

## APPEAL DECISION

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|----------------------------|--|--------------------------|------------------|
| <b>Appeal Decision:</b>    | Approved                                   | <b>Issue:</b>            | Eligibility      |
| <b>Decision Date:</b>      | MAY 10 2019                                | <b>Hearing Date:</b>     | 03/13/2019       |
| <b>MassHealth's Reps.:</b> | Michael Capuano & Gabe Gillis              | <b>Appellant's Rep.:</b> | Michael T. Baker |
| <b>Hearing Location:</b>   | Chelsea<br>MassHealth<br>Enrollment Center |                          |                  |

### Authority

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

### Jurisdiction

Through notices dated January 30, 2019, MassHealth determined that the appellant is not eligible for MassHealth because he has more countable assets than MassHealth allows including assets held in trust. (130 CMR 520.000; Exhibit 1A; Exhibit 1B). Counsel for the appellant appealed these decisions in a timely manner. (130 CMR 610.000; Exhibit 2; Exhibit 3).

### Action Taken by MassHealth

MassHealth determined that the appellant is not eligible for MassHealth because he has more countable assets than MassHealth benefits allow.

### Issue

Whether MassHealth was correct in determining that the appellant has more

countable assets than MassHealth benefits allow.

## Summary of Evidence

MassHealth received an application for long-term care on November 30, 2018 seeking coverage as of September 1, 2018. The appellant was admitted into a long-term care facility on August 20, 2018. MassHealth sent the appellant a request for information on December 6, 2018. MassHealth received the information necessary to complete the application and determined the appellant ineligible due to excess assets.

MassHealth determined that the appellant had to spend \$1,317,490.67 of his assets to qualify for MassHealth. (Testimony; Exhibit 1A). The assets at issue are funds in two trusts that MassHealth considered countable. (Testimony; Exhibit 1B). MassHealth determined that there were circumstances under which trust principal could be paid and/or used for the benefit of the appellant or his spouse including the ability of the appellant or his spouse to serve as Trustee and receive Trustee compensation. (Testimony; Exhibit 1B).

Counsel for MassHealth argued that the terms of the trusts at issue include Articles 18.09 and 29 of each trust. The appellant and his spouse are named Co-Trustees. Article 18.09 of each trust states:

*The Donor and the Donor's spouse reserve the right to remove and replace any Trustee, with or without cause; provided, however, for such time as both the Donor and the Donor's spouse are living and have legal capacity, such right shall be exercised only by mutual agreement of the Donor and the Donor's spouse.*

Article 29 of each trust states: *"The Trustee shall be entitled to reasonable compensation for its services as such."* Counsel for MassHealth argued that the entitlement to reasonable compensation and ability to serve as Trustee make the trust countable. MassHealth argued that there would be additional limiting language if there was a limit on the amount of compensation. MassHealth did not regard the term "reasonable" as limiting language.

Counsel for the appellant appeared in person. Copies of each trust and information about the assets held in trust were incorporated into the hearing record as Exhibit 4 and Exhibit 5. The beneficiaries of [Appellant Full-Name] Family Irrevocable Trust and [Community Spouse's Full-Name] Family Irrevocable Trust are

the appellant's three children and their issue. Each trust holds different assets with a total of approximately \$1,346,188. Counsel for the appellant noted that the appellant resigned as Trustee in August 2018. The appellant's spouse and son currently serve as Co-Trustees.

Article 4.02 of both trusts state:

*During the life of the donor, the Trustee shall have no power to make any distributions of any income and/or principal at any time to or for the benefit of either the Donor or the Donor's spouse. The Donor and the Donor's spouse irrevocably and unequivocally waive, renounce, and disclaim any and all right, title or interest which they may have now or in the future in the income and principal of the trust.*

Under this provision, the appellant and his spouse waive and renounce any right to principal under the terms of each trust. The provision also precludes the appellant and his spouse from receiving income. Counsel argued that neither the appellant nor his spouse can receive compensation as Trustees as that would be a source of income.

The record was held open to give both parties the opportunity to submit legal briefs. (Exhibit 6). A brief from MassHealth was incorporated into the hearing record as Exhibit 7. A brief from counsel for the appellant was incorporated into the hearing record as Exhibit 8.

In their brief MassHealth argues that the entitlement to reasonable compensation makes the entire corpus of both trusts countable as there are no restrictions on the source or amount of compensation. MassHealth utilizes text from the State Medicaid Manual to argue that the broad language of the "any circumstances test" allows MassHealth to consider the entire corpus of a trust available if a trust permits payment to an applicant for a specific purpose, despite the unlikelihood of the full payment. MassHealth notes that it is not their responsibility to place a value on a distribution such as "reasonable compensation" for services. Therefore, the entire corpus is countable for both instruments.

Counsel for the appellant argues that while the trusts provide a Trustee the right to reasonable compensation, they also have language that prohibits the distribution of income and principal to or for the benefit of the appellant or his spouse. Therefore, as Trustee, the appellant is not entitled to reasonable compensation. Counsel also notes that should the appellant be entitled to compensation, such compensation would constitute taxable wages and considered "earned income"

and earnings for services is not the same as benefitting. Counsel also argues that it would not be fair or reasonable for a Trustee to charge unlimited fees to drain a trust and would be inconsistent with the intent of establishing the trust.

## Findings of Fact

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

1. MassHealth received an application for long-term care on November 30, 2018 seeking coverage as of September 1, 2018.
2. The appellant was admitted into a long-term care facility on August 20, 2018.
3. MassHealth sent the appellant a request for information on December 6, 2018.
4. MassHealth received the information necessary to complete the application and determined the appellant ineligible due to excess assets.
5. MassHealth determined that the appellant had to spend \$1,317,490.67 of his assets to qualify for MassHealth.
6. The assets at issue involved two trusts that MassHealth considered as countable assets.
7. The appellant and his spouse served as Co-Trustees.
8. The appellant resigned as Trustee in August 2018.
9. The appellant's son and spouse currently serve as Co-Trustees.
10. The appellant and his spouse waived and renounced any right to income or principal under the terms of each trust.
11. The trusts preclude the appellant and his spouse from receiving income.
12. The trusts allow a Trustee to receive reasonable compensation.

## Analysis and Conclusions of Law

MassHealth administers and is responsible for the delivery of health-care services to MassHealth members. (130 CMR 515.002). The regulations governing MassHealth at 130 CMR 515.000 through 522.000 (referred to as Volume II) provide the requirements for noninstitutionalized persons aged 65 or older, institutionalized persons of any age, persons who would be institutionalized without community-based services, as defined by Title XIX of the Social Security Act and authorized by M.G.L. c. 118E, and certain Medicare beneficiaries. (130 CMR 515.002). The appellant in this case is an institutionalized person. Therefore, the regulations at 130 CMR 515.000 through 522.000 apply to this case. (130 CMR 515.002).

At issue on appeal was whether assets held in two irrevocable trusts were countable as the appellant and his spouse are Donors and Co-Trustees. (130 CMR 520.000). The trusts in this case were created in 2012. Therefore, the regulations at 130 CMR 520.023 apply. 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. (130 CMR 520.023). The trusts at issue in this case are irrevocable.

Whether a trust is countable is determined by analyzing whether any portion of the principal or income from the principal can be paid under any circumstances. (130 CMR 520.023(C)(1)(a)). The relevant portion of the State Medicaid Manual, HCFA Transmittal 64 §3259.1(A)(8) provides as follows: "Payment – for purposes of this section a payment from a trust is any disbursement from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property."

Pursuant to 130 CMR 520.024(A)(2), payments from the income or principal of an irrevocable trust established by the individual or spouse to or for the benefit of the individual are countable. (130 CMR 520.024(A)(2)). Since the trust does not allow payments of income or principal to the appellant, MassHealth cannot consider the trust assets in determining eligibility.

In their brief, MassHealth failed to distinguish the trust in this case from that in Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312 (2016) where the Court of Appeals noted that the authority of a trustee to determine an allocation between principal and income of any proceeds of trust assets is constrained by

reasonable accounting principles and practices. (Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312 (2016)). Reasonable compensation to a Trustee would be constrained by reasonable accounting principles and practices. Such constraints include categorizing compensation as a distribution of trust principal or allowing payment of 100% of trust principal.

Additionally, the court in Heyn noted that one should construe trust's provisions "in light of the trust instrument as a whole." Id. Counsel for the appellant is correct that MassHealth's position that trust assets are available to the appellant simply because the trust language allows a Trustee to receive reasonable compensation is an incomplete analysis. In looking at the instrument as a whole, the appellant and his spouse waived all rights to income and principal from both trusts. This prohibition makes the appellant ineligible to receive compensation as Trustee.

MassHealth also fails to distinguish this case from Daley v. Executive Office of Health and Human Services, 477 Mass. 188 (2017) where the court noted that the "any circumstances" test does not depart from the fundamental purpose of "actual availability" which serves primarily to prevent States from conjuring fictional sources of income and resources. Daley v. Executive Office of Health and Human Services, 477 Mass. 188 (2017). In this case, MassHealth is conjuring fictional sources of income and resources rather than adhering to the terms of the trust. MassHealth fails to distinguish this case from most recent decisions that continue to overturn agency decisions involving the availability of trust assets. Instead, MassHealth relies on decisions that precede these more recent decisions and text from a manual rather than effectively distinguishing this case from recent decisions issued by the Massachusetts Supreme Judicial Court and Massachusetts Court of Appeals.

The appellant has demonstrated by a preponderance of the evidence that the trust assets at issue are not countable to appellant for MassHealth purposes. (130 CMR 520.023(C)).

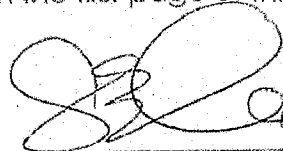
This appeal is approved.

## **Order for MassHealth**

Determine the appellant eligible for MassHealth without considering assets held in trust as countable.

## 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.



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Susan Burgess-Cox  
Hearing Officer  
Board of Hearings

CC:

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