

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: APPROVED

Appeal Number: 2179143

Decision Date: 01/14/2022

Hearing Date: 12/23/2021

Hearing Officer: Kenneth Brodzinski

Appearance for Appellant:




Appearance for MassHealth:

Jamie Lapa – 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:	Assets - Trust
Decision Date:	01/14/2022	Hearing Date:	12/23/2021
MassHealth's Rep.:	Jamie Lapa	Appellant's Rep.:	
Hearing Location:	Springfield		

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 December 3, 2021, MassHealth denied Appellant's application for MassHealth Long Term Care benefits due to excess assets which included Trust principal (Exhibit A). Appellant filed this appeal in a timely manner on December 3, 2021 (see 130 CMR 610.015(B) and Exhibit A). Denial of assistance constitutes valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied Appellant's application for MassHealth Long Term Care benefits due to excess assets which included Trust principal

Issue

The appeal issue is whether MassHealth correctly applied the controlling law(s)/regulation(s) to facts when it denied Appellant's application for MassHealth Long Term Care benefits due to excess assets which included Trust principal

Summary of Evidence

The MassHealth representative testified that Appellant filed an application for MassHealth Long-Term Care benefits on August 17, 2021. The application was denied on December 3, 2021 due to a determination that Appellant had assets exceeding the \$2,000.00 eligibility limit.

The MassHealth representative testified that the primary asset placing Appellant over the asset limit was the principal in an irrevocable trust established by Appellant in 2013 (Exhibit E). The MassHealth representative testified that the principal of the trust was deemed countable due to trust provision 2.2 which established a special power of appointment allowing payments of principal to charitable and/or nonprofit organizations.

The MassHealth representative explained that its determination was made pursuant to the directives contained in Eligibility Operations Memo 20-04 February 18, 2020 examples 2 and 3 (Exhibit D). The MassHealth representative also clarified that while trust income is being counted as income, it is not being counted as an asset for MassHealth eligibility purposes.

Appellant was represented by counsel who filed a memorandum of law (Exhibit C). Counsel essentially argued that MassHealth's denial is inconsistent with recent case law governing the countability of trust principal for MassHealth eligibility purposes.

Findings of Fact

Based on a preponderance of the evidence, this record supports the following findings:

1. Appellant filed an application for MassHealth Long term Care benefits on August 17, 2021.
2. Appellant created an irrevocable trust in 2013.
3. MassHealth reviewed the trust document and concluded that payments of income from the trust were countable income.
4. MassHealth concluded that provision 2.2 of the trust rendered the trust principal countable as an asset for MassHealth eligibility purposes.
5. On December 3, 2021, MassHealth denied Appellant's Long term Care application due to excess assets (Exhibit A).

Analysis and Conclusions of Law

Trust income

As the MassHealth representative acknowledged at hearing, contrary to the assertions set forth in Appellant's Memorandum of Law, while MassHealth is counting Trust payments as income, it is not counting such income as a countable asset.

Trust principal

The MassHealth eligibility worker correctly applied the provisions of MassHealth's Operations Memo 20-04 February 18, 2020 (Ops Memo). Unfortunately, the Ops Memo is inconsistent with controlling law. This matter is governed by Fournier v. Secretary of the Executive Office of Health and Human Services, 488 Mass. 43 (2021).

The provisions of the trust in Fournier and Appellant's trust are identical

In Fournier, Trust provision (2.2) stated that the Donee:

shall have the power to appoint from time to time, by an instrument in writing by [herself] or by [her] legal representative, all or any part of the trust property then on hand to any one or more charitable or non-profit organizations over which [she has] 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 [F]ederal, [S]tate, or local government or any sub-division, department, or agency thereof."

(Id., at 49).

Here, the provision of Appellant's trust (also 2.2) states that Appellant:

shall have the power to appoint from time to time, by an instrument in writing by myself or by my legal representative; all or any part of the trust property then on hand to any one or more charitable or nonprofit organizations over which I 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.

Fournier explicitly held that such trust provisions creating a special power of appointment do not allow a donee access to principal; therefore, trust principal is not accessible to a donee/applicant for MassHealth eligibility purposes.

We are not persuaded because MassHealth's hypothesized appointment is not permitted under established principles of trust and property law. Neither party disputes that article 2.2 grants [DONEE] a limited power of appointment, which allows [DONEE] to appoint trust principal "to any one or more charitable or non-profit organizations over

*which [she has] no controlling interest” By definition, a “limited power of appointment” is a power that “restricts to whom the estate may be conveyed; esp[ecially], a power by which the donee can appoint to only the person or class specified in the instrument creating **1169 the power, but cannot appoint to oneself or one’s own estate.” Black’s Law Dictionary 1417 (11th ed. 2019).¹¹ The persons or entities to whom an appointment is authorized collectively are known as the class of “permissible appointees.” See *52 Restatement (Third) of Property: Wills and Other Donative Transfers § 17.2 (2011).*

Our cases long have understood that, with respect to limited powers of appointment, the class of permissible appointees is restricted to the class of persons or entities specifically named in the limited power, and does not include by implication the donee of the limited power (citations omitted) (Fournier, at 51-52).

The Fournier Court also rejected MassHealth’s requirement that a special power of appointment must expressly bar principal being given to or for the applicant’s benefit.

*Furthermore, we are unpersuaded that the terms of the [DONEE] trust must expressly bar [DONEE] from exercising her limited power of appointment for her own benefit, as MassHealth contends. MassHealth does not cite, nor are we aware of, any Massachusetts case that has imposed such a rigid requirement on the construction of a trust. On the contrary, “a provision making trust principal available to persons other than the grantor does not by its nature make it available to the grantor.” Heyn, 89 Mass. App. Ct. at 318, 48 N.E.3d 480. It generally is accepted that “[t]he donor may define the permissible appointees of a nongeneral power by exclusion, by inclusion, or by a combination of the two.... If they are defined by inclusion, the donor lists the persons to whom a valid appointment can be made.” Restatement (Third) of Property: Wills and Other Donative Transfers § 19.15 comment d (2011). Article 2.2 defines the class of permissible appointees by inclusion, specifically by referencing “any one or more charitable or non-profit organizations over which *55 [[DONEE] has] no controlling interest” as objects of the appointment power. Accordingly, the absence of express language prohibiting [DONEE] from exercising her limited power for her benefit does not in turn permit [DONEE] to do so (Id., at 54-55).*

MassHealth’s decision to count the Trust principal for MassHealth eligibility purposes relative to Appellant’s application for MassHealth Long term Care Services due to section 2.2 of the subject trust is not supported by the controlling law. For the foregoing reasons, the appeal is APPROVED.

Order for MassHealth

- Rescind denial of December 3, 2021, remove trust principal from countable assets and redetermine eligibility with new notice.
- MassHealth should consider immediately revising Operations Memo 20-04 February 18, 2020 to reflect the current controlling law.

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.

Kenneth Brodzinski
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Dori Mathieu, Springfield MassHealth Enrollment Center,
88 Industry Avenue, Springfield, MA 01104, 413-785-4186

MassHealth Legal Department