

Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied in part Approved in part	Appeal Number:	1814090
Decision Date:	MAR 20 2019	Hearing Date:	November 13, 2018
Hearing Officer:	Brook Padgett	Record Open:	January 14, 2019

Appellant Representative:

Brian Barreira, Esq.
Andrew Gallant, Esq.
John O'Brien, Esq.



MassHealth Representatives:

Gloria Medeiros, MassHealth Enrollment
Center Taunton
Michael Somers, Esq.



Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, 6th floor
Quincy, MA 02171

APPEAL DECISION

Appeal Decision:	Denied in part; Approved in part	Issue:	130 CMR 520:023
Decision Date:	MAR 20 2019	Hearing Date:	November 13, 2018
MassHealth Reps.:	G. Medeiros, M. Somers, Esq.	Appellant Rep.:	B. Barreira, Esq.
Hearing Location:	Taunton		

Authority

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

Jurisdiction

The Appellant received a notice dated August 15, 2018, stating: "MassHealth has decided that you are not eligible for MassHealth because you have more countable assets than MassHealth benefits allow... The provisions of your trust under which trust principal can be paid to you or your spouse or can be paid for you or your spouse's benefit, include, but not limited to:

 Realty Trust

1. Article 2 – you can direct the Trustee to distribute trust income and principal of any amount to you; and
2. Article 3 – you can terminate the trust at any time and upon termination receive the entire trust principal as the 100% beneficiary of the trust during your lifetime. Regulations: 130 CMR 520.003, 130 CMR 520.023(B); 130 CMR 520.023(C)." (Exhibit 1).

The Appellant filed this appeal timely on August 17, 2018. (130 CMR 610.015(B); Exhibit 2). Denial of assistance is valid grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

The Appellant's long term care application was denied for being over the MassHealth asset limit.

Issue

Is the Appellant over the assets limit for long term care eligibility?

Summary of Evidence

MassHealth testified the Appellant applied for long term care benefits on March 02, 2018. MassHealth issued a denial of the application on April 26, 2018, stating the Appellant was over the MassHealth asset limit of \$2,000.00. Additional documentation was received on May 07, 2018, and a second denial was issued on May 11, 2018, for the same reason. On August 15, 2018, MassHealth generated a more detailed explanation of the Appellant's denial. (See Exhibit 1). Counsel for MassHealth argued the Appellant is applying for a program for the destitute while she has access to almost two million dollars in assets. The [REDACTED] Realty Trust ([REDACTED] RT) contains real estate valued at \$1.8 million. The Appellant has a life estate interest in the property which is currently valued at \$274,974.00 ($\$1,812,500 \times 0.15171 = \$274,974.00$)¹. The document titled DECLARATION OF TRUST Article 2 states "The Trustee 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" The Appellant is listed as beneficiary and as a result has access to the principal. Further Article 3 states "The Trust may be terminated at any time by the beneficiaries, or any one or more of them, by notice in writing to the Trustees, or by the Trustees by notice to the beneficiaries ...". The Appellant is a beneficiary so she without consent of any other party she has the ability to terminate the Trust and access the entire trust principal. MassHealth submitted into evidence an Appeal Worksheet, application dated March 02, 2018, SC-1, notice date March 22, 2018, April 26, 2018, May 11, 2018, August 15, 2018, property record card, Section 7520 Interest Rates, Table S, Quit Claim Deed, Declaration of Trust, Schedule of Beneficiaries, Amendment of Trust, Resignation of Trustee, Application Supplement E and mortgage. (Exhibit 4).

The Appellant was represented by counsel who was accompanied by Attorney Gallant and the Appellant's son and Attorney O'Brien via telephone. The Appellant argued the Trust dated and recorded on [REDACTED] 2005, is a nominee trust which holds title to the Appellant's primary residence and is a title-holding vehicle on the public record at the Registry of Deeds. The owners of the real estate per the terms of the nominee trust are the Appellant who owns a life estate interest and her son and [REDACTED] own all the vested remainder interest as disclosed on the Schedule of Beneficial Interests.² Counsel maintains it is well established under Massachusetts law that a Nominee Trust does not create a trust.³ It creates a principal-agent relationship and not a trustee-beneficiary relationship and only the owner of the Beneficial Interest can modify or transfer their ownership. Upon any termination of the Trust the Trustee must convey the property to the owners as provided by the Schedule of Beneficiaries. The Appellant's son and [REDACTED] have vested ownership interests

¹ Table S, is based on a single life factors table for an 85 year old individual with an interest at 2.8% (See Exhibit 4).

² The Appellant's son subsequently transferred 1% of his ownership interest to [REDACTED] Properties, LLC (SMG).

³ See Exhibit 5.

and neither the Appellant nor the Trustee have any method, explicit or implicit, to make them give away what they already own.

Attorney O'Brien the drafter of the Trust testified telephonically arguing that there was never any intention to provide the Appellant with access to the principal. Nominee trusts are not trusts in the true sense of the word as the document simply sets up an agency relationship and does not allow any activity without the Trustee approval. The Appellant submitted the following into evidence: *Medallion Realty Trust*, U.S. Bankruptcy Court, Massachusetts, March 21, 1990 Appeal No. 89-40143-MA; *FDIC v. Porter*, 46 Mass. App. Ct. 241 (1999); Massachusetts Law Quarterly article "The Nominee Trust in Massachusetts Real Estate Practice"; Directive 95-5: Deeds Excise on Transfer of beneficial Interests in Nominee Trusts May 09, 1995; Quit Claim Deed dated [REDACTED] 2005; [REDACTED] Realty Trust; Resignation of Trustee dated [REDACTED], 2018; and Schedule of Beneficiaries. (Exhibit 5).

At the request of the MassHealth representative the record remained open until December 13, 2018, to respond to the Appellant's argument. The record was extended until January 14, 2019 for the Appellant to respond to the MassHealth's December 13, 2018, submission. (Exhibit 6).

MassHealth responded within the required time limits arguing the Appellant has access to Trust principal for her own benefit under Article 2 which allows a beneficiary (of which the Appellant is one) to direct payment of principal to her. The first sentence of Article 2 states that the Trustees hold Trust principal for the benefit of the beneficiaries. MassHealth argues this sentence alone deems the entire Trust countable under the "any circumstances test" as the Trust explicitly states the Trustees hold the Trust principal for the benefit of the Appellant. Article 2 further states "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 interests..." MassHealth maintains that since the Appellant is a beneficiary, she can direct the Trustees to pay her any amount of principal she wants. Since the Trust states in the absence of any direction, payment will be made according to the beneficiaries respective interest; therefore the inverse applies that the beneficiary can direct the Trustees to pay to the Appellant more than her respective interest if she so chooses. Finally MassHealth argues if the Trust is found to be noncountable it should be determined the Appellant continues to own a life estate interest in the property.⁴ (Exhibit 7).

The Appellant's counsel responded to the MassHealth submission within the required time limits restating prior arguments that the maximum the Appellant has regarding the real estate is as a life tenant and her corresponding life estate interest. Since the nominee title-holding entity has been terminated, the Appellant holds a life estate as a matter of record title. The Appellant representative submitted into evidence the following: a Memorandum in Support; *Hirvi v. Sudders*, Order on Plaintiffs' Motion for Declaratory Judgement, Massachusetts Law Quarterly article "The Nominee Trust in Massachusetts Real Estate Practice"; *Medallion Realty Trust*, U.S. Bankruptcy Court, Massachusetts, March 21, 1990 Appeal No. 89-40143-MA; *In Re Eastmare Development Corp.*,

⁴ The Appellant has maintained that she intends to return home.

150 B.R. 495 (Bankr. D. Mass. 1993); *In Re Stoll*, 330 B.R. 470 (Bankr. S.D.N.T. 2005); Directive 95-5: Deeds Excise on Transfer of Beneficial Interests in Nominee Trusts May 09, 1995; and Quit Claim Deed dated January 10, 2019. (Exhibit 8A-D).

Findings of Fact

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

1. The Appellant is a single woman residing in a nursing facility who filed an application for MassHealth long term care benefits on March 02, 2018. (Exhibit 4).
2. On [REDACTED], 2005, the Appellant as grantor transferred real estate for the consideration of \$1.00 to the [REDACTED] RT. (Exhibit 4).
3. The entire corpus of the [REDACTED] RT is the assessed value of Appellant's primary residence valued at \$1.8 million. (Exhibit 4).
4. On May 25, 2005, the Schedule of Beneficiaries for the [REDACTED] RT lists the Appellant and her son as sole trustees of the Trust and the Appellant as owner of a life estate and her son as the owner of the remainder interest. (Exhibit 4).
5. On February 29, 2016, the Appellant resigned as Trustee of the [REDACTED] RT. (Exhibit 4).
6. On February 29, 2016, the Appellant's son conveyed 1% of the remainder interest to [REDACTED] Properties LLC. (Exhibit 4).
7. On February 29, 2016, the [REDACTED] RT Schedule of Beneficiaries lists beneficiaries as the Appellant as owner of a life estate, with the remainder interest of 99% to the Appellant's son 1% to [REDACTED]. (Exhibit 4).
8. MassHealth has valued the Appellant's life estate interest at \$274,974.00 ($\$1,812,500 \times 0.15171 = \$274,974.00$). (Exhibit 4).
9. The DECLARATION OF TRUST states:
 - 1. "The undersigned hereby DECLARE that they and their successors in trust will hold any and all property that may be transferred to them as Trustees hereunder for the sole benefit of the persons hereinafter call the beneficiaries whose names are set forth in a Schedule of Beneficial Interest signed by the Trustees in the proportions therein set forth. The Trust established hereunder shall be known as: [REDACTED] RT."
 - 2. "The Trustee 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 directions of the beneficiaries, and in the absence of such direction shall pay the income to the beneficiaries, in proportion to their respective interests, at least yearly. . . ."

- 3. “The Trust may be terminated at any time by the beneficiaries, or any one or more of them, by notice in writing 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 trust, but subject to any leases, mortgage, contracts, or other encumbrances on the Trust Estate, to the beneficiaries as tenants in common in proportion to their respective interests. (Exhibit 4).

10. On August 15, 2018, the Appellant’s MassHealth application was denied for excess assets contained in the [REDACTED] RT. (Exhibit 1).

Analysis and Conclusions of Law

The Appellant is a resident of a nursing facility who applied for MassHealth benefits on March 02, 2018. On [REDACTED], 2005, the Appellant established a Trust; therefore, regulations at 130 CMR 520.023 (Trusts or Similar Legal Devices Created on or after August 11, 1993) are controlling.

Where an individual has established a trust, MassHealth and the courts consider whether “...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, and payments from that portion of the corpus or income (I) to or for the benefit of the individual, shall be considered income of the individual, (II) for any other purpose, shall be considered a transfer of assets by the individual. 42 U.S.C. §1396p(d)(3)(B)(i)⁵, 130 CMR 520.023(C)(1)(a).⁶ The effect of the “any circumstances” test is that if the trustee is afforded even a peppercorn of discretion” to make payment of principal to an applicant, or if the trust allows such payment based on certain conditions, then the entire amount that the applicant could receive under the trust is counted for MassHealth purposes.⁷

Whether the [REDACTED] RT is a realty trust or a nominee trust the issue is whether the Appellant has the discretion to access principal within the trust for her own benefit. Article 2 states unequivocally that the Trustee shall pay over the principal and income pursuant to the directions of the beneficiaries. Further Article 3 states unequivocally that the Trust may be terminated at any time by any one or more of the beneficiaries. The Appellant has always been and continues to be a beneficiary of the [REDACTED] RT and therefore has the authority under Article 2 to request the Trustee pay over the principal to her and under Article 3 to dissolve the Trust and gain access to principal. In either instance the Appellant possesses a life estate interest with the remainder interest of the Trust held by her son and [REDACTED]. While this makes the entire amount that the Appellant could receive under the trust countable for MassHealth purposes, the Appellant’s entire amount consists

⁵ *Heyn v. Director of the Office of Medicaid*, 89 Mass. App. Ct. 312, 315 & n.7 (2016).

⁶ Trusts or Similar Legal Devices Created on or after August 11, 1993. (C) Irrevocable Trusts. (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.

⁷ *Cohen v. Commissioner of the Div. of Med. Assistance*, 423 Mass. 413 (1996).

of only a life estate interest. Appellant can sell, mortgage or lease her life estate to pay for her nursing facility care.

As there are circumstances which give the Appellant the ability to access principal of the [REDACTED] RT then the entire amount that the Appellant could receive under the trust is counted for MassHealth purposes and this appeal is denied in part. Since the entire amount that the Appellant could receive under the trust is her life estate interest only, the remainder interest of the trust is not countable and this appeal is approved in part.

Order for the MassHealth

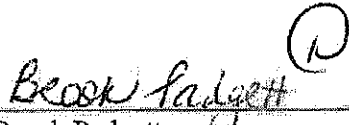
Redetermine Appellant's long term care eligibility after counting the Appellant's life estate interest.

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, Division of Medical Assistance, at the address on the first page of this decision.

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.



Brook Padgett
Hearing Officer
Board of Hearings

cc: Taunton MEC

Michael Somers, MassHealth Assistant General Counsel

Brian Barreira, 118 Long Pond Road #206, Plymouth, MA 02360

Andrew Gallant, O'Brien and Associates, 10 Kearney Road, Suite 305, Needham, MA 02494