the Office of Medicaid issued a denial in this case without providing the reasons. The federal regulation at 42 C.F.R. 435.913 requires the agency to "send … a written notice of the agency's decision" that provides not only "the specific regulation supporting the action," but also "the reasons for the action." The denial notice did not follow the strict requirements of federal law. The reasons were finally provided at the hearing, not in the denial notice.

Under 130 CMR 610.026, "[a] notice concerning an intended appealable action must be … adequate in that it must be in writing and contain: (1) a statement of the intended action; (2) the reasons for the intended action; (3) a citation to the regulations supporting such action…," but the denial notice in this case did not include any reasons. As the Office of Medicaid has done in many other cases involving irrevocable trusts, the denial notice in this case merely listed totals of countable assets, and the reasons for the denial were not provided to the Appellant by the Office of Medicaid until the fair hearing had already begun, via the submission of the MassHealth lawyer's memorandum into the record.

Where under 42 C.F.R. 435.913(a) the "agency must include in each applicant's case record facts to support the agency's decision on his application," its delaying its notification of the reasons for the denial to the Appellant was a cynical tactical measure by the lawyer representing the Office of Medicaid to prevent the Appellant from having a full and fair hearing. The fair hearing was not continued (and a motion to do so is hereby made), so the Appellant has been deprived of the right to submit verbal testimony into the record after having finally received the reasons for the denial during the scheduled time for the fair hearing.

Under 130 CMR 610.012(A)(1), the fair hearing process "is an administrative, adjudicatory proceeding whereby dissatisfied applicants … can, upon written request, obtain an administrative determination of the appropriateness of … certain actions or inactions on the part of the MassHealth agency." Under 130 CMR 610.012(C)(1), "[t]he decision of the hearing officer is based only on those matters that are presented at the hearing," and under 130 CMR 610.065(A)(8), the hearing officer is required "to render a fair, independent, and impartial decision based on the issues and evidence presented at the hearing."

The denial notice issued by a Medicaid agency must "detail[] the reasons" sufficiently enough for the affected person to challenge both the application of the law to the person's factual circumstances and the "factual premises" of the state's action. Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970). The explanation in the notice itself must be more than a "general explanation" or "conclusory statement," and must provide at least "a brief statement of … factual underpinning." Barnes v. Healy, 980 F.2d 572, 579 (9th Cir. 1992). The notice requirement "lies at the heart of due process," Gray Panthers v. Schweiker, 652 F.2d 146, 168 (D.C. Cir. 1980), "for if notice is inadequate other procedural protections become illusory," David v. Heckler, 591 F.Supp. 1033, 1042 (E.D.N.Y. 1984). See also Vargas v. Trainor, 508 F.2d 485, 490 (7th Cir., 1974).

The Hearing Officer in this case should approve the MassHealth appeal on due process grounds, based on the failure of the MassHealth denial notice to contain the reasons for the denial.

(2) The Office of Medicaid Is Not Entitled to Deference

The Office of Medicaid did not bring any fair hearing decisions or previous eligibility determinations on similar trusts to the attention of the Board of Hearings, and therefore did not produce a considered, balanced explanation of its final agency decisions in other cases. The Office of Medicaid's unexplained inconsistency undercuts its claims for deference:

> "The common sense behind this stance is powerful: Inconsistency suggests an arbitrary or unsure interpreter upon whom the regulated cannot rely." Richard W. Murphy, "Judicial Deference, Agency Commitment, and Force of Law," 66 Ohio State Law Journal 1013, 1015 (2005).

In a case of first impression about the duties of the agency under administrative consistency as applied to trusts, on August 18, 2016 the Norfolk Superior Court ruled against the agency:

> "Significantly, on other occasions the Agency determined that the same sort of trust provision … is not a persuasive basis for counting a trust as an asset for Medicaid purposes. … When an agency does not consistently interpret its regulations, its interpretation is entitled to no weight. Morin v. Commissioner of Pub. Welfare, 16 Mass. App. Ct. 20, 24-25 (1983)(deference destroyed when an agency decided the case at issue differently than a case it heard months earlier, which had virtually identical facts); Boston Police Superior Officers Fed'n v. Boston, 414 Mass. 458 (in affirming agency decision, court found significant that it was consistent with agency's prior decisions)." Ruby Anagnoston v. Kristin Thorn, Director of the Office of Medicaid, Norfolk Superior Court docket no. 1482CV01293 (2016), p. 8. (Notice of appeal filed.)

The Anagnoston case is not alone in ruling that an agency must be consistent, as the SJC made the same ruling in Cohen:

> "It is usually the initial not the changed interpretation of a statute that earns the kind of deference the Commonwealth would need here. See Barnett v. Weinberger, 818 F.2d 953, 960-961 n.74 (D.C. Cir. 1987), and cases cited (deference depends on consistency of interpretation)." Cohen v. Commissioner of the Division of Medical Assistance, 423 Mass. 299 (1996), footnote 18.

The need for the agency to disclose and explain its inconsistencies is clear and members of the Office of the Attorney General have taken this very position in the manual on administrative adjudicatory proceedings published and available online in the Administrative Law Division area of mass.gov:

> "In cases in which a board is departing from longstanding precedent, the board must explain its rationale carefully. Although not bound in a strict sense by stare decisis, boards and administrative tribunals are under a special duty to explain themselves where they depart from an established line of decisions." Manual for Conducting Administrative Adjudicatory Proceedings, Office of the Attorney General of the Commonwealth of Massachusetts (Robert L. Quinan, Jr., Editor), p. 64 (2012).

Such inclusion of previous decisions in the Agency's processes is required under M.G.L. c. 30A, s. 11(8):

> "The problem of consistency in state administrative agency adjudicatory proceedings is fundamental in that it strikes at the very heart of the problem of administrative justice. … Generally speaking, a state administrative agency should adhere to the doctrine of stare decisis wherever possible in its administrative adjudications. As a general proposition, a state administrative agency, just as courts, should adhere to precedent in its adjudications in order to insure insofar as possible that those similarly situated will be treated in the same manner in administrative adjudications. See Boston Gas Co. v. Department of Public Utilities, 367 Mass. 92, 104, 324 N.E.2d 372, 379 (1975). … Where the obviously inconsistent application of agency standards to similar situations is lacking in any rational basis in the adjudicatory proceeding's final decision, the agency's final decision is arbitrary and capricious. … M.G.L.A. c. 30A, s. 11(8) expressly provides that every final decision in an adjudicatory proceeding by a state administrative agency subject to the provisions of the Massachusetts Administrative Procedure Act must be accompanied by a statement of reasons. This statutorily imposed requirement of reasoned decision-making obliges state administrative agencies in Massachusetts to explain the reasons for their inconsistencies and departures from stare decisis in adjudicatory proceedings." McDonough, Gerald A., 38 Mass. Practice, Administrative Law & Practice s. 10:49 (2016), pp. 627-629.

Thus, the hearing officer need not grant deference to any of the claims made in the memorandum filed by the Office of Medicaid at the fair hearing unless the agency makes

a full disclosure, comparison and explanation of all MassHealth eligibility determinations and fair hearing decisions involving similar legal arguments and similar trust provisions.

(3) The Irrevocable Trust in this Appeal is a Nominee Trust, Which Is a Principal-Agency Relationship Rather Than a Trust

The Realty Trust in this appeal is a so-called "nominee" trust, a type of trust often used in Massachusetts for the purpose of holding title to real estate. A nominee trust is "an arrangement for holding title to real property under which one or more persons . . . pursuant to a written declaration of trust, declare that they will hold any property they acquire as trustees for the benefit of one or more undisclosed beneficiaries." Robert L. Birnbaum and James F. Monahan, The Nominee Trust in Massachusetts Real Estate Practice, 60 Mass. L.Q. 364, 365-66 (1976). Moreover, a nominee trust "is an entity created for the purpose of holding legal title to property with the trustees having only perfunctory duties." Roberts v. Roberts, 419 Mass. 685, 687 (1995), citing Morrison v. Lennett, 415 Mass. 857, 860 (1993), quoting Johnston v. Holiday Inns, Inc., 595 F.2d 890, 893 (1st Cir. 1979). "Unlike in a 'true trust' the trustees of a nominee trust have no power, as such, to act in respect of the trust property, but may only act at the direction of . . . the beneficiaries." Id.

See Morrison v. Lennett, 415 Mass. 857, 860 (1993), holding that a nominee trust is "an entity created for the purpose of holding legal title to property with the trustees having only perfunctory duties." quoting Johnston v. Holiday Inns, Inc., 595 F.2d 890, 893 (1st Cir. 1979). "Unlike in a 'true trust', the trustees of a nominee trust have no power, as such, to act in respect of the trust property, but may only act at the direction of . . . the beneficiaries." Birnbaum, The Nominee Trust in Massachusetts Real Estate Practice, 60 Mass. L.Q. 364, 365 (1976). See Penta v. Concord Auto Auction, Inc., 24 Mass. App. Ct. 635 , 639-640 (1987); Malaguti, Hazardous Use of Nominee Realty Trust, 1 MSL L. Rev. 63, 65 (1993). A nominee trust is often used to hold legal title to real estate so that the identity of the trust beneficiary may remain undisclosed. Birnbaum, supra at 365; Malaguti, supra at 63-64.

Massachusetts courts have consistently treated nominee trusts as mere agency relationships. See Roberts v. Roberts, 419 Mass. 685, 688-89 (1995) (nominee trusts usually treated as agency relationships); Drucker v. State Tax Comm'n, 374 Mass. 198, 200-01 (1978) (nominee trust not a true trust for purposes of income taxation); Apahouser Lock & Sec. Corp. v. Carvelli, 26 Mass. App. Ct. 385, 388 (1988) (trustees of nominee trusts seen as agents rather than trustees); see also Birnbaum, supra, at 366-68.

Superior Court judges have already considered and rejected the position of the Office of Medicaid when it made similar challenges to nominee trusts in the late 1990's. In both cases, the beneficiary of the nominee trust was, as here, an irrevocable trust, and the nominee trust was ignored for legal purposes.

In Leger v. Comm'r of the Division of Medical Assistance, Middlesex Superior Court No. 98-0768 (September 3, 1998), the Court reviewed a nominee trust which held title to real estate. In Leger, the Appellant served as trustee of a nominee trust. The Schedule of Beneficial Interests to the nominee trust listed two irrevocable trusts (one was an income-only trust and the

other provided that neither income nor principal could be distributed to the Appellant) as the beneficiaries of the nominee trust. The Appellant and his wife were the trustees of the irrevocable trusts. In erroneously concluding in the Appeal Decision that the assets held in the nominee trust were countable, the Hearing Officer relied on language in the nominee trust allowing for amendments by the trustee to the schedule of beneficial interests. On appeal pursuant to M.G.L. c. 30A, Superior Court Judge Hiller B. Zobel concluded that the assets held in the nominee trust were not countable for MassHealth purposes:

> "The Realty Trust has no power to distribute income; indeed, as a nominee trust, it has no power to act at all, except at the direction of the beneficiaries. . . . The [applicants] are not direct beneficiaries of the Realty Trust; the two trusts of which they are the respective trustees (and life beneficiaries) are the Realty Trust's beneficiaries. Thus an act on the part of the [applicants] with respect to the corpus of the Realty Trust (such as causing reconveyance of the residence) would necessarily be limited by the strictures placed on them in their capacity as trustees (emphasis in original) of the respective [irrevocable] trusts. Specifically, they may not, as trustees, act in derogation of the interests of the residuary beneficiaries. Causing dissipation of the trust's interest in the Realty Trust - which reconveyance of the residence would certainly do - violates their fiduciary obligation with respect to the trusts which are the sole beneficiaries of the Realty Trust."

In an equally instructive decision, Cronin v. Division of Medical Assistance, Suffolk Superior Court No. 99-2853 (April 24, 2000), the Court reviewed a nominee trust which held the proceeds from the sale of the applicant's home. In Cronin, the schedule of beneficial interests to the nominee trust named the Appellant's daughter and an irrevocable trust as beneficiaries. The Appellant's daughter served as trustee for both the nominee trust and the irrevocable trust. In finding that the assets held in the nominee trust were countable, the Hearing Officer in the Appeal Decision concluded that language in the nominee trust permitting amendments, with the consent of the beneficiaries, amounted to circumstances under which the principal of the nominee trust could be distributed to the applicant. On appeal pursuant to M.G.L. c. 30A, Superior Court Judge Maria I. Lopez concluded that the assets held in the nominee trust were not countable for MassHealth purposes:

> "[A]s is the case with all nominee trusts, the trustee is completely limited in his or her ability to amend or revoke the trust and can only do so at the direction of those listed on the Schedule of Beneficiaries. . . . The DMA's reliance on the fact that the Realty Trust can be revoked or amended is misplaced. The revocability or amendability does not cause a trust to be available to a MassHealth applicant where such a revocation or amendment would constitute a breach of fiduciary duty to the beneficiaries [of the irrevocable trust] . . . . The [nominee] trust states that the trustee is only authorized to pay the income or principal "among the beneficiaries in proportion to their respective interests." The appellant, however, is not a beneficiary of the Realty Trust. . . . The appellant is one of several beneficiaries of the Irrevocable Trust and has an *income-only* interest (emphasis

in original). Accordingly, the trustee is never authorized, under any circumstance, to distribute principal to the appellant."

Neither Leger nor Cronin was reviewed by an appellate court. The victorious MassHealth appellants would obviously have had no reason to file any appeal. The Division of Medical Assistance (the predecessor of the Office of Medicaid) would have had an opportunity to file an appeal and an incentive to do so if it believed an error of law had occurred, but chose not to do so. By not appealing those decisions, the Office of Medicaid has therefore acquiesced to the treatment of nominee trusts as mere agency relationships and as not revocable or amendable without the direction of all beneficiaries. Thus, any arguments made by the office of Medicaid about the Realty Trust are contrary to previous final decisions on similar cases, and the agency is estopped from newly raising the same argument that as already repudiated.[1]

(4) The Appellant Is Eligible for MassHealth Because the Appellant's Irrevocable Trust Allows Distributions to the Appellant of Income Only

The Office of Medicaid made an error of law to the extent that it may have determined that the availability of income to the settlor rendered the principal to also be available. There is no dispute that the net accounting income (if any) of the irrevocable trust should be treated as countable income for MassHealth purposes, but "income" and "principal" are inherently different property interests and are treated wholly differently under federal Medicaid and Massachusetts MassHealth rules, including for eligibility purposes. See, e.g. 42 U.S.C. § 1396p(d)(3)(B)(i); 20 CFR 416.1207; 130 CMR 520.009(E) and 130 CMR 520.023(C)(1)(a) & (b); compare, e.g., 130 CMR 520.007 to 130 CMR 520.009. The real estate deeded to the trust by the settlor is principal, not income, in part because the Massachusetts Principal and Income Act ("MPIA") requires that a Trustee allocate to principal "assets received from a transferor during the transferor's lifetime." M.G.L. c. 203D § 13(1). See also Restatement (Third) of Trusts §233, comment p (a trustee has no power to deviate from generally accepted practices of fiduciary accounting when determining what is chargeable to income versus to principal).

The Office of Medicaid appears to have misinterpreted the holding by the Massachusetts Appeals Court in Doherty, which, despite having been ignored by the agency in its memorandum, has since that time been clarified by the Massachusetts Appeals Court in Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312 (2016). A direct path of the principal of the trust back to the settlor was found in Doherty.[2] There is no such path of principal to the settlor in the irrevocable trust in this case. Paragraph 4.1 of the Appellant's irrevocable trust allows distributions of net income to the appellant. Paragraph 4.2 allows principal to the

[1] Under the doctrine of offensive issue preclusion, also known as offensive collateral estoppel, the agency is prohibited from continuing to bring up issues where its position had already been ruled against. Bellermann v. Fitchburg Gas and Electric Light Company, 470 Mass. 43, 60 (2014).

[2] "Art. XXII of the trust expressly authorized the trustee "in its sole discretion" and notwithstanding "anything contained in this Trust Agreement" to the contrary, to "pay over and distribute the entire principal of [the] Trust fund to the beneficiaries thereof [including the Medicaid applicant], free of all trusts."" Heyn at 319.

distributed to the remainderpersons of the irrevocable trust, who are her children. Paragraph 10.4 prohibits ever adding the Appellant to the class of persons who may receive distributions of principal.

The correct legal position about trust interpretation was stated on page 12 in the September 28, 2007 brief entitled "Defendant's Opposition to Appellant's Motion for Judgment on the Pleadings" filed in Essex Superior Court by Carolann Mitchell, Assistant General Counsel of the Executive Office of Health and Human Services in the Doherty case:

> "In reviewing contracts, the courts have found that a contract must be read in such a way that no part of the agreement is left meaningless. See Starr v. Fordham, 420 Mass. 178, 190 (1995); see also S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc., 343 Mass. 635, 640 (1962). In other words, contracts must be construed to give "reasonable effect" to each provision contained therein. See State Line Snacks Corp. v. Town of Wilbraham, 28 Mass. App. Ct. 717 (1990). …To allow the one sentence … to control the whole of this document would render the Settlor's stated intent … completely meaningless. Such an interpretation of this trust is … against the weight of the law."

On that same page in the brief, the Office of Medicaid recognized and stressed the importance of fiduciary duties in trust analysis under Massachusetts trust law and federal Medicaid law; the Office of Medicaid took the position that the Trustee in the Doherty case had fiduciary duties, but not to the remainderpersons, but rather to the Settlor:

> "The unambiguous language of Article II demonstrates the Trustees' fiduciary duty runs to Muriel, and dictates that they can use all assets of the Irrevocable Trust for her care and benefit."

The opposite is true in this case, where the Trustee has fiduciary duties to the remainderpersons, and cannot distribute principal to or for the benefit of the Appellant from the Irrevocable Trust without violating those duties. Nowhere in the Irrevocable Trust in this appeal is there any provision even slightly similar to the trust provision in Doherty that permitted the trustee to take action "without regard to the interests of the remaindermen." Doherty at 441.

The Doherty holding was explained very well by Hearing Officer Sara McGrath in her decision in Appeal 1401521, and the same applies 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, 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." The Appellant's Irrevocable Trust at issue in this case contains no explicit assertion that public benefits will likely be insufficient for Appellant, nor any implicit direction for the Trustees to invade trust assets to ensure that the Appellant's quality of life is maintained.

Unlike in Doherty, the Appellant's trust, viewed as a whole, evinces that principal is not meant to be available to the settlor. The Office of Medicaid attempts to isolate phrases in the Irrevocable Trust out of context, but under Massachusetts law phrases in trusts must not be read independently; rather, the entire trust must be read as a whole, and the Office of Medicaid pushed that very point in the Doherty case: "[A]s MassHealth strongly presses upon us, this clause may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole." Doherty at 441. "Trust instruments must be construed to give effect to the intention of the settlor as ascertained from the language of the whole instrument considered in the light of the attendant circumstances. Groden v. Kelley, 382 Mass. 333, 335 (1981)." Harrison v. Marcus, 396 Mass. 424, 429 (1985). See also Schroeder v. Danielson, 37 Mass. App. Ct. 450, 453 (1994). Overemphasis on one or two provisions of the trust instrument is not permissible under Massachusetts trust law. "One or two expressions in the trust deed must not be so construed as to impair or destroy the whole scheme of the trust, when another and more reasonable construction is possible." Shirk v. Walker, 298 Mass. 251, 261 (1937). If two provisions of the trust are in apparent contradiction to each other when each is read in isolation, construction must be found that will allow meaning to both provisions to resolve the apparent contradiction, as it is presumed that all provisions in a trust were intended by the settlor to have meaning. Watson v. Baker, 444 Mass. 487 (2005).

The Realty Trust and Irrevocable Trust are linked together, with the Irrevocable Trust being the sole beneficiary of the Realty Trust, and must be read together as a whole. Paragraph 3 of the Realty Trust states: "The Trustee shall have no power to deal in or with the Trust Estate except as directed by the beneficiaries." Paragraph 12 of the Realty Trust states: "Notwithstanding anything which may be construed to the contrary anywhere in this Declaration of Trust, if one or more irrevocable trusts is or are the beneficiary or beneficiaries listed on the Schedule of Beneficial Interests, then neither ZZZZZZZZZ nor ZZZZZZZ nor any successor Trustee shall have any power to amend or terminate this nominee trust without the explicit instruction from the Trustee(s) of the irrevocable trust(s), and nothing contained herein shall override the irrevocability of said trust(s)." The Schedule of Beneficial Interests of the Realty Trust unambiguously states: "Under no circumstances shall the principal of the ZZZZZZZZ REALTY TRUST, or the ZZZZZZZZ 2004 IRREVOCABLE TRUST ever be available for distribution to ZZZZZZZZ or ZZZZZZZ." It was therefore reckless, and an argument advanced in bad faith, for the agency to claim that the applicant can become the sole beneficiary of the Realty Trust, especially after having made the same invalid claims and lost and acquiesced in Leger and Cronin.

The beneficiaries of the principal of the Irrevocable Trust are XXXXXX and XXXXXX, both of whom attended the fair hearing. Only if they both die does the Appellant attain the power of appointment in paragraph 4.3. Thus, there is no direct path of the principal of the trust to the Appellant, and the Appellant is a beneficiary of trust income only.

(5) Self-Settled Irrevocable Income-Only Spendthrift Trusts Are Valid under Massachusetts Law and Federal Medicaid Trust Law and Do Not Constitute Countable Assets for MassHealth Eligibility Purposes

For purposes of assessing an applicant's eligibility for MassHealth long-term care benefits, the Office of Medicaid determines whether the applicant has excess countable assets. In order for the assets in the Appellant's irrevocable trust to be included in the determination of the countable assets, principal from the trust must be payable to or accessible by the Appellant. See 130 CMR 520.023(C)(1). The Appellant's ability to receive income from the trust does not cause the trust principal to be a countable asset, as income is treated separately than assets under MassHealth regulations and becomes added to the Patient Paid Amount upon approval. 130 CMR 520.009(A)(3).

The treatment of irrevocable trusts under federal Medicaid law is found at 42 U.S.C. § 1396p(d), and the proper review of self-settled irrevocable trusts for countability is set forth in federal Medicaid trust law at 42 U.S.C. § 1396p(d)(3)(B)(i), which simply states:

> "In the case of an irrevocable trust, if there are any circumstances under which payment from the trust could be made to or on behalf 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."

The plain language of the federal law makes it clear that Congress did not completely prohibit trusts in the Medicaid context. The simple question posed by the federal Medicaid trust law is whether a payment can be made to or for the benefit of the settlor. In some cases, principal is deemed available, and therefore a countable asset, because it can be paid to or for the settlor. In other cases, such as this case, only income is payable for the settlor's benefit, and only the income is considered available and countable.

The Supreme Judicial Court ("SJC") has already concluded in the leading Massachusetts case regarding federal Medicaid trust law, Cohen v. Division of Medical Assistance, 423 Mass. 399 (1996), that a self-settled irrevocable income-only spendthrift trust is valid under Massachusetts law and federal Medicaid trust law:

> "[A] trust might be written to deprive the trustee of any discretion (for instance allowing the payment only of income) and … such a limitation would be respected." Cohen at 418.

In 2009, the Massachusetts Appeals Court in Doherty v. Director of the Office of Medicaid, 74 Mass. App. Ct. 439 (2009) reached the same conclusion:

> "Finally, we take this opportunity to stress that we have no doubt that self-settled, irrevocable trusts may, if so structured, so insulate trust assets that those assets will be deemed unavailable to the settlor." Doherty at 442-43.

In 2016, the Massachusetts Appeals Court in Heyn perceived the need to reiterate the legal conclusion that such income-only irrevocable trusts are allowable:

> "We are called upon yet again to review a determination that assets within a self-settled irrevocable inter vivos trust should be treated as available to the trust grantor for payment of nursing home expenses (and, correspondingly, render the grantor ineligible for Medicaid benefits). … Nonetheless, it is settled that, properly structured, such trusts may be used to place assets beyond the settlor's reach and without adverse effect on the settlor's Medicaid eligibility." Heyn at 312-314.

In addition, in 2004, the Massachusetts legislature was presented with voting on the option, allowed to the states by federal Medicaid law since 1993, of allowing estate recovery against trusts. The bill it passed limited estate recovery to the probate estate. The existing law, M.G.L. c. 118E, s. 31(c), does not allow any estate recovery at all against trusts and shows that there is no Massachusetts legislative policy against trusts in the MassHealth context.

(6) A Denial of This Appeal Would Result in the Nursing Home Having No Recourse for Payment

The memorandum of the Office of Medicaid describes the Irrevocable Trust as if the principal were directly payable to the Appellant, and callously ignores the financial consequences to the nursing home where services are being provided. If a MassHealth application in this case is denied due to the existence of the Irrevocable Trust, and if the nursing home could reach the Irrevocable Trust as a creditor of the denied MassHealth applicant under Massachusetts debtor-creditor laws, then the nursing home could eventually be made whole by suing the denied MassHealth applicant and the Irrevocable Trust. Where, however, a creditor of the Appellant in this case cannot reach the principal of this Irrevocable Trust and the Trustee cannot be forced to pay the nursing home, then the nursing home would be left with no payment source if this MassHealth application and appeal are denied:

> "If the settlor-beneficiary creates a remainder interest in another person, then the settlor-beneficiary's creditors will not be able to reach the remainder interest if the trustee cannot reach the corpus for the settlor-beneficiary's benefit." In re Shurley, 115 F.3d 333 (5th Cir. 1997), citing G. Bogert & G. Bogert, Trusts and Trustees (2d rev. ed. 1992), § 223, at 453. "Where the settlor retains only a limited interest in a trust, the portion thereof not retained is afforded some protection even though it is self-settled. The settlor's creditors can reach trust assets to the maximum extent that the trustee could distribute or apply such assets for the settlor-beneficiary's benefit." Peter Spero, Asset Protection: Legal Planning, Strategies and Forms, 6.08[2] (Warren Gorham & Lamont, 2007), citing 2 A. Scott & W. Fratcher, The Law of Trusts (4th ed. 1987), §156.2, at 175.

The nursing home could end up being the true financial victim in this case if it is required to provide nursing home care, and MassHealth will not cover the applicant's costs, and the Irrevocable Trust cannot be successfully sued by the nursing home to pay the settlor's bills. If

the Irrevocable Trust in this appeal cannot be sued to provide for the settlor's support, then the principal of the Irrevocable Trust cannot be deemed an available asset under Medicaid trust law and corresponding MassHealth regulations.

The agency's interpretations of the federal Medicaid trust law are not rational because they do not take into account that a nursing home is required under 42 C.F.R. s. 483.12(a)(2) and 940 C.M.R. 4.09 to render services until administrative remedies are exhausted. If the terms of the trust render the Appellant insolvent and the trust's principal unreachable by the Appellant's creditors, then the trust's principal cannot be deemed countable by the agency. When the Trustee's fiduciary duties then prevent the Trustee from expending principal in such a manner, the nursing home gets stuck in the middle, without any payment source, unpaid. Public policy, if not federal law, should prevent the Office of Medicaid from interpreting federal Medicaid law in a manner that potentially leaves a nursing home or other medical vendor without any payment source after being required to provide such services.

(7) The Trustee's Authority to Define Income and Principal under Massachusetts Law in No Way Allows Principal to be Distributed to the Appellant

The Office of Medicaid misconstrues the Trustee's powers determine what is principal or income as empowering the trustee to call the principal of the Irrevocable Trust "income" and distribute it to the Appellant. In reality, the trustee's powers do not permit the trustee to play fast and loose with concepts of principal and income accounting.

Section 103(a)(4) of the Uniform Principal and Income Act, as adopted in Massachusetts as M.G.L. c.203D, s. 3(a)(4), states that, in allocating receipts and disbursements to or between principal and income, a trustee "shall add a receipt or charge a disbursement to principal if the terms of the trust … do not provide a rule for allocating the receipt or disbursement to or between principal and income." Thus, the legal presumption in Massachusetts is that any amount received is not income, but rather principal. In the absence of explicit contrary powers in the trust, the Trustee of the Irrevocable Trust in this appeal has no power to deviate from generally accepted practices of fiduciary accounting when determining what is income or principal. See Restatement (Third) of Trusts §233, comment p. In Old Colony Trust Co. v. Silliman, 352 Mass. 6 (1967), the Massachusetts Supreme Judicial Court interpreted the extent of a trustee's authority under a similar provision, holding it was "primarily an administrative power authorizing the trustee in instances of doubt to use its best informed judgment in good faith in the light of what the established rules suggest..." and that such a "power may not be used to shift beneficial interests." Id. at 9. Provisions granting "even very broad discretionary powers are to be exercised in accordance with fiduciary standards and with reasonable regard for usual fiduciary principles." Id. at 10. See also Worcester County Nat. Bank v. King, 359 Mass. 231, 234-235, 268 N.E.2d 838 (1971) and Fine v. Cohen, 35 Mass. App. Ct. 610, 617 (1993), which interpret similar provisions and hold that even with broad discretionary powers, a trustee may not exercise his or her discretion to shift beneficial interests in a trust.

In addition, the Heyn case has clarified that an annuity must be allocated between the principal and income of the trust, and that a Trustee's fiduciary duties and state law need to be considered in determining whether a Trustee can make any distribution of principal. No such

analysis was done by the agency on this issue when it issued its typical broadbrush claims against the Appellant's trust.

(8) Federal Medicaid Trust Law Requires that the Appellant's Irrevocable Trust Be Scrutinized Under Insolvency Analysis

In Cohen, the SJC held that the essence of federal Medicaid trust law was whether a creditor could reach the settlor-applicant's interest in the trust:

> "Restatement (Second) of Trusts s. 156 (1959) … provides: "Where the Settlor is a Beneficiary . . . (2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit. ... Under such a trust, a grantor puts his assets in a trust of which he is the beneficiary, giving his trustee discretion to pay out monies to gratify his needs but limiting that discretion so that the trustee may not pay the grantor's debts. Thus, the grantor hopes to put the trust assets beyond the reach of his or her creditors." Cohen at 414.

The Cohen court described a successful self-settled, spendthrift trust as putting the trust assets beyond the reach of the settlor's creditors, then proceeded to find that the trusts in the consolidated case had not done so because the Trustees had discretion to make distributions of principal directly to the settlors.

The plain language of the federal Medicaid trust law shows that it is the ability to make payment from the trust, ignoring purported limitations on the Trustee's discretion, that makes the trust countable. Being "available" under federal Medicaid trust law means that the Trustee can make a payment to or for the settlor under the terms of the trust, which would also concomitantly allow a creditor of the settlor to reach the assets under state debtor-creditor law, as the SJC had concluded in Cohen:

> "[I]f, in any circumstances any amount of money might be paid to a beneficiary, the maximum of such amount is deemed to be available to the beneficiary." Cohen at 406-407.

Scrutiny of a trust under the 1993 federal Medicaid trust law at 42 USC 1396p(d)(2)(C) specifies four and only four aspects of state trust law that may be ignored in determining eligibility:

> "(C) …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."

All of these exceptions relate to trust provisions that would not be protective of a trust's assets against a creditor of the settlor. Thus, the Congressional intention of requiring states to implement insolvency analysis on irrevocable trusts ensured that the settlor's creditors, especially the nursing home providing services to the settlor, would have access to legal remedies against the settlor's interest in the trust upon a Medicaid denial.

The Office of Medicaid is required to follow this federal law: "Where there is a conflict between State and Federal regulations, the Legislature intended that the [agency] comply with the Federal rule." Cruz v. Commissioner of Pub. Welfare, 395 Mass. 107, 112 (1985). The agency's own MassHealth trust regulation at 130 CMR 520.021 confirms that federal law is controlling, and authorizes the hearing officer to rule against the agency on its interpretation of federal Medicaid trust law:

> "In the event that a portion of 130 CMR 520.021 through 520.024 conflicts with federal law, the federal law supersedes."

The Office of Medicaid cannot establish that Congress intended to leave a nursing home (which under 42 C.F.R. s. 483.12(a)(2) and 940 C.M.R. 4.09 cannot easily discharge or evict its nonpaying residents) high and dry, with the possibility of being required to render a substantial amount of care during the Medicaid application and fair hearing processes with the possibility of no eventual payment source. If the agency is allowed to implement its newly-minted positions on federal Medicaid trust law, then the nursing home, the medical vendor which provided services to the Appellant, could be left without any payment from MassHealth despite having no legal remedy against the settlor's interest in the trust.

Federal Medicaid trust law mirrors bankruptcy law, as a beneficial interest in a valid spendthrift trust is not considered property of the bankruptcy estate. 11 U.S.C. § 541(c)(2). Section 541(c)(2) of the Bankruptcy Act provides that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable" in bankruptcy, and this section has been held to apply to spendthrift provisions in trust documents. See Patterson v. Shumate, 504 U.S. 753, 758 (1992) and In re Moses, 167 F.3d 470 (9th Cir. 1999).

Under the Cohen holding and a plain reading of the federal Medicaid trust law, if the nursing home cannot reach the trust as a creditor of the settlor, then the principal of the trust is not a countable or available asset. If a payment cannot be made from trust principal to or for the settlor under the terms of the trust, then such the trust principal is not deemed countable or available under federal Medicaid trust law. The comment made in 1985 when Congress was implementing federal Medicaid trust law about preventing Medicaid applicants from "having your cake and eating it too" related to a trust variation that for some reason was then allowable, where the Trustee could be given the unfettered discretion to give the trust's assets directly back to the settlor, but if the Appellant in this case cannot reach the cake, or be given the cake by the Trustee, then the Appellant cannot eat it.

(9) The Office of Medicaid Has No Legal Authority to Treat a MassHealth Applicant's Home in a Self-Settled Irrevocable Income-Only Trust As Per Se "Available" and Therefore a Countable Asset

(A) The MassHealth Regulation at 130 CMR 520.023(C)(1)(d), as Newly Misinterpreted by the Office of Medicaid, Is Not in Accordance with Federal Medicaid Trust Law

One reason for this appeal is that 130 CMR 520.023(C)(1)(d) was misinterpreted by the Office of Medicaid. The regulation at issue in this case is 130 CMR 520.023(C):

> (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).

Under (a) and (b), the analysis correctly is whether a payment can be made to or for the settlor. The Office of Medicaid argued instead that if the settlor of the trust can or does use the home, then it is "available," and per se countable, yet the regulatory interpretation is not in accordance with federal Medicaid trust law or the Office of Medicaid's long history of implementing the law correctly.

Before January 1, 2014, the Office of Medicaid had an official, published position on what the term "available" meant, as under the "Definition of Terms" in 130 CMR 515.001, the term "available" was defined as "a resource that is countable under Title XIX of the Social Security Act." That definition of "available" had existed in MassHealth regulations all the way back to October 1, 1999, when the 1993 federal Medicaid trust law changes were implemented by regulation in Massachusetts. Thus, from October 1, 1999 through December 31, 2013, it was clear that an asset was considered available if it was countable, and not the other way around.

Since January 1, 2014, the word "available" has no longer been defined anywhere in the MassHealth regulations, and the Office of Medicaid chose not to disclose the pre-2014 definition of the word "available" to the Hearing Officer, nor the agency's long history of treating a MassHealth applicant's home as available only when the trust principal was payable to or for the applicant.

The MassHealth regulation at 130 CMR 520.023(C)(1)(d) itself does not support the interpretation given to it by the Office of Medicaid, where after the word "available" comes the phrase "according to the terms of the trust." A provision in a deed or trust that allows the settlor to live in the settlor's former home does not somehow vest the Trustee with discretion to deed the home to the settlor in violation of the Trustee's fiduciary duties to the other beneficiaries.[3] Massachusetts law is controlling as to the nature of the Appellant's beneficial interests, as the United States Court of Appeals for the Third Circuit has already examined Congressional intent in the context of federal Medicaid trust laws in Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012) and concluded that state law matters in the analysis:

> "Congress rigorously dictates what assets shall count and what assets shall not count toward Medicaid eligibility. State law obviously plays a role in determining ownership, property rights, and similar matters. … "Trusts are, of course, required to abide by a State's general law of trusts. … [T]here is no reason to believe [Congress] abrogated States' general laws of trusts. … …[W]e reject the conclusion that application of these traditional powers is contrary to the will of Congress. After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues." Lewis at 334, 335, 343.

Moreover, Massachusetts law is controlling as to the nature of the Appellant's beneficial interests because in Guerriero v. Commissioner of the Division of Medical Assistance, 433 Mass. 628 (2001), the SJC has already ruled that Massachusetts trust law is controlling in a determination of whether a distribution of assets can be made to the settlor of a trust.[4] The SJC has held that, in applying federal Medicaid trust law, Massachusetts trust law must first be reviewed to determine the settlor's interests, and if a distribution cannot be made to the settlor, then, as the Court found in Guerriero, the trust's assets cannot be treated as countable assets for MassHealth purposes:

> "The statute asks only what the maximum amount of funds available to the beneficiary are in any circumstances pursuant to the exercise of the trustee's discretion." Cohen at 424.

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[3] See, e.g., the Trustee's duty of impartiality under M.G.L. c. 203E, s. 803: "If a trust has 2 or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests."

[4] "In a written trust, the nature and extent of a trustee's discretion as to any issue is defined by (1) the terms of the trust instrument and (2) in the absence of any provision in the terms of the trust, by the rules governing the duties and powers of the trustee. Restatement (Second) of Trusts s. 164 (1959). If the trustee violates any duty to a beneficiary, the trustee will be liable for "breach of trust." Restatement (Second) of Trusts, supra at s. 201. Accordingly, the question is whether the "irrevocable waiver" completely deprived the trustee of any discretion to distribute trust principal to Guerriero, evaluating the trustee's discretion in light of his duties imposed by the written trust instrument and his relationship to the parties of the trust." Guerriero at 632.

To the extent that the usage of the home could be viewed as a payment from an irrevocable income-only trust, it would be treated as income because the principal is not being consumed or even accessible by living there.[5] The Appellant's right to use-and-occupancy of the home in the trust, however, does not produce any money or other currency that could be paid out of the trust or received by the Appellant; thus, the Appellant's right to use-and-occupancy in the trust is "income-in-kind" which, under the MassHealth regulation at 130 CMR 520.015, is "noncountable income" that is "not considered in determining the financial eligibility of the applicant."

Further, a use-and-occupancy right in an irrevocable trust cannot be reached by a creditor of the settlor. To the extent that a use and occupancy right is created under a valid spendthrift trust for purposes of 11 U.S.C. § 541(c)(2), the actuarial value of a use-and-occupancy right cannot be reached in bankruptcy, and the Bankruptcy Court cannot force the distribution of any of the real estate to the settlor if the trust prohibits the settlor from receiving distributions of principal.

In addition to the foregoing, a renowned legal treatise on trust law states that the principal of a trust is not distributable or available without written specificity in the trust:

> "Nowadays, it is default law that the current beneficiary of a trust is entitled to the net trust accounting income. It is also default law that a trust is income only, i.e., the current beneficiary is not entitled to principal, unless the governing instrument indicates that the settlor intended otherwise. Thus, a trust for the "benefit" of C, remainder to D is normally income only absent additional language suggesting the contrary. Without such additional language, the trustee would have no power to invade principal for the income beneficiary." Charles E. Rounds, Jr. and Charles E. Rounds, III, Loring and Rounds: A Trustee's Handbook (2013 Edition), §5.4.1.3 at 376-377.

Nowhere in federal Medicaid trust law or federal Supplemental Security Income ("SSI") law, which also must be followed by the Office of Medicaid, is the countability of an irrevocable trust evaluated based upon the investments chosen by the Trustee. The regulatory interpretation in this case is arbitrary and capricious, an error of law, and in excess of the statutory authority or jurisdiction of the agency.

[5] A person with a limited lifetime interest in real estate is not considered under Massachusetts law to have access to principal. See Spring v. Hollander, 261 Mass. 373 (1927), where the SJC held that upon a sale of real estate a life tenant is entitled to income only, and principal is not available to the life tenant, and see Langlois v. Langlois, 326 Mass. 85 (1950), where it was held that a beneficiary with a life interest does not have power to consume the principal of the property.

(B) The Office of Medicaid is Newly Misinterpreting Two 1994 Sentences that Have Long Been Available in the State Medicaid Manual

The Office of Medicaid has pointed out that the State Medicaid Manual states, at 3259.1 A.6.:

> Payment.--For purposes of this section a payment from a trust is any disbursal 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 section of the State Medicaid Manual, available to the Office of Medicaid since 1994, contemplates that a payment could be either income or principal, and that usage of the Appellant's home could be treated as a payment. The new position of the Office of Medicaid appears to be that mere usage of or ability to use a home transferred to a trust is per se a payment of principal, yet the list of what may be considered a "payment" in the State Medicaid Manual does not support the Defendant's position. The first sentence declares expressly the distinction between income and principal, a distinction that is fundamental to trust and property laws. The second sentence does not disturb that distinction, even indirectly; it establishes only that a payment, as defined in the first sentence – i.e., a disbursal of either principal or income – can be in cash or in kind. The right to use real property is offered as an example of the latter, and does not convert an equitable, discretionary beneficial interest into entitlement to the principal, nor does it somehow vest the Trustee with the authority to make any such distribution. Per Cohen, Guerriero and Heyn, Massachusetts law is used to make such determinations, yet the Office of Medicaid apparently ignores it, as a life tenant, or someone who is granted lifetime usage, such as use-and-occupancy, is entitled to only income, and cannot consume principal. See Spring v. Hollander, 261 Mass. 373 (1927), Langlois v. Langlois, 326 Mass. 85 (1950) and Hinckley v. Clarkson, 331 Mass. 453 (1954). Under long-standing Massachusetts law, a beneficiary with a use-and-occupancy right is not permitted to deprive the contingent remainder beneficiaries of principal, and the Trustee has a fiduciary duty to preserve the principal for the benefit of the remainder beneficiaries. Hinckley at 455.

(C) The Actual Rationale for the MassHealth Regulation at 130 CMR 520.023(C)(1)(d) Is Found in the Office of Medicaid's Last Known Position Statement Regarding Federal Medicaid Trust Law

The long-standing position of the Division of Medicaid Assistance, now known as the Office of Medicaid, regarding irrevocable trusts was established in a legal policy statement dated April 29, 1992, entitled "Transfer and Trust Issues Reconciliation of Department Policy," where on page 3 the standard of review, similar to Restatement (Second) of Trusts s. 156 as described in Cohen, was simply that a trust was "countable up to the limit of the trustee's discretion to distribute it to the applicant." The Appellant knows of no other official position statement by the agency.

Note that Question 2, parts (a) and (b), on pages 2-3 of the Defendant's April 29, 1992 position statement, addresses the issue of whether a home transferred to a trust should remain

noncountable, and provides the reasoning behind the promulgation of 130 CMR 520.023(C)(1)(d): to cause the settlor's home to lose its noncountable status when it is transferred to a trust. A home is usually considered to be a noncountable asset if it is in the MassHealth applicant's name, but the Commonwealth is not disadvantaged by its being noncountable because after the MassHealth recipient's death there is an estate recovery claim against it for reimbursement by the Commonwealth for MassHealth benefits paid on the recipient's behalf. If, however, the home were in a trust yet still considered to be noncountable despite being distributable to the MassHealth applicant, the transfer of the home to the trust would avoid a post-death estate recovery claim against it for reimbursement by the Commonwealth simply due to its avoiding probate. Thus, the reason for adding (d) to 130 CMR 520.023(C)(1) was to avoid this incongruous result, i.e., the usage of a trust to avoid a MassHealth estate recovery claim.

The lack of institutional memory of the agency on why 130 CMR 520.023(C)(1)(d) was originally promulgated is yet one more reason it is entitled to no deference in its arguments.

(D) Previous Written Positions of the Office of the Attorney General in Massachusetts Appellate Court Cases Are Inconsistent with the Office of Medicaid's Position

The major Massachusetts appellate court cases to date have been Cohen in 1996, Lebow v. Commissioner of the Division of Medical Assistance, 433 Mass. 171 (2000), Guerriero in 2001, Doherty in 2009 and Heyn in 2016, and the briefs filed in those cases by the Office of the Attorney General support the Appellant's contention that the principal of a trust is only countable when a payment from principal can be made to or for the settlor of the trust. In all references in those briefs as to whether an asset in a trust is "available," the context is whether the asset is distributable by the Trustee to the settlor-applicant.

In the Doherty case, which is known to have involved the appellant's home held in the trust (as the Massachusetts Appeals Court specifically mentions the appellant's right to live there), there is no mention in the briefs filed at any level by or on behalf of the Office of Medicaid about Muriel Doherty's home being a countable asset due to her living there and it therefore being "available" and per se countable. No mention of 130 CMR 520.023(C)(1)(d) can be found in any such brief.

In the Heyn case, in the "Background" provided by the Court, it is specifically stated that the trust owned "her former residence, held by the trust." Heyn at 313. The hearing officer had rejected the "available" home argument made by the Defendant at the fair hearing,[6] yet the Defendant did not challenge that agency decision despite the issue having been raised below and overall issues of Medicaid trust law being in dispute in the Massachusetts Appeals Court. Thus,

[6] The hearing officer in the underlying Heyn appeal, Fair Hearing Decision 1306280, on page 10 had specifically rejected the arguments of the Office of Medicaid regarding the home being "available" under 130 CMR 520.023(C)(1)(d).

the Heyn decision undermines the Defendant's positions in this case, and the Defendant is estopped from raising the "available" home argument here after having acquiesced in Heyn.[7]

(E) The Board of Hearings, in Rendering the Final Decision of the Office of Medicaid, Has Issued Inconsistent Decisions Regarding What "Available" Means in 130 CMR 520.023(C)(1)(d), and the Office of Medicaid Has ignored Those Decisions and Therefore Fails to Engage in Administrative Consistency

The Appellant is entitled as a matter of law to reasoned consistency in agency decision-making by the Office of Medicaid.

> "A party to a proceeding before an agency has a right to expect and obtain reasoned consistency in the agency's decisions." Boston Gas Co. v. Dep't of Pub. Utilities, 367 Mass. 92, 104 (1975). "The law demands a certain orderliness. If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable. … [T]he prospect of a government agency treating virtually identical legal issues differently in different cases, without any semblance of a plausible explanation, raises precisely the kinds of concerns about arbitrary agency action that the consistency doctrine addresses." Davila–Bardales v. Immigration and Naturalization Service, 27 F.3d 1, 5 (1st Cir. 1994)

There are numerous other cases about how agencies are required to maintain administrative consistency. Unfortunately, decisions in cases involving irrevocable trusts can often depend on who the hearing officer is that was assigned to the case. The agency and its administrative adjudicatory subsidiary, the Board of Hearings, are acting in violation of law by not comparing and explaining prior eligibility determinations and fair hearing decisions.

In Fair Hearing Decision 1402188, decided on November 10, 2014, in approving an irrevocable trust, Hearing Officer Christopher S. Taffe wrote on page 15:

> "I conclude that under the terms of the Trust, there is no evidence that there is any "portion" of the Realty Trust which is "payable" to the Appellant; I will note that while the regulation in 130 CMR 520.023(C)(1)(d) is somewhat vague as to what "available" means in terms of the former home, the fact that the entire subsection in the regulation at 130 CMR 520.023(C)(1) is titled "Portion Payable" suggests that, for there to be a finding of countability and availability, there must be some circumstances in the trust language which gives an LTC applicant some colorable claim and ability to receive some form of payment from the resource in the trust corpus. This is also consistent with 42 U.S.C. §1396p(d)(3)(B)(ii),

[7] Under the doctrine of offensive issue preclusion, also known as offensive collateral estoppel, the agency is prohibited from continuing to bring up issues where its position had already been ruled against. Bellermann v. Fitchburg Gas and Electric Light Company, 470 Mass. 43, 60 (2014).

quoted by MassHealth in its memorandum, which uses the phrase "...payment from the trust ..." to describe the "any circumstances" test."

In Fair Hearing Decision 1404746, decided March 30, 2015, Hearing Officer Thomas J. Goode on pages 16-17 ruled that the home or former home of the applicant in a trust should not be treated differently than other assets:

> "I disagree with the MassHealth position that because appellant's former residence is "available" to the spouse under the terms of the Trust, it is therefore countable under 42 U.S.C. 1396p (d)(2)(A)(B) and (C) and under 130 CMR 520.023(C)(l)(d). In the case of an irrevocable trust, 42 U.S.C. 1396p(d)(3)(B) imposes the "any circumstances" test under which either income or principal can be paid to the applicant, and considers available the amount that could be paid to the individual from income or from the corpus of the trust. ... MassHealth interprets the word "available" under 520.023(C)(l)(d) to include the equitable title retained under the life estate interest that allowed Appellant and the spouse the right to use the property during their lifetime. The MassHealth position implies that by retaining a life estate interest in the former home under a trust the former … home becomes countable. However, regulation 130 CMR 520.023(C)(l)(d), read within the context of the "any circumstances" test at 42 U.S.C.l396p(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. ... There is no preclusion under either federal law or MassHealth regulations restricting an applicant from retaining a life estate interest in the former residence. Therefore, it would be inconsistent to determine that the former home held in Trust is automatically countable under 520.023(C)(l)(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 the benefit of the applicant. … As I have found that there are no such circumstances under the terms of the Trust that allow the sale of the former home such that the proceeds, i.e., Trust principal, could be paid to Appellant or the spouse to be used for the benefit of the applicant/individual, the former home is not countable."

In Fair Hearing Decision 1509625, dated November 2, 2015, Hearing Officer Thomas J. Goode analyzed the new position of the Office of Medicaid regarding Section 3259.1 A.6 of the State Medicaid Manual and soundly rejected the legal argument as a matter of law:

> "Assuming the right to occupy the property is properly considered a disbursal, 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. 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.

> … 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."

The Office of Medicaid chose not to bring the fair hearing decisions in Appeals 1402188, 1404746 and 1509625 to the attention of the Hearing Officer, in violation of its duty of administrative consistency. It is a violation of the duty of administrative consistency to continue to issue eligibility determinations that both ignore and are inconsistent with the previous fair hearing decisions of the agency.[8]

The Director of the Office of Medicaid had the right to order rehearings in Appeals 1402188, 1404746 and 1509625, but did not do so, and let those decisions stand. Thus, where a fair hearing is the final decision of the agency on a particular legal issue or set of facts, and where the agency has a duty of administrative consistency, it is a violation of the Appellant's rights, including Equal Protection under both the United States and Massachusetts Constitutions, to receive a different result than the appellants in those cases on the issue of the interpretation of the word "available" in MassHealth trust regulations.[9] In addition, there may be many more hearing decisions that are unknown to the Appellant on the issue of whether a home being lived in by a MassHealth applicant is "available," and the lawyer representing the Office of Medicaid has an ethical duty, under Massachusetts Rules of Professional Conduct, Rule 3.3(a), to disclose those fair hearing decisions and explain any similarities or differences therein.[10]

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[8] "The principles of claim preclusion and issue preclusion … apply both to administrative boards and to courts." Lopes v. Board of Appeals of Fairhaven, 27 Mass. App. Ct. 754, 755 (1989) "Courts routinely apply collateral estoppel to issues resolved by agencies." Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise 13.4 at 260 (1994).

[9] The Office of Medicaid is failing to fulfill the agency's duties, where under 42 C.F.R. 435.901, "[t]he Medicaid agency's standards and methods for determining eligibility must be consistent with the objectives of the program and with the rights of individuals under the United States Constitution, the Social Security Act, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and all other relevant provisions of Federal and State laws." The Office of Medicaid has a duty under all of these laws to treat all MassHealth applicants fairly and consistently, yet has made no attempt to reconcile its fair hearing decisions on similar facts and issues.

[10] "Rule 3.3(a)(3) refers to "legal authority," which should be understood to include not only case law precedents, but also statutes, ordinances, regulations, and administrative rulings. Indeed, the duty to reveal the latter kinds of authority is of greater practical significance, precisely because they are less likely to be discovered by the tribunal itself." Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, s. 29.11, at 29-16 (3rd ed. 2000). "Any ethical and procedural obligation of a private attorney to be fair to opponents and candid with the court is enforceable when the litigant is represented by an attorney for the government. As a United States Attorney General put it more than a hundred years ago, "in the performance of . . . his duty . . . he is not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and legal obligations." 6

(10) The State Medicaid Manual Requires the Office of Medicaid to Consider and Follow SSI Law in Its Eligibility Determinations Regarding Trusts

In 1994, the Health Care Financing Administration, now known as the Centers for Medicare and Medicaid Services, issued HCFA Transmittal Letter 64, which eventually became part of the State Medicaid Manual, which is binding on the States by contract. The Foreword to the State Medicaid Manual, at B.1., states:

> "Contents.-- The manual provides instructions, regulatory citations, and information for implementing provisions of Title XIX of the Social Security Act (the Act). Instructions are official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies. This authority is recognized in the introductory paragraph of State plans."

In section 3259.6 D. of the State Medicaid Manual, states are instructed to apply SSI law and principles in their Medicaid eligibility determinations involving trusts:

> "1. Payments Made From Revocable Or Irrevocable Trusts to or on Behalf of Individual.--Payments are considered to be made to the individual when any amount from the trust, including an amount from the corpus or income produced by the corpus, is paid directly to the individual or to someone acting on his/her behalf, e.g., a guardian or legal representative.
> …
> NOTE: A payment to or for the benefit of the individual is counted under this provision only if such a payment is ordinarily counted as income under the SSI program. (emphasis added)"

In violation of this section of the State Medicaid Manual, the Office of Medicaid never made any eligibility determination that usage of the Appellant's home caused it to be treated as income under the SSI program.

The Office of Medicaid violates federal law whenever it utilizes any eligibility methodology that is more restrictive than that used by the SSI program:

Ops. Atty. Gen. Office and Duties of Attorney General 326, 334 (1854) (Caleb Cushing to the President)." Zimmerman v. Schweiker, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983). "[C]ounsel for the government, no less than their colleagues in the private sector, are bound by the same obligations to the court. There is, indeed, much to suggest that government counsel have a higher duty to uphold because their client is not only the agency they represent but also the public at large. Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1981) ("A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.")." Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983). (emphasis added)

> "In determining income and resource eligibility for Medicaid, states may not employ a methodology which renders an individual ineligible for Medicaid where that individual would be eligible for SSI. See 42 U.S.C. § 1396a(r)(2)(A)(i). In addition, states must use reasonable standards for determining eligibility which only take into account income and resources which are available to the recipient and which would not be disregarded in determining eligibility for SSI. 42 U.S.C. § 1396a(a)(17). For SSI purposes, if an individual has no authority to liquidate a property right, it is not considered an "available resource." 20 C.F.R. § 416.1201(a)(1). Social Security Administration guidance further explains that a trust is an "available resource" only if the beneficiary has the legal authority to compel the use of trust assets for her own support and maintenance. See Social Security Administration, Program Operating Manual System ("POMS") § S01120.200(D)(2)." Brown v. Day, 434 F. Supp. 2d 1035, 1037-38 (D. Kan. 2006).

See also Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012), 42 U.S.C. § 1396a(r)(2), 42 U.S.C. § 1396a(a)(10)(C)(i)(III), 42 C.F.R. § 435.601, and Fair Hearing Decision 1102569, where the Office of Medicaid has already conceded that it is bound by the doctrine of SSI comparability.

There is no section in SSI law, SSI regulations or the Program Operations Manual System ("POMS") of the Social Security Administration that would result in the Appellant's home in an irrevocable trust being deemed countable based on its usage, and the Hearing Officer made no such finding or even considered SSI law. Under the SSI program, if an individual's home is in a trust of which the individual is a beneficiary and the individual uses it, it does not count as in-kind support and maintenance income. Further, a home or former home held in an irrevocable trust is not considered a resource under SSI law and regulations. The term "resources" is defined for SSI purposes at 416 C.F.R. 1201 as "cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." The SSI regulation further provides:

> "If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse)." 20 C.F.R. § 416.1201(a)(1)."

The typical response by the Office of Medicaid to this SSI issue is to deflect attention from the real issue by pointing out that SSI caseworkers are instructed in the POMS not to make Medicaid eligibility determinations involving trusts, but such a response lacks merit. First, the POMS does not have the legal authority to override specific federal Medicaid law at 42 U.S.C. § 1396a(r)(2) and 42 U.S.C. § 1396a(a)(10)(C)(i)(III) requiring that Medicaid not be more restrictive than SSI. Second, Social Security workers are directed in the POMS not to make Medicaid eligibility determinations, because, although Medicaid cannot be more restrictive than SSI, it can be less restrictive, and the State Medicaid Manual backs up this point:

> "[I]n determining whether and how a trust is counted in determining eligibility, you may apply more liberal methodologies for resources which you may be using under §1902(r)(2) of the Act." State Medicaid Manual, Section 3257.B.4.

The agency appears to lack concern for the law where it continues to point to two sentences in one area of the State Medicaid Manual yet ignores other sentences in the same area.

(11) Exhibits

The following exhibits are attached hereto and incorporated herein to supplement this brief and substantiate some of the major points made herein.

Exhibits 1-4 highlight some points made about federal law. Exhibit 1, 42 CFR 431.210, shows that the agency must provide the reasons for the denial, not just citations to MassHealth regulations. Exhibit 2, a portion of 42 USC 1396a, shows that MassHealth is not allowed to be more restrictive but can be less restrictive than federal SSI law. Exhibit 3, State Medicaid Manual section 3257.B.4., also shows that MassHealth cannot be more restrictive but can be less restrictive than federal SSI law. Exhibit 4, State Medicaid Manual section 3259.6.D., shows that a trust cannot be found countable unless it would be treated as income under SSI law.

Exhibits 5-6 highlight some points made about Massachusetts law. Exhibit 5, M.G.L. c. 203D, ss. 3 and 13, show that trust receipts, including its initial funding, are presumed to be principal. Exhibit 6, M.G.L. c.118E, s. 31, shows that the Massachusetts legislature approved the existence of income-only irrevocable trusts by limiting estate recovery to a deceased MassHealth recipient's probate estate.

Exhibits 7-8 show the involvement of the Office of the Attorney General with agencies and nursing homes. Exhibit 7, selected pages from the Manual on Conducting Administrative Adjudicatory Proceedings, explains that every Massachusetts agency has a duty to explain its conflicting decisions. Exhibit 8, 940 C.M.R. 4.09, shows that nursing homes are required to render services pending the exhaustion of MassHealth administrative remedies, or else they could be sued for damages and costs under M.G.L. c. 93A.

Exhibits 9-12 are four Massachusetts cases, Cohen, Guerriero, Heyn and Anagnoston, that ratify some of the Appellant's major points of law.

Exhibits 13-15 reflect the agency's inconsistent, unexplained history on MassHealth trust issues. Exhibit 13 is the agency's brief in the Doherty case in Superior Court, wherein the agency took the official legal position that a trust must be read as a whole. Exhibit 14, which includes many pages from the agency's past regulations and the Massachusetts Register from 1999-2013, shows that from October 1, 1999 through December 31, 2013 the word "available" had a definition that the agency now pretends never existed. Exhibit 15, the agency's 1992 and last-known position statement on

federal Medicaid trust law, shows that the agency wanted to treat a home that was distributable to the settlor as countable so that a trust could not be used to avoid an estate recovery claim against a home.

Exhibits 16-23 are some fair hearing decisions mentioned herein, 1409399, 1404746, 1509625, 1102569, 1402188, 1516247, 1602421 and 1601959, that seem to be on point. Exhibit 24 is fair hearing decision 1306280, which was reversed by Heyn. Exhibits 25-29 are five more fair hearing decisions from recent months, 1600434, 1600653, 1602142, 1603821 and 1604346, which found a MassHealth applicant's home in a trust is not countable merely because it is available for usage by the applicant.