Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

[redacted]
c/o St. Patrick's Manor
863 Central Street
Framingham, MA 01701

Appeal Decision:	Approved	**Appeal Numbers:**	1819099 and 1820304
Decision Date:	JAN 17 2019	**Hearing Date:**	10/31/2018
Hearing Officer:	Sara E. McGrath		

Appearances for Appellant:
[redacted]

Appearances for MassHealth:
Cara Miller, Tewksbury MEC
Michael Somers, Esq.

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

APPEAL DECISION

Appeal Decision:	Approved	**Issues:**	Long-Term Care Eligibility
Decision Date:	JAN 17 2019	**Hearing Dates:**	10/31/2018
MassHealth's Reps.:	Cara Miller Michael Somers, Esq.	**Appellant's Rep.:**	[redacted] Esq.
Hearing Location:	Tewksbury MEC		

Authority

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

Jurisdiction

Through a notices dated July 31 and September 13, 2018, MassHealth denied appellant's application for MassHealth benefits because of excess assets in the amount of $343,911.16 (Exhibits 1 and 3). Appellant filed timely appeals of the denials on August 20 and September 20, 2018 (Exhibits 1 and 3). Because the notices reference the same assets, the two appeals were consolidated.[1] Denial of an application for benefits is a valid basis for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied appellant's application for long-term care benefits because of excess assets.

Issue

The issue on appeal is whether MassHealth correctly determined appellant's eligibility for long-term care for benefits.

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[1] MassHealth issued its second notice to comply with the Massachusetts Superior Court decision of *Maas v. Sudders*, Superior Ct. Bost. Dist., Docket No. 18-129-D (2018).

Summary of Evidence

A MassHealth eligibility worker and an attorney from the legal unit testified as follows: Appellant was admitted to a nursing facility on March 28, 2018. On June 1, 2018, a long-term care application was filed on appellant's behalf, seeking coverage as of May 12, 2018. MassHealth determined that property held in an irrevocable trust is countable.[2] On July 31 and September 13, 2018, MassHealth denied the appellant's application on the basis of excess assets in the amount of $343,911.66 (Exhibits 1 and 3).

Appellant executed an irrevocable trust on March 8, 2001, naming her son and daughter as trustees. On that same day, appellant conveyed property in Southborough Massachusetts by deed into the trust.[3] The parties agree that the value of the trust property is $344,100. Appellant noted that the property was sold several weeks prior to the hearing date at fair-market value. The proceeds of $337,500 have been placed in a trust savings account.

MassHealth identified four trust provisions that represent circumstances under which the trust income and principal can be paid to appellant or used for her benefit. Those include, in relevant part, the following:

> Article 2.1
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> If any property is placed in trust during the Donor's life, the trustee may pay Donor or may pay on Donor's behalf as much of the income of the trust as the [sic] shall determine in their sole and nonreviewable discretion to be necessary for the Donor's care and well-being. Any income not so paid may be accumulated and added to the principal. Except as provided in paragraph 2.2 below, the principal shall be held until the termination of this trust.
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> Article 2.2
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> During Donor's lifetime she shall have the power to appoint from time to time, by instrument in writing by Donor or by Donor's legal representative, all or any part of the trust property then on hand to any one or more charitable or nonprofit organizations over which the Donor have [sic] no controlling interest, whether or not organized for a purpose specified in section 170(c) of the Internal Revenue Code of 1986, but excluding any federal, state, or local government or any subdivision,

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[2] MassHealth identified other bank assets of $1,811.66 (Exhibits 1 and 3). Appellant did not dispute the countability of these assets.

[3] The deed indicates that appellant reserved a life estate interest in this property (Exhibit 6, exhibit 3).

department, or agency thereof.

Articles 5.1, 5.2, and 5.8

The Donor may appoint successor and additional Trustees....

Donor may remove any Trustee by notice to that Trustee.

All Trustees shall be entitled to fair and reasonable compensation for the services they perform for the trust. Such compensation shall be accounted for, as taxable income and the amount of such compensation shall be based on the customary and prevailing charges for services of a similar nature during the same period of time and in the same geographic locale. Trustees shall be reimbursed for the reasonable costs and expenses incurred in connection with their duties performed under this agreement.

Article 7.4

It is Donor's intent 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 me. Trustees may, to the extent that the income of the trust generates a tax liability for Donor, distribute to Donor or for Donor's benefit such amounts of income or principal of the Trust as they deem necessary to satisfy such tax obligation.

(Exhibit 5).

MassHealth and appellant offered the following arguments:

Article 2.1

MassHealth argues that if the trust accumulates income in excess of the original principal amount, that accumulated income is an available asset. MassHealth noted that because the trust has no undistributed income, this issue is likely irrelevant. Appellant agrees that she is an income beneficiary of the trust.

Article 2.2

MassHealth points to the SJC's decision in *Daley v. Executive Office of Health and Human Services*, in which the Court remanded a companion case (*Nadeau*) to the Board of Hearings to determine, among other things, whether trust assets could have been used to pay a nonprofit organization for care received from a nursing home operated by a nonprofit organization (477

Mass. 188, 203 (2017)). MassHealth argues that the SJC found that a power to appoint to a charity or nonprofit is circumstance through which trust assets are available to the trust donor. MassHealth cites the following SJC sentence from the decision: "Had Nadeau received care at a nursing home operated by a nonprofit organization, he could have used the assets of the trust, including his home, to pay the nonprofit organization for his care" (*Id.* at 203). Appellant argues that after the remand in *Nadeau*, the Board of Hearings determined that there was no evidence that a nonprofit nursing facility would be allowed or required to use the trust principal for the appellant's benefit or care. Appellant further argues that were appellant to appoint trust principal to a nonprofit nursing facility, the facility would be under no obligation to give that principal back to appellant or use it for his benefit, citing *Heyn v. Director of the Office of Medicaid*, 89 Mass. App. Ct. 312, 318-319 (2016).

Articles 5.1, 5.2, and 5.8

MassHealth argues that because appellant can appoint herself trustee and use trust principal to compensate herself, trust principal is available to her. MassHealth concedes that reasonable compensation would not include *all* trust assets, but argues that because the trust does not specifically limit the amount of principal that can be used, the amount is unlimited and MassHealth considers all trust assets to be accessible to appellant under this trust provision. Appellant argues that because the trust language includes the word *reasonable*, not all trust assets could be paid under this provision. The trust is a simple trust and does not require much. Further, there is no history of any trustee fees being paid, and, in any case, appellant is not competent and could never serve as trustee. MassHealth responded that a power of attorney could stand in appellant's shoes. Lastly, appellant argues that because the notice does not state a specific amount of compensation that could be paid, MassHealth's argument is invalid.

Article 7.4

MassHealth argues that trust principal can be used to pay appellant's tax liability, and per the *Daley* decision, this is a clear pathway for appellant to access trust principal. MassHealth argues that to require MassHealth to calculate the amount of any potential tax liability is an improper shift of the burden of proof. Appellant has the burden to prove her financial eligibility for MassHealth. As above, because the trust does not specifically limit the amount of principal that can be used, the amount is unlimited and MassHealth considers all trust assets to be accessible to appellant under this trust provision. Appellant argues that after the remand in *Nadeau*, the Board of Hearings determined that this trust provision does not provide access to trust principal. Appellant further argues that the trust does not generate enough income to necessitate the filing of a tax return. Further, any potential tax liability would be offset by appellant's medical expenses, which includes her monthly patient paid amount, eliminating any tax liability. Lastly, appellant argues that because the notice does not state a specific amount of tax liability that could be incurred, MassHealth's argument is invalid.

Appellant submitted a legal memorandum at hearing memorializing the above arguments (Exhibit 6). MassHealth requested that the hearing officer leave the record open for the submission of a legal memorandum. The hearing officer declined the request at hearing, but noted that the Board would entertain a request to re-open the record after MassHealth's post-hearing review of appellant's legal memorandum. The Board did not receive a request to re-open the record.

Findings of Fact

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

1. On March 8, 2001, appellant established an irrevocable trust, naming her son and daughter as trustees. On the same date, she transferred her home into the trust.

2. On March 28, 2018, appellant was admitted to a nursing facility.

3. On June 1, 2018, a MassHealth application was filed on the appellant's behalf, seeking coverage as of May 12, 2018.

4. On July 31 and September 13, 2018, MassHealth denied appellant's application on the basis of excess assets.

5. On August 20 and September 20, 2018, the appellant filed timely appeals of the excess asset denials.

6. In or about October 2018, the trust sold the property at fair-market value; the proceeds of $337,500 have been placed in a trust savings account and currently earns interest of $11.28 per month, or $135.38 per year.

7. In October 2018, appellant's physician confirmed that she has advanced Alzheimer's dementia and is unable to make decisions pertaining to her health or finances (Exhibit 6, exhibit 7).

8. The trust is irrevocable and provides that its principal shall be held until the termination of the trust (Articles 1.1 and 2.1).

9. Appellant is an income beneficiary of the trust (Article 2.1).

10. The trust gives the donor the power to appoint trust property to any one or more charitable or nonprofit organizations over which the donor has no controlling interest (Article 2.2).

11. The trust provides that the donor may be appointed trustee and may receive trustee compensation from trust principal (Articles 5.1, 5.2, and 5.8).

12. The trust provides that trustees may use trust principal to satisfy the donor's income tax liability (Article 7.4).

Analysis and Conclusions of Law

At issue in this case is MassHealth's determination that the appellant has available assets in excess of the allowable limit under MassHealth regulations. Specifically, MassHealth determined that the appellant retained access to property and/or funds in an irrevocable family trust. Appellant contends that under the terms of the trust she is entitled to trust income only, but that the trustee has no discretion to distribute principal to her.

The MassHealth regulation at 130 CMR 520.023(C) applies to irrevocable trusts or similar legal devices created on or after August 11, 1993, and provides in part as follows:

> (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.
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> (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.
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> (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).
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> (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).
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> (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).

(130 CMR 520.023(C)).

The trust in this case includes an express statement that except as provided in Article 2.2, trust principal shall be held until the termination of the trust. 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" (*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 (130 CMR 520.023(C)). MassHealth determined that there are circumstances in which trust principal can be made available for appellant's use and found the assets fully countable.

MassHealth found that there are three provisions through which the appellant could receive trust principal. MassHealth found that under Article 2.2, the appellant has the lifetime power to appoint principal and income to charitable organizations and can therefore appoint principal to the facility for payment of her long-term care costs. In support of this argument, MassHealth points to the SJC's decision in *Daley v. Executive Office of Health and Human Services*, in which the Court remanded a companion case (*Nadeau*) to the Board of Hearings to determine, among other things, whether trust assets could have been used to pay a nonprofit organization for care received from a nursing home operated by a nonprofit organization (477 Mass. 188, 203 (2017)). MassHealth's reliance on the SJC's remand order to support its conclusion that trust principal is accessible to appellant through this trust provision is not persuasive; the SJC specifically left this determination to the Board of Hearings.

After the remand in *Nadeau*, the Board of Hearings determined that there was no evidence that a nonprofit nursing facility would be allowed or required to use the trust principal for appellant's benefit or care. The hearing officer in that matter then concluded that there was no clear path by which the appellant could access trust principal. The same issue remains in this case: once distributed to the organization, it is by no means certain that funds distributed would be used specifically for appellant's care. Accordingly, MassHealth's argument on this point falls short.

MassHealth also found that appellant has access to trust principal under both Article 5.8 (trustee compensation) and Article 7.4 (payment of tax liabilities). MassHealth concedes that not all trust principal could reasonably be accessed under either provision, but argues that because neither provision specifically limits the amount of accessible principal, MassHealth considers the access unlimited and has determined that the entire trust principal is accessible to appellant.

Appellant argues generally that because MassHealth failed to specifiy the limited dollar amount of trust principal available under these trust provisions, its argument fails. Additionally, appellant argues that because the trust only authorizes fair and reasonable trustee compensation, appellant's potential access to trust principal is at most very limited or more realistically, none, given her current mental status. Similarly, appellant argues that due to her current circumstances, she will never owe any taxes and will not access trust principal through this trust provision either.

MassHealth's argument that both trust provisions allow potential access to trust principal is persuasive and, importantly, not specifically disputed by appellant. However, MassHealth conceded at hearing it would not be reasonable to conclude that appellant can access *all* trust assets through these trust provisions, and only did so because the trust does not limit the available amount of principal. But the trust *does* limit appellant's access to trust principal; it limits trustee compensation to a fair and reasonable amount, and limits tax payments to appellant's actual income tax obligation. Appellant presented unrefuted testimonial evidence that to date, trustee compensation has never been paid out of the trust and that due to the trust's simple and straightforward nature, any trustee compensation would be minimal. Appellant also pointed out that the trust principal currently generates income of $135.38 per year and that any tax liability would likely be offset by deductions, including her substantial out-of-pocket medical expenses (her monthly patient-paid amount). Thus, MassHealth's determination that *all* trust principal is accessible to appellant is not supported by the facts or relevant case law.

MassHealth had an obligation to determine *the portion* of trust principal accessible to appellant under these two trust provisions (*Daley*, 477 Mass. at 203). MassHealth failed to do so, leaving appellant with no specific asset amount to either dispute or accept. Further, without specific numbers, appellant is unable to reduce her assets in accordance with 130 CMR 520.004. For these reasons, MassHealth's argument that appellant has access to the entire trust principal under these two provisions falls short as well.

Appellant has demonstrated that the irrevocable trust into which the appellant transferred her property on March 8, 2001 is not countable to her for MassHealth eligibility purposes. The appeal is approved.

Order for MassHealth

Rescind notices dates July 31 and September 13, 2018. Do not count trust assets. Redetermine eligibility and notify appellant, with 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, Office of Medicaid, at the address on the first page of this decision.

Sara E. McGrath

Sara E. McGrath
Hearing Officer
Board of Hearings

cc: Tewksbury MEC

Michael Somers, Esq., MassHealth Legal Unit

[redacted]