

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1909004
Decision Date:	SEP 09 2019	Hearing Date:	06/18/2019
Hearing Officer:	Thomas J. Goode	Record Open to:	07/23/2019

Appearance for Appellant:
Margot Birke, Esq.

Appearance for MassHealth:
Kathleen Towle, Springfield 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:	130 CMR 520.023
Decision Date:	SEP 09 2019	Hearing Date:	06/18/2019
MassHealth's Rep.:	Kathleen Towle	Appellant's Rep.:	Margot Birke, Esq.
Hearing Location:	Tewksbury MassHealth Enrollment Center Room 2	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 April 4, 2019, MassHealth denied Appellant's application for MassHealth long-term care benefits due to excess assets, and assets held in trust deemed countable to Appellant (130 CMR 520.003, 520.016(B), 520.023, and Exhibit 1). Appellant filed this appeal in a timely manner on May 1, 2019 (130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (130 CMR 610.032). The hearing record remained open until July 9, 2019 at Appellant's request to allow Appellant to verify \$97,000 in assets held outside of the trust, and submit a legal memorandum. Appellant's response was timely received (Exhibits 7, 9). A MassHealth response was due by July 23, 2019, which was timely received, and stated that assets outside of the trust had been verified, and the only remaining issue involved the determination that assets held in trust are countable (Exhibit 8).¹

Action Taken by MassHealth

MassHealth denied Appellant's application for MassHealth long-term care benefits due to assets held in trust deemed countable to Appellant.

¹ On August 5, 2019, MassHealth erroneously issued an approval notice. The error was recognized, and the notice was rescinded to await a hearing decision addressing assets held in the Family Trust (Exhibit 11).

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.023, in denying Appellant's MassHealth application due to assets held in trust deemed countable to Appellant.

Summary of Evidence

The MassHealth representative testified that an application for MassHealth long-term care benefits was submitted on December 18, 2018 seeking coverage effective November 19, 2018. The MassHealth legal department reviewed the Trust (Exhibit 4, pp. 24-27); and on April 4, 2019, MassHealth issued a notice informing Appellant that the irrevocable Family Trust "is a countable asset because there are circumstances under which Trust principal could be paid to and/or used for your or your spouse's benefit including under section 2.1(b), you or your spouse can appoint direct payment of Trust principal to charitable or nonprofit organizations including nursing facilities to pay for your or your spouse's care."

Section 2.1(b) of the Trust reads:

During our lifetimes we shall have the power to appoint from time to time, by an instrument in writing by either of us or by either of our legal representatives, all or any part of the trust property then on hand to any one or more charitable or nonprofit organizations over which we have no controlling interest, whether or not organized for a purpose specified in section 170(c) of the Internal Revenue Code of 1986, but excluding any federal, state, or local government or any subdivision, department, or agency thereof.

In a legal memorandum submitted by Appellant's attorney, Appellant asserted that assets held in Trust are not countable under Section 2.1(b). On May 4, 2012, Appellant and his spouse established the Trust, and deeded real property to the Trust. A use and occupancy provision was executed. One of Appellant's sons and his wife are co-Trustees. Citing 42 USC 1396p(d)(3)(B)(i), 130 CMR 520.023(C), 520.007, and State of Washington v. Bowen, 815F.2d 549 (9th Cir. 1987),² Appellant argued that a self-settled trust can be used to protect assets; and assets held in trust are available to the grantor only to the extent assets can be paid out of trust to or for the grantor's benefit. Appellant argued that Appellant and her spouse are income beneficiaries, but retained no right to access principal. The principal of the Trust is to be held until the termination of the Trust under Article 2.1(a), unless the Trust Protector, whose authority is discretionary, permits the trustees to make distributions to each other under Article 2.2. To date, no income has been generated by the real property held in the Trust, and there have been no distributions from principal. Appellant is prohibited from serving as a trustee. Citing Daley v. Secretary of the Executive Office of Health and Human Services, 744 Mass. 188 (Mass., No. SJC-12200, May 30, 2017), and Nadeau v.

² See Exhibit 17.

Director of the Office of Medicaid (Mass., No. SJC-12205, May 30, 2017),³ Appellant argued that MassHealth cannot count as available assets owned by an irrevocable trust unless and only to the extent the trustee may distribute principal to the applicant or his or her spouse. The real property held in the Trust is inaccessible to Appellant under 130 CMR 520.006, and 42 USC 1396p(d)(3)(B)(ii). Appellant argued under M.G.L. c.203E, s. 808(c)⁴ that a power of appointment cannot be stretched in meaning to allow a return of the principal of the trust to the settlor because such a power does not allow the settlor to benefit by engaging in self-dealing. Further, the power to appoint principal to others does not create a direct path from the principal to the settlor as established in Daley and Nadeau in which the trusts contain the same language as the instant trust, and which were ultimately approved. Citing Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312, 318-319⁵, Appellant asserted that the ability to appoint trust principal to a charitable entity does not make the assets of the Trust a countable resource because the provision does not provide “any circumstances,” or a clear path by which a payment could be made to or for the benefit of the appellant. Moreover, Appellant argued that she is entitled to consistency in agency decision-making by the Office of Medicaid, and is entitled to the same outcome as in Nadeau.

On July 29, 2019, Appellant also submitted a recent Worcester Superior Court case, Misiaszek v. Secretary of the Executive Office of Health and Human Services, (Sup. Ct. No. 1885CV1370C, July 19, 2019) that held that the power to appoint assets to a charitable organization does not render trust assets available in a MassHealth eligibility determination (Exhibit 10).

Findings of Fact

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

1. An application for MassHealth long-term care benefits was submitted on December 18, 2018 seeking coverage effective November 19, 2018.
2. On May 4, 2012, Appellant and his spouse established the Trust, and deeded real property to the Trust. A use and occupancy provision was also executed.
3. One of Appellant’s sons and his wife are co-Trustees.
4. On April 4, 2019, MassHealth issued a notice informing Appellant that the irrevocable Family Trust “is a countable asset because there are circumstances under which Trust principal could be paid to and/or used for your or your spouse’s benefit including under section 2.1(b), you or your spouse can appoint direct payment of Trust principal to charitable or nonprofit organizations including nursing facilities to pay for your or your spouse’s care.”

³ See Exhibit 16.

⁴ See Exhibit 15.

⁵ See Exhibit 13.

5. Section 2.1(b) of the Trust reads: “[d]uring our lifetimes we shall have the power to appoint from time to time, by an instrument in writing by either of us or by either of our legal representatives, all or any part of the trust property then on hand to any one or more charitable or nonprofit organizations over which we have no controlling interest, whether or not organized for a purpose specified in section 170(c) of the Internal Revenue Code of 1986, but excluding any federal, state, or local government or any subdivision, department, or agency thereof.”

Analysis and Conclusions of Law

Federal law at 42 USC §1396p states:

(d) Treatment of Trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a Trust established by such individual.

(2)

(A) For purposes of this subsection, an individual shall be considered to have established a Trust if assets of the individual were used to form all or part of the corpus of the Trust and if any of the following individuals established such Trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a Trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the Trust attributable to the assets of the individual.

(C) Subject to paragraph (4)⁶, this subsection shall apply 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.

(3)

(B) In the case of an irrevocable trust—

(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.

Regulation 130 CMR 520.023(C) applies to trusts or similar legal devices created on or after August 11, 1993:

(C) Irrevocable Trusts.

(1) Portion Payable.

(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.

⁶ This subsection does not apply to the Trust at hand.

(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).

(2) Portion Not Payable. Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could not be paid under any circumstances to or for the benefit of the nursing-facility resident will be considered a transfer for less than fair-market value and treated in accordance with the transfer rules at 130 CMR 520.019(G).

MassHealth determined that assets held in Trust are countable based on Daley v. Sec'y of Executive Office of Health & Human Servs., 477 Mass. 188, 203 (2017) and Nadeau v. Director of the Office of Medicaid, 477 Mass. 188 (2017). In addressing the power of appointment to a charity or nonprofit organization, the SJC states:

First, the Nadeaus may “appoint ... all or any part of the trust property...to any one or more charitable or non-profit organizations” over which they have no controlling interest. 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, p. 16 (emphasis added)

On April 4, 2019, MassHealth issued a notice informing Appellant that the irrevocable Family Trust “is a countable asset because there are circumstances under which Trust principal could be paid to and/or used for your or your spouse’s benefit including under section 2.1(b), you or your spouse can appoint direct payment of Trust principal to charitable or nonprofit organizations including nursing facilities to pay for your or your spouse’s care.” A hearing was held on June 18, 2019. MassHealth was represented by a long-term care caseworker who appeared by

telephone. A MassHealth attorney did not appear at hearing, nor was a legal memorandum submitted into evidence. The April 4, 2019 notice states the basis for the denial, but with no further testimony or legal analysis for the determination, there is minimal support for the MassHealth position.

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity.⁷ Appellant has persuasively argued that the ability to appoint trust principal to a charitable entity does not make the assets of the Trust a countable resource because it does not create a clear pathway for the resources to be used on Appellant's behalf, any more than a gift free of Trust does not present a pathway back to Appellant.⁸ The Superior Court arrived at the same conclusion in Misiaszek (Exhibit 10, pp. 19-20). MassHealth appears to have relied entirely on Nadeau in deeming Trust assets countable under Article 2.1(b). In remanding the Nadeau case to MassHealth, the SJC plainly states that the Nadeaus could have used Trust assets to pay for his care at a nursing home operated by a nonprofit organization; however, the SJC determined only that it is appropriate for MassHealth to consider whether this possibility fits within the "any circumstances" test. The SJC directs that MassHealth must "consider whether this possibility fits within the "any circumstances" test; however, the SJC provides no legal analysis or guidance with regard to whether or not the power to appoint assets to a charity or nonprofit organization meets "any circumstances" because the issue was not adjudicated by the Daley Court.⁹ MassHealth has not presented a legal argument supporting why Article 2.1(b) fits within the "any circumstances" test other than circularly relying on Nadeau. Therefore, Appellant has carried the burden of proof in showing that the power to appoint assets to a charity or nonprofit organization does not render assets available to Appellant, or available for use on her behalf. The appeal is therefore approved.

Order for MassHealth

Determine Appellant's eligibility for MassHealth long-term care benefits without regard to assets held in the Family Trust.

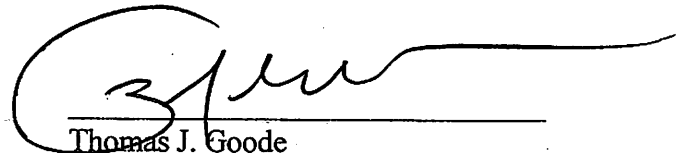
⁷ Merisme v. Board of Appeals of Motor Vehicle Liability Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989).

⁸ Citing Heyn at 318: "a provision making trust principal available to persons other than the grantor does not by its nature make it available to the grantor, any more than if the grantor had gifted the same property to such a person...."

⁹ The Daley Court concluded only "that neither the grant in an irrevocable trust of a right to use and occupancy in a primary residence deeded to that trust, nor the retention of a life estate in a primary residence after deeding it to such a trust, makes the equity in the home owned by the trust a countable asset for the purpose of determining an applicant's eligibility for long-term care benefits under the Federal Medicaid Act; therefore, this court vacated the judgments in two cases that relied on a finding that the home was a countable asset but remanded each matter for further findings regarding other possible sources of countable assets contained in the trust at issue in each matter." Daley, at 1-2.

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.



Thomas J. Goode
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Dori Mathieu, Springfield MassHealth Enrollment Center

Appellant Attorney: Margot Birke, Esq., Elder Law Solutions, One Harris Street, Newburyport, MA 01950