COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
OFFICE OF MEDICAID
BOARD OF HEARINGS

Appeal No. 1814090, Kathryn Gaull v. Office of Medicaid

Memorandum of Appellant Regarding MassHealth Denial

Date: January 14, 2019

To: Brook Padgett, Hearing Officer

To: Michael Somers, MassHealth Attorney

From: Brian E. Barreira, Appellant's Attorney

The MassHealth agency is limited to only putting forth evidence and arguments in support of the reasons outlined in the Denial Notice dated August 15, 2018 ("Denial Notice"). The Denial Notice determined the Appellant was ineligible for MassHealth Long-Term-Care Services in a Nursing Facility due to excess assets, allegedly a Trust. The Denial Notice contains the following reasons why MassHealth considers the "Omaha Street Realty Trust" to be a countable asset:

> "This notice explains why your trust(s) is considered countable for MassHealth eligibility purposes. The provisions of your trust under which trust principal can be paid to you or your spouse can be paid for your or your spouse's benefit, include, but are not limited to:
>
> Omaha Street 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"

These two reasons are the only reasons listed in the Denial Notice. Any other reasons for denying the Appellant benefits put forth by MassHealth during the hearing or in any subsequent

memorandum are invalid and violate the Appellant's due process rights, as determined via Declaratory Judgment issued by Justice Douglas Wilkins of the Suffolk Superior Court on June 22, 2018 and clarified by him on October 11, 2018; these decisions are attached as Exhibits A and B. Thus, the Appellant moves to strike all such other arguments, including the newly-unveiled argument that a nominee title-holding vehicle is one of the "similar legal devices" that the agency is allowed to treat as a trust.

Under the Maas-Hirvi Declaratory Judgment, hearing officers are limited to reviewing the reasons for the denial that are contained on the denial notice, and this procedural limitation means that they cannot come up with any other reasons to support the denial.

(1) General Background

In 2005, the Appellant met with Attorney John J. O'Brien ("Attorney O'Brien") to discuss her estate plan. Attorney O'Brien, who has testified telephonically in this appeal, drafted a standard nominee trust in lieu of a life estate deed, as was his customary practice. In his experience, so-called nominee trusts were very popular among his tax and business clients due to their benefits of shielding the beneficiaries from the public record and, if used properly, due to their ability to avoid real estate passing through probate. He and the Appellant both liked the idea they could accomplish the exact same outcome of a life estate deed via a nominee trust, allowing the identity of the beneficiary (her son, Samuel Gaull) to remain shielded from the public record and allowing him to transfer his ownership interest more efficiently if he so chose.

The Appellant's estate plan was completed by Attorney O'Brien in May 2005. Attorney O'Brien does not specialize in long-term care planning or Medicaid trusts, nor were these matters even discussed during their meetings. The idea of long-term care planning was not even a consideration in this estate plan, as in 2005 the Appellant had two long term care insurance policies in place and had been paying premiums on them since 1999.

(2) Description of the Omaha Street Realty "Trust"

The Omaha Street Realty Trust dated ZZZZZZ, 2005 and recorded with the Norfolk County Registry of Deeds in Book ZZZZZZ, Page ZZZZZZ is a nominee title-holding entity which holds title to the real estate at 125 Omaha Street, ZZZZZZ, Massachusetts ("Real Estate").

The ownership interest in the Real Estate was irrevocably transferred from the Appellant to Samuel Gaull, and the Appellant retained a life estate in the Real Estate on May 25, 2005. The Omaha Street Realty Trust is a so-called "nominee trust" and is not a true trust; rather, it is a title-holding nominee vehicle on the public record at the Registry of Deeds. The owners of the Real Estate, as per the initial terms of the nominee trust, were the Appellant, who owned a life estate, and Samuel Gaull, who fully owned all of the vested remainder interest in the Real Estate. Since then, Samuel Gaull has transferred 1% of his ownership interest to Wichita Properties, LLC. The owners of the Real Estate are disclosed on the Schedule of Beneficial Interest. The "Trustee" is actually an agent, may only act at the direction of the beneficiaries and does not have any independent authority to act in any manner.

In order to determine the owner of property owned by a nominee trust, one must look to the Schedule of Beneficial Interests to determine the owners and those ownership interests cannot be changed or modified by the Trustee. Only the owner of a beneficial interest in a nominee trust can modify or transfer his/her/its ownership interest.[1] Upon any termination of a nominee trust, the Trustee must convey the property to the owners, without the exercise of any discretion or other control by the Trustee.

The Trustee has no discretion to distribute principal to the life tenant, nor income or a life estate to a remainder beneficiary. Similar to a so-called life estate deed, under no circumstances can any owner be compelled to transfer the owner's vested ownership interest to any other owner. Any such action by the owner of a beneficial interest to direct the Trustee would be voluntary and independent of the terms of the nominee title-holding vehicle.

Samuel Gaull has already made such an assignment when he transferred 1% of his vested ownership interest to Wichita Properties, LLC. The owners' respective ownership interests are currently held as follows:

"Kathryn Gaull	Life Estate
Samuel Gaull	99% Remainder Interest
Wichita Properties, LLC	1% Remainder Interest"

[1] "The law of Massachusetts is plain that a valid trust, once created, cannot be revoked or altered except by the exercise of a reserved power to do so, which must be exercised in strict conformity to its terms. *Viney* v. *Abbott,* 109 Mass. 300. *Leahy* v. *Old Colony Trust Co.* 326 Mass. 49, 52, and cases cited. Scott, Trusts (1939), § 330.8." Phelps v. State Street Trust Company, 330 Mass. 511, 512 (1993).

If Samuel Gaull were to die, his remaining 99% vested ownership interest would pass not under the terms of the trust, but rather through probate via his Last Will and Testament.

Under the flawed analysis presented by MassHealth in its brief, the vested owners of any nominee trust could make any MassHealth applicant a beneficiary at any time, and the agency could attempt to make the same argument about anything owned by anybody. Under the analysis in Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312 (2016), MassHealth should not and cannot infer that because the other beneficiaries can independently opt to transfer their ownership interests to the Appellant, then they will any more than they should infer that anyone else can and will transfer any other property, cash, stocks or other assets to the Appellant:

> "[F]or 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."

Heyn at 318-319.

Samuel Gaull and Wichita Properties, LLC have vested ownership interests, and neither the Appellant nor the Trustee have any method, explicit or implicit, to make them give away what they already own.

(3) The "Trust" in this Appeal is a Nominee "Trust," Which Is Not an Actual Trust, and the "Trustee" Has No Discretion to Distribute Assets to the Appellant

The "trust" in this appeal is a so-called nominee trust, "an arrangement for holding title to real property under which one or more persons . . . pursuant to a written declaration of trust, declare that they will hold any property they acquire as trustees for the benefit of one or more undisclosed beneficiaries." Birnbaum, Robert L. and James F. Monahan, The Nominee Trust in Massachusetts Real Estate Practice, 60 Mass. L.Q. 364, 365-66 (1976).[2] A nominee trust "is an entity created for the purpose of holding legal title to property with the trustees having only perfunctory duties." Roberts v. Roberts, 419 Mass. 685, 687 (1995), citing Morrison v. Lennett, 415 Mass. 857, 860 (1993), quoting Johnston v. Holiday Inns, Inc., 595 F.2d 890, 893 (1st Cir. 1979). "Unlike in a 'true trust' the trustees of a nominee trust have no power, as such, to act in respect of the trust property, but may only act at the direction of . . . the beneficiaries." Id. See

[2] A copy of this law review article is attached as Exhibit C.

Morrison v. Lennett, 415 Mass. 857, 860 (1993), holding that a nominee trust is "an entity created for the purpose of holding legal title to property with the trustees having only perfunctory duties." quoting Johnston v. Holiday Inns, Inc., 595 F.2d 890, 893 (1st Cir. 1979). "Unlike in a 'true trust', the trustees of a nominee trust have no power, as such, to act in respect of the trust property, but may only act at the direction of . . . the beneficiaries." Birnbaum at 364-365. See also Penta v. Concord Auto Auction, Inc., 24 Mass. App. Ct. 635, 639-640 (1987); Malaguti, Hazardous Use of Nominee Realty Trust, 1 MSL L. Rev. 63, 65 (1993). A nominee trust is often used to hold legal title to real estate so that the identity of the trust beneficiary may remain undisclosed. Birnbaum, supra at 365; Malaguti, supra at 63-64.

Massachusetts courts and bankruptcy courts have consistently treated nominee trusts as mere agency relationships. See Roberts v. Roberts, 419 Mass. 685, 688-89 (1995) (nominee trusts usually treated as agency relationships); Drucker v. State Tax Comm'n, 374 Mass. 198, 200-01 (1978) (nominee trust not a true trust for purposes of income taxation); Apahouser Lock & Sec. Corp. v. Carvelli, 26 Mass. App. Ct. 385, 388 (1988) (trustees of nominee trusts seen as agents rather than trustees); see also Birnbaum, supra, at 366-68.[3] In the case of In Re Medallion Realty Trust, 103 B.R. 8 (1989), the United States Bankruptcy Court, District of Massachusetts, went further into the analysis of what a nominee "trust" is and found that a nominee "trust" that had two beneficiaries was not a trust, but rather a partnership:

> They may not have considered themselves partners. They may have had in mind only ownership in a trust whose written declaration purports to prevent personal liability. ... The law fixes the legal consequences which flow from the conduct of the parties. E.g., Gunnison v. Langley, 85 Mass. 337 (3 Allen) (1862); West v. Keff-McGee Corp., 586 F.Supp. 493 (E.D.La.1984), rev'd on other grounds, 765 F.2d 526 (5th Cir.1985): 1 R. Rowley, Rowley on Partnership, § 7 .6 (2d ed. 1960)."

In Re Medallion Realty Trust, 103 B.R. 8, 13 (1989).[4]

On appeal, in the case of In Re Medallion Realty Trust, 120 B.R. 245 (1990), the United States District Court, District of Massachusetts, reached the same conclusion, and pointed to the

[3] See Restatement (Second) of Agency § 14(B) (1958) ("One who has title to property which he agrees to hold for the benefit and subject to the control of another is an agent-trustee and is subject to the rules of agency."); Restatement (Second) of Trusts § 8 comments b and h (1959) (same); 1 Scott, Trusts § 8, at 95 (4th ed. 1987) (Where a person is both agent and trustee for another, "the agency relation ... predominates").

[4] A copy of this case is attached as Exhibit D.

same type of provision that strips any degree of control or discretionary authority from the Trustee of the Omaha Street Realty Trust:

> The powers of the trustees were quite limited. "The Trustees shall have no power to deal in or with the Trust Estate except as directed by the beneficiaries .... ". … The principles of agency, rather than the principles of trust, are applicable. … The agency relationship in the instant case arose from the fact that the trustees were prohibited from taking any action without direction from a majority of the beneficial interests. … A similar theme was sounded in Neville v. Gifford. 242 Mass. 124, 136 N.E. 160 (1922) … "[C]onsidered as a whole [the trust declaration] makes the property subject to the control of the [beneficiaries]; and constitutes the trustees merely managing agents and not principals." Id. at 127, 136 N.E. at 162.

In Re Medallion Realty Trust, 120 B.R. 245, 246, 248 (1990).[5]

This case is extremely significant because there is no other court that is as specialized as the federal bankruptcy court in reviewing trusts to determine the ownership interests therein. See also the Massachusetts bankruptcy case of In Re Eastmare Development Corp., 150 B.R. 495 (Bankr.D.Mass. 1993), attached as Exhibit F, and the New York bankruptcy case of In Re Stoll, 330 B.R. 470 (Bankr.S.D.N.Y. 2005), attached as Exhibit G, both of which reach the same conclusions about nominee trusts being owned by the beneficial owners.

The Omaha Street Realty Trust, which provides income to the Appellant and growth of principal for the remainder owners, manages a multi-unit house and provides income for the support of the Appellant. Under the analysis in In Re Medallion Realty Trust and other decisions discussed above, the Omaha Street Realty Trust is not a trust, but rather an agency relationship between the Trustee (the agent) and the beneficiaries (the vested owners). The Appellant's ownership interest in the Omaha Street Realty Trust is identical to the ownership of a life estate contained in the body of a deed. The existence of the nominee trust does not alter who actually owns the property held for property law purposes, tax purposes, creditor purposes, or any other purpose whatsoever. Moreover, the subject property is business property essential for the Applicant's self-support, and therefore is a noncountable asset pursuant to 130 CMR 520.008(D).

[5] A copy of this case is attached as Exhibit E.

All of these cases (except Stoll) are legally binding on lower courts and Massachusetts agencies. Federal Medicaid trust law does not give the MassHealth agency the option of ignoring Massachusetts trust, property and business law, as the United States Court of Appeals for the Third Circuit has already examined Congressional intent in the context of Medicaid trust laws, and determined that Congress did not override all state laws. "Congress rigorously dictates what assets shall count and what assets shall not count toward Medicaid eligibility. State law obviously plays a role in determining ownership, property rights, and similar matters." Lewis v. Alexander, 685 F.3d 325, 334 (3d Cir. 2012). "Trusts are, of course, required to abide by a State's general law of trusts." Lewis at 335, footnote 15. "[T]here is no reason to believe [Congress] abrogated States' general laws of trusts. … After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues." Lewis at 343.

The same conclusion as in Lewis that state laws must control trust interpretation has been reached in Dana v. Gring, 374 Mass. 109 (1977) by the Supreme Judicial Court of Massachusetts with regard to the treatment of irrevocable trusts under another federal statute, the Internal Revenue Code:

> Although the decision whether to include the trust property in Gring's gross estate for the purposes of determining tax liability is undeniably a question of Federal tax law, see Morgan v. Commissioner, 309 U.S. 78, 80-81 (1940), a conclusion as to the extent of Gring's power under the terms of the trust involves the interpretation of a testamentary instrument, and, as such, clearly turns on questions of State law. See, e.g., Mazzola v. Myers, 363 Mass. 625, 633 (1973); Old Colony Trust Co. v. Silliman, 352 Mass. 6, 8 (1967); Morgan v. Commissioner, supra at 80; Blair v. Commissioner, 300 U.S. 5, 9-10 (1937); Freuler v. Helvering, 291 U.S. 35, 44-45 (1934); Stedman v. United States, 233 F. Supp. 569, 571 (D. Mass. 1964); Pittsfield Nat'l Bank v. United States, 181 F. Supp. 851, 853 (D. Mass. 1960)."

Dana at 113. The Dana case is relevant in that it explains the applicability of federal and state laws to trusts and other legal instruments. In every context (whether tax, public benefits or otherwise) federal law controls the federal consequence of the substance of various arrangements, while state law tells us what the substance of the arrangement is. Here, Massachusetts law must be explored to tell us, given the terms of the legal instrument and default and mandatory state law, what the legal instrument is and does.

If the nominee title-holding vehicle in this appeal were to be treated as a trust, the federal Medicaid trust law at 42 USC 1396p(d)(2)(C) specifies only four aspects of state trust law that may be ignored in determining eligibility:

> "(C) …this subsection shall apply without regard to—
> (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 of distributions from the trust."

All four of these exceptions apply to a trust that has a direct path of the assets to the grantor-applicant. The trust must, as a precondition of countability, allow the trustee to make distributions to or for the settlor or allow the settlor to take the assets, and the trust must thereafter make an attempt to limit that discretion. Having the trust initially available, but with an attempt to attach restrictive clauses as a protective overlay, is what was described in Cohen v. Comm'r of Div. of Med. Assistance, 423 Mass. 399 (1996). as "concocted for the purpose of having your cake and eating it too." Cohen at 414. None of these exceptions apply to a nominee trust, where the persons or entities known as "beneficiaries" are actually beneficial owners with vested rights that cannot be overridden and neither the settlor nor the Trustee have any discretion to make changes to the ownership interests.

(4) Since At Least 1995, the Massachusetts Department of Revenue Has Not Treated Nominee Trusts as Actual Trusts

The Massachusetts Department of Revenue ("DOR") disregards nominee trusts and treats the beneficial owners as the true owners of the property held in such nominee vehicles. Directive 95-5, attached as Exhibit H, indicates the DOR looks behind the nominee title-holding entity and treats the beneficial owners as the true owners of the real estate held therein. The Directive also states that excise taxes (also referred to as deed stamps) shall be assessed on sales and transfers of the beneficial ownership interests of nominee trusts, equating them to transfers of real estate via deed.

The DOR treats nominee trusts as disregarded entities and equates transfers of their beneficial interests to deed transfers. Massachusetts citizens are entitled to consistent treatment of nominee trusts by Massachusetts state agencies, and the MassHealth agency should be held to the long-standing interpretation of nominee trusts by the DOR.

(5) A Nominee Vehicle Relies Solely on the Direction of the Vested Owners, and Therefore Is Not a Trust or a "Similar Legal Device"

Although the MassHealth Denial Notice makes no mention of the nominee vehicle being a legal device that is similar to a trust, the Agency's brief mentions "similar legal devices" a lot. Here's what the MassHealth trust regulations state about that phrase:

> "520.023: Trusts or Similar Legal Devices Created on or after August 11, 1993
>
> The 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. Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual."

That's it. The MassHealth regulation simply mentions that the federal law can apply to "similar legal devices," but does not even state that the MassHealth agency intends to pursue any such devices as trusts. There is no description in the MassHealth regulation about what a similar legal device is. There is no place in the MassHealth regulation that actually gives guidance on how to determine whether an instrument is a similar legal device. The MassHealth regulation, as brought up for the first time in the agency's brief (and not in the Denial Notice), is hereby challenged as being overbroad, void for vagueness and a violation of law. The MassHealth agency could conceivably utilize this regulation to claim that almost every agency, partnership, corporation, LLC, LLP or other business interest should be treated as a trust, yet Massachusetts citizens have been provided with no advance notice of the agency's considerations.

The State Medicaid Manual, at 3259.1(A)(2), provides a definition of "similar legal device" that state Medicaid agencies must follow:

> This is any legal instrument, device, or arrangement which may not be called a trust under State law but which is similar to a trust. That is, it involves a grantor who transfers property to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section). The grantor makes the transfer with the intention that it be held, managed, or administered by the individual or entity for the benefit of the grantor or others. This can include (but is not limited to) escrow accounts, investment accounts, pension funds, and other similar devices managed by an individual or entity with fiduciary obligations.

Thus, fiduciary obligations need to be present in the legal instrument according to the federal agency to which the state agency must defer under the Medicaid scheme of cooperative

federalism. In deference to the State Medicaid manual, the fiduciary duties of a trustee are specifically recognized in the definition of "trust" in the MassHealth regulation at 130 CMR § 515.001:

> a legal device satisfying the requirements of state law that places the legal control of property or funds with a trustee. It also includes, but is not limited to, any legal instrument, device, or arrangement that is similar to a trust, including transfers of property by a grantor to an individual or a legal entity with fiduciary obligations so that the property is held, managed, or administered for the benefit of the grantor or others. Such arrangements include, but are not limited to, escrow accounts, pension funds, and similar devices as managed by an individual or entity with fiduciary obligations. (emphasis added)

Thus, a nominee "trust" should not be considered to be a trust unless a trustee of a nominee trust has fiduciary obligations, but how can the trustee of a nominee trust ever have fiduciary duties when the trustee is powerless to act without the direction of the beneficiaries?

(6) The Massachusetts Uniform Trust Code ("MUTC") Does Not Cover Nominee Trusts, and the "Trustee" of a Nominee Trust Has None of the Fiduciary Duties in Article Eight of the MUTC

In 2008-2012, Massachusetts probate and trust laws went through a near-complete overhaul, yet nominee "trusts" are not covered by the Massachusetts Uniform Probate Code or the Massachusetts Uniform Trust Code ("MUTC"). Section 102 of the MUTC bill that was enacted states: "This chapter applies to express trusts, charitable or non-charitable, of a donative nature and trusts created pursuant to a judgment or decree that requires the trust to be administered in the manner of an express trust." The Report of the Ad Hoc Massachusetts Uniform Trust Act Committee's comments were: "The Committee revised Section 102 to provide that the Code will apply only to trusts of a donative nature, making clear that the Code will not apply to business trusts or other non-donative trust arrangements." A donative trust would place the beneficial interests under the control of a trustee, whereas in a non-donative trust such as a nominee trust, the beneficiaries control the trustee. Nominee "trusts" were excluded from coverage by the MUTC because they are not considered to be true trusts under

Massachusetts law and because the "beneficiaries" already control their vested ownership interests.[6]

The MUTC spelled out most of the fiduciary duties of a Trustee under Massachusetts law, and the Trustee of a nominee title-holding vehicle has none of those duties. By way of example, Section 802(a) states that "[a] trustee shall administer the trust solely in the interests of the beneficiaries," Section 803 states that "the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests," Section 804 states that "the trustee shall exercise reasonable care, skill and caution," Section 809 states that "a trustee shall take reasonable steps to take control of and protect the trust property," and Section 811 states that "the trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust." All of these fiduciary duties necessarily presuppose that the trustee is empowered to take discretionary action without the permission of the beneficiaries, yet the "trustee" of a nominee "trust" has no such authority.

Section 816(26) of the MUTC acknowledges that a nominee trust is merely a title-holding entity and not a trust where it grants to a trustee of a trust the power to:

> establish or continue title-holding entities, including so-called "nominee trusts", for the purposes of holding legal title to any portion or all of the trust property without the need to record or make public the terms of the trust."

The Massachusetts legislature, in enacting the MUTC, has therefore indicated that "nominee trusts" are not trusts, and the MassHealth agency is required to follow this legislative decision in its interpretations of legal instruments.

(7) The MassHealth Applicant Merely Has a Life Estate Interest in the Real Estate

The life tenant does not own the principal, so the life tenant is without access to it, and it is not available to the life tenant. The fact that the ownership was held within a nominee title-holding vehicle does not mean that the Appellant's ownership interest has been a trust interest. "[T]he mere fact that a transferee who is to receive the benefits of the property for life is called a "trustee" is not conclusive and a legal life estate may be found to have been created." Bogert

[6] "The MUTC exempts express trusts of a non-donative nature from its purview. Presumably the exemption would cover most nominee trusts whose shares of beneficial interests vest *ab initio."* Maloney, Courtney J. and Charles E. Rounds, Jr., "The Massachusetts Uniform Trust Code: Context, Content and Critique," 96 Mass. L. Rev. 27, 30 (2014).

Hess, The Law of Trusts & Trustees (Third Edition), s. 27 @ 379. See also Schaefer v. Schaefer, 141 Ill. 337, 31 N.E. 136 (1892); Thompson v. Adams, 205 Ill. 552, 69 N.E. 1 (1903).

The MassHealth regulation at 130 CMR 515.001 defines what a life estate is, and the definition does not prevent ownership by a nominee holding entity:

> [A] life estate is established when all of the remainder legal interest in a property is transferred to another, while the legal interest for life rights to use, occupy, or obtain income or profits from the property is retained.

What occurred when the deed was executed and delivered on May 25, 2005 fits this regulatory definition. The remainder legal interest was irrevocably transferred to Samuel Gaull and vested in him as of that date, and the Appellant ended up with a vested life estate only.

(8) The MassHealth Agency Ignores Its Duty of Administrative Consistency

In its brief, the MassHealth agency has not even bothered to mention whether its position against the nominee trust in this case is consistent with its twenty-five (25) years of eligibility determinations and fair hearing decisions since the current federal Medicaid trust law took effect in 1993. In sweeping its historical positions under the rug, the MassHealth agency chooses not to fulfill its duties to the tribunal:

> "[L]egal authority[]" … should be understood to include not only case law precedents, but also statutes, ordinances, regulations, and administrative rulings. Indeed, the duty to reveal the latter kinds of authority is of greater practical significance, precisely because they are less likely to be discovered by the tribunal itself.

Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, s. 29.11, at 29-16 (3rd ed. 2000).

Massachusetts case law has long required agencies to make such disclosures.[7] In a case involving the duties of the MassHealth agency to be administratively consistent in dealing with trusts, on August 18, 2016 the Norfolk Superior Court ruled against the MassHealth agency:

[7] "A party to a proceeding before an agency has a right to expect and obtain reasoned consistency in the agency's decisions." Boston Gas Co. v. Dep't of Pub. Utilities, 367 Mass. 92, 104 (1975). "The law demands a certain orderliness. If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable. … [T]he prospect of a government agency treating virtually identical legal issues differently in different cases, without any semblance of a plausible explanation, raises precisely the kinds of concerns about arbitrary agency action that the consistency doctrine

> Significantly, on other occasions the Agency determined that the same sort of trust provision … is not a persuasive basis for counting a trust as an asset for Medicaid purposes. … When an agency does not consistently interpret its regulations, its interpretation is entitled to no weight. Morin v. Commissioner of Pub. Welfare, 16 Mass. App. Ct. 20, 24-25 (1983)(deference destroyed when an agency decided the case at issue differently than a case it heard months earlier, which had virtually identical facts); Boston Police Superior Officers Fed'n v. Boston, 414 Mass. 458 (in affirming agency decision, court found significant that it was consistent with agency's prior decisions).

Ruby Anagnoston v. Kristin Thorn, Director of the Office of Medicaid, Norfolk Superior Court docket no. 1482CV01293 (2016), p. 8.

The need for the MassHealth agency to disclose and explain its inconsistencies is clear; in Administrative Law & Practice, 38 Mass. Practice s. 10:49, pp. 627-629 (2016), author Gerald A. McDonough has written that agencies must disclose and reconcile their previous decisions:

> The problem of consistency in state administrative agency adjudicatory proceedings is fundamental in that it strikes at the very heart of the problem of administrative justice. … Generally speaking, a state administrative agency should adhere to the doctrine of stare decisis wherever possible in its administrative adjudications. As a general proposition, a state administrative agency, just as courts, should adhere to precedent in its adjudications in order to insure insofar as possible that those similarly situated will be treated in the same manner in administrative adjudications. See Boston Gas Co. v. Department of Public Utilities, 367 Mass. 92, 104, 324 N.E.2d 372, 379 (1975). … Where the obviously inconsistent application of agency standards to similar situations is lacking in any rational basis in the adjudicatory proceeding's final decision, the agency's final decision is arbitrary and capricious. … M.G.L.A. c. 30A, s. 11(8) expressly provides that every final decision in an adjudicatory proceeding by a state administrative agency subject to the provisions of the Massachusetts Administrative Procedure Act must be accompanied by a statement of reasons. This statutorily imposed requirement of reasoned decision-making obliges state administrative agencies in Massachusetts to explain the reasons for their inconsistencies and departures from stare decisis in adjudicatory proceedings.

The same position is taken in the long-standing manual on administrative adjudicatory proceedings available online in the Administrative Law Division area of www.mass.gov:

> In cases in which a board is departing from longstanding precedent, the board must explain its rationale carefully. Although not bound in a strict sense by stare

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addresses." Davila–Bardales v. Immigration and Naturalization Service, 27 F.3d 1, 5 (1st Cir. 1994). "An administrative agency must respect its own precedent, and cannot change it arbitrarily and without explanation, from case to case." Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010).

> decisis, boards and administrative tribunals are under a special duty to explain themselves where they depart from an established line of decisions.

Manual for Conducting Administrative Adjudicatory Proceedings, Office of the Attorney General of the Commonwealth of Massachusetts (Robert L. Quinan, Jr., Editor), p. 64 (2012).

Given the large numbers of nominee trusts recorded in Massachusetts, it strains credulity that the MassHealth agency would not have not approved many MassHealth applications in the past twenty-five (25) years that involved nominee trusts of applicants.[8] The failure of the MassHealth agency to explain its historical inconsistencies in dealing with nominee trusts renders the Denial Notice arbitrary and capricious.

(9) Even If the Nominee Trust Were Considered to Be a Trust, the Doherty Case is Inapplicable

The Office of Medicaid is incorrect in attempting to draw similarities between this nominee trust and the odd irrevocable trust in Doherty v. Commissioner, 74 Mass. App. Ct. 439 (2009). In Doherty, there was a class of beneficiaries to whom the Trustee could make discretionary payments if the Trustee so chose; the Trustee had the power "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," so long as the trustees, "in [their] sole judgment," determine that the "fund created . . . shall at any time be of a size which . . . shall make it inadvisable or unnecessary to continue such Trust fund." The Trustee in Doherty also had the power to "determine all questions as between income and principal and to credit or charge to income or principal or to apportion between them any receipt or gain . . . notwithstanding any statute or rule of law for distinguishing income from principal or any determination of the Courts." In addition, the settlor in Doherty had directed the Trustee to "accumulate the Trust principal to the extent feasible, due to the unforeseeability" of [the settlor's] "future needs" and "without regard to the interests of the remaindermen." (emphasis added). The court found the implicit authority for the Trustee to invade principal in

[8] As far back as 1976 there was an article in the Massachusetts Law Quarterly (now known as the Massachusetts Law Review) about the prevalence of such nominee trusts, so the prevalence of such title-holding entities should not be in dispute. See Birnbaum, Robert L. and James F. Monahan, The Nominee Trust in Massachusetts Real Estate Practice, 60 Mass. L.Q. 364 (1976), attached as Exhibit E.

the Trustee's discretion; the court wrote about language in the trust indicating an intent to administer the trust so as to address the settlor's changing life needs:

> [E]mbedded in the trust's governing recitation is not only an explicit assessment that public or other charitable benefits will likely be insufficient to provide Muriel the quality of life she might desire, but the corollary implicit direction for the trustees, in such case, to invade assets to make up that difference.

Doherty at 442. By way of contrast, in the nominee trust in this appeal there is no such intention embedded or even implied, and the draftsperson of the nominee trust has testified at the fair hearing that there never was any such intention to provide the Appellant with access to the principal.[9]

Here, in the Appellant's appeal, there are vested owners of the principal of the nominee trust, as well as a life tenant. The Trustee has no discretion to act, so the MassHealth agency is incorrect in asserting on page 5 of its brief that this nominee trust "functions like a Trust." On page 2 of its brief, the agency attempts to mislead the hearing officer that the Trustee has full power and authority to dispose of the Trust property when it selectively presents only a portion of Article 2 of the nominee trust; the agency recklessly omits that the so-called Trustee's power to act, as limited at the beginning of that very sentence the agency clipped in Article 2, is "[a]lways subject to the direction of the beneficiaries."

Upon termination of the nominee trust, the Trustee is directed to make proportionate distributions, and the Trustee has recently done so by deeding the remainder interest to the remainder beneficiaries, and a life estate to the Appellant, as the agency had effectively requested in its brief.[10]

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[9] In cases of ambiguity, the settlor's intentions control the interpretation of a trust. "When interpreting trust language … we do not read words in isolation and out of context. Rather we strive 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. Pond v. Pond, 424 Mass. 894, 897 (1997). Berman v. Sandier, 379 Mass. 506, 510 (1980). Putnam v. Putnam, 366 Mass. 261, 266 (1974). If, read in the context of the entire document, a given word or phrase is ambiguous, we may accept and consider extrinsic evidence showing the circumstances known to the settlor when he or she executed the document. Berman v. Sandler, supra. Putnam v. Putnam, supra at 266-267[8]." Hillman v. Hillman, 433 Mass. 590, 593 (2001).

[10] The deed is attached as Exhibit I.

(10) Conclusion

The legal instrument, the facts and circumstances surrounding the property, and case law interpreting similar legal instruments show that this "trust" is a nominee trust, that it should be treated as a disregarded entity and that the ownership of the Real Estate should be determined based on the Schedule of Beneficiaries. The Appellant only holds a life estate interest in the Real Estate while the vested remainder ownership interests are currently held by Samuel Gaull and Wichita Properties, LLC. These interests are completely vested, transferable and alienable to the beneficial owners. In accordance with the holdings in the In Re Medallion Realty Trust cases, the ownership interest of Samuel Gaull or the Appellant would be subject to Massachusetts debtor-creditor laws if he or she filed a petition for bankruptcy.

The analysis of MassHealth fails when it concludes there is a Trustee who can distribute principal to the Appellant, or the Appellant can withdraw it. As a life tenant, the maximum the Appellant can receive is a life estate. If the Trustee were directed to make a distribution other than proportionate to the current beneficial ownership interests, such direction would involve a gift, not an action by the Appellant or the Trustee under the terms of the legal instrument.

The hearing officer should determine that the principal of the Real Estate is not a countable asset, as the Appellant merely owned a life estate (in accordance with the MassHealth regulation at 130 CMR 515.001) in a nominee holding-holding entity that has since been terminated by deeding a life estate to her. To emphasize in closing what has been earlier stated, the MassHealth regulation at 130 CMR 515.001 does not require that a life estate only be in a recorded deed, and does not prohibit the usage of a nominee holding entity for such an interest:

> [A] life estate is established when all of the remainder legal interest in a property is transferred to another, while the legal interest for life rights to use, occupy, or obtain income or profits from the property is retained.

Under the unambiguous language in the Schedule of Beneficiaries of the Omaha Street Realty Trust, the Appellant has always had a life estate and only a life estate, and now that the nominee title-holding entity has been terminated, she now has a life estate as a matter of record title.