

**Office of Medicaid
BOARD OF HEARINGS**

Appeal Decision:	Approved	Appeal Number:	1905492
Decision Date:	6/4/19	Hearing Date:	05/14/2019
Hearing Officer:	Patricia Mullen		

Appearances for Appellant:

Appearance for MassHealth:
Gessica Brunot, Chelsea MEC



*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:	Trust assets
Decision Date:	6/4/19	Hearing Date:	05/14/2019
MassHealth's Rep.:	Gessica Brunot, Chelsea MEC	Appellant's Reps.:	
Hearing Location:	Taunton MassHealth 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 a notice dated March 5, 2019, MassHealth denied the appellant's application for MassHealth Standard benefits for long term care residents because MassHealth determined that the appellant had assets in a countable trust which exceed the MassHealth limit. (see 130 CMR 520.023 and Exhibit 1). MassHealth determined specifically that 25% of a nominee trust was countable because there are circumstances under which the trust principal can be paid to the appellant under sections 3.3, 4.1, 5.1, and 5.2 and the First Amended Schedule of Beneficiaries. (Exhibit 5, p. 9). The appellant filed this appeal in a timely manner on March 18, 2019. (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 MassHealth Standard for long term care residents.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.023, in determining

that assets held in a nominee trust are countable to the appellant.

Summary of Evidence

The appellant was represented at the hearing by his attorney, his Power of Attorney (POA) who is also his son, his daughter, and the business office manager from his skilled nursing facility (SNF). MassHealth was represented telephonically by a worker from the MassHealth Enrollment Center (MEC) in Chelsea. The MassHealth representative stated that the appellant is a single individual and submitted a MassHealth application on January 10, 2019 seeking a December 24, 2018 MassHealth start date. (Exhibit 5, p. 4). The appellant was admitted to the SNF from the hospital on November 23, 2018. (Exhibit 5, p. 4). The MassHealth representative stated that MassHealth determined that The Family Nominee Trust¹ (hereinafter “the nominee trust”) was countable to the appellant.

The nominee trust was established on July 1, 1997 and on that same day, the appellant transferred the remainder interest of his primary residence into the nominee trust, after retaining a life estate interest for himself. (Exhibit 5, pp. 15, 18, testimony). The real estate property has a tax assessed value of \$240,000.00. (Exhibit 5, p. 19). The nominee trust and deed were recorded with the Registry of Deeds on September 18, 1997. (Exhibit 5, p. 10). The appellant is the sole trustee of the nominee trust and the original beneficiaries were his 4 children. (Exhibit 5, p. 15; Exhibit 7). After the death of one of the appellant’s children, the Schedule of Beneficial Interests was amended on November 21, 2007, listing the appellant’s 3 children, then living, as beneficiaries with each getting a 33.33% beneficial interest of the assets held by the nominee trust. (Exhibit 7).

The declaration of the nominee trust states that trust property “shall be held in trust, for the sole benefit of the individuals or entities listed in the Schedule of Beneficiaries in the proportions stated in said Schedule which Schedule has this day been executed by the Beneficiaries and filed with the Trustees...” (Exhibit 5, p. 10).

Section 3 of the nominee trust is entitled “Beneficiaries”. (Exhibit 5, p. 11). Section 3 states:

3.1 The term “Beneficiaries” shall mean the persons and entities listed as Beneficiaries in the Schedule of Beneficiaries and in such revised Schedule of Beneficiaries, from time to time hereafter executed and delivered as provided above and the respective interests of the beneficiaries² shall be as therein stated.

3.2 Decisions made and actions taken hereunder (including without limitation, amendment and termination of this Trust; appointment and removal of Trustees; directions and notices to Trustees; and execution of documents) shall be made or taken, as the case may be, by majority vote, in writing, of the beneficiaries.

¹ The title of the nominee trust contains the appellant’s family name which is left out of this decision for privacy and confidentiality purposes.

² The nominee trust terms are recorded verbatim here and any inconsistencies in grammar or capitalizations were at the hand of the drafter of the nominee trust. (Exhibit 5).

3.3 Any trustee may without impropriety become a Beneficiary hereunder and exercise all rights of a beneficiary with the same effect as though he or she or it were not a Trustee. The parties hereunder recognize that if a sole Trustee and a sole Beneficiary are one and the same person, legal and equitable title hereunder shall merge as a matter of law.

(Exhibit 5, p. 11).

Section 4 of the nominee trust is entitled "Powers of Trustees". (Exhibit 5, p. 12). Section 4 states in part:

4.1 The Trustees shall hold the principal of this Trust and receive the income therefrom for the benefit of all of the Beneficiaries, and shall pay over the principal and income pursuant to the direction of the majority of the Beneficiaries and without such direction shall pay the income to the Beneficiaries in proportion to their respective interests.

4.2 Except as hereinafter provided in case of the termination of this Trust, the Trustees shall have no power to deal in or with the Trust Estate except as directed by the majority of the Beneficiaries. When, as, if and to the extent specifically directed by the majority of the Beneficiaries, the Trustees shall have the following powers:

4.2.1 to buy, sell, convey, assign, mortgage or otherwise dispose of all or any part of the Trust Estate and as landlord or tenant execute and deliver leases and subleases;

4.2.2 to execute and deliver notes for borrowing for the majority of the Beneficiaries;

4.2.3 to grant easements or acquire rights of easements and enter into agreements and arrangements with respect to the Trust Estate;

4.2.4 to endorse and deposit checks in an account for the benefit of the Beneficiaries;

4.2.5 but the Trustees shall have NO AUTHORITY TO MAINTAIN BANK ACCOUNTS IN THE NAME OF THE TRUST OR TRUSTEES but the Beneficiaries may maintain bank accounts in the name of the Beneficiaries. In the event of a violation of this subparagraph, the Trustees shall indemnify and save harmless the Beneficiaries from any liability resulting therefrom, including taxes and accounting expenses.

(Exhibit 5, p. 12; emphasis in the original document).

Section 5 of the nominee trust is entitled "Termination". (Exhibit 5, p. 13). Section 5 states:

5.1 This Trust may be terminated at any time by notice in writing from the majority of the beneficiaries, provided that such termination shall be effective only when a certificate thereof signed by the Trustees, shall be recorded with the Registry of Deeds. Notwithstanding any other provision of this undersigned that this Trust, and consistent with the intention of the

undersigned that this Trust cannot violate the Rule Against Perpetuities, this Trust shall terminate in any event TWENTY (20) years from the date of the death of the last surviving Trustee of the original Trustees named in this instrument.

5.2 In the case of any termination of the Trust, the Trustees shall transfer and convey the specific assets constituting the Trust Estate, subject to any leases, mortgages, contracts, or other encumbrances on the Trust Estate, to the Beneficiaries as tenants in common in proportion to their respective interests hereunder, or as otherwise directed by the majority of the Beneficiaries, provided, however the Trustees may retain such portion thereof as in their opinion necessary to discharge any expense or liability, determined or contingent, of the Trust.

(Exhibit 5, p. 13).

Section 6.1 of the nominee trust states:

This Declaration of Trust may be amended from time to time by an instrument in writing signed by the majority of the Beneficiaries and delivered to the Trustees, provided in each case that the amendment shall not become effective until the instrument of amendment or a certificate setting forth the terms of such amendment, signed by the Trustees, is recorded with the Registry of Deeds.

(Exhibit 5, p. 13).

The MassHealth representative stated that the MassHealth legal department determined that sections 3.3, 4.1, 5.1, and 5.2 of the nominee trust create circumstances whereby the appellant could access the trust assets. The MassHealth representative noted that MassHealth legal determined that 25% of the total nominee trust assets of \$240,000.00 were countable to the appellant. The MassHealth representative stated that MassHealth counted total nominee trust assets of \$60,000.00 ($\$240,000/4$) which exceed the MassHealth limit of \$2,000.00.

The appellant's attorney noted that MassHealth has not argued what specifically in the listed nominee trust provisions creates a circumstance whereby trust assets could be made available to the appellant. The appellant's attorney stated that he can only guess on what MassHealth is arguing here. The hearing officer asked the appellant's attorney to explain why section 3.3 of the nominee trust would not allow the appellant, as trustee, to make himself a trust beneficiary. The appellant's attorney stated that the language in section 3.3 of the nominee trust is standard language in every nominee trust and the provision is there to acknowledge that it is acceptable for a trustee to also be a beneficiary. The appellant's attorney explained that in the event a trustee of the nominee trust was to be named a beneficiary, he or she could continue to act in his or her capacity as trustee. The appellant's attorney noted that the fact that it is not improper for an individual to be both trustee and beneficiary of the nominee trust does not mean the appellant can make himself a beneficiary of this trust. The appellant's attorney stated that the nominee trust is a title holding vehicle and the beneficiaries, the appellant's 3 children, are the true owners of the property. The appellant's attorney noted further that the nominee trust holds a remainder interest in the real estate property,

while the appellant holds a life estate interest. The appellant's attorney submitted a legal memorandum, an article from Massachusetts Law Quarterly, and a directive from the Massachusetts Department of Revenue with regard to nominee trusts. (Exhibits 8, 9, 10). The appellant's attorney also submitted Superior Court decisions with regard to MassHealth trust notices. (Exhibits 11, 12).

In the legal memorandum, the appellant's attorney wrote that a nominee trust is an entity created for the purpose of holding legal title to property and trustees of a nominee trust have only perfunctory duties and no power to act with respect to the trust property, unless directed by the beneficiaries. (Exhibit 8, p. 2). The appellant's attorney noted that Massachusetts case law consistently treats nominee trusts as mere agency relationships and trustees of nominee trusts are seen as agents rather than trustees. (Exhibit 8, pp. 2-3; Roberts v Roberts, 410 Mass, 685 (1995); Apahouser Lock & Sec. Corp v. Carvelli, Mass. App. Ct. 385 (1988)). The appellant's attorney argued that the trustee of the nominee trust is actually an agent and does not have independent authority or discretion to act in any manner with regard to trust property. (Exhibit 8, p. 5). The appellant's attorney noted that the beneficiaries are the owners of the property held by nominee trust and only a beneficiary can modify or transfer his/her/it ownership interest, not the trustee. (Exhibit 8, p. 5).

The appellant's attorney argued further that even if the nominee trust in this appeal were considered to be a true trust rather than agency relationship, neither the trustee nor the appellant, as grantor, has any power to take the vested ownership interests away from the beneficiaries. (Exhibit 8, p. 10). The appellant's attorney cited to Daley v. Secretary of the Executive Office of Health and Human Services, 477 Mass. 188 (2017) in which the SJC stated "[b]y declaring the equity in a home owned by an irrevocable trust to be actually available to an applicant where the trustee has no power to sell the home and distribute the proceeds to the applicant under any circumstance, Massachusetts is effectively 'conjuring [a] fictional' resource by 'imputing financial support' from a person who has no authority to furnish it." (Exhibit 8, p. 10; Daley at 202-203). The appellant's attorney noted that because the trustee of the nominee trust has no power to sell the appellant's former residence and distribute proceeds to the appellant under any circumstance, MassHealth is imputing financial support from a person who has no authority to furnish it. The appellant's attorney argued that there are no circumstances set forth in the terms of the nominee trust that would allow for trust assets to be available to the appellant under any circumstances.

The appellant's attorney stated further that the appellant's daughter and son/POA have lived with him in his former primary residence for 13 and 10 years respectively. The appellant's attorney argued that in the event the nominee trust is deemed countable by hearing decision, the appellant's daughter would qualify as a caretaker child and his son is disabled, allowing for a permissible transfer of the former primary residence to them. (Exhibits 13, 14).

Findings of Fact

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

1. The appellant is a single individual and submitted a MassHealth application on January 10, 2019 seeking a December 24, 2018 MassHealth start date.
2. The appellant was admitted to the SNF from the hospital on November 23, 2018.
3. The nominee trust was established on July 1, 1997 and on that same day, the appellant transferred the remainder interest of his primary residence into the nominee trust, after retaining a life estate interest for himself.
4. The real estate property has a tax assessed value of \$240,000.00.
5. The nominee trust and deed were recorded with the Registry of Deeds on September 18, 1997.
6. The appellant is the sole trustee of the nominee trust and the original beneficiaries were his 4 children; after the death of one of the appellant's children, the Schedule of Beneficial Interests was amended on November 21, 2007, listing the appellant's 3 children as beneficiaries with each getting a 33.33% beneficial interest of the assets held by the nominee trust.
7. MassHealth determined that 25% of the total nominee trust assets of \$240,000.00 were countable to the appellant.
8. MassHealth determined that sections 3.3, 4.1, 5.1, and 5.2 of the nominee trust created circumstances whereby the appellant could access the trust assets

Analysis and Conclusions of Law

The total value of assets owned by an institutionalized individual must not exceed \$2,000.00. (130 CMR 520.016(A)).

The MassHealth agency counts the value of the principal and income of a revocable or irrevocable trust in accordance with 130 CMR 520.021 through 520.024. (130 CMR 520.007(I)).

Treatment of Trusts

130 CMR 520.021 through 520.024 explains how to treat the principal of and payments from a revocable or irrevocable trust established by the individual or by the spouse. 130 CMR 520.024(A) also includes trusts established by other than the individual or spouse and trusts whether or not established by will. In the event that a portion of 130 CMR 520.021 through 520.024 conflicts with federal law, the federal law supersedes. (130 CMR 520.021).

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 amount of an irrevocable trust countable to an applicant is determined 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 520.007(G)(8).

130 CMR 520.023(C)(1).

MassHealth argues that sections 3.3, 4.1, 5.1, 5.2, and the First Amended Schedule of Beneficial Interests of the nominee trust create a circumstance under which 25% of the nominee trust principal could be paid to and/or used for the appellant's benefit. The appellant's attorney is correct in his assertion that MassHealth has provided no argument as to what specifically in these nominee trust provisions make 25% of the nominee trust assets countable to the appellant.

The language in section 3.3 of the nominee trust pertains to a situation where the majority of beneficiaries might vote to make the trustee a beneficiary of the trust and what that action would mean with regard to legal and equitable title of the trust property. Section 3.3 of the nominee trust does not give a trustee discretion to make him or herself or any other individual a beneficiary of the trust.

Section 4.1 of the nominee trust states that the trustee shall pay over principal and income pursuant to the direction of the majority of the beneficiaries. The appellant is not a beneficiary of the nominee trust and this provision does not create a circumstance under which the nominee trust principal could be paid to him or on his behalf.

Sections 5.1 and 5.2 of the nominee trust set forth the requirements for termination of the nominee trust. Under these terms, the termination must be in writing from the majority of beneficiaries and the assets are to be distributed to the beneficiaries as tenants in common in proportion to their respective interests. The appellant is not a beneficiary of the nominee trust and sections 5.1 and 5.2 do not create a circumstance making nominee trust assets available to the appellant.

Without the benefit of any clear argument from MassHealth, I can only assume that MassHealth determined that the appellant, as trustee, could make himself a beneficiary under section 3.3 of the nominee trust and thus enjoy all the beneficial interests set forth in sections 4.1, 5.1, and 5.2 of the nominee trust. Further, if the appellant made himself a beneficiary, it would be in proportion to the 3 beneficiaries already listed in the Schedule of Beneficial Interests, thus giving him a 25% interest.

As noted above, section 3.3 does not give the trustee of the nominee trust discretion or power to name himself a beneficiary of the nominee trust. A thorough reading of the nominee trust shows that only the beneficiaries have the discretion and authority to act with regard to the nominee trust assets. The trustee has “no power to deal in or with the Trust Estate except as directed by the majority of the Beneficiaries.” (Exhibit 5, p. 12). The appellant, as trustee and/or grantor, has no authority to name himself a beneficiary of the nominee trust and has no power to direct the beneficiaries to name him a beneficiary.

Based on the above, I do not find any circumstances described in the terms of the nominee trust, by which any of the resources of the nominee trust can be made available to the appellant. Accordingly, the assets held in the nominee trust are not countable to the appellant and his total assets are less than \$2,000.00. The appeal is approved.

Order for MassHealth

Modify the notice dated March 5, 2019 and do not count the nominee trust assets in determining the appellant’s total countable assets. Determine if the appellant was otherwise eligible for MassHealth on December 24, 2018.

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.

Patricia Mullen
Hearing Officer
Board of Hearings