

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

[REDACTED]
Jewish Nursing Home of Western Mass
770 Converse Street
Longmeadow, MA 01106

Appeal Decision:	Approved; Remand	Appeal Number:	1707285
Decision Date:	SEP 22 2017	Hearing Date:	07/17/2017
Hearing Officer:	Zohra Aziz	Record Open to:	09/11/2017

Appellant Representatives:

Hyman G. Darling, Esq.; BaconWilson
[REDACTED]

MassHealth Representative:

Karyn Boutin, MEC at Springfield



The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171

APPEAL DECISION

Appeal Decision:	Approved; Remand	Issue:	LTC Excess Assets
Decision Date:	SEP 22 2017	Hearing Date:	07/17/2017
MassHealth Rep.:	Karyn Boutin	Appellant Reps.:	Step-Daughter/POA with Counsel
Hearing Location:	Springfield MassHealth Enrollment Center		

Authority

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

Jurisdiction

Through a notice dated April 6, 2017 MassHealth denied the appellant's long-term care (LTC) application for MassHealth benefits because MassHealth determined that the appellant's assets exceed program limits for MassHealth eligibility. (see 130 CMR 520.003, 520.004, 520.023 and Exhibit 1). The appellant filed this appeal in a timely manner on May 8, 2017. (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's LTC application for MassHealth benefits because MassHealth determined that the appellant's assets exceed program limits.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.003, 520.004 and 520.023, in determining that the appellant's assets exceed program limits for MassHealth eligibility.

Summary of Evidence

A MassHealth representative testified that on October 19, 2016 MassHealth received a Long-Term Care (LTC) application on behalf of the appellant. The appellant is 89 years old and entered the nursing facility on September 30, 2016. The nursing facility is seeking coverage effective October 15, 2016. Based upon verifications submitted by the appellant, MassHealth determined that the appellant has total assets in the amount of \$192,000.00 consisting of a home held in a Trust and \$1.00 held in bank account. (Exhibit 1). Through a notice dated April 6, 2017 MassHealth denied the appellant's long-term care (LTC) application for MassHealth benefits because MassHealth determined that the appellant's assets exceed program limits for MassHealth eligibility. (Exhibit 1).

The D.M.P. Trust (the Trust)¹ was established by the appellant's spouse D.M.P. on September 7, 2012. The Trust was initially funded with \$10.00. The appellant's spouse D.M.P. also transferred her home into the Trust and the Trust is currently valued at \$192,000.00 (the current value of the home).² The appellant's spouse D.M.P. is designated as the Settlor and Trustee. The appellant's spouse's four children are the primary beneficiary of the Trust. The Trust grants the appellant the right of use and occupancy during his lifetime. The appellant is referred to as "the Beneficiary" in Trust and in the Agency's legal memoranda.

In support of its position, MassHealth submitted a legal memorandum from the agency's legal unit. (Exhibit 5). The MassHealth legal unit noted and/or found fault with the following provisions of the Trust:

Article Second, provides that during the Settlor's lifetime and in the event the Property [placed in the Trust] is an asset of the Trust, the Trustees shall retain the Property in Trust for the benefit of the Settlor and Settlor's spouse T.P. [the Beneficiary] and the Trustee is directed to permit the occupancy of the Property as a home for the Settlor and the Beneficiary [the appellant]."

Article Third provides that the "Settlor reserves the right at any time or times to withdraw all or any portion of the Trust property, to remove any Trustee, to appoint new or additional Trustees, or amend or revoke this Trust in whole or in part . . ."

Article Fourth provides in part that upon the death of the Settlor, "the Trustee shall retain the Property in Trust for the benefit of the Beneficiary [the appellant] if he survives the

¹ Initials are being utilized to preserve confidentiality.

² The MassHealth representative testified that there was another Trust that was created at the same time, the T.P. Trust, which was not funded and is not at issue today.

death of the Settlor . . . If the Beneficiary survives the death of the Settlor, the Trustee is authorized and directed to permit the occupancy thereof as a home for the Beneficiary until occurrence of a Terminating event, as hereinafter defined.”

Article Fifth provides that upon the Settlor’s death, the Settlor’s daughter S.L. shall succeed as Trustee.

MassHealth determined that the Trust established by the appellant’s spouse D.M.P. is a revocable Trust. Article Third specifically authorizes the Settlor to amend or revoke the Trust in whole or part. MassHealth asserted that Medicaid law dictates that the entire principal in a revocable Trust is a countable asset. Therefore, because the Trust is revocable, the Trust assets are available to the appellant and countable in his eligibility determination. MassHealth concluded that the principal and income of the D.M.P. Trust are available to the appellant and countable in an eligibility determination. (Exhibit 5).

The appellant was represented by Attorney H.D. who asserted that the Trust is not countable. Counsel continued that the appellant’s spouse established the Trust and the appellant only had the right to use and occupy the home during his lifetime. Upon the occurrence of a terminating event, the Trustee is authorized and directed to sell the Property and distribute the net proceeds . . . in equal shares to the four beneficiaries of the Trust who are the appellant’s spouse’s four children. These are not children in common but in fact children from the appellant’s spouse’s first marriage and the appellant did not adopt her children. The appellant is not a named beneficiary but in fact only had rights limited to use and occupancy the home until the occurrence of a Terminating event. A Terminating Event shall mean any or more of the following: (i) the death of the Beneficiary (the appellant); or (ii) the Beneficiary notifies the Trustees in writing that the Beneficiary no longer desires to use and occupy the Property; or (iii) the sale of the Property upon the occurrence of (i) or (ii). The appellant is responsible for all charges incident to maintaining the home while use and occupancy of the home. The appellant is not otherwise a beneficiary of the Trust and only has legal rights of use and occupancy. The Trustee has no right under any circumstances to distribute principal to the appellant. Also that a right to reside in the property does not translate to the appellant having rights over the corpus of the Trust. This is clearly articulated in the Trust.

Counsel continued that the appellant’s spouse D.M.P. passed away on September 26, 2016. The appellant was institutionalized on September 30, 2017 (within days of her passing) and only occupied the home for a few days subsequent to his wife passing. The home is now listed for sale and any proceeds from the sale of this home will be distributed to the beneficiaries of Trust. The appellant is not a beneficiary of the Trust and will not receive any of the proceeds from the sale of the home and the home is the only asset in the Trust.

Counsel for the appellant requested an opportunity to respond to the Agency’s legal brief and was presented to him at hearing. The hearing record remained open until August 14, 2017 for Counsel and until September 11, 2017 for MassHealth to respond. (Exhibit 6). Counsel for the

appellant's submission was received timely. (Exhibit 7). MassHealth indicated that the Agency is waiving the option to respond and still maintains their initial opinion. (Exhibit 8).

In the brief submitted by Counsel for the appellant, Counsel re-iterated the appellant's position at hearing. Counsel added that MassHealth is incorrect in analyzing this Trust as Revocable Trust. Counsel agrees that the D.M.P Trust was designated as a revocable Trust, however it well established law in Massachusetts that revocable Trusts become irrevocable upon the death of the Grantor. In the case at hand, the Grantor died on September 26, 2016 at which time there was no longer a Grantor alive to revoke the Trust. The Grantor did not provide any provisions to the beneficiaries to have any rights to make any decisions within the Trust and the Revocable Trust became Irrevocable. The appellant applied for Long-Term Care services on October 19, 2016 and the Trust should have been analyzed as a Irrevocable Trust. MassHealth erred in analyzing it as a Revocable Trust. (Exhibit 7).

Findings of Fact

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

1. On October 19, 2016 MassHealth received a Long-Term Care (LTC) application on behalf of the appellant.
2. The appellant is 89 years old and entered the nursing facility on September 30, 2016.
3. The nursing facility is seeking coverage effective October 15, 2016.
4. Based upon verifications submitted by the appellant, MassHealth determined that the appellant has total assets in the amount of \$192,000.00 consisting of a home held in a Trust and \$1.00 held in bank account. (Exhibit 1).
5. Through a notice dated April 6, 2017 MassHealth denied the appellant's long-term care (LTC) application for MassHealth benefits because MassHealth determined that the appellant's assets exceed program limits for MassHealth eligibility. (Exhibit 1).
6. The D.M.P. Trust (the Trust) was established by the appellant's spouse D.M.P. on September 7, 2012 as a Revocable Trust.
7. The D.M.P. Trust was initially funded with \$10.00. The appellant's spouse D.M.P also transferred her home into the Trust and the Trust is currently valued at \$192,000.00 (the current value of the home).
8. The appellant's spouse D.M.P is designated as the Settlor and Trustee.
9. The appellant's spouse's four children are the primary beneficiary of the Trust.

10. The Trust grants the appellant the right of use and occupancy of the home during his lifetime.
11. The Grantor of the Trust, the appellant's spouse, passed away on September 26, 2016. (Testimony).
12. The MassHealth noted and/or found fault with the following provisions of the Trust:

Article Second, provides that during the Settlor's lifetime and in the event the Property [placed in the Trust] is an asset of the Trust, the Trustees shall retain the Property in Trust for the benefit of the Settlor and Settlor's spouse T.P. [the Beneficiary] and the Trustee is directed to permit the occupancy of the Property as a home for the Settlor and the Beneficiary [the appellant]."

Article Third provides that the "Settlor reserves the right at any time or times to withdraw all or any portion of the Trust property, to remove any Trustee, to appoint new or additional Trustees, or amend or revoke this Trust in whole or in part . . ."

Article Fourth provides in part that upon the death of the Settlor, "the Trustee shall retain the Property in Trust for the benefit of the Beneficiary [the appellant] if he survives the death of the Settlor . . . If the Beneficiary survives the death of the Settlor, the Trustee is authorized and directed to permit the occupancy thereof as a home for the Beneficiary until occurrence of a Terminating event, as hereinafter defined."

Article Fifth provides that upon the Settlor's death, the Settlor's daughter S.L. shall succeed as Trustee.

(Exhibit 5).

Analysis and Conclusions of Law

130 CMR 520.003: Asset Limit

(A) The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Standard, Essential, or Limited may not exceed the following limits:

- (1) for an individual — \$2,000; and
- (2) for a couple living together in the community where there is financial responsibility according to 130 CMR 520.002(A)(1) — \$3,000.

(B) The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Senior Buy-In, as described in 130 CMR 519.010: *MassHealth Senior Buy-In*, or MassHealth Buy-In, as described in 130 CMR 519.011: *MassHealth Buy-In*, may not exceed the following limits:

- (1) for an individual — in calendar year 2011, \$6,680 and, in calendar year 2012, \$6,940; and
- (2) for a couple living together in the community where there is financial responsibility according to 130 CMR 520.002(A)(1) — in calendar year 2011, \$10,290 and, in calendar year 2012, \$10,410.

130 CMR 520.004: Asset Reduction

(A) Criteria.

(1) An applicant whose countable assets exceed the asset limit of MassHealth Standard, Essential, or Limited may be eligible for MassHealth

(a) as of the date the applicant reduces his or her excess assets to the allowable asset limit without violating the transfer of resource provisions for nursing-facility residents at 130 CMR 520.019(F); or

(b) as of the date, described in 130 CMR 520.004(C), the applicant incurs medical bills that equal the amount of the excess assets and reduces the assets to the allowable asset limit within 30 days after the date of the notification of excess assets.

(2) In addition, the applicant must be otherwise eligible for MassHealth.

(B) Evaluating Medical Bills. The MassHealth agency does not pay that portion of the medical bills equal to the amount of excess assets. Bills used to establish eligibility

(1) cannot be incurred before the first day of the third month prior to the date of application as described at 130 CMR 516.002: *Date of Application*;

(2) must not be the same bills or the same portions of the bills that are used to meet a deductible based on income; and

(3) for MassHealth Essential, must be incurred on or after the effective date of the coverage type.

(C) Date of Eligibility. The date of eligibility for otherwise eligible individuals described at 130 CMR 520.004(A)(1)(b) is the date that his or her incurred allowable medical expenses equaled or exceeded the amount of his or her excess assets.

(1) If after eligibility has been established, an individual submits an allowable bill with a medical service date that precedes the date established under 130 CMR 520.004(C), the MassHealth agency readjusts the date of eligibility.

(2) In no event will the first day of eligibility be earlier than the first day of the third month before the date of the application, if permitted by the coverage type.

(D) Verification. The MassHealth agency requires the applicant to verify that he or she incurred the necessary amount of medical bills and that his or her excess assets were reduced to the allowable asset limit within required timeframes

130 CMR 520.021: Treatment of Trusts

130 CMR 520.021 through 520.024 explains how to treat the principal of and payments from a revocable or irrevocable trust established by the individual or by the spouse. 130 CMR 520.024(A) also includes trusts established by other than the individual or spouse and trusts whether or not established by will. In the event that a portion of 130 CMR 520.021 through 520.024 conflicts with federal law, the federal law supersedes.

130 CMR 520.023: Trusts or Similar Legal Devices Created on or after August 11, 1993³

The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will. 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.

(A) Look-Back Period for Transfers into or from Trusts.

(1) Look-Back Period.

(a) For transfers made before February 8, 2006, the look-back period is 36 months for trusts where all or any portion of the income or principal of an irrevocable trust can be paid to or for the benefit of the nursing-facility resident, but is paid instead to someone else.

(b) The look-back period is 60 months

(i) for transfers made on or after February 8, 2006, subject to the phase-in described in 130 CMR 520.019(B)(2), if all or any portion of the income or principal of a trust can be paid to or for the benefit of the nursing-facility resident, but is instead paid to someone else;

(ii) if payments are made from a revocable trust to other than the nursing-facility resident and are not for the benefit of the nursing-facility resident; or

(iii) if payments are made into an irrevocable trust where all or a portion of the trust income or principal cannot under any circumstances be paid to or for the benefit of the nursing-facility resident.

(2) Period of Ineligibility Due to a Disqualifying Transfer. The MassHealth agency determines the amount of the transfer and the period of ineligibility for payment of nursing facility services in accordance with the rules at 130 CMR 520.019(G).

(B) Revocable Trusts.

(1) The entire principal in a revocable trust is a countable asset.

(2) Payments from a revocable trust made to or for the benefit of the individual are countable income.

(3) Payments from a revocable trust made other than to or for the benefit of the nursing facility resident are considered transfers for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(4) The home or former home of a nursing-facility resident or spouse held in a revocable 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).

(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.

³ The regulations regarding Trusts created before April 7, 1986 and August 11, 1993 do not apply to this case. This Trust was created on September 7, 2012. (see Exhibit 5).

(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).

(D) Exemptions to the Trust Rules.

(1) Special-Needs Trusts and Pooled Trusts. Under federal trust exemption regulations at 42 U.S.C. 1396(p)(d)(4) special-needs trusts and pooled trusts as defined in 130 CMR 515.001 are not subject to the income and asset countability rules at 130 CMR 520.023(B) and (C).

(2) Revision of a Trust to Comply with the Criteria of a Special-Needs or Pooled Trust. The MassHealth agency will not deny or terminate MassHealth due to excess assets if a trust is revised to comply with the criteria of a special-needs trust or a pooled trust in accordance with the rules at 130 CMR 520.019(J).

(3) Burial Trust. A burial trust is a trust established to pay solely for various funeral and burial expenses of the individual or the spouse. An irrevocable burial trust meeting the criteria of 130 CMR 520.008(F) is not a countable asset.

130 CMR 520.024: General Trust Rules

130 CMR 520.024 applies to trusts whether or not established by will and whether or not established by the individual or spouse.

(A) Irrevocable Trust.

(1) The assets and income held in an irrevocable trust established by the individual or spouse that the trustee is required to distribute to or for the benefit of the individual are countable.

(2) Payments from the income or principal of an irrevocable trust established by the individual or spouse to or for the benefit of the individual are countable.

(3) The assets and income held in an irrevocable trust established by other than the individual or spouse that the trustee is required to distribute to the individual are countable.

(4) Payments from the income or the principal of an irrevocable trust established by other than the individual or spouse to the individual are countable.

(B) Home in Trust: Community-Based Individuals. For an applicant or member who is not a nursing-facility resident, the principal place of residence held in a revocable or irrevocable trust is a non-countable asset. A home that is not the principal place of residence is countable and not subject to the exemptions of 130 CMR 520.007(G)(2) while an asset of the trust.

(C) Home in Trust: Cure.

(1) If the MassHealth agency has denied or terminated MassHealth because the home or former home in trust is considered an excess asset, the MassHealth agency will rescind that action if the home or former home has been removed from the trust and returned to the nursing-facility resident in accordance with the full cure rules at 130 CMR 520.019(K).

(2) When the home or former home is removed from a trust, as determined by the MassHealth agency, the MassHealth agency will redetermine eligibility using the rules at 130 CMR 520.007(G)(8) and the full cure rules at 130 CMR 520.019(K).

(3) When the home or former home has been removed from the trust, the MassHealth agency may place a lien in accordance with 130 CMR 515.012.

(D) Repayment of Financial and Medical Assistance. An individual who has received or will be receiving payments from a third party as a result of an accident, injury, or other loss must first repay the MassHealth agency for medical assistance under M.G.L. c. 118E, § 22 and 42 U.S.C. 1396a(a)(25)(A) and (B) and the Department of Transitional Assistance for financial assistance under M.G.L. c. 18, § 5G, even if such third-party payments have been or will be placed in a special-needs or pooled trust in accordance with 42 U.S.C. 1396p(d)(4).

I find that the corpus/principal of The D.M.P. Trust is not available or accessible to the appellant and is consequently not countable as an asset of the appellant in a MassHealth eligibility determination.

First, I find that The D.M.P. Trust became irrevocable upon the death of D.M.P. Walker v. Walker, 433 Mass. 581, 583 (2001)(revocable trust became irrevocable upon death of grantor); State Street Bank & Trust Co. v. D'Amario, 368 Mass. 542, 544 (1975)(same). Therefore, for purposes of this matter, The D.M.P. Trust must be analyzed as an *irrevocable* trust, contrary to MassHealth's assertion that the trust is revocable and requires a ruling against the appellant.

Second, I find this matter controlled by the holding in Daley v. Sec'y. of the Exec. Ofc. Of Health & Human Svcs., 477 Mass. 188 (2017). In Daley, the Massachusetts Supreme Judicial Court (SJC) concluded that:

“...neither the grant in an irrevocable trust of a right of use and occupancy in a primary residence to an applicant nor the retention by an applicant of a life estate in his or her primary residence makes the equity in the home owned by the trust a countable asset for the purpose of determining Medicaid eligibility for long-term care benefits. Daley, at 189.

The material facts presented in Daley are also presented in this case. To wit, the appellant's primary residence is the principal of a now irrevocable trust (Article Second) and said trust grants him the right to reside in the residence until the occurrence of a "terminating event" (Article Second and Fourth, Section (1)). Upon the occurrence of a "terminating event," the Trustee must sell the principal and distribute the proceeds to a group of Beneficiaries to which the appellant does not belong (Article Fourth, Section (1)(d)). The Trust makes no provision for the principal to be available to the appellant or for the proceeds of any sale of said principal to be provided to him.

When an appellant elects to exercise his right to reside in a residence held as the principal of an irrevocable trust, he receives income (in the form of the imputed fair market rental value of the property) but such income "is not a payment from the corpus of the trust" but is instead "a payment from the 'income on the corpus'" and therefore the value of the home/corpus of the Trust is not countable as an asset. Daley, at 201.

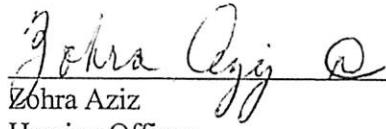
For the foregoing reasons, this appeal is APPROVED and remanded for MassHealth to make an eligibility determination.

Order for MassHealth

- Rescind the denial notice dated 04/6/2017.
- Re-determine eligibility based on an application date of 10/19/2016.
- Do not count the principal of the trust.
- Notify appellant of eligibility. Include appeal rights.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.


Zohra Aziz
Hearing Officer
Board of Hearings

cc: MassHealth Representative: Dori Mathieu

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Appellant Representative: 