

JUDGMENT ON THE PLEADINGS

**Trial Court of Massachusetts
The Superior Court**



DOCKET NUMBER

1885CV01639

Dennis P. McManus, Clerk of Courts

CASE NAME

Brisebois, Irene
vs.
Marylou Sudders In Official Capacity As Secretary of the Executive
Office of Health and Human Services

COURT NAME & ADDRESS

Worcester County Superior Court
225 Main Street
Worcester, MA 01608

This action came before the Court, Hon. Michael Doolin, presiding, upon a motion for judgment on the pleadings,

After hearing or consideration thereof,

It is **ORDERED AND ADJUDGED:**
that the complaint of the Plaintiff be and hereby is dismissed.

DATE JUDGMENT ENTERED
09/09/2019

CLERK OF COURTS/ ASST. CLERK

X

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

**SUPERIOR COURT
CIVIL ACTION
No. 1885CV01639**

IRENE BRISEBOIS

vs.

MARYLOU SUDDERS¹

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

INTRODUCTION

This is an action for judicial review pursuant to G. L. c. 30A, § 14, whereby the plaintiff, Irene Brisebois (“plaintiff”), challenges a decision by the Massachusetts Office of Medicaid’s (“MassHealth”) denial of her application for long-term care benefits due to excess assets. The plaintiff now moves for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c). For the following reasons, the motion is **ALLOWED**.

BACKGROUND

The plaintiff is a ninety-year-old widow. She is permanently institutionalized and is residing at the Coleman House in Northborough, Massachusetts. On November 17, 2017, the plaintiff applied for MassHealth long-term care benefits to pay for the cost of her nursing home. She is seeking a benefit start date of December 14, 2017.

On February 15, 2018, the plaintiff received a notice from MassHealth denying her application for benefits due to excess countable assets held in an irrevocable trust (“Trust”). The plaintiff, through her eligibility representative, timely appealed this denial notice and an administrative hearing was held at the MassHealth Board of Hearings on May 24, 2018.

¹ Secretary of the Executive Office of Health and Human Services

Following the administrative hearing, a Hearing Officer with the MassHealth Board of Hearings (“Hearing Officer”) issued a decision dated October 4, 2018, upholding MassHealth’s denial and agreeing with its assessment that the Trust was a countable asset.

The plaintiff established the Trust with her now deceased husband, Francis Brisebois (“Francis”), in 2006. The plaintiff and Francis are grantors of the Trust (“Grantors”). Her son and grandson are the co-trustees. The plaintiff has never served as trustee of the Trust.

On the same date that the Trust was executed, the plaintiff and Francis transferred title of their former primary residence located at 84 Topsfield Circle in Shrewsbury, Massachusetts, into the Trust. The Trust holds real estate valued at \$300,000, a life insurance policy valued at \$70,000, and \$20,000 in cash.

The Trust contains various provisions relating to the administration of the Trust. Article II of the Trust, titled “Provisions During the Life of Both Grantors,” directs how income and principal are to be distributed from the Trust to the beneficiaries. Article II states that the Grantors are entitled to receive distributions of income only from the Trust, unless one of the Grantors is institutionalized and in need of long-term nursing care. In that case, all net income of the Trust property shall be paid to or for the benefit of the noninstitutionalized Grantor. Article II contains an explicit prohibition against the distribution of the principal to the Grantors:

None of the principal of the Trust may be distributed to or for the benefit of either Grantor under any circumstance. The Trustee has no power to distribute the principal of the Trust property to or for the benefit of either Grantor, either Grantors’ creditors, the estate of either Grantor or the creditors of either Grantors’ estate and shall not do so under any circumstances. (Emphasis added).

Article II also provides the Grantors with a limited power to appoint assets from the Trust to their children by stating:

Notwithstanding the foregoing, each Grantor reserves and is given a limited or special power of appointment, exercisable during said Grantor’s lifetime by written instrument

delivered to the Trustee, to appoint the principal of the Trust either outright or upon trusts, powers of appointments, conditions or limitations, to such person or persons (whether in equal or unequal shares) among the members of the class consisting of the Grantors' issue.

Article III, entitled "Provision upon the Death of the First Grantor to Die," similarly states that, in the event of either Grantor's death,

None of the principal of the Trust may be distributed to the Surviving grantor under any circumstance. The Trustee has no power to distribute the principal of the Trust property to or for the benefit of said surviving Grantor, said surviving Grantor's creditors, the estate of said surviving Grantor or the creditors of the said surviving Grantor's estate and shall not do so under any circumstance.

Article III contains the nearly identical "notwithstanding the foregoing" language that appears in Article II.

Article V of the Trust, entitled "Spendthrift Clause: Disclaimer; Withholding for Taxes," provides:

The interest of any beneficiary under this Trust Agreement either as to income or principal shall not be subject to anticipation, alienation, or assignment by the beneficiary and shall not be subject to any legal process, bankruptcy proceedings or the interference or control of creditors, the spouse of any married beneficiary, or others; provided that nothing in this paragraph (a) of this Article V shall in any way restrict the exercise of any power of appointment granted in this Trust Agreement.

Finally, Article VIII, "Concerning the Trusteeship," states, in relevant part:

Either Grantor may, at any time, without the consent of any person, by written instrument delivered to all Trustees, remove any Trustee, fill any vacancy in the office of Trustee, appoint successor Trustees and appoint additional Trustees.

A Trustee is entitled to compensation for its services in accordance with its standard schedule of charges at any time in effect or, in the case of an individual Trustee, at a reasonable hourly rate.

DISCUSSION

I. Standard of Review

Pursuant to G. L. c. 30A, § 14(5), judicial review is limited to the administrative record. A party appealing an agency's decision bears the heavy burden of demonstrating its invalidity. See

Springfield v. Department of Telecommunications & Cable, 457 Mass. 562, 567-568 (2010). Further, courts must give due deference to the “experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” G. L. c. 30A, § 14(7). Conversely, a court may reverse, remand, or modify an agency’s decision if it determines that the substantial rights of a party were prejudiced because the agency’s decision was unsupported by substantial evidence or was arbitrary and capricious. See G. L. c. 30A, § 14(7).

Substantial evidence is “such evidence as a reasonable mind might accept as adequate to support a conclusion.” G. L. c. 30A, § 1(6); *Murphy v. Contributory Ret. Appeal Bd.*, 463 Mass. 333, 344 (2012). When applying the substantial evidence test, the court must take into account “the entire record,” including “both the evidence supporting the [Department’s] conclusion and whatever in the record fairly detracts from the weight of that evidence.” *Covell v. Department of Social Servs.*, 439 Mass. 766, 783 (2003). Additionally, a decision is arbitrary and capricious when there is no rational explanation that reasonable people might support. *Garrity v. Conservation Comm’n of Hingham*, 462 Mass. 779, 792 (2012). It is the sole province of the agency to judge the weight of the factual evidence presented. See *Guarino v. Director of the Div. of Employment Sec.*, 393 Mass. 89, 92 (1984). In other words, even if the court disagrees with the agency’s decision and would have ruled differently, it may not substitute its view of the facts as long as the decision is supported by substantial evidence and was not arbitrary and capricious. See *Hanover Ins. Co. v. Commissioner of Ins.*, 443 Mass. 47, 50 (2004).

II. Analysis

The Massachusetts Medicaid program, MassHealth, “is a joint State and Federal program designed to pay the cost of medical care for those who are otherwise unable to afford it.” *Normand v. Director of the Office of Medicaid*, 77 Mass. App. Ct. 634, 636 (2010). To

qualify for Medicaid benefits, MassHealth applicants must meet certain financial eligibility requirements. *Tarin v. Commissioner of Div. of Med. Assistance*, 424 Mass. 743, 747 (1997). Only individuals who have \$2,000 or less in “countable assets” qualify for Medicaid nursing home benefits in the form of long-term care coverage. See 130 Code Mass. Regs. §§ 519.006(A)(2) and 520.003(A)(1).

It is well established that a properly structured irrevocable inter vivos trust may be used to place assets beyond the applicant’s reach, rendering them not countable for the purpose of the applicant’s Medicaid eligibility. See *Heyn v. Director of Office of Medicaid*, 89 Mass. App. Ct. 312, 314 (2016). However, any portion of the principal held in the trust which could “under any circumstances” be paid for the benefit of the applicant is a countable asset for purposes of determining eligibility for Medicaid benefits. *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 440 (2009), citing 130 Code Mass. Regs. § 520.023(C)(1).

Accordingly, MassHealth needs to demonstrate that the plaintiff had access to more than \$2,000 of the principal, or income on the principal from the Trust corpus, under “any circumstances” at any time during the existence of the trust. “In assessing whether the trust would allow distribution of principal to [the plaintiff], under any circumstances, we construe its provisions in light of the trust instrument as a whole.” *Heyn*, 89 Mass. App. Ct. at 315 (internal quotation marks omitted)(alteration in original). When interpreting trust language, a court or agency is not to read words in isolation and out of context. *Pond v. Pond*, 424 Mass. 894, 897-898 (1997). The purpose is to discern the settlor’s intent from the trust instrument as a whole and from the circumstances known to the settlor at the time the instrument was executed. *Berman v. Sandler*, 379 Mass 506, 510 (1980).

In this case, the Hearing Officer upheld MassHealth's denial of the plaintiff's application because he agreed that the Trust was a countable asset for the purposes of the plaintiff's long-term care eligibility determination. Specifically, he reasoned that the "notwithstanding the foregoing" provision of Articles II and III allows the plaintiff the power to appoint principal to her children upon the condition that the money is returned to her. He concluded that such phrase "frees the appellant's power of appointment from the prohibition on the appellant's benefiting from trust principal." According to the Hearing Examiner, under the "any set of circumstances" test, "this is a clear and obvious path for the Applicant to access trust principal for her benefit and it is therefore countable." He also concluded that a spendthrift clause in Article V explicitly exempts the power of appointment from spendthrift protections. Finally, he agreed with MassHealth that the plaintiff could have named herself as trustee and paid herself a portion of the principal as reasonable compensation.

In the motion for judgment on the pleadings, the plaintiff argues that, under the explicit terms of the Trust, she cannot receive any distributions of Trust principal and, accordingly, the corpus of the Trust cannot be considered a countable resource. She specifically relies on the language that "[n]one of the principal of the Trust may be distributed to or for the benefit of either Grantor under any circumstance. The Trustee has no power to distribute the principle of the Trust property to or for the benefit or either Grantor, either Grantors' creditors, the estate of either Grantor or the creditors of either Grantors' estate and shall not do so under any circumstance." (Emphasis added).

Upon thorough review of the Trust provisions, this court disagrees with MassHealth that the Trust establishes a clear path by which the plaintiff may access trust principal for her benefit without violating common law trust principles. First, the court finds that MassHealth's reliance on

Petition of Estate of Braiterman, 145 A.3d 682 (N.H. 2016) and *Doherty*, 74 Mass. App. Ct. 439, is misplaced. Unlike the Trust in this case, the *Braiterman* trust did not expressly preclude the trustee from distributing any part of the principal to the applicant. In her capacity as Trustee, the applicant in *Braiterman* had the “uncontrolled discretion” to adjust between income and principal, and to “terminate the Trust by distributing the principal and accumulated income of the Trust Fund, if, in her judgment, she might lose eligibility for substantial cash benefits or medical or other services because of the Trust . . . and if, in her judgment, such loss of eligibility would likely necessitate expenditures from the Trust for or on [her] behalf [as the donor] at a rate expected to deplete the Trust substantially and to defeat its supplemental and long-term purposes.” *Id.* at 228 (internal quotations marks omitted)(alterations in original). Further, the trust contained a clause that expressed the applicant’s “hope” that if the trust is terminated during her lifetime, the legatees would use trust assets “to supplement the income and the governmental benefits to which [she] may be entitled by reason of age, disability or otherwise.” *Id.* (alteration in original.). The *Braiterman* court concluded that this language “evinced the applicant’s general intent that Trust disbursements be used for her benefit.” *Id.*

The *Braiterman* court also distinguished that trust from the trust in *Heyn*: “Unlike the Trust [in *Braiterman*] the trust in *Heyn* expressly precluded the trustee from distributing any part or all of the principal to the applicant. . . . Further, Clause 4.1.1 of the Trust in this case evinces the applicant’s general intent that Trust disbursements be used for her benefit . . . ; there is no indication that the trust in *Heyn* contained a similar clause.” *Id.* at 230. As the Trust here expressly precludes any distribution of the principal to the plaintiff and lacks any intent on the plaintiff’s behalf that the disbursements be used to her benefit, it is distinguishable from *Braiterman*.

Similarly, unlike the case here, the trust in *Doherty* evidenced the applicant's expectation that the trustees would invade assets for the applicant's benefit. See 74 Mass. App. Ct. at 442. Although that trust did explicitly provide that the trustee may "make no distributions of principal from the Trust to or on behalf of" the applicant, the court refused to read the clause in isolation. *Id.* at 441. The *Doherty* court focused on a provision that provided the trustee with the authority to "in its sole discretion and notwithstanding anything contained in this Trust Agreement to the contrary, pay over and distribute the entire principal of [the] Trust fund to the beneficiaries thereof, free of all trusts[.]" *Id.* at 441 (internal quotations marks omitted)(first alteration in original). The *Doherty* court read the term beneficiaries to include the applicant. *Id.* at 441 n.6. The trust also directed the trustee to "accumulate the Trust principal to the extent feasible, due to the unforeseeability of [the applicant's] future needs and without regard to the interests of the remaindermen." *Id.* (internal quotations marks omitted). "When considered as a whole, . . . the trust constitutes a remarkably fluid legal vehicle, intelligently structured to provide both [the applicant] and the trustees maximum flexibility to respond to [the applicant's] changing life needs." *Id.* at 442 (internal quotations marks omitted). There, the trust, as structured, allowed 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.* at 443 (internal quotations marks omitted)(alteration in original). This is not the case here.

Second, the Hearing Examiner's determination that, pursuant to Article II, the plaintiff could appoint the Trust's assets to her children upon the "condition" that they use such assets for her benefit runs contrary to the Supreme Judicial Court's decision in *Heyn*, where the court rejected MassHealth's position that a limited power of appointment retained by the grantor provided the

grantor with access to trust principal. 89 Mass. App. Ct. at 318. The court held that “a provision making trust principal available to persons other than the grantor does not by its nature make it available to the grantor, any more than if the grantor had gifted the same property to such a person when she created the trust, rather than placing it in trust.” *Id.* “More generally, for purposes of computing countable assets, Medicaid does not consider assets held by other family members who might, by reason of love but without legal obligation, voluntarily contribute monies toward the grantor’s support.” *Id.* at 318-319.

The fact that the trust in *Heyn* did not have the “conditions or limitations language” does not change this court’s determination that the limited power of appointment which allows the plaintiff to appoint principal to her children does not render the assets of the Trust a countable resource. “An assignment by the plaintiff, pursuant to the limited power of appointment, as theorized by MassHealth, would constitute a violation of trust terms.” *Misiaszek v. Sudders*, 1885CV1370, slip op. at 5 (Mass. Super. Ct. July 19, 2019) (Sullivan, J.). “A limited power of appointment is exercisable only in favor of permissible appointees, and any attempt to exercise a limited power in favor of an impermissible appointee, i.e. to use principal for the personal benefit of the grantor, is therefore invalid.” *Id.* at 5-6, citing to Restatement (Third) of Property (Wills & Don. Trans.), §§ 17.2, 19.15-19.16 (2011). Judge Sullivan recognized that “[a] transfer as hypothesized by the Board in support of its denial of benefits to the plaintiff would be ineffective, and thus does not constitute circumstances under which payment from the trust could be made to or for the benefit of the plaintiff.” *Id.* at 6. This court sees no reason to depart from this conclusion.

Third, the Hearing Officer’s conclusion that the Trust’s spendthrift clause is invalid misses the mark, as the Trust is not a self-settled trust established for the benefit of the plaintiff. See

Cohen v. Commissioner of Div. of Med. Assistance, 423 Mass. 399, 414 n.21 (1996) (“When the trust is not a self-settled trust, the language of the trust, even to the extent of a spendthrift clause, is honored.”). Further, the Hearing Examiner improperly concluded that the plaintiff can receive principal by appointing herself as trustee and paying herself reasonable compensation. Construing the Trust’s provisions in light of the trust instrument as a whole, see *Heyn*, 89 Mass. App. Ct. at 315, this court agrees that the plaintiff’s incapacity makes her incompetent to act as Trustee and she would not be eligible to serve as such under the provisions of Article VIII. Finally, this court has previously held that even if the applicant, as trustee, ever did receive reasonable payment for her services, it would be treated as income under the MassHealth regulations, as opposed to a distribution of Trust corpus to her. *Keddy v. Sudders*, No. 1685CV01500, slip op. at 4-5 (Mass. Super. Ct. Jan. 29, 2018) (Goodwin, J.).

In light of the above discussion, the court concludes that there is no circumstances under the Trust by which the plaintiff can access the Trust principal during her lifetime. Even giving the requisite due deference to MassHealth’s decision, the decision to deny the plaintiff’s application was not supported by substantial evidence and was an error of law. As such, the principle within the Trust should not have been considered a countable asset. MassHealth’s determination that the plaintiff is ineligible for the long-term care benefits is reversed.

ORDER

For the reasons stated, the plaintiff’s motion for judgment on the pleadings is

ALLOWED.

Date: 9/5/19



Michael Doolin
Justice of the Superior Court