

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2304778
<b>Decision Date:</b>	08/24/2023	<b>Hearing Date:</b>	07/17/2023
<b>Hearing Officer:</b>	Susan Burgess-Cox	<b>Record Open to:</b>	08/19/2023

**Appearance for Appellant:**  
Lisa Neeley

**Appearance for MassHealth:**  
Lindsey Carney



*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 LTC/Lien
<b>Decision Date:</b>	08/24/2023	<b>Hearing Date:</b>	07/17/2023
<b>MassHealth's Rep.:</b>	Lindsey Carney	<b>Appellant's Rep.:</b>	Lisa Neeley
<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

On May 9, 2023, MassHealth issued a notice of intent to place a lien on property in [REDACTED], Massachusetts. (130 CMR 515.012; Exhibit 1). The appellant's attorney-in-fact filed a timely appeal on June 12, 2023. (130 CMR 610.000; Exhibit 2; Exhibit 3). A hearing was held on July 17, 2023. (Exhibit 4). At the request of the parties, the record was held open until August 17, 2023. (Exhibit 5).

### Action Taken by MassHealth

MassHealth issued notice of intent to place a lien on property in [REDACTED], Massachusetts.

### Issue

Whether MassHealth was correct in making a decision to place a lien on property in [REDACTED], Massachusetts.

### Summary of Evidence

MassHealth determined the appellant eligible for long-term care benefits in 2019. Since that initial determination, the appellant has continued to be eligible for MassHealth long-term care with no gap in coverage. In March 2023, the appellant underwent an eligibility review and MassHealth took action to place a lien on real property.

In 2008, the appellant transferred the real property at issue into a trust that allowed the appellant receipt of income distributions. At the time of the initial application, MassHealth received a copy of the trust and deed conveying the real property into the trust and deemed the asset non-countable. At hearing, the MassHealth representative testified that in this 2023 review, the agency determined that the appellant retained a legal interest in the real property that would be subject to the agency's lien rules. MassHealth based this decision on language in the deed that states:

The Grantor reserves the power to appoint, in whole or in part, the property conveyed hereunder to or for the benefit of any one or more of the Grantor's issue in such proportions, outright or upon such trusts, terms and conditions as the Grantor may specify by a writing executed and acknowledged by the Grantor during the Grantor's lifetime and recorded with the Worcester District Registry of Deeds within sixty (60) days of the date of such exercise, or by the Last Will or Codicil of the Grantor, making specific reference hereto.

The trust has the following provisions in effect during the lifetime of the appellant:

[The] Grantor reserves a limited or special power of appointment, exercisable during the Grantor's lifetime by written instrument delivered to the Trustee, to appoint the principal of the Trust either 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 Grantor's issue.

The MassHealth representative testified that the power of appointment in the deed provided the appellant with a legal interest in the property that could be subject to a lien. At hearing, the MassHealth representative testified that the agency still considered the trust property as noncountable.

Counsel for the appellant argued that the appellant did not hold any legal or possessory interest in the real property, only the ability to appoint the property to any one or more of her issue. It was noted at hearing that neither party presented copies of the documents discussed at hearing including the deed and the trust. The record was held open for the parties to present copies of such documents as well as any relevant arguments regarding the matter at issue. (Exhibit 5). Documents presented by the appellant were incorporated into the hearing record as Exhibit 6. MassHealth responded that they stand with the determination that they may place a lien on the

property. (Exhibit 7).

In the brief submitted by counsel for the appellant, counsel argues that MassHealth's attempt to place a lien on the real property is erroneous and the agency did not provide a basis or justification for their action. Counsel states the appellant deeded her entire interest in the real property to the non-countable trust in 2008 and retains no legal interest in the real property that could be subject to a lien. At the time of the transfer of the property to the trust, title to the property vested with the trust. Counsel argues that under Massachusetts law, the trustee holds full legal title to the trust property and rights of possession that go along with it. (Exhibit 6; Ferri v. Powell-Ferri, 476 Mass. 651; McClintock v. Scahill, 403 Mass. 397; Welch v. Boston, 221 Mass. 155). Counsel argues that the power of appointment in the deed and trust are the same type of power and the language in the deed does not give the appellant any greater rights or interest in the real property.

Counsel also notes that the regulations regarding the treatment of trusts state that, with respect to irrevocable trusts, the home or former home of an applicant is countable only if principal is permitted to be disbursed to the applicant for benefits. In this case, no principal is permitted to be disbursed to the appellant. Additionally, counsel argues that because MassHealth determined that the trust is a non-countable asset, there is no interest in the trust that is subject to a lien because MassHealth already determined that the trust owns the home, not the appellant. Counsel cites Heyne v. Director of the Office of Medicaid and Fournier v. the Secretary of the Executive Office of Health and Human Services to argue that provisions of a deed or trust that permit a grantor to appoint assets to their issue, charities or nonprofit organizations do not make property available to the grantor. (Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312 (2016); Fournier v. the Secretary of the Executive Office of Health and Human Services, 488 Mass. 43 (2021)).

## Findings of Fact

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

1. MassHealth determined the appellant eligible for long-term care benefits in 2019.
2. MassHealth has paid for the appellant's long-term care costs since the initial eligibility decision.
3. In March 2023, the appellant underwent an eligibility review and MassHealth took action to place a lien on real property.
4. In 2008, the appellant transferred the real property at issue into an irrevocable trust.
5. The deed and trust allow the appellant to retain a power to appoint property to or for the

benefit of members of a class consisting of the appellant's issue.

6. The appellant has no legal or possessory interest in the trust property.
7. At the time of the initial eligibility decision and in this eligibility review, MassHealth considered trust property noncountable.

## **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).

The issue on appeal is the ability of the agency to place a real estate lien on real property that the appellant took action to transfer into a trust. A real estate lien enables MassHealth to recover the cost of medical benefits paid or to be paid on behalf of a member. (130 CMR 515.012). MassHealth will place a real estate lien against any property in which a member has a legal interest subject to the following conditions:

- (1) per court order or judgement; or
- (2) without a court order or judgement, if all of the following requirements are met:
  - (a) the member is an inpatient receiving long-term or chronic care in a nursing facility or other medical institution;
  - (b) none of the following relatives lives in the property:
    - (i) a spouse;
    - (ii) a child under the age of 21, or a blind or permanently and totally disabled child; or
    - (iii) a sibling who has a legal interest in the property and has been living in the house for at least one year before the member's admission to the medical institution;
  - (c) MassHealth determines that the member cannot reasonably be expected to be discharged from the medical institution and return home; and
  - (d) the member has received notice of the Division's determination that the above conditions have been met and that a lien will be placed. The notice includes the member's right to a fair hearing.

In this case, MassHealth incorrectly determined that the appellant had a legal interest in the real property for which she would receive a share of the proceeds. The language relied upon by the agency in determining that the appellant holds such an interest clearly indicates that the appellant can only appoint property to her issue, this does not equate with an individual retaining a legal interest for which they will receive a share of the proceeds from a sale. The agency made a determination that this was not a countable asset for which they could place a lien at the time of the initial eligibility decision and in subsequent redeterminations. It is unclear as to why the agency now believes that the appellant holds a legal interest for which they could obtain any recovery through the placement of a lien. The appellant is listed solely as the grantor of the property. As the grantor, the appellant no longer has a legal interest in the property unless such is retained in the deed. MassHealth failed to demonstrate how a power to appoint allows the appellant to retain an interest that could be subject to a lien.

As noted by counsel for the appellant, a power of appointment does not make an asset available to the grantor when the power specifies the parties to whom the grantor can appoint the assets. In this case, those parties are the appellant's issue, not the appellant. While Heyn v. Director of the Office of Medicaid and Fournier v. the Secretary of the Executive Office of Health and Human Services address such powers in determining whether property held in trust is countable, the same principals can be utilized in determining whether this power provides an individual with an interest in real property that would entitle them to proceeds from a sale of the property. If such powers do not make trust property available to a grantor, it is not clear as to how they could make real property available to a grantor. A power of appointment is one that restricts to whom the property can be conveyed and does not include by implication the donee of the limited power. (Fournier v. the Secretary of the Executive Office of Health and Human Services, 488 Mass. 43, 170 (2021)). As noted above, the decision made by MassHealth that the appellant has a legal interest in real property for which the agency can place a lien was not correct.

This appeal is approved.

## **Order for MassHealth**

Rescind the notice of intent to place a lien on the property listed in the notice on appeal.

## **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: Sylvia Tiar, Tewksbury MassHealth Enrollment Center, 367 East Street, Tewksbury, MA 01876-1957, 978-863-9290

MassHealth Representative: Lien Coordinator, UMass Medical – Estate Recovery Unit, PO Box 15205, Worcester, MA 01615-0205

Appellant Representative: [REDACTED]  
[REDACTED]