

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Denied in part; Approved in part	Appeal Number:	1904061
Decision Date:	6/3/19	Hearing Date:	April 18, 2019
Hearing Officer:	Brook Padgett		

Appellant Representative:

MassHealth Representative:



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

APPEAL DECISION

Appeal Decision:	Denied in part; Approved in part	Issue:	130 CMR 520.022
Decision Date:	6/3/19	Hearing Date:	April 18, 2019
MassHealth Rep.:		Appellant Rep.:	
Hearing Location:	Tewksbury		

Authority

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

Jurisdiction

The Appellant received a notice dated February 15, 2019, stating: MassHealth has decided that you are not eligible for MassHealth because you have more countable assets than MassHealth benefits allow. (130 CMR 520.002, 520.028, 520.003, 520.004; Exhibit 1).

The Appellant received an additional notice also dated February 15, 2019, stating this notice explains why your Trust(s) is considered a countable asset for MassHealth eligibility purposes.

The Patricia A. Pasquale Irrevocable Trust is countable because there are circumstances under which the Trust(s) principle can be paid to and/or used for your benefit including:

- Under Section 4.05 you can appoint direct payment of Trust principal to charitable organizations on any conditions, including nursing facility to pay for your care.
- Under Section 4.05 you can appoint direct payment of Trust principal to your issue on any conditions, including to pay for your care.
- Under the Trust preamble and Section 15 and 26, you can serve as Trustee and receive Trustee compensation.
- Under Section 20.11 the Trustee can use Trust principal to buy annuities, life insurance, endowment policies or other forms of insurance for your benefit.

The Appellant filed this appeal timely on February 27, 2019. (130 CMR 610.015(B); Exhibit 2).

Denial of assistance is valid grounds for appeal. (130 CMR 610.032).

Action Taken by MassHealth

The Appellant's long term care application was denied as MassHealth determined she was over the asset limit for eligibility.

Issue

Is the Appellant over assets limit for MassHealth eligibility?

Summary of Evidence

MassHealth testified the Appellant applied for long term care benefits on October 31, 2018, while still residing in the community. On February 08, 2019, MassHealth was notified the appellant was not entering a nursing facility and began to process her application for community MassHealth. MassHealth determined the appellant had assets of \$771,827.16 consisting of \$69,958.08 in personal accounts¹ and \$11,375.13 in the Patricia Pasquale Revocable Trust of 2013 (Revocable Trust)² and \$690,493.95 in the Patricia A. Pasquale Irrevocable Trust (Irrevocable Trust and/or Trust).³ After subtraction of the statutory \$2,000.00 asset limit the appellant had excess assets of \$769,827.16. On February 15, 2019, the appellant was denied MassHealth as she was over the asset limit for eligibility.

The appellant was represented by counsel who acknowledged the appellant is over the asset limit for MassHealth and that she continues to retain all the funds in her personal accounts as well as the Revocable Trust and the Irrevocable Trust. The representative understands the funds contained in the appellant's personal and Revocable Trust are countable and need to be spent down prior to eligibility, however the appellant disagrees with MassHealth determination that the assets contained in the Irrevocable Trust are countable.

The MassHealth legal representative argued that Section 4.05⁴ of the Irrevocable Trust allows the appellant to appoint during her lifetime payment of Trust principal to charitable organizations on any conditions, which in this case would include nursing facilities. Section 4.05 also allows the

¹ \$14,226.97 Santander account #5977, \$36,709.00 Fidelity IRA account #2326, \$18,683.92 SBLI account #0877 Life Insurance, \$338.19 Group Universal Life account #0716 (\$20,000.00 face value).

² Fidelity #5824.

³ Fidelity #4972.

⁴ 4. **Payments During Life of Settlor** .05 Notwithstanding the forgoing, the Settlor reserves a limited or special power of appointment, exercisable during life by written instrument delivered to the Trustee, to appoint, outright or upon Trusts, powers of appointment, conditions or limitations, to such person or persons (whether in equal or unequal shares) among members of the class consisting of the Settlor's issue of all generation or charitable organizations other than governmental entities, but no such power or payment shall be used to discharge a legal obligation of the Settlor.

appellant to appoint direct payment of Trust principal to her issue on any conditions. The language of “on any condition” allows the appellant to distribute principal to her issue and then instruct them to use those funds to pay for her nursing home care. Section 15⁵ allows the appellant to be appointed as Trustee and Section 26⁶ allows the Trustee to receive Trustee compensation. MassHealth argues the appellant can be re-appointed as Trustee and request compensation to be used to pay nursing facility bills. Lastly Section 20.11⁷ allows the Trustee to use Trust principal to buy annuities, life insurance, endowment policies or other forms of insurance for her benefit, the proceeds of which would be used to pay the nursing facility. MassHealth asserts that Board of Hearings (BOH) decisions affirming the countability of annuities have recently been upheld in Superior Court. MassHealth submitted into evidence case history, first page of application, MassHealth notices, Irrevocable Trust, Revocable Trust and bank statements and a Memorandum in Support. (Exhibit 4).

The Appellant was represented by counsel who argued the Appellant is an 82 year old woman who established the Irrevocable Trust on April 07, 2007, and funded the Trust with stock and cash. On August 12, 2013, the appellant resigned as Trustee. The plain language of the Trust prohibits alteration of the Trust under Article 3⁸ and distribution of principal and income to the appellant under Article 4⁹. The clear intent of the appellant establishing the Trust was to remove her from control and use of Trust property and protect Trust principal from the cost of long term care. When the appellant created the Irrevocable Trust it was for the purposes of legal estate planning and distributing her assets and not for the purpose of hiding access to her funds by pretending to give them away while maintaining control. The Appellant’s counsel asserts that a retained or limited power of appointment has no bearing on the issue of whether an applicant retained any interest in a Trust for the purpose of countability for MassHealth purposes. Quoting *Heyn v. Director of the Office of Medicaid*, 83 Mass. App. Ct. 312 (2016) “A provision making trust principal available to persons other than the grantor does not by its nature make it available to the grantor.” Arguing once funds are legally owned by a family member, he or she has a no legal obligation to use the funds on behalf of the grantor. Similarly once a charity receives a gift from the appellant they have no legal obligation to use the gifted funds on behalf of the appellant. Further payment to a charity designated for a single individual are not gifts to the charity, but rather a gift to the individual benefiting from the transferred funds. Finally, the appellant currently is not a Trustee, but if she was appointed as Trustee any compensation that she could

⁵ **15. Vacancies and Succession of Trustees** .01 Any Trustee may resign by delivering his resignation to all other Trustees then serving, Additional or successor Trustee may be appointed by unanimous action of all Trustees serving at the time of the appointment. .03 A successor Trustee shall have the same powers, duties and discretions s such Trustee would have if originally named herein.

⁶ **26. Compensation of Trustee** The Trustee shall be entitled to reasonable compensation for its services as such.

⁷ **20. Trustee Powers** .11 To hold, retain purchase, dispose or otherwise deal with life insurance, annuities, endowment policies or other forms of insurance on the life of the Settlor, or any beneficiary or any other person for the benefit of any beneficiary and to pay the premiums and costs therefor from the principal or income of the Trust.

⁸ **3. Irrevocability** The Settlor expressly waives any and all right which she may have, by operation of law or otherwise, to revoke, alter, amend or otherwise change this Indenture of Trust or any of the provisions thereof.

⁹ **4. Payments During Life of Settlor** .02 The Trustee shall pay to the Settlor so much of the net income, if any, as the Trustee deems advisable in the Trustee’s sole and absolute discretion. .03 The Trustee shall have no power to make any distributions or principal at any time or for the benefit of the Settlor.

command must be reasonable (such as \$1,500.00) and not the entire principal. The Appellant submitted into evidence a Memorandum in Support. (Exhibit 5).

MassHealth submitted from the Supreme Court of New Hampshire Petition of the Estate of Thea Braiterman, 169 N.H. 217 (2016), arguing that the court determined the power to make a distribution to a beneficiary conditioned upon the beneficiary using the distribution for the appellant's benefit is sufficient to find the trust countable for Medicaid purposes. (Exhibit 6).

Findings of Fact

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

1. Appellant is an 82 year old single woman residing in the community who filed an application for MassHealth long term care benefits on October 31, 2018. (Exhibit 4).
2. On February 08, 2019, MassHealth was notified the appellant was not entering a nursing facility and process her application for community MassHealth. (Exhibit 4).
3. MassHealth determined the appellant had excess assets of \$769,827.16. (\$69,958.08 in personal accounts, \$11,375.13 in a Revocable Trust and \$690,493.95 in an Irrevocable Trust) (Exhibit 4).
4. The appellant established the Irrevocable Trust on April 07, 2007. (Exhibit 5).
5. The appellant acknowledges all the assets are countable except for the \$690,493.95 in an Irrevocable Trust. (Testimony).
6. On August 12, 2013, the appellant resigned as Trustee. (Exhibit 5).
7. MassHealth maintains the irrevocable Trust allows the appellant accesses to Trust principal under the following sections: Section 4.05, 15, 20.11 and 26. (Exhibit 4 and testimony).
8. The MassHealth asset limit for eligibility is \$2,000.00 (130 CMR 520.003).

Analysis and Conclusions of Law

The Appellant applied for MassHealth community benefits on February 08, 2019. On April 07, 2007, the appellant established an irrevocable Trust and funded it with cash and stocks; therefore, regulations at 130 CMR 520.023 (Trusts or Similar Legal Devices Created on or after August 11, 1993) are controlling. The issue at appeal is whether the funds contained in the Irrevocable Trust are still available to the appellant for her care or if the Trust document limits such access.

The MassHealth long term care program is designed to assist in providing health care for the poor and therefore MassHealth has the obligation to scrutinize all Trust documents as it is expected that

applicant's deplete their own resources before obtaining assistance from the government to pay for their care. While there are individuals and Trusts which go to great lengths to appear to transfer funds out of an applicant's control while administering the Trust in a manner so that they continue to maintain authority over the funds, there are also legitimate Trusts that have been drafted to provide for a family member in life as well as preserving and protecting assets for beneficiaries upon the family member's death, that are not an attempt of the applicant to "have their cake and eat it to." What is relevant in determining the countability of assets held in an irrevocable Trust established by an applicant or spouse or funded with an applicant's assets is the "any circumstances" test mandated at 42 U.S.C §1396p(d)(3)(B)(i) and 130 CMR 520.023(C)(1). The court has held in a number of cases that if there is a means within the Trust to provide funds to the settlor then the funds are seen as available for Medicaid eligibility.

MassHealth asserts the assets contained in the Appellant's Trust are countable based on a number of Trust provisions including the 4.05, 4.15, 20 and 26 maintaining these provisions allow access to the principal of the Trust. However I find nothing in these provisions or any other of the Trust provisions that allow the Appellant to either revoke the Trust or allow Trust principal to be distributed to the Appellant as claimed by MassHealth. The provisions cited by MassHealth contain either standard Trust language which allow for the usual and customary administration of a Trust, or require the Trustee to breach his/her fiduciary duty or the beneficiaries to accept trust funds and then give them away.

The fact that the Trust contains provisions which makes trust principal available to persons or entities other than the appellant does not therefore make trust principal available to the appellant. Once funds are legally transferred from the Trust, there is no legal obligation that the recipients of those funds use them on behalf of the appellant. This is true whether the funds are appointed to a charity or given to a beneficiary.¹⁰ Further the argument that the appellant, who is not a Trustee, could access the entire principal as Trustee compensation is not convincing simply based on the language of the Trust itself as it states the Trustee shall be entitled to reasonable compensation. Reasonable compensation for the administration of a trust is not unlimited access to trust assets. Lastly I find the notion that the Trustee's use of Trust principal to purchase life insurance, annuities or other forms of insurance on the life of the Settlor and for the benefit of any beneficiary, gives the appellant access to all Trust assets to be unpersuasive. The language of 20.11 is limited to the purchase of any policy that is "for the benefit of any beneficiary" of which the appellant is not a member.¹¹

¹⁰ There is no section in the Trust at hand which instructs the beneficiaries to make payments to the appellant. This is contrary to Braiterman, 169 N.H. 217 (2016) which maintains that "collusion was arguably encouraged by Clause 4.1.1., which provided that, in the event the Trust's existence disqualifies the applicant for Medicaid benefits, the applicant "suggests" that the Trust be terminated and that the Legatees (her children) use the Trust assets "to supplement the income and ... governmental benefits and services to which [she] may be entitled." In that case the circumstances under which the payments from the Trust could be made to benefit the applicant are not speculative but, rather, are specifically anticipated under the Trust agreement.

¹¹ MassHealth asserts that the use of Trust principal and income to pay premiums for life insurance, annuities, endowments and other investments makes the Trust assets countable. MassHealth indicates there are Superior Court upholding such decisions; however the case here is distinguishable, specifically that the language of the trust at issue in the Superior Court case contains terms different than the Trust at issue here (see Joyce A. Dolge v. Marylou

Finally, any uncertainty caused by the Trust language in Sections 4.05, 4.15, 20 and 26 is clarified by the definitive language in Section 3 which states the Trust is irrevocable, and cannot be altered or amended by the Settlor and Section 4.03 which states the Trustee shall have no power to make distributions of principal at any time to or for the benefit of the Settlor. I find nothing in the plain reading of the Trust document which allows the Appellant to either revoke the Trust or allow Trust principal to be distributed to the Appellant as claimed by MassHealth; and that the Trust provisions in this case, considered collectively, create such an instrument that renders assets noncountable in the determination of Medicaid eligibility. This appeal is therefore approved in part.

There is no question the appellant's assets contain in the Revocable Trust and personal bank accounts are countable for MassHealth purposes and this appeal is denied in part. (130 CMR 520.022(A)).¹²

Order for the MassHealth

The appellant has 30 days from the date of the decision to provide verification of the asset spend down of countable assets in her personal account and Revocable Trust.

Sudders et al., Norfolk Superior Court Civil Action No. 17-10464). In Dolge, the Superior Court found that when there is no provision in the Trust that requires the purchased annuity be in "exchange for assets of equivalent value" or otherwise returned to the corpus, then the annuity payments would not be required to be returned back to the Trust and the annuity payments would not be governed by Trust terms. Here the Trust requires the any purchase be used for the benefit of the beneficiaries of the Trust and therefore would continue to be governed by the terms of the Trust.

¹² 130 CMR 520.022: Trusts or Similar Legal Devices Created before August 11, 1993 (A) Revocable Trust. The assets and income of an individual or spouse in a revocable Trust are countable. The fair-market value of the home or former home of the nursing-facility resident or spouse in a revocable Trust is a countable asset. Where the home or former home is an asset of the Trust, the home or former home is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

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

Brook Padgett
Hearing Officer
Board of Hearings

cc: