

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2206818
<b>Decision Date:</b>	10/27/2022	<b>Hearing Date:</b>	10/18/2022
<b>Hearing Officer:</b>	Marc Tonaszuck		

**Appearance for Appellant:**



**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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	Long Term Care
<b>Decision Date:</b>	10/27/2022	<b>Hearing Date:</b>	10/18/2022
<b>MassHealth's Rep.:</b>	Kathleen Towle	<b>Appellant's Rep.:</b>	[REDACTED]
<b>Hearing Location:</b>	Springfield MEC		

## 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 08/29/2022, MassHealth informed the appellant that it denied her application for long term care (LTC) benefits because she failed to submit verifications (130 CMR 515.008; Exhibit 1A).

Through a notice dated 09/20/2022, MassHealth informed the appellant that it denied her application for LTC benefits because she has more countable assets than MassHealth benefits allow (130 CMR 520.003, 520.004; Exhibit 1B). The appellant's power of attorney filed this timely appeal on 09/20/2022, appointing attorney Nina Dow as the appeal representative (130 CMR 610.015(B); Exhibits 2 and 4)<sup>1</sup>. Denial of assistance is valid grounds for appeal (130 CMR 610.032).

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<sup>1</sup> In MassHealth Eligibility Operations Memo (EOM) 20-09 dated April 7, 2020, MassHealth states the following:

- Regarding Fair Hearings during the COVID-19 outbreak national emergency, and through the end of month in which such national emergency period ends:
  - All appeal hearings will be telephonic; and
  - Individuals will have up to 120 days, instead of the standard 30 days, to request a fair hearing for member eligibility-related concerns.

## Action Taken by MassHealth

MassHealth denied the appellant's application for LTC benefits.

## Issue

Did MassHealth correctly determine that the assets held in trust are countable in an eligibility determination for LTC benefits?

## Summary of Evidence

The MassHealth representative from the Springfield MassHealth Enrollment Center Intake Unit testified that the appellant is a nursing home resident. An application for Long Term Care (LTC) benefits was received by MassHealth on the appellant's behalf on 07/19/2022, seeking MassHealth benefits effective on 08/30/2022. MassHealth denied the application on 08/29/2022 for failure to provide requested verifications necessary for MassHealth to make an eligibility determination; however, verifications were received by MassHealth and a second denial notice issued on 09/20/2022, denying the application on the basis of excess assets.

The appellant is a single individual and the asset limit is \$2,000.00. MassHealth determined that the appellant has countable assets in excess of \$2,000.00; specifically, MassHealth counted the assets held in a trust in the eligibility determination. The trust holds \$384,418.43 in assets, comprised of real estate, life insurance policies and a cash balance held in a bank account.

The trust was established in 2012, more than 60 months prior to the application date. The appellant and her late husband were the donors of the trust. According to the terms of the trust, MassHealth determined that the appellant had excess assets and she is therefore ineligible for MassHealth LTC benefits. In reviewing the trust document, the MassHealth representative testified that article 5, section .05 of the trust states the following:

Notwithstanding the foregoing, the Donors reserve a limited or special power of appointment, exercisable during their lifetimes by written instrument delivered to the Trustee, to appoint the remaining principal and any undistributed income of the Trust, outright or upon trusts, powers of appointments, conditions or limitations, to such person or persons (whether in equal or unequal shares) among the members of the class consisting of [the appellant's issue] and their issue of all generations, or charitable organizations other than governmental entities, but no such power or payment shall be used to discharge a legal obligation of the Donors or either one of them.

(See Exhibit 5.)

MassHealth relied on operations memo 20-04 (02/18/2020) and regulations at 130 CMR 520.023 (C)(1) when it made its decision (Exhibits 5 and 6).

Appellant was represented at the fair hearing by an attorney (Exhibits 2 and 4). Counsel stated that there is no dispute that the trust was established prior to the look back period and is therefore the funding of which is not a disqualifying transfer. She also stated that the trust is an irrevocable trust according to article 4 of the trust. The appellant, as grantor of the trust, is an income only beneficiary and has no rights to the trust principal according to article 5. Counsel argued that the appellant has a “limited or special power of appointment” and can only appoint trust principal to her children, and their issue, or charitable contributions. The trust should be read as a whole, and in doing so, the appellant cannot access the trust principal (Exhibit 7).

Counsel presented copies of two Massachusetts cases that support her argument that the trust principal is not countable by MassHealth in an eligibility determination. In both cases, MassHealth counted the trust principal in the applicants’ eligibility determinations based on the language of trust provisions similar to those at issue in this appeal. In both cases, the courts reversed MassHealth’s denials based on those trust provisions (Exhibits 8 and 9).

Counsel argued that MassHealth incorrectly counted the trust principal in this matter, that the principal is not countable in an eligibility determination, and that the appellant is not able to access the principal.

## **Findings of Fact**

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

1. The appellant, a nursing home resident, applied for MassHealth LTC benefits on 07/19/2022, seeking MassHealth benefits effective on 08/30/2022.
2. The appellant is a single individual.
3. In 2012, the appellant and her now-deceased husband were the grantors/donors of a trust, whose principal is valued at \$384,418.43.
4. On 09/20/2022, MassHealth denied the appellant’s application for LTC benefits, based on its determination that she had assets in excess of the program limits.
5. The appellant is an income beneficiary of the trust.
6. The trust is an irrevocable trust.
7. Article 5.03 of the trust reads:

The Trustee shall have no power to make any distributions of principal to or for the benefit of the Donors or to either one of them. Each Donor irrevocable and unequivocally waives, renounces and disclaims any and all right, title and interest which such Donor may have now or in the future in the principal of the trust.

8. Article 5.05 of the trust reads:

Notwithstanding the foregoing, the Donors reserve a limited or special power of appointment, exercisable during their lifetimes by written instrument delivered to the Trustee, to appoint the remaining principal and any undistributed income of the Trust, outright or upon trusts, powers of appointments, conditions or limitations, to such person or persons (whether in equal or unequal shares) among the members of the class consisting of [the appellant's issue] and their issue of all generations, or charitable organizations other than governmental entities, but no such power or payment shall be used to discharge a legal obligation of the Donors or either one of them.

## Analysis and Conclusions of Law

The appellant applied for MassHealth long term care benefits as nursing home resident. In order to qualify for MassHealth benefits as a nursing home resident, an applicant must have less than \$2,000.00 in countable assets (130 CMR 520.003). MassHealth denied the long term care application for excess assets in the amount of \$384,418.43, which is the value of assets held in an irrevocable trust, which was established in 2012. The appellant and her now-deceased husband were the Donors of the trust. Because the appellant's trust was established beyond the 60-month look-back period the regulations at 130 CMR 520.023 (Trusts or Similar Legal Devices Created on or after August 11, 1993) are controlling.<sup>2</sup>

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

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<sup>2</sup> 130 CMR 520.023: Trusts or Similar Legal Devices Created on or after August 11, 1993 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. 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. (A) Look-Back Period for Transfers into or from Trusts. (1) Look-Back Period. (b) The look-back period is 60 months (i) for transfers made on or after February 8, 2006, subject to the phase-in described in 130 CMR 520.019(B)(2), if all or any portion of the income or principal of a trust can be paid to or for the benefit of the nursing-facility resident, but is instead paid to someone else; (ii) if payments are made from a revocable trust to other than the nursing-facility resident and are not for the benefit of the nursing-facility resident; or (iii) if payments are made into an irrevocable trust where all or a portion of the trust income or principal cannot under any circumstances be paid to or for the benefit of the nursing-facility resident.

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 is 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 MassHealth long term care program is designed to assist in providing health care coverage for the poor and therefore MassHealth has the obligation to scrutinize trust documents as it is expected that applicant's deplete their own resources before obtaining assistance from the government to pay for their care. Under both federal law and MassHealth regulations concerning the treatment of assets held in an irrevocable trust, it is the Trustee's ability to maintain access to trust principal that renders trust resources countable. This ability includes any portion of the trust principal that could be paid to or for the benefit of the appellant. It is well held that such circumstances need not have occurred, or even be imminent, in order for the principal to be treated as countable assets; it is enough that the amount could be made available to the applicant/appellant "under any circumstances".<sup>3</sup>

When determining if there is trust asset availability is whether despite language to the contrary, there is a provision that allows the applicant control over trust principal within the language of the trust itself. MassHealth maintains the appellant has the right under the Trust to access Trust principal within the meaning of Medicaid law.<sup>4</sup>

MassHealth argues article 5.05 of the trust gives the trustee the ability to access the trust principal. The article reads as follows:

Notwithstanding the foregoing, the Donors reserve a limited or special power of

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<sup>3</sup> See *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439, 440 (2009); *Lebow v. Commissioner of the Division of Medical Assistance*, 433 Mass. 177-178 (2001); and *Guerriero v. Commissioner of the Division of Medical Assistance*, 433 Mass. 628, 630-631 (2001).

<sup>4</sup> CMS at 3-3-109.25.8 HCFA Tr #65

appointment, exercisable during their lifetimes by written instrument delivered to the Trustee, to appoint the remaining principal and any undistributed income of the Trust, outright or upon trusts, powers of appointments, conditions or limitations, to such person or persons (whether in equal or unequal shares) among the members of the class consisting of [the appellant's issue] and their issue of all generations, or charitable organizations other than governmental entities, but no such power or payment shall be used to discharge a legal obligation of the Donors or either one of them.

According to MassHealth, the operations memorandum (20-04 dated 02/18/2020), which states that the trust principal is countable if the trust language includes a provision for the power of appointment (special power of appointment, and/or limited power of appointment) or a charitable organization clause. MassHealth concluded that because the appellant's trust has the above provision, the trust principal is countable because there is not language within the same provision that "completely prohibits the distribution to, or use of trust principal for, the benefit of the [appellant]" (Exhibit 6).

A plain reading of the trust as a whole, however, supports the appellant's argument that she is prohibited from accessing the principal of the trust. The trust document is very clear that the appellant is an income-only beneficiary and has no right to access or the ability to receive a distribution or payment of principal. Article 5.05 of the trust does not permit the appellant, as Donor, to appoint trust principal to herself or for her benefit. Further, even though that same provision allows the appellant, as Donor, to appoint trust principal to "charitable organizations," trust provision 5.03 prohibits the Trustee(s) from making distributions of principal to or for the benefit of the appellant.

MassHealth's argument that the trust principal is countable was based on a sub-regulatory operations memorandum. The appellant provided citations to case law that address the issue on point; specifically the articles at issue herein. In *Fournier v. Secretary of the Executive Office of Health and Human Services*, 488 Mass. 43, the Supreme Judicial Court determined that MassHealth incorrectly counted the principal held in a trust, based on an article with very similar wording as in the instant case<sup>1</sup> (Exhibit 8). MassHealth has advanced no argument based on case law. Accordingly, the appellant has met her burden of showing that MassHealth's decision was incorrect and not otherwise supported by the regulations and relevant case law.

After review of the trust as a whole, the trust principal is not countable as the appellant has no access to the corpus of the trust.

## **Order for MassHealth**

Deem the trust principal not countable in an eligibility determination. Redetermine eligibility. Inform appellant of her 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.

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Marc Tonaszuck  
Hearing Officer  
Board of Hearings

cc:

MassHealth Representative: Dori Mathieu, Springfield MassHealth Enrollment Center,  
88 Industry Avenue, Springfield, MA 01104

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<sup>1</sup> In *Fournier*, the SJC determined that language in the trust did not render the principal countable in a MassHealth determination. The language reads that the appellant “has the power to appoint from time to time, by an instrument in writing by [herself] or by [her] legal representative, all or 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 Federal, State, or local government or any sub-division, department, or agency thereof” (488 Mass. 43).