

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1800964
Decision Date:	4/27/18	Hearing Date:	02/15/2018
Hearing Officer:	Rebecca Brochstein	Record Closed:	04/09/2018

Appearances for Appellant:

Appearances for MassHealth:
Kim McAvinchey, Tewksbury MEC
Michael Somers, Esq.



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Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
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APPEAL DECISION

Appeal Decision:	Approved	Issue:	Long-term care eligibility
Decision Date:	4/27/18	Hearing Date:	02/15/2018
MassHealth's Reps.:	Kim McAvinchey Michael Somers	Appellant's Rep.:	
Hearing Location:	Tewksbury MassHealth Enrollment Center		

Authority

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

Jurisdiction

Through a notice dated December 6, 2017, MassHealth denied the appellant's application for long-term care benefits due to excess assets (Exhibit 1). The appellant filed a timely appeal on December 11, 2017 (130 CMR 610.015(B); Exhibit 2). Denial of an application for benefits is a valid basis for appeal (130 CMR 610.032). Hearing was held on February 15, 2018, and the record held open until April 9, 2018, for the submission of supplemental legal memoranda (Exhibits 6-8).

Action Taken by MassHealth

MassHealth denied the appellant's application for long-term care benefits because it determined that she had more countable assets than are allowable under MassHealth regulations.

Issue

The appeal issue is whether MassHealth correctly determined that assets in trust are countable to the appellant and that she therefore has excess assets.

Summary of Evidence

An eligibility worker from the Tewksbury MassHealth Enrollment Center appeared at the hearing and testified as follows: The appellant was admitted to a long-term care facility on March 22, 2017. On September 28, 2017, she filed a MassHealth long-term care application, seeking coverage as of November 1, 2017. In processing the case, the worker forwarded information on two trusts to the MassHealth legal unit, which advised that the trust principal was countable to the appellant for MassHealth eligibility purposes. On December 6, 2017, MassHealth denied the application on the basis of excess assets in the amount of \$360,583.49. See Exhibit 1.

The documents in evidence reflect the following history regarding the trusts: On November 8, 2011, the appellant (“Donor”) established the EMS Irrevocable Trust (the “irrevocable trust”), naming her son as the trustee. The provisions of the irrevocable trust include the following:

1. THE TRUST FUND

...

1.2 The trust created by this Agreement shall be irrevocable. The Donor may not revoke or amend this Agreement in any way. The Trustee, however, may at any time, or from time to time, amend any administrative provisions of this trust by any instrument in writing signed and acknowledged by the Trustee. For purposes of the foregoing, the term “administrative provisions” refers to any provisions of the trust dealing with the management and administration of the trust and in no event shall any such amendment affect, enlarge or shift any beneficial interest created hereunder.

2. DISTRIBUTION OF TRUST ASSETS DURING LIFE OF DONOR

2.1 Payment of income and principal.

- (a) The Trustee, in his sole discretion, may use so much of the income or may invade Trust principal for the purpose of maintenance, taxes and other costs associated with any property owned by the Trust from time to time.
- (b) The Trustee shall pay the Donor or apply for the benefit of the Donor all of the income of the trust, at least quarterly during the Donor’s lifetime. The Trustee shall not make any distribution of trust principal to Donor, for any reason, under any circumstances.
- (c) The Donor shall have the right to use and occupy any residence that may from time to time be held in trust hereunder.

2.2 Distribution to Donor’s children.

The independent trustee may distribute to any of the Donor’s children such portions of the trust principal as the independent trustee in his absolute and uncontrolled discretion may deem advisable. . . .

3. DISTRIBUTION OF TRUST ASSETS UPON DEATH OF DONOR

3.1 Upon the death of Donor, the Trustee shall:

- (a) Pay the principal and undistributed income as Donor may appoint by will as provided in subarticle 5.4; and
- (b) The Trustee shall pay the remaining trust principal and undistributed income, free and clear of all trust to the Donor's children . . . in equal shares, outright, free and clear of all trust. . . .

3.2 Termination of Trust

This trust shall terminate upon the death of the Donor or when the Trustee has earlier paid out all the trust property under this article or under the termination provisions of this article.

3.3 Termination of Trust by Trustee

At any time after the Donor's death, the Trustee is granted the power to terminate the trust and then distribute all of the assets for any one or more of the following reasons to be determined by the Trustee in her sole discretion.

- (a) Because it is no longer economical to administer the trust assets and trust;
- (b) Because the retention of assets in trust is no longer in the best interest of one or more of the beneficiaries due to changes in the tax laws or other legal considerations;
- (c) Because of unforeseen changes in the circumstances applicable to one or more of the following beneficiaries or the assets of the trust;
- (d) For reasons set forth in any memorandum addressed to the Trustee by Donor; and
- (e) For any reason deemed sufficient by the Trustee.

Upon trust termination, the Trustee shall pay the trust property as provided in subarticle 3.1.

...
6. TAXES AND OTHER PAYMENTS

6.1 Payments for Donor's estate.

The Trustee may in her sole discretion pay to the Donor's estate or to the tax authorities any taxes payable by reason of the Donor's death chargeable against the residue of the estate and any other debts of the estate or expenses of administration and legacies under the Donor's will that, if paid by the executor, would reduce the residue of the estate. This subarticle shall not be construed to require such payments by the trustee.

...
6.4 Tax Liability.

It is the intent of the Donor that this trust be construed as a "grantor trust" under Internal Revenue Code section 677(a). All income distributed, held, or accumulated by this trust shall be taxable to the Donor. The trustee may, to the extent that the income generates a tax liability for the Donor, distribute to the Donor such amounts of income or principal of the trust as the trustee deems necessary to satisfy such tax obligation.

6.5 Right of Substitution.

The Donor retains the right to reacquire the principle [sic] of this trust by substituting property of equivalent value.

Also on November 8, 2011, the appellant established the [S] Fairway 2011 Realty Trust (the “realty trust”). Schedule A of the realty trust named the irrevocable trust as the sole beneficiary. See Exhibit 4. On the same date, the appellant conveyed property located in Natick, Massachusetts, to the realty trust. On August 22, 2013, the trustee of the realty trust sold the property to a third party and deposited the net proceeds into a bank account in the name of the irrevocable trust. See Exhibit 4.

In its legal memorandum, MassHealth offers two distinct reasons that the trust principal is countable to the appellant. First, the agency argues that under Section 6.1 of the irrevocable trust, “the applicant’s debts which fall into her probate estate can be paid for using the Trust principal.” MassHealth contends that these can include payments for personal and unpaid debts, and that the regulation does not account for restrictions on “when or whether” such payments can be made. As there is no cap on the amount of the debt that could be paid, MassHealth argued, the entire corpus would be considered available and countable under this provision.

Second, MassHealth points to Section 6.4 of the irrevocable trust, which provides that the trustee may, to the extent that the income generates a tax liability for the Donor, distribute to the Donor such amounts of income or principal of the trust as the trustee deems necessary to satisfy such tax obligation. MassHealth determined that at least \$2,577.93 of trust principal could be used to satisfy the applicant’s income taxes under the “any circumstances” test. MassHealth calculated this figure as follows:

Trust value:	\$362,580.49
Applicant’s Age at time of Application	96
Life Expectancy at time of Application	3.16 years ¹
Annual Interest Rate on 5 Year Annuity	2.25%
Annual Interest Generated by Annuity	\$8,158 (\$362,580.49 x 2.25%)
Total Interest During Applicant’s Lifetime	\$25,779 (\$8.158 x 3.16)
Assumed Tax Rate	10%
Total Potential Tax Liability	\$2,577.93 (\$25,779 x 10%)

MassHealth thus determined that the amount of trust principal that would be “available” for the appellant’s benefit under the “any set of circumstances” test would be \$2,577.93.² At hearing,

¹ The life expectancy and annuity rates are detailed in MassHealth’s supporting documents. See Exhibit 4.

² MassHealth contends that this is not an “over-asset” figure, or the amount that the appellant may spend down to bring her assets under the regulatory limit. The agency determined that in order to reduce the amount of the trust principal available to the appellant below the statutory limit of \$2,000, the trust

the MassHealth attorney clarified that these figures are not meant to be exact, but rather an estimation of the portion of principal that is available to the appellant. He argued that this approach is a reasonable interpretation of federal law. See Exhibit 4.

The appellant was represented by counsel at hearing. He maintained that the trust was properly drafted such that the appellant retained no access to trust principal, and complained that MassHealth is just looking for a way to make the trust problematic. He disagreed with the arguments presented by MassHealth at hearing but requested time to review the agency's legal memo (which he had not previously seen) in order to provide a more detailed response. The record was held open for him to do so. See Exhibits 6 and 7.

In his response brief, the appellant's attorney disagrees that the trust provision allowing for payments on behalf of the appellant's estate after her death constitute a circumstance in which trust principal can be made available to her. He argues that this provision does not allow for a distribution of trust principal during her lifetime, noting that numerous other fair hearing decisions have considered and rejected this point. The appellant's attorney also takes issue with MassHealth's calculation of the appellant's potential tax liability, pointing to faulty assumptions in the formula and arguing that in reality income from the trust's holdings have generated no tax liability for the appellant. Taken together, the attorney argues, the appellant has no access to trust principal under the terms of this trust. See Exhibit 8.

Findings of Fact

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

1. On November 8, 2011, the appellant established the [EMS] Irrevocable Trust, naming her son as the trustee. The terms of the irrevocable trust include the following:
 - a. The trust created by this Agreement shall be irrevocable. The Donor may not revoke or amend this Agreement in any way. The Trustee, however, may at any time, or from time to time, amend any administrative provisions of this trust by any instrument in writing signed and acknowledged by the Trustee. For purposes of the foregoing, the term "administrative provisions" refers to any provisions of the trust dealing with the management and administration of the trust and in no event shall any such amendment affect, enlarge or shift any beneficial interest created hereunder. (Section 1.2)

would have to spend the corpus down to a maximum level of \$281,293.96. This is again assuming a 2.25% annual interest rate on an annuity, a life expectancy of 3.16 years, and a tax rate of 10%. In its brief, MassHealth's equation is set up as follows (where X = the maximum allowable value of the trust corpus): $X[(.0225)(3.16)(.1)] = \$2,000$. In this equation, $X = \$281,293.96$.

- b. The Trustee shall pay the Donor or apply for the benefit of the Donor all of the income of the trust, at least quarterly during the Donor's lifetime. The Trustee shall not make any distribution of trust principal to Donor, for any reason, under any circumstances. (Section 2.1(b))
 - c. Upon the death of Donor, the Trustee shall (a) Pay the principal and undistributed income as Donor may appoint by will as provided in subarticle 5.4; and (b) the Trustee shall pay the remaining trust principal and undistributed income, free and clear of all trust to the Donor's children. (Section 3.1)
 - d. The Trustee may in her sole discretion pay to the Donor's estate or to the tax authorities any taxes payable by reason of the Donor's death chargeable against the residue of the estate and any other debts of the estate or expenses of administration and legacies under the Donor's will that, if paid by the executor, would reduce the residue of the estate. This subarticle shall not be construed to require such payments by the trustee. (Section 6.1)
 - e. It is the intent of the Donor that this trust be construed as a "grantor trust" under Internal Revenue Code section 677(a). All income distributed, held, or accumulated by this trust shall be taxable to the Donor. The trustee may, to the extent that the income generates a tax liability for the Donor, distribute to the Donor such amounts of income or principal of the trust as the trustee deems necessary to satisfy such tax obligation. (Section 6.4)
2. On November 8, 2011, the appellant established the [S] Fairway Realty Trust. Schedule A of the realty trust named the irrevocable trust as the sole beneficiary.
 3. On November 8, 2011, the appellant conveyed her property to the realty trust.
 4. On August 22, 2013, the trustee of the realty trust sold the property to a third party and deposited the net proceeds into a bank account in the name of the irrevocable trust.
 5. On March 22, 2017, the appellant was admitted to a long-term care facility.
 6. On September 28, 2017, the appellant filed a MassHealth long-term care application, seeking coverage as of November 1, 2017.
 7. In reviewing the long-term care application, MassHealth determined that the appellant had access to the trust assets.
 8. On December 6, 2017, MassHealth denied the appellant's application on the basis of excess assets of \$360,583.49.

Analysis and Conclusions of Law

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. 130 CMR 520.023. For property held in a revocable trust – defined in 130 CMR 515.001 as “a trust whose terms allow the grantor to take action to regain any of the property or funds in the trust” – the rules are as follows (130 CMR 520.023(B)):

- (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).

For an irrevocable trust – defined as “a trust that cannot be in any way revoked by the grantor” – the amount countable to an applicant is determined as follows (130 CMR 520.023(C)):

- (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 (8).

In this case, MassHealth determined that the appellant retained access to assets that are held in an irrevocable trust established by the appellant in 2011.³ The trust includes an express statement that the

³ The assets in question are bank funds from the sale of property that was previously held in a realty trust. (The irrevocable trust is also the beneficiary of the realty trust.) The terms of the irrevocable trust are controlling for purposes of determining the appellant’s access to trust principal.

appellant is not entitled to any distribution of trust principal “for any reason, under any circumstances.” Nevertheless, such a clause “may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole.” See Doherty v. Director of the Office of Medicaid, 74 Mass. App. Ct. 439, 441 (2009). The issue is whether, considering the document as a whole, “[a]ny portion of the principal” held by the trust could “under any circumstances” be paid to or for the benefit of the appellant. See 130 CMR 520.023(C). MassHealth determined that there are circumstances in which trust principal can be made available for the appellant’s use and found the assets fully countable.

As outlined in its legal memorandum, MassHealth offers two arguments in support of this determination. First, MassHealth points to Section 6.1 of the trust, which provides that the trustee may pay to the appellant’s estate or to the tax authorities “any taxes payable by reason of the [appellant’s] death chargeable against the residue of the estate and any other debts of the estate or expenses of administration and legacies under [her] will that, if paid by the executor, would reduce the residue of the estate.”

MassHealth argues that the trustee’s authority to make payments toward the appellant’s debts after her death constitutes a circumstance under which trust principal can be made available to her. From a practical standpoint, the trustees may take no action under this provision until after the appellant’s death. It cannot reasonably be construed to give the appellant access to trust principal to pay any expenses, for the nursing home or otherwise, during her lifetime. Further, as the appellant points out, the MassHealth regulations consider whether trust principal is payable to an “individual” – and any payments made pursuant to this section would be made not to an individual, but rather to the appellant’s estate.

Second, MassHealth argues that under Section 6.4 of the trust, the trustee may, to the extent the income generates a tax liability for the appellant, distribute to her such amounts of income or principal of the trust as the trustee deems necessary to satisfy such tax obligation. See Daley v. Sec’y of Exec. Office of Health & Human Servs, 477, Mass. 188 (2017). To calculate the extent of the potential tax liability that the trust principal could be used to satisfy, MassHealth created a hypothetical scenario in which the appellant would purchase an annuity, earn interest on the annuity payments annually for the rest of her life, and use trust principal to pay the tax liability on that interest. MassHealth presented this scenario as a “conservative” approximation of the amount of trust principal the appellant could receive under Section 6.4.

MassHealth’s general approach to the tax liability calculation is not unreasonable. However, the appellant’s attorney has offered several valid reasons why that methodology is problematic when applied to this particular case. On a fundamental level, the appellant would simply be ineligible to purchase the annuity identified by the agency, as she is well past the age limit of 85 and her life expectancy of 3.16 years is less than the minimum initial contract term of five years. The appellant’s counsel also points out that while MassHealth assumes her interest income would be taxed at a rate of 10% (and in fact argues that this assumption is “conservative”), in reality deductions from her

substantial out-of-pocket medical expenses (her monthly patient-paid amount) would offset any other income she receives.⁴ In fact, the attorney reported, the appellant has not filed taxes since 2014 because her accountant determined that she has had no tax liability at all. See Exhibit 8.

The appellant correctly argues that the Section 6.4 limits the trustee's authority to use trust principal to pay "to the extent that the income generates a tax liability for the Donor." In this case, there is compelling evidence that the appellant has had no tax liability since several years preceding her MassHealth application and that this is unlikely to change. Consequently, the evidence demonstrates that the appellant will not be eligible to receive any trust principal under Section 6.4 of the trust.

For the forgoing reasons, this appeal is approved.

Order for MassHealth

Rescind the notice dated December 6, 2017. Deem the appellant to have no access to the principal of the trust. Proceed to redetermine her long-term care in accordance with this decision.

Implementation of this Decision

If this decision is not implemented within 30 days after the date hereon, you should contact your MassHealth Enrollment Center. If you experience further 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.

Rebecca Brochstein
Hearing Officer
Board of Hearings

cc: Tewksbury MEC

⁴ The appellant provided documentation that the trust account generated actual income of \$310.56, \$141.64, \$107.67, and \$98.47 for the years of 2014 through 2017, respectively. See Exhibit 8.