

**Office of Medicaid  
BOARD OF HEARINGS**

<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	1821006
<b>Decision Date:</b>	6/3/19	<b>Hearing Date:</b>	12/21/2018
<b>Hearing Officer:</b>	Alexandra Shube	<b>Record Open to:</b>	02/02/19

**Appearance for Appellant:**

**Appearance for MassHealth:**



*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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	LTC Eligibility – Trust
<b>Decision Date:</b>	6/3/19	<b>Hearing Date:</b>	12/21/2018
<b>MassHealth’s Rep.:</b>		<b>Appellant’s Rep.:</b>	
<b>Hearing Location:</b>	Tewksbury MassHealth Enrollment Center	<b>Aid Pending:</b>	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 September 4, 2018, MassHealth denied the appellant's application for MassHealth long-term care benefits because it determined that the appellant had excess assets held in trust (see 130 CMR 520.003 and Exhibit 1). The appellant filed this appeal in a timely manner on September 26, 2018 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

## Action Taken by MassHealth

MassHealth denied the appellant’s application for long-term care benefits due to a determination that the appellant had excess assets held in a trust.

## Issue

The appeal issue is whether MassHealth was correct in determining that the appellant was ineligible for MassHealth long-term care benefits because she had assets in excess of the allowable limits.

## Summary of Evidence

A MassHealth representative appeared at the hearing and testified that on June 12, 2018, MassHealth received an application for long-term care benefits for the appellant. As of the date of application, the appellant was a single female over the age of 65 who entered the nursing facility on April 12, 2017. The appellant requested a start date of May 1, 2018. The application was denied on September 4, 2018 because the appellant retained \$269,261.78 in countable assets. There was \$7,089.78 from a life insurance policy, \$170 in her PNA, and \$262,000 in the F.O. Family Irrevocable Trust (hereinafter, "the Trust") from the proceeds of the sale of her home.

The MassHealth representative submitted as Exhibit 4 a copy of the Trust and relevant Trust documents, which provided the following background: On October 28, 2011, the appellant established the F.O. Family Irrevocable Trust and funded it with her home in Milford, Massachusetts on the same day. The home was the only asset that was ever placed in the Trust. The home was sold on June 15, 2018 and the net proceeds of the sale were placed in the Trust. The proceeds from the sale remain the only asset in the Trust. The documentation also noted that the life insurance policy was in the process of being cash surrendered.

The Trust contains the following relevant provisions:

**1. The Trust Fund**

1.2 The trust created by this agreement shall be irrevocable. I may not revoke or amend this agreement in any way. My trustee, however, may at any time, or from time to time, amend any administrative provisions of this trust by any instrument in writing signed and acknowledged by my trustee. For purposes of the foregoing, the term "administrative provision" refers to any provision of the trust dealing with the management and administration of the trust and in no event shall any such amendment affect, enlarge or shift any beneficial interests created hereunder.

**2. Payment of Income and Principal**

2.1 If any property is placed in trust during my life, my trustee may pay me or may pay on my behalf as much of the income of the trust as she shall determine in her sole discretion to be necessary for my care and well being. Any income not so paid may be accumulated and added to the principal. The principal of this trust shall be held in trust until the termination of this trust.

**3. Termination of This Trust**

3.2 If the real estate is sold during my lifetime, then my trustee shall After my death, the retain the proceeds during my lifetime and if the proceeds are placed in an interest-bearing account, my trustee shall pay me the interest generated at least quarter annually. My trustee shall not be required to have the proceeds from the sale of the real estate generate any income.

**4. Distribution of Trust Assets**

4.1 Disposition upon termination. Upon termination of this trust, my trustee shall: Pay the trust property including any accrued and undistributed income as I may appoint by my Last Will and Testament appoint, including the power to appoint to my estate. In the event I fail to exercise such an appointment by way of my last will and testament, my trustee shall distribute

in equal shares, the assets held in trust, as follows:

- (a) One share for each child of mine who is alive at the time of distribution;
- (b) One share for each child of mine who has died prior to the time of the distribution, but he have living issue at the time of the distribution with the living issue taking his/her parent's share by right of representation.

## **5. The Trustee**

### **5.1 Appointment of trustee.**

- (a) At present Catherine F. Becotte is the sole trustee. The term "trustee" includes the original trustees and all successor or additional trustees.
- (b) I may appoint successor and additional trustees...

### **5.2 Removal or resignation of trustee.**

- (a) I may remove any trustee by notice to that trustee...

### **5.4 General powers of trustee.** In addition to all common law and statutory authority, our trustee, except as otherwise provided, shall have the power without approval of any court and in any manner it considers advisable:

- (e) to sell, mortgage, exchange, lease, or otherwise dispose of or encumber any property on any terms, no purchaser being bound to see to the application of any proceeds and whether or not the effect thereof extends beyond the term of this trust...
- (h) to determine what part of the trust property is income and what part is principal...
- (j) to borrow or lend any amounts...

## **MassHealth's Argument**

An attorney from MassHealth's legal department appeared at hearing and submitted a legal memorandum after hearing that further set forth the reasons for deeming the Trust a countable asset. For irrevocable trusts, per MassHealth regulations and federal Medicaid law, the "any circumstances test" allows MassHealth to evaluate whether there are any circumstances under the terms of the trust that would allow payment to or for the benefit of an applicant from the income or principal of a trust. MassHealth argues that circumstances exist under which the trust assets should be deemed available to the appellant.

First, MassHealth argued that, pursuant to Article 2.1 of the Trust, the right to income from the real estate is a circumstance under which the appellant may enjoy any income, or convert unpaid income into a countable asset. MassHealth stated that it was unclear if the real estate generates income, but to the extent that it does, any income paid to the appellant is available to her. Additionally, Article 5.4 allows the trustee to determine what part of the trust property is income and what part is principal. MassHealth argued that this would allow the trustee to strategically withhold from the appellant income generated by the property that should be available to the appellant as income. MassHealth stated that "If Daley stands for the proposition that intentional decisions to forgo income keep that potential income as countable, it stands to reason that potential income deliberately not paid, but reverting to trust principal, keeps that unpaid income that which could have been used for the applicant's benefit." Daley v. Secretary of the Executive Office of Health and Human Services, 477 Mass. 188, 201 (2017).

Second, MassHealth argued that Article 5.4 allows the trustee exclusive discretion to borrow or lend any amounts “without approval of any court and in any manner it considers advisable,” as well as to determine what part of the trust property is income and what is principal. Thus, the Trustee may mortgage the property and lend money to any individual, including the appellant, under any terms the trustee deems advisable, including for no interest or repayment after the appellant’s death. This would be another circumstance under which trust assets are available to the appellant.

### **Appellant’s Argument**

The appellant’s attorney appeared at hearing and submitted a legal memorandum at hearing, as well as a response to MassHealth’s memorandum after hearing. The appellant argues that there are no terms in the Trust that make Trust assets available to the appellant.

First of all, the appellant emphasized that distributions from any trust must not be performed in breach of any fiduciary duty or in violation of law. The trust must be read as a whole and the fiduciary duties of trustees must be observed in construing the terms of a trust.

Second, the appellant argued that there is a clear injunction against distribution of principal to the settlor. Only income may be distributed. Article 2 states “The principal of this trust shall be held in trust until the termination of this trust,” prohibiting the appellant from accessing Trust principal. Article 3 also states that if the real estate is sold during the appellant’s lifetime, the trustee shall retain the proceeds. He argues that “Medicaid law recognizes a distinction between income and principal, and allows for income to be distributed to the settlor of the trust without causing principal to be countable.” Every other provision in the Trust must be read in conjunction with Articles 2 and 3. Powers given to the trustee and other provisions in the Trust cannot be interpreted to override other portions of a trust that prohibit the payment or usage of principal for the benefit of the grantor, especially where a trust must be read as a whole. As the Trust prohibits distribution of the principal to the settlor of the trust, then the trustee is prohibited from making such distributions, to do otherwise would be a breach of his/her fiduciary duty.

The proceeds from the sale of the remainder interest were placed in a non-interest-bearing account, so there is no income to be accrued and counted; however, the appellant argues that in Daley “the ‘any circumstances’ test was ‘qualified by an important caveat: if the amounts that may be paid to the Medicaid applicant come only from the income of the trust, those income payments do not render the principal of the trust available as an asset; rather they are treated as income that may affect the amount of Medicaid benefits to be received but not the applicant’s eligibility for such benefits.’” Id. at 194. Therefore, the appellant’s right to receive income distributions does not affect her eligibility for MassHealth or make the Trust assets countable.

In response to MassHealth’s arguments, the appellant states that MassHealth is “cherry-picking” provisions of the trust. The appellant argues that the testamentary power of appointment and the ability to remove and replace trustees does not give the appellant access to Trust principal.

## **Findings of Fact**

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

1. On June 12, 2018, MassHealth received an application for long-term care benefits on behalf of the appellant, requesting a start date of May 1, 2018 (Testimony).
2. As of the date of application, the appellant was a single female over the age of 65 who entered the nursing facility on April 12, 2017 (Testimony).
3. The application was denied on September 4, 2018 because the appellant retained \$269,261.78 in countable assets (Exhibit 1).
4. The Trust was established and funded on October 28, 2011 (Exhibit 4 at 28-38).
5. The appellant's Milford home was the only asset placed in the Trust (Testimony).
6. The appellant's home was sold on June 15, 2018 and the net proceeds of the sale were placed in the Trust (Testimony and Exhibit 4 at 40-42).
7. As of the date of the appellant's MassHealth application, the Trust contained \$262,000 (Testimony and Exhibit 1).

## **Analysis and Conclusions of Law**

At issue is whether MassHealth correctly determined that the appellant is ineligible for MassHealth long-term care benefits because she retained trust assets in excess of the allowable limit. 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. See 130 CMR 520.003(A)(1). 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. See 130 CMR 520.023. With respect to Medicaid eligibility determinations involving irrevocable trusts created on or after August 11, 1993, federal law at 42 U.S.C. § 1396p(d)(3)(B) states:

- (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*, 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 subject to subsection (c) of this section; and
- (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be

considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

42 U.S.C. §1396p(d)(3)(B) (emphasis added).

Pursuant to the corresponding MassHealth regulation, the amount of an irrevocable trust countable to an applicant is determined as follows as follows:

(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.*

(b) Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income.

(c) Payments from the income or from the principal of an irrevocable trust made to another and not to or for the benefit of the nursing-facility resident are considered transfers of resources for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(d) The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or (8).

130 CMR 520.023(C) (emphasis added).

In its denial notice, MassHealth counted the F.O. Family Irrevocable Trust with holdings of \$262,000 as available to the appellant. Based on the federal Medicaid statute and MassHealth regulation cited above, the pertinent question is whether any portion of the Trust principal, could “under any circumstances” be paid to or for the benefit of the appellant. Under the “any circumstances” test, if the grantor gives the trustee any “leeway to respond to emergency and unexpected circumstances,” the total amount available to be paid to address such circumstances is counted as fully available to the grantor, even if the trust provisions otherwise limit the trustee’s discretion to pay for long-term care.” Daley v. Secretary of Executive Office of Health and Humans Services, 477 Mass. 188, 193-194 (citing Cohen v. Commissioner of the Div. of Med. Assistance, 423 Mass. 399, 418-19 (1996)). Accordingly, the whole trust instrument must be reviewed. Doherty v. Director of the Office of Medicaid, 74 Mass. App. Ct. 439, 441 (2009).

#### 1. Article 2 – Payment of Income and Principal

The appellant has successfully demonstrated that her right to income, under Article 2 of the Trust, does not allow her to access Trust principal. MassHealth argues that the pertinent federal Medicaid statute and MassHealth regulation cited above provide that under the “any circumstances” test, any income that *could be generated* from the corpus is counted as an asset

when determining Medicaid eligibility. In other words, all potential income, whether received or not, is a countable asset under 130 CMR 520.023(C)(1)(a). This argument, however, stretches the meaning of the “any circumstances” test and disregards the SJC’s clear ruling in Daley, that income and principal are to be treated differently. The Daley Court held that “[t]he ‘any circumstances test’ is qualified by an important caveat: if the amounts that may be paid to the Medicaid applicant come only from the income of the trust, those income payments do not render the principal of the trust available as an asset; rather they are treated as income that may affect the amount of Medicaid benefits to be received but not the applicant’s eligibility for such benefits.” Daley at 194.

Had trust income accrued and not been paid to the appellant, MassHealth could appropriately count any accumulated amount as an available asset under subsection 130 CMR 520.023(C)(1)(a). However, the record shows that there is no built up income in the Trust. Accordingly, because no income is available (i.e. has been generated) that “could be paid” to or for the benefit of the Appellant, 130 CMR 520.023(C)(1)(a) does not apply. Actual payments of income from the Trust<sup>1</sup> – which would appropriately be considered income to Appellant – are addressed in 130 CMR 520.023(C)(1)(b) and 42 USC §1396p(d)(3)(B)(i)(I).<sup>2</sup>

## 2. Article 5.4 – The Trustee

MassHealth next argued that Trust principal can be paid to or for the benefit of the appellant via the trustee’s broad powers to mortgage the property and borrow or lend any amounts “without the approval of any court and in any manner it considers advisable.” This would include the ability to lend money to the appellant under any terms, including no interest or repayment until after the appellant’s death.

In full, the initial paragraph of Article 5.4 states “In addition to all common law and statutory authority, our trustee, **except as otherwise provided**, shall have power without approval of any court and in any manner it considers advisable... (j) to borrow or lend any amounts.” (Emphasis added). As the appellant argued, the Trust must be read as a whole. Furthermore, the provisions of Article 5.4 contain standard trust language involving investments, loans, insurance, mortgages, and borrowing that allow for the usual and customary administration of a trust. Any uncertainty that may be caused with regards to the provisions in Article 5.4 does not eliminate the language in Articles 2 and 3, prohibiting distribution of Trust principal to the appellant. When Article 5.4 is read as a whole (in particular, the language “except as otherwise provided”), the trustee is clearly bound by his/her fiduciary duties and cannot violate any other provisions in the trust if and when he/she borrows or lends any money or performs any other tasks listed in Article 5.4.

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<sup>1</sup> A “payment from a trust,” as used in 42 USC § 1396p(d)(3), refers to “a disbursement from the corpus of the trust or from the income generated by the trust which benefits the party receiving it.” Daley at 200 (quoting State Medicaid Manual, HCFA Pub. No. 45-3, Transmittal 64 § 3259.1.A.8 (Nov. 1994).

<sup>2</sup> MassHealth regulations covering financial eligibility consider “interest and dividend income,” as “unearned income.” 130 CMR 520.009(D). Because such income is countable, the appellant would be obligated to apply such amounts to her patient-paid amount to offset the cost of her care. See 130 CMR 520.009(C).



Based on the aforementioned reasons, the trust instrument does not present “any circumstances” that allow payment of trust assets to be made to or for appellant’s benefit. Therefore, the Trust is not countable and the appeal is APPROVED.

## **Order for MassHealth**

Rescind the notice dated September 4, 2018. Deem the appellant to have no access to the principal of the Trust. Proceed to re-determine her long-term care eligibility in accordance with this decision.

## **Implementation of this Decision**

If this decision is not implemented within 30 days after the date hereon, you should contact your MassHealth Enrollment Center. If you experience further 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.

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Alexandra Shube  
Hearing Officer  
Board of Hearings

cc:

MassHealth Representative: Sylvia Tiar, Tewksbury MassHealth Enrollment Center, 367 East Street, Tewksbury, MA, 01876-1957