

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Approved in Part; Denied in Part	<b>Appeal Number:</b>	1613334
<b>Decision Date:</b>	1/3	<b>Hearing Date:</b>	11/14/2016
<b>Hearing Officer:</b>	Susan Burgess-Cox	<b>Record Open to:</b>	12/12/2016

**Appellant Representative:**

**MassHealth Representative:**  
Nicholas Jackson



*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

<b>Appeal Decision:</b>	Approved in Part; Denied in Part	<b>Issue:</b>	Eligibility
<b>Decision Date:</b>	1/3	<b>Hearing Date:</b>	11/14/2016
<b>MassHealth Rep.:</b>	Nicholas Jackson	<b>Appellant Rep.:</b>	
<b>Hearing Location:</b>	Tewksbury 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 September 23, 2016, MassHealth determined that the appellant is not eligible for MassHealth because he has more countable assets than MassHealth allows. (130 CMR 520.000; Exhibit 1). The appellant's attorney-in-fact appealed this decision in a timely manner naming counsel for the appellant as an appeal representative. (130 CMR 610.000; Exhibit 2; Exhibit 6). Denial of assistance is valid grounds for appeal. (130 CMR 610.032).

## Action Taken by MassHealth

MassHealth determined that the appellant is not eligible for MassHealth because he has more countable assets than MassHealth benefits allow.

## Issue

Whether MassHealth was correct in determining that the appellant has more countable assets than MassHealth benefits allow.

## Summary of Evidence

The MassHealth representative, from the Taunton MassHealth Enrollment Center, testified that MassHealth received an application for long-term care benefits on June 10, 2016. MassHealth determined that the appellant was not eligible for MassHealth due to having more countable assets than MassHealth allows. (Testimony; Exhibit 1; Exhibit 4). Documents from MassHealth, including a legal brief, were incorporated into the hearing record as Exhibit 4.

The MassHealth representative testified that the issue on appeal involved property held in trust as well as money in a bank account that MassHealth deemed countable. (Testimony; Exhibit 1; Exhibit 4). MassHealth considered the property held in trust to have a value of \$466,853.10. The appellant had \$33,266.22 in a bank account. These combined assets made the appellant over the limit for MassHealth eligibility by \$498,119.32. (Testimony; Exhibit 1; Exhibit 4). On August 31, 2009, the appellant created the [Appellant Surname] Family Irrevocable Trust. The appellant is the Donor and his son is the Trustee. The trust allows the appellant to receive income for his care and well-being. (Testimony; Exhibit 4). Any income not paid to the appellant may be accumulated and added to trust principal. (Testimony; Exhibit 4). The principal shall be held unless distributed in accordance with the following trust provision:

### *2.2 Distributions to our Issue*

*Our trustee also may, in its discretion, pay to any one or more of our issue all or any part of the principal as our trustee considers advisable. Our trustee may make the payments at any time to one or more of such issue, in any amounts and proportions, and for any purposes as our trustee considers advisable. Our trustee may take into account any factors it considers appropriate, having regard for the interests of all person affected. (Exhibit 4).*

The appellant and his spouse retained the right to use and occupy any residence that may from time to time be held in trust. (Exhibit 4). MassHealth argued that the right to use and occupy a residence held in trust is a payment making the trust countable for eligibility purposes. (Exhibit 4). MassHealth acknowledged that the appellant does not have a life estate and does not own the property. (Exhibit 4).

Counsel for the appellant appeared in person and argued that the trust is not countable. The two properties held in trust were sold in December 2014 and March 2015. Funds from the sale of each property were placed in a bank account in the name of the trust. Counsel for the appellant acknowledged that the appellant had the right to income from the trust and the right to use and

occupy property owned by the trust but argued that the right to use and occupy is not a life estate and there are limited rights associated with use and occupancy. Counsel for the appellant did not have verification of the spenddown of the remaining assets held in a bank account.

The record was held open to give the appellant the opportunity to provide a brief and any additional evidence regarding the appellant's excess assets. (Exhibit 5). MassHealth was provided with the opportunity to respond. Documents presented by the appellant were incorporated into the hearing record as Exhibit 6. MassHealth did receive the documents submitted by the appellant noting that there was still an excess asset amount and the brief presented by the appellant regarding the assets held in trust did not cause MassHealth to adjust their original decision. (Exhibit 7).

Counsel notes that "use and occupancy" is a legal term used in trust and other legal documents. Counsel states,

The right to use and occupy is considered to be a very limited right to a property [which] does not convey with it any ownership interest at all. Use and Occupancy is living in or using premises or property as a tenant, but with less substantive rights. A closely-related meaning is the number of units in such a building that are rented or leased, or otherwise in use. (Exhibit 7).

Counsel provided affidavits from the appellant and Trustee as to their understanding of the right to use and occupy. (Exhibit 7). The appellant's affidavit states that he understood that he had the right to have physical access to the properties. (Exhibit 7). The appellant also states that the trustee did not consult with him or seek his approval regarding the sale of the properties. (Exhibit 7). Counsel argues that MassHealth misinterprets the law in their disregard of state trust laws. Counsel cites provisions of federal Medicaid law at 42 U.S.C. 1396p(d) that specify four aspects of state trust law that may be ignored in determining eligibility for MassHealth:

- (i) The purposes for which a trust is established;
- (ii) Whether the trustees have or exercise any discretion under the trust;
- (iii) Any restrictions on when or whether distributions may be made from the trust; or
- (iv) Any restrictions on the use and distributions from the trust.

Counsel argues that the limited rights of the appellant under the terms of the trust in no way lead to accessibility of trust principal for the appellant. During the record open period counsel for the appellant noted that she did not have information to include in the record regarding the spenddown of the funds in a

bank account with a balance of \$33,266.22. (Exhibit 8).

## Findings of Fact

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

1. MassHealth received an application for long-term care benefits on June 10, 2016.
2. MassHealth determined that the appellant was not eligible for MassHealth due to having more countable assets than MassHealth allows.
3. MassHealth determined that the appellant had countable assets held in trust valued at \$466,853.10.
4. MassHealth determined that the appellant had a bank account with a balance of \$33,266.22.
5. On August 31, 2009, the appellant created the [Appellant Surname] Family Irrevocable Trust.
6. The appellant is the Donor and his son is the trustee.
7. The trust allows the appellant to receive income for his care and well-being.
8. Any income not paid to the appellant may be accumulated and added to trust principal.
9. Principal shall be held by the trust unless distributed in accordance with the following trust provision:

### *2.2 Distributions to our Issue*

*Our trustee also may, in its discretion, pay to any one or more of our issue all or any part of the principal as our trustee considers advisable. Our trustee may make the payments at any time to one or more of such issue, in any amounts and proportions, and for any purposes as our trustee considers advisable. Our trustee may take into account any factors it considers appropriate, having regard for the interests of all person affected.*

10. The appellant and his spouse retained the right to use and occupy any residence that may from time to time be held in trust.
11. The appellant did not have a life estate interest in the trust property.
12. The properties held in trust were sold in December 2014 and March 2015.
13. Proceeds from the sale were placed in a bank account for the trust.

## **Analysis and Conclusions of Law**

MassHealth administers and is responsible for the delivery of health-care services to MassHealth members. (130 CMR 515.002). The regulations governing MassHealth at 130 CMR 515.000 through 522.000 (referred to as Volume II) provide the requirements for noninstitutionalized persons aged 65 or older, institutionalized persons of any age, persons who would be institutionalized without community-based services, as defined by Title XIX of the Social Security Act and authorized by M.G.L. c. 118E, and certain Medicare beneficiaries. (130 CMR 515.002). The appellant in this case is an institutionalized person. Therefore, the regulations at 130 CMR 515.000 through 522.000 apply to this case. (130 CMR 515.002).

MassHealth determined that the appellant was not eligible for MassHealth due to having excess assets. (130 CMR 520.000). At issue were assets held in trust as well as funds available in a bank account. This decision will address both issues separately. On August 31, 2009, the appellant created the [Appellant Surname] Family Irrevocable Trust. The appellant is the Donor and his son is the trustee. The trust allows the appellant to receive income for his care and well-being. Any income not paid to the appellant may be accumulated and added to trust principal. Since the trust was created in 2009, the regulations 130 CMR 520.023 apply.

Pursuant to 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. The trust in this case was an irrevocable family trust created by the appellant naming only his issue as beneficiaries.

Counsel argues that the limited rights of the appellant under the terms of the trust in no way lead to accessibility of trust principal for the appellant. Counsel for the appellant provided a more persuasive, legally accurate argument that "use and

occupancy" is a legal term and a limited right to a property that does not convey with it any ownership interest. MassHealth failed to demonstrate how the appellant can legally access the corpus of the trust. In fact, the property at issue was sold without consultation or approval by the appellant. MassHealth equates the right to use and occupy property held in trust as a method in which the entire trust corpus can be available to the appellant.

MassHealth relies on a portion of the State Medicaid Manual, HCFA Transmittal 64 §3259.1(A)(8) that states: "Payment – for purposes of this section a payment from a trust is any disbursement from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property." MassHealth fails to demonstrate how the right to use and occupancy translates into an ownership interest that the appellant can convey or obtain payment from. The definition of payment in the memorandum refers to income as a payment as well as disbursements of principal. This definition does not clearly equate a payment to a distribution of principal alone. MassHealth relies on vague language from a memorandum, not actual regulations or statutory language to conclude that the right to use and occupy equates to payment. Additionally, as stated above, the definition relied on refers to income generated by the trust as well as a disbursement from the corpus as a type of payment. The appellant did not dispute the fact that he is entitled to income. The appellant presented a more persuasive argument to consider the trust as non-countable.

Pursuant to 130 CMR 520.024(A)(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. (130 CMR 520.024(A)(2)). Since the trust does allow payments for income, any income from the trust is countable. The trustee does not have discretion to make anything else available to the appellant. Therefore, the decision made by MassHealth regarding the trust was not correct. This part of the appeal is approved.

Countable assets are all assets that must be included in the determination of eligibility. (130 CMR 520.007). Countable assets include assets to which the applicant or member or his or her spouse would be entitled whether or not these assets are actually received when failure to receive such assets results from the action or inaction of the applicant, member, spouse, or person acting on his or her behalf. (130 CMR 520.007). The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Standard, Family Assistance, or Limited may not exceed \$2,000 for an individual. (130 CMR 520.003(A)(1)).

As noted by MassHealth at the hearing and in the notice on appeal, in addition

to the assets held in trust, the appellant had assets in a bank account in excess of \$2,000 that were not spent down. (130 CMR 520.003(A)(1)). The appellant can reduce those assets to become eligible for MassHealth without violating the transfer of resource provisions or incur medical bills that equal the amount of excess assets. (130 CMR 520.004(A)). It was not clear at the hearing whether the appellant did spend down those additional assets and during the record open period counsel acknowledged that those assets were not likely spent down. (Exhibit 8). Therefore, this part of the appeal is denied as MassHealth was correct in determining that the appellant had excess assets.

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. (130 CMR 520.004(A)).

The appellant received a notice of excess assets and clearly did not spend down all of those assets as some were not countable. (130 CMR 520.000). However, this decision will provide the appellant with the opportunity to spend down the assets deemed countable by MassHealth and in this decision within 30 days after the date of this decision as the appellant did file for a fair hearing and the effective date of any adjustments to the appellant's eligibility status will be the date on which all eligibility conditions were met, regardless of when the supporting evidence was submitted. (130 CMR 520.004(A); 130 CMR 610.071(A)). If the appellant does not present evidence that the assets totaling \$31,266.22 were spent down, MassHealth will then determine the appellant's eligibility as of the first day of the third month prior to the date of the application if the appellant had medical bills from the long-term care facility from that date. (130 CMR 520.004)).

This appeal is approved in part and denied in part.

## **Order for MassHealth**

Disregard the assets held in trust as countable and provide the appellant 30 days from the date of this decision to spend down the remaining \$31,266.22 in excess



assets.

## **Notification of Your Right to Appeal to Court**

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

## **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.

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Susan Burgess-Cox  
Hearing Officer  
Board of Hearings

cc: