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To: Jared Krok – Springfield MEC
From: Amy Dybas – Director Member Services Policy Implementation
By: Katy Schelong, Assistant General Counsel
Date: January 20, 2017
Re: [REDACTED] Appeal No. 1615211

The applicant, [REDACTED] is [REDACTED] years old, a resident of a nursing facility, and applied for long-term care benefits. The applicant's husband, [REDACTED] passed away.

Revocable Trust of [REDACTED]

Apparently in 1972, the applicant's husband established, during his lifetime, the "Revocable Trust of [REDACTED]" which is a Medicaid Qualifying Trust. 130 CMR 520.022(B). The relevant MassHealth regulation reads in part:

(B) Medicaid Qualifying Trust.

- (1) A Medicaid qualifying trust is a revocable or irrevocable trust or similar legal device, created or funded by the individual or spouse, other than by a will, under which
- (a) the individual is a beneficiary of all or part of the discretionary or required payments or distributions from the trust; and
 - (b) a trustee or trustees are permitted to exercise any discretion to make payments or distributions to the individual.

- (2) The maximum amount of payments or fair-market value of property that may be permitted under the terms of the trust to be distributed to the individual assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the individual is countable in the determination of eligibility...

The "Revocable Trust of [REDACTED]" is a trust created and funded by the applicant's spouse. 130 CMR 520.023(B)(1). The applicant's late husband was the Settlor. The original Trustees were [REDACTED] and the Third National Bank. Although in accordance with the Fourth Article the Trust was revocable by the husband during his lifetime, upon his death, the Trust became irrevocable. In accordance with the Ninth Article, after the husband's death, the Trust was divided into two shares, referred to as Trust A and Trust B. The applicant is a Beneficiary of the Revocable Trust of [REDACTED] and its two shares. 130 CMR 520.022(B)(1)(a). According to the documents provided, there are no longer any assets in Trust A. As of July 31, 2016, the assets held in a U.S. Trust account titled in the [REDACTED] Revocable Trust, Trust B, were valued at \$368,436.99.

¹ See generally Health Insurance Portability and Accountability Act ("HIPAA"), P.L. 104-191; 42 U.S.C. § 1320d-2; 42 USC § 1396a(a)(7); 42 USC § 1320d-2, -4; Privacy Act of 1974, 5 U.S.C. § 552a Act; 42 C.F.R. § 164.508; 42 CFR § 431.300-307; 42 CFR § 483.10; 42 CFR § 435.945(f)(4); 45 CFR 164 *et seq.*; 20 CFR § 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).

Pursuant to Paragraph B(1) of the Ninth Article, the Trustee shall pay from Trust B to the applicant the net income, at least quarterly. 130 CMR 520.022(B)(1)(b). In addition, Paragraph B(1) of the Ninth Article gives the Trustees' discretion "...to pay or expend such amount or amounts of the Trust Estate as the Trustees shall determine to be necessary for advisable to provide for the support, maintenance, comfort and medical expenses of the Settlor's said wife..." from Trust B. 130 CMR 520.022(B)(1)(b); *see also generally Victor v. Massachusetts Executive Office of Health & Human Services*, Mass. App. Ct. 1:28 Decision 09-P-1361 (July 21, 2010)(Court upheld the Agency's determination that a trust established by the applicant's husband during his lifetime but funded by the husband's Last Will & Testament, was nonetheless countable to the applicant in an eligibility determination).. Since the Trustee has discretion to distribute principal to the applicant and for her maintenance, comfort and medical expenses, the principal is fully countable. 130 CMR 520.022(B)(2)("The maximum amount of payments...that may be permitted under the terms of the trust to be distributed to the individual assuming the full exercise of discretion by the trustee...for the distribution of the maximum amount to the individual is countable in the determination of eligibility.").

Therefore, the [REDACTED] Trust is fully countable in the applicant's Medicaid eligibility determination. 42 U.S.C. § 1396a(k); 130 CMR 520.022(B)(2); *Cohen v. Comm'r of the Div. of Med. Assist.*, 423 Mass. 399, 413 (1996) ("If there is a peppercorn of discretion, then whatever is the most the beneficiary might *under any state of affairs* receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility."); *Lebow v. Comm'r of Div. of Med. Assist.*, 433 Mass. 171, 172 (2001)("The purpose of the statute is to prevent individuals from using trust law to ensure their eligibility for Medicaid coverage, while preserving their assets for themselves or their heirs."); *Bisceglia v. Comm'r Massachusetts Div. of Med. Assist.*, 1996 WL 655713, 4 (Mass.Super.) ("If the grantor's intent to shelter assets for other than Medicaid purposes is viewed as a legitimate device for preserving plaintiff's eligibility for Medicaid benefits, then the result would have a disastrous effect on the future of Medicaid. Other applicants would be able successfully to argue that their trusts were not disqualifying because the grantor had harbored a purpose distinct from Medicaid eligibility preservation. The trust would once again become an effective tool permitting an otherwise ineligible person to hide assets and therefore qualify for benefits. This court declines to breathe life into a device so inconsistent with the legislative purpose."). The SJC in *Cohen* very clearly explained that 42 U.S.C. § 1396a(k)(1) specifies how much is deemed available when determining eligibility: "the greatest amount that the trustees in *any set of circumstances* might have discretion to pay out to the beneficiary." (Emphasis added). 423 Mass. at 413. It is irrelevant whether the set of circumstances exists or if the Trustee wants to exercise authority or discretion under the instrument to distribute principal because under controlling Medicaid case law, the maximum amount that may be made available at any time, or that may be used for the benefit of the applicant at any time, is countable without regard to any limiting provisions.² *Id.*; *Lebow v. Comm'r of Div. of Med. Assist.*, 433 Mass. 171, 177-178 (2000)("The issue is not whether the trustee has the authority to make payments to the grantor at a particular moment in

² Courts in other jurisdictions likewise disregard provisions, like those in this Trust, that seek to artificially cut off trustee discretion in order to render assets not countable. *See In re Ruby Owen*, 2012 Ark. App. 381 (2012); *Rosckes v. County of Carver*, 783 N.W.2d 220, 225 (2010); *Vincent v. Department of Human Services*, 331 Ill. Dec. 314, 322 (2009).

time. Rather, if there is *any* state of affairs, at *any* time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets count in calculating the grantor's Medicaid eligibility." (Emphasis in original).

Irrevocable Trust:

On June 29, 2006, the applicant established the Irrevocable Trust. 130 CMR 520.023. MassHealth regulation, 130 CMR 520.023(C) concerning irrevocable trusts established after August 11, 1993 states:

(C) Irrevocable Trusts.

(1) Portion Payable.

(a) Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset.

(b) Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income.

(c) Payments from the income or from the principal of an irrevocable trust made to another and not to or for the benefit of the nursing-facility resident are considered transfers of resources for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(d) The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).

(2) Portion Not Payable. Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could not be paid under any circumstances to or for the benefit of the nursing-facility resident will be considered a transfer for less than fair-market value and treated in accordance with the transfer rules at 130 CMR 520.019(G).

The applicant is the Grantor of her Irrevocable Trust. The Trustees are the applicant's children, and . The "Schedule of Benefits," executed by the applicant-Grantor on June 29, 2006, states that after the applicant's death, the Trust property is to be distributed to the applicant's four children. *See also* Trust, Second Article F (allows for revisions to the Schedule, "...according to the then current Schedule..."). By a deed dated June 29, 2006, the applicant transferred for no consideration her home located at , Massachusetts; no life estate was reserved under the deed. In evaluating trusts such as the one here, the federal Medicaid statute provides that the countability of a self-settled inter vivos trust is made without regard to, among other things, whether the trustees "have or exercise any discretion under the trust" and "whether distributions may be made from the trust." 42 U.S.C. §1396p(d)(2)(C)(ii) and (iii); *see generally* *Lewis v. Alexander*, 685 F.3d 325, 333 (3d Cir. 2012)("Congress made a specific choice to expand the types of assets being treated as trusts and to unambiguously require States to count trusts against Medicaid eligibility. Its primary objective was unquestionably to prevent Medicaid recipients from receiving taxpayer-funded health care while they sheltered their own assets for their benefit and the benefit of their heirs..."); *Family Trust of Massachusetts, Inc. v. United States*, 722 F.3d 355, 357 (2013)

("Under statutory 'trust-counting' rules, a trust corpus is generally counted as an asset for the purpose of the eligibility limits." (Citations omitted)).

Paragraph A of the Second Article provides that the Trustees have discretion to distribute the net income of the Trust to the applicant. 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(a). Accordingly, the income or potential income that could be generated from the principal is considered a countable asset in a Medicaid eligibility determination, and the applicant is not financially eligible because she does not meet the \$2,000 asset limit.³ 42 U.S.C. §1396p(d)(3)(B)(i); 130 CMR 520.023(C)(1)(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.") (emphasis added); see also *State Medicaid Manual*, HCFA Transmittal 64, §3258.6 ("Treatment Of Income As Asset. – Under OBRA 1993, income, in addition to resources, is considered to be an asset for transfer (and trust) purposes."); *State Medicaid Manual*, HCFA Transmittal 64, § 3259.1(A)(8) ("Payment" from a trust is not limited to actual cash disbursements and includes other rights in the principal the applicant has under the trust); *State Medicaid Manual*, §3259.6(D) ("...Payments made for the benefit of the individual are payments of any sort, including an amount from the corpus or income produced by the corpus, paid to another person or entity such that the individual derives some benefit from the payment... Payments to maintain a home are also payments for the benefit of the individual."). The position that available-but-not-yet-paid income should be treated as an asset subject to the cap of \$2,000 has been endorsed by the Massachusetts Appeals Court. In *Ford v. Commissioner of Medical Assistance*: 1) the MassHealth applicant placed her home in trust prior to the look-back period (the house was sold and the trust contained \$200,000); the applicant was indisputably an income beneficiary; 3) the parties disagreed whether trust principal was available to the applicant. *Ford v. Comm'r Div. of Med. Assist.*, Mass. App. Ct. 1:28 Decision 08-P-2091 (October 19, 2009). The Appeals Court ultimately upheld MassHealth's determination that the principal was available to the applicant, placing her over the asset limit (the court held it did not matter if there was a time restriction on the trustee's ability to pay principal to the applicant because the any set of circumstances test concerned whether payments could be made at any time in the future). Significantly, the *Ford* case also has a footnote regarding the applicant's status as an income beneficiary which endorses the argument posed above: "the applicant appears to concede that trust income can currently be distributed to her and that this is 'countable' toward the \$2,000 threshold. On the present record, it is not entirely clear why this alone does not render the applicant ineligible." *Id.*, at fn1.

In addition to the Appeals Court, superior court cases have also affirmed this line of reasoning. The best explanation came from the court in *Sands v. Commonwealth of Massachusetts, EOHHS, Office of Medicaid SUCV2013-3537-A*, p.p. 10-13 (April 28, 2014) (Wilkins, J.):

The Trust had more than \$391,000 in assets. Even 10% per year would be \$39,100, and shopping for a favorable annuity would undoubtedly yield a higher return to [the grantor] . . . While the Trust provisions quoted by the hearing officer (Article XIV.I) may not support her inclusion of the entire Trust in countable

³ If during the past five years Trust income was paid to someone other than the applicant and/or added to the principal and if the principal was not countable, these would be disqualifying transfers. 130 CMR 520.023(C)(1)(c) and 130 CMR 520.019(G).

assets, the Trustee certainly has discretion to pay [the grantor] substantially more than the \$2,000 allowed.”

Thus, by the Second Article alone, the applicant is not financially eligible. 130 CMR 520.003(A)(1); 130 CMR 520.023(“Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual.”). While Paragraph A of the Second Article also states that the Trustees shall not distribute principal to or for the benefit of the applicant during her lifetime, under Paragraph B of the Second Article, the applicant reserved the personal right, irrespective of the Trustee and its discretion, to reacquire Trust assets by substituting assets of an equivalent value. This is an “any circumstance” under the Irrevocable Trust where the principal is available for the benefit of the applicant, by the applicant herself. 130 CMR 520.023(C)(1)(a). In a Medicaid eligibility determination, it is irrelevant whether the applicant needs to, wants to, or is able to exercise this authority. The fact that under the terms of the Trust such an option exists renders the principal available and countable, which several Courts have acknowledged:

Under the post-1993 version of the statute, for purposes of determining eligibility for Medicaid benefits, “countable assets” include any portion of the trust principal that could “under any circumstances” be paid “to or for [the] benefit [of]” Roche.⁷ *Doherty, supra*. Such circumstances need not have occurred, or even be imminent, in order for the principal to be treated as “countable assets”; it is enough that the amount could be made available to Roche under any circumstances. See *Lebow, supra* at 177-178, 740 N.E.2d 978

Heyn v. Director of the Office of Medicaid, 48 N.E.3d 480, 483-484 (April 15, 2016).

Likewise, the New Hampshire Supreme Court stated in upholding the Medicaid Agency’s determination that a Trust established and funded by the applicant, but under which the applicant was not named as a beneficiary as to either income or principal:

Given the facts of this case, we cannot say that there are no circumstances under which payments from the Trust could be made “for the benefit” of the applicant. 42 U.S.C. § 1396p(d)(3)(B)(i); see *Doherty*, 908 N.E.2d at 392. “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*, 908 N.E.2d at 393. The Trust in this case is not such a vehicle. In our view, the Trust, as structured, allows the applicant “a degree of discretionary authority that would . . . permit [her] to enjoy her assets, preserve those assets for her heirs, and receive public assistance, to, in effect, have her cake and eat it too.” *Id.* (quotation and brackets omitted). Congress has declared a contrary intent — “that Medicaid benefits be made available only to those who genuinely lack sufficient resources to provide for themselves.” *Id.* “We perceive no reason in this case to deviate from that mandate.” *Id.*

Petition of Estate of Thea Braiterman (New Hampshire Department of Health and Human Services) No. 2015-0395 (July 12, 2016) (Emphasis in original).

In addition, Pursuant to Paragraph C(1) of the Second Article, the applicant has the right to reside in the [REDACTED] real estate during her lifetime, and in accordance with Paragraph (2), the real estate may not be sold without the applicant's written consent. This is another "any circumstance" rendering the principal countable. 130 CMR 520.023(C)(1)(a) and (d). In accordance with the Medicaid statute, regulatory guidance and MassHealth regulations, the real estate held in the applicant's irrevocable trust was fully countable in her eligibility determination. 42 U.S.C. §1396p(d)(3)(B)(i); *State Medicaid Manual*, HCFA Transmittal 64, § 3259.1(A)(8) ("... A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property."). 130 CMR 520.023; 130 CMR 520.023(C)(1)(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)."); *Doherty v. Dir. of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009) (Provision purporting to disallow distributions of principal to the applicant was disregarded, in part due to the Plaintiff's retained right to occupy the real estate and veto its sale); see also *Ford v. Comm'r Div. of Med. Assist.*, Mass. App. Ct. 1:28 Decision 08-P-2091 (October 19, 2009) (Upholding the Agency's determination that all trust assets were countable and rejecting plaintiff's argument that the trust principal was not countable because the trustee did not currently have discretion to pay applicant principal); *Cohen v. Comm'r of the Div. of Med. Assist.*, 423 Mass. 399, 416, 418, 419-420, 424 (1996) (Countable assets in Plaintiff's trusts included all amounts available to the applicant, assuming exercise of the full discretion of the trustees, while disregarding any limitation on discretion); *Lebow v. Comm'r of Div. of Med. Assist.*, 433 Mass. 171, 177-178 (2000) ("The issue is not whether the trustee has the authority to make payments to the grantor at a particular moment in time. Rather, if there is *any* state of affairs, at *any* time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets count in calculating the grantor's Medicaid eligibility." (Emphasis in original). Paragraphs (D)(2) and (E) of the Second Article also allow for principal to be used for capital improvements to the applicant's home, and if the home is sold, the proceeds may be used to purchase another residence in which the applicant has the right to reside. *State Medicaid Manual*, §3259.6(D) ("...Payments made for the benefit of the individual are payments of any sort, including an amount from the corpus or income produced by the corpus, paid to another person or entity such that the individual derives some benefit from the payment... Payments to maintain a home are also payments for the benefit of the individual."). Accordingly, the income and principal of the [REDACTED] Irrevocable Trust are countable assets in the applicant's eligibility determination. 130 CMR 520.023(C)(1)(a).

On March 30, 2012, and within the five year Medicaid look-back period, the [REDACTED] real estate titled in the applicant's Trust was sold for \$290,000. The net proceeds were deposited to a UBS account. The December 2015 USB statement shows that during 2015, the value of net deposits and withdrawals was -\$12,324.20. The legal unit has no information of how the withdrawals were distributed or used. If Trust principal was distributed to or used for the benefit of the applicant, clearly the Trustees believe they have such authority. 130 CMR 520.02(C)(1)(a); 130 CMR 520.003(A)(1) ("The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Standard... may not exceed \$2,000."); 130 CMR 520.023; 42 U.S.C. §1396p(d). An applicant cannot credibly claim Trust principal is available to her, or may be used for her benefit, when she is not under a Medicaid

eligibility determination, but then claim the same Trust assets are not available or countable because taxpayer funded welfare benefits are sought. See generally *Number Three Lounge, Inc. v. Alcoholic Beverages Control Commission*, 7 Mass. App. Ct. 301, 309-310 (1979) (agency is the sole judge of credibility and weight of the evidence before it, and it is permissible to question intra-familial transactions and look to direct and circumstantial evidence to make a judgment and/or finding); *Bisceglia v. Comm'r, Div. of Mass. Div. of Med. Assist.*, 1996 WL 655713 (Mass. Super.) (1996) (Toomey, J.). Likewise, an applicant cannot reasonably expect the Agency to be bound by the terms of her Trust when she and the Trustees are not similarly bound. The applicant has not proven, and the terms of her Trust do not support a finding, that there are "no circumstances" under which the resources of the [REDACTED] Irrevocable Trust are not, and were not, available to or for the benefit of the applicant. 130 CMR 520.023.

However, if a hearing officer were to find the principal of the [REDACTED] Irrevocable Trust as non-countable, the appeal could not be approved in its entirety. In such an instance, the applicant still would not be financially eligible due to the countability of the income of the Irrevocable Trust, and the countability of the income and principal of the Revocable Trust of [REDACTED] 130 CMR 520.023(C)(1)(a); 130 CMR 520.022(B); 130 CMR 520.003(A)(1).