

**Office of Medicaid
BOARD OF HEARINGS**

Appeal Decision:	Approved	Appeal Number:	1814304
Decision Date:	6/14/19	Hearing Date:	12/20/2018
Hearing Officer:	Christopher Jones	Record Open to:	03/03/2019

Appearance for Appellant:

Appearance for MassHealth:

Kim McAvinchey – Tewksbury MEC
Michael Capuano, Esq.



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

APPEAL DECISION

Appeal Decision:	Approved	Issue:	LTC – Assets/Trust
Decision Date:	6/14/19	Hearing Date:	12/20/2018
MassHealth’s Rep.:	Kim McAvinchey; Michael Capuano, Esq.	Appellant’s Rep.:	
Hearing Location:	Tewksbury MassHealth Enrollment Center	Aid Pending:	No

Authority

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

Jurisdiction

Through a notice dated May 17, 2018, MassHealth denied the appellant’s application for MassHealth long-term-care benefits because it determined the applicant had excess countable assets. Exhibit 2.1; 130 CMR 520.003, 520.004. This appeal was filed in a timely manner on June 12, 2018.¹ Exhibit 2; 130 CMR 610.015(B). Denial of assistance is valid grounds for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied the appellant’s application for long-term-care benefits because it deemed assets held in a trust to be countable.

¹ This matter was originally scheduled for hearing on August 2, 2018, but this hearing was rescheduled due to the death of the applicant. A voluntary administration statement for the applicant’s estate was filed with the probate court on August 10, 2018, but a stamped copy of this statement was not submitted to the Board of Hearings until November 19, 2018. Once the stamped statement was received this matter was scheduled for hearing. See Exhibits 4-6.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.000, in determining that the assets held in an irrevocable trust are countable in determining eligibility for Medicaid benefits.

Summary of Evidence

The applicant was over the age of 65 when she entered a nursing facility on December 8, 2017. An application for long-term-care benefits was submitted on her behalf on February 20, 2018, and benefits were sought as of December 13, 2017. On May 17, 2018, MassHealth denied the application because it deemed assets held in a trust established by the applicant to be countable in determining her eligibility. The applicant and her spouse established a trust on July 5, 2011 and funded it with real property. On March 22, 2013, the trust deeded back to the applicant and her spouse a life estate in the trust's property. This property is the only asset of the trust; it had a tax assessment value of \$601,200 in 2018.² At the hearing, MassHealth submitted an exhibit packet that recalculated the excess asset amount by excluding the value of the life estate, \$86,019.70, which results in the trust being valued at \$515,180.30. At the time benefits were requested, the applicant also had a bank account with \$1,005.52 and a personal-needs allowance account with \$218.40.

As a preliminary issue, the appellant's attorney argued that MassHealth's notice was deficient given the Superior Court decision in Maas/Hirvi.³ Furthermore, because MassHealth did not have a written justification for its decision at the hearing, she argued that the application should be summarily approved. MassHealth's attorney argued that, because this notice was pre-Maas/Hirvi, it was not implicitly defective. He also argued that MassHealth has the right to present a full explanation for eligibility determinations up to the date of the hearing, and he was prepared to explain MassHealth's decision on the record. The parties were given the following option: go forward with the hearing on the oral arguments presented by MassHealth, without a record open period for MassHealth to put their position in writing; or stop the hearing to allow MassHealth to submit a written legal position regarding its decision, to which the appellant could reply in writing and request that the hearing be reconvened. The appellant requested that the record be left open for MassHealth to submit a written memorandum. The parties were asked to put all arguments they wanted considered in writing. Both parties submitted memoranda and neither requested that the matter be reconvened for oral arguments. Neither party's memorandum made any further arguments regarding the sufficiency of MassHealth's notice.

² The MassHealth denial notice counted the total assessed value of the real property. See Exhibit 2.1.

³ See Maas v. Sudders, Sup. Ct. CA Nos. 18-129-D, 18-845-D (Wilkins, J. June 22, 2018).

Findings of Fact

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

1. The applicant was over the age of 65 when she entered a nursing facility on December 8, 2017. An application for long-term-care benefits was submitted on her behalf on February 20, 2018, and benefits were sought as of December 13, 2017. Exhibit 7; testimony by MEC representative.
2. On May 17, 2018, MassHealth denied the application due to excess assets according to 130 CMR 520.003, 520.004. These assets included the \$601,200-tax-assessed value of real property held in a trust established by the applicant and her spouse. Exhibits 2.1, 7; testimony by MEC representative.
3. The applicant and her spouse funded the trust with real property on July 5, 2011. This property is the only asset of the trust. Exhibits 7, 8.
4. On March 22, 2013, the trust deeded a life estate back to the applicant and her spouse valued at \$86,019.70. At the hearing, MassHealth recalculated the countable value of the trust to be \$515,180.30. At the time benefits were requested, the applicant also had a bank account with \$1,005.52 and a personal-needs allowance account with \$218.40. Exhibits 7, 11; testimony by MEC representative.
5. The donors of the trust were the applicant and her husband, and their two sons as joint trustees. Neither donor may be a trustee. Exhibit 8, p. 1-1.
6. The trust is irrevocable and neither donor “can alter, amend, revoke, or terminate it in any way.” Exhibit 8, § 1.03.
7. The donors retained “no right, title or interest in the income or principal of this trust or any other incident of ownership in any trust property.” Exhibit 8, § 1.04.
8. Under § 1.05, the donors reserved testamentary limited powers of appointment:

Each of us may appoint any property contributed to this trust to any one or more of our descendants, their spouse and charities qualified under Section 2055 of the Internal Revenue Code in equal or unequal proportions and on any terms or conditions as each of us may designate. Each of us may exercise this power by valid will or valid living revocable trust, and the power will be effective immediately after the death of the person exercising this power. Neither of us may exercise this power for the purpose of discharging our legal obligations or otherwise for our pecuniary benefit.

Each of us may suspend or irrevocably release this power of appointment in whole or in part. We may not exercise this power to appoint any interest in this trust to ourselves, our estates, our creditors, or the creditors of our estate. ...

9. Section 1.06 describes the intent of the donors:

We are creating this trust with the intent that assets transferred to the trust be held for the benefit of our trust beneficiaries on the terms and conditions set forth in this agreement. In order to maximize the benefit to our trust beneficiaries; we give our Trustee broad discretion with respect to the management, distribution and investment of assets in our trust. Our specific objectives in creating this trust include, but are not limited to, having:

Any contribution made to this trust be treated as incomplete gifts for gift tax purposes. But because we do not have the ability to demand or vest any trust assets in ourselves or our estates, we intend that that [sic] the trust and all trust property be protected from attachment by our creditors. We may suspend, further limit, or irrevocably release this power of appointment in whole or in part at any time;

The assets of the trust estate be excluded for federal estate tax purposes from the gross estates of our trust beneficiaries except to the extent we have explicitly granted a general power of appointment to a trust beneficiary; and

The assets in this trust not be subject to the claims of our creditors and any beneficiary's creditors.

10. Section 1.07 states that the trust is intended to "be a grantor trust for federal income tax purposes for those period time during which either of us or any other person holds one or more of the powers described in Sections 671-679 of the Internal Revenue Code To carry out this intent, the following provisions apply in the administration of the trust."

(a) Power to Add Charities of Beneficiaries

During our lifetime, the Trust Protector may add beneficiaries to this trust by designating any charitable organization described in Section 170 of the Internal Revenue Code as an additional beneficiary of the net income or principal of the trust. After designating any additional charitable beneficiary, our Trustee may, but is not required to, distribute net income or principal to the additional charitable beneficiary, in amounts of proportions determined by our Trustee or as directed by the Trust Protector or the Distribution Advisor.

(b) Nonfiduciary Capacity

The powers described in this Section are exercisable solely in a nonfiduciary capacity without approval or consent of any person acting in a fiduciary capacity. No claim for breach of fiduciary duty may be imposed upon any other party as a result of the exercise or nonexercise of the powers granted under this Section.

(c) Release and Re-Grant of Powers

The Trust Protector may release any or all of the powers described in this Section at any time by delivering written instruction to our Trustee. The release will be effective upon its receipt by our Trustee, unless the release instructs that it is to be effective upon a later date.

The Trust Protector may re-grant any power released at any time by delivering

written instructions to our Trustee.

11. The donors' two sons are specifically identified as their only children and as the lifetime beneficiaries of the trust's income and principal. Exhibit 8, Art. 2.

12. Article Four creates a Distribution Adviser, and § 4.01 states:

The purpose of the Distribution Adviser is to separate decisions concerning distributions from the other responsibilities of our Trustee. The Distribution Adviser has the exclusive authority to direct, consent to, or disapprove distributions from the trust. The Distribution Adviser's authority is broad and absolute, and decisions made by the Distribution Adviser are not subject to review except for willful neglect, willful misconduct, or bad faith on the part of the Distribution Adviser. Our Trustee may not resist any decision to make or to withhold any distribution to any beneficiary directed by the Distribution Adviser.

13. The Trust Protector may remove the Distribution Adviser at any time without cause, and a Trust Protector may also be a Distribution Adviser. Exhibit 8, § 4.02.

14. If the Trust Protector fails to appoint a Distribution Adviser, the Trustee holds all of the powers and authority otherwise granted to the Distribution Adviser. Exhibit 8, § 4.04.

15. When acting as a fiduciary, the Distribution Adviser is entitled to compensation. No compensation is required when the Distribution Adviser renders services in a nonfiduciary capacity. Exhibit 8, § 4.06.

16. Section 5.01 describes the role of the Trust Protector:

The purpose of the Trust Protector is to direct our Trustee in matters concerning the trust, and to assist, if needed, in achieving our objectives as manifested by the other provisions of our estate plan. Any Trust Protector must be a corporate fiduciary or any individual who is not related or subordinate to either of us, while either of us is still living, or any beneficiary within the meaning of Section 672(c) of the Internal Revenue Code and is not an adverse party within the meaning of Section 672(b) of the Internal Revenue Code.

17. Section 5.02 appoints a committee to serve as Trust Protector by a majority vote. This committee includes three people who share the donors' last name, and the attorney who drafted the trust. Exhibit 8, § 5.02.

18. The Trust Protector committee may remove and appoint new committee members with or without cause; the Trustee may not remove a Trust Protector. Exhibit 8, § 5.04(a)-(b).

19. "The Trust Protector is not liable for any action in the absence of an affirmative showing of bad faith. The Trust Protector may not be held liable for any act or omission and will be

reimbursed promptly ... unless it is conclusively established that the act or omission was motivated by an actual intent to harm the beneficiaries of the trust or was an act of self-dealing for personal pecuniary benefit.” Exhibit 8, § 5.09.

20. Section 5.10 details the Trust Protector’s Powers:

(a) Power to Amend or Modify the Trust Agreement

The Trust Protector may amend or modify this agreement as it applies to any trust over which the Trust Protector is serving as Trust Protector.

Any amendment made by the Trust Protector will be binding and conclusive on all persons interested in the trust, unless the amendment is shown by clear and convincing evidence to have been made by the Trust Protector in bad faith. The Trust Protector may not be liable for any consequences of amending or not amending the trust. Any amendment must be made in writing and signed by the Trust Protector. The Trust Protector must deliver a copy of the amendment to the Primary Beneficiaries and Trustees of the amended trust.

...

(c) Power to Remove and Appoint Trustees

[The Trust Protector has the power to remove Trustees without cause. If a beneficiary has the power to remove a Trustee, the Trust Protector may veto that removal.]

(d) Power to Refuse or Revoke a Contribution in Whole or in Part

The Trust Protector may refuse or subsequently revoke any contribution made to the trust in whole or in part at any time in the Trust Protector’s sole and absolute discretion. ... The Trust Protector must return any property subject to any refusal or revocation under the authority of this subsection to the donor who contributed the property.

(e) Power to Direct Investments

[The Trust Protector has the power to direct the Trustees in any investments and veto any independent Trustee investment decisions.]

21. The Trust Protector’s Limitations are detailed in § 5.11:

The Trust Protector may not exercise any power or discretion in favor of the Trust Protector or, for the Trust Protector’s benefit, or for the benefit of any person to whom the Trust Protector is related or subordinate within the meaning of Section 672(c) of the Internal Revenue Code. It is our intent that nothing in this agreement be construed in any manner that would cause the Trust Protector to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Internal Revenue Code.

22. Section 6.01 governs distributions during the life of the donors. The relevant part reads:

(a) Distributions Directed by Distribution Adviser

Our Trustee may distribute income or principal to any beneficiary only as

authorized or directed by the Distribution Adviser. ... The Distribution Adviser may direct our Trustee to make or modify any distributions to or for the benefit of any beneficiary, and may direct our Trustee to withhold any distributions in whole or in part from any beneficiary.

As directed by the Distribution Adviser our Trustee may distribute income or principal of the trust to the beneficiaries, as follows:

(1) Distribution of Income and Principal to the Trust Beneficiaries

... our Trustee may distribute as much of the trust property to or for the benefit of any beneficiary as our Trustee determines is necessary or advisable for the beneficiary's health, education, maintenance and support. In making distributions, our Trustee may distribute net income, principal, or both.

(2) Unequal Distributions Authorized

Our Trustee may make distributions to or for the benefit of one or more trust beneficiaries to the complete exclusion of the other beneficiaries. Our Trustee may make distributions to beneficiaries in equal or unequal amounts according to their respective needs.

23. Upon the death of both donors, the remaining trust property is divided according to a schedule. Exhibit 8, § 7.01.

24. Section 11.14 of the trust allows the Trustee to pay property taxes, assessments, fees, charges, and other expenses incurred in the administration of the trust. Exhibit 8, § 11.14.

Analysis and Conclusions of Law

Medicaid Law

The purpose of Medicaid is to provide medical assistance to those "whose income and resources are insufficient to meet the costs of necessary medical services." 42 USC § 1396-1 (2014). To accomplish this purpose, MassHealth is only available to individuals over the age of sixty five if they have less than \$2,000 in assets. 130 CMR 520.003. An applicant becomes eligible for long-term-care benefits "as of the date the applicant reduces his or her excess assets to the allowable asset limit without violating the transfer of resource provisions for nursing-facility residents" 130 CMR 520.004(A)(1)(A). Furthermore, a five-year "lookback period" allows the agency to review the applicant's financial records to see whether assets were given away in order to qualify. See 130 CMR 520.019(B); 130 CMR 520.023(A).

Congress found that people were artificially impoverishing themselves through the use of trusts, and created rules for reviewing trusts to determine whether the applicant had truly given away their resources before the look-back period. See Cohen v. Comm'r of the Div. of Med. Asst., 423 Mass. 399, 402-403 (1996). The test applied in Cohen looked solely to determine whether a trustee had discretion at any time to make distributions, and if so determined those distributions to be countable. Id.

The current test looks to see whether any resources held in a trust could be paid to or on behalf of an applicant. For revocable trusts, this means the entirety of the trust's holdings are countable. 130 CMR 520.022(A). For irrevocable trusts:

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, 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, and (II) for any other purpose, shall be considered a transfer of assets by the individual.

42 USC § 1396p(d)(3)(B)(i).

Furthermore, this test is applied “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.” 42 USC § 1396p(d)(2)(C).

This is commonly referred to as the “any circumstances” test. Daley v. EOHHS, 477 Mass. 188, 193-194 (2017); Heyn v. Dir. of Medicaid, 89 Mass. App. Ct. 312, 315 n.7 (2016). This test was devised by Congress to further restrict the use of trusts in Medicaid planning that had been allowed under the “trustee’s discretion” test. See Cohen, 423 Mass. at 403; see also 42 USC 1396a(k) (1992 Supp. II). The “any circumstances” test allows MassHealth to review a trust to determine whether “the trustee is afforded even a ‘peppercorn of discretion’ to make payment of principal to the applicant, or if the trust allows such payment based on certain conditions, then the entire amount that the applicant could receive under ‘any state of affairs’ is the amount counted for Medicaid eligibility.” Daley at 193 (citing Cohen, 423 Mass. at 413) (emphasis added). This test is applied without regard to whether the circumstances have ever occurred, “it is enough that the amount could be made available to [the donor] under any circumstances.” Heyn, 89 Mass. App. Ct. at 315 (citing Lebow v. Comm’r of the Div. of Med. Asst., 433 Mass. 171, 177-178 (2001)).

However, if under “any circumstances,” payment may be only made from income, then MassHealth may only count the amount of income distributable and it must treat the distributions as income received. Daley at 194 (citing Guerriero v. Comm’r of the Div. of Med. Assist., 433 Mass. 628, 632 n.6 (2001); 130 CMR 520.026). The difficulty in applying the any circumstances test is in determining when a trust allows for distributions.

Parties' Arguments

MassHealth notes that a life estate was transferred back to the applicant in 2013.⁴ Its only argument on this matter is that “if the applicant holds a life estate in property, that interest should be treated by the agency according to the current agency practice and policy.” Exhibit 12, p. 6.

Regarding the remainder of the trust, MassHealth argues that two provisions allow for distributions to charitable organizations that could have provided care to the applicant. Section 1.07 of the trust allows the Trust Protector to add charitable organizations as beneficiaries of the trust, and then make distributions to a charitable nursing facility to pay for the appellant’s care. MassHealth relies upon Daley as legal support for this argument. There, the Nadeau Trust gave Nadeau the power to appoint all or part of the principal of the trust to a nonprofit or charitable organization. The court remanded the case, stating:

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. Because approximately one-fourth of the nursing homes in Massachusetts are operated by nonprofit organizations, albeit not the nursing home where he received care, it is appropriate for MassHealth to consider whether this possibility fits within the “any circumstances” test.

Daley, at 203 (footnote omitted).

The Trust Protector may add charitable organizations as beneficiary of the trust; MassHealth analogizes this to Nadeau’s power of appointment, and argues this trust is countable according to Daley. MassHealth argues it is exercising its discretion, “per Daley, to determine whether such distributions fit within the ‘any circumstances’ test.” Exhibit 10, p. 9. In a footnote, MassHealth cites to a fair hearing decision that held that a power of appointment that can be exercised in favor of a charitable organization would allow “[t]hose funds to be used for the appellant’s benefit. It does not matter whether it is likely that the nursing facility would use those exact funds for the appellant; what matters is that a circumstance exists in which the facility could use those exact funds to benefit the appellant.” Id. at 9 n.4 (quoting Appeal No. 1706917, p. 18 (June 15, 2018)). MassHealth also notes that the applicant “retained a testamentary power of appointment over trust assets. ... This is further evidence of the applicant’s lack of divestment of the trust property. In addition, this power of appointment provides leverage for the applicant to control her trustees (children) actions regarding the distributions of trust assets.” Id.

MassHealth’s second basis for finding the trust countable under the “any circumstances” test is the appellant’s power of appointment. MassHealth characterizes this appointment power as an unfettered right of appointment that the applicant could have used to “condition a payment of principal to her descendants with the requirement that it be returned back to her, or for it to be used

⁴ MassHealth’s memorandum claims that the “deed was not provided to MassHealth.” However, it is included in MassHealth’s exhibit packet. Exhibit 7, pp. 9-10.

for her benefit.” Exhibit 10, p. 10. MassHealth notes that the power of appointment may be “on any terms or conditions” and therefore likens the power to Petition of Estate of Braiterman, 145 A. 3d 682 (NH 2016). There, the donor retained the right to appoint, during life, “outright, or upon trusts, conditions, or limitations.” 145 A.3d at 684-685. MassHealth further argues, without legal support, that this power is not subject to fiduciary limitations because it is a power reserved by the donor and not a power vested in the trustee. MassHealth distinguishes Heyn, wherein a power to appoint principal free of trust to beneficiaries did not cause the trust to be countable. Here, MassHealth argues “the *special* power of appointment *explicitly* allows the applicant to create a legal obligation” Exhibit 10, pp. 10-11.

The appellant’s preliminary argument is that both of MassHealth’s bases require an overly broad reading of the “any circumstances” test. They argue that every precedential decision requires that “principal can actually be paid to the applicant for benefits via a direct path from the trust to the applicant.”⁵ The appellant argues that the donors of the trust were never beneficiaries, and the only named beneficiaries were the applicant’s two children. Because she was never a beneficiary, the applicant could never receive principal or income distributions from the trust.⁶ Exhibit 12, pp. 6-8.

Regarding MassHealth’s second basis, the appellant distinguishes this trust from the Braiterman trust in one very important regard: the applicant’s power of appointment is testamentary, while Braiterman held a life-time power of appointment. Therefore, the applicant could not have appointed assets to her family or a charitable organization upon the condition that they are returned to her, because she could only exercise her power of appointment at the time of her death. The appellant distinguishes that the power of appointment here explicitly prohibits its use on behalf of the applicant or her creditors. Exhibit 12, pp. 8-9.

The appellant also argues MassHealth has mischaracterized the Trust Protector’s power in §1.07. The appellant believes this provision as included “as a means to establish grantor trust status,” and not as a means of somehow providing an avenue of payment to a nursing facility. The appellant argues similar grantor trust provisions, like the right to substitute property, have been deemed acceptable under the “any circumstances” test. Exhibit 12, p. 11 (citing Heyn, 89 Mass. App. Ct. at 318).

Finally, the appellant disputes MassHealth’s characterization of Daley. The appellant argues that Daley remanded the case to the Board of Hearings to consider whether it was appropriate for MassHealth to consider a power of appointment to a charitable organization would make a trust countable. The appellant notes that the hearing officer who heard the remanded Nadeau case concluded that the power of appointment to a charity or non-profit did not make Nadeau’s trust countable. Exhibit 12, pp. 11-13. Even if the Trust Protector’s authority to make a charity a beneficiary is akin to a limited power of appointment to a charitable organization, under trust law a

⁵ It is unclear how the federal statute fits into this interpretation: “if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual” 42 USC § 1396p(d)(3)(B)(i).

⁶ MassHealth has raised no issue regarding trust’s distribution of a life estate to the applicant and her spouse in 2013. Therefore, it is not appropriate for this decision to analyze this issue of its own accord. See 130 CMR 610.082(A); Maas v. Sudders, Sup. Ct. CA Nos. 18-129-D, 18-845-D (Wilkins, J. June 22, 2018).

limited power of appointment may not be exercised on behalf of an impermissible appointee. *Id.* at 14 (citing Restatement (Third) of Property (Wills & Don. Trans.) §§ 17.2, 19.15-19.16 (2011)). Furthermore, the wielder of a power of appointment is a fiduciary under state law MGL Ch. 203E, § 808(c). The appellant cites trust law principles that prevent a single clause from being read out of context to invalidate the intent of the entire instrument. Exhibit 12, pp. 14-15 (*Ferri v. Powell-Ferri*, 476 Mass. 651, 654, 659 (2017)). Therefore, the appellant argues the trust did not allow a distribution to a charitable organization to be conditional upon the distribution being redirected to benefit the applicant. The appellant notes the similarity to *Heyn* in this regard, which held that MassHealth cannot anticipate that a beneficiary will agree to return a distribution from the trust once they receive it. See Exhibit 12, pp. 15-16 (citing *Heyn*, 89 Mass. App. Ct. at 318)). The appellant reviews several recent Fair Hearing decisions that highlight the gap in MassHealth's reasoning: "Following *Heyn* it is not clear how a nursing home[] would be under any legal obligation to use assets, appointed by Appellant, to cover the cost of Appellant's care." Exhibit 12, pp. 16-18 (quoting Appeal No. 1806192, pp. 15-16 (Aug. 1, 2018)).

Analysis

Neither of the legal reasons put forward by MassHealth explain why this trust is countable under the "any circumstances" test. Section 1.07 of the trust allows the Trust Protector to add charitable beneficiaries. Nothing in this power allows the Trust Protector or the Trustee to condition those beneficial distributions. Section 6.01 governs distributions by the Trustee, and while it allows one beneficiary to be favored to the exclusion of another, nothing in the distribution powers allows the distributions to be conditioned. Therefore, the appellant is correct that this power to add beneficiaries is similar to the power of appointment reviewed in *Heyn*. In *Heyn*, the donor could only appoint assets "free of trust"; here, the Trustee cannot condition distributions to beneficiaries. "[A] provision making trust principal available to persons other than the grantor does not by its nature make it available to the grantor." *Heyn* at 318.

The appellant is also correct that the power of appointment does not make the trust countable. MassHealth tautologically argues that, according to *Daley* "because the instant trust includes the power to appoint trust principal to any charitable organizations, it can be used to pay a nursing facility that is a charitable organization for the Applicant's care." Exhibit 10, p. 8. *Daley* did not hold that Nadeau's power of appointment to a nonprofit organization made his trust countable. Had it done so, there would have been no reason to remand the matter. Yet, MassHealth's only explanation as to why a power of appointment to a non-profit causes a trust to be countable is to cite *Daley* and a fair hearing decision.⁷

To explain how a power of appointment to a charity makes a trust countable under the "any circumstances" test, several hurdles must be overcome. MassHealth cites *Braiterman* because the

⁷ Both parties cited fair hearing decisions to support their arguments matter. Fair hearing decisions are not precedential, as they are based upon the "based upon evidence, testimony, materials, and legal rules, presented at the hearing." 130 CMR 610.082; see also 130 CMR 610.085(A)(2). Here, MassHealth identified two avenues of distribution, but the appellant responded that common law and state law trust principles foreclose that avenue. MassHealth has provided no legal basis for ignoring state law in this case.

power of appointment there, as here, could be exercised with conditions attached. However, the appellant accurately distinguished the power in Braiterman from the power here. First, the applicant's power of appointment was testamentary, requiring the applicant to be dead before assets could be appointed upon conditions. Secondly, the donors of the trust could "not exercise this power to appoint ... to ourselves, our estates, our creditors, or the creditors of our estate." Finally, MassHealth is incorrect that the director of a power of appointment acts free from fiduciary liability. State law deems a person exercising a power of appointment to be a fiduciary, and MassHealth offered no legal method for overcoming these hurdles. Therefore, because the appellant has refuted the reasons given by MassHealth as to why the trust is countable, this appeal is APPROVED.

Order for MassHealth

Exclude the assets held in the trust from the appellant's countable assets and continue processing the February 20, 2018 application.

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, at the address on the first page of this decision.

Christopher Jones
Hearing Officer
Board of Hearings