

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2402523
Decision Date:	6/10/2024	Hearing Date:	3/22/2024
Hearing Officer:	Cynthia Kopka	Record Open to:	4/25/2024

Appearance for Appellant:



Appearance for MassHealth:

Eileen Smith, Charlestown



*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:	Denied	Issue:	LTC, disqualifying transfer, special needs trust
Decision Date:	6/10/2024	Hearing Date:	3/22/2024
MassHealth's Rep.:	Eileen Smith	Appellant's Rep.:	Attorney
Hearing Location:	Taunton (remote)	Aid Pending:	No

Authority

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

Jurisdiction

By notice dated December 20, 2023, MassHealth denied the appellant's application for MassHealth because the appellant had recently given away or sold assets to become eligible for MassHealth. MassHealth calculated a period of ineligibility from January 17, 2023 to June 5, 2024. Exhibit 1. The appellant filed this timely appeal on February 16, 2024. Exhibit 2, 130 CMR 610.015(B). Denial of assistance is a valid basis for appeal. 130 CMR 610.032. The hearing record was held open and extended through April 25, 2024 for the submission of additional information. Exhibit 6.

Action Taken by MassHealth

MassHealth denied the appellant's application for making impermissible transfers of assets and calculated a period of ineligibility.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.019, in determining that the appellant made disqualifying transfers during the look-back period and in

calculating the period of ineligibility.

Summary of Evidence

Appearing at the hearing were a MassHealth long term care representative and the appellant's attorney. Both sides submitted supportive pre-hearing documents. Exhibits 4 and 5. After the hearing, the record was held open and both sides provided post-hearing submissions. Exhibits 7 and 8. A summary of testimony and documentation follows.

On March 31, 2023, MassHealth received Appellant's application for long term care benefits seeking a start date of January 17, 2023. Exhibit 4. The appellant was admitted to a nursing facility [REDACTED] to the requested start date. MassHealth had initially denied the application for failure to verify. The appellant appealed this denial and resolved the verification issue, preserving the March 31, 2023 application date.

On December 20, 2023, MassHealth denied the appellant's application. MassHealth determined that the appellant had impermissibly transferred assets to become eligible for MassHealth during the five year lookback period. Exhibit 1. Specifically, in [REDACTED], the appellant, through her power of attorney (POA), transferred property that the appellant owned by deed to a special needs trust (hereinafter, "the Trust") to benefit her disabled adult child under the age of [REDACTED] Exhibit 4 at 19-20 (deed). The deed retains for the appellant a life estate in the property. *Id.* The appellant's POA is also the Trustee of the Trust. *Id.* at 18. The MassHealth representative testified that the home was valued at \$215,730.¹ Using the average daily rate of \$427, MassHealth calculated a penalty period of 506 days, from January 17, 2023 through June 6, 2024. Exhibit 1.

MassHealth confirmed that the appellant had properly verified that the beneficiary of the Trust was the appellant's child (hereinafter "Child") and that the Child is totally disabled. Though MassHealth regulations provide that a transfer of assets to a special needs trust (or "SNT") for the sole benefit of a disabled child is allowed, MassHealth's legal department determined that the Trust did not meet the requirements in order for the transfer to be permissible.

Relying upon, inter alia, 42 USC §1396p(d)(4)(A) (hereinafter "(d)(4)(A)"); 130 CMR 515.001 (definition of special needs trust); 130 CMR 520.109(D)(3); the State Medicaid Manual ("SMM") HCFA [Health Care Financing Administration, now called Centers for Medicare and Medicaid Services, or "CMS"] Pub. 45-3, Transmittal 64 ("HCFA Transmittal 64") §§ 3257, 3259.7(A), and 3258; and the Social Security Administration's Program Operations Manual System ("POMS") SI 01120.203(B) (Nov. 1994), MassHealth provided instructions on how the Trust could be revised to

¹ MassHealth's submission only includes the 2023 assessor's valuation of the property which was \$253,700. *Id.* at 22. The calculation provided by MassHealth in Exhibit 1 is based on the figure cited, presumably the value three years prior. As the value of the property was not disputed, this hearing decision will accept the more favorable valuation of \$215,730 and calculation of 506 penalty days.

comport with MassHealth's requirements, summarized as follows:

1. The Trust must be revised to include a payback provision upon Child's death which takes priority over any other death or termination distributions from the Trust. Social Security Administration's Program Operations Manual System (POMS) SI 01120.203(B)(1)(h)²
2. The Trust must state that the Trustee shall provide notice to MassHealth, et. al, within two weeks of any amendment, alteration, or early termination of the Trust.
3. The Trust must employ an "adequate consideration" and "reasonable return" standards regarding any Trustee financial transactions involving third parties other than the Trust beneficiary.
4. The Trust must also provide that the Trustee will supply MassHealth, the Commonwealth of Massachusetts, Executive Office of Health and Human Services ("EOHHS"), Office of Medicaid or Estate Recovery Unit or any successor entity, unit or subdivision with an accounting of any disbursements when requested by EOHHS in order to verify the reasonableness of any disbursements. EOHHS may request an accounting at any time during the Trust beneficiary's lifetime and after death until any and all EOHHS repayment claims have been satisfied.
5. The Trust may not include a provision allowing any party, either during life or by Will, the power to appoint trust property prior to reimbursement to state Medicaid agencies.
6. The Trust may not include a provision allowing the Medicaid recipient or MassHealth applicant or member, attorney-in-fact, Executor or Personal Representative to disclaim his or her beneficial interest under the Trust.

The MassHealth representative testified that, if the Trust is amended to include these required provisions, the transfer will be permissible under the regulation and the appellant would be eligible. If the appellant did not cure the transfer, the appellant would have to submit a new application to obtain eligibility beginning June 6, 2024.

The appellant's attorney argued that the Trust was created in [REDACTED] as an SNT for the benefit of the Child. The appellant's attorney argued that the Trust meets MassHealth's definition of an SNT and therefore the transfer of the property to the Trust was permissible under 130 CMR 520.019(D)(3) and/or (4) and 42 USC 1396p(c)(2)(B) (hereinafter "(c)(2)(B)") (iii) and (iv). The appellant's attorney argued that MassHealth requested revisions to be made to the trust but did not offer citations explaining what authority MassHealth has to request those revisions. The appellant's attorney also asserted that MassHealth's revision requirements violate (c)(2)(B)(iii) and (iv) because the revisions requested impact the Child, not the appellant. The appellant's attorney asserted that the Child is not the applicant. The appellant's attorney also argued that MassHealth may not declare a transfer of real property to a trust to be disqualifying just because the Trust does not contain repayment and accounting provisions. The Trust is a third-party SNT that was not self-settled by the Child. The appellant's attorney argued that the requested revisions that there

² <https://secure.ssa.gov/poms.nsf/home!readform>, last checked June 4, 2024.

be a payback provision for benefits paid on behalf of the Child upon her death and accounting requirements to MassHealth at any time, upon request is so onerous as to discourage people from using special needs trusts at all.

In her original brief, the appellant's attorney argued that the Trust is not the appellant's countable asset. The appellant is not the trustee or any beneficiary of the Trust. Citing 42 USC § 1396p(d) and 130 CMR 520.023(C). The appellant's attorney argued that the Trust does not meet the any circumstances test. The appellant's attorney argued that the Trust is inaccessible to Appellant under 130 CMR 520.006.

In her reply brief, the appellant's attorney argued that MassHealth erred in determining the transfer was disqualifying because the transfer was made for a purpose exclusively other than qualifying for MassHealth benefits. The appellant's attorney argued that it is improper to penalize the appellant for the actions of a third party unrelated to qualifying for benefits. The appellant's attorney further argued that the transfer was initiated in [REDACTED] well before the current 2023 application. The gap in time signifies that the transfer was not an effort to qualify for benefits. Dambach v. Dept. of Social Serv., 313S.W.3d 188, 191-92 (MO. Ct. App. 2010).

In addition, the appellant's attorney argued that the appellant's sole intent in making the transfer was to benefit her Child. The appellant's attorney provided an affidavit by the drafting attorney in support. Exhibit 8 at 6. The drafting attorney wrote that the appellant's POA transferred the home to the Child because he was concerned about the appellant being coerced by outside parties into making a poor financial decision that would deprive the Child of care. *Id.* The drafting attorney wrote that the POA expressed no concern about long term care for the appellant. *Id.*

The appellant's attorney further argued that federal law mandates that transfers to trust for the benefit of disabled individuals under the age of [REDACTED] be considered permissible transfers. 42 USC §1396p(c)(2)(B)(iv). In addition, HCFA Transmittal 64 § 3258.10 states that there are a number of instances where penalties would not apply, including if assets were transferred to a trust established for the sole benefit of an individual under [REDACTED] years of age who is disabled. The appellant's attorney argued that the Trust is a third-party SNT, created for the Child and funded with property owned by the appellant. Therefore, there is no requirement that the Trust contain specific language that provides payback provisions.

When asked whether the appellant explored amending the Trust to include the requested provisions, the appellant's attorney stated that it was considered but ultimately dismissed, as the Trust is valid. The Trust was not drafted in an effort to hide anything from MassHealth. The appellant's attorney acknowledged that the application date would be lost if the appeal was denied.

Relevant provisions of the Trust include:

1.3 Powers to revoke or amend or change trustee

This trust is irrevocable. Donor may not revoke or amend this agreement.

1.4 Beneficiary

This is a nonsupport, supplemental needs trust for the benefit of the donor's sister [the Child] ... who may hereinafter be known as the "primary beneficiary" hereunder, and who is a handicapped or disabled person.

...

4. TERMINATION OF THE TRUST

4.1 Distribution on death of primary beneficiary

This trust shall terminate upon the death of the primary beneficiary, at which time the trustee shall pay the remaining principal and undistributed income to the then living issue of the donor's mother, [the appellant], per stirpes.

4.2 Distribution if no beneficiary living.

If at any time no person is living who is eligible to receive property under the foregoing provisions of this trust, the trustee shall pay the remaining property to the person who would be entitled to receive the property of [the appellant], under the laws of [REDACTED] then in force and in the proportions prescribed by such laws as if she had then died intestate, a resident of [REDACTED] and not survived by a spouse.

Exhibit 5 at 29, 30. Section 2 of the Trust lists the Trust's purpose, which is to supplement but not supplant any benefits and services the Child would be eligible for from governmental and charitable sources and to assist in providing for the Child's future residential, personal, and other non-medical needs. *Id.* at 29. Section 3 of the Trust allows for payment of income and principal to the Child or on the Child's behalf. *Id.* at 30. Section 5.7 allows the Trustee to be reasonably compensated. *Id.* at 36. Section 5.9(d) provides that "The trustee may, in the trustee's sole discretion, allow any caregiver or guardian of the primary beneficiary hereunder to use any real estate held by the trust as his or her primary residence along with the primary beneficiary, even if such person is also the trustee or donor." *Id.* at 36-37.

Findings of Fact

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

1. On March 31, 2023, MassHealth received the appellant's application for long term care benefits seeking a start date of January 17, 2023. Exhibit 4.
2. On December 20, 2023, MassHealth denied the appellant's application. MassHealth determined that the appellant had impermissibly transferred assets to become eligible for MassHealth during the five year lookback period. Exhibit 1.
3. MassHealth determined that the assessed value of the property was \$215,730, divided this by the daily rate of \$427, and calculated a total penalty period of 506 days, from January 17, 2023 through June 6, 2024. *Id.*
4. The appellant filed a timely appeal on February 16, 2024. Exhibit 2.
5. In 2020, the appellant's POA transferred property the appellant owned by deed to the Trust to benefit the Child, retaining a life estate for the appellant. Exhibit 4 at 19-20.
6. The appellant's POA is the Trustee and donor of the Trust. *Id.* at 18.
7. The Child is the appellant's child, who is disabled and under the age of [REDACTED]
8. The Trust does not contain a provision the Commonwealth of Massachusetts will receive amounts remaining in the account upon the death of the Child up to the amount paid by the MassHealth agency for services to the Child. Exhibit 5 at 29-39.
9. The Trust does not contain a provision that if the Child has lived in more than one state, the funds remaining upon the death of the Child or early termination of the Trust are distributed to each state in which the Child received Medicaid based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on the Child's behalf. *Id.*
10. The Trust does not include provisions that the Trustee will promptly provide written notice of the death of the Child, proposed early termination, and any other changes, such as the appointment of another Trustee, as well as accountings or other documents of the administration of the Trust to the MassHealth agency or its designee. *Id.*
11. The Trust is irrevocable pursuant to Section 1.3. *Id.* at 29.
12. Section 1.4 of the Trust states that the Trust is "nonsupport, supplemental needs trust for the benefit of the donor's sister [the Child]" and names the Child as the primary beneficiary.

13. Section 2 of the Trust lists the Trust's purpose, which is to supplement but not supplant any benefits and services the Child would be eligible for from governmental and charitable sources and to assist in providing for the Child's future residential, personal, and other non-medical needs. *Id.* at 29.
14. Section 3 of the Trust allows for payment of income and principal to the Child or on the Child's behalf. *Id.* at 30.
15. Sections 4.1 and 4.2 provide for the termination of the Trust upon the death of the Child and that the Trustee would pay the remaining principal and undistributed income to the living issue of the appellant, and if there is no one living eligible, to the person entitled to receive the appellant's property under Massachusetts law. *Id.* at 29-30.
16. Section 5.7 allows the Trustee to be reasonably compensated. *Id.* at 36.
17. Section 5.9(d) provides that "The trustee may, in the trustee's sole discretion, allow any caregiver or guardian of the primary beneficiary hereunder to use any real estate held by the trust as his or her primary residence along with the primary beneficiary, even if such person is also the trustee or donor." *Id.* at 36-37.
18. The appellant's attorney provided an affidavit by the drafting attorney in support. Exhibit 8 at 6

Analysis and Conclusions of Law

To qualify for MassHealth Standard coverage as a resident of a long term care facility, an individual must have countable assets of \$2,000 or less. 130 CMR 519.006(A)(4). MassHealth considers any transfer of a resource owned by a nursing facility resident for less than fair market value during the appropriate look-back period to be a disqualifying transfer unless the transfer in question is permitted or exempted under the regulations. Specifically, 130 CMR 520.018(B) states that MassHealth "will deny payment for nursing facility services to an otherwise eligible nursing-facility resident ... who transfers or whose spouse transfers countable resources for less than fair-market value during or after the period of time referred to as the look-back period." The look-back period for transfers of resources occurring on or after February 8, 2006 is 60 months. 130 CMR 520.019(B)(2).

According to 130 CMR 520.019(C), set forth in pertinent part,

The MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse

(including the home or former home of the nursing-facility resident or the spouse) for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J). The MassHealth agency may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident or spouse is or would be entitled if such action had not been taken.

Per 130 CMR 520.0019(G),

Where the MassHealth has determined that a disqualifying transfer of resources has occurred, the MassHealth will calculate a period of ineligibility. The number of months in the period of ineligibility is equal to the total, cumulative, uncompensated value as defined in 130 CMR 515.001 of all resources transferred by the nursing-facility resident or the spouse, divided by the average monthly cost to a private patient receiving nursing-facility services in the Commonwealth of Massachusetts at the time of application, as determined by the MassHealth agency.

Here, it is undisputed that, during the five year lookback period, the appellant's POA transferred the appellant's ownership of property to the Trust via deed. The issue is whether the transfer was permissible as defined by 130 CMR 520.019(D) or otherwise allowable under 130 CMR 520.019(F).

Permissible transfer – SNT and “sole benefit”

Permissible transfers identified in 130 CMR 520.019(D) include, in relevant part:

(D) Permissible Transfers. The MassHealth agency considers the following transfers permissible. Transfers of resources made for the sole benefit of a particular person must be in accordance with federal law.

...

(3) The resources were transferred to the nursing facility resident's permanently and totally disabled or blind child or to a trust, a pooled trust, or a special-needs trust created for the sole benefit of such child.

(4) The resources were transferred to a trust, a special-needs trust, or a pooled trust created for the sole benefit of a permanently and totally disabled person who was younger than ■ years old at the time the trust was created or funded.

The corresponding federal Medicaid statute at 42 USC § 1396p(c)(2)(B) states in relevant part:

An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that – (B) the assets (i) were transferred to the individual's spouse or to

another for the sole benefit of the individual's spouse, (ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse, (iii) **were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or (iv) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under [REDACTED] years of age who is disabled** (as defined in section 1382c(a)(3) of this title).

(Emphasis added).

MassHealth in its post-hearing submission³ refers to 42 U.S.C. §1396p(d)(4)(A) in defining an SNT:

A trust containing the assets of an individual (applicant) under age [REDACTED] who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court **if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.**

(Emphasis added). However, (d)(4)(A) does not appear to be applicable here because the Trust does not contain the Child's assets, but those received in the subject transfer. Matter of [REDACTED] Supplemental Needs Tr., 99 Mass. App. Ct. 376, 380 (2021) [REDACTED]. The appellant's attorney raised the argument that the Trust should be considered a third-party SNT described in (c)(2)(B)(iii) or (iv), asserting that under these regulations, the Trust would not need a payback provision to preserve MassHealth eligibility, unlike the emphasized provision in (d)(4)(A) above.

MassHealth's definition of an SNT is set forth in 130 CMR 515.001 (emphasis added):

Special-needs Trust – Effective until sixty days after the end of the maintenance of effort and continuous eligibility provisions of Section 6008 of the Families First Coronavirus Response Act (Public Law No. 116-127),^[4] **a special-needs trust is one that meets all the following criteria as determined by the MassHealth agency.**

- (1) The trust was created for a disabled individual younger than [REDACTED] years old.
- (2) The trust was created for the sole benefit of the individual by the individual's parent, grandparent, legal guardian, or a court.

³ MassHealth's post-hearing submission, Exhibit 7, is not tailored to this appeal but is a "reference sheet ... provided only as guidance and should not be used as a substitute for legal advice from a beneficiary's own counsel." MassHealth's legal department never submitted any memorandum of law or brief for this appeal despite the record open request for such. Exhibit 6.

⁴ According to Eligibility Operations Memorandum (EOM) 23-15, the end of Maintenance of Effort period was December 31, 2023, making the effective date of the change March 1, 2024.

- (3) The trust provides that the Commonwealth of Massachusetts will receive amounts remaining in the account upon the death of the individual up to the amount paid by the MassHealth agency for services to the individual.**
- (4) When the member has lived in more than one state, the trust must provide that the funds remaining upon the death of the member are distributed to each state in which the member received Medicaid based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on the member's behalf.**

Effective sixty days after the end of the maintenance of effort and continuous eligibility provisions of Section 6008 of the Families First Coronavirus Response Act (Public Law No. 116-127), a trust that meets all the following criteria as determined by the MassHealth agency:

- (1) The trust was created for a disabled individual younger than [REDACTED] years old.
- (2) (a) The trust was created for the sole benefit of the individual, by the individual, on or after [REDACTED] or
- (b) The trust was created for the sole benefit of the individual by the individual's parent, grandparent, legal guardian, conservator, or a court.
- (3) The trust provides that the Commonwealth of Massachusetts will receive amounts remaining in the account upon the death of the individual up to the amount paid by the MassHealth agency for services to the individual.**
- (4) When the member has lived in more than one state, the trust must provide that the funds remaining upon the death of the member or early termination of the trust are distributed to each state in which the member received Medicaid based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on the member's behalf.**
- (5) The trust must include provisions that the trustee will promptly provide written notice of the death of the individual, proposed early termination, and any other changes, such as the appointment of another trustee, as well as accountings or other documents of the administration of the trust to the MassHealth agency or its designee.**

Regarding 130 CMR 520.019(D), it is clear that the Trust does not meet the definition of a "special-needs trust" as set forth in 130 CMR 515.001. There is no clause that provides that the Commonwealth of Massachusetts will receive amounts remaining in the account upon the death of the individual up to the amount paid by MassHealth for services to the individual. There is also no clause regarding the proportionate share of Medicaid recovery if the individual has lived in more than one state. Finally, the Trust would not meet the third requirement effective after March 1, 2024, that the Trust must include a provision that the Trustee would promptly provide written notice of any relevant changes to MassHealth. The Trust contains none of these provisions set forth in MassHealth's regulation. Additionally, MassHealth's regulations does not differentiate between a self-settled or a third-party SNT. On its face, the Trust does not meet MassHealth's

definition of an SNT.

However, a transfer to an SNT is not the only permissible transfer under 130 CMR 520.019(D)(3). The regulation allows for transfers to the Child directly or to “a trust ... created for the sole benefit of such child.” *Id.* Here, the transfer is permissible if the Trust was drafted for the sole benefit of the Child.

CMS, formerly HCFA, published instructions now compiled in the federal agency’s State Medicaid Manual (SMM). HCFA Transmittal 64 § 3257(B)(6) provides guidance on how “sole benefit” may be analyzed (emphasis added):

A transfer is considered to be for the sole benefit of a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that **no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.**

Similarly, a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual **if the trust benefits no one but that individual, whether at the time the trust is established or any time in the future.** However, the trust may provide for reasonable compensation, as defined by the State, for a trustee or trustees to manage the trust, as well as for reasonable costs associated with investing or otherwise managing the funds or property in the trust.

A transfer, transfer instrument, or trust that provides for funds or property to pass to a beneficiary who is not the spouse, blind or disabled child, or disabled individual is not considered to be established for the sole benefit of one of these individuals. In order for a transfer or trust to be considered to be for the sole benefit of one of these individuals, the instrument or document must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.

An exception to this requirement exists for trusts discussed in §3259.7. Under these exceptions, the trust instrument must provide that any funds remaining in the trust upon the death of the individual must go to the State, up to the amount of Medicaid benefits paid on the individual’s behalf. **When these exceptions require that the trust be for the sole benefit of an individual, the restriction discussed in the previous paragraph does not apply when the trust instrument designates the State as the recipient of funds from the trust.** Also, the trust may provide for disbursement of funds to other beneficiaries, provided the trust does not permit such disbursements until

the State's claim is satisfied. Finally, "pooled" trusts may provide that the trust can retain a certain percentage of the funds in the trust account upon the death of the beneficiary.

The case law analyzing "sole benefit" mostly concerns the phrase as it applies to annuities purchased by spouses and whether a transfer to an annuity was made for the sole benefit of the spouse as to exempt the transfer from disqualification. 42 USC §1396p(c)(2). See, e.g., [REDACTED] v. Exec. Off. of Health & Hum. Servs., 491 Mass. 223 (2023), [REDACTED] 734 F.3d 473 (6th Cir. 2013). Regarding transfers made pursuant to (c)(2)(B)(iii) and (iv), and 130 CMR 520.019(D)(3) and (4), the Massachusetts Appeals Court noted (in dicta) that per the HCFA/SMM guidance, the presence of a clause allowing assets to be distributed to other beneficiaries upon the death of the disabled child would mean that the trust would not be considered for the disabled child's sole benefit:

We note that for a third-party special needs trust under (c)(2)(B)(iv), if [disabled child] had been the sole beneficiary of the [REDACTED] trust, then the payback provision would not have been necessary to preserve [the donor's] eligibility. However, as the judge's decision reflects, **because the [REDACTED] trust contained a clause distributing any assets remaining at [disabled child]'s death to other beneficiaries, the trust likely would not qualify as being for the "sole[] ... benefit" of [disabled child] unless the payback provision was included.** 42 U.S.C. § 1396p(c)(2)(B)(iv). See also State Medicaid Manual, Health Care Finance Administration Pub. No. 45, Transmittal No. 64, § 3257(B)(6) (Nov. 1994) (State Medicaid Manual) (providing guidance on interpretation of "sole benefit" language under § 1396p[c][2][B][iv]).

[REDACTED] 99 Mass. App. Ct. at 381 fn 7 [REDACTED].

Other jurisdictions have construed the "sole benefit" requirement to mean that no other individual or entity except the beneficiary may benefit from the trust assets in any way at the time of transfer or any time in the future. [REDACTED] 99 Mass. App. Ct. at 389 ([REDACTED] dissenting and citing [REDACTED], 579 F.3d 1171, 1186 (10th Cir. 2009)). The dissent in [REDACTED] noted that "it appears to be an open question whether such trusts qualify under (c)(2)(B)(iv) if they have a contingent beneficiary who takes the corpus of the trust upon the death of the beneficiary." *Id.* [REDACTED] pointed to [REDACTED] as finding that the sole benefit in related annuity provision of statute does not necessarily mean a contingent beneficiary cannot be named. *Id.*

Conversely, POMS SI 01150.120(B)(8) provides that a "transfer is considered to be for the sole benefit of a person if the transfer is arranged so that no other person or entity can benefit from the transferred resources **at the time of the transfer or for the remainder of that person's life**" (emphasis added).

The appellant asserted that the Trust was established for the sole benefit of the Child. MassHealth did not specifically refute this contention, as it ended its determination at the finding that the Trust did not meet the definition of an SNT without considering other permissible transfers in 130 CMR 520.019(D). The Trust does not list any other beneficiary. It is irrevocable and only terminates upon the death of the Child. The purpose of the Trust is to assist the Child and there are no clauses that would allow another party to benefit from the transfer. Section 5.9(d) does not allow another person to reside in the property unless that person is the Child's caregiver or guardian. Finally, Sections 4.1 and 4.2 provide that upon the Child's death, the assets of the Trust would pass to the appellant's (not the Child's) heirs.

The Social Security POMS guidance would suggest that the Trust was for the Child's sole benefit because it terminates upon the Child's death, therefore benefiting only the Child during the remainder of her life. Conversely, the guidance from HCFA Transmittal 64 § 3257(B)(6) and ██████ make clear that because Sections 4.1 and 4.2 allow the assets of the Trust to pass to other beneficiaries at a future time, the Trust is not for the sole benefit of the Child and will not be exempt from a disqualifying transfer penalty unless it contains a payback provision. Here, the ██████ and HCFA guidance holds more weight than POMS. Accordingly, I conclude that the Trust was not created for the sole benefit of the Child.

Intent

In addition to permissible transfers, MassHealth will not impose a period of ineligibility for transferring resources at less than fair market value if the appellant demonstrates to MassHealth's satisfaction that

- (1) the resources were transferred exclusively for a purpose other than to qualify for MassHealth; or
- (2) the nursing-facility resident or spouse intended to dispose of the resource at either fair-market value or for other valuable consideration. Valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.

130 CMR 520.019(F).

The appellant's attorney argued that MassHealth erred in disqualifying the transfer because it was made exclusively for a purpose other than to qualify for MassHealth pursuant to 130 CMR 520.019(F)(1). HCFA Transmittal 64 § 3258.10 sets forth the following guidance to transfers exclusively for a purpose other than qualifying for Medicaid:

Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid.--Require the individual to establish, to your satisfaction, that the asset was transferred for a

purpose other than to qualify for Medicaid. **Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient.** Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred.

(Emphasis added).

Citing the above provision, the Massachusetts Appeals Court has recognized that “federal law mandates a heightened evidentiary showing” on the issue of exclusive intent. See [REDACTED] Director of the Office of Medicaid, 80 Mass. App. Ct. 777, 785-786 [REDACTED]. The element of “exclusivity” under this provision means that the possibility of needing public assistance for medical care must not have weighed at all upon the appellant’s (or the POA’s) mind at the time the decision was made.

The appellant’s evidence of intent, an affidavit from the attorney who drafted the Trust, is insufficient to meet the appellant’s burden of proving that the appellant, through her POA, transferred the property to the Child exclusively for a purpose other than the appellant’s qualifying for Medicaid. [REDACTED] Dir. of Off. of Medicaid, 83 Mass. App. Ct. 1134, 988 N.E.2d 471 [REDACTED]⁵ (citing [REDACTED] 80 Mass. App. Ct. at 777 and finding that assertions made by an attorney on behalf of client were insufficient to satisfy burden of proving by convincing evidence that the money was transferred for an exclusive purpose other than to qualify for Medicaid). Additionally, the appellant’s argument that the three-year gap between the date of the transfer and the time of the MassHealth application demonstrates that there was no intent to qualify for MassHealth is similarly unavailing without any other information about the appellant’s clinical state or anticipated need for public benefits at the time of the transfer.⁶ There is no convincing evidence in the record that the transfer of the appellant’s asset was made exclusively for a purpose other than to qualify for MassHealth.

Other arguments made by the appellant, such as the Trust is not a countable asset of the appellant’s or that the any circumstances test should apply, are not relevant because MassHealth did not determine that the Trust is the appellant’s countable asset. However, the property owned by the appellant was undisputably her asset until it was transferred to the Trust in [REDACTED].

This appeal is denied. The appellant will have to complete a new application in order to secure benefits following the expiration of the penalty period.

Order for MassHealth

⁵ Unpublished Memorandum and Order Pursuant to Rule 1:28, now Appeals Court Rule 23, included in this record as Exhibit 9.

⁶ The only information in the record about the appellant’s state of mind at the time of the transfer was that the appellant’s POA was concerned about Appellant’s susceptibility to financial manipulation.

None.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Cynthia Kopka
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

[REDACTED]

MassHealth Legal and/or General Counsel's Office – Sharon Boyle