

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

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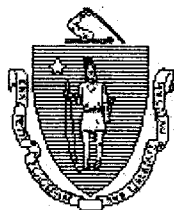
Appeal Decision:	Approved	Appeal Number:	1717990
Decision Date:	MAY 01 2018	Hearing Date:	03/05/18
Hearing Officer:	Stanley Kallianidis		

Appellant Representative:

Brian Barreira, Esq.

MassHealth Representatives:

Michael Somers, Esq.;
Karen Boutin for Jared Krok, Springfield



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

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Trust Assets
Decision Date:	MAY 01 2018	Hearing Date:	03/05/18
MassHealth Reps.:	Michael Somers, Esq. Karen Boutin		

Authority

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

Jurisdiction

Notice dated 10/12/17 was sent to the appellant stating that MassHealth had denied her application for MassHealth benefits due to excess assets (Exhibit 1). The appellant filed this appeal on 11/10/17 and, therefore, it is timely (see Exhibit 2 and 130 CMR 610.015).

A denial of MassHealth benefits is grounds for appeal (130 CMR 610.032).

Two previous hearing dates were rescheduled. One was at the appellant's attorney's request due to his surgery. The other was due to a subpoena request to the Board of Hearings along with a request for the Superior Court to issue an injunction on the instant proceedings. The subpoena request was denied, the Superior Court matter request is currently pending, but the parties agreed to a hearing date (Exhibits 9-12).

Action Taken by MassHealth

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

Issue

Pursuant to 130 CMR 520.023(C), was MassHealth correct to count the assets of an irrevocable trust in determining the appellant's eligibility?

Summary of Evidence

The MassHealth representative from the Springfield MEC testified that the appellant filed her MassHealth application on July 18, 2017 (Exhibit 3). The appellant's application was denied due to excess assets. According to the denial letter, the excess assets were over the \$2,000.00 limit. The assets totaled \$251,796.00 and were from a Trust valued at \$251,571.00, and two bank accounts totaling \$225.00. Since the bank accounts were under the \$2,000.00 limit, the only issue and dispute was over whether or not assets held in an irrevocable Trust were countable (Exhibit 1).

The MassHealth representative submitted the Trust in question into evidence: the R.M. and J.M. Living Trust (the Trust). The Trust was established in 2008 by the appellant and her spouse, now deceased, as Grantors, and was funded by two parcels of land, one in New York, and the other in Massachusetts. The Massachusetts property was sold in 2014. The appellant's son was named as Trustee and the appellant's son and daughters were named Beneficiaries of the principal. The Trust is irrevocable and the appellant is entitled to the income from the Trust (Exhibit 4).

According to Article 3(b) of the Trust, "The Trustee shall not be entitled to invade the principal of the Trust for either Grantor..." However, the Trustee may use principal to pay for the funeral and burial expenses, for death taxes and probate fees for either Grantor. According to Article 4, the Grantors reserved a testamentary power of appointment to one or more descendants, and Article 5 provides for the termination of the Trust upon the death of the appellant as surviving Grantor, subject to the testamentary power (Exhibit 4).

According to Article 8, the Trustee has powers to invest Trust funds, sell or mortgage real estate, hold shares in securities, borrow money and mortgage Trust property, hold cash, execute and deliver written instruments, permit an income Beneficiary to occupy real estate, and retain and pay for services. According to Article 15, the appellant Grantor reserved a lifetime power of appointment to make gifts of Trust principal to any charity qualifying under IRS code. According to Article 17, the appellant as Grantor has the right to use or occupy property. According to Article 20, the Grantor may distribute principal in equal shares to her children as Beneficiaries an amount not to exceed the federal gift tax exclusion limit (Exhibit 4).

The decision to count the assets of the Trust was based upon a memo from MassHealth's legal division, which held that, even though the Trust is irrevocable, its principal is available to the appellant and therefore is a countable asset. The MassHealth attorney highlighted the arguments made in the memo, and gave his principal reason for why the Trust principal should be fully countable (Exhibit 5).

According to MassHealth, the Trustee regularly accessed principal for the benefit of the appellant, and made distributions to her. The Trustee made regular payments of \$4100.00 or \$4500.00 to the appellant during a two-year period, approximately \$100,000.00 in total. Also, after the September 2014 sale of the Mashpee property, the Trust paid the mortgage debt that remained on the property even though this was the appellant's debt. The appellant cannot then claim that the distribution of Trust assets would be a breach of fiduciary duty, when the Trustee has used these assets in the past for the benefit of the appellant, MassHealth argued, as this would be "having your cake and eating it too."

Also, MassHealth argued that under federal and state law, trust income available or that could be paid to a Medicaid applicant is a countable asset. MassHealth distinguished actual paid-out income from income that an applicant has the right and/or potential to receive. The former is income and the latter is an asset. MassHealth argued that "It is immaterial whether any circumstance currently exists, the potentiality ('could be paid') is sufficient to render the Trust countable when determining eligibility for Medicaid long-term care." In this case, MassHealth argued that the remaining New York property could be rented and that the income generated could then be given to the appellant.

MassHealth continued that, in this case the appellant's power of appointment, both lifetime and testamentary, makes the principal countable. The Trustee's broad powers, such as paying the appellant's funeral expense, also render a circumstance where the Trust's principal could be paid out to the appellant. MassHealth distinguished the rulings of the *Daley* and *Heyn* decisions. (*Heyn v. Director of the Office of Medicaid*, 48 N.E. 3d 480 (2016) and *Daley v. Secretary of Executive Office of Health and Human Services*, 477 Mass. 188 (2017)). MassHealth concluded that the New York property is not an exempt asset because it is not the principal place of residence of the appellant and is not located in Massachusetts. It distinguished its arguments from the "use and occupancy" argument which it is not relying on (Exhibit 5).

According to argument and a memo from the appellant's attorney, the appellant has no right to any principal distributions from the Trust according to its terms. He contended that MassHealth's argument that income that is "available-but-not-yet-paid" is countable principal has been rejected by the Supreme Judicial Court in *Daley*. He reiterated his argument made in his denied subpoena request that MassHealth has failed to engage in administrative consistency and due process by not reconciling fair hearing decisions on similar facts and circumstances. The appellant's attorney also argued that partial control by a settlor is not relevant, and that a power of appointment does not give the settlor a right to access principal for herself. In addition, he argued that MassHealth regulations recognize the fiduciary duties of trustees, and that federal Medicaid law recognizes only four circumstances where state trust law can be ignored in a determination of eligibility, and that Medicaid law must be construed in favor of the applicant.

With regard to the Trust at hand, the appellant's attorney argued further that trusts must be read as a whole, and, a distribution of principal where a trustee does not have discretion to distribute principal is a breach of a the trustee's fiduciary duty. Such a distribution is a "breach of trust" and the trustee in such case would be liable for the harm caused to the beneficiaries. In support of this his discussion, the appellant's attorney cited *Guerriero v. Commissioner of Div. of Medical Assistance*, 433 Mass. 628 (2001) (Exhibit 6).

The attorney who drafted the Trust briefly testified that there is no provision in the Trust that allows the Trustee to distribute principal to the appellant as Grantor. Any such distribution should be considered a breach of the Trustee's fiduciary duty.

With regard to the breach of the trustee's fiduciary duty, the Trustee testified that he was mistakenly advised by a financial representative that he could use the Trust principal to pay for the appellant's assisted living fees. He testified that his sisters, the remainder beneficiaries of principal, along with himself, are upset that he did this. The appellant's attorney added that whether this was a mistake or willful breach is irrelevant; the payments made to the appellant's assisted living center do no render the Trust countable. This would still be the case even if the beneficiaries were willing to given Trust principal to the appellant, he contended.

The appellant's attorney submitted various other documents into the hearing record. These documents included other hearing decisions from the Board of Hearings where the appeals were approved, a letter from the Office of Attorney General to the Chief Justice of the Supreme Judicial Court regarding the *Daley* case, and a copy of the amended complaint seeking injunctive and declaratory relief in the Superior Court (Exhibits 7-9).

Findings of Fact

The record shows, and I so find:

1. The appellant applied for MassHealth on July 18, 2017 (Exhibit 1).
2. The appellant's application was denied due to excess assets over the \$2000.00 limit (Exhibit 1).
3. The countable assets totaled \$251,796.00, with \$251,571.00 held in trust (Exhibit 1).
4. The only issue and dispute was over whether or not assets held in an irrevocable trust were countable (testimony).
5. The Trust was created in 2008 by the appellant and her spouse, now deceased, as Grantors, and was funded by two parcels of land, one in New York, and the other in

Massachusetts. The Massachusetts property was sold in 2014 (Exhibit 4).

6. The appellant's son was named as Trustee and the appellant's son and daughters were named Beneficiaries of the principal. The Trust is irrevocable and the appellant is entitled to the income from the Trust (Exhibit 4).
7. According to Article 3(b) of the Trust, "The Trustee shall not be entitled to invade the principal of the Trust for either Grantor..." However, the Trustee may use principal to pay for the funeral and burial expenses, for death taxes and probate fees for either Grantor (Exhibit 4).
8. According to Article 4, the Grantors reserved a testamentary power of appointment to one or more descendants, and Article 5 provides for the termination of the Trust upon the death of the appellant as surviving Grantor, subject to the testamentary power (Exhibit 4).
9. According to Article 8, the Trustee has powers to invest Trust funds; sell or mortgage real estate, hold shares in securities, borrow money and mortgage Trust property, hold cash, execute and deliver written instruments, permit an income Beneficiary to occupy real estate, and retain and pay for services (Exhibit 4).
10. According to Article 15, the appellant Grantor reserved a lifetime power of appointment to make gifts of Trust principal to any charity qualifying under IRS code (Exhibit 4).
11. According to Article 17, the appellant as Grantor has the right to use or occupy property (Exhibit 4).
12. According to Article 20, the Grantor may distribute principal in equal shares to her children as Beneficiaries an amount not to exceed the federal gift tax exclusion limit (Exhibit 3).
13. The Trustee made regular payments of \$4100.00 or \$4500.00 towards the appellant's assisted living fee during a two-year period prior to her nursing home admission, approximately \$100,000.00 in total (Exhibit 5).
14. Following the September 2014 sale of the Mashpee property, the Trust paid the mortgage debt that remained on the property (Exhibit 5).

Analysis and Conclusions of Law

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

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

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

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

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

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

The appellant applied for MassHealth on July 18, 2017. The application was denied due to excess assets. As of the hearing date, the sole asset in dispute was a Trust with holdings of \$251,571.00. The Trust was established in 2008 by the appellant and her spouse, now deceased, as Grantors, and was funded by two parcels of land, one in New York, and the other in Massachusetts.

As more than five years has elapsed between the creation of the Trust and the application date, it cannot be considered to be a disqualifying transfer as it is beyond the look-back period. No other transfers were raised at hearing. Therefore, there is no issue of disqualifying transfers for this appeal.¹

There is no dispute that the Trust is irrevocable. Similarly, there is no issue of countable income. The parties agree that income from the Trust is available to the appellant as

¹ 130 CMR 520.019(B)2): For transfers of resources occurring on or after February 8, 2006, the look-back period extends back in time for 60 months from the time the applicant both was a nursing home resident and had applied for MassHealth.

Grantor. The fact that the appellant is entitled to income from the Trust has no bearing on the issue of the accessibility of principal. The appellant is not a Trustee, nor is she a beneficiary of principal. The appellant's son was named as Trustee and the appellant's son and daughters were named Beneficiaries of the principal.

The pertinent question in this case is whether or not the principal of the Trust is available to the appellant "under any circumstance." The answer is found by examining the language of the Trust. According to Article 3(b) of the Trust, "The Trustee shall not be entitled to invade the principal of the Trust for either Grantor..." There is no other clause which addresses circumstances in which the appellant by herself or the Trustee could distribute principal to the appellant. Clearly then, by the explicit terms of the Trust, there is no way for the appellant to have access to the principal.

Nonetheless, MassHealth is counting the Trust's assets. As justification, it argues broadly that Trust income available or that could be paid to a Medicaid applicant is a countable asset. While I agree that "income" that is not paid out of the Trust becomes part of the principal, this does not make the principal itself countable. In clear language, Article 3(b) of the Trust states that principal cannot be paid to the appellant. In calling "countable income" a "countable asset," MassHealth is jumping over a line of demarcation between income and principal in violation of the ruling of *Daley*. Income and principal are not interchangeable terms, and as stated above, income is not an issue in this appeal.

MassHealth reiterates an argument made in other trust appeals: that the Trust's general testamentary power of appointment makes the principal countable. The court in *Heyn* ruled otherwise, however. MassHealth points out that in this case, the appellant has a lifetime right of appointment to a charity qualifying under IRS code. While the court in *Daley* found that a similar power of appointment to a non-profit organization could make principal countable as a nursing home could be a non-profit organization, MassHealth made no claim that the appellant's nursing home is an IRS recognized charity so as to make the principal of this Trust available to her.

MassHealth alternatively argues that because the Trustee may use principal to pay for the funeral and burial expenses of the appellant, the principal if the Trust is countable. Even if this language were interpreted to mean the purchase of funeral and burial plans while the appellant were still alive, such plans and trust are exempt in determining eligibility for Medicaid long-term care benefits. (See 130 CMR 520.008 for plans and 520.023(D)(3) for trusts.)

Finally, MassHealth argues that the Trustee regularly accessed principal for the benefit of the appellant, and made distributions to her. It noted that the Trustee made regular payments of \$4100.00 or \$4500.00 to the appellant's assisted living fee prior to her nursing home admission for a total amount approximating \$100,000.00. Additionally, after the September 2014 sale of the Mashpee property, the Trust paid the mortgage debt that remained on the property even though this was the appellant's debt. I conclude that paying the mortgage of the Mashpee real estate was not a benefit to the appellant, nor did it diminish the net value of the asset. Moreover, the power of the Trustee to sell property was expressly given in the Trust, and in paying the bank debt owed he did nothing wrong as the sale required him to pay off all existing mortgages.

This leaves the narrow issue of whether the Trustee paying or the appellant's assisted living fee met the "any circumstances" clause of 130 CMR 520.023(C)(1)(a). First of all, I disagree with MassHealth in calling this a case of "having your cake and eating it too." Other than paying for the appellant's assisted living fee, there was no noted instance of the Trustee invading principal. For instance, there was no pattern of payments of principal to the appellant, nor was there evidence of collusion or bad faith between the Trustee and appellant. Rather, I conclude that a more accurate description of what happened when the Trustee paid the appellant's assisted living fee is that he breached his fiduciary duty to the Beneficiaries in alienating them from a portion of the principal in violation of the Trust.

Secondly, and most important, MassHealth has not identified a federal or state court ruling, a statute, regulation, or even a formal policy which would equate a Trustee's past breach to mean that principal "could be paid under any circumstances." Absent any such legal authority, I am thus unable to conclude that the Trustee's breach of duty in using principal to pay for the appellant's assisted living fee passes the "under any circumstances" test. The "under any circumstances" language pertains to the terms of the Trust, and in this case, there is no such language which make principal available to the appellant. On the contrary, the language of Article 3(b) of the Trust states quite the opposite.

In conclusion, the assets of the Trust are unavailable to the appellant, and based upon the above cited regulations, the Trust assets should not have been counted in her eligibility determination.

The appeal is therefore approved.

Order for MassHealth

Disregard assets of Trust, re-open appellant's application and re-determine her eligibility for MassHealth.

Implementation of this Decision

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



Stanley Kallianidis
Hearing Officer
Board of Hearings

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