

Exhibit O

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved; Remand	Appeal Number:	1215864
Decision Date:	3/7/13	Hearing Date:	11/26/2012
Hearing Officer:	Marc Tonaszuck	Record Open to:	01/18/2013

Appellant Representative:

MassHealth Representative:
Cristin Rossini



*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; Remand	Issue:	Long Term Care
Decision Date:	3/7/13	Hearing Date:	11/26/2012
MassHealth Rep.:	Cristin Rossini	Appellant Rep.:	
Hearing Location:	Springfield 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 07/12/2012, MassHealth denied appellant's application for MassHealth long term care (LTC) benefits because MassHealth determined that assets held in trust are countable and exceed program limits (130 CMR 520.003, 520.023; Exhibit 1). The appellant filed this appeal in a timely manner on 07/25/2012 (130 CMR 610.015(B); Exhibit 2). A hearing was scheduled to take place at the Springfield MassHealth Enrollment Center (MEC) on 10/29/2012; however, it was rescheduled to take place on 11/26/2012 because the MEC was closed due to inclement weather (Exhibits 3A and 3B). Denial of assistance is valid grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied appellant's application for MassHealth long-term care benefits.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.003, 520.023, in determining that assets held in trust are countable to appellant and exceed program limits.

Summary of Evidence

The MassHealth representative testified that the appellant, an 83 year old widow, entered a skilled nursing facility on 07/26/2006. A MassHealth long term care application was submitted on her behalf on 05/31/2012, seeking MassHealth eligibility beginning 05/24/2012 (Exhibit 5). Since she was first institutionalized, the appellant privately paid for her care until 05/24/2012. On 07/12/2012, MassHealth denied appellant's application due to assets of \$503,807.00, that were in excess of the \$2,000.00 program limits. The countable assets are comprised of \$607.00 in cash in a bank account and \$503,200.00 of real estate held in trust and deemed countable to appellant (Exhibit 1).

At issue is a trust executed by the appellant on 12/07/2006 (Exhibit 6). The trust is an irrevocable trust and appellant is the grantor of the trust. On or about 12/07/2006, the appellant transferred her real estate to the trust, her son being appointed as trustee. Trust provisions include the following uncontested provisions:

Article First (C) states that "this trust is irrevocable..."

Article Second states that

The trust property shall be disposed of in the following manner:

- A) During the life of the appellant, the trustees shall periodically distribute as much of the net income as they in their sole discretion deem necessary to or for the benefit of the appellant. There shall be no distribution of principal to or for the benefit of the appellant during her lifetime.
- B) The appellant reserves to herself the right to reacquire particular trust assets by substituting assets of equal value.
- C) 1. The appellant shall have the right to reside at the home owned by the trust, for the rest of her life; PROVIDED, however, that she is mentally, physically, and financially able to maintain the property and voluntarily chooses to do so.
2. The trustees shall not sell or otherwise dispose of or encumber said residence without the written consent of the appellant or her personal representative which may include her guardian, conservator or agent servicing with a valid power of attorney.
- D) 1. In lieu of paying rent to the trust, the appellant shall be solely responsible for the payment of all home equity and mortgage loans, utilities, insurance, real estate taxes and normal maintenance and cosmetic repairs for as long as she shall occupy the property...
- F) Upon the death of the appellant, the trustees shall administer and distribute the principal, accumulated and undistributed net income of the trust property according to the then current schedule of beneficial interest executed and filed with the trustees. Once such distribution has been completed, the trust shall be terminated and appropriate notice recorded in any registry of deeds in which this trust or certificate of trust is recorded, if necessary.
- G) The appellant shall have a special power of appointment of the trust principal. This power may be exercised only in favor of the appellant's children and other

issue, and the spouses of such children and other issue, in such amounts, proportions and manner, in trust or otherwise, as the holder of the power may designate. The holder of the special power of appointment may not exercise the same in favor of herself, her creditors, her estate or the creditors of her estate. Such power may be exercised by will, trust or separate writing duly signed by the appellant, and duly notarized...

Article Tenth states that the appellant expressly waives any and all rights which she may have, by operation of law or otherwise, to revoke, amend or otherwise change this declaration of trust or any of the provisions hereof. The appellant may, however, from time to time change the schedule of beneficial interest referred to in Article Second, paragraphs E and F.

Through a legal opinion submitted at hearing, and through a reply to the appellant's response to the legal opinion, MassHealth analyzed the trust under provisions of 42 USC § 1396p(d), and 130 CMR 520.023(C), as the trust is irrevocable and dated after 1993. Specifically, MassHealth argues that under 130 CMR 520.023(C)(1)(a), 42 USC § 1396p(d)(3)(B)(i); and 42 USC § 1396p(d)(2)(B), 42 USC § 1396p(d)(2)(C)(ii), there are circumstances under the trust provisions that would allow appellant to access the corpus of the trust, and therefore the resources are considered available and countable to appellant. Citing Doherty v. Director of the Office of Medicaid, 74 Mass. App. Ct. 439, 443 (2009), MassHealth argues that although Article Second of the trust states that the appellant does not retain any interest in trust principal, the countability of trust principal is not predicated on merely one trust provision, and the whole of the instrument must be reviewed. MassHealth notes that pursuant to Article Second (C) of the trust, appellant has a right to live in the property held in trust for so long as she desires and is able; pursuant to Article Second (G), the appellant has the power to appoint the trust principal to her children and grandchildren; and Article Tenth, she retains the power to change the schedule of beneficiaries. MassHealth asserts that these powers render the trust principal within appellant's control. MassHealth also asserts that the appellant has control over the principal under Article Second of the trust that states that she can reacquire particular trust assets by substituting assets of equal value. Citing Cohen v. Comm'r, Division of Medical Assistance, 423 Mass. 399, 416 (1996), MassHealth argues that because there are circumstance under which principal can be made available or used for appellant's benefit, the trust principal is countable in determined appellant's MassHealth eligibility (Exhibits 7 and 10).

In a post hearing memorandum, appellant counsel asserts that the appellant was exercising her right to arranger her affairs in any manner she chose prior to the 60-month Medicaid look back period. He further argues that the trust assets are not available to the appellant and should not be countable in an eligibility determination. The trust allows for discretionary distributions of income to the appellant, and as such the income from the trust is countable; however, there have been no such disbursements to the appellant. The trust gives no latitude to the trustee to distribute principal and the trustee has no

combination of powers that would make a distribution of principal possible without violating both the terms of the trust and the trustee's fiduciary duty. Although the appellant had the right to live in the property held in the trust, it is not available to her. MassHealth must look at all terms of the trust and read them together to understand the meaning of the trust, citing Doherty v. Director of the Office of Medicaid, 74 Mass.App.Ct. 439 (2009). Additionally, the appellant's special power of appointment does not give her control or ownership over the trust property, especially because the power expressly prohibits her from exercising the power in favor of herself, her creditors, her estate, or the creditors of her estate. Finally, counsel argues that the trustee power to convert the principal into an income producing asset has no effect on the trust (Exhibits 9 and 11).

Findings of Fact

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

1. Appellant is an 83 year old widow who entered a skilled nursing facility on 07/26/2006.
2. A MassHealth long term care application was submitted on her behalf on 05/31/2012, seeking MassHealth eligibility beginning 05/24/2012.
3. On 07/12/2012, MassHealth denied appellant's MassHealth application due to assets in excess of program limits comprised of \$607.00 in cash held in a bank account and \$503,200.00 in real estate held in trust and deemed countable to appellant (Exhibit 1).
4. On 12/07/2006, appellant transferred her real estate consisting of two parcels, to the trust, with her son serving as trustee.
5. The trust is an irrevocable trust and appellant is the grantor of the trust.
6. Appellant's husband predeceased the creation of the trust.
7. Article First (C) of the trust states that "this trust is irrevocable ..."
8. Article Second states that "the trust property shall be disposed of in the following manner:
 - A) During the life of the appellant, the trustees shall periodically distribute as much of the net income as they in their sole discretion deem necessary to or for the benefit of the appellant. There shall be no distribution of principal to or for the benefit of the appellant during her lifetime.
 - B) The appellant reserves to herself the right to reacquire particular trust assets by substituting assets of equal value.

C) 1. The appellant shall have the right to reside at the home owned by the trust, for the rest of her life; PROVIDED, however, that she is mentally, physically, and financially able to maintain the property and voluntarily chooses to do so.

2. The trustees shall not sell or otherwise dispose of or encumber said residence without the written consent of the appellant or her personal representative which may include her guardian, conservator or agent servicing with a valid power of attorney.

D) 1. In lieu of paying rent to the trust, the appellant shall be solely responsible for the payment of all home equity and mortgage loans, utilities, insurance, real estate taxes and normal maintenance and cosmetic repairs for as long as she shall occupy the property...

F) Upon the death of the appellant, the trustees shall administer and distribute the principal, accumulated and undistributed net income of the trust property according to the then current schedule of beneficial interest executed and filed with the trustees. Once such distribution has been completed, the trust shall be terminated and appropriate notice recorded in any registry of deeds in which this trust or certificate of trust is recorded, if necessary.

G) The appellant shall have a special power of appointment of the trust principal. This power may be exercised only in favor of the appellant's children and other issue, and the spouses of such children and other issue, in such amounts, proportions and manner, in trust or otherwise, as the holder of the power may designate. The holder of the special power of appointment may not exercise the same in favor of herself, her creditors, her estate or the creditors of her estate. Such power may be exercised by will, trust or separate writing duly signed by the appellant, and duly notarized..."

9. Article Tenth of the trust states that the appellant "expressly waives any and all rights which she may have, by operation of law or otherwise, to revoke, amend or otherwise change this declaration of trust or any of the provisions hereof. The appellant may, however, from time to time change the schedule of beneficial interest referred to in Article Second, paragraphs E and F."

Analysis and Conclusions of Law

In the case at hand, there are no factual disputes; rather, the issues revolve around the interpretation of the language of the various trust provisions involved. The trust is properly considered in the context of both state and federal law applying to trusts created after 1993, of which pertinent sections follow:

Federal law at 42 U.S.C. 1396p (d)(3)(B)(i) states:

In the case of an irrevocable trust, 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 (emphasis added).

Regulation 130 CMR 520.023 applies to trusts or similar legal devices created on or after August 11, 1993, and follows in pertinent part:

(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.

(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).

Following is a summary of the powers and provisions pursuant to the Trust:

Article First (C) states that "this trust is irrevocable..."

Article Second states that

The trust property shall be disposed of in the following manner:

- A) During the life of the appellant, the trustees shall periodically distribute as much of the net income as they in their sole discretion deem necessary to or for the benefit of the appellant. There shall be no distribution of principal to or for the benefit of the appellant during her lifetime.

- B) The appellant reserves to herself the right to reacquire particular trust assets by substituting assets of equal value.
- C) 1. The appellant shall have the right to reside at the home owned by the trust, for the rest of her life; PROVIDED, however, that she is mentally, physically, and financially able to maintain the property and voluntarily chooses to do so.
- D) 2. The trustees shall not sell or otherwise dispose of or encumber said residence without the written consent of the appellant or her personal representative which may include her guardian, conservator or agent servicing with a valid power of attorney.
 - 1. In lieu of paying rent to the trust, the appellant shall be solely responsible for the payment of all home equity and mortgage loans, utilities, insurance, real estate taxes and normal maintenance and cosmetic repairs for as long as she shall occupy the property...
- F) Upon the death of the appellant, the trustees shall administer and distribute the principal, accumulated and undistributed net income of the trust property according to the then current schedule of beneficial interest executed and filed with the trustees. Once such distribution has been completed, the trust shall be terminated and appropriate notice recorded in any registry of deeds in which this trust or certificate of trust is recorded, if necessary.
- G) The appellant shall have a special power of appointment of the trust principal. This power may be exercised only in favor of the appellant's children and other issue, and the spouses of such children and other issue, in such amounts, proportions and manner, in trust or otherwise, as the holder of the power may designate. The holder of the special power of appointment may not exercise the same in favor of herself, her creditors, her estate or the creditors of her estate. Such power may be exercised by will, trust or separate writing duly signed by the appellant, and duly notarized...

Article Tenth states that the appellant expressly waives any and all rights which she may have, by operation of law or otherwise, to revoke, amend or otherwise change this declaration of trust or any of the provisions hereof. The appellant may, however, from time to time change the schedule of beneficial interest referred to in Article Second, paragraphs E and F.

As the MassHealth attorney states, "Congress and courts have recognized and rejected the use of trusts as devices to shelter assets for the benefit of the family members while simultaneously obtaining taxpayer funded Medicaid benefits."¹ See Exhibit 10. The

¹ The MassHealth attorney cites and summarizes the holding in the following cases: *Cohen v. Commissioner of Div. of Med Assistance*, 423 Mass. 399, 416 (1996) (explaining that the rule for self-settled trusts is addressed to an arrangement "concocted for the purpose of having your cake and eating it too"), *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 443 (2009) (Medicaid applicants are prohibited from receiving public health care assistance while also preserving assets for their heirs through the use of a trust which purported to cut off applicant's ability to access the trust principal), *Victor v. Massachusetts Executive Office of*

Massachusetts Supreme Court and the Appellant Courts have provided guidance in the interpretation of the federal and state laws regarding trusts. While appellant correctly notes that the court in Doherty v. Director of the Office of Medicaid does recognize that assets held in trust can be so insulated as to render the assets non countable in a determination of Medicaid eligibility, the "any circumstances" test mandated by both federal and state law does effectively create a presumption that a self-settled, inter vivos trust established by an applicant or spouse or funded with an applicant's assets is countable in an eligibility determination.² I find in this case, the trust provisions, considered collectively,³ do not create circumstances, not even a peppercorn, in which the appellant can exercise discretion to access trust principal.

The following facts are clear and undisputed. The appellant is the grantor of the trust and her son is the trustee. The date of the transfer of the real estate into the trust was prior to the 60-month look back period from the date the appellant applied for MassHealth benefits. The value of the real estate held in the trust is \$503,200.00. The appellant has access to the income from the trust; and up until the date of the hearing, there has been none.

MassHealth argues that the provisions of the trust give the appellant the power and control over the principal, making the total value available to her under some circumstances. Counsel for the appellant denies the assertion and argues that none of the principal is available to the appellant. I agree with appellant's counsel. The appellant cannot, without violating a provision of the trust, take back the real estate held in the trust, unless she replaces it with something of equal value. Likewise, the trustee cannot convey the real estate back to the appellant without violating the trust or his fiduciary duties. Accordingly, I find that the language of the trust does not violate the regulations or case law and as such, the principal of the trust is not countable in a long term care eligibility determination.

This appeal is approved and remanded for MassHealth to make an eligibility determination.

health & Human Services, Mass. App Ct. 1, 28 Decision 09-P-1361 (July 21, 2010) (Court upheld the Agency's determination that a trust established by the applicant's husband during his lifetime but funded by the husband's Last Will & Testament, was nonetheless countable to the applicant in an eligibility determination, and Lebow v. Commissioner of Div. of Med. Assistance, 433 Mass. 171, 173 (2000), (Medicaid applicants are expected to deplete their own resources before obtaining assistance from the government).

² See Cohen, "if there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility."

³ See Doherty, a "clause may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole."

Order for MassHealth

Rescind the denial notice dated 07/12/2012. Redetermine eligibility based on an application date of 05/31/2012. Do not count the principal of the trust. Notify appellant of eligibility. Include appeal rights.

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.

Marc Tonaszuck
Hearing Officer
Board of Hearings

cc: MassHealth Representative: Maryellen Sullivan

DECLARATION OF THE [REDACTED] IRREVOCABLE TRUST

WHEREAS, the Grantor, [REDACTED] of Wilbraham, Hampden County, Massachusetts, is about to transfer and deliver to the Trustees certain funds and/or properties;

NOW THEREFORE, the Grantor declares that the Trustees shall hold and administer the property which is now or hereafter may be transferred to them as such Trustees, or in any way acquired and held hereunder, in Trust for the purposes, and in the manner, and with and subject to the powers and provisions herein contained, as follows:

FIRST: TRUSTEES

A) Words or phrases as used herein importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter. The term "Trustees" as used herein and any pronoun referring thereto shall mean the person or persons who from time to time will be serving as Trustees hereunder, or any of them, as the context admits.

B) The Grantor's son, [REDACTED] of Granby, Connecticut, shall serve as the original Trustee of this Trust.

C) This Trust is irrevocable and shall be known as The [REDACTED] Irrevocable Trust and may be referred to as such.

SECOND: BENEFICIAL INTEREST

The Trust property shall be disposed of in the following manner:

A) During the life of the Grantor, the Trustees shall periodically distribute as much of the net income only of the Trust property as they in their sole discretion deem necessary to or for the benefit of [REDACTED]. There shall be no distribution of principal to or for the benefit of the Grantor during her lifetime.

B) The Grantor reserves to herself the right to reacquire particular Trust assets by substituting assets of equal value.

C) (1) The Grantor shall have the right to reside at [REDACTED] and [REDACTED] [REDACTED] Wilbraham, Hampden County, Massachusetts, owned by the Trust, for the rest of her life; PROVIDED, however, that she is mentally, physically and financially able to maintain the property and voluntarily chooses to do so.

(2) The Trustees shall not sell or otherwise dispose of or encumber said residence without the written consent of the Grantor or her personal representative which may include her guardian, conservator or agent serving with a valid Power of Attorney.

D) (1) In lieu of paying rent to the Trust, said [REDACTED] shall be solely responsible for the payment of all home equity and mortgage loans, utilities, insurance, real estate taxes and normal maintenance and cosmetic repairs for as long as she shall occupy the property.

(2) Capital improvements, and major structural repairs in the nature of capital improvements, shall be made in the sole discretion of the Trustees. The cost of such capital improvements shall be paid by the Trustees either from the gross income or the principal of the Trust.

E) In the event that the Trustees sell the above-referenced property and purchase a subsequent residential property, the Grantor shall have the right to reside in that property upon the same terms and conditions as set forth above. Any purchaser of said real estate may rely on the Trustees to affirm that the consent of the Grantor has been given.

F) Upon the death of the Grantor, the Trustees shall administer and distribute the principal, accumulated and undistributed net income of the Trust property according to the then current Schedule of Beneficial Interest executed and filed with the Trustees. Once such distribution has been completed, the Trust shall be terminated and appropriate notice recorded in any Registry of Deeds in which this Trust or Certificate of Trust is recorded, if necessary.

G) The Grantor herein shall have a special power of appointment of the Trust principal. This power may be exercised only in favor of the Grantor's children and other issue, and the spouses of such children and other issue, in such amounts, proportions and manner, in Trust or otherwise, as the holder of the power may designate. The holder of the special power of appointment may not exercise the same in favor of herself, her creditors, her estate or the creditors of her estate. Such power may be exercised by Will, Trust or a separate writing duly signed by the Grantor, and duly notarized.

H) No person to whom any reversionary, future or expectant interest is given, nor any person entitled to any income, shall have the power to alienate or dispose of such interest or income by anticipation or to subject the same to his or her debts or liabilities, and no such interest or income shall be liable for his or her debts or liabilities.

THIRD: POWERS AND OBLIGATIONS OF TRUSTEES

A) The Trustees shall have, in addition to those powers conferred by law or otherwise, the following discretionary powers, privileges and exemptions incidental to their management and distribution of Trust assets as set forth in Article SECOND above:

(1) To sell, convey, assign, mortgage, loan or otherwise dispose of or encumber all or any part of the Trust estate, to execute and deliver leases and subleases, to

borrow money and to execute and deliver Notes or other evidence of such borrowing, subject to the provisions as hereinbefore set forth in Section (C)(2) of Article SECOND.

(2) To administer, invest and reinvest the Trust fund in any state or jurisdiction and in any property (including investment companies, money market funds and common Trust funds with notice to beneficiaries) whether or not of a kind or in proportion ordinarily considered suitable for Trust investments and whether or not productive or marketable, and may permit all or any part of the Trust property to be held in the custody of a banking institution or brokerage house. The specific nature of the Trust investments shall be determined, and any changes in the form or type of Trust investments shall be made, only with the knowledge and consent of the Grantor.

(3) To participate in any reorganization, recapitalization, merger or similar transaction; to give proxies or powers of attorney, with or without power of substitution, for voting upon any shares or certificates of interest belonging to the Trust.

(4) To make any payment or distribution directly to any beneficiary, whether or not competent, or to apply the same for his or her benefit and, in the case of a minor, to deposit the same in any bank in his or her name or to invest the same in custodianship or Trust for his or her benefit.

(5) To determine in accordance with reasonable accounting practice what shall belong and be chargeable to income and, in making that determination, or for any other purpose, the Trustees may employ an accountant or attorney-at-law and rely upon his or her opinion.

(6) Subject to the terms and conditions of Article SECOND above, it is the Grantor's intention to give the Trustees wide discretion in matters of management of the Trust property and the foregoing enumeration of powers is not intended to exclude any powers reasonably incidental to such management.

B) Notwithstanding any provisions herein to the contrary, no Trustee shall be required to take any action that will, in the opinion of such Trustee, involve him/her in any personal liability unless he/she is first indemnified to his/her satisfaction. Any person dealing with the Trustees shall be fully protected in accordance with the provisions of Articles FOURTH and FIFTH hereunder.

C) Any and all actions taken by the Trustees, whether pursuant to the powers and authority granted above or otherwise, shall be in their sole discretion as determined unanimously by the Trustees in office at the time the action is taken.

D) No Trustee shall be liable for the acts or omissions of a Co-Trustee or any prior Trustee. Further, no Trustee shall be liable for any error of judgment nor for any loss arising out of any act or omission in the execution of the provisions of this Trust so long as he/she acts in good faith, but shall be responsible only for his/her own wilful breach of trust.

E) No Trustee or successor Trustee shall be required to give bond or furnish surety on any bond required by law.

FOURTH: BINDING AUTHORITY AND VALIDTY OF TRUSTEES' ACTIONS

A) Any deed, mortgage, lease, note, easement or other instrument, similar or dissimilar to the foregoing, executed and delivered by the Trustee on behalf of the Trust shall be binding.

B) No purchaser, transferee, mortgagee, lender, lessee or any other person or entity dealing with the Trust shall be required to inquire into the authority of any Trustee to take any action or make any decisions hereunder, or to inquire into the authorization of any Trustee to execute and deliver any instrument, and the signature of the Trustee shall be sufficiently binding upon this Trust.

FIFTH: RELIANCE ON RECORD AS TO TRUST STATUS

A) No purchaser, transferee, mortgagee, lender, lessee or any other person or entity dealing with the Trustees as they then appear of record in the Registry of Deeds of any county in which this instrument is recorded shall be bound to ascertain or inquire further as to the persons who are then Trustees hereunder, and such record shall be conclusive evidence of the identity of said Trustees at any time, and any record of the due execution and acknowledgment of this Trust duly recorded in the said Registry of Deeds and the absence of any record duly dissolving this Trust recorded therein or in such other Registry of Deeds in which this Trust was duly recorded shall be conclusive evidence of this existence of the Trust, and any purchaser, transferee, mortgagee, lender, lessee or any other person or entity dealing with the Trustees as they then appear of record may rely thereupon as conclusive evidence of the existence of the Trust.

B) A written statement of any Trustee at any time as to any facts relative to the Trust may always be relied upon and shall always be conclusive evidence in favor of any transfer agent and any other person or entity dealing in good faith with the Trustees in reliance upon such statement.

C) The receipt of the Trustees for monies or things paid or delivered to them shall be an effective receipt on behalf of the Trust with respect to any person or entity or delivering the same. No person or entity from whom the Trustees or any one of them shall receive any money, property or other credits shall be required to see to the application thereof.

SIXTH: DISCLAIMER OR RELEASE OF TRUSTEES' POWERS

A) Trustee may, at any time, disclaim or release any power, in whole or in part, by an instrument in writing, duly signed, acknowledged before a Notary Public, delivered to any Co-Trustee, and if none, to any beneficiary, and recorded in the Registry of Deeds in the county where this Trust or Certificate of Trust is recorded. Such disclaimer or release may be for such period of time as such Trustee may specify without in any way affecting the continuance of the power in any other Trustee.

SEVENTH: DELEGATION OF TRUSTEES' POWERS

Any Trustee may, from time to time, delegate in writing the power to sign checks or withdrawal orders and the custody of the Trust fund to a Co-Trustee for such period or periods of time as he/she may determine, and similarly may delegate such other powers and discretions for periods not exceeding one (1) year at a time; provided, however, that any powers or discretions withheld from any Trustee by the terms of this Declaration of Trust shall not be delegated to such Trustee under this Article.

EIGHTH: RESIGNATION, DEATH OR REMOVAL OF TRUSTEE; APPOINTMENT OF SUCCESSOR

A) Any Trustee hereunder may resign by a written instrument signed and acknowledged by such Trustee and recorded with any Registry of Deeds in which this Trust or Certificate of Trust may be recorded.

B) Any Trustee may be removed by a majority of the beneficiaries or their personal representatives, as their interest may appear at the time of the removal, by written instrument signed and acknowledged, delivered to the Trustee and recorded with such Registry of Deeds.

C) Upon the death, resignation, or removal of any Trustee, the named successor Trustees shall forthwith be appointed. A written certificate signed and acknowledged by any Trustee naming the Trustee or Trustees appointed or removed and, in the case of any appointment, the acceptance in writing by the Trustee or Trustees appointed, shall be recorded with said Registry of Deeds.

D) Upon the appointment of any succeeding Trustee, the title to the Trust Estate shall thereupon and without the necessity of any conveyance be vested in said succeeding Trustee jointly with the remaining Trustee or Trustees, if any. Subject only to the terms and conditions set forth in Article THIRD hereunder, each succeeding Trustee shall have all the rights, powers, authority and privileges as if named as the Original Trustee. In the event [REDACTED] shall fail or cease to serve as Trustee hereunder, then the Grantor's daughter-in-law, [REDACTED], of Wilbraham, Massachusetts, shall serve as successor Trustee.

E) In the event that neither the original nor any named successor Trustee continue to serve hereunder, any further successor Trustees shall be appointed by a majority of the beneficiaries, or their personal representatives, as their interests may appear at the time of the appointment, subject to the provisions of Article EIGHTH, Paragraph (C) herein above.

NINTH: ACCOUNTING

The Trustees shall render accounts of the administration of the Trust annually. The assent by all persons, or the personal representative of such persons who are not of full age or legal capacity, who for the period of any account were entitled to receive the income of the Trust

and on the last day of the account would have been entitled to receive the principal of the Trust if it had then terminated shall make such account, in the absence of fraud or manifest error, binding and conclusive upon all persons then having or who may thereafter have any interest, vested or contingent, in the income or principal of the Trust estate. The failure of any person or their personal representative to object to any such account by a writing mailed to the Trustees within thirty (30) days of the receipt of a copy of the account shall be deemed to be an assent by such person.

TENTH: IRREVOCABILITY

The Grantor expressly waives any and all rights which she may have, by operation of law or otherwise, to revoke, alter, amend or otherwise change this Declaration of Trust or any of the provisions hereof. The Grantor may, however, from time to time change the Schedule of Beneficial Interest referred to in Article SECOND, Paragraphs (E) and (F).

ELEVENTH: CONSTRUCTION: CONFLICT OF LAWS

This is a Massachusetts Trust and shall be interpreted in accordance with the laws of the Commonwealth of Massachusetts, and its validity and administration shall be governed by said laws except with respect to such assets required by law to be governed by the laws of some other jurisdiction.

IN WITNESS WHEREOF, the Grantor sets her hand hereto as a sealed instrument, and said [REDACTED] in token of his acceptance of the Trust hereby created sets his hand hereto, both on this 7th day of December, 2006.

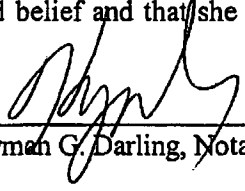
[REDACTED]
[REDACTED] Grantor

[REDACTED]
[REDACTED] Trustee

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

On this 7th day of December, 2006, before me, the undersigned notary public, personally appeared [REDACTED], proved to me through satisfactory evidence of identification, which was photographic identification with signature issued by a federal or state governmental agency, personal knowledge of the undersigned, oath or affirmation of a credible witness, to be the person whose name is signed on the preceding or attached document, and who swore, subscribed and affirmed to me that the contents of the document are truthful and accurate to the best of her knowledge and belief and that she signed the document voluntarily for its stated purpose.



Hyman G. Darling, Notary Public

My commission expires: January 29, 2010



HYMAN G. DARLING
Notary Public
Commonwealth of Massachusetts
My Commission Expires
January 29, 2010

DECLARATION OF THE [REDACTED] IRREVOCABLE TRUST

Dated December 7, 2006

Schedule of Beneficiaries

Upon the death of the Grantor, [REDACTED], the balance of the Trust property remaining in the hands of the Trustee shall be distributed outright and free of trust in equal shares, share and share alike, to the Grantor's children, [REDACTED] of Granby, Connecticut, [REDACTED] of Monson, Massachusetts, and [REDACTED] of Wilbraham, Massachusetts, if living, and if not living, to the issue of a deceased child of the Grantor by right of representation. In the event any child of the Grantor shall predecease the Grantor leaving no issue then living, then such child's share shall be distributed in equal shares, share and share alike among those children of the Grantor then living, with the issue of a deceased child taking per stirpes.

Exhibit P

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Jean Maas
40 Sunset Avenue
Lenox, MA 02124

Appeal Decision:	Approved	Appeal Number:	1717990
Decision Date:	MAY 01 2018	Hearing Date:	03/05/18
Hearing Officer:	Stanley Kallianidis		

Appellant Representative:

Brian Barreira, Esq.

MassHealth Representatives:

Michael Somers, Esq.;
Karen Boutin for Jared Krok, Springfield



**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:	Approved	Issue:	Trust Assets
Decision Date:	MAY 01 2018	Hearing Date:	03/05/18
MassHealth Reps.:	Michael Somers, Esq. Karen Boutin		

Authority

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

Jurisdiction

Notice dated 10/12/17 was sent to the appellant stating that MassHealth had denied her application for MassHealth benefits due to excess assets (Exhibit 1). The appellant filed this appeal on 11/10/17 and, therefore, it is timely (see Exhibit 2 and 130 CMR 610.015).

A denial of MassHealth benefits is grounds for appeal (130 CMR 610.032).

Two previous hearing dates were rescheduled. One was at the appellant's attorney's request due to his surgery. The other was due to a subpoena request to the Board of Hearings along with a request for the Superior Court to issue an injunction on the instant proceedings. The subpoena request was denied, the Superior Court matter request is currently pending, but the parties agreed to a hearing date (Exhibits 9-12).

Action Taken by MassHealth

MassHealth denied the appellant's MassHealth application due to excess assets.

Issue

Pursuant to 130 CMR 520.023(C), was MassHealth correct to count the assets of an irrevocable trust in determining the appellant's eligibility?

Summary of Evidence

The MassHealth representative from the Springfield MEC testified that the appellant filed her MassHealth application on July 18, 2017 (Exhibit 3). The appellant's application was denied due to excess assets. According to the denial letter, the excess assets were over the \$2,000.00 limit. The assets totaled \$251,796.00 and were from a Trust valued at \$251,571.00, and two bank accounts totaling \$225.00. Since the bank accounts were under the \$2,000.00 limit, the only issue and dispute was over whether or not assets held in an irrevocable Trust were countable (Exhibit 1).

The MassHealth representative submitted the Trust in question into evidence: the R.M. and J.M. Living Trust (the Trust). The Trust was established in 2008 by the appellant and her spouse, now deceased, as Grantors, and was funded by two parcels of land, one in New York, and the other in Massachusetts. The Massachusetts property was sold in 2014. The appellant's son was named as Trustee and the appellant's son and daughters were named Beneficiaries of the principal. The Trust is irrevocable and the appellant is entitled to the income from the Trust (Exhibit 4).

According to Article 3(b) of the Trust, "The Trustee shall not be entitled to invade the principal of the Trust for either Grantor..." However, the Trustee may use principal to pay for the funeral and burial expenses, for death taxes and probate fees for either Grantor. According to Article 4, the Grantors reserved a testamentary power of appointment to one or more descendants, and Article 5 provides for the termination of the Trust upon the death of the appellant as surviving Grantor, subject to the testamentary power (Exhibit 4).

According to Article 8, the Trustee has powers to invest Trust funds, sell or mortgage real estate, hold shares in securities, borrow money and mortgage Trust property, hold cash, execute and deliver written instruments, permit an income Beneficiary to occupy real estate, and retain and pay for services. According to Article 15, the appellant Grantor reserved a lifetime power of appointment to make gifts of Trust principal to any charity qualifying under IRS code. According to Article 17, the appellant as Grantor has the right to use or occupy property. According to Article 20, the Grantor may distribute principal in equal shares to her children as Beneficiaries an amount not to exceed the federal gift tax exclusion limit (Exhibit 4).

The decision to count the assets of the Trust was based upon a memo from MassHealth's legal division, which held that, even though the Trust is irrevocable, its principal is available to the appellant and therefore is a countable asset. The MassHealth attorney highlighted the arguments made in the memo, and gave his principal reason for why the Trust principal should be fully countable (Exhibit 5).

According to MassHealth, the Trustee regularly accessed principal for the benefit of the appellant, and made distributions to her. The Trustee made regular payments of \$4100.00 or \$4500.00 to the appellant during a two-year period, approximately \$100,000.00 in total. Also, after the September 2014 sale of the Mashpee property, the Trust paid the mortgage debt that remained on the property even though this was the appellant's debt. The appellant cannot then claim that the distribution of Trust assets would be a breach of fiduciary duty, when the Trustee has used these assets in the past for the benefit of the appellant, MassHealth argued, as this would be "having your cake and eating it too."

Also, MassHealth argued that under federal and state law, trust income available or that could be paid to a Medicaid applicant is a countable asset. MassHealth distinguished actual paid-out income from income that an applicant has the right and/or potential to receive. The former is income and the latter is an asset. MassHealth argued that "It is immaterial whether any circumstance currently exists, the potentiality ('could be paid') is sufficient to render the Trust countable when determining eligibility for Medicaid long-term care." In this case, MassHealth argued that the remaining New York property could be rented and that the income generated could then be given to the appellant.

MassHealth continued that, in this case the appellant's power of appointment, both lifetime and testamentary, makes the principal countable. The Trustee's broad powers, such as paying the appellant's funeral expense, also render a circumstance where the Trust's principal could be paid out to the appellant. MassHealth distinguished the rulings of the *Daley* and *Heyn* decisions. (*Heyn v. Director of the Office of Medicaid*, 48 N.E. 3d 480 (2016) and *Daley v. Secretary of Executive Office of Health and Human Services*, 477 Mass. 188 (2017)). MassHealth concluded that the New York property is not an exempt asset because it is not the principal place of residence of the appellant and is not located in Massachusetts. It distinguished its arguments from the "use and occupancy" argument which it is not relying on (Exhibit 5).

According to argument and a memo from the appellant's attorney, the appellant has no right to any principal distributions from the Trust according to its terms. He contended that MassHealth's argument that income that is "available-but-not-yet-paid" is countable principal has been rejected by the Supreme Judicial Court in *Daley*. He reiterated his argument made in his denied subpoena request that MassHealth has failed to engage in administrative consistency and due process by not reconciling fair hearing decisions on similar facts and circumstances. The appellant's attorney also argued that partial control by a settlor is not relevant, and that a power of appointment does not given the settlor a right to access principal for herself. In addition, he argued that MassHealth regulations recognize the fiduciary duties of trustees, and that federal Medicaid law recognizes only four circumstances where state trust law can be ignored in a determination of eligibility, and that Medicaid law must be construed in favor of the applicant.

With regard to the Trust at hand, the appellant's attorney argued further that trusts must be read as a whole, and, a distribution of principal where a trustee does not have discretion to distribute principal is a breach of a the trustee's fiduciary duty. Such a distribution is a "breach of trust" and the trustee in such case would be liable for the harm caused to the beneficiaries. In support of this his discussion, the appellant's attorney cited *Guerriero v. Commissioner of Div. of Medical Assistance*, 433 Mass. 628 (2001) (Exhibit 6).

The attorney who drafted the Trust briefly testified that there is no provision in the Trust that allows the Trustee to distribute principal to the appellant as Grantor. Any such distribution should be considered a breach of the Trustee's fiduciary duty.

With regard to the breach of the trustee's fiduciary duty, the Trustee testified that he was mistakenly advised by a financial representative that he could use the Trust principal to pay for the appellant's assisted living fees. He testified that his sisters, the remainder beneficiaries of principal, along with himself, are upset that he did this. The appellant's attorney added that whether this was a mistake or willful breach is irrelevant; the payments made to the appellant's assisted living center do no render the Trust countable. This would still be the case even if the beneficiaries were willing to given Trust principal to the appellant, he contended.

The appellant's attorney submitted various other documents into the hearing record. These documents included other hearing decisions from the Board of Hearings where the appeals were approved, a letter from the Office of Attorney General to the Chief Justice of the Supreme Judicial Court regarding the *Daley* case, and a copy of the amended complaint seeking injunctive and declaratory relief in the Superior Court (Exhibits 7-9).

Findings of Fact

The record shows, and I so find:

1. The appellant applied for MassHealth on July 18, 2017 (Exhibit 1).
2. The appellant's application was denied due to excess assets over the \$2000.00 limit (Exhibit 1).
3. The countable assets totaled \$251,796.00, with \$251,571.00 held in trust (Exhibit 1).
4. The only issue and dispute was over whether or not assets held in an irrevocable trust were countable (testimony).
5. The Trust was created in 2008 by the appellant and her spouse, now deceased, as Grantors, and was funded by two parcels of land, one in New York, and the other in

Massachusetts. The Massachusetts property was sold in 2014 (Exhibit 4).

6. The appellant's son was named as Trustee and the appellant's son and daughters were named Beneficiaries of the principal. The Trust is irrevocable and the appellant is entitled to the income from the Trust (Exhibit 4).
7. According to Article 3(b) of the Trust, "The Trustee shall not be entitled to invade the principal of the Trust for either Grantor..." However, the Trustee may use principal to pay for the funeral and burial expenses, for death taxes and probate fees for either Grantor (Exhibit 4).
8. According to Article 4, the Grantors reserved a testamentary power of appointment to one or more descendants, and Article 5 provides for the termination of the Trust upon the death of the appellant as surviving Grantor, subject to the testamentary power (Exhibit 4).
9. According to Article 8, the Trustee has powers to invest Trust funds; sell or mortgage real estate, hold shares in securities, borrow money and mortgage Trust property, hold cash, execute and deliver written instruments, permit an income Beneficiary to occupy real estate, and retain and pay for services (Exhibit 4).
10. According to Article 15, the appellant Grantor reserved a lifetime power of appointment to make gifts of Trust principal to any charity qualifying under IRS code (Exhibit 4).
11. According to Article 17, the appellant as Grantor has the right to use or occupy property (Exhibit 4).
12. According to Article 20, the Grantor may distribute principal in equal shares to her children as Beneficiaries an amount not to exceed the federal gift tax exclusion limit (Exhibit 3).
13. The Trustee made regular payments of \$4100.00 or \$4500.00 towards the appellant's assisted living fee during a two-year period prior to her nursing home admission, approximately \$100,000.00 in total (Exhibit 5).
14. Following the September 2014 sale of the Mashpee property, the Trust paid the mortgage debt that remained on the property (Exhibit 5).

Analysis and Conclusions of Law

MassHealth regulation 130 CMR 520.023(C)(1), Irrevocable Trusts states.

(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).

(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).

The appellant applied for MassHealth on July 18, 2017. The application was denied due to excess assets. As of the hearing date, the sole asset in dispute was a Trust with holdings of \$251,571.00. The Trust was established in 2008 by the appellant and her spouse, now deceased, as Grantors, and was funded by two parcels of land, one in New York, and the other in Massachusetts.

As more than five years has elapsed between the creation of the Trust and the application date, it cannot be considered to be a disqualifying transfer as it is beyond the look-back period. No other transfers were raised at hearing. Therefore, there is no issue of disqualifying transfers for this appeal.¹

There is no dispute that the Trust is irrevocable. Similarly, there is no issue of countable income. The parties agree that income from the Trust is available to the appellant as

¹ 130 CMR 520.019(B)2):For transfers of resources occurring on or after February 8, 2006, the look-back period extends back in time for 60 months from the time the applicant both was a nursing home resident and had applied for MassHealth.

Grantor. The fact that the appellant is entitled to income from the Trust has no bearing on the issue of the accessibility of principal. The appellant is not a Trustee, nor is she a beneficiary of principal. The appellant's son was named as Trustee and the appellant's son and daughters were named Beneficiaries of the principal.

The pertinent question in this case is whether or not the principal of the Trust is available to the appellant "under any circumstance." The answer is found by examining the language of the Trust. According to Article 3(b) of the Trust, "The Trustee shall not be entitled to invade the principal of the Trust for either Grantor..." There is no other clause which addresses circumstances in which the appellant by herself or the Trustee could distribute principal to the appellant. Clearly then, by the explicit terms of the Trust, there is no way for the appellant to have access to the principal.

Nonetheless, MassHealth is counting the Trust's assets. As justification, it argues broadly that Trust income available or that could be paid to a Medicaid applicant is a countable asset. While I agree that "income" that is not paid out of the Trust becomes part of the principal, this does not make the principal itself countable. In clear language, Article 3(b) of the Trust states that principal cannot be paid to the appellant. In calling "countable income" a "countable asset," MassHealth is jumping over a line of demarcation between income and principal in violation of the ruling of *Daley*. Income and principal are not interchangeable terms, and as stated above, income is not an issue in this appeal.

MassHealth reiterates an argument made in other trust appeals: that the Trust's general testamentary power of appointment makes the principal countable. The court in *Heyn* ruled otherwise, however. MassHealth points out that in this case, the appellant has a lifetime right of appointment to a charity qualifying under IRS code. While the court in *Daley* found that a similar power of appointment to a non-profit organization could make principal countable as a nursing home could be a non-profit organization, MassHealth made no claim that the appellant's nursing home is an IRS recognized charity so as to make the principal of this Trust available to her.

MassHealth alternatively argues that because the Trustee may use principal to pay for the funeral and burial expenses of the appellant, the principal if the Trust is countable. Even if this language were interpreted to mean the purchase of funeral and burial plans while the appellant were still alive, such plans and trust are exempt in determining eligibility for Medicaid long-term care benefits. (See 130 CMR 520.008 for plans and 520.023(D)(3) for trusts.)

Finally, MassHealth argues that the Trustee regularly accessed principal for the benefit of the appellant, and made distributions to her. It noted that the Trustee made regular payments of \$4100.00 or \$4500.00 to the appellant's assisted living fee prior to her nursing home admission for a total amount approximating \$100,000.00. Additionally, after the September 2014 sale of the Mashpee property, the Trust paid the mortgage debt that remained on the property even though this was the appellant's debt. I conclude that paying the mortgage of the Mashpee real estate was not a benefit to the appellant, nor did it diminish the net value of the asset. Moreover, the power of the Trustee to sell property was expressly given in the Trust, and in paying the bank debt owed he did nothing wrong as the sale required him to pay off all existing mortgages.

This leaves the narrow issue of whether the Trustee paying or the appellant's assisted living fee met the "any circumstances" clause of 130 CMR 520.023(C)(1)(a). First of all, I disagree with MassHealth in calling this a case of "having your cake and eating it too." Other than paying for the appellant's assisted living fee, there was no noted instance of the Trustee invading principal. For instance, there was no pattern of payments of principal to the appellant, nor was there evidence of collusion or bad faith between the Trustee and appellant. Rather, I conclude that a more accurate description of what happened when the Trustee paid the appellant's assisted living fee is that he breached his fiduciary duty to the Beneficiaries in alienating them from a portion of the principal in violation of the Trust.

Secondly, and most important, MassHealth has not identified a federal or state court ruling, a statute, regulation, or even a formal policy which would equate a Trustee's past breach to mean that principal "could be paid under any circumstances." Absent any such legal authority, I am thus unable to conclude that the Trustee's breach of duty in using principal to pay for the appellant's assisted living fee passes the "under any circumstances" test. The "under any circumstances" language pertains to the terms of the Trust, and in this case, there is no such language which make principal available to the appellant. On the contrary, the language of Article 3(b) of the Trust states quite the opposite.

In conclusion, the assets of the Trust are unavailable to the appellant, and based upon the above cited regulations, the Trust assets should not have been counted in her eligibility determination.


The appeal is therefore approved.

Order for MassHealth

Disregard assets of Trust, re-open appellant's application and re-determine her eligibility for MassHealth.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this notice, you should contact your local office. 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.



Stanley Kallianidis
Hearing Officer
Board of Hearings

cc:

Brian Barreira, Esq.
118 Long Pond Road, # 206
Plymouth, MA 02360

Douglas Maas, POA
8 Park Place
Valatie, NY 12184

Paul O'Neil
Assistant General Counsel, EOHHS
One Ashburton Place, 11th Floor
Boston, MA 02108