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To: Lindsay Gallant – Taunton MEC

From: Amy Dybas – Director Member Services Policy Implementation

From: Pamela Worstell – Assistant General Counsel

Date: 11/14/2016

Re: [REDACTED]

You have asked for a legal opinion regarding the treatment of the [REDACTED] Realty Trust (“Realty Trust”) and [REDACTED] 2004 Irrevocable Trust (“Irrev. Trust”) arrangement in determining the eligibility of the applicant, [REDACTED].

RECOMMENDATION:

- 1) The Trust is countable.
- 2) The applicant should be informed that if the home is removed from the Trust and she regains ownership, then it will be reviewed under the rules pertaining to a home held outside of Trust.

FACTS:

The applicant and spouse established the Trust arrangement in 2004 by transferring their home to the Realty Trust. The Irrev. Trust is the beneficiary of the Realty Trust.

REALTY TRUST

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

The applicant and spouse deeded their home to the Realty Trust in 2004. The applicant and spouse are named as Trustee under the Trust.

Under the deed, they reserved, *"the right to the use and occupancy of the premises during their respective lifetimes, without power of partition, with [REDACTED] and [REDACTED], or the survivor of them, to pay for all maintenance and repairs, water and sewer charges, insurance charges and taxes relating to said premises."*

Under 1. *"... The term "Beneficiaries" wherever used herein shall mean the beneficiary or beneficiaries listed in the Schedule of Beneficial Interests this day executed and filed with the Trustee or in the revised Schedule of Beneficial Interests, if any from time to time executed and filed with the Trustee.....Any Trustee may without impropriety become a beneficiary hereunder and exercise all rights of a beneficiary with the same effect as though the Trustee were not Trustee."*

Under 3. *"The Trustee shall have no power to deal in or with the Trust Estate except as directed by the beneficiaries..."*

Under 4. Of the Trust, *"the Trust may be terminated at any time by the holder or holders of that percentage of the beneficial interests herein specified below by notice in writing to the Trustee and the other beneficiaries..... In the case of any such termination, the Trustee shall transfer and convey the specific assets constituting the Trust Estate, subject to any leases, mortgages, contracts, or other encumbrances on the Trust Estate, to the beneficiaries in proportion to their respective interests hereunder. The percentage of the beneficial interests required to terminate the Trust shall be not less than one hundred percent (100%)."*

Under 5. *"...This Declaration of Trust may be amended from time to time by an instrument in writing signed by the holder or holders of that percentage of the beneficial interests herein specified below and acknowledged by one or more of such Trustees or beneficiaries....The percentage of beneficial interests required to amend the Trust shall be not less than one hundred percent (100%)."*

Under 12. *"Notwithstanding anything to the contrary... neither [REDACTED] nor [REDACTED] 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 trust9s0, and nothing contained herein shall override the irrevocability of said trust(s)."*

Under the Schedule of Beneficial Interest, the Realty Trust lists as Beneficiary:

[REDACTED]

[REDACTED] and

[REDACTED]
Trustees of [REDACTED] 2004 IRREVOCABLE TRUST

The schedule of beneficiaries states, "Under no circumstances shall the principal of the [REDACTED] Realty Trust or the [REDACTED] 2004 Irrevocable Trust ever be available for distribution to [REDACTED] or [REDACTED]."

[REDACTED] 2004 IRREV. TRUST

The Trust was established in 2004 by the applicant and spouse who are listed as Donors. The daughter, applicant and spouse are listed as Trustee.

Under 3.1 The applicant 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." The applicant and spouse, "each also reserve the power, exercisable at any time from time to time by written instrument delivered to the Trustees during such person's lifetime, to appoint any articles of tangible personal property, outright or upon trusts, conditions or limitations, to any one or more of the legatees."

Under 3.2, the applicant and spouse, "each reserve the power, exercisable at any time or from time to time by written instrument delivered to the Trustees during such person's lifetime to appoint any part or all of the principal of the Trust Fund, outright or upon trusts, conditions or limitations, to charitable or non-profit organizations other than governmental entities."

Under 3.4 the applicant and spouse, "each reserve the right to alter provisions relating to the successor Trustees in paragraph 2.1".

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

Under 3.7 Neither the applicant or spouse retains any power or authority whatever to revoke or amend any provision of this Agreement of Trust.

Under 4.1 During the life time of the applicant and spouse, "the Trustees shall distribute, to or for the benefit of [REDACTED] and [REDACTED] all of the net income of the Trust Fund. If the Trust Fund contains real estate or a mobile home, the income of the Trust Fund

shall be applied first to all expenses associated with maintaining or repairing such asset, and the Trustees are only authorized to distribute the net income after such expenses have been paid."

Under 4.2, during the life time of the applicant and spouse, the Trustee may distribute principal to their daughter and son in law via their power of appointment under 3.2 in their sole discretion.

Under 4.3, *Upon the death, during the lifetime of the applicant and spouse, of both the donor's daughter and son in law, then the applicant and spouse shall each have a general power of appointment over the Trust fund, exercisable at anytime by written instrument delivered to the Trustees during such person's lifetime. The exercise of such power shall be personal to them, and may not be exercised by a guardian, conservator, Attorney in fact, or other fiduciary or agent.*

Under 6.11 *the Trustee has the power "to collect rents and other profits from real estate, and to pay all carrying charges thereon and make repairs thereto".*

ANALYSIS:

Under MassHealth regulations:

Any portion of the principal of or the income from the principal of an irrevocable Trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset. 130 CMR 520.023(C)(1)(a).

The federal law from which the MassHealth regulation is derived states:

*"IF there are any circumstances under which **payment from the trust could be made to or for the benefit of the individual**, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered **resources available to the individual**". 42 USC 1396p(d)(3)(B)(i).*

Under the instant Trust arrangement there are several specific circumstances where payment of principal can be made to or for the benefit of the applicant notwithstanding general language in the schedule of beneficiaries stating that the principal is not available to the applicant and spouse.

For example under 1. of the Realty Trust, any Trustee may become a beneficiary. Under 4. of the Realty Trust, the beneficiaries can terminate the Trust. Accordingly, under these two

provisions, the applicant and spouse could become 50% beneficiaries of the Realty Trust (along with the Irrev. Trust). In the event the beneficiaries terminate the Trust, the applicant and spouse would receive at least 50% of the Trust corpus.

Additionally, under 4, the Realty Trust could be terminated, and the corpus (the home) would go to its beneficiary, the Irrev. Trust. Under 3.1 and 3.5 of the Irrev. Trust, the applicant has a right to live in any property held in the Trust and to receive rental income from such real property. The Center for Medicare and Medicaid Services ("CMS", formerly the Health Care Financing Agency, "HCFA"), the federal agency tasked with administering the Medicaid program issued guidance which specifically states that a "right to use and occupy" property under a Trust is a "payment" within the meaning of the Medicaid Trust law provisions above. Specifically, CMS states at page 3-3-109.25.8 of HCFA Tr # 64 :

"Payment – For purposes of this section a payment from a trust is any disbursement from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, *as well as noncash or property disbursements, such as the right to use and occupy real property.*"

Under this circumstance, the Trust provides for circumstances where the entire Trust corpus can be used *for the applicant's benefit*. This is the right to occupy the home held in Trust. This is a circumstances where "payment" of corpus could be made for the applicant's benefit within the meaning of the federal law and makes the corpus available and a countable asset.¹ Neither federal nor state Medicaid Trust law require that the applicant "own" Trust corpus, or that the applicant's right to use the real property be valued as a "life estate". The Medicaid Federal Trust law, requires that *any portion* of the Trust property where payment could be made under the Trust for the applicant's benefit be considered *available* as an asset. The definition of "payment" encompasses a "right to use" as stated above. Accordingly, since under the language of the Trust, the entire corpus can be used *for the applicant's benefit*, the entire Trust is payable, available and countable. This result is consistent with the intent of the Medicaid program, since otherwise, individuals could circumvent Medicaid countability and estate recovery rules pertaining to real property and Trust assets by simply transferring their

¹ See Doherty v. Director of Office of Medicaid, 74 Mass. App. Ct. 439, (2009) In that case, notwithstanding the trust's general prohibition against corpus distributions, as herein, the judge ruled the trust was countable, based on other trust sections which provided otherwise and the Trustees retained powers. These other provisions and powers evidenced that the applicant had not insulated herself from her assets for Medicaid eligibility purposes. Likewise, in the instant case, the applicant and spouse have retained numerous powers over the Trust property, including the power to disinherit their daughter/Trustee and son in law through their special powers of appointment and the power to change successor Trustees. They also have the right to benefit from the property and can live in it and receive the income from it.

home and assets into a Trust, while enjoying the usage rights of such property. Therefore, the applicant's right to occupy a home while held in the Trust constitutes circumstances under the Trust where the entire corpus could be paid for the benefit of the applicant within the meaning of Medicaid law. 42 USC 1396p(d).² Also see Daley v. Sudders Civil Action No. 15-CV-0188-D, Worcester, December 23, 2015; Nadeau v. Thorn, Superior Court No. 14-CV-02278C, Worcester, December 29, 2015. Both these cases held that an applicant's retained life estate, and ability to use the home, rendered the Trust countable.

Additionally, under 4.3 of the Irrev Trust, the applicant and spouse reserved a general power of appointment for themselves, in the event their daughter and son in law die during their lifetime. Accordingly, under this general power of appointment, the applicant and spouse can reappoint the Trust property back to themselves. This would be another circumstance rendering the Trust principal distributable and countable to the applicant.

Accordingly, the Trust is countable, since there are circumstances where corpus payments can be *made to or for the benefit* of the applicant. 42 USC 1396p(d).

If you have any questions regarding this legal opinion, please contact Pamela Worstell, Assistant General Counsel at Pamela.Worstell@ehs.state.ma.us or 617-573-1684.

² Likewise, the federal Trust law provisions specifically disallow the home countability exclusion, which otherwise would apply, when a home is held in Trust. See 42 USC 1396p(h)(5).