

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2200228
<b>Decision Date:</b>	2/17/2022	<b>Hearing Date:</b>	01/31/2022
<b>Hearing Officer:</b>	Susan Burgess-Cox		

**Appearance for Appellant:**



**Appearance for MassHealth:**

Stephanie DeSousa



*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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	Eligibility
<b>Decision Date:</b>	2/17/2022	<b>Hearing Date:</b>	01/31/2022
<b>MassHealth's Rep.:</b>	Stephanie DeSousa	<b>Appellant's Rep.:</b>	
<b>Hearing Location:</b>	All Parties Appeared by Telephone	<b>Aid Pending:</b>	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 December 24, 2021, MassHealth denied the appellant's application for MassHealth benefits because her countable assets were over the program limit. (130 CMR 520.000; Exhibit 1). The appellant's attorney-in-fact filed a timely appeal on January 12, 2022. (130 CMR 610.015(B); Exhibit 2; Exhibit 3). Denial of assistance is valid grounds for appeal. (130 CMR 610.032).

### Action Taken by MassHealth

MassHealth determined that the appellant was not eligible for long-term care benefits due to excess assets.

### Issue

Whether MassHealth was correct in determining that the appellant had excess assets.

## Summary of Evidence

The MassHealth representative, from the Taunton MassHealth Enrollment Center, appeared by telephone and presented documents that were incorporated into the hearing record as Exhibit 5. Most of the documents presented by the appellant's representative were duplicative of those presented by MassHealth. The parties agreed to a single submission of such documents. (Exhibit 5). A letter from an attorney noting some facts related to the assets at issue was incorporated into the hearing record as Exhibit 6.

The appellant submitted an application for long-term care seeking coverage as of November 1, 2021. MassHealth determined that the appellant was not eligible due to assets that exceeded the program limits. MassHealth considered property they deemed held in trust as countable. In the notice on appeal, MassHealth determined that the appellant had an interest of \$325,000 in the property. (Testimony; Exhibit 1). The interest in this property and a bank account with a balance of \$298 would bring the appellant's total countable assets to \$325,298. (Testimony; Exhibit 1; Exhibit 5).

In July 2000, the appellant and her spouse transferred a manufactured home into the [Appellant's Surname] Family Trust. The appellant retained a life estate interest and lived in the home. In August 2000, the appellant assigned the lease associated with the home's site to the trust. The trust document names the appellant's daughter as trustee and the appellant's five children as beneficiaries. The appellant's life estate interest is noted in the bill of sale, not the trust.

The MassHealth representative at hearing acknowledged that the property was the appellant's principle place of residence. MassHealth considered the property as held in a revocable trust so considered it under the regulations at 130 CMR 520.023(B) which state that the entire principal in a revocable trust is a countable asset. Additionally, the regulations in that section state that the home or former home of a nursing-facility resident or spouse held in a revocable 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).

The MassHealth representative testified that the following provision led MassHealth to conclude that the trust was revocable:

3. Except as expressly provided in this instrument, the Trustee shall have no power to deal in or with the trust estate, except as directed by the beneficiaries. When, as, if and to the extent directed by the beneficiaries, the Trustee shall have the full power and authority to sell, assign, mortgage, deal with, or otherwise dispose of, all or any part of the trust property, and, as lessor or lessee, to execute and deliver leases and subleases, and to execute and deliver notes or other evidence of borrowing by or in behalf of the beneficiaries hereto, and to grant to acquire rights or easements and enter into agreements or arrangements with respect to the trust property, and too do all other acts or things which an owner of property ca do.

The trust also states:

4. The beneficiaries of this Trust in their own right, shall have the control of the management and handling of the trust property, and the Trustee shall have no duty with respect to such management or handling or collection of income, payment or taxes, insurance, litigation or otherwise except on written direction, as herein above provided, and after payment to the Trustee of all money necessary to carry out said instructions.
5. This trust shall terminate twenty (20) years from the date of the death of the last surviving Trustee of the original Trustees named in this instrument, unless extended or sooner terminated by the holder or holders of one hundred (100%) percent of the beneficial interests herein by notice in writing to the Trustee, but such termination shall only be effective when a certificate thereof signed and acknowledged by the Trustee hereunder is recorded in the Plymouth Registry of Deeds. Upon any such termination, the Trustee 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 in proportion to their respective interests.

Other provisions of the document speak to the role of the trustee working under the direction of the beneficiaries. The appellant is not listed as a beneficiary or trustee. A schedule of beneficial interests names the appellant's five children as beneficiaries and notes that if any of those listed are deceased then his or her share shall go to his or her children.

An attorney appeared by telephone and noted that the trust provided 100% interest in the property to the appellant's children other than the life estate

retained by the appellant. As noted above, the life estate is recorded in the bill of sale, not the trust. Counsel noted that the appellant does not hold any interest in the trust. Counsel acknowledged that the appellant still held a life estate interest in the property itself.

## **Findings of Fact**

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

1. The appellant submitted an application for long-term care seeking coverage as of November 1, 2021.
2. MassHealth determined that the appellant was not eligible due assets that exceeded program limits.
3. MassHealth determined that the appellant had total countable assets of \$325,298.
4. MassHealth considered property held in a trust as countable.
5. MassHealth valued the trust property at \$325,000.
6. The appellant had a bank account with a balance of \$298.
7. In July 2000, the appellant and her spouse transferred a manufactured home into the [Appellant's Surname] Family Trust.
8. In August 2000, the appellant assigned the lease associated with the home's site to the trust.
9. The appellant retained a life estate interest in the property and lived in the home.
10. The life estate interest is noted in the bill of sale, not the trust.
11. The appellant's daughter is trustee.
12. The appellant's five children are beneficiaries of the trust.
13. The appellant is not named in the trust.

14. The following provision led MassHealth to conclude that the trust was revocable:

- Except as expressly provided in this instrument, the Trustee shall have no power to deal in or with the trust estate, except as directed by the beneficiaries. When, as, if and to the extent directed by the beneficiaries, the Trustee shall have the full power and authority to sell, assign, mortgage, deal with, or otherwise dispose of, all or any part of the trust property, and, as lessor or lessee, to execute and deliver leases and subleases, and to execute and deliver notes or other evidence of borrowing by or in behalf of the beneficiaries hereto, and to grant to acquire rights or easements and enter into agreements or arrangements with respect to the trust property, and too do all other acts or things which an owner of property ca do.

15. The trust also states:

- The beneficiaries of this Trust in their own right, shall have the control of the management and handling of the trust property, and the Trustee shall have no duty with respect to such management or handling or collection of income, payment or taxes, insurance, litigation or otherwise except on written direction, as herein above provided, and after payment to the Trustee of all money necessary to carry out said instructions.
- This trust shall terminate twenty (20) years from the date of the death of the last surviving Trustee of the original Trustees named in this instrument, unless extended or sooner terminated by the holder or holders of one hundred (100%) percent of the beneficial interests herein by notice in writing to the Trustee, but such termination shall only be effective when a certificate thereof signed and acknowledged by the Trustee hereunder is recorded in the Plymouth Registry of Deeds. Upon any such termination, the Trustee 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 in proportion to their respective interests.

## **Analysis and Conclusions of Law**

MassHealth administers and is responsible for the delivery of health-care services to MassHealth members. (130 CMR 515.002). The regulations governing MassHealth at 130 CMR 515.000 through 522.000 (referred to as Volume II) provide the requirements for noninstitutionalized persons aged 65 or older, institutionalized persons of any age, persons who would be institutionalized without community-based services, as defined by Title XIX of the Social Security Act and authorized by M.G.L. c. 118E, and certain Medicare beneficiaries. (130 CMR 515.002). The appellant in this case is an institutionalized person. Therefore, the regulations at 130 CMR 515.000 through 522.000 apply to this case. (130 CMR 515.002).

Countable assets are all assets that must be included in the determination of eligibility. (130 CMR 520.007). Countable assets include assets to which the applicant or member or his or her spouse would be entitled whether or not these assets are actually received when failure to receive such assets results from the action or inaction of the applicant, member, spouse, or person acting on his or her behalf. (130 CMR 520.007).

The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will. (130 CMR 520.023). 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).

MassHealth considered the trust at issue as a revocable trust. Under the regulations, the entire principal in a revocable trust is a countable asset. (130 CMR 520.023(B)(1)). The regulations define a revocable trust as a trust whose terms allow the grantor to take action to regain any of the property or funds in the trust. (130 CMR 515.001). The trust in this case does not have any terms that would allow the appellant to take action to regain any of the property or funds held in the trust. The appellant and her spouse are not named in the trust. The declaration of trust was made by the appellant's daughter as trustee and the appellant's children, including the trustee, are listed as beneficiaries. The provision that MassHealth utilized in determining that the trust was revocable does not appear to include any right of the appellant to revoke the trust. As noted above, the provision states:

- Except as expressly provided in this instrument, the Trustee shall have no power to deal in or with the trust estate, except as directed by the beneficiaries. When, as, if and to the extent directed by the beneficiaries, the Trustee shall have the full power

and authority to sell, assign, mortgage, deal with, or otherwise dispose of, all or any part of the trust property, and, as lessor or lessee, to execute and deliver leases and subleases, and to execute and deliver notes or other evidence of borrowing by or in behalf of the beneficiaries hereto, and to grant to acquire rights or easements and enter into agreements or arrangements with respect to the trust property, and too do all other acts or things which an owner of property ca do.

It was not clear at the hearing why MassHealth would consider such a provision as one making the trust revocable. Instead, it appears to provide exclusive authority to the beneficiaries and the appellant is not listed as such in the trust or schedule of beneficiaries.

In February 2021, the Massachusetts Supreme Judicial Court (SJC) issued a decision regarding the transfer of property into a nominee trust. Guilfoil v. Sec'y of the Exec. Office of Health & Human Servs., 486 Mass. 788 (2021). In Guilfoil, the question at issue was whether the entire interest of a property transferred into a nominee trust is a countable asset for MassHealth purposes. Id. In Guilfoil, the plaintiff created a trust, the sole corpus of which consisted of her home. Id. The plaintiff retained a life estate interest in the property as a beneficiary while her children had a remainder interest. Id.

The court in Guilfoil noted that is well established that a nominee trust is "an entity created for the purpose of holding legal title to property with the trustees having only perfunctory duties. Morrison v. Lennett, 415 Mass. 857 (1993); Guilfoil v. Sec'y of the Exec. Office of Health & Human Servs., 486 Mass. 788 (2021). The common characteristics of a nominee trust are as follows:

- 1) the names of the beneficiaries are filed with the trustees rather than being publicly disclosed;
- 2) a trustee may serve simultaneously as a beneficiary;
- 3) the trustees lack power to deal with the trust property except as directed by the beneficiaries;
- 4) a third party may rely on the disposition of trust property pursuant to any instrument signed by the trustees, without having to inquire as to whether the terms of the trust have been complied with; and
- 5) the beneficiaries may terminate the trust at any time, thereby receiving legal title to the trust property as tenants in common in proportion to their beneficial interests. See Guilfoil 486 Mass. at 793; Roberts v. Roberts, 419 Mass. 685 (1995),



As in Guilfoil, it is the third feature in which the trustee has no power to act in respect of the trust property except as directed by the beneficiaries that is the key to deeming the trust at issue as a nominee trust. Unlike a true trust, the trustees of a nominee trust have no power themselves to act in respect of the trust property, they may only act at the direction of the beneficiaries. Id. The provision relied on by MassHealth in declaring the trust at issue as revocable is actually one of the common characteristics of a nominee trust listed above. As noted above, the provision states: "the Trustee shall have no power to deal in or with the trust estate, except as directed by the beneficiaries". It is unclear how MassHealth considers this provision as one that makes the trust revocable. It does not allow the appellant to take action to regain any of the property or funds in the trust. (130 CMR 515.001). It gives such authority to the beneficiaries alone and the appellant is not a beneficiary. Even the appellant's life estate interest is not within the terms of the trust.

A true trust involves a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person. See Guilfoil 486 Mass. at 794. While the document at issue does not state that it is intended to be a nominee trust, it also does not name it as revocable or irrevocable. Instead, the terms of the document speak to the categorization of the instrument as a nominee trust. The [Appellant Surname] Family Trust does not establish a fiduciary relationship between the party named as trustee and the beneficiaries. Instead, it is an agency relationship where the trustee can only take action under the direction of the beneficiaries. Again, the appellant is not one of those beneficiaries. Therefore, she has no access to the trust corpus and it can't be deemed a countable asset for MassHealth eligibility purposes.

The issue was raised at hearing as to whether MassHealth could deem the appellant's life estate interest as a countable asset. In Guilfoil, the SJC addressed this issue noting that other jurisdictions have excluded the value of a life estate in determining Medicaid eligibility and noted that the right to use an occupy a home does not make the home "available" to them. See Guilfoil 486 Mass. at 800. The court noted that a joint tenant, tenant by the entirety or tenant in common holds a direct ownership interest in property but a life tenant does not have the ability to sell the home and distribute proceeds. See Guilfoil 486 Mass. at 800. Because a life estate does not permit an individual to sell the home, the court concluded that the retention of a life estate does not render the property a countable asset. Id. Therefore, the property in the [Appellant Surname] Family Trust should not be considered an asset in determining eligibility for MassHealth.

The decision made by MassHealth was not correct.

This appeal is approved.

## **Order for MassHealth**

Disregard the property held by the [Appellant Surname] Family Trust as a countable asset in determining eligibility.

## **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.

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Susan Burgess-Cox  
Hearing Officer  
Board of Hearings

cc:

MassHealth Representative: Justine Ferreira, Taunton MassHealth Enrollment Center, 21 Spring St., Ste. 4, Taunton, MA 02780, 508-828-4616

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