



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF MEDICAID

_____)	
)	
Appellant,)	
v.)	BOARD OF HEARINGS
MASSHEALTH,)	APPEAL NO. 1814090
Respondent.)	
_____)	

MASSHEALTH'S POST-HEARING MEMORANDUM

INTRODUCTION

All assets of  Realty Trust (the "Trust") are countable in an eligibility determination. See 42 U.S.C. §1396p(d) et seq; 130 CMR 520.023. Under the terms of the Trust, payment from the Trust corpus could be made to or for the benefit of the applicant, making the full value of the Trust countable under 42 U.S.C. §1396p(d)(3)(B) and 130 CMR 520.023. As a threshold matter, all trusts and "similar legal devices" are analyzed under the federal and state Medicaid laws regarding Trusts, making the appellant's argument that this is not a "true" irrevocable trust irrelevant. Further, the applicant can access Trust principal for her benefit under Article 2, which allows a beneficiary (of which the applicant is one) to direct the payment of principal to her. Finally, even if the Hearing Officer does not find this Trust fully

countable, MassHealth requests that this Hearing Officer rule that the applicant owns a life estate in the property held in Trust.¹

FACTS

The applicant established the Trust in 2005 by transferring her home into the Trust. According to information provided to MassHealth, the Trust is worth approximately \$1.8 million (the asset limit for MassHealth is \$2,000 – or one-tenth of one percent of the Trust’s value). The Schedule of Beneficiaries lists the applicant as owning a life estate and her son, Stephen [REDACTED] as owning the remainder interest.² The following Trust provisions are relevant to this appeal:

Article 2

“The Trustees shall hold the principal of this Trust and receive the income therefrom for the benefit of the beneficiaries, and shall pay over the principal and income pursuant to the direction of the beneficiaries, and in the absence of such direction shall pay the income to the beneficiaries . . .

. . . the Trustees shall have full power and authority to . . . otherwise dispose of all or any part of the Trust property . . .”

Article 3

“The Trust may be terminated at any time by the beneficiaries, or any one or more of them, by notice in writing the to the Trustees, or by the Trustees by notice to the beneficiaries . . . In case of any such termination, the Trustees shall transfer and convey the entire Trust Estate free and discharged of trusts . . . to the beneficiaries as tenants in common in proportion to their respective interests . . .

¹ Because the applicant indicated a desire to return home on her application, the ownership of the life estate would not be an impediment to eligibility; however, MassHealth would place a lien upon the life estate.

² Stephen [REDACTED] now owns 99% of the remainder interest with 1% owned by an LLC.

STATUTORY AND LEGAL BACKGROUND

In order to be approved for long-term care benefits, the total value of countable assets or resources owned by, or available to, the applicant may not exceed \$2,000. 130 CMR 520.003(A)(1). Countable assets are all assets that must be included in the determination of eligibility, and include all assets to which the applicant or his spouse would be entitled whether or not these assets are actually received. 130 CMR 520.007.

The treatment of irrevocable trusts established on or after August 11, 1993 is governed by 42 U.S.C. §1396p(d) et seq., which states in relevant part:

(i)if there are *any circumstances* under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual...(emphasis added)

42 U.S.C. § 1396p(d)(3)(B)(i). This federal statute has been codified in Massachusetts regulations:

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.

130 CMR 520.023(C)(1)(a).

Massachusetts courts have interpreted this “any set of circumstances” test broadly, and decades of case law have made clear that the Agency must perform a rigorous examination of irrevocable trusts to determine if any plausible circumstances exist whereby an applicant can access trust principal or income. See Cohen v. Comm’r of the Div. of Med. Asst., 423 Mass. 399, 413 (1996) (“if there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility”); Lebow v. Comm’r of Div. of Med. Asst., 433 Mass. 171, 174,75 (2001) (“if there is *any* state of affairs, at *any* time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets will count in calculating the grantor's Medicaid eligibility”) (emphasis in original); Doherty v. Dir. of Off. of Medicaid, 74 Mass.App.Ct. 439, 442 (2009).

ANALYSIS

First, MassHealth regulations clearly require MassHealth to analyze this Trust (or even accepting the appellant’s label that this is something other than a “true” trust) under the financial eligibility rules regarding trusts. See 130 CMR 520.023 (“[t]he trust and transfer rules at 42 U.S.C. 1396p apply to trusts or *similar legal devices* created on or after August 11, 1993, that are created or funded other than by a will”) (emphasis added). Even if this document titled “Declaration of Trust,” which uses the word “Trust” repeatedly throughout and is governed by “Trustees” is not a “true” trust, this is clearly a similar legal device that needs to be analyzed under the Medicaid trust rules. The applicant funded this Trust or similar legal device other than by will with her own property. The property is managed by Trustees and governed by a set of

articles indicating how the Trustees must treat the property with respect to the beneficiaries. Medicaid financial eligibility rules are not so easily evaded by changing the label on a device used to hold assets. Since this Trust or similar legal device functions like a Trust, it is analyzed under the Medicaid rules on trusts, which means MassHealth must employ the “any set of circumstances test to determine if any trust principal or income can be paid to or for the benefit of the applicant. See 42 U.S.C. § 1396p(d)(3)(B)(i).

Applying the “any set of circumstances” test to this Trust requires a conclusion that the Trust principal can be paid to or for the benefit of the applicant. The first sentence of Article 2 clearly states that the Trustees hold the Trust principal for the benefit of the applicant: “[t]he Trustees shall hold the principal of this Trust . . . for the benefit of the beneficiaries.” This sentence alone is enough for MassHealth to deem the entire Trust countable under the any set of circumstances test. Unlike most irrevocable trusts which state the purpose of the trust is to hold property for the benefit of an applicant’s heirs (and income for the benefit of the applicant), this Trust explicitly states the Trustees hold the Trust principal for the benefit of the applicant. This makes the Trust similar to the one analyzed by the Massachusetts Appeals Court in Doherty, where the Court found it important to its eventual decision that the trust was countable the fact that “the trust vehicle, considered as a whole, evidences [the applicant’s] expectation or intent that the trustees will invade trust assets when necessary to ensure [the applicant’s] comfort.” Doherty, 74 Mass.App.Ct. at 392. Here too, the governing purpose of the Trust instrument is that the principal be held and used for the applicant’s benefit, and the remaining language in the Trust needs to be viewed with an understanding that this Trust is explicitly designed for the principal to benefit the applicant.

The remainder of Article 2 demonstrates that Trust principal can easily be paid directly to the applicant: “The Trustees . . . shall pay over the principal and income pursuant to the direction of the beneficiaries, and in the absence of such direction shall pay the income to the beneficiaries, in proportion to their respective interest . . .” Since the applicant is a beneficiary, she can direct the Trustees to pay to her any amount of principal she wants. Since the Trustees have the authority to dispose of the property, the property can be sold and the Trustees can then distribute cash directly to the applicant. The Trust states that in the absence of such direction, payments will be made according to the beneficiaries’ respective interest. This inversely implies that the beneficiary can direct the Trustees to pay to the applicant *more* than her respective interest if she so chooses. The applicant can use this power to direct the Trustees to pay to her any amount of the approximately \$1.8 million that the Trust currently holds “for the benefit of the beneficiaries.” Therefore, the Trust is countable in an amount well over \$2,000 and the applicant is not eligible for MassHealth long-term care.³

There is no reason to presume – without it being explicitly stated – that the direction over Trust principal would require the assent of both beneficiaries. It is the applicant’s burden to prove eligibility and thus the applicant’s burden to prove that there are “no set of circumstances” whereby Trust principal can be used for her benefit. 42 U.S.C. § 1396p(d)(3)(B)(ii). Here, the Trust states that the beneficiaries (Catherine [REDACTED] or Steven [REDACTED]) can direct Trust principal to be paid to either one of them. It does not affirmatively say that one beneficiary, i.e. the applicant, could not undertake this power of dispersal of Trust principal. Even if the assent of Steven [REDACTED] was required, this is still a circumstance under the terms of the Trust whereby Trust principal can be paid to the applicant. This can be distinguished from Heyn v. Director of the

³ As stated above, if for some reason this Hearing Officer does not conclude that the Trust is countable, MassHealth respectfully requests a ruling indicating that the applicant is the owner of a life estate, which would

Office of Medicaid – which found that money transferred directly to an heir was not countable simply because the heir could return the funds out of familial obligation – because here the Trust itself presents the circumstances by which money can transferred *out of the Trust* to the applicant. See 89 Mass.App.Ct. 312, 319 (2016)

CONCLUSION

The Trust is countable in an eligibility determination because the Trust permits a payment of Trust principal directly to, or for the benefit of, the applicant in the following ways. Article 2 gives the power of complete dispersal of Trust principal to the applicant at the direction of the beneficiaries – and the applicant is a beneficiary. Therefore MassHealth respectfully requests this Board to uphold the decision that the applicant is not eligible for MassHealth long-term care.

Respectfully Submitted,

/s/Michael J. Somers

Michael Somers (BBO#682798)
Assistant General Counsel
Executive Office of Health and Human Services
One Ashburton Place, 11th Floor
Boston, MA 02108
(617) 573-1600

Dated: December 13, 2018

Certificate of Service

The undersigned counsel hereby certifies that a copy of the foregoing document was served this day by email on appellant's counsel.

Dated: December 13, 2018

/s/Michael J. Somers

Michael J. Somers
Assistant General Counsel