COMMONWEALTH OF MASSACHUSETTS

Appeals Court

WORCESTER, ss. No. 2020-P-0043

EMILY MISIASZEK

v.

MARYLOU SUDDERS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT

BRIEF OF THE SECRETARY OF THE EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

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STATEMENT OF THE ISSUE

To determine financial eligibility for Medicaid long-term care benefits, 42 U.S.C. § 1396p(d)(3)(B)(1) provides in relevant part that, with respect to an irrevocable trust, "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which … payment to the individual could be made shall be considered resources available to the individual[.]" (Emphasis added.) The question presented is: where a Medicaid applicant has created an irrevocable trust and conveyed her assets into it, but reserved to herself personally the power to appoint part or all of those assets to a non-profit or charitable organization, and where many nursing facilities are non-profit organizations, are such assets counted under 42 U.S.C. § 1396p(d)(3)(B)(1) for the purposes of determining Medicaid eligibility on the ground that the applicant could use the assets for her own benefit, including to pay for her care in a non-profit nursing home?

STATEMENT OF THE CASE

I. Nature of the Case

This case involves Plaintiff-Appellee Emily Misiaszek's creation of a trust (the "Trust") designed to shield her assets from being counted in the Medicaid eligibility analysis. When she created this Trust, Misiaszek reserved to herself a power of appointment that empowers her to convey those same assets free of trust during her lifetime to a non-profit or charitable organization. This case concerns

the question whether, notwithstanding Misiaszek's conveyance of the assets into a self-settled irrevocable trust, they are nevertheless countable assets for Medicaid eligibility purposes on the ground that she could use those assets for her own benefit by appointing them to a non-profit nursing facility to pay for nursing facility care.

II. Procedural History

Misiaszek is an applicant for MassHealth long-term care benefits. On July 25, 2017, MassHealth found Misiaszek financially ineligible for Medicaid benefits, on the ground that she had assets in excess of the limit for financial eligibility. Specifically, MassHealth determined that the principal of the Trust that Misiaszek and her now-deceased husband had created in 2002, into which they had conveyed their home, was countable in the Medicaid eligibility analysis. RA:50.[1] Misiaszek appealed the denial to the Office of Medicaid Board of Hearings. ADD:60. On August 8, 2018, a Hearing Officer affirmed MassHealth's denial, holding that the assets in Misiaszek's Trust remained countable assets for the purposes of determining eligibility for MassHealth benefits because she could still access the assets in the Trust for her own benefit by exercising a power of appointment that

[1] "RA:" followed by a number refers to the pages of the Record Appendix. "ADD:" followed by a number refers to the pages of the Addendum to this brief.

she had reserved to herself in the Trust instrument that would permit her to appoint those same assets to a non-profit nursing facility to pay for her care. ADD:60-74.

On September 5, 2018, Misiaszek sought judicial review under G.L. c. 30A, § 14. RA:5. On July 19, 2019, upon consideration of cross-motions for judgment on the pleadings under Superior Court Standing Order 1-96, the Superior Court issued an order reversing the decision of the Board of Hearings and remanding the matter to MassHealth for the allowance of Misiaszek's application for long-term care benefits, and on July 25, 2019, the Superior Court entered judgment on the pleadings in accordance with its order. ADD:53-58; RA:7, 202. On September 20, 2019, MassHealth timely filed a notice of appeal.[2] RA:7, 207.

STATEMENT OF FACTS

I. Statutory and Regulatory Framework

The federal Medicaid Act, enacted in 1965, created a cooperative State and federal program to provide medical assistance to individuals who cannot afford to pay for their own medical costs. *Daley v. Sec'y of Exec. Office of Health & Human Servs*., 477 Mass. 188, 189 (2017); *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006). The stated purpose of the Medicaid

[2] This order is appealable by the agency under the longstanding "*Cliff House* exception" for orders final as to the agency itself. *See Commercial Wharf East Condo. Ass'n v. Dep't of Envir. Prot.*, 93 Mass. App. Ct. 425, 429-31 (2018) (discussing, *inter alia*, *Cliff House Nursing Home, Inc. v. Rate Setting Comm'n*, 378 Mass. 189 (1979)).

program is to provide medical assistance to those "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. Although State participation in Medicaid is voluntary, participating States must comply with certain requirements imposed by the Medicaid Act. *Daley*, 477 Mass. at 190. Massachusetts participates in Medicaid via its State Medicaid program known as MassHealth. *Id*. at 190; G.L. c. 118E, § 9.[3]

As the Supreme Judicial Court has recently explained, "Medicaid has become one of the largest programs in the Federal budget as well as a major expenditure for State governments, which must finance a significant portion of Medicaid benefits on their own." *Dale*y, 477 Mass. at 190 (citing data that Medicaid is the third largest domestic program in the federal budget, after Medicare and Social security; provides coverage to nearly 70 million low-income Americans; and, as of 2014, represented 23% of Massachusetts' state budget). Further, "the demand for Medicaid long-term care benefits, which cover nursing home care as well as other long-term care services, has grown steadily as a result of our country's aging population and the expense of paying privately for nursing

[3] Federal law expressly provides that states must "comply with the provisions of section 1396p of this title," 42 U.S.C. § 1396a(a)(18)—which include the very provisions at issue here concerning the treatment of trusts and disqualifying transfers, 42 U.S.C. § 1396p(c)-(d). By statute, the federal agency administering Medicaid can deny the Commonwealth some of its federal funding if it commits eligibility errors that exceed a specified threshold. 42 U.S.C. § 1396b(u).

homes or other long-term care." *Id*. at 191 (noting that Medicaid pays for the care of two-thirds of people in nursing homes in the United States).

Consistent with Medicaid's purpose to assist needy individuals, federal and State law require recipients to meet certain financial eligibility requirements. To qualify for Medicaid in Massachusetts, MassHealth requires that "[t]he total value of countable assets owned by or available to" an individual applicant not exceed $2,000. 130 Code Mass. Regs. § 520.003(A)(1); *Daley*, 477 Mass. at 191-92. 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 Code Mass. Regs. § 520.007; *see also* 42 U.S.C. § 1396p(h)(1)(A)-(C). One important exception, however, is that applicants may qualify for Medicaid even when they own a home. A home used as a primary residence is "exempt from consideration" in the eligibility analysis (unless the equity exceeds a certain ceiling) while the applicant, the applicant's spouse, or certain family members continue to live there. 130 Code Mass. Regs. § 520.008. In that situation, MassHealth provides benefits to the applicant, but then places a lien on the home and recovers the cost of those benefits from the value of the home at a later time when the specified family members are no longer living there. G.L. c. 118E, §§ 31 & 32; 130 Code Mass. Regs.

§ 515.012. The home loses this special status, however, if the applicant conveys it into a trust, in which case it is treated like any other trust asset. 130 Code Mass. Regs. § 520.008(A).

A. Statutory and Regulatory Framework for Evaluating Trusts in the Medicaid Eligibility Analysis

Because Medicaid is a program for poor people, individuals are expected to "'spend down' or otherwise deplete their resources" before obtaining assistance from Medicaid (except their homes, as explained above). *Daley*, 477 Mass. at 192; *Lebow v. Commissioner of the Div. of Med. Assistance*, 433 Mass. 171, 172 (2001). Nevertheless, "[t]he unfortunate reality is that some individuals with significant resources devise strategies to appear impoverished in order to qualify for Medicaid benefits." *Lebow*, 433 Mass. at 172; *accord Daley*, 477 Mass. at 192. One common strategy is for individuals "to transfer assets into an *inter vivos* trust, whereby funds appear to be out of the individual's control, yet generally are administered by a family member or loved one." *Lebow*, 433 Mass. at 172. The purpose of such Medicaid planning strategies is to enable people with assets that could be used to pay for their own care to become eligible for Medicaid by transferring those assets to children or other loved ones, thereby "shifting to the taxpayers the burden of paying for that care." *Daley*, 477 Mass. at 192; *see also Cohen v. Commissioner of the Div. of Med. Assistance*, 423 Mass. 399, 414 (1996) (describing such trusts as devices "concocted for the purpose of having your cake

and eating it too"). "As a report of the House of Representatives' committee on energy and commerce declared in 1985, 'When affluent individuals use Medicaid qualifying trusts and similar 'techniques' to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children.'" *Daley*, 477 Mass. at 192 (quoting H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1, at 72 (1985)); *Lebow,* 433 Mass. at 172 (same); *Cohen*, 423 Mass. at 404 (same).

To address this issue, Congress enacted two constraints on the ability to use trusts in such Medicaid planning strategies. *Daley*, 477 Mass. at 193. The first one (not at issue in this case) is the so-called "look-back" rule, which imposes a penalty for asset transfers for less than fair market value within a certain period prior to the Medicaid application, and renders the individual ineligible for Medicaid benefits for a period of time determined by the value of the assets transferred. 42 U.S.C. § 1396p(c)(1)(B)(i); *Dale*y, 477 Mass. at 193.

The second is the so-called "any circumstances" test. This test applies when an individual creates an irrevocable trust of which she is a beneficiary and funds it with her own assets (commonly termed a "self-settled" trust). 42 U.S.C. § 1396p(d)(1). The "any circumstances" test provides as follows:

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources

> available to the individual, and payments from that portion of the corpus or income—
>
> > (I) to or for the benefit of the individual, shall be considered income of the individual, and
> >
> > (II) for any other purpose, shall be considered a transfer of assets by the individual … .

42 U.S.C. § 1396p(d)(3)(B)(1). The corresponding Massachusetts regulation similarly provides that "[a]ny 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 of the individual is a countable asset." 130 Code Mass. Regs. § 520.023(C)(1)(a); *Daley*, 477 Mass. at 193 n. 7. The "any circumstances" test applies only to self-settled irrevocable trusts, like the one at issue here.[4] 42 U.S.C. § 1396p(d)(3)(B).

The effect of the "any circumstances" test is that if the trust allows payments from the trust corpus to or for the benefit of the applicant, "then the entire amount that the applicant could receive under 'any state of affairs' is the amount counted for Medicaid eligibility." *Daley*, 477 Mass. at 193 (citing *Cohen*, 423 Mass. at 413). Importantly, the relevant circumstances "need not have occurred, or even be

[4] In the case of revocable trusts, trust assets are always counted in the eligibility analysis. 42 U.S.C. § 1396p(d)(3); 130 Code Mass. Regs. § 520.023(B). In a revocable trust, the trust settlor can, by definition, retrieve her assets free of trust simply by revoking the trust.

imminent, in order for the principal to be treated as 'countable assets[.]'" *Heyn v. Director of the Office of Medicaid*, 89 Mass. App. Ct. 312, 315 (2016); *accord Lebow*, 433 Mass. at 177-78. The Supreme Judicial Court has illustrated this point with the following example, drawn from the *State Medicaid Manual* (published by the federal Health Care Financing Administration, now called the Centers for Medicare and Medicaid Services, which administers the Medicaid program): if a trust contains $50,000 in principal under which payment of principal may be made to the applicant only in the event that the applicant requires a heart transplant, the full $50,000 is counted in the eligibility analysis because it is a payment that could be made "under some circumstances, even though the likelihood of payment is remote." *Daley*, 477 Mass. at 193 n. 8 (quoting *State Medicaid Manual*, Health Care Financing Administration Pub. No. 45-3, Transmittal 64 § 3259.6E (Nov. 1994) (emphasis in original)).

B. *Daley* and Powers of Appointment

Daley, issued in 2017, is the Supreme Judicial Court's most recent decision applying the "any circumstances" test. In *Daley*, the Court considered the question whether trust assets were countable for Medicaid eligibility purposes where the applicants had conveyed their homes into self-settled trusts but retained the right to reside in and enjoy the use of the homes for the rest of their lives. *Daley*, 477 Mass. at 189. The Court determined that the value of the homes (the trust corpus)

was not countable because the right to use and occupy a home represents an interest in trust income, not trust corpus, and thus does not constitute a payment from the corpus so as to render the corpus countable in the eligibility analysis. *Id.* at 201-02. Instead, the right of use and occupancy constitutes a payment of income that affects how much the applicant is required to contribute to their care. *Id*.

At the end of the opinion, however, the Court identified "two other possible sources of countable assets" in the trust at issue in the companion case, *Nadeau v. Director of Office of Medicaid*, and remanded that case to MassHealth to evaluate. The first such possible source was a provision of the *Nadeau* trust (identical to the one at issue in this case) in which the applicant had reserved to himself a power to "appoint … all or any part of the trust property … to any one or more charitable or nonprofit organizations" over which he had no controlling interest. *Daley*, 477 Mass. at 203. The Court explained that, "[h]ad Nadeau received care at a nursing home operated by a nonprofit organization, he could have used the assets of the trust, including his home, to pay the nonprofit organization for his care," and concluded that, "[b]ecause approximately one-fourth of the nursing homes in Massachusetts are operated by nonprofit organizations, albeit not the nursing home where he received care, it is appropriate for MassHealth to consider whether this possibility fits within the 'any circumstances' test." *Id*. at 203.

Since *Daley* was decided, this possibility has been addressed in a number of cases on administrative appeal before the Office of Medicaid Board of Hearings, which have reached different conclusions.[5]

II. Factual Background

On December 12, 2002, Misiaszek and her now-deceased husband established the Trust at issue in this case. RA:59-69 (Trust instrument). By a deed of the same date, Misiaszek and her husband transferred into the Trust, for no consideration, their home located in Dudley, Massachusetts. ADD:61; RA:70-71. The trustee is Misiaszek's daughter. RA:59. From the time she formed the Trust up through the day she entered a nursing facility, Misiaszek continued to live in the home. ADD:61.

A. Terms of the Trust

The relevant terms of the Trust include the following. The Trust instrument recites the purpose of the Trust as "to manage my [sic] assets and to use them to

[5] *See*, *e.g.*, BOH Appeal No. 1810124 (Sept. 25, 2018) (trust principal countable), ADD:124-36, and BOH Appeal No. 1811536 (Feb. 13, 2019) (trust principal not countable), ADD:137-45. In the *Nadeau* case itself, the hearing officer concluded on remand after the *Daley* decision that the power of appointment did not render the trust assets countable, reasoning that "[t]here is no evidence that if the appellant were to move to a non-profit nursing facility, and if he were to appoint Trust principal to that charitable or non-profit organization that the non-profit nursing facility would be allowed to or required to use the Trust principal for the appellant's benefit or care. Accordingly, there is no clear path by which the appellant … may access Trust principal pursuant to this article." Remand Appeal Decision, Board of Hearings No. 1408634, ADD:159.

allow us to live in the community as long as possible." RA:59 (Art. 1.2). (For simplicity, when describing provisions of the Trust, this brief refers to Misiaszek and her husband collectively as "Misiaszek," because the Trust refers to both spouses together without distinction.) The Trust provides that it is irrevocable. RA:59 (Art. 1.3).

Payment of principal and income of the Trust are governed by Article 2. Article 2.1 provides for payments of income to Misiaszek, and for principal to be accumulated until termination of the trust, but with one important exception:

> If any property is placed in trust during our lives, our trustee may pay us or may pay on our behalf as much of the income of the trust as it shall determine in its sole and non-reviewable discretion to be necessary for our care and well-being. Any income not so paid may be accumulated and added to the principal. **Except as provided in paragraph 2.2 below, the principal shall be held until the termination of this trust.**

RA:59 (Art. 2.1) (boldface added). That exception, Article 2.2, reserves to Misiaszek, during her lifetime, the power to appoint principal to charitable or non-profit organizations over which she has no controlling interest, as follows:

> During our lifetime, we shall have the power to appoint from time to time, by an instrument in writing by ourselves or by our 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 we 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 sub-division, department, or agency thereof.

RA:59.

The Trust does not impose any fiduciary duties or constraints on Misiaszek's exercise of this power. Article 4.9, entitled "Limitations," imposes fiduciary duties and constraints on the *trustee*, but does not mention Misiaszek. These constraints include that "[n]o trustee shall exercise or participate in the exercise of any power of discretion (which would otherwise be a general power of appointment under section 2041(b)(1) of the Internal Revenue Code) in his or her favor as a beneficiary or in favor of his or her estate or creditors or creditors of the estate." RA:65.

In contrast, the Trust contains no such limitations with respect to Misiaszek's exercise of her power of appointment. The subject matter of powers of appointment is addressed in Article 5.4 (entitled "Power of appointment"), which contains only a single limitation on the exercise of the power, that the exercise refer specifically to this Trust instrument. The provision is otherwise expansive, providing as follows:

> Any power of appointment by will[6] granted under this agreement can be exercised only by specific reference to this agreement and the power to be exercised and shall include the right to appoint all or part of the property subject to the power, to appoint outright, to give to the appointee or appointees different types of interests and general or

[6] The reference to a power of appointment "by will" is confusing, since the power of appointment in this Trust is a lifetime power, not a testamentary power. RA:59. While this reference is not material to any of the issues in this case, it may be a scrivener's error, or it may be intended to refer to a situation where Misiaszek, during her lifetime, executes a will that exercises her power of appointment.

> limited powers of appointment, to appoint in trust and create separate trusts, to appoint a new trustee or trustees, and to give a trustee or trustees discretion to pay or apply income and principal within the class of permissible appointees.

RA:67.

Next, the distribution of assets is governed by Article 3. Article 3.1 provides that the Trust shall terminate upon the earlier of Misiaszek's death, or a determination by the Trustee that the Trust should be terminated. RA:60. Article 3.2 governs the disposition of Trust assets upon termination, providing that the remaining principal and undistributed income shall be paid to Misiaszek's children, as follows:

> Upon termination of this trust, our trustee shall: (a) Pay **the remaining principal** and undistributed income in equal shares to our children in equal shares with their issue to take by right of representation.[7]

RA:60 (boldface added). The remaining two provisions of Article 3 concern distributions if no beneficiary is living (Article 3.3), and payments to persons under 25 or unable to manage their affairs (Article 3.4), which are not at issue in this case. RA:60-61.

The Trust additionally gives Misiaszek the right to use and occupy any residence held in the Trust, as well as the right to reacquire the property by

[7] This quotation is the complete text of Article 3.2. The reference to a subsection "(a)" is likely a scrivener's error.

substituting property of an equivalent value. RA:60, 68. The Trust also empowers Misiaszek to remove any trustee, with or without cause, and to appoint any successor or additional trustees. RA:61.

B. Misiazek's Medicaid Application

On May 31, 2017, Misiaszek applied for MassHealth benefits after having been admitted to a nursing facility. RA:50. At the time she applied, the value of the real estate in the Trust exceeded the eligibility ceiling by $161,290. *Id.*

On July 25, 2017, MassHealth denied her application on the ground that the assets in the Trust exceeded the eligibility limit. *Id*. Misiaszek appealed to the Office of Medicaid Board of Hearings, which affirmed MassHealth's decision, relying on *Daley* to conclude that Trust principal was countable because Misiaszek could exercise her power of appointment to use Trust principal to pay for her care in a non-profit nursing facility. ADD:67-73. Misiaszek then appealed to the Superior Court, which reversed. ADD:53-58. It reasoned that the Hearing Officer's reliance on *Daley* was misplaced because *Daley* did not purport to decide the question it raised concerning the power of appointment. ADD:56-57. It further concluded that there was "no clear path by which the plaintiff, while complying with the Trust terms and applicable law, may access trust principal to her benefit," reasoning that the theorized appointment would violate the terms of the Trust that prohibit the transfer of principal for the benefit of the grantor, and that any attempt

to exercise a limited power of appointment in favor of an impermissible appointee (that is, for the benefit of Misiaszek) would be ineffective as a matter of law. ADD:57-58.

SUMMARY OF ARGUMENT

The Board of Hearings was correct to conclude that there exists a possible circumstance under the terms of this Trust by which, as the Supreme Judicial Court theorized in *Daley*, Misiaszek can access trust assets for her own benefit by appointing them to a non-profit nursing facility to pay for her care. This circumstance need not actually have occurred, or even be imminent, for it to render trust assets countable. An example of such a circumstance is that Misiaszek could enter a non-profit nursing facility and receive services, thereby incurring a debt to the facility, and then appoint Trust assets to the facility to pay the debt (pp. 24-27).

Nothing in the plain language of the Trust prohibits this scenario. The Superior Court erred when it concluded that this scenario would violate a term of the Trust prohibiting distributions of principal to Misiaszek, because this Trust contains no such term. Further, the Trust's express purpose evinces an intent to benefit Misiaszek, even at the expense of the children-beneficiaries (pp. 28-34).

Nor is there any clear statutory or common law principle that would foreclose this scenario. In the Superior Court, Misiaszek relied on G.L. c. 203E, § 808, which imposes certain fiduciary duties, but that statute only applies to

powers to direct the trustee, not powers of appointment, which are different (pp. 34-37). Misiaszek also relied on the *Restatement (Third) of Property (Wills & Donative Transfers)* (2011), which declares any attempt to exercise a limited power of appointment for the purpose of benefiting the holder of the power to be ineffective. That rule, however, does not foreclose the possibility that Misiaszek could use trust assets to pay for her care because the rule does not necessarily extend to self-settled trusts like this one, and, indeed, extending the rule to such trusts would not serve the rule's core purpose (pp. 37-45). Accordingly, the Superior Court erred in concluding that there is no circumstance in which Misiaszek can access principal for her benefit, and the decision of the Superior Court should be reversed.

ARGUMENT

The Principal of the Trust Is Countable Under the "Any Circumstances" Test Because Misiaszek Can Access It for Her Own Benefit by Appointing Trust Principal to a Non-Profit Nursing Facility to Pay for Her Care.

The Hearing Officer was correct that there exists a circumstance in which Misiaszek could access the principal of this Trust for her own benefit, by exercising the power of appointment to convey Trust principal to a non-profit nursing facility to pay for her care. Because there exists a circumstance in which payment from the principal of the Trust "could be made … for the benefit of the

individual," under the "any circumstances" test, 42 U.S.C. § 1396p(d)(3)(B)(i), the principal of the Trust is countable in the Medicaid eligibility analysis.

I. Standard of Review

Judicial review of agency decisions is governed by G.L. c. 30A, § 14, which provides that a court may reverse, remand or modify an agency decision where it is based upon an error of law, unsupported by substantial evidence, or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. G.L. c. 30A, § 14(7). The burden is on the party appealing the agency's decision to show the invalidity of the decision. *Bagley v. Contributory Ret. Appeal Bd*., 397 Mass. 255, 258 (1986). To the extent that an agency determination involves a question of law, it is subject to de novo judicial review. *Bulger v. Contributory Ret. Appeal Bd*., 447 Mass. 651, 657 (2006); *Megiel-Rollo v. Contributory Ret. Appeal Bd*., 81 Mass. App. Ct. 317, 320 (2012). The interpretation of a written trust is a matter of law to be resolved by the court. *Ferri v. Powell-Ferri*, 476 Mass. 651, 654 (2017); *Matter of MacMackin Nominee Realty Tr*., 95 Mass. App. Ct. 144, 150 (2019).

II. The Plain Language of the Trust Permits Misiaszek to Appoint Principal to a Non-Profit Nursing Facility to Pay for Her Care.

A. There is a Clear Path by Which Misiaszek May Access Trust Principal for Her Benefit.

Here the appointment of principal to a non-profit nursing facility constitutes a circumstance in which payment from principal "could be made … for the benefit

of the individual," thus rendering the Trust principal countable. 42 U.S.C. § 1396p(d)(3)(B)(i). While Misiaszek may contend (as the hearing officer reasoned on remand in *Nadeau*, ADD:159) that there is no clear path by which Misiaszek could use the power of appointment to access principal because nothing requires a nursing facility to use any appointed property for the benefit of Misiaszek, that reasoning misses the point because it does not preclude the circumstance at issue here. What matters under the "any circumstances" test is not whether the relevant circumstance is likely to occur, but whether it could occur. *Dale*y, 477 Mass. at 193 n. 8; *Heyn,* 89 Mass. App. Ct. at 315; *Lebow*, 433 Mass. at 177-78.

Here, there are plainly circumstances in which Misiaszek could convey the principal to a non-profit nursing facility to be used for her benefit. She could enter a nursing facility with an express promise to pay for her care through the power of appointment. Alternatively, she could enter a nursing facility and receive services on the understanding that her care would be paid for from some other source (such as a family member, or Medicare, which covers skilled nursing facility care in certain circumstances for up to 100 days, 42 U.S.C. § 1395d(a)(2), 42 C.F.R. § 409.20), thereby incurring a debt to the nursing facility, and then subsequently appoint trust principal to the nursing facility to pay the debt. From the nursing facility's perspective, this payment would be no different than any other payment it

received for services rendered, just as if Misiaszek had sent the facility a check on her personal bank account. This scenario is not even "contrived," as the Superior Court characterized it, ADD:57 (although "contrived" is not the correct analysis, *see Daley*, 477 Mass. at 193 n. 8; *Heyn*, 89 Mass. App. Ct. at 315; *Lebow*, 433 Mass. at 177-78). It is not uncommon for individuals to apply for MassHealth benefits at the time they enter a nursing facility and receive services in the interim while the application is under review by MassHealth and, if necessary, the Board of Hearings. *See* G.L. c. 118E, § 30 ("the division shall pay for eligible care and services furnished to an eligible applicant during the three months immediately prior to the month in which the applicant filed his or her application"); 42 U.S.C. § 1396a(a)(34). Indeed, this scenario appears to have occurred in this case.[8] Thus, it is entirely possible for a nursing facility to provide substantial services up front, in the expectation of receiving payment later.

[8] A search of the trial court's on-line docketing system reveals what appears to be a collection action filed on May 24, 2019 by Overlook Masonic Health Center, Inc. against Emily Misiaszek, as donor and/or beneficiary of the Trust. *Overlook Masonic Health Center, Inc. Doing Business as Overlook Masonic Health Center vs. Emily M. Misiaszek Also known as Emily Misiaszek, Donor and/or Beneficiary of the Theodore F. Misiaszek and Emily M. Misiaszek Irrevocable Trust u/d/t December 12, 2002 et al.*, Worcester Sup. Ct. No. 1985CV00767. That case is currently pending.

B. Nothing in the Plain Language of the Trust Prohibits Such an Exercise of the Power of Appointment.

By its plain language, the Trust permits Misiaszek to appoint the principal of the Trust to a nursing facility that is organized as a non-profit or charitable organization, and there is nothing in the Trust that prohibits her from doing so for the purpose of paying for her care in such a nursing facility. When interpreting trusts, "[i]t is fundamental that a trust instrument must be construed to give effect to the intention of the donor as ascertained from the language of the whole instrument considered in the light of circumstances known to the donor at the time of its execution." *Ferri*, 476 Mass. at 654 (quoting *Watson v. Baker*, 444 Mass. 487, 491 (2005)); *accord Heyn*, 89 Mass. App. Ct. at 315 ("In assessing whether the trust would allow distribution of principal to [the applicant] 'under any circumstances,' we construe its provisions in light of the trust instrument as a whole."). "The rules of construction of a contract apply similarly to trusts; where the language of a trust is clear, [courts] look only to that plain language." *Ferri*, 476 Mass. at 654. Here, the language of the Trust is clear: it explicitly gives Misiaszek the power, during her lifetime, to dispose of part or all of the trust principal by exercising her power of appointment to convey it to a non-profit or charitable organization over which she has no controlling interest, and contains no limitation on her power to do so. *Cf.* RA:65 (Trust Art. 4.9 limiting power of trustee to appoint property for trustee's own benefit).

Importantly, nothing in the Trust prohibits the use of principal for the benefit of Misiaszek. For this reason, the Superior Court erred when it concluded that "[a]n assignment by the plaintiff, pursuant to the limited power of appointment, as theorized by MassHealth, would constitute a violation of trust terms. … The trust prohibits any transfer of principal for the benefit of the grantor." ADD:57. To the contrary, the Trust contains no language barring transfers of principal to or for the benefit of Misiaszek. *See generally* RA:59-69. This Trust thus differs from many trusts that do prohibit distributions of principal to or for the benefit of the trust grantor. *See*, *e.g., Daley*, 477 Mass. at 197 (trust provided that "[t]he Trustee[s] shall have no authority or discretion to distribute principal of the Trust to or for the benefit of either Donor"); *Doherty v. Dir. of Office of Medicaid*, 74 Mass. App. Ct. 439, 440 (2009) (trust provided that "under no conditions were the successor trustees to 'make ... distributions of principal from the Trust, to [Muriel] or on behalf of [Muriel].'"); *Heyn*, 89 Mass. App. Ct. at 315 n. 8 (trust provided that trustee was authorized to distribute part or all of the principal "to any persons (other than the Grantor) otherwise entitled to the assets of this Trust after the death of the Grantor").

Instead, this Trust provides that the Trustee is authorized to pay income to Misiaszek, and that the principal shall be held until termination of the Trust unless Misiaszek exercises her power of appointment over the principal. RA:59. As a

result of this provision, Misiaszek's children (the "children-beneficiaries") have no definite expectation of receiving the principal at any time. This is made clear by the plain language of Article 2.1, which directs principal to be held until termination of the trust "[e]xcept as provided in paragraph 2.2. below" (the paragraph creating the power of appointment), and Article 3.2, which provides that the children-beneficiaries will receive only "the *remaining* principal." RA:59-60 (emphasis added). Thus, the intent of the Trust is clear that what the children-beneficiaries have is only an expectancy of receiving principal upon termination of the Trust that is entirely contingent on Misiaszek refraining from exercising her power of appointment during her lifetime. *See Pfannenstiehl v. Pfannenstiehl*, 475 Mass. 105, 115 (2016) (beneficiary's interest in discretionary trust was mere expectancy where, among other things, his beneficial interest was subject to reduction by discretionary distributions of principal to ten other beneficiaries).

Further, while the appointment may only be made to non-profit and charitable organizations, the Trust does not purport to limit the purposes for which the appointment could be made, or the uses to which the appointed property could be put. It does not provide that the appointment must be for charitable purposes.

This conclusion is corroborated by the express purpose of the Trust, which evidences a clear intent to benefit Misiaszek, even at the expense of the children-beneficiaries, where it provides that "the purpose of this trust is to manage my

assets and to use them to allow me to live in the community as long as possible." RA:59 (emphasis added). Thus, nothing in the Trust indicates any intention to prevent Misiaszek from exercising her power to appoint to a non-profit as she sees fit, unconstrained by any obligation to preserve the principal for the benefit of her children.

This case is closely analogous to a recent decision by the Supreme Court of New Hampshire, which held a trust countable for Medicaid eligibility purposes based on a power of appointment. *Petition of Estate of Thea Braiterman*, 169 N.H. 217, 145 A.3d 682 (2016). As in this case, that case involved a self-settled trust into which the applicant had conveyed her home. Also as in this case, the trust instrument authorized payments of income to the applicant but did not explicitly prohibit distributions of principal for her benefit.[9] And also as in this case, the applicant had reserved to herself a limited power of appointment over principal—

[9] More specifically, the trust instrument contained a term prohibiting distributions of principal in a manner that would benefit the *trustee*, but after the applicant resigned as trustee, this provision no longer applied to her. *Braiterman*, 169 N.H. at 228, 145 A.3d at 691. The trust instrument provided that, "[n]otwithstanding any other provisions of this instrument except as specifically set forth herein, the discretionary power of the Trustee ... to distribute principal or income or to determine the size of any such distribution shall not be exercised or exercisable by any Trustee in a manner that will benefit the Trustee personally or anyone whom the Trustee has a legal obligation to support." *Id.*, 169 N.H. at 221, 145 A.3d at 685.

in that case, a power to appoint principal, outright or upon conditions, to any one or more of the trust "Legatees," who were her three children.[10] The New Hampshire Supreme Court concluded that the trust principal was countable under the "any circumstances" test because the applicant retained the power to "to make a distribution to a legatee conditioned upon that legatee using the distribution for the applicant's benefit." *Braiterman*, 169 N.H. at 229, 145 A.3d at 692. It concluded that nothing in the trust limited the applicant's ability to impose conditions on her appointment of principal to any one or more of the legatees, and further found that the trust evinced a general intent that trust assets be used to benefit the applicant. *Id.,* 169 N.H. at 229-30, 145 A.3d at 692-93.[11]

The Trust in this case provides an even clearer direct path for the use of principal to benefit Misiaszek than did the Trust in *Braiterman*, because here Misiaszek could appoint Trust assets directly to a non-profit nursing facility for her

[10] Specifically, the trust instrument gave the donor-applicant "the power, exercisable at any time ..., to appoint any part or all of the principal of the Trust Fund, outright or upon trusts, conditions or limitations, to any one or more of the Legatees," including "the power to make lifetime gifts." *Braiterman*, 169 N.H. at 220, 145 A.3d at 685.

[11] Clause 4.1.1 of the trust suggested, without requiring, that if the trust were determined to prevent her from being eligible for medical benefits, that it would be terminated and the assets distributed to the legatees, in the hope that they would use a portion of the gift to supplement her income. *Braiterman*, 169 N.H. at 220, 145 A.3d at 685.

care and would not need to rely on the act of an intermediary (such as the child-beneficiaries) to use the property for her benefit. This circumstance also distinguishes this Trust from the trust at issue in *Heyn*, which contained a limited power of appointment over trust principal to the applicant's "issue." *Heyn*, 89 Mass. App. Ct. at 315. On administrative review, the hearing officer found the trust countable on the ground (among others) that the applicant could appoint principal to one of her children, who could in turn convey it to her. *Heyn*, 89 Mass. App. Ct. at 318. The Appeals Court disagreed on the ground that this theorized circumstance relied on voluntary action by a third-party intermediary.[12] It reasoned that "a provision making trust principal available to persons other than the grantor does not by its nature make it available to the grantor, any more than if the grantor had gifted the same property to such a person when she created the trust, rather than placing it in trust," and that "Medicaid does not consider assets held by other family members who might, by reason of love but without legal obligation, voluntarily contribute monies toward the grantor's support." *Heyn*, 89

[12] *Heyn*'s discussion of this issue is arguably dictum on an issue not raised by either party. The court itself characterized its discussion as a "brief comment" on the hearing officer's theory, acknowledging that the Superior Court had not reached the issue and MassHealth had not raised it on appeal. *Heyn*, 89 Mass. App. Ct. at 318.

Mass. App. Ct. at 318-19.[13] Here, in contrast, Misiaszek's use of the power of appointment does not need to rely on the use of an intermediary whose presence defeated any clear path to the applicant in *Heyn*; here Misiaszek can exercise the power herself to pay the nursing facility directly.

C. There is No Clear Legal Bar Preventing Misiaszek from Appointing Principal to a Non-Profit Nursing Facility to Pay for Her Care.

Next, Misiaszek relies on provisions of the Massachusetts Uniform Trust Code and common law trust principles to contend that Misiaszek could not exercise her power of appointment to pay for her own care, because that result would be barred by statutory and common law principles of trust law. But state law principles do not necessarily control the federal law analysis of Medicaid eligibility. *See Needham v. Director of the Office of Medicaid*, 88 Mass. App. Ct. 558, 563 (2015) ("The issue before us is not whether the trust was reformed as a matter of State law. The issue is whether MassHealth is required to recognize a reformation as a matter of Federal law when determining whether there has been a disqualifying transfer. The answer to that question in this case is no."). In any

[13] While not critical to the resolution of this case, *Braiterman* is not inconsistent with *Heyn*. *Braiterman* distinguished *Heyn* because the *Braiterman* trust gave the applicant certain coercive powers over the legatees that the applicant could use to compel them to use principal for her benefit, even if they were not legally obligated to do so. *Braiterman*, 169 N.H. at 230, 145 A.3d at 692-93.

event, as explained in more detail below, the statute relied on by Misiaszek does not apply to powers of appointment, and the common law trust principles she identifies may not extend to self-settled trusts.

1. G.L. c. 203E, § 808(c) Concerns Powers to Direct a Trustee, Not Powers of Appointment.

First, Misiaszek relies on § 808(c) of the Massachusetts Uniform Trust Code, G.L. c. 203E, § 808(c), contending that this section imposes a fiduciary duty on the exercise of a power of appointment. Section 808 provides in full as follows:

> Powers to direct
>
> (a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.
>
> (b) If the terms of a trust confer upon a person, other than the settlor of a revocable trust, **power to direct certain actions of the trustee**, the trustee shall act in accordance with an exercise of the power, unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.
>
> (c) A person who holds a **power to direct** is presumptively a fiduciary who is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct shall be liable for any loss that results from a breach of a fiduciary duty.

G.L. c. 203E, § 808 (boldface added). This section, however, only applies to a power to direct the actions of a trustee, not a power to appoint trust property. A power to direct is a power conferred by the trust instrument on an individual who is

not the trustee (sometimes called the "trust director," "trust protector," "trust advisor," or other similar terms) to direct the action of the trustee. George Gleason Bogert et al., *Bogert's The Law of Trusts and Trustees* § 138 (June 2019 update) (describing power to direct as one in which "the settlor grants at least one power of trust administration to a person other than the trustee"). While historically, trustees were required to carry out all of their duties personally, trusts employing powers of direction have become increasingly popular because "a directed trust creates the flexibility to designate the most qualified person to carry out each task required for proper trust administration." *Id*. Powers to direct may include a wide variety of powers, such as "the power to direct the trustee in acts of investments, distributions, and borrowing and lending money," or even "the power to remove and replace the directed trustee or amend the trust instrument." *Id*. The power at issue in this case, however, is not a power to direct; it is a power of appointment. This is clear from the plain language of the trust instrument, which authorizes Misiaszek *herself* to make the appointment.[14] *See* Art. 2.2 at RA:59 ("[W]e shall

[14] The distinction between powers of appointment and powers to direct governed by G.L. c. 203E, § 808 is corroborated by the Uniform Law Commission, which, in 2018 (subsequent to Massachusetts' adoption of the Uniform Trust Code in 2012) decided to repeal the cognate § 808 of the Uniform Trust Code, which is identical to Massachusetts' version of that section in all respects except one not relevant to this case, and replace it with an entirely separate uniform act explicitly governing powers to direct, called the Uniform Directed Trust Act (UDTA). *See* Uniform Trust Code (2020) Legislative Note & 2018 Amendment to repealed § 808,

have the power to appoint from time to time, by an instrument in writing by ourselves or by our legal representative … ").

2. Common Law Trust Principles Do Not Foreclose the Possibility That Misiaszek Could Appoint Trust Principal to a Non-Profit Nursing Facility to Pay for Her Care.

Next, Misiaszek points to provisions of the *Restatement (Third) of Property (Wills & Donative Transfers)* (2011) ("*Restatement (Third)*") for the proposition that a limited power of appointment is exercisable only in favor of the appointees specified by the power,[15] and that any attempt to exercise the power for the benefit

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ADD:180-82; *Bogert*, § 138; *see also* UDTA § 9 Legislative Note, ADD:190 (instructing states adopting the UDTA that have previously adopted the Uniform Trust Code to delete all of § 808 except § 808(a) and to move that section into the UDTA). The UDTA draws an explicit distinction between powers to direct and powers of appointment, where it excludes powers of appointment from its scope. UDTA § 5(b) (2017), ADD:184 ("This [act] does not apply to a: (1) power of appointment;"). It also makes clear that powers of appointment, unlike powers to direct, are non-fiduciary in nature, defining a power of appointment as "a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property." UDTA § 5(a), ADD:184. This decision of the Uniform Law Commission thus confirms what is indicated by the plain language of § 808 of both the Uniform Trust Code and Massachusetts' Uniform Trust Code: that that section concerns powers to direct, not powers of appointment.

[15] The term "limited" (or "special") power of appointment refers to a power where the class of persons to whom the appointment can be made is limited and does not include the holder, in contrast to a "general" power of appointment, where the appointment can be made to anyone including the holder of the power herself. *See*, *e.g.*, *Pitman v. Pitman*, 314 Mass. 465, 474-75 (1943) (a power to appoint to "issue" was a "special" power of appointment). The *Restatement (Third)* uses the term "nongeneral." *Restatement (Third) of Property (Wills & Donative Transfers)*

any other individual (including the holder of the power herself) would be ineffective. ADD:63. *The Restatement (Third)* provides in pertinent part as follows:

> An appointment to a permissible appointee is ineffective to the extent that it was (i) conditioned on the appointee conferring a benefit on an impermissible appointee, (ii) subject to a charge in favor of an impermissible appointee, (iii) upon a trust for the benefit of an impermissible appointee, (iv) in consideration of a benefit conferred upon or promised to an impermissible appointee, (v) primarily for the benefit of the appointee's creditor, if that creditor is an impermissible appointee, or (vi) motivated in any other way to be for the benefit of an impermissible appointee.

Restatement (Third) § 19.16, ADD:173.

However, research has not revealed any Massachusetts authority applying this proposition in the Medicaid eligibility analysis—especially not in a case where doing so would foreclose Medicaid consideration of a circumstance that is clearly authorized by the plain language of the Trust. And State trust law principles are not necessarily controlling in the federal Medicaid eligibility analysis. *See Needham*, 88 Mass. App. Ct. at 563.

Further, it is questionable whether Massachusetts courts would follow the *Restatement* on this point with respect to self-settled trusts, even outside the

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§ 19.15, Cmt. (c) ("The donee of a nongeneral power can make a valid appointment only to a permissible appointee (an object of the power).").

Medicaid context. Research has revealed only one Massachusetts case that follows the *Restatement* on this point, *Pitman v. Pitman*, 314 Mass. 465, 477 (1943) (citing *Restatement (First) of Property* § 353 (1940), ADD:161-64).[16] But that case involved a trust created by a third party, and the rationale underlying both *Pitman* and the *Restatement*—protecting the intent of the trust settlor—does not have any clear application to a self-settled trust. *Pitman* involved a decedent who attempted to exercise a testamentary power of appointment that was conferred on him by his mother in her will. Pitman's mother's will had created trusts that provided for payment of income to Pitman for life and that gave him a power to appoint principal to the issue of his mother's mother through his own will.[17] In the course

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[16] Although *Pitman* cites the then-current *Restatement (First) of Property* § 353 (1940), *see Pitman*, 314 Mass. at 477, the *Restatement (Third)* § 19.16, relied on by Misiaszek, is substantially consistent with the *Restatement (First)* § 353. *Restatement (Third)* § 19.16, Reporter's Note, ADD:179. The provision of the *Restatement (First)* cited in *Pitman* provides as follows:

> If the donee of a special power makes an appointment to an object of the power in consideration of a benefit conferred upon or promised to a non-object, the appointment is ineffective to whatever extent it was motivated by the purpose to benefit the non-object, except as stated in § 355 (fiduciaries and purchasers without notice).

Restatement (First) of Property § 353 (1940), ADD:179.

[17] Specifically, Pitman's mother's will gave Pitman a power to appoint principal "to and among such one or more of the then living issue of my deceased mother, Maria Theresa Hollander [Pitman's mother's mother], in such shares, for such estates, and on such conditions as may be permitted by the laws of the Commonwealth of Massachusetts, as he shall appoint by his last will duly admitted

of a divorce proceeding, Pitman entered into an agreement with his wife discharging his alimony obligations to her by (among other things) agreeing to execute a will exercising the power of appointment in favor of their two daughters, which he subsequently did. *Pitman*, 314 Mass. at 467-68. After his death, his will was challenged on the ground that his exercise of his limited power of appointment was "in fraud of the power." *Id.* at 475. On review, the Supreme Judicial Court invalidated his attempted exercise, holding that the same motives that prompted his execution of the alimony agreement with his wife also caused his exercise of the power in his will. It explained as follows:

> The exercise of the power was not a thing of barter or bargain, and there is a fraudulent exercise of a power not only where the donee acts corruptly for a pecuniary gain but where he acts primarily for his own personal advantage or that of a third person who is a non-object of the power and thereby abuses the power which the donor conferred on him.

Id. at 476-77. The court reasoned that Pitman's purpose in exercising the power of appointment—to discharge his alimony obligations—was inconsistent with the purpose for which his mother had created the power, which was to benefit the issue of her mother. It explained that "the execution of the power did not result from any sound discretionary action upon the part of the donee [that is, Pitman] in

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to probate." *Pitman*, 314 Mass. at 467. In default of appointment the trust funds were to be divided equally between Pitman's living children and the issue of his deceased children. *Id.*

selecting the objects as their needs and necessities should honestly appeal to him, but that he exercised the power to facilitate the granting of a divorce, *a purpose which was entirely alien to that for which the power was created*." *Id*. at 477 (emphasis added). In a similar vein, the Court also invalidated the alimony agreement between Pitman and his wife in which he had agreed to exercise the power in favor of his daughters. *Id*. at 476. The Court again focused on the intent of the donor of the power, Pitman's mother, explaining that, by entering into a contract during his lifetime that committed him in advance to exercise his testamentary power of appointment in a certain way, he contravened his mother's intent that his discretion in his exercise of the power "should remain free and untrammeled up to the time of death." *Id*. at 476.

The rationale of *Pitman* does not have any clear application to a self-settled trust like the one at issue in this case, where the donor of the power (that is, the settlor of the trust) and the donee of the power (that is, the person who exercises the power) are one and the same person. The rationale for the rule of *Pitman* is to protect the will of the donor by preventing the donee from exercising it for a purpose different than what the donor intended. *Pitman*, 314 Mass. at 477. Section 353 of the *Restatement (First) of Property*, which *Pitman* cites, states this rationale explicitly: "[w]here an appointment is made to an object in consideration of a benefit conferred upon or promised to a non-object an element is injected into

the motivation of the exercise of the power which is foreign to the intent of the donor in creating the power for the benefit of the objects." *Restatement (First) of Property* § 353 Cmt. (a) ("Rationale"), ADD:162.[18]

This rationale has no application to a self-settled trust like this one. Where the donor and the donee are the same person, there is no need to protect the donor-donee from her own actions. In an earlier Medicaid case, the Supreme Judicial Court recognized that self-settled spendthrift trusts (like this one) are very different from trusts created by third parties, describing self-settled spendthrift trusts as devices "concocted for the purpose of having your cake and eating it too," in which the trust settlor conveys his or her own property into a trust "hop[ing] to put the trust assets beyond the reach of his or her creditors." *Cohen*, 423 Mass. at 414; *see also id*. at 403 (noting that "[t]he parties have not cited any case in any jurisdiction that has applied [the applicant's] reasoning to a trust in which the grantor or settlor is also the beneficiary, a so-called self-settled trust"). Thus, the Medicaid statute distinguishes between self-settled trusts and trusts created by third parties, applying

[18] This rationale is even more explicit in the *Restatement (Second) of Property*: "If the donee of a power is motivated, in making an appointment to an object, to circumvent the donor's intention of limiting the appointment to specified objects, the donee has injected an element into the decision to exercise the power that is foreign to the intent of the donor in creating the power for the benefit of the objects. Therefore, to whatever extent the appointment to the object is induced by such motive, it is ineffective." *Restatement (Second) of Property* § 20.2 (1986), ADD:165.

the "any circumstances" only to self-settled trusts but not others. 42 U.S.C. § 1396p(d)(1) ("the rules specified in paragraph (3) shall apply to a trust established by such individual."). Similarly, spendthrift clauses are ineffective in the case of self-settled trusts, but not those created by third parties. *Calhoun v. Rawlins*, 93 Mass. App. Ct. 458, 462, *rev. denied sub nom*. *Shonna Calhoun v. Rawlins*, 480 Mass. 1110 (2018) ("When faced with the question whether creditors may reach the assets of spendthrift trusts, our cases distinguish between spendthrift trusts that are created by third parties, such as parents, and spendthrift trusts that are self-settled by an individual who is both settlor and beneficiary.").

For the purposes of this case, the two types of trusts differ with respect to the relevant intent. "In interpreting a trust, the intent of the settlor is paramount." *Morse v. Kraft*, 466 Mass. 92, 98 (2013); *accord Ferri*, 476 Mass. at 654. In this self-settled trust, the person who exercises the power of appointment is the settlor. So if she exercises a power that *she created for herself*, and does so in accordance with the plain language of the instrument by which she created that power, her exercise does not present the same concern to protect the intent of a third-party settlor that caused the Court to invalidate the exercise in *Pitman*. 314 Mass. at 477.

This distinction is illustrated by a New York statute in the analogous context of a rule prohibiting holders of testamentary powers of appointment from entering

into contracts during their lifetime binding their exercise of their power (as the decedent in *Pitman* attempted to do). New York has prohibited such contracts by statute. *N.Y. Est. Powers & Trusts Law* § 10-5.3, ADD:121. In 1973, the New York Court of Appeals was presented with a case involving both a self-settled trust and a trust created by a third party. While the majority held that the plain language of the statute on its face applied to both kinds of trusts, a vigorous dissent argued that self-settled trusts should be exempt from the statute because the rationale for the statute did not apply to self-settled trusts, explaining that the statute was enacted "to protect the interests of the settlor-donor. So, where the settlor-donor and donee are the same, the statute should have no application." *In re Brown's Estate*, 33 N.Y.2d 211, 220, 306 N.E.2d 781, 786, 351 N.Y.S.2d 655, 662 (1973) (Gabrielli, J., dissenting). The New York legislature "agreed with the *Brown* dissent's position that this statute was intended to protect the donor's wishes," and amended the statute to exempt self-settled trusts, because protecting the interests of the donor is "obviously not a concern when the donor *is* the donee." *N.Y. Est. Powers & Trusts Law* § 10-5.3 & *Practice Commentary* (McKinney), ADD:122 (explaining legislative history and purpose of amendment exempting self-settled trusts) (emphasis in original).

This same distinction applies to the holding of *Pitman*: where the rationale of *Pitman* is to protect the intent of a third-party donor from being thwarted by the

donee, that rationale has no application where the donor *is* the donee. Indeed, nothing in the Trust agreement indicates that Misiaszek, as settlor, ever intended to prevent herself from exercising the power for her own benefit. The Trust does not limit the appointment to charitable purposes alone. To the contrary, the stated purpose of the Trust reveals an affirmative intention to benefit Misiaszek, and says nothing about benefiting the children-beneficiaries. RA:59 (Art. 1.2). *See Braiterman*, 169 N.H. at 228, 145 A.3d at 691 (finding significant that trust evinced purpose to benefit applicant). In short, using the power of appointment to pay for nursing facility care—which would benefit the nursing home as well as Misiaszek—does not contravene any intent discernible in this Trust. Thus, *Pitman* does not clearly foreclose the possibility raised in *Daley*, and as a result, this possibility provides a potential path for Misiaszek to use Trust principal for her own benefit. Because such a circumstance could therefore potentially occur—it is not barred by *Pitman* or the trust-law principles invoked by Misiaszek—the principal of the Trust is countable in the Medicaid eligibility analysis under the "any circumstances" test of 42 U.S.C. § 1396p(d)(3)(B)(i), and the judgment of the Superior Court should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed.

Respectfully submitted,

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Date: July 1, 2020

CERTIFICATE OF COMPLIANCE

I, Julie E. Green, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 10,065 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word (version: Word 2016).

/s/ Julie E. Green
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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2020, I filed with the Appeals Court and served the attached Brief of Appellant Marylou Sudders in her capacity as Secretary of the Executive Office of Health and Human Services, in *Misiaszek v. Sudders*, No. 2020-P-0043, through e-mail on the following:

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT

C.A. NO. 1885CV1370C

EMILY MISIASZEK,

Plaintiff

Vs.

MARYLOU SUDDERS,
SECRETARY OF THE
EXECUTIVE OFFICE OF HEALTH
AND HUMAN SERVICES,
Defendant

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MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

The plaintiff seeks review, pursuant to G.L. c. 30A, § 14, of a decision issued by the MassHealth Board of Hearings ("the Board") affirming a denial of MassHealth long-term care benefits to her.[1] The Board found the plaintiff's assets, previously transferred to an irrevocable trust, remained countable assets for the purposes of determining her eligibility for benefits because there were circumstances under which the plaintiff could potentially benefit from the

[1] MassHealth is a cooperative federal and state program through which Massachusetts administers Medicaid benefits. Shelales v. Direc. Of the Office of Medicaid, 75 Mass. App. Ct. 636, 637 (2009)

trust assets. After hearing and consideration of the submissions by both parties, the plaintiff's motion for judgment on the pleadings is **ALLOWED**.

FACTUAL BACKGROUND

The plaintiff Emily Misiaszek is an elderly widow. She is a permanent resident of Overlook Masonic Nursing Home, a nursing facility, based upon her age, health, and overall physical condition. She applied for MassHealth long-term care benefits to pay for the cost of her nursing home care, seeking a benefit eligibility start date of May 5, 2017.

On December 12, 2002 the plaintiff and her late husband established The Theodore F. Misiaszek and Emily M. Misiaszek Irrevocable Trust ("the trust") as Grantors. The plaintiff's daughter Patricia Fournier was named Trustee, and continues to serve in that capacity. On the same date the trust was created, Mr. and Mrs. Misiaszek deeded property in Dudley, MA into the trust for no consideration. The property transferred was the couple's primary residence, where the plaintiff continued to reside until she entered the skilled nursing facility.

The trust is irrevocable. It permits payment of income only to the Grantors, at the sole and exclusive discretion of the Trustee. Any income not dispersed to the Grantors becomes principal that cannot be distributed to or for the benefit of the Grantors. The trust will terminate upon the death of the last surviving Grantor.

Under Article 2.2, the plaintiff has a limited power to appoint trust property, during her lifetime, to charitable and non-profit organizations over which she has no controlling interest. This limited power of appointment is the basis upon which the plaintiff was determined to be ineligible for MassHealth long-term care benefits. The Board held that there could be circumstances where, pursuant to the limited power of appointment, the plaintiff could benefit

from a transfer of assets to a charitable or non-profit organization. Specifically, the Board hypothesized a situation where the plaintiff moved into a non-profit nursing facility, transferred assets to the facility pursuant to her limited power of appointment, and the facility then used the transferred assets to pay for services to the plaintiff. The trust principal was therefore found to be a countable asset, rendering the plaintiff ineligible for benefits.

STANDARD OF REVIEW

Pursuant to G.L. c. 30A, § 14(7), this court may reverse, remand, or modify an agency decision if "the substantial rights of any party may have been prejudiced" because the agency decision is based on an error of law or on unlawful procedure, arbitrary and capricious, or unwarranted by facts found by the agency and supported by substantial evidence. Mr. Costa bears the burden of demonstrating the invalidity of the Board's decision. Merisme v. Board of Appeal on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989). In reviewing an agency decision, the Court is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it" by statute. G.L. 30A, § 14(7) (1997); Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992); Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988). The reviewing court may not substitute its judgment for that of the agency. Southern Worcester County Regional Vocational Sch. v. Labor Relations Comm'n, 386 Mass. 414, 420-21 (1982), citing Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n, 372 Mass. 152, 154 (1977). Nor may a court reject an administrative agency's choice between two conflicting views, even though the court justifiably would have made a different choice had the matter been presented de novo. Zoning Bd. of Appeals v. Housing Appeals Comm'n, 385 Mass. 651, 657 (1982) (citations omitted

DECISION

The sole obstacle to plaintiff's eligibility for MassHealth long-term care benefits is the language of the trust, at Article 2.2, permitting the plaintiff as Grantor to transfer principal to a charitable or non-profit organization. The Board found that this article of the trust could result in circumstances where trust principal could be paid for the benefit of the Grantor, if transfer was made to a non-profit nursing home where she resided and the transferred funds were used to pay for services received by her. To be eligible for MassHealth long-term care benefits the applicant cannot have countable assets in excess of $2,000.00. *See* 130 C.M.R. 520.003(A)(1) Inclusion of the principal of the trust in calculating plaintiff's countable assets rendered her ineligible for the benefits sought.

"Under the post-1993 version of (42 U.S.C. § 1396p(d)(3)(B)), for purposes of determining eligibility for Medicaid benefits, 'countable assets' include any portion of the trust principal that could under any circumstances be paid to or for the benefit of (the applicant). 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) under any circumstances." Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312, 315 (2016) (citations omitted)

In reaching its decision the Board relied heavily, if not exclusively, on the matter of Daley v. Secretary of Executive Office of Health and Human Services, 477 Mass. 188 (2017). The Board described the holding in Daley as "clear" where the court stated, as to the limited power of appointment and the posited exercise of it, "it is appropriate for MassHealth to consider whether this possibility fits within the 'any circumstances' test." Id. at p. 203 The court made no findings or decision as to the limited power of appointment in the Nadeau trust, discussed in

Daley, but simply found it "appropriate" for MassHealth to consider the proposed fact pattern. The court raised a question but provided no answer, deferring to MassHealth. Upon remand, MassHealth denied the application for long-term care benefits again, this time based upon the contrived scenario proposed by the court, whereby the grantor would move to a non-profit nursing facility and then assign trust principal to that nursing home, pursuant to the limited power of appointment, so that the assigned assets could be used for his benefit. The grantor appealed to the Board of Hearings, and the denial was reversed. The opining hearing officer found "no evidence that if the appellant were to move to a non-profit organization that the non-profit nursing facility would be allowed to or required to use the Trust principal for the appellant's benefit or care." He found "no clear path by which the appellant, in complying with Trust terms and applicable law, may access Trust principal pursuant to this Article." *See* Office of Medicaid Board of Hearings Appeal No. 1408634-remand, p. 13 (March 5, 2018)

There is no substantive difference between Article 2.2 of the plaintiff's trust and the article considered in the Daley/Nadeau matter. Just like the Nadeau trust, the plaintiff's trust establishes no clear path by which the plaintiff, while complying with the Trust terms and applicable law, may access trust principle to her benefit. An assignment by the plaintiff, pursuant to the limited power of appointment, as theorized by MassHealth, would constitute a violation of trust terms. "It is fundamental that a trust instrument must be construed to give effect to the intention of the donor as ascertained from the language of the whole instrument considered in the light of circumstances known to the donor at the time of its execution." Powers v. Wilkinson, 399 Mass. 650, 653 (1987) (citation omitted) The trust prohibits any transfer of principal for the benefit of the grantor. A limited power of appointment is exercisable only in favor of permissible appointees, and any attempt to exercise a limited power in favor of an

impermissible appointee, i.e. to use principal for the personal benefit of the grantor, is therefore invalid. *See* Restatement (Third) of Property (Wills & Don. Trans.) §§ 17.2, 19.15-19.16 (2011) "An appointment to a permissible appointee is ineffective to the extent that it was (i) conditioned on the appointee conferring a benefit on the impermissible appointee, (ii) subject to a charge in favor of an impermissible appointee, (iii) upon a trust for the benefit of an impermissible appointee, (iv) in consideration of a benefit conferred upon or promised to an impermissible appointee, (v) primarily for the benefit of the appointee's creditor, if that creditor is an impermissible appointee, or (vi) motivated in any other way to be for the benefit of an impermissible appointee. Id. at §19.16 A transfer as hypothesized by the Board in support of its denial of benefits to the plaintiff would be ineffective, and thus does not constitute circumstances under which payment from the trust could be made to or for the benefit of the plaintiff.

ORDER

For the foregoing reasons and those advanced by the plaintiff, the plaintiff's motion for judgment on the pleadings is **ALLOWED**. The decision of the Board is reversed, and this matter is remanded to MassHealth for the allowance of the plaintiff's application for MassHealth long-term care benefits, consistent with this decision.

Date: July 19, 2019

Susan E. Sullivan
Associate Justice of the Superior Court

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Copies mailed 7/25/19

Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

Emily Misiaszek
15 Progress Avenue
Dudley, MA 01571

Appeal Decision:	DENIED	**Appeal Number:**	1714886
Decision Date:	AUG - 8 2018	**Hearing Date:**	11/10/2017
Hearing Officer:	Kenneth Brodzinski	**Record Open to:**	01/12/2018

Appellant Representative:

Attorney David Dupont with Patricia Fournier and Mary Kolodziejcza

MassHealth Representative:

Kathleen Racine and Attorney Charles Sheehan

APPEAL DECISION

Appeal Decision:	Denied	**Issue:**	LTC Eligibility - Trust
Decision Date:	AUG - 8 2018	**Hearing Date:**	11/10/2017
MassHealth Rep.:	Kathleen Racine, Atty. Charles Sheehan	**Appellant Rep.:**	Attorney David Dupont
Hearing Location:	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 July 25, 2017, MassHealth denied Appellant's application for MassHealth Long-Term Care Benefits because MassHealth determined that assets held in a trust are countable and exceed MassHealth eligibility limits (Exhibit A). Appellant filed this appeal in a timely manner on August 14, 2107 (see 130 CMR 610.015(B) and Exhibit A). Denial of assistance constitutes valid grounds for appeal (see 130 CMR 610.032). A hearing was held on November 10, 2017 after which the record was held open on the parties' requests until January 12, 2018 to allow for the exchange of legal memoranda.

Action Taken by MassHealth

MassHealth denied Appellant's application for MassHealth Long-Term Care Benefits because MassHealth determined that assets held in trust are countable to Appellant for MassHealth eligibility purposes.

Issue

The appeal issue is whether MassHealth properly applied the controlling regulations and law to accurate facts when it denied Appellant's application for MassHealth Long-Term Care Benefits upon determining that assets held in trust are countable to Appellant for MassHealth eligibility purposes.

Summary of Evidence

Appellant's counsel was first provided with a copy of MassHealth's legal memorandum (included with Exhibit B) at the time of hearing. The record was left open to allow Appellant time to review MassHealth's memorandum and file a response memorandum. MassHealth requested time to file a response memorandum. The record closed on January 12, 2018 with both parties having filed their post-hearing memoranda (Exhibits C and D). Appellant's salient arguments are set forth in her response memorandum.

Through the memoranda and testimony, the parties put forth the following facts which are not in dispute: Appellant is a resident of a nursing facility who applied for MassHealth Long-Term Care benefits. Appellant does not have a spouse living in the community. On December 12, 2002, Appellant and her now-deceased husband established the [Family Surname] Trust (the Trust). Appellant and her husband are the Grantors of the Trust. By a deed dated December 12, 2002, Appellant and her husband transferred, for no consideration, real estate located in Dudley, Massachusetts to the Trust. From the time of Trust formation up through the day Appellant entered a skilled nursing facility, Appellant lived in the home located at the Dudley, Massachusetts property held in Trust. From the date of Trust formation to the time of this hearing, Appellant's daughter has been the sole Trustee of the Trust.

The following is a brief review of the positions set forth in the legal memoranda submitted into the record by the parties.

MassHealth's Memorandum (Exhibit B)

MassHealth argues that pursuant to Article 2.2 the entire corpus of the Trust is countable for MassHealth eligibility purposes because it authorizes Appellant to appoint any or all of the Trust property to any charitable organization. In support of its position, MassHealth relies on *Daley v. Secretary of State of the Executive Office of Health & Human Services* 477 Mass. 188 (2017).

MassHealth argues that pursuant to Article 2.3 the entire corpus of the Trust is countable for MassHealth eligibility purposes because it grants Appellant with the "right of use and occupy any residence that may from time to time be held in Trust". In support of its position, MassHealth again relies on *Daley* as well as 42 U.S.C. 1396(p(3)(B)(i).

MassHealth argues that pursuant to Articles 4.1 and 4.2 the entire corpus of the Trust is countable for MassHealth eligibility purposes because they authorize Appellant to remove and replace any Trustee. MassHealth further argues that the Trust does not prohibit Appellant from naming herself and receiving compensation for trustee services that she provides or from naming Trustees that would be amenable to her will. MassHealth argues that in practical effect, the Trust impairs Appellant's "ownership" of the Trust property in only minor or immaterial ways while preserving for her significant incidences of ownership. MassHealth relies on *Sands v. Commonwealth of Massachusetts, EOHHS, Office of Medicaid* SUCV2013-3537-A and *Doherty v. Director of the Office of Medicaid*, 74 Mass. App. Ct. 439,441 (2009)..

MassHealth argues that pursuant to Article 6.4 the entire corpus of the Trust is countable for MassHealth eligibility purposes because it establishes that the Trust is a grantor trust and empowers the Trustee to make distributions of income or principal to Appellant in any amount the Trustee deems necessary to satisfy the tax obligations of the Trust. In support of its position, MassHealth relies on *Daley* and *Edholm v. Minnesota Department of Human Services, et. al.,* A12-1623 Minn. App. Ct. A12-1623 (June 17, 2013).

MassHealth argues that pursuant to Article 5.4 the entire corpus of the Trust is countable for MassHealth eligibility purposes because it grants Appellant a testamentary power of appointment over the principal which shows Appellant still maintains an interest in the Trust principal, is evidence of Appellant's lack of divestment in Trust principal and is evidence of the kind of fluidity and flexibility of the instrument discussed in *Doherty*, 74 Mass.App.Ct. 439 at 441.

Appellant's Memorandum (Exhibits C)

Appellant argues that Article 2.1 controls the disposition of Trust principal and specifically allows Appellant to receive only Trust income and prohibits any distributions of principal to Appellant during her lifetime.

If the Trust is terminated during Appellant's lifetime, then Article 3.1 directs that principal is to be distributed to Appellant's children or their descendants.

Appellant acknowledges that the question of whether Trust principal is countable for MassHealth eligibility purposes is governed by the "any Circumstances'; test set forth in 42 USC s.1396p(d)(3)(B)(i) and 130 CMR 520.023(C)(1).

Appellant likens the subject Trust and its prohibition to accessing principal to the Trust at issue in *Heyn v Director of the Office of Medical Assistance*, 433 Mass. 171 (2001) and distinguishes the Trust from those reviewed in *Doherty v. Director of the Office of Medicaid, 74 Mass.* App. Ct. 439 (2009) and Lebow v. Commissioner of the Division of Medical Assistance, 433 Mass. 171 (2001). Appellant further argues that the Trust contains no administrative provisions or trustee powers which permit the shifting of beneficial interests under the terms of the Trust or to otherwise provide Appellant with

access to principal.

On the matter of Appellant's power to appoint Trust principal to charitable or non-profit organizations pursuant to Article 2.2, Appellant argues that Article 2.2 does not render principal accessible to her to be used for her benefit. Appellant argues that *Daley* did not change the legal nature of a limited power of appointment. Appellant maintains that for MassHealth eligibility purposes, the *Daley* Court remanded the case back to the Board of Hearings to consider whether it is appropriate for MassHealth to deem principal countable in the presence of such a power if it allows principal to be paid to a non-profit or charitable nursing facility in which Appellant could reside. Appellant argues that the Trust does not allow such an appointment if Appellant has a controlling interest in the charity or non-profit. Also, Appellant notes that any distributions so made could not be considered payments for Appellant's benefit because the appointed assets cannot be used for Appellant's personal benefit.

Appellant further argues that the true and permissible scope of her "limited" power of appointment is restricted by the fact that her only interest in the Trust is that of an income beneficiary. Appellant cites to MGL c.203, s.808(c) which states that a person who holds a power to direct is presumptively a fiduciary who is required to act in good faith with regard to the purposes of the Trust and the interests of the beneficiaries. Appellant also cites to Restatement (Third) of Property (Wills & Don. Trans.) ss. 17.2, 19.15-19.16 (2011) that a limited power of appointment is exercisable only in favor of permissible appointees and any attempt to act in favor of impermissible appointees (such as Appellant/grantor) would be invalid and ineffective. Appellant argues that for these reasons, Appellant could not use her power of appointment to transfer principal to a charitable or non-profit skilled nursing facility and direct the facility to use the funds to pay for her care.

Appellant further cites to language in *Heyn* indicating that provisions making trust principal available to persons other than the grantor does not by its nature make it available to the grantor any more than if the grantor had gifted the same principal to such a person. Appellant acknowledges that Appellant could exercise her power of appointment and make a gift to a charity or non-profit that could include a skilled nursing facility. But Appellant asserts that she would have no power over such entities to then direct them to use the donated funds to cover the cost of any care they render to Appellant.

Appellant also maintains that the spendthrift provision at Article 5.1 prevents the power of appointment from being exercised to appoint assets to a non-profit nursing facility for the purposes of paying the facility for care it renders to Appellant as the facility would be a creditor and such payments would violate the spendthrift provision.

With regard to Appellant's ability to use and occupy any real estate owned by the Trust, Appellant again cites to *Daley* which held that any actual or imputed rent derived from such real estate does not affect the applicant's eligibility for Medicaid Long Term Care

benefits, but they may affect the amount the applicant must contribute to the payment of her care (i.e., the Patient Paid Amount).[1]

Appellant argues that the ability to remove and appoint Trustees pursuant to Articles 4.1 and 4.2 has no bearing on whether the Trust terms empower the Trustee (whoever it is) to distribute principal to Appellant.

Appellant argues that the ability of the Trustee to be compensated for services rendered does not make principal available to Appellant if she were to serve as Trustee. Appellant argues that she is not serving as Trustee and has never made a claim for any kind of compensation from the Trust. Additionally, and if she were to serve as Trustee and receive compensation, such payments would be considered income and paid toward the PPA. Appellant notes that pursuant to the Massachusetts Uniform Trust Code (MGL c.203E, s.708(a)) all Trustees are entitled to "reasonable" compensation for their services whether or not the Trust contains an explicit provision authorizing such payment.

Appellant argues that Article 6.4's provision allowing Trust principal to be used to pay Appellant's tax obligation arising from receipt of Trust income does not render all principal available to Appellant for MassHealth eligibility purposes. Appellant argues that pursuant to Daley, the agency was to make a factual determination as to what portion of the principal could be distributed to satisfy such a tax liability; therefore, the Court did not conclude, as MassHealth argues, that the mere ability to use principal for this purpose rendered all the principal countable for MassHealth eligibility purposes. Appellant argues that as a factual matter, the trust has only ever been funded with the home, Appellant lived in the home up until her nursing admission, and she never received any income from the Trust. Consequently, Appellant argues she never had a tax obligation arising from the receipt of income; therefore, no Trust principal could have been paid to her for this purpose.

Lastly, Appellant argues that if she were now to receive any Trust income, it would be unlikely that a tax obligation would ever arise due to such income because as a nursing home resident, the income would go towards her PPA and be subject to a medical deduction on her tax return which would eliminate any tax obligation arising from the income.

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[1] Appellant makes further arguments about how any such income could not be used towards Appellant's Patient Paid Amount (PPA) on theory that it would be non-countable as "income-in-kind". This argument is premature as MassHealth has not made a positive eligibility determination and has not yet determined a PPA. This argument will not be addressed further in this decision.

MassHealth's Reply Memorandum (Exhibit D)

MassHealth's reply memorandum reiterates and expands on a number of the positions set forth in its first memorandum.

MassHealth asserts that under federal and state law, prohibitions against distributions of principal are to be disregarded if contradicted by other provisions in the trust. Despite Article 2.1 limiting distributions to the Grantor to income only, MassHealth argues that taken individually and cumulatively, the following Trust provisions contradict the provisions of Article 2.1 limiting the Grantor to receiving distributions of income only:

- *"The purpose of this trust is to manage my assets and to use them to allow me to live in the community as long as possible."* (Article 1.2);
- The Applicant is entitled to income distributions determined by the Trustee *"in its sole and non-reviewable discretion to be necessary for our care and well-being"* (Article 2.1);
- The Applicant, irrespective of the Trustee or any other trust provision, has a lifetime Power of Appointment over all or part of the trust principal and income which she may exercise at any time to dispose of the entire trust corpus (Article 2.2);
- The Applicant has the right to use and occupy any real estate owned by the trust (Article 2.3);
- The Trustee is the Applicant's daughter and a potential residual beneficiary. The Trustee has broad powers to deal with the trust property, including selling it, renting it, investing it and determining what amounts to pay the Applicant in income (Article 4);
- The Applicant may remove and replace Trustees with or without cause (Article 4);
- The Applicant can name herself Trustee and receive compensation for services performed as Trustee (Article 4.8);
- Trust principal may be distributed to the Executor or Administrator of the Applicant's estate, and principal may be used to pay funeral costs, administrative expenses, and taxes that arise both after death and during the applicant's lifetime(Article 6.1);
- The Applicant has declared to the IRS that she is the owner of the trust property (Article 6.4); and

- The Applicant retains the right to reacquire the real estate held in the trust (Article 6.5).

Additionally, MassHealth cites to familiar federal and state statutes and case law to support the following arguments:

- Appellant bears the burden of demonstrating that there are "no circumstances" under which principal or income from the Trust are available "to or for the benefit" of the Appellant.
- Appellant's lifetime power of appointment makes all Trust principal and income available for her benefit and countable as an asset.
- Appellant's right to remove and replace trustees gives her complete control of the trust principal and income.
- Appellant has access to income on principal from the trust in excess of the countable asset limit.
- Medicaid eligibility is determined by federal statutes and state regulations, not the common law of trusts.
- Appellant declared herself the "Owner" of the Trust property to the IRS and now wishes to contradict this declaration when applying for Medicaid benefits.

Findings of Fact

By a preponderance of the evidence, I find the following:[2]

1. Appellant is a resident of a nursing facility who applied for MassHealth Long-Term Care benefits.
2. Appellant does not have a spouse living in the community.
3. On December 12, 2002, Appellant and her now-deceased husband established the subject Trust.
4. Appellant and her husband are the Grantors of the Trust.
5. By a deed dated December 12, 2002, Appellant and her husband transferred, for no consideration, real estate located in Dudley, Massachusetts to the Trust.

[2] The specific terms of the Trust will not be delineated and listed here as separate facts. The Trust document is in the record as part of Exhibit B and its terms are self evident.

6. From the date of Trust formation up through the day Appellant entered a skilled nursing facility, Appellant lived in the home located at the Dudley, Massachusetts property held in Trust.

7. From the date of Trust formation up through the date of this hearing, Appellant's daughter has been the sole Trustee of the Trust.

Analysis and Conclusions of Law

MassHealth correctly maintains that during the eligibility process, an applicant bears the burden of demonstrating to MassHealth that her assets are below the applicable eligibility limit (130 CMR 520.003-004). But as an Appellant, for the purposes of this appeal, she bears the burden of demonstrating that the agency's action is invalid or incorrect (*Merisme v. Board of Appeals of Motor Vehicle Liability Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989).. The agency action here is not merely that Appellant's countable assets exceed the $2,000.00 eligibility limit. The agency also determined that the entire corpus of the subject Trust is countable for MassHealth eligibility purposes and directed that the entire amount of the corpus be spent down within thirty days (Exhibit A). For the narrow, but clear reason set forth at the end of this section, I find that MassHealth has properly applied the controlling law to accurate facts in concluding that the entire trust principal is countable for MassHealth Long-Term Care eligibility purposes.

The subject Trust is properly considered in the context of both state and federal law applying to trusts created after 1993, including:

Federal law at 42 USC §1396p which states:

(d) Treatment of Trust amounts

(1)For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a Trust established by such individual.

(2)(A)For purposes of this subsection, an individual shall be considered to have established a Trust if assets of the individual were used to form all or part of the corpus of the Trust and if any of the following individuals established such Trust other than by will:

(i)The individual.
(ii)The individual's spouse.
(iii)A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.
(iv)A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a Trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the Trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to—

(i) the purposes for which a Trust is established,

(ii) whether the Trustees have or exercise any discretion under the Trust,

(iii) any restrictions on when or whether distributions may be made from The Trust, or

(iv) any restrictions on the use of distributions from the Trust.

(3) (A) In the case of a revocable trust—

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust—

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

(I) to or for the benefit of the individual, shall be considered income of the individual, and (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

Federal law at 42 U.S.C. 1396p (d)(3)(B)(i) states:

In the case of an irrevocable trust, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income (emphasis added).

MassHealth regulation 130 CMR 520.023 applies to trusts or similar legal devices

created on or after August 11, 1993, states in pertinent part (emphasis added):

> *(C) Irrevocable Trusts.*
>
> *(1) Portion Payable.*
>
> *(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 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 are 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 subject Trust was established and funded after 1993. There is no dispute that the income from the Trust is available and countable to Appellant.

I am not persuaded by MassHealth's argument that the degree of control and power Appellant retains over the Trust corpus demonstrate that it is available for her benefit. Appellant is correct that the "any circumstances" test requires MassHealth to identify a specific circumstance or avenue within the Trust terms by which principal can either be paid directly to Appellant or used for her benefit (130 CMR 520.023(C)(1)(a)). While a Trustee's powers may be broad, it is not evidence of a circumstance by which Trust principal can be paid to Appellant or used for her benefit.

I am also not persuaded by MassHealth's position that available-but-not-yet-paid income should be prospectively treated as an asset subject to the $2,000 eligibility cap. Contrary to MassHealth's assertion, I do not believe such a position has been endorsed by the Massachusetts Appeals Court in *Ford v. Comm. Div. of Med. Assist.*, Mass. App. Ct. 1:28 Decision 08-P-2091 (October 19, 2009). In *Ford*, the Court ruled against the

applicant who argued that a certain trust no longer allowed for payments of principal to be made. Applying the pre 1993 trust rules, the Court held that the principal was countable because it had been available to Appellant under the terms of the trust. Quoting *Lebow v. Commissioner of Div. of Med. Assistance*, the Court stated: *The issue is not whether the trustee has the authority to make payments to the grantor at a particular moment in time. Rather, if there is any state of affairs, at any time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets count in calculating the grantor's Medicaid eligibility* (*Lebow v. Commissioner of Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2001)). The holding has nothing to do with counting income payments and yet-to-be-paid income as countable assets.

MassHealth's reliance on *Ford* in this instance is entirely misplaced. A single footnote in the Court's brief opinion does question why the receipt of income that would cause Appellant's assets to exceed the $2,000.00 eligibility limit would not itself render Appellant ineligible for benefits. But this is conjecture and an indication that the Court needed more information, as the Court itself indicates in the same footnote. Such is not a "holding" supporting MassHealth's position that income and yet-to-be-paid income should be prospectively treated as a countable asset for eligibility purposes. Federal regulation 42 USC 1382b(3)(6)(b) reads: *the term "corpus" means, with respect to a trust, all property and other interests held by the trust, including accumulated earnings and any other addition to the trust after its establishment (except that such term does not include any such earnings or addition in the month in which the earnings or addition is credited or otherwise transferred to the trust). This is consistent with* 130 CMR 520.023(C)(1) which 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 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 are countable income.* Subpart (a) refers to both principal and the accumulated income (interest) all of which constitutes countable assets (this is consistent with 42 USC 1382b(3)(6)(b) *supra*). Subpart (b) is concerned with actual payments of income (interest) out of the trust which constitute income for the recipient. As an income beneficiary what Appellant is entitled to under this Trust is described under subpart (b), income, not subpart (a) assets.

If it is MassHealth's contention that the subject Trust presently contains accumulated income that has yet to be paid over to Appellant, such a fact has neither been specifically alleged nor evidenced.

On the matter of trustee compensation, I find that MassHealth's argument is not without merit. Trust Articles 4.1 and 4.8 provide that Appellant can become a Trustee and that she can be compensated from both income and principal. MassHealth regulations are clear and unambiguous, *[a]ny 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 of the individual is a countable asset* (130 CMR 520.023(C)(1)(a)). *Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income* (130 CMR 520.023(C)(1)(b)).

Nevertheless, Appellant's arguments concerning the amount that a Trustee could be compensated also have merit. The above-cited regulation concerns either the amount of specific payments and/or "the portion" of income or principal that could be paid to or for the benefit of the individual. It does not state, as MassHealth appears to assert, that if some principal or income could be so paid then all principal and income would be countable.

Whether or not an applicant can serve as Trustee is generally irrelevant.[3] Nowhere in state or federal regulations does it state that the Medicaid agency is to base a determination of Trust countability on the expectation that the Trustee is to breach his/her duty or authority. MassHealth determinations must be based on the Trustee (whoever it is) acting pursuant to both the terms of the particular trust at issue as well as trust law which applies to all trusts. This includes the trustee's fiduciary duties whether specifically stated in the trust document or not. Generally, this duty would prevent the trustee from making unreasonable administration charges against the trust to gain access to all principal. Specifically, with regard to the Trust at issue, Article 4.8 states that the Trustee is entitled only to "fair and reasonable" compensation. Given that the Trust corpus is in the form of a home with an approximate countable value of $160,000.00, as a factual matter, I cannot concur with MassHealth that all of the principal could reasonably be expected to be properly paid to Appellant as compensation if she were to serve as Trustee. MassHealth needs to make some showing of what portion of the principal or income could reasonably be expected to be paid to Appellant if she were to serve as Trustee. Where MassHealth has made no such showing, I find its conclusion that all of the Trust principle is countable for MassHealth eligibility purposes to be unsupported by fact and law.

On the matter of the use and occupancy of a home held in Trust, the Massachusetts Supreme Judicial Court's recent decision in *Daley* made clear that the use and occupancy of a home in trust could result in the fair-market-value rent being imputed and counted as income which could be applied toward the calculation of Appellant's PPA, but it would not constitute a countable asset for MassHealth eligibility purposes (*Mary E. Daley Personal Representative vs. Secretary of the Executive Office of Health and Human Services,* (477 Mass. 188 at 201-202 (2017)).[4]

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[3] It could be relevant if an applicant can make herself the sole beneficiary and the sole Trustee thereby collapsing the Trust through merger. The import of whether that would constitute "revocation" which is distinct from "termination" in this case is unclear given that the Trust provides that all Trust principal is to be distributed to Appellant's children upon termination.

[4] A meaningful tie-in exists with the *Daley* decision and MassHealth's argument about yet-to-be-paid income being counted as an asset (discussed above). Future rent is essentially the same as future income, yet the *Daley* Court clearly treats imputed rent as income and not as a countable asset. The Court makes no mention of MassHealth being able to calculate yet-to-be-paid rent as an asset in the way that MassHealth presently urges yet-to-be-paid income to be deemed a countable asset. And there is no reasonable basis to think that the Court would have sanctioned MassHealth counting future rent as an asset because to do so would obviate the ability of a member to collect rent on a monthly basis and have it counted as income and applied to her PPA as the Court directed. The same rent could not be counted as both a countable asset and income.

I find MassHealth is correct in its determination that the subject Trust is a "grantor trust" in that the Trustee may use principal to pay any tax liability accruing to Appellant from her receipt of Trust income (Article 6.4). *". . . . because the trust is intended to be construed as a "grantors trust" under the Internal Revenue Code, 26 U.S.C. § 677(a), with all income distributed to the grantors taxable to them, the trustee may pay any tax liability arising from such distributions from the corpus of the trust. MassHealth may determine that this portion of the corpus is a countable asset under the "any circumstances" test and may ascertain, under § 1396p(d)(3), the size of the "portion of the corpus from which . . . payment to the individual could be made" in this circumstance"* (*Id.*, at 203). However, I find MassHealth has yet to make a credible showing of what Appellant's maximum tax liability reasonably could be. This needs to be to be done in order for the agency to comply with 130 CMR 520.023(C)(1) in determining the "portion payable".

On the matter of the retained power of appointment – Appellant's arguments are well grounded in trust law and prior to the *Daley* decision, I would have agreed with her analysis and concluded that because her power of appointment is limited and she is not a member of the defined class of possible appointees, trust principal could not be paid to her or to a charitable or non-profit organization to be used for her benefit. But the holding in *Daley* on this matter is clear. In considering the Nadeau Trust in *Daley*, the Supreme Judicial Court of Massachusetts held:

> *Because the MassHealth determination that Nadeau was ineligible to receive Medicaid long-term care benefits rests solely on the availability of his home as a resource, we vacate the judgment affirming this finding and remand the matter to MassHealth to evaluate two other possible sources of countable assets. As earlier discussed,* ***the terms of the Nadeau Trust permit the equity in the Nadeau home to be paid at the Neadeau's direction or for their benefit during their lifetimes in two circumstances****.*
>
> *First, the Nadeaus may* ***"appoint . . . all or any part of the trust property . . . to any one or more charitable or non-profit organizations" over which they have no controlling interest****. Had Nadeau received care at a nursing home operated by a nonprofit organization, he could have used the assets of the trust, including his home, to pay the nonprofit organization for his care.* ***Because approximately one-fourth of the nursing homes in Massachusetts are operated by nonprofit organizations, [Note 13] albeit not the nursing home where he received care, it is appropriate for MassHealth to consider whether this possibility fits within the "any circumstances" test****.*

The salient language of the Neadeau Trust concerning the power of appointment is the same as the subject Trust. Appellant retained the power to appoint an unlimited amount of income and/or principal to a chartable or non-profit organization. The *Daley* Court was not concerned with the fact that Nadeau was not actually residing in a non-profit nursing facility – only that he could be in such a facility. The *Daley* Court found that while in such a facility Nadeau's power of appointment enabled him to use the principal to pay for his care. Given the clarity of the holding on this issue, it is not immediately clear why the Court decided to remand the issue back to MassHealth (not the Board of

Hearings) to see if the possibility of residing in a non-profit nursing facility meets the requirements of the "any circumstances" test. It may simply have been a desire to have the agency take the action it is charged with making while applying the guidance the Court had just articulated. Regardless, in this case, MassHealth has considered the matter and determined that Appellant's power of appointment does allow her to access all of the Trust principal to pay for her nursing home care if she were to reside in a non-profit skilled nursing facility; therefore, this is a circumstance whereby Trust principal can be used for Appellant's benefit. Accordingly, the trust principal is countable for MassHealth long Term Care eligibility purposes pursuant to 130 CMR 520.023(C)(1)(a). The fact that Appellant is not currently residing in a non-profit facility is not controlling, as the Court in *Daley* acknowledged with Nadeau. The Massachusetts Court of Appeals has also held that the circumstance giving rise to asset countability need not be current, but needs only to be existent at some point during the operation of the trust: (*Lebow v. Commissioner of Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2001): *The issue is not whether the trustee has the authority to make payments to the grantor at a particular moment in time. Rather, if there is any state of affairs, at any time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets count in calculating the grantor's Medicaid eligibility).*

In her memorandum, Appellant asserts that the Trust's spendthrift provision (Article 5.1) prevents her from using her power of appointment to pay a creditor, such as a non-profit nursing facility. But the spendthrift provision at Article 5.1 concerns a prohibition against alienating the interest of a beneficiary. MassHealth's determination does not concern Appellant's interest as a beneficiary being alienated (either by the Trustee or by Appellant as a beneficiary). Rather, it relies on Appellant's ability as Grantor to exercise her power of appointment to distribute all trust principal to a non-profit (nursing facility). According to *Daley*, these funds can be used to pay for her long-term care. Also, MassHealth correctly cites to *Cohen v. Commissioner of the Div. of Med. Assistance*, 423 Mass. 399 (1996), *cert, denied sub nom. Kokoska v. Bullen*, 519 U.S. 1057 (1997)) which held that trust provisions that seek to limit trustee discretion or a beneficiary's interest for the purposes of defeating Medicaid eligibility are to be ignored (*Cohen*, at 416, 418, 419-420, 424).

For the foregoing reasons, the appeal is DENIED.

Order for MassHealth and Notice to Appellant

The applicable time lines governing cures and trust reformation set forth in 130 CMR 520.024(C) and undue hardship claims at 130 CMR 520.024(E) will run from the date of this decision.

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.

Kenneth Brodzinski
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Dori Mathieu
Appellant Attorney: David J. DuPont, Esq. Belforti & Dupont, 1 Church Street, Webster, MA 01570
Appellant Representative: Patricia Fournier, POA, 429 School Stret, Webster, MA 01570

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVII. Public Welfare (Ch. 115-123b)
Chapter 118E. Division of Medical Assistance (Refs & Annos)

M.G.L.A. 118E § 31

§ 31. Adjustment or recovery of payments

Effective: July 1, 2004
Currentness

(a) This subsection shall apply to estates of individuals dying prior to April first, nineteen hundred and ninety-five. There shall be no adjustment or recovery of medical assistance correctly paid except as follows:

(1) Recovery from the Permanently Institutionalized: From the estate of an individual, regardless of age, who was an inpatient in a nursing facility or other medical institution when he or she received such assistance. Recovery of such assistance shall be limited to assistance provided on or after March twenty-second, nineteen hundred and ninety-one.

(2) Recovery from Persons Age 65 and Over: From the estate of an individual who was sixty-five years of age or older when such individual received such assistance. Any recovery may be made only after the death of the surviving spouse, if any, and only at a time when such individual has no surviving child who is under age twenty-one or is blind or permanently and totally disabled. The division shall waive recovery where it would result in undue hardship, as defined by the division in its regulations.

(b) This subsection shall apply to estates of individuals dying on or after April first, nineteen hundred and ninety-five. There shall be no adjustments or recovery of medical assistance correctly paid except as follows:

(1) Recovery from the Permanently Institutionalized: From the estate of an individual, regardless of age, who was an inpatient in a nursing facility or other medical institution when he or she received such assistance. Recovery of such assistance shall be limited to assistance provided on or after March twenty-second, nineteen hundred and ninety-one.

(2) Recovery from Persons Age 65 and Over: From the estate of an individual who was sixty-five years of age or older when he or she received such assistance.

(3) Recovery from Persons Age 55 and Over for Post-October 1, 1993 Medicaid: From the estate of an individual who was fifty-five years of age or older when he or she received such assistance, where such assistance was for services provided on or after October first, nineteen hundred and ninety-three.

Any recovery may be made only after the death of the surviving spouse, if any, and only at a time when he or she has no surviving child who is under age twenty-one or is blind or permanently and totally disabled. The division shall waive recovery if such recovery would work an undue hardship, as defined by the division in its regulations.

(c) For purposes of this section, “estate” shall mean all real and personal property and other assets includable in the decedent's probate estate under the General Laws.

(d) The division is also authorized during an individual's lifetime to recover all assistance correctly provided on or after April 1, 1995, if property against which the division has a lien or encumbrance under section 34 is sold. No lien or encumbrance shall be valid against any bona fide purchaser for value or take priority against any subsequent mortgagee for value unless and until it is recorded in the registry of deeds where the property lies.

Repayment shall not be required under this subsection while any of the following relatives lawfully resides in the property: (1) a sibling who had been residing in the property for at least one year immediately prior to the individual being admitted to a nursing facility or other medical institution; or (2) a child who (i) had been residing in the property for at least two years immediately prior to the parent being admitted to a nursing facility or other medical institution; and (ii) establishes to the satisfaction of the division that he provided care which permitted the parent to reside at home during that two year period rather than in an institution; and (iii) has lawfully resided in the property on a continuous basis while the parent has been in the medical institution.

If repayment is not yet required because a relative specified above is still lawfully residing in the property and the individual wishes to sell the property, the purchaser shall take possession subject to the lien or the division shall release the lien if the individual agrees to (1) either set aside sufficient assets to satisfy the lien or give bond to the division with sufficient sureties and (2) repay the division as soon as the specified relative is no longer lawfully residing in the property. Notwithstanding the foregoing or any general or special law to the contrary, the division and the parties to the sale may by agreement enter into an alternative resolution of the division's lien.

This subsection shall not limit the division's ability to recover from the individual's estate under subsection (a) or (b) or as otherwise provided under any general or special law.

Credits

Added by St.1993, c. 161, § 17. Amended by St.1995, c. 38, § 133; St.1996, c. 450, § 158; St.1997, c. 43, § 94; St.2003, c. 26, § 329, eff. July 1, 2003; St.2004, c. 149, § 167, eff. July 1, 2004.

Notes of Decisions (6)

M.G.L.A. 118E § 31, MA ST 118E § 31
Current through Chapter 87 of the 2020 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVII. Public Welfare (Ch. 115-123b)
Chapter 118E. Division of Medical Assistance (Refs & Annos)

M.G.L.A. 118E § 32

§ 32. Provision of death certificate and probate petition to division; liability of estate beneficiaries; claims against estate; sale or transfer of property subject to lien or claim

Effective: July 1, 2014
Currentness

(a) Notwithstanding any provision of law to the contrary, a petition for admission to probate of a decedent's will or for administration of a decedent's estate shall include a sworn statement that copies of said petition and death certificate have been sent to the division by certified mail in accordance with sections 3-306(f) and 3-403(f) of chapter 190B. Within 30 days of a request by the division, a personal representative shall complete and send to the division by certified mail a form prescribed by the division and provide such further information as the division may require.

In the event a petitioner fails to send copies of the petition and death certificate to the division and the decedent received medical assistance for which the division is authorized to recover under section thirty-one, any person receiving a distribution of assets from the decedent's estate shall be liable to the division to the extent of such distribution.

(b) The division may present claims against a decedent's estate as follows: (1) within four months after approval of the official bond of the personal representative, file a written statement of the amount claimed with the registry of probate where the petition was filed and deliver or mail a copy thereof to the personal representative. The claim shall be deemed presented upon the filing of the claim in the registry of probate; or (2) within one year after date of death of the decedent, commence an action under the provisions of section 9 of chapter 197.

(c) When presenting its claim by written statement under subsection (b), the division shall also notify the personal representative of (1) the circumstances and conditions which must exist for the division to be required to defer recovery under section 31 and (2) the circumstances and conditions which must exist for the division to waive recovery under its regulations for undue hardship.

(d) The personal representative shall have 60 days from the date of presentment to mail notice to the division by certified mail of one or more of the following findings: (1) the claim is disallowed in whole or in part, or (2) circumstances and conditions where the division is required to defer recovery under section 31 exist, or (3) circumstances and conditions where the division will waive recovery for undue hardship under its regulations exist. A notice under clause (2) or (3) shall state the specific circumstances and conditions which exist and provide supporting documentation satisfactory to the division. Failure to mail notice under clause (1) shall be deemed an allowance of the claim. Failure to mail notice under clause (2) shall be deemed an admission that the circumstances or conditions where the division is required to defer recovery under section 31 do not exist. Failure to mail notice under clause (3) shall be deemed an admission that the circumstances and conditions for the division to waive recovery for undue hardship under its regulations do not exist.

(e) If the division at any time within the period for presenting claims under subsection (b) amends the amount due, the personal representative shall have an additional 60 days to mail notice to the division under clause 1 of subsection (d).

(f) If the division receives a disallowance under clause (1) of subsection (d), the division may commence an action to enforce its claim in a court of competent jurisdiction within 60 days after receipt of said notice of disallowance. If the division receives a notice under clause (2) or (3) of said subsection (d), with which it disagrees, the division may commence an action in a court of competent jurisdiction within 60 days after receipt of said notice. If the division fails to commence an action after receiving a notice under clause (2) of said subsection (d), the division shall defer recovery while the circumstances or conditions specified in said notice continue to exist. If the division fails to commence an action after receiving a notice under clause (3) of said subsection (d), the division shall waive recovery for undue hardship.

(g) Unless otherwise provided in any judgment entered, claims allowed pursuant to this section shall bear interest at the rate provided under section 6B of chapter 231 commencing four months plus 60 days after approval of the official bond of the personal representative.

Notwithstanding the foregoing, if the division fails to commence an action after receipt of a notice under clause (2) of subsection (d), interest at the rate provided under section 6B of chapter 231 shall not commence until the circumstances or conditions specified in the notice received by the division under said clause (2) cease to exist. The personal representative shall notify the division within 30 calendar days of any change in the circumstances or conditions asserted in said clause (2) notice, and upon request by the division, shall provide updated documentation verifying that the circumstances or conditions continue to exist.

If the division's claim has been allowed as provided herein and no circumstances and conditions requiring that the division defer recovery under section 31 exist, it may petition the probate court for an order directing the personal representative to pay the claim to the extent that funds are available or for such further relief as may be required.

(h) Notice of a petition by a personal representative for a license to sell real estate shall be given to the division in any estate where:

(1) the division has filed a written statement of claim with the registry of probate as provided in subsection (b); or

(2) the division has filed with the registry of probate a notice, as prescribed under subsection (a) of section 9 of chapter 197, that an action has been commenced.

(i) In all cases where:--

(1) the division determines it may have a claim against a decedent's estate;

(2) a petition for administration of the decedent's estate or for admission to probate of the decedent's will has not been filed; and

(3) more than one year has passed from the decedent's date of death, the division is hereby authorized to designate a public administrator to be appointed and to serve pursuant to chapter 194. Said designation by the division shall include a statement of the amount claimed. This provision shall apply to all estates in which no petition for administration of the decedent's estate or

for admission to probate of the decedent's will has been filed as of the effective date of this section, regardless of the decedent's date of death.

(j) If the personal representative wishes to sell or transfer any real property against which the division has filed a lien or claim not yet enforceable because circumstances or conditions specified in section 31 continue to exist, the division shall release the lien or claim if the personal representative agrees to (1) either set aside sufficient assets to satisfy the lien or claim, or to give bond to the division with sufficient surety or sureties and (2) repay the division as soon as the circumstances or conditions which resulted in the lien or claim not yet being enforceable no longer exist. Notwithstanding the foregoing provision or any general or special law to the contrary, the division and the parties to the sale may by agreement enter into an alternative resolution of the division's lien or claim.

Credits

Added by St.1993, c. 161, § 17. Amended by St.1995, c. 38, § 135; St.1997, c. 43, § 95; St.2003, c. 26, § 330, eff. July 1, 2003; St.2004, c. 149, § 168, eff. July 1, 2004; St.2014, c. 165, §§ 149 to 151, eff. July 1, 2014.

Notes of Decisions (3)

M.G.L.A. 118E § 32, MA ST 118E § 32
Current through Chapter 87 of the 2020 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206)
Chapter 203E. Massachusetts Uniform Trust Code (Refs & Annos)
Article 8. Duties and Powers of Trustee

M.G.L.A. 203E § 808

§ 808. Powers to direct

Effective: July 8, 2012
Currentness

Powers to direct

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person, other than the settlor of a revocable trust, power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power, unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) A person who holds a power to direct is presumptively a fiduciary who is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct shall be liable for any loss that results from a breach of a fiduciary duty.

Credits
Added by St.2012, c. 140, § 56, eff. July 8, 2012.

M.G.L.A. 203E § 808, MA ST 203E § 808
Current through Chapter 87 of the 2020 2nd Annual Session

End of Document

Code of Massachusetts Regulations
Title 130: Division of Medical Assistance
Chapter 515.000: Masshealth: General Policies (Refs & Annos)

130 CMR 515.012

515.012: Real Estate Liens

Currentness

(A) Liens. A real estate lien enables the MassHealth agency to recover the cost of medical benefits paid or to be paid on behalf of a member. Before the death of a member, the MassHealth agency will place a lien against any property in which the member has a legal interest, subject to the following conditions:

(1) per court order or judgment; or

(2) without a court order or judgment, 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:

1. a spouse;

2. a child younger than 21 years old, or a blind or permanently and totally disabled child; or

3. 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) the MassHealth agency 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 MassHealth 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.

(B) Recovery. If property against which the MassHealth agency has placed a lien under 130 CMR 515.012(A) is sold during the member's lifetime, the MassHealth agency may recover all payment for services provided on or after April 1, 1995. This provision does not limit the MassHealth agency's ability to recover from the member's estate in accordance with 130 CMR 515.011.

(C) Exception. No recovery for nursing facility or other long-term-care services may be made under 130 CMR 515.012(B) if the member

(1) was institutionalized;

(2) notified the MassHealth agency that he or she had no intention of returning home; and

(3) on the date of admission to a long-term-care institution had long-term-care insurance that, when purchased, met the requirements of 130 CMR 515.014 and the Division of Insurance regulations at 211 CMR 65.09(1)(e)(2).

(D) Repayment Deferred.

(1) In the case of a lien on a member's home, repayment under 130 CMR 515.012 is not required while any of the following relatives are still lawfully living in the property:

(a) a sibling who has been living in the property for at least one year before the member's admission to the nursing facility or other medical institution; or

(b) a son or daughter who

1. has been living in the property for at least two years immediately before the member was admitted to a nursing facility or other medical institution;

2. establishes to the satisfaction of the MassHealth agency that he or she provided care that permitted the parent to live at home during the two-year period before institutionalization; and

3. has lived lawfully in the property on a continual basis while the parent has been in the institution.

(2) Repayment from the estate of a member that would otherwise be recoverable under any regulation is still required even if the relatives described in 130 CMR 515.012(D) are still living in the property.

(E) Dissolution. The MassHealth agency will discharge a lien placed against property under 130 CMR 515.012(A) if the member is released from the medical institution and returns home.

(F) Verification. The applicant or member must cooperate in providing verification as to whether the conditions under 130 CMR 515.012(A) exist, and in providing any information necessary for the MassHealth agency to place a lien.

(G) Recording Fee. The MassHealth agency is not required to pay a recording fee for filing a notice of lien or encumbrance, or for a release or discharge of a lien or encumbrance under 130 CMR 515.012.

The Massachusetts Administrative Code titles are current through Register No. 1418, dated May 29, 2020. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 130, § 515.012, 130 MA ADC 515.012

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Massachusetts Regulations
Title 130: Division of Medical Assistance
Chapter 520.000: Masshealth: Financial Eligibility (Refs & Annos)

130 CMR 520.003

520.003: Asset Limit

Currentness

(A) The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Standard, Family Assistance, or Limited may not exceed the following limits:

(1) for an individual -- $2,000; and

(2) for a couple living together in the community where there is financial responsibility according to 130 CMR 520.002(A)(1) -- $3,000.

(B) The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Senior Buy-in for Qualified Medicare Beneficiaries (QMB) as described in 130 CMR 519.010: *MassHealth Senior Buy-in (for Qualified Medicare Beneficiaries (QMB))* or MassHealth Buy-in for Specified Low Income Medicare Beneficiaries (SLMB) or MassHealth Buy-in for Qualifying Individuals (QI), both as described in 130 CMR 519.011: *MassHealth Buy-in*, may not exceed the amount equal to two times the amount of allowable assets for Medicare Savings Programs as identified by the Centers for Medicare and Medicaid Services. Each calendar year, the allowable asset limits shall be made available on MassHealth's website.

(C) The treatment of a married couple's assets when one spouse is institutionalized, as described in 130 CMR 520.016(B).

Credits
History: 1407 Mass. Reg. 89, amended eff. Jan. 1, 2020.

The Massachusetts Administrative Code titles are current through Register No. 1418, dated May 29, 2020. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 130, § 520.003, 130 MA ADC 520.003

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Massachusetts Regulations
Title 130: Division of Medical Assistance
Chapter 520.000: Masshealth: Financial Eligibility (Refs & Annos)

130 CMR 520.007

520.007: Countable Assets

Currentness

Countable assets are all assets that must be included in the determination of eligibility. 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. In determining whether or not failure to receive such assets is reasonably considered to result from such action or inaction, the MassHealth agency considers the specific circumstances involved. The applicant or member and the spouse must verify the total value of countable assets. However, if he or she is applying solely for Mass-Health Senior Buy-in for Qualified Medicare Beneficiaries (QMB) as described in 130 CMR 519.010: *MassHealth Senior Buy-in (for Qualified Medicare Beneficiaries (QMB))* or MassHealth Buy-in for Specified Low Income Medicare Beneficiaries (SLMB) or MassHealth Buy-in for Qualifying Individuals (QI) both as described in 130 CMR 519.011: *MassHealth Buy-in*, verification is required only upon request by the MassHealth agency. 130 CMR 520.007 also contains the verification requirements for certain assets. The assets that the MassHealth agency considers include, but are not limited to, the following.

(A) Cash.

(1) Definition. Cash is defined as currency, checks, and bank drafts in the possession of or available to the applicant, member, or spouse.

(2) Verification. The applicant's or member's declaration on the application or redetermination form stating the amount of cash available to him or her is sufficient verification.

(B) Bank Accounts.

(1) Definition. Bank accounts are defined as deposits in a bank, savings and loan institution, credit union, or other financial institution. Bank accounts may be in the form of savings, checking, or trust accounts, term certificates, or other types of accounts.

(2) Determination of Ownership and Accessibility. The MassHealth agency considers funds in a bank account available only to the extent that the applicant or member has both ownership of and access to such funds. The MassHealth agency determines the ownership of and access to the funds in accordance with 130 CMR 520.005 and 520.006.

(3) Verification of Account Balances. The MassHealth agency requires verification of the current balance of each account at application, during eligibility review, and at times of reported change.

(a) Noninstitutionalized individuals excluding the individuals described at 130 CMR 519.007(B): *Home- and Community-based Services Waiver Frail Elder* must verify the amount on deposit by bank books or bank statements that show the bank balance within 45 days of the date of application or the date that the eligibility review is received in a MassHealth Enrollment Center or outreach site.

(b) Nursing-facility residents as described at 130 CMR 515.001: *Definition of Terms* must verify the amount on deposit by bank books or bank statements that show the current balance and account activity during the look-back period.

(c) If during an eligibility review the member states either orally or in writing that an account other than a checking account contains a balance of $25 or less, the MassHealth agency does not require verification provided that, in combination with other countable assets, it would not affect continued eligibility.

(d) If lack of either access to or ownership of funds in an account is verified, the MassHealth agency will not consider the funds a countable asset.

(C) Individual Retirement Accounts, Keogh Plans and Pension Funds.

(1) Individual Retirement Accounts. An Individual Retirement Account (IRA) is a tax-deductible savings account that sets aside money for retirement. Funds in an IRA are counted as an asset in their entirety less the amount of penalty for early withdrawal.

(2) Keogh Plans. A Keogh Plan is a retirement plan established by a self-employed individual. A Keogh Plan may be established for the self-employed individual alone or for the self-employed individual and his or her employees. If the Keogh Plan was established for the self-employed individual alone, the funds in the Plan are counted as an asset in their entirety less the amount of penalty for early withdrawal. If the Keogh Plan was established for employees other than the spouse of the applicant or member, the MassHealth agency does not count the funds as an asset.

(3) Pension Funds. A pension fund is a retirement plan established by an employer to provide benefit payments to employees upon retirement or disability. Pension funds that are being set aside by an individual's current employer are not countable as an asset. Pension funds from an individual's former employer are countable in their entirety less any penalties for withdrawal provided such funds are accessible. (*See* 130 CMR 520.006.)

(D) Securities. Securities include, but are not limited to, stocks, bonds, options, futures contracts, debentures, mutual funds including money-market mutual funds, and other financial instruments. Tradable securities are valued at the most recent closing-bid price, and nontradable securities are valued at current equity value. A security for which there is no market value or that is inaccessible in accordance with 130 CMR 520.006 is noncountable.

(E) Cash-surrender Value of Life-insurance Policies.

(1) The cash-surrender value of a life-insurance policy is the amount of money, if any, that the issuing company has agreed to pay the owner of the policy upon its cancellation. An individual may adjust the cash-surrender value of life insurance to meet the asset limit. The MassHealth agency will consider the cash-surrender-value amount an inaccessible asset during the adjustment period.

(2) If the total face value of all countable life-insurance policies owned by the applicant, member, or spouse exceeds $1,500, the total cash-surrender value of all policies held by that individual is countable. The MassHealth agency does not count the face value of burial insurance and the face value of life-insurance policies not having cash-surrender value (for instance, term insurance) in determining the total face value of life-insurance policies. Burial insurance is insurance whose terms specifically provide that the proceeds can be used only to pay the burial expenses, funeral expenses, or both of the insured.

(F) Vehicles as Countable Assets.

(1) Requirements. In determining the assets of an individual (and the spouse, if any), the countability of a vehicle is determined as follows.

(a) One vehicle per household is noncountable regardless of its value if it is for the use of the eligible individual or couple or a member of the eligible individual's or couple's household.

(b) The equity value of all other vehicles is a countable asset,

(2) Exemption.

(a) Three-month Exemption. The MassHealth agency does not count the value of nonexempt vehicles exceeding the asset limit for three calendar months provided the applicant or member signs an agreement with the MassHealth agency to dispose of the vehicles at fair-market value.

(b) Additional Exemption for Good Cause. The MassHealth agency may grant an additional three-month extension if the disposition was prevented by an event beyond the control of the individual who was making a good-faith effort to dispose of the property during the initial three-month period.

(c) Proceeds. The proceeds from the sale of the vehicle after payment of loans or other encumbrances and expenses of sale such as taxes, fees, and advertising costs are a countable asset in the month received and in subsequent months. The equity value of a vehicle that has not been sold three calendar months after the date of the written agreement (or six calendar months after the date of the written agreement if an extension has been granted) is a countable asset.

(d) Equity Value. Equity value is determined by subtracting the balance of any loans, liens, encumbrances, and expenses of sale, such as taxes, fees, and advertising costs, from the fair-market value of the vehicle.

(e) Fair-market Value. Fair-market value is the price for which the vehicle will sell on the open market.

(f) Verification. The applicant or member must verify the fair-market value and equity value of all vehicles. Verification must be a written document providing reasonable evidence of value. Acceptable verification includes, but is not limited to, the following:

1. the wholesale value (for cars and trucks) and finance value (for recreational vehicles) tables in the most recent vehicle valuation book that is used by the MassHealth agency;

2. the low value in an older car valuation book (for cars and trucks). If the car or truck is too old to be listed in an older car valuation book, the MassHealth agency will assign a value of $250;

3. the written appraisal of a licensed automobile dealer who deals with classic, custom-made, or antique vehicles, if the vehicle is considered a classic, custom-made, or antique; or

4. for recreational vehicles, the projected loan value as quoted by a bank or other lending institution; documents showing the value of the vehicle for insurance purposes; or a written estimate of the cash value of the vehicle from a licensed recreational vehicle dealer.

(g) Specially Equipped Vehicles. Special equipment for the handicapped, other optional equipment, or low mileage do not increase the value of the vehicle.

(G) Real Estate.

(1) Real Estate As a Countable Asset. All real estate owned by the individual and the spouse, with the exception of the principal place of residence as described in 130 CMR 520.008(A), is a countable asset. The principal place of residence is subject to allowable limits as described in 130 CMR 520.007(G)(3). Business or nonbusiness property as described in 130 CMR 520.008(D) is a noncountable asset.

(2) Nine-month Exemption. The value of such real estate is exempt for nine calendar months after the date of notice by the MassHealth agency, provided that the individual signs an agreement with the MassHealth agency within 30 days after the date of notice to dispose of the property at fair-market value. The MassHealth agency will extend the nine-month period as long as the individual or the spouse continues to make a good-faith effort to sell, as verified in accordance with 130 CMR 520.007(G)(4).

(3) Fair-market Value and Equity Value. The fair-market value and equity value of all countable real estate owned by the individual and the spouse must be verified at the time of application and when it affects or may affect eligibility. For applications received on or after January 1, 2006, equity interest in the principal place of residence exceeding $750,000 renders an individual ineligible for payment of nursing facility and other long-term-care services, unless the spouse of such individual or the individual's child who is younger than 21 years old or who is blind or permanently and totally disabled resides in the individual's home. The allowable equity interest amount will be adjusted annually, beginning in January 2011. The adjustment will be based year-to-year on the percentage increase in the Consumer Price Index.

(a) The applicant or member must verify the fair-market value by a copy of the most recent tax bill or the property tax assessment that was most recently issued by the taxing jurisdiction, provided that this assessment is not one of the following:

1. a special purpose assessment;

2. based on a fixed-rate-per-acre method; or

3. based on an assessment ration or providing only a range.

(b) In the event that a current property-tax assessment is not available or the applicant or member wishes to rebut the fair-market value determined by the MassHealth agency, a comparable market analysis or a written appraisal of the value of the property from a knowledgeable source will establish the fair-market value. A knowledgeable source is a licensed real-estate agent or broker, a real-estate appraiser, an official of a bank, a savings-and-loan association, or a similar lending organization, or an official of the local real-estate tax jurisdiction.

(c) A copy of the loan instruments or other binding documents that show evidence of the payment schedule and the outstanding balance of the loan will verify the equity value of the property.

(d) The MassHealth agency may waive the period of ineligibility due to excess equity value in real estate if the individual meets the conditions described at 130 CMR 520.007(G)(13).

(4) Good-faith Effort to Sell Real Estate. The individual or the spouse must verify his or her good-faith effort to dispose of countable real estate by evidence such as advertisements or documentation of the listing of the real estate with licensed real-estate agents or brokers, including a report of any offer from prospective buyers. The MassHealth agency will terminate eligibility if, at any time, the individual rejects a reasonable offer to buy the real estate. An offer to buy real estate is considered reasonable if it is at least two-thirds of the fair-market value, unless the individual proves otherwise to the MassHealth agency's satisfaction.

(5) Proceeds from the Sale of Real Estate. The proceeds from the sale of the real estate, after the payment of loans, liens, or other encumbrances, and expenses of sale such as taxes, fees, and advertising costs, are a countable asset in the month received and in subsequent months.

(6) Right to Recovery. If a member fails to report the acquisition of real estate within ten days after taking title to the real estate and the equity value of the real estate, when added to all other countable assets, exceeds the MassHealth asset standard, the MassHealth agency has the right to recover overpayment in accordance with 130 CMR 515.010: *Recovery of Overpayment of Medical Benefits* and to initiate any and all other legal remedies available.

(7) Former Home of a Community-based Individual. If an applicant or member (or spouse, if any) moves out of his or her home for reasons other than institutionalization without the intent to return, the home, whether or not held in trust,

becomes a countable asset because it is no longer used as the individual's principal place of residence. The former home is subject to the requirements described in 130 CMR 520.007(G)(2).

(8) Former Home of an Institutionalized Individual. If an applicant or member moves out of his or her home to enter a medical institution, the MassHealth agency considers the former home a countable asset that is subject to 130 CMR 520.007(G)(2), provided all of the following conditions are met. If the former home of a nursing-facility resident as defined in 130 CMR 515.001: *Definition of Terms* is placed in a trust, the MassHealth agency will apply the trust rules in accordance with 130 CMR 520.021 through 520.024.

(a) The individual is institutionalized as defined in 130 CMR 515.001: *Definition of Terms*.

(b) None of the following relatives of the individual is living in the property:

1. a spouse;

2. a child who is younger than 21 years old or who is blind or permanently and totally disabled;

3. a sibling who has a legal interest in the home and who was living there for a period of at least one year immediately before the applicant's or member's admission to the medical institution;

4. a son or daughter who was living in the applicant's or member's home for a period of at least two years immediately before the date of the applicant's or member's admission to the medical institution, and who establishes to the satisfaction of the MassHealth agency that he or she provided care to the applicant or member that permitted him or her to live in the home rather than in a medical institution; or

5. a dependent relative. A dependent relative is any of the following who has any kind of medical, financial, or other dependency: a child, stepchild, or grandchild; a parent, stepparent, or grandparent; an aunt, uncle, niece, or nephew; a brother, sister, stepbrother, or stepsister; a half brother or half sister; a cousin; or an in-law.

(c) The applicant or member (and spouse, if any) moves out of his or her home without the intent to return.

(d) The applicant or member does not own long-term-care insurance with coverage that meets the requirements of 130 CMR 515.014: *Long-term-care Insurance Minimum Coverage Requirements for MassHealth Exemptions* and the Division of Insurance regulations at 211 CMR 65.09(1)(e) 2.

(9) Verification of Dependency and Residence of Relative Living in the Former Home.

(a) Relationship. The institutionalized individual must verify his or her relationship to the relative living in the former home by birth certificates, marriage licenses, or any other documents necessary to establish the relationship.

(b) Dependency. The institutionalized individual must verify the relative's dependency on the institutionalized individual by a signed statement from the relative attesting to the existence and duration of the dependency. The MassHealth agency may require additional evidence if the relative's claim of dependency is questionable or self-contradictory.

(c) Residence. The institutionalized individual must verify the relative's residence in his or her former home only if there is conflicting or contradictory evidence regarding the relative's residence.

(10) Option to Liquidate to Pay for Medical Care. Instead of selling the countable former home, the individual may liquidate its equity value to pay for his or her medical care. If the individual chooses this option, the home will be noncountable until the equity value is liquidated, but not longer than nine calendar months after the date of the MassHealth agency's notice.

(11) Undue Hardship: Jointly Owned Assets.

(a) The MassHealth agency will continue to exclude otherwise countable property, including a former home, when it is jointly owned and the sale of the property by an individual would cause the other owners to lose housing.

(b) Loss of housing would result when the property serves as the principal place of residence for one (or more) of the other owners, and sale of the property would result in loss of that residence, and no other housing would be readily available for the displaced other owner. If undue hardship as defined in 130 CMR 520.007(G)(11) ceases to exist, the property becomes a countable asset.

(12) Lien. The MassHealth agency will place a lien before the death of a member against any real estate in which the member has a legal interest. This lien will be placed only if all of the conditions of 130 CMR 515.012: *Real Estate Liens* are met.

(13) Waiver of the Period of Ineligibility Due to Excess Equity Value in the Principal Place of Residence Causing Undue Hardship.

(a) The MassHealth agency may waive the denial of payment of long-term-care services for excess equity value in the principal place of residence if ineligibility would cause the individual undue hardship when the following conditions exist:

1. the denial of long-term-care services would deprive the nursing-facility resident of medical care such that his or her health or life would be endangered, or the nursing-facility resident would be deprived of food, shelter, clothing, or other necessities such that he or she would be at risk of serious deprivation; and

2. the institution has notified the nursing-facility resident of its intent to initiate discharge the resident because the resident has not paid for his or her institutionalization; and

3. there is no less costly noninstitutional alternative available to meet the nursing-facility resident's needs.

(b) Undue hardship does not exist when imposition of the period of ineligibility would merely inconvenience or restrict the nursing-facility resident without putting the nursing-facility resident at risk of serious deprivation.

(c) Where the MassHealth agency has issued a denial notice based on the equity value in the principal place of residence, the individual may request a hardship waiver.

1. The individual must submit a written request for consideration of undue hardship and supporting documentation to the MassHealth Enrollment Center listed on the notice of denial within 15 days after the date on the notice.

2. Within 30 days after the date of the request, the MassHealth agency informs the individual in writing of the decision and of the right to a fair hearing. The MassHealth agency extends this 30-day period if the MassHealth agency requests additional documentation or if extenuating circumstances, as determined by the MassHealth agency, require additional time.

(d) The nursing-facility resident may appeal the MassHealth agency undue-hardship decision and denial of payment of long-term-care services by submitting a request for a fair hearing to the Office of Medicaid Board of Hearings within 30 days after the receipt of the MassHealth agency written undue-hardship notice, in accordance with 130 CMR 610.000: *MassHealth: Fair Hearing Rules.* If the denial occurs pursuant to 130 CMR 520.007(G)(13)(c)1., the nursing-facility resident may instead appeal the denial of eligibility for long-term-care services by submitting a request for a fair hearing to the Office of Medicaid Board of Hearings, in accordance with 130 CMR 610.000: *MassHealth: Fair Hearing Rules,* while the resident also submits a written request for consideration of undue hardship. If the request for the hardship waiver is later denied, the nursing-facility resident may appeal the MassHealth agency's undue hardship decision by submitting a request for a fair hearing to the Office of Medicaid Board of Hearings within 30 days after the receipt of the MassHealth agency written undue hardship decision notice, in accordance with 130 CMR 610.000: *MassHealth: Fair Hearing Rules.*

(H) Retroactive SSI and RSDI Benefit Payments.

(1) Requirements. Retroactive SSI and RSDI benefit payments are noncountable in the month of receipt and for six months after the month of receipt. Such payments must be readily identifiable as retroactive SSI or RSDI payments, and should be deposited in a separately identifiable account. If commingled with other funds, and not separately identifiable according to the MassHealth agency, the MassHealth agency considers the total amount on deposit a countable asset. Any amount of the benefit payment still retained on the first day following the excluded periods described in 130 CMR 520.007(H)(1) is a countable asset.

(2) Verification. The applicant or member must verify the amount of the benefit and the date of receipt. The preferred source of verification is the notification letter from the Social Security Administration. The amount on deposit may be verified by a bank book or bank statement that shows that the benefit payment is not commingled with other funds.

(I) Trusts. The MassHealth agency counts the value of the principal and income of a revocable or irrevocable trust in accordance with 130 CMR 520.021 through 520.024.

(J) Annuities, Promissory Notes, Loans, Mortgages, and Similar Transactions.

(1) Treatment of Annuities Established Before February 8, 2006. Payments from an annuity are countable income in accordance with 130 CMR 520.009. If the annuity can be converted to a lump sum, the lump sum, less any penalties or costs of converting to a lump sum, is a countable asset. Purchase of an annuity is a disqualifying transfer of assets for nursing-facility residents as defined at 130 CMR 515.001: *Definition of Terms* in the following situations:

(a) when the beneficiary is other than the applicant, member, or spouse;

(b) when the beneficiary is the applicant, member, or spouse and when the total present value of projected payments from the annuity is less than the value of the transferred asset (purchase price). In this case, the MassHealth agency determines the amount of the disqualifying transfer based on the actuarial value of the annuity compared to the beneficiary's life expectancy using the life-expectancy tables as determined by the MassHealth agency, giving due weight to the life-expectancy tables of institutions in the business of providing annuities;

(c) when the terms of the annuity postpone payment beyond 60 days, the MassHealth agency will treat the annuity as a disqualifying transfer of assets until the payment start date; or

(d) when the terms of the annuity provide for unequal payments, the MassHealth agency may treat the annuity as a disqualifying transfer of assets. Commercial annuity payments that vary solely as a result of a variable rate of interest are not considered unequal payments under 130 CMR 520.007(J)(1)(d).

(2) Treatment of Annuities Established on or after February 8. 2006. In addition to the requirements in 130 CMR 520.007(J)(1), the following conditions must be met.

(a) The purchase of an annuity will be considered a disqualifying transfer of assets unless

1. the Commonwealth of Massachusetts is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual;

2. the Commonwealth of Massachusetts is named as such a remainder beneficiary in the second position after the community spouse, or minor or disabled children; or

3. the Commonwealth of Massachusetts is named as such a remainder beneficiary in the first position if the community spouse or the representative of any minor or disabled children in 130 CMR 520.007(J)(2)(a)2. disposes of any such remainder for less than fair-market value.

(b) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(1) and (2)(a) and is irrevocable and nonassignable, or unless the annuity satisfies 130 CMR 520.007(J)(2)(c).

(c) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(2)(b), or unless the annuity names the Commonwealth of Massachusetts as a beneficiary as required under 130 CMR 520.007(J)(2)(a) and the annuity is

1. described in section 408(b) or (q) of the Internal Revenue Code of 1986;

2. purchased with the proceeds from an account or trust described in section 408(a), (c), or (p) of the Internal Revenue Code of 1986;

3. purchased with the proceeds from a simplified employee pension described in section 408(k) of the Internal Revenue Code of 1986; or

4. purchased with the proceeds from a Roth IRA described in section 408A of the Internal Revenue Code of 1986.

(3) Promissory Notes. Loans, or Mortgages. The value of any outstanding balance due on a promissory note, loan, or mortgage is considered a disqualifying transfer of assets, unless all of the following conditions are met:

(a) the repayment terms of the promissory note, loan, or mortgage are actuarially sound, based on actuarial tables as determined by the MassHealth agency;

(b) the promissory note, loan, or mortgage provides for equal payment amounts during the life of the loan, with no deferral and no balloon payments; and

(c) the promissory note, loan, or mortgage prohibits cancellation of the balance upon the death of the lender.

(4) Transactions Involving Future Performance. Any transaction that involves a promise to provide future payments or services to an applicant, member, or spouse, including but not limited to transactions purporting to be annuities, promissory notes, contracts, loans, or mortgages, is considered to be a disqualifying transfer of assets to the extent that the transaction does not have an ascertainable fair-market value or if the transaction is not embodied in a valid contract that is legally and reasonably enforceable by the applicant, member, or spouse. This provision applies to all future performance whether or not some payments have been made or services performed.

(5) Additional Regulations About Transfers of Assets. Transfers of assets are further governed by 130 CMR 520.018 and 520.019.

Credits

History: 1407 Mass. Reg. 89, amended eff. Jan. 1, 2020.

The Massachusetts Administrative Code titles are current through Register No. 1418, dated May 29, 2020. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 130, § 520.007, 130 MA ADC 520.007

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Massachusetts Regulations
Title 130: Division of Medical Assistance
Chapter 520.000: Masshealth: Financial Eligibility (Refs & Annos)

130 CMR 520.008

520.008: Noncountable Assets

Currentness

Noncountable assets are those assets exempt from consideration when determining the value of assets. In addition to the noncountable assets described in 130 CMR 520.006 and 520.007, the following assets are noncountable.

(A) The Home. The home of the applicant or member and the spouse and any land appertaining to the home, as determined by the MassHealth agency, if located in Massachusetts and used as the principal place of residence, are considered noncountable assets, except when the equity interest in the home exceeds the amount described in 130 CMR 520.007(G)(3). The home is subject to the lien rules at 130 CMR 515.012: *Real Estate Liens*. If the home is placed in a trust or in an arrangement similar to a trust, the MassHealth agency will apply the trust rules at 130 CMR 520.021 through 520.024.

(B) Assets of an SSI Recipient. The assets of an SSI recipient are exempt from consideration as countable assets.

(C) Proceeds from the Sale of a Home. The proceeds from the sale of a home used by the applicant or member as the principal place of residence, provided the proceeds are used to purchase another home to be used as the principal place of residence, are considered noncountable assets. Such proceeds are exempt from consideration as countable assets for the three calendar months following the month of receipt. The MassHealth agency places a lien before the death of the member against any real estate in which the member has a legal interest in accordance with 130 CMR 515.012: *Real Estate Liens*.

(D) Business and Nonbusiness Property. Business and nonbusiness property essential to self-support and property excluded under an SSA-approved plan for self-support are considered noncountable assets.

(E) Any Loan or Grant. Any loan or grant including, but not limited to, scholarships, the terms of which preclude their use for current maintenance, is considered a noncountable asset.

(F) Funeral or Burial Arrangements.

(1) The following funeral or burial arrangements for the applicant, member, or spouse are considered noncountable assets:

(a) any burial space, including any burial space for any immediate family member;

(b) one of the following:

1. a separately identifiable amount not to exceed $1,500 expressly reserved for funeral and burial expenses; or

2. life-insurance policies designated exclusively for funeral and burial expenses with a total face value not to exceed $1,500;

(c) the cash-surrender value of burial insurance; and

(d) prepaid irrevocable burial contracts or irrevocable trust accounts designated for funeral and burial expense.

(2) Appreciated value or interest earned or accrued and left to accumulate on any contracts, accounts, or life insurance is also noncountable. If the applicant, member, or spouse uses any of these assets, including the interest accrued, for other than funeral or burial arrangements of the applicant, member, or spouse, the MassHealth agency considers the asset available and countable under the provisions of 130 CMR 520.007, 520.018, and 520.019.

(3) The applicant, member, or spouse has the right to establish a burial arrangement or change the designation of his or her funds to a burial arrangement described in 130 CMR 520.008(F). If such arrangement is made within 60 days after the date that the applicant or member was notified of his or her right to do so, then the MassHealth agency considers the arrangement to have been in existence on the first day of the third month before the application.

(G) Veterans' Payments. Veterans' payments for aid and attendance, unreimbursed medical expenses, housebound benefits, and enhanced benefits retained after the month of receipt, provided these payments are separately identifiable, are considered noncountable assets. Appreciated value and earned interest are also noncountable.

(H) Special-needs Trust. A special-needs trust in accordance with the trust rules at 130 CMR 520.021 through 130 CMR 520.024 is considered a noncountable asset.

(I) Pooled Trust. A pooled trust in accordance with the trust rules at 130 CMR 520.021 through 130 CMR 520.024 is considered a noncountable asset.

(J) ICF/MR Trust. A trust established before April 7, 1986, solely for the benefit of a resident of an intermediate-care facility for the mentally retarded (ICF/MR), is considered a noncountable asset.

(K) Other Assets. Any other assets considered noncountable for Title XIX eligibility purposes is considered a noncountable asset.

Credits

History: 1407 Mass. Reg. 89, amended eff. Jan. 1, 2020.

The Massachusetts Administrative Code titles are current through Register No. 1418, dated May 29, 2020. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 130, § 520.008, 130 MA ADC 520.008

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Massachusetts Regulations
Title 130: Division of Medical Assistance
Chapter 520.000: Masshealth: Financial Eligibility (Refs & Annos)

130 CMR 520.023

520.023: Trusts or Similar Legal Devices Created on or after August 11, 1993

Currentness

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.

(a) For transfers made before February 8, 2006, the look-back period is 36 months for trusts where all or any portion of the income or principal of an irrevocable trust can be paid to or for the benefit of the nursing-facility resident, but is paid instead to someone else.

(b) The look-back period is 60 months

1. 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;

2. 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

3. 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.

(2) Period of Ineligibility Due to a Disqualifying Transfer. The MassHealth agency determines the amount of the transfer and the period of ineligibility for payment of nursing-facility services in accordance with the rules at 130 CMR 520.019(G).

(B) Revocable Trusts.

(1) The entire principal in a revocable trust is a countable asset

(2) Payments from a revocable trust made to or for the benefit of the individual are countable income.

(3) Payments from a revocable trust made other than to or for the benefit of the nursing-facility resident are considered transfers for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(4) 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 (G)(8).

(C) Irrevocable Trusts.

(1) Portion Payable.

(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 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 are 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 (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).

(D) Exemptions to the Trust Rules.

(1) Special-needs Trusts and Pooled Trusts. Under federal trust exemption regulations at 42 U.S.C. 1396(p)(d)(4) special-needs trusts and pooled trusts as defined in 130 CMR 515.001: *Definition of Terms* are not subject to the income and asset countability rules at 130 CMR 520.023(B) and (C).

(2) Revision of a Trust to Comply with the Criteria of a Special-needs or Pooled Trust The MassHealth agency will not deny or terminate MassHealth due to excess assets if a trust is revised to comply with the criteria of a special-needs trust or a pooled trust in accordance with the rules at 130 CMR 520.019(J).

(3) Burial Trust. A burial trust is a trust established to pay solely for various funeral and burial expenses of the individual or the spouse. An irrevocable burial trust meeting the criteria of 130 CMR 520.008(F) is not a countable asset.

The Massachusetts Administrative Code titles are current through Register No. 1418, dated May 29, 2020. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 130, § 520.023, 130 MA ADC 520.023

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XIX. Grants to States for Medical Assistance Programs (Refs & Annos)

42 U.S.C.A. § 1396-1

§ 1396-1. Appropriations

Currentness

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XIX, § 1901, as added Pub.L. 89-97, Title I, § 121(a), July 30, 1965, 79 Stat. 343; amended Pub.L. 93-233, § 13(a)(1), Dec. 31, 1973, 87 Stat. 960; Pub.L. 98-369, Div. B, Title VI, § 2663(j)(3)(C), July 18, 1984, 98 Stat. 1171.)

Notes of Decisions (24)

42 U.S.C.A. § 1396-1, 42 USCA § 1396-1
Current through P.L. 116-142.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XIX. Grants to States for Medical Assistance Programs (Refs & Annos)

42 U.S.C.A. § 1396p

§ 1396p. Liens, adjustments and recoveries, and transfers of assets

Currentness

(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except--

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual--

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home,

except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if--

(A) the spouse of such individual,

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title, or

(C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution),

is lawfully residing in such home.

(3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall dissolve upon that individual's discharge from the medical institution and return home.

(b) Adjustment or recovery of medical assistance correctly paid under a State plan

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B), the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of--

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan (but not including medical assistance for medicare cost-sharing or for benefits described in section 1396a(a)(10)(E) of this title).

(C)(i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, and which satisfies clause (iv), or which has a State plan amendment that provides for a qualified State long-term care insurance partnership (as defined in clause (iii)) which provided for the disregard of any assets or resources--

(I) to the extent that payments are made under a long-term care insurance policy; or

(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

(iii) For purposes of this paragraph, the term "qualified State long-term care insurance partnership" means an approved State plan amendment under this subchapter that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy if the following requirements are met:

(I) The policy covers an insured who was a resident of such State when coverage first became effective under the policy.

(II) The policy is a qualified long-term care insurance policy (as defined in section 7702B(b) of the Internal Revenue Code of 1986) issued not earlier than the effective date of the State plan amendment.

(III) The policy meets the model regulations and the requirements of the model Act specified in paragraph (5).

(IV) If the policy is sold to an individual who--

(aa) has not attained age 61 as of the date of purchase, the policy provides compound annual inflation protection;

(bb) has attained age 61 but has not attained age 76 as of such date, the policy provides some level of inflation protection; and

(cc) has attained age 76 as of such date, the policy may (but is not required to) provide some level of inflation protection.

(V) The State Medicaid agency under section 1396a(a)(5) of this title provides information and technical assistance to the State insurance department on the insurance department's role of assuring that any individual who sells a long-term care insurance policy under the partnership receives training and demonstrates evidence of an understanding of such policies and how they relate to other public and private coverage of long-term care.

(VI) The issuer of the policy provides regular reports to the Secretary, in accordance with regulations of the Secretary, that include notification regarding when benefits provided under the policy have been paid and the amount of such benefits paid, notification regarding when the policy otherwise terminates, and such other information as the Secretary determines may be appropriate to the administration of such partnerships.

(VII) The State does not impose any requirement affecting the terms or benefits of such a policy unless the State imposes such requirement on long-term care insurance policies without regard to whether the policy is covered under the partnership or is offered in connection with such a partnership.

In the case of a long-term care insurance policy which is exchanged for another such policy, subclause (I) shall be applied based on the coverage of the first such policy that was exchanged. For purposes of this clause and paragraph (5), the term "long-term care insurance policy" includes a certificate issued under a group insurance contract.

(iv) With respect to a State which had a State plan amendment approved as of May 14, 1993, such a State satisfies this clause for purposes of clause (ii) if the Secretary determines that the State plan amendment provides for consumer protection

standards which are no less stringent than the consumer protection standards which applied under such State plan amendment as of December 31, 2005.

(v) The regulations of the Secretary required under clause (iii)(VI) shall be promulgated after consultation with the National Association of Insurance Commissioners, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, and shall specify the type and format of the data and information to be reported and the frequency with which such reports are to be made. The Secretary, as appropriate, shall provide copies of the reports provided in accordance with that clause to the State involved.

(vi) The Secretary, in consultation with other appropriate Federal agencies, issuers of long-term care insurance, the National Association of Insurance Commissioners, State insurance commissioners, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, shall develop recommendations for Congress to authorize and fund a uniform minimum data set to be reported electronically by all issuers of long-term care insurance policies under qualified State long-term care insurance partnerships to a secure, centralized electronic query and report-generating mechanism that the State, the Secretary, and other Federal agencies can access.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time--

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title; and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B), when--

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution),

is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3)(A) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

(B) The standards specified by the Secretary under subparagraph (A) shall require that the procedures established by the State agency under subparagraph (A) exempt income, resources, and property that are exempt from the application of this subsection

as of April 1, 2003, under manual instructions issued to carry out this subsection (as in effect on such date) because of the Federal responsibility for Indian Tribes and Alaska Native Villages. Nothing in this subparagraph shall be construed as preventing the Secretary from providing additional estate recovery exemptions under this subchapter for Indians.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual--

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(5)(A) For purposes of clause (iii)(III), the model regulations and the requirements of the model Act specified in this paragraph are:

(i) In the case of the model regulation, the following requirements:

(I) Section 6A (relating to guaranteed renewal or noncancellability), other than paragraph (5) thereof, and the requirements of section 6B of the model Act relating to such section 6A.

(II) Section 6B (relating to prohibitions on limitations and exclusions) other than paragraph (7) thereof.

(III) Section 6C (relating to extension of benefits).

(IV) Section 6D (relating to continuation or conversion of coverage).

(V) Section 6E (relating to discontinuance and replacement of policies).

(VI) Section 7 (relating to unintentional lapse).

(VII) Section 8 (relating to disclosure), other than sections 8F, 8G, 8H, and 8I thereof.

(VIII) Section 9 (relating to required disclosure of rating practices to consumer).

(IX) Section 11 (relating to prohibitions against post-claims underwriting).

(X) Section 12 (relating to minimum standards).

(XI) Section 14 (relating to application forms and replacement coverage).

(XII) Section 15 (relating to reporting requirements).

(XIII) Section 22 (relating to filing requirements for marketing).

(XIV) Section 23 (relating to standards for marketing), including inaccurate completion of medical histories, other than paragraphs (1), (6), and (9) of section 23C.

(XV) Section 24 (relating to suitability).

(XVI) Section 25 (relating to prohibition against preexisting conditions and probationary periods in replacement policies or certificates).

(XVII) The provisions of section 26 relating to contingent nonforfeiture benefits, if the policyholder declines the offer of a nonforfeiture provision described in paragraph (4).

(XVIII) Section 29 (relating to standard format outline of coverage).

(XIX) Section 30 (relating to requirement to deliver shopper's guide).

(ii) In the case of the model Act, the following:

(I) Section 6C (relating to preexisting conditions).

(II) Section 6D (relating to prior hospitalization).

(III) The provisions of section 8 relating to contingent nonforfeiture benefits.

(IV) Section 6F (relating to right to return).

(V) Section 6G (relating to outline of coverage).

(VI) Section 6H (relating to requirements for certificates under group plans).

(VII) Section 6J (relating to policy summary).

(VIII) Section 6K (relating to monthly reports on accelerated death benefits).

(IX) Section 7 (relating to incontestability period).

(B) For purposes of this paragraph and paragraph (1)(C)--

(i) the terms "model regulation" and "model Act" mean the long-term care insurance model regulation, and the long-term care insurance model Act, respectively, promulgated by the National Association of Insurance Commissioners (as adopted as of October 2000);

(ii) any provision of the model regulation or model Act listed under subparagraph (A) shall be treated as including any other provision of such regulation or Act necessary to implement the provision; and

(iii) with respect to a long-term care insurance policy issued in a State, the policy shall be deemed to meet applicable requirements of the model regulation or the model Act if the State plan amendment under paragraph (1)(C)(iii) provides that the State insurance commissioner for the State certifies (in a manner satisfactory to the Secretary) that the policy meets such requirements.

(C) Not later than 12 months after the National Association of Insurance Commissioners issues a revision, update, or other modification of a model regulation or model Act provision specified in subparagraph (A), or of any provision of such regulation or Act that is substantively related to a provision specified in such subparagraph, the Secretary shall review the changes made to the provision, determine whether incorporating such changes into the corresponding provision specified in such subparagraph would improve qualified State long-term care insurance partnerships, and if so, shall incorporate the changes into such provision.

(c) Taking into account certain transfers of assets

(1)(A) In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

(B)(i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) or in the case of any other disposal of assets made on or after February 8, 2006, 60 months) before the date specified in clause (ii).

(ii) The date specified in this clause, with respect to--

(I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan, or

(II) a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value.

(C)(i) The services described in this subparagraph with respect to an institutionalized individual are the following:

(I) Nursing facility services.

(II) A level of care in any institution equivalent to that of nursing facility services.

(III) Home or community-based services furnished under a waiver granted under subsection (c) or (d) of section 1396n of this title.

(ii) The services described in this subparagraph with respect to a noninstitutionalized individual are services (not including any services described in clause (i)) that are described in paragraph (7), (22), or (24) of section 1396d(a) of this title, and, at the option of a State, other long-term care services for which medical assistance is otherwise available under the State plan to individuals requiring long-term care.

(D)(i) In the case of a transfer of asset made before February 8, 2006, the date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.

(ii) In the case of a transfer of asset made on or after February 8, 2006, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

(E)(i) With respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to--

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

(ii) With respect to a noninstitutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall not be greater than a number equal to--

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

(iii) The number of months of ineligibility otherwise determined under clause (i) or (ii) with respect to the disposal of an asset shall be reduced--

(I) in the case of periods of ineligibility determined under clause (i), by the number of months of ineligibility applicable to the individual under clause (ii) as a result of such disposal, and

(II) in the case of periods of ineligibility determined under clause (ii), by the number of months of ineligibility applicable to the individual under clause (i) as a result of such disposal.

(iv) A State shall not round down, or otherwise disregard any fractional period of ineligibility determined under clause (i) or (ii) with respect to the disposal of assets.

(F) For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless--

(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual under this subchapter; or

(ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

(G) For purposes of this paragraph with respect to a transfer of assets, the term “assets” includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this subchapter unless--

(i) the annuity is--

(I) an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986; or

(II) purchased with proceeds from--

(aa) an account or trust described in subsection (a), (c), or (p) of section 408 of such Code;

(bb) a simplified employee pension (within the meaning of section 408(k) of such Code); or

(cc) a Roth IRA described in section 408A of such Code; or

(ii) the annuity--

(I) is irrevocable and nonassignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

(H) Notwithstanding the preceding provisions of this paragraph, in the case of an individual (or individual's spouse) who makes multiple fractional transfers of assets in more than 1 month for less than fair market value on or after the applicable look-back date specified in subparagraph (B), a State may determine the period of ineligibility applicable to such individual under this paragraph by--

(i) treating the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) during all months on or after the look-back date specified in subparagraph (B) as 1 transfer for purposes of clause (i) or (ii) (as the case may be) of subparagraph (E); and

(ii) beginning such period on the earliest date which would apply under subparagraph (D) to any of such transfers.

(I) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage--

(i) has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

(iii) prohibits the cancellation of the balance upon the death of the lender.

In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of clauses (i) through (iii), the value of such note, loan, or mortgage shall be the outstanding balance due as of the date of the individual's application for medical assistance for services described in subparagraph (C).

(J) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least 1 year after the date of the purchase.

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that--

(A) the assets transferred were a home and title to the home was transferred to--

(i) the spouse of such individual;

(ii) a child of such individual who (I) is under age 21, or (II) (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title;

(iii) a sibling of such individual who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date the individual becomes an institutionalized individual; or

(iv) a son or daughter of such individual (other than a child described in clause (ii)) who was residing in such individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who (as determined by the State) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility;

(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)) 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)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title);

(C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual; or

(D) the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary.

The procedures established under subparagraph (D) shall permit the facility in which the institutionalized individual is residing to file an undue hardship waiver application on behalf of the individual with the consent of the individual or the personal representative of the individual.

While an application for an undue hardship waiver is pending under subparagraph (D) in the case of an individual who is a resident of a nursing facility, if the application meets such criteria as the Secretary specifies, the State may provide for payments for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of payments for 30 days.

(3) For purposes of this subsection, in the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

(4) A State (including a State which has elected treatment under section 1396a(f) of this title) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance under a State plan for such individual, a State shall, using a reasonable methodology (as specified by the Secretary), apportion such period of ineligibility (or any portion of such period) among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State plan.

(5) In this subsection, the term “resources” has the meaning given such term in section 1382b of this title, without regard to the exclusion described in subsection (a)(1) thereof.

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to--

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

(3)(A) In the case of a revocable trust--

(i) the corpus of the trust shall be considered resources available to the individual,

(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c).

(B) In the case of an irrevocable trust--

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income--

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, 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.

(B) A trust established in a State for the benefit of an individual if--

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) 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, and

(iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a nonprofit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

(e) Disclosure and treatment of annuities

(1) In order to meet the requirements of this section for purposes of section 1396a(a)(18) of this title, a State shall require, as a condition for the provision of medical assistance for services described in subsection (c)(1)(C)(i) (relating to long-term care services) for an individual, the application of the individual for such assistance (including any recertification of eligibility for such assistance) shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as may be specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

(2)(A) In the case of disclosure concerning an annuity under subsection (c)(1)(F), the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual. Nothing in this paragraph shall be construed as preventing such an issuer from notifying persons with any other remainder interest of the State's remainder interest under such subsection.

(B) In the case of such an issuer receiving notice under subparagraph (A), the State may require the issuer to notify the State when there is a change in the amount of income or principal being withdrawn from the amount that was being withdrawn at the time of the most recent disclosure described in paragraph (1). A State shall take such information into account in determining the amount of the State's obligations for medical assistance or in the individual's eligibility for such assistance.

(3) The Secretary may provide guidance to States on categories of transactions that may be treated as a transfer of asset for less than fair market value.

(4) Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1).

(f) Disqualification for long-term care assistance for individuals with substantial home equity

(1)(A) Notwithstanding any other provision of this subchapter, subject to subparagraphs (B) and (C) of this paragraph and paragraph (2), in determining eligibility of an individual for medical assistance with respect to nursing facility services or other long-term care services, the individual shall not be eligible for such assistance if the individual's equity interest in the individual's home exceeds $500,000.

(B) A State may elect, without regard to the requirements of section 1396a(a)(1) of this title (relating to statewideness) and section 1396a(a)(10)(B) of this title (relating to comparability), to apply subparagraph (A) by substituting for "$500,000", an amount that exceeds such amount, but does not exceed $750,000.

(C) The dollar amounts specified in this paragraph shall be increased, beginning with 2011, from year to year based on the percentage increase in the consumer price index for all urban consumers (all items; United States city average), rounded to the nearest $1,000.

(2) Paragraph (1) shall not apply with respect to an individual if--

(A) the spouse of such individual, or

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title,

is lawfully residing in the individual's home.

(3) Nothing in this subsection shall be construed as preventing an individual from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home.

(4) The Secretary shall establish a process whereby paragraph (1) is waived in the case of a demonstrated hardship.

(g) Treatment of entrance fees of individuals residing in continuing care retirement communities

(1) In general

For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, the rules specified in paragraph (2) shall apply to individuals residing in continuing care retirement communities or life care communities that collect an entrance fee on admission from such individuals.

(2) Treatment of entrance fee

For purposes of this subsection, an individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource available to the individual to the extent that--

(A) the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;

(B) the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and

(C) the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.

(h) Definitions

In this section, the following definitions shall apply:

(1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action--

(A) by the individual or such individual's spouse,

(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or

(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(2) The term "income" has the meaning given such term in section 1382a of this title.

(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) of this title.

(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii).

(5) The term "resources" has the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XIX, § 1917, as added Pub.L. 97-248, Title I, § 132(b), Sept. 3, 1982, 96 Stat. 370; amended Pub.L. 97-448, Title III, § 309(b)(21), (22), Jan. 12, 1983, 96 Stat. 2410; Pub.L. 100-203, Title IV, § 4211(h)(12), Dec. 22, 1987, 101 Stat. 1330-207; Pub.L. 100-360, Title III, § 303(b), Title IV, § 411(l)(3)(I), July 1, 1988, 102 Stat. 760, 803; Pub.L. 100-485, Title VI, § 608(d)(16)(B), Oct. 13, 1988, 102 Stat. 2417; Pub.L. 101-239, Title VI, § 6411(e)(1), Dec. 19, 1989, 103 Stat. 2271; Pub.L. 103-66, Title XIII, §§ 13611(a) to (c), 13612(a) to (c), Aug. 10, 1993, 107 Stat. 622 to 628; Pub.L. 109-171, Title VI, §§ 6011(a), (b), (e), 6012(a) to (c), 6014(a), 6015(b), 6016(a) to (d), 6021(a)(1), Feb. 8, 2006, 120 Stat. 61 to 68; Pub.L. 109-432, Div. B, Title IV, § 405(b)(1), Dec. 20, 2006, 120 Stat. 2998; Pub.L. 110-275, Title I, § 115(a), July 15, 2008, 122 Stat. 2507; Pub.L. 111-5, Div. B, Title V, § 5006(c), Feb. 17, 2009, 123 Stat. 507; Pub.L. 113-67, Div. A, Title II, § 202(b)

(3), Dec. 26, 2013, 127 Stat. 1177; Pub.L. 114-255, Div. A, Title V, § 5007(a), Dec. 13, 2016, 130 Stat. 1197; Pub.L. 115-123, Div. E, Title XII, § 53102(b)(1), Feb. 9, 2018, 132 Stat. 298.)

Notes of Decisions (84)

42 U.S.C.A. § 1396p, 42 USCA § 1396p
Current through P.L. 116-142.

End of Document

McKinney's Consolidated Laws of New York Annotated
Estates, Powers and Trusts Law (Refs & Annos)
Chapter 17-B. Of the Consolidated Laws
Article 10. Powers (Refs & Annos)
Part 5. Extent of Donee's Authority to Appoint or Contract to Appoint an Estate in Appointive Property

McKinney's EPTL § 10-5.3

§ 10-5.3 Contract to appoint; power not presently exercisable

Currentness

(a) The donee of a power of appointment which is not presently exercisable, or of a postponed power which has not become exercisable, cannot contract to make an appointment; except that this prohibition shall not apply if the donor and donee are the same person. Such a prohibited contract, if made, cannot be the basis of an action for specific performance or damages, but the promisee can obtain restitution of the value given by him for the promise unless the donee has exercised the power pursuant to the contract.

(b) The provisions of this section shall not abridge the ability of the donee of a power of appointment which is not presently exercisable to release his power pursuant to 10-9.2 or to make the power, after release, an imperative power, except that where the donor designated persons or a class to take in default of the donee's exercise of the power, a release with respect to appointive property must serve to benefit all those so designated as provided by the donor.

Credits

(L.1966, c. 952. Amended L.1967, c. 686, § 97; L.1977, c. 341, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

By Margaret Valentine Turano

This section provides that the donee of a postponed power or a power that is not presently exercisable may not enter into a contract to appoint it, unless the donee also created the power. *See Matter of Frank,* 52 A.D.2d 335, 383 N.Y.S.2d 777 (4th Dep't 1976). The rationale is that the donor presumably gave a postponed power in order to defer the choice of appointees until a later time, and to allow the donee to exercise the power in advance would thwart the donor's intent. *See Farmers' Loan & Trust Co. v. Mortimer,* 219 N.Y. 290, 114 N.E. 389 (1916) (holder of a testamentary power agreed to exercise it in favor of several banks who, in consideration of his promise, loaned

him money, but he exercised the power in favor of his family, which the court upheld because the contracts were ineffective). If the donee enters into a contract and exercises his power pursuant to the contract, the appointment is valid. *See Benjamin v. Morgan Guarantee Trust Co.,* 154 Misc.2d 125, 584 N.Y.S.2d 724 (Surrogate's Court, Suffolk County 1992), *affirmed*, 202 A.D.2d 536, 609 N.Y.S.2d 276 (2d Dep't 1994), *leave to appeal dismissed*, 83 N.Y.2d 1000, 616 N.Y.S.2d 480, 640 N.E.2d 148 (1994), *leave to appeal denied*, 86 N.Y.2d 707, 634 N.Y.S.2d 441, 658 N.E.2d 219 (1995); *Matter of Rogers,* 168 Misc. 633, 6 N.Y.S.2d 255 (Surrogate's Court, 1938). If he does not, the other party to the contract may not maintain an action for specific performance, *see Kent v. Thornton,* 179 Misc. 593, 39 N.Y.S.2d 435 (Supreme Court, 1942), *affirmed sub nom. Matter of Kent,* 265 A.D. 904, 38 N.Y.S.2d 573 (4th Dep't 1942), but may obtain restitution of the amount he paid (subparagraph (a)).

In 1977 the legislature amended this section to permit a donee of a power not presently exercisable to contract to exercise it if he also created the power (L. 1977, ch. 341). This legislatively overrules *Matter of Brown,* 33 N.Y.2d 211, 351 N.Y.S.2d 655, 306 N.E.2d 781 (1973), *reargument denied*, 34 N.Y.2d 755, 357 N.Y.S.2d 1027, 314 N.E.2d 426 (1974), where the donee had contracted with his ex-wife to exercise two testamentary powers of appointment, one created by his mother and one by him, in favor of their son, and he had reneged on that promise. The son brought a proceeding to enforce the contract, and the Court of Appeals, over a strong dissent, refused to enforce it, even with respect to the power the donee had created himself. The legislature agreed with the *Brown* dissent's position that this statute was intended to protect the donor's wishes, *citing Farmers' Loan & Trust Co. v. Mortimer,* 219 N.Y. 290, 114 N.E. 389 (1916), which was obviously not a concern when the donor *is* the donee. *See* Recommendation of the Law Revision Commission, L. 1977, Leg. Doc. No. 19, 65(c).

Under subparagraph (b), even though a donee cannot contract to exercise his power, he can release it under EPTL 10-9.2, which allows all powers other than imperative powers to be released. *See* Restatement of Property § 334; *Merrill v. Lynch,* 173 Misc. 39, 13 N.Y.S.2d 514 (Supreme Court, New York County 1939).

Under subparagraph (b)'s predecessor, a donee could not contract to exercise a testamentary power of appointment, but he could release it, and sometimes a release could operate to benefit some of the persons who were to take in default, but not all. *See* Simes and Smith, Future Interests § 1016. For example, in *Seidel v. Werner*, 81 Misc. 2d 220, 364 N.Y.S.2d 963 (Supreme Court, New York County 1975), *affirmed*, 50 A.D.2d 743, 376 N.Y.S.2d 139 (1st Dep't 1975), the decedent had a testamentary power of appointment. If he failed to exercise it, the property was to pass to his four children. He contracted to exercise it in favor of two of his children, A and B. He reneged on his promise and A and B argued that his agreement was not a prohibited contract under this section but rather a release, since it was in favor of takers in default, a position supported by Restatement of Property § 336. The court ruled that it was not a release but a prohibited attempt to enter into a contract. Because of the split between the Restatement and *Seidel v. Warner*, the legislature amended subparagraph (b) conform with the *Seidel* approach: no release is valid unless it benefits all the default takers equally. L. 1977, ch. 34. *See* Recommendation of the Law Revision Commission, L. 1977, Leg. Doc. No. 19, 65(c).

LEGISLATIVE STUDIES AND REPORTS

Source: RPL § 146.

Changes: None.

Comments: This section re-enacts RPL § 146 without substantive change. Changes in form are keyed to the drafting pattern of the new law.

Notes of Decisions (8)

McKinney's E. P. T. L. § 10-5.3, NY EST POW & TRST § 10-5.3
Current through L.2019, chapter 758 & L.2020, chapters 1 to 56, 58 to 88. Some statute sections may be more current, see credits for details.

End of Document

Office of Medicaid
BOARD OF HEARINGS

Appeal Decision:	Dismissed; Denied	**Appeal Numbers:**	1810124, 1807725, 1802921
Decision Date:	9/25/18	**Hearing Date:**	06/15/2018
Hearing Officer:	Christopher Jones	**Record Open to:**	08/06/2018

Appearance for Appellant:

Appearance for MassHealth:
Kim McAvinchey, Tewksbury MEC
Michael Somers, Esq., MassHealth Legal

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:	Dismissed; Denied	**Issue:**	LTC – Trust
Decision Date:	9/25/18	**Hearing Date:**	06/15/2018
MassHealth's Rep.:	Michael Somers, Esq.; Kim McAvinchey	**Appellant's Rep.:**	
Hearing Location:	Tewksbury MassHealth Enrollment Center	**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

Through a notice dated December 14, 2017, MassHealth denied the appellant's application for MassHealth long-term-care benefits because the appellant had $90,548.38.35 in excess assets in a "Bank Account." Exhibit 2; 130 CMR 520.003, 520.004. The appellant filed this appeal in a timely manner on December 29, 2017.[1] Exhibit 2; 130 CMR 610.015(B). Denial of assistance is valid grounds for appeal. 130 CMR 610.032.

[1] This appeal is of MassHealth Notice No. 58480287. Two other appeal files were created in regard to the appellant's request for MassHealth coverage. Appeal No. 1802921 was premised upon MassHealth Notice Nos. 58937587 and 58925243. Both of those notices were generated by the MassHealth unit that deals with community-based members, as opposed to long-term-care members. Appeal No. 1807725 was in regard to Notice No. 58520251, which was also a denial of community-based benefits based upon the appellant's income. These issues are all moot, as the appellant is only seeking long-term-care benefits, and they are DISMISSED. See Exhibit 2.

This hearing was originally scheduled for March 12, 2018. The appellant died, and the hearing was postponed to allow for a personal representative of the estate to be appointed. See Exhibits 3, 4. After the personal representative was appointed on April 18, 2018, the matter was scheduled for hearing on May 24, 2018, but the appellant's attorney requested that hearing be rescheduled due to a conflict with her schedule. See Exhibit 5.

Action Taken by MassHealth

MassHealth denied the appellant's application based upon excess assets, half of which were in a self-settled trust, and half of which were in an investment account the applicant jointly owned with her power of attorney.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.003, 520.004, and 520.024, in determining that these assets were appropriately countable as the applicant's.

Summary of Evidence

The applicant and her spouse created eponymous trusts in April 1999, funding each trust with investment and bank accounts. The applicant's spouse died in 2011, and his trust has been liquidated. The applicant entered the nursing facility on November 18, 2016. An application for MassHealth long-term-care benefits was submitted on July 6, 2017. The nursing facility is seeking long-term-care benefits starting on May 3, 2017. The representative from MassHealth's Enrollment Center ("MEC") testified that as of June 16, 2017 the applicant had a personal checking account with $1,005.52 and a personal-needs-allowance ("PNA") account with $159.55. The applicant was a joint account holder with her daughter/power of attorney ("POA") on an investment account that held $43,496.25 as of April 30, 2017. The appellant was the settlor and income-beneficiary of at trust that held $47,887.06 in assets as of April 30, 2017. These amounts in their entirety resulted in MassHealth's determination that the appellant was $90,548.38 over MassHealth's $2,000 asset limit.

Prior to the hearing, it was believed that both of the investment accounts were held in the trust.[2] The MEC representative confirmed that MassHealth would only count half of the jointly-held investment account, or $21,748.12. However, she asked that the appellant verify that the account was jointly held at the beginning of the lookback period.

The applicant's trust includes the following provisions that were highlighted by the parties:

> 3. Irrevocability
>
> The Donor expressly waives any and all right which he may have, by operation of law or otherwise, to revoke, alter, amend or otherwise change this Indenture of Trust or any of the provisions thereof.
>
> 4. Payments During Life of Donor and Donor's Spouse
>
> .01 For as long as either the Donor or the Donor's spouse is living, the Trustee shall hold and administer the Trust property as follows.

[2] The appellant's attorney pointed out that there was nothing in MassHealth's notice that gave any indication as to where the total dollar amount came from so that they could clarify that one of the accounts was outside of the trust.

.02 During the life of the Donor, the Trustee shall pay to the Donor so much of the net income, if any, ... as the Trustee deems advisable in the Trustee's sole and absolute discretion. Following the death of the Donor, if the Donor's spouse is then living, the Trustee shall pay to the Donor's spouse so much of the net income, if any, as the Trustee deems advisable in the Trustee's sole discretion.

.03 The Trustee shall have no power to make any distributions of principal at any time to or for the benefit of either the Donor or the Donor's spouse.

.04 The Trustee shall pay such amounts of principal as the Trustee, in its sole and absolute discretion, shall determine to or for the benefit of the members of a class consisting of the issue of the Donor then living .... .

.05 Notwithstanding the foregoing, the Donor reserves a limited or special power of appointment, exercisable during her lifetime 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 appointment, conditions or limitations, to such person or persons (whether in equal or unequal shares) among the members of the class consisting of the Donor's 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 Donor.

5. Payments After Death of Survivor of Donor and Donor's Spouse

.01 After the death of the survivor of the Donor and the Donor's spouse, the Trustee shall divide and allocate the trust property and any undistributed income into as many equal shares as there are children of the Donor then living and children of the Donor then deceased leaving issue then living.

.02 In the case of a share allocated to a then living child of the Donor, said share shall be paid over and distributed to such child, outright and free of trusts.

...

8. Exercise of Discretion and Powers by Trustee

...

.05 Notwithstanding any other provision of this instrument to the contrary, the powers and discretions of the Trustee shall not be exercised in such a manner as would cause the Donors from being eligible for any health, medical, social, residential and personal benefits and services which may be available from any governmental source to the extent that any such power or

discretion is so exercised, it shall be void.[3]

...

15. Vacancies and Succession of Trustees

...

.10 Notwithstanding the foregoing, during the life of the Donor, the Donor reserves the right to remove and replace any Trustee without cause.

...

20. Trustee's Powers

The Trustee shall have generally all the powers necessary, convenient, or incidental to the proper administration of the Trust ... together with all other powers, may be exercised without application to, or decree of or license of, any court, whether or not the Trustee is personally interested in the exercise of such powers, and which shall continue beyond the termination of the Trust hereunder for the purposes of distribution:

...

.11 To hold, retain, purchase, dispose of or otherwise deal with life insurance, annuities, endowment policies or other forms of insurance on the life of a Donor, any beneficiary or any other person for the benefit of any beneficiary and to pay the premiums and costs therefor from the principal or income of the trust.

...

Notwithstanding the foregoing, NO POWER GIVEN TO THE TRUSTEE HEREUNDER SHALL BE CONSTRUED TO PERMIT THE DONOR TO BORROW INCOME OR PRINCIPAL.

...

23. Combination of Like Trusts

For convenience of administration and investment, the Trustee may consolidate this trust or any share of this trust with, or may make gifts to or receive gifts from, any other trust having like provisions created by the Donor or any member of the Donor's family, and may administer the amounts so combined as one or more common funds and make joint or several distributions therefrom.

27. Compensation of Trustee

The Trustee shall be entitled to reasonable compensation for its services as such.

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[3] Both of MassHealth's memoranda identify this provision as appearing at Paragraph 5.05, rather than 8.05.

Exhibit 6E.

The applicant's spouse's trust included identical irrevocability and combination provisions as exist in the applicant's trust.[4] Exhibit 6E, ¶¶ 3, 23; Exhibit 6F, ¶¶ 3, 23. However, the spouse's trust also includes paragraph 4.02:

> During the life of the Donor, the Trustee shall pay to the Donor so much of the net income, if any, to the Donor as the Trustee deems advisable in the Trustee's sole and absolute discretion. Upon the death of the Donor, if the Donor's spouse is then living, the Trustee shall pay to the Donor's spouse the net income of the Trust. If, and only if, the net income of the Trust is less than then thousand ($10,000.00) in any one year, the Trustee shall supplement the net income with a distribution of principal.

Exhibit 6F.

At the hearing, MassHealth Legal's representative reviewed the memorandum he submitted into the record.[5] MassHealth's primary argument is that the spouse's trust is obviously countable under the "any circumstances" test. Even though the applicant's spouse's trust no longer held assets, following the spouse's death, the spouse's trust allowed for principal distributions to the applicant of $10,000 less any accrued income every year. Both trusts included provisions whereby the trustees could consolidate them with similar trusts. Therefore, the applicant's trust and her spouse's trust could have been consolidated, continued to include the allowance for distributing up to $10,000 per year in principal, and thus made the applicant's own trust principal distributable to her.

Alternatively, MassHealth notes that paragraph 4.05 retained to the applicant a special power of appointment "upon trusts, powers of appointment, conditions or limitations, to such person or persons (whether in equal or unequal shares) among the members of the class consisting of the Donor's issue of all generations or charitable organizations ... ."[6] Because this provision allowed the applicant to appoint principal to her children upon the condition that they use the money to benefit her. MassHealth notes that this particular "circumstance" was the basis for New Hampshire's highest court to find a Medicaid trust countable there. See Petition of Estate of Braiterman, 145 A. 3d 682 (NH 2016).

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[4] An incomplete copy of the spouse's trust was submitted into the record, and the document cuts off just before the final clause of Paragraph 23 (the combination provision). The appellant does not dispute, however, that this provision is identical in both trusts. See Exhibit 6F, p. 23.

[5] MassHealth's initial legal memorandum was also submitted as part of the MEC representative's hearing packet. See Exhibit 6D. It is identified as a confidential document, but neither of MassHealth's representatives asked that it be removed from the hearing record under a claim of attorney-client privilege or protected work product.

[6] There is language in the power of appointment that prohibits the "power or payment [from being] used to discharge a legal obligation of the Donor ...." In his presentation at the hearing, MassHealth's attorney argued that this limitation does not apply to an appointment to a principal beneficiary that is conditioned upon the principal being returned to the donor. He later argued that the "any circumstances" test applies at any time, under any set of imaginable scenarios, and regardless of restrictions on the purpose of the distributions. MassHealth's couching of the initial argument is presumed to be an alternative argument.

Finally, MassHealth noted that the power of appointment could be exercised to a charitable organization. MassHealth argues that the applicant could have appointed the trust principal to a charitable nursing facility upon the condition that it be used as compensation for her care, as indicated by Daley v. EOHHS, 477 Mass. 188 (2017).

The appellant's attorney argued that the trusts are both silent in regards to what trust terms control after consolidation. The appellant argues that trusts must be read as a whole, giving effect to the intention of the parties The appellant argues that the restrictions in the applicant's trust that restrict the use of principal for her benefit should be controlling in the event of consolidation. She further pointed out that the trusts had different trustees, and therefore there would be further confusion regarding who would administer the resulting trust. Furthermore, she attempted to limit the breadth of the principal distribution provision in the spouse's trust by emphasizing that it only allows principal distributions up to $10,000 per year, if the trust did not generate $10,000 in income.[7] The applicant was not entitled to any distributions from her own trust; rather her right to income was discretionary, but she never received income distributions. The appellant's attorney acknowledged that the applicant was over assets, but argued that they should still have the opportunity to spend down assets once MassHealth has accurately identified the amount of the excess assets.[8] She asked that the record be left open to formally address MassHealth's memorandum in writing.

The appellant prepared a memorandum for the hearing, but it was prepared without knowledge of the basis for MassHealth's decision beyond what was stated in the December 14 notice. The appellant argues that only half of the jointly-held investment account should be countable, and generally reviewed the law underlying Medicaid trust review. The appellant further argued that MassHealth failed to provide adequate notice pursuant to 130 CMR 515.007, as the notice only indicated that $92,388.83 were held in a "Bank Account." See Exhibit 8.

MassHealth pointed out that there does not appear to be any precedent that actually reads the trust as a whole in order to figure out intent, instead of simply identifying a specific ambiguous clause that appears to create a "circumstance" allowing distribution. MassHealth argued that the settlor's intent should never be a relevant fact in Medicaid review because the intent would always be to preserve assets from Medicaid countability.[9]

The record was left open for the appellant to verify ownership of the jointly held investment account

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[7] It was clarified that the crux of this argument is that the entirety of the principal could have been paid out over the course the existence of the trusts. This is especially true given the fact that it would take only five years to reduce the applicant's trust's assets through these allowable $10,000 distributions. The appellant was asked to specifically address whether there was some law that required a certain set of trust provisions being adopted in a consolidated trust.

[8] MassHealth's MEC representative expressed concern regarding why the applicant had not spent down her share of the investment account within 30 days from the date of the denial notice. It was pointed out that MassHealth's notice does not clearly identify the nature of the excess assets, as it combines assets both in and out of trust, and counts the entirety of an investment account, which MassHealth agreed should not be countable.

[9] The appellant attempted to argue that this trust was created so long ago that it would be unfair to impute Medicaid eligibility into the settlor's intentions when the trust was created. MassHealth offered a letter from the law firm that created the trusts, which states that the purpose of the trust is partly to protect "the assets from the cost of long term care to the extent possible." Exhibit 7D.

at the start of the lookback period, and for additional memoranda from both parties. The appellant filed a responsive memorandum arguing that the power of appointment does not result in trust principal being countable because the power specifically precludes disbursements to satisfy legal obligations. Had the applicant attempted to appoint principal to her children upon the condition that it be returned, the appellant argues there is no legal obligation for the recipient of the appointment to return the principal to the applicant. The appellant further argued that such an argument fails where the applicant lacked capacity to exercise the power of appointment. Exhibit 9, p. 3 (citing Appeal No. 1706917 (July 11, 2017)); Exhibit 7C. The applicant's power of attorney avers that the applicant was incompetent to manage her affairs from 2011, when her spouse died, until her death. Exhibit 9A.

Regarding consolidation, the appellant conceded that the trusts could be consolidated and there does not appear to be clear law governing which trust provisions would govern in the event of consolidation. The appellant states:

> Furthermore, the balance of the [applicant's trust] during the relevant period is less than $48,000, and the [spouse's trust] had a balance of $0. Given that Appellant would be entitled under a consolidation to $10,000 of net income per year, the entirety of the Trust funds would be lawfully exhausted prior to the date of application. As such, by virtue of a zero balance, the asset would not be countable.

Exhibit 9, p. 4. In other words, had the trusts been consolidated in 2011, when the applicant's spouse died, the applicant would have been paid out the entirety of her trust's account by 2016.

Additionally, the appellant filed a supplemental memorandum arguing that a recent Superior Court ruling, Maas v. Sudders, SSCA 18-845-D (Wilkins, J. June 22, 2018), found MassHealth to be systematically providing insufficient notice with regard to trust decisions. The appellant argues that Maas necessitates that the agency's decision be overturned and the appellant's benefits be approved. Exhibit 11. MassHealth responded, stating that nothing in Maas necessitates a substantive approval be awarded, and the decision itself only required that MassHealth issue adequate notice to the named participants in the case and provide adequate notice going forward. MassHealth further argues that any remedy based on Maas would merely delay the substantive outcome of this case.

Findings of Fact

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

1. The applicant entered the nursing facility on November 18, 2016. An application for MassHealth long-term-care benefits was submitted on July 6, 2017, and the nursing facility was seeking coverage starting on May 3, 2017. Exhibit 6; Testimony by MassHealth.

2. April 1999, the applicant and her spouse each created an eponymous trust, the terms of which as reviewed above are hereby incorporated as fact. Exhibits 6E, 6F.

    a. The trusts are irrevocable. Exhibit 6E, ¶ 3; Exhibit 6F, ¶ 3.

b. The applicant is an income beneficiary, and applicant's trust prohibits the trustee from making principal distributions to the applicant or her spouse. Exhibit 6E, ¶ 4.03.

c. Notwithstanding the prohibition on the trustee distributing principal to the applicant, the applicant retained a limited or special power of appointment "upon trusts, powers of appointment, conditions or limitations, to such person or persons (whether in equal or unequal shares) among the members of the class consisting of the Donor's 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 Donor." Exhibit 6E, ¶ 4.05.

d. The applicant retained the authority to remove and replace trustees. Exhibit 6E, ¶ 15.10.

e. The trusts may be consolidated. Exhibit 6E, ¶ 23; Exhibit 6F, ¶ 23.

f. The applicant's spouse's trust allowed for principal distributions of up to $10,000 per year, less any income generated by the trust, to the applicant. Exhibit 6F, ¶ 4.02.

3. The applicant's spouse died in 2011, and his trust was liquidated prior to the applicant entering the nursing facility. Testimony by appellant's attorney; Exhibits 8, 10.

4. As of June 16, 2017, the appellant had $1,165.07 in cash held in a checking account and her PNA account at the nursing facility. As of April 30, 2017, she was the joint owner of an investment account holding $43,496.25, half of which is $21,748.13 (rounded up). Exhibit 6, 6J; Testimony by MEC representative and appellant's attorney.

5. As of April 30, 2017, the applicant's trust held another investment account with $47,887.06 in investments. Exhibit 6K.

6. Through a notice dated December 14, 2017, MassHealth denied the application for MassHealth long-term-care benefits because due to $90,548.38.35 in excess assets in a "Bank Account." Exhibit 2.

7. MassHealth determined the assets held in the Irrevocable Trusts to be countable under the "any circumstances" test set out at 42 USC § 1396p(d). See Exhibits 2, 4.3.

8. MassHealth's specific arguments, as identified at hearing, are:

a. The trusts may be consolidated, adopt the provision allowing disbursement of up to $10,000 in principal per year, and thus distribute the entirety of the trust principal to the applicant. Exhibit 7.

b. The applicant could have appointed principal to her children upon the condition that the principal be returned to her, or to a charitable nursing facility upon the condition that it be used to pay for her care. Exhibit 7.

9. The appellant argues that the power of appointment does not make the principal disbursable, but concedes that the consolidation provision would have allowed the principal to be distributed to the applicant. Exhibit 10.

10. The appellant further argues that MassHealth provided inadequate notice, which should result in the appeal being approved. Exhibit 11.

Analysis and Conclusions of Law

The appellant challenges whether MassHealth has not provided adequate notice in this case. See 130 CMR 610.026(A); Maas v. Sudders, Sup. Ct. CA Nos. 18-129-D, 18-845-D, p. 15 (Wilkins, J. June 22, 2018).[10] The Maas decision found MassHealth's notices in trust cases violate 42 CFR § 431.210, which requires the agency provide a "clear statement of the specific reason" for the agency's action. The justice awarded declaratory relief requiring the agency provide adequate notice moving forward. Maas, slip op. at 15. In addition to citing the relevant regulation, the justice felt adequate notice required some indication as to what provisions of the trust made the trust countable. Furthermore, systematically providing insufficient notice could not be "cured" through a later full explanation of the decision. The justice reasoned that providing clear and specific reasons in a notice reduces delays in processing the applicant's case, but it also checks the agency's ability to act arbitrarily through ad hoc rationalizations. Slip op. at 5-12.

However, the appellant's requested remedy does not correspond to MassHealth's notice deficiency. Though Maas found that delay in processing appeals in a systematic manner could not be sufficiently redressed through providing parties additional time, in an individual circumstance, such relief is appropriate. Indeed, with regard to the specific plaintiffs, Maas afforded them the right to have corrected and adequate notices issued, and did not make a substantive determination on the applicant's eligibility. Such a procedural outcome would only create further delay in addressing the substantive question of whether the applicant's trust holds countable assets. Therefore, the appellant's requested relief is DENIED.

MassHealth reviews trusts using the "any circumstances" test. For irrevocable trusts, this test looks for

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income (I) to or for the benefit of

[10] The appellant cites 130 CMR 515.007, which explains the "Rights of Applicants and Members." However, there is nothing in this regulation that governs notice requirements.

> the individual, shall be considered income of the individual, and (II) for any other purpose, shall be considered a transfer of assets by the individual.

42 USC § 1396p(d)(3)(B)(i).

Furthermore, this test is applied "without regard to—(i) the purposes for which a trust is established, (ii) whether the trustees have or exercise any discretion under the trust, (iii) any restrictions on when or whether distributions may be made from the trust, or (iv) any restrictions on the use of distributions from the trust." 42 USC § 1396p(d)(2)(C).

Substantively, the appellant agrees that upon consolidation the applicant could have received the entirety of her trust's principal through annual distributions of up to $10,000. Apparently, the appellant believes that, because the distributions did not take place prior to the applicant's death, they are not allowed to be counted now. However, the "any circumstances" test allows MassHealth to review a trust without regard to whether the circumstances have ever occurred, "it is enough that the amount could be made available to [the donor] under any circumstances." Heyn v. Dir. of Medicaid, 89 Mass. App. Ct. 312, 315 (2016) (citing Lebow v. Comm'r of the Div. of Med. Asst., 433 Mass. 171, 177-178 (2001)). Based upon the 23rd paragraph of each trust, the trusts may be consolidated, and the consolidated trust could include paragraph 4.02 of the spouse's trust, which allows the applicant to receive up to $10,000 in principal every year. Had this consolidation occurred in 2011 (let alone in 1999), the applicant would have received all of her trust's assets.[11] Therefore, this appeal is DENIED.

I further accept MassHealth's other arguments as presented. In support of its argument that the power of appointment makes principal countable, MassHealth cited the Petition of Estate of Braiterman, 145 A. 3d 682 (NH 2016); and Doherty v. Dir. of the Off. of Medicaid, 74 Mass. App. Ct. 439 (2009). In Braiterman, the settlor of the trust was not a beneficiary of the trust at all, though she had retained a similarly worded limited power of appointment that could be used to give trust principal to certain named beneficiaries upon any condition. 145 A.3d at 684-685. In Doherty, the donor was only an income beneficiary, and there was an explicit prohibition on distributing trust principal to her. 74 Mass. App. Ct. at 441. In both cases, the courts held that the appellant could access the entirety of trust's principal due to language in the trusts that, under trust law, would not

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[11] In Appeal No. 1706917, cited by the appellant, the hearing officer agreed that an incompetent applicant could no longer exercise powers they had retained under the trust. This application of the "any circumstances" test ignores that the powers could have been exercised prior to incompetency. That said, a fair hearing decision must be "based upon evidence, testimony, materials, and legal rules, presented at the hearing" and any "evidence, testimony, materials, legal rules, or arguments presented after the close of the hearing will be excluded ...." 130 CMR 610.082. A fair hearing decision must be grounded upon the facts and arguments presented by the parties; trust language will be reviewed consistently with the parties' arguments as to how the law applies the trust's provisions.

Cohen illustrates what steps the agency can take to minimize differing explanations and interpretations of the "any circumstances" test. See Cohen v. Comm'r of the Div. of Med. Asst., 423 Mass. 399, 411 n. 18 (1996) (agency's interpretation of the "trustee's discretion" test was not entitled to deference because (1) there were no regulations to which the court could defer; (2) the agency could not establish that they had been consistently applying their interpretation; and (3) the state agency's interpretation was based upon guidance from the federal government that was also not embodied in regulation).

have been considered avenues of distribution. Both cases note the various powers retained by the donors in creating the trusts, such as the power to appoint, the power to decide who is a trustee, and the power to demand that income be accumulated. 145 A.3d at 685; 74 Mass. App. Ct. at 391-392.

The appellant relies upon Heyn, which is the only Massachusetts precedent to address a power of appointment.[12] Heyn v. Dir. of Medicaid, 89 Mass. App. Ct. 312 (2016). The power of appointment there was "free of Trust," and the court held that such an appointment was akin to an outright gift, and the fact that principal could be removed from trust did "not by its nature make [trust principal] available to the grantor, any more than if the grantor had gifted the same property to such a person when she created the trust, rather than placing it in trust."[13] 89 Mass. App. Ct. at 318; see also Guerriero v. Comm'r of the Div. of Med. Asst., 433 Mass. 628, 629-632 (2001).

At hearing, MassHealth further clarified its view of any "any circumstances" test to allow the agency to review the trust without regard to the intent of the donors. I agree with MassHealth that a fair hearing is not an appropriate forum for establishing the intent of the parties to a trust. Administratively, this is certainly a clearer standard and more readily usable in general application.

Therefore, MassHealth has identified two more "circumstances" through which the applicant could have accessed the entirety of the trust principal in order to benefit herself. First, she could have appointed principal to one of her children upon the condition that the distribution be used to pay for her care. Second, she could have appointed the entirety of the trust principal to a nursing facility that is organized as a 501(c)(3) charitable organization. MassHealth's reading of 42 USC § 1396p(d)(2)(C) grants the agency the authority to ignore fiduciary duties that would otherwise constrain the donor or the trustees from exercising the power of appointment upon conditions that would benefit the appellant. The federal law disregards any restrictions on the use of distributions,

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[12] The principle discussion in that case was whether the trustee's power to apportion between income and principal could be used to divert annuity payments to the income beneficiary, claiming the payments were entirely income. 89 Mass. App. Ct. at 313-314. The court held that MassHealth factually "misapprehends the nature of annuity payments," as each annuity payment includes a return of principal along with an interest payment. Because the trustee's power to apportion between principal and income was limited by "reasonable accounting principles," the principal portion of the payment would need to be recaptured by the trustee and held for the remaindermen. 89 Mass. App. Ct. at 317.

[13] While indisputably binding precedent, this analogy ignores one of the advertised reasons for creating a trust instead of simply gifting resources. Retaining the power to disinherit someone allows the donor to threaten potential beneficiaries with defeasement to ensure that they will agree to return principal to the donor. Even within the limitations of trust law, the parties to a trust could still agree to use the trust principal to privately pay for the settlor's nursing facility care in order to get past the lookback period, thus preserving the remainder of the trust principal for the remaindermen. However, as only the parties to the trust may pursue legal action for the breach of fiduciary duties, the parties to a trust may agree to ignore trust restrictions, and MassHealth is left without remedy in state court. Cf. Appeal No. 1609344, pp. 6, 9, 14 n. 20 (MassHealth presented no argument regarding how fiduciary duties were affected by the "any circumstances" test, resulting in the trust assets being deemed non-countable, despite the parties to the trust admittedly breaching fiduciary duties to pay nursing facility costs to get past the lookback period).

which means that payments to the nursing facility can be for services rendered rather than solely in a donative capacity.[14]

Order for MassHealth

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.

Christopher Jones
Hearing Officer
Board of Hearings

[14] Because the "any circumstances" test applies at any time during the existence of the trust, it does not matter whether or not the nursing facility in which the appellant resided in was organized as a charity. It is sufficient that the appellant **could** have received her care at a charitable nursing facility, to which she **could** have appointed the trust principal.

Office of Medicaid
BOARD OF HEARINGS

Appeal Decision:	Approved	**Appeal Number:**	1811536
Decision Date:	2/13/19	**Hearing Date:**	09/12/2018
Hearing Officer:	Alexandra Shube		

Appearance for Appellant:

Appearance for MassHealth:
Michael Somers, Esq.
Nereida Mercado, Chelsea 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:**	Eligibility; Trust
Decision Date:	2/13/19	**Hearing Date:**	09/12/2018
MassHealth's Rep.:	Michael Somers, Esq. Nereida Mercado	**Appellant's Rep.:**	
Hearing Location:	Tewksbury MassHealth Enrollment Center	**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

Through a notice dated April 26, 2018, MassHealth denied the appellant's application for MassHealth long-term care benefits due to assets held in trust deemed countable to the appellant (see 130 CMR 520.016(B), 520.023, and Exhibit 1). The appellant filed this appeal in a timely manner on May 7, 2018 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth long-term care benefits due to assets held in trust deemed countable to the appellant.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.023, in denying the appellant's MassHealth application due to assets held in trust deemed countable to appellant.

Summary of Evidence

The MassHealth representative testified that the appellant was admitted to a skilled nursing facility on December 1, 2017. An application for long-term benefits was received on February 5, 2018, seeking eligibility effective November 1, 2017. On April 26, 2018, MassHealth determined that the appellant's assets exceeded the program limits by $306,856.10. On March 19, 2012, the appellant established the D. Family Irrevocable Trust (hereinafter, the Trust) and funded it on the same day by transferring her home residence into the Trust. The house has never been sold and remains in the Trust. The Trust includes the following relevant provisions:

Article III, Section A

The Trustee shall pay to, or for the benefit of, the Settlor so much of the income of the trust as the Trustee shall determine in his/her sole and non-reviewable discretion, as may be necessary for the Settlor care and well being. Any income not paid may be accumulated and added to the principal. The principal shall be held until the termination of this Trust. Principal shall not be distributed to the Settlor…

During the Settlor lifetimes, the Settlor shall have the power to appoint from time to time, by an instrument in writing, personally or through a legal representative, all or any part of the trust property then on hand, to any one or more charitable or nonprofit organizations over which the Settlor have no control or interest, whether or not organized for a specific purpose specified section 170(c) of the Internal Revenue Code, but excluding any federal, state, or local government or any subdivision, department, or agency thereof.

Article III, Section B.

The Trustee may also, in his/her discretion, pay to any one or more of the Settlor issue, all or any part of the principal, in equal or unequal distributions, as the Trustee considers advisable, in his/her sole, and non-reviewable discretion. If it is contemplated that a distribution will be made under this Section to a person who is also a Trustee, then that person may not have any part in that decision. Distributions to said Trustee should be agreed to by the remaining beneficiaries.

Article XII

The interest of any beneficiary of any trust shall not be anticipated, sold, transferred, alienated, encumbered nor in any other manner assigned by any beneficiary. Such interest shall not be subject to any legal process, bankruptcy proceedings or the interferences or control of creditors, spouses, or divorced spouses, governments or their agencies, or others, for the debts, obligations or activities of any beneficiary or beneficiary's legal representative.

In its Memorandum in Opposition to Appeal, MassHealth argues that for irrevocable trusts, per MassHealth regulations and federal Medicaid law, the "any circumstances test" allows MassHealth to evaluate whether there are any circumstances under the terms of the trust that would allow payment to or for the benefit of an applicant from the income or principal of a trust. MassHealth further argues that all the assets in the Trust are countable because under Article III, Section A, the appellant reserved the right to appoint all or any of the trust property to any nonprofit or charitable organization over which the applicant has no controlling interest. Thus, the appellant has authority under the Trust to appoint any part of the Trust assets to a non-profit nursing facility to be used for her benefit. In support thereof, MassHealth argues that in Daley v. Sec'y of Executive Office of Heatlh & Human Servs., 477 Mass. 188, 203 (2017) the Supreme Judicial Court (the SJC) held that if a trust includes a provision whereby trust assets can be appointed to a nonprofit or charitable organization, those assets are available to pay for long-term care. MassHealth cites the following language from the decision: "Had Nadeau received care at a nursing home operated by a nonprofit organization, he could have used the assets of the trust, including his home, to pay the nonprofit organization for his care." Id. Furthermore, "[b]ecause approximately one-fourth of the nursing homes in Massachusetts are operated by nonprofit organizations... it is appropriate for MassHealth to consider whether this possibility fits within the 'any circumstances' test." Id.

Additionally, MassHealth argues that there is nothing in the language of the Trust that states that the payment of the Trust principal to a non-profit nursing facility would be in a donative capacity. To presume that appointment of principal must be in a donative capacity is to read language into the Trust that does not exist. Additionally, MassHealth argues that Article III, Section A only prohibits distributions of principal directly to the applicant ("Principal shall not be distributed to the Settlor"). It does not prohibit, as other trusts do, the distributions of principal for the applicant's benefit. In its Memorandum, MassHealth states that "[u]nder the any set of circumstances test, trust funds are available for eligibility purposes if they can be paid to or for the benefit of the applicant... Therefore, using the power of appointment to make payments directly to a non-profit nursing home would not contradict the other clauses of the Trust because it would not be a payment directly to the applicant" (Exhibit 6 at 6). The only limitation regarding the appellant's power to appoint to a non-profit organization is that the appellant have no control over the organization.

The appellant was represented by an attorney who appeared at hearing and argues that the trust assets are not available to the appellant and thus should not be counted in the appellant's eligibility determination. She provided a Memorandum and Supplemental Memorandum in further support of her position. The appellant asserts that MassHealth wrongly relies upon Daly in this situation. She argues that the SJC did not issue a ruling, but dicta, on the issue of the power to appoint trust property to charitable or non-profit organizations. Instead, the SJC remanded the case to the Board of Hearings to consider whether it is "appropriate for MassHealth to consider whether this possibility [under a limited power of appointment] fits within the 'any circumstances' test." Id. She argues that the limited power to appoint to a charitable or non-profit organization does not satisfy the "any circumstances" test because appointed assets cannot be used for the appellant's personal benefit, such as to pay for nursing facility care costs. This limited power to appoint allows the appellant to make gifts to such entities, but it does not enable her to use trust principal to pay for her own personal expenses or dictate how the nonprofit or charitable organizations uses the assets.

Furthermore, she argues that the trust must be construed as a whole and the fiduciary duties of trustees must be observed in construing the terms of a trust. A limited power of appointment does not, and cannot be interpreted to, override other portions of a trust that prohibit the payment or usage of principal for the benefit of the grantor, especially where a trust must be read as a whole. The appellant's attorney relies on Restatement (Third) of Property (Wills & Don. Trans.) §§ 17.2, 19.15-19.16 (2011) to state that "[a] limited power of appointment is exercisable only in favor of permissible appointees, and any attempt to exercise a limited power in favor of an impressible appointee, i.e. to use principal for the personal benefit of the grantor, is invalid." As the appellant has the right to receive only income distributions from the trust, not principal, this does not allow her to somehow use her limited power of appointment to direct the appointed funds to be used for her benefit or personal care costs. As such, if she were to use her power of appointment for her benefit, it would be a breach of her fiduciary duty.

She further argues that the appellant's nursing facility would be her creditor, and thus, per the spendthrift clause at Article XII, the appellant would be unable to appoint principal to the nursing facility to satisfy her debt there. She asserts that the appellant is not in a nonprofit nursing facility, but even if she were, the nursing facility would be her creditor, as it would be seeking payment on a debt accrued from non-payment of her nursing facility care costs and Article XII states that "[t]he interest of any beneficiary under this agreement shall not be subject to assignment, alienation, pledge, attachment, or claims of creditors."

The appellant's attorney also relies significantly on Heyn v. Director of Medicaid, 89 Mass. App. Ct. 312, 318 (2016) which held that "... a provision making trust principal available to persons other than the grantor does not by its nature make it available to the grantor, any more than if the grantor had gifted the same property to such a person..." The appellant could exercise the limited power to appoint trust property to make a donative gift to a charity or nonprofit organization, as well as a pooled trust; however, the organizations would be under no obligation to then use donated assets to pay for the appellant's care costs. She argues that similar to children receiving assets via a power of appointment as discussed in Heyn, the nursing facility here would be under no obligation to then use those assets for the appellant's care costs.

Findings of Fact

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

1. The appellant was admitted to a skilled nursing facility on December 1, 2017 (Testimony and Exhibit 5).

2. MassHealth received an application for long-term care benefits on February 5, 2018, seeking eligibility effective November 1, 2017 (Testimony and Exhibit 5).

3. On April 26, 2018, MassHealth determined that the appellant's assets exceeded the program limits by $306,856.10 (Exhibit 1).

4. On March 19, 2012, the appellant established the D. Family Irrevocable Trust and funded it on the same day by transferring her home residence into the Trust (Exhibits 5 and 6).

5. The house has never been sold and remains in the Trust (Exhibit 7).

6. Article III, Section A of the Trust provides the following:

> The Trustee shall pay to, or for the benefit of, the Settlor so much of the income of the trust as the Trustee shall determine in his/her sole and non-reviewable discretion, as may be necessary for the Settlor care and well being. Any income not paid may be accumulated and added to the principal. The principal shall be held until the termination of this Trust. Principal shall not be distributed to the Settlor…
>
> During the Settlor lifetimes, the Settlor shall have the power to appoint from time to time, by an instrument in writing, personally or through a legal representative, all or any part of the trust property then on hand, to any one or more charitable or nonprofit organizations over which the Settlor have no control or interest, whether or not organized for a specific purpose specified section 170(c) of the Internal Revenue Code, but excluding any federal, state, or local government or any subdivision, department, or agency thereof.

7. Article III, Section B of the Trust provides the following:

> The Trustee may also, in his/her discretion, pay to any one or more of the Settlor issue, all or any part of the principal, in equal or unequal distributions, as the Trustee considers advisable, in his/her sole, and non-reviewable discretion. If it is contemplated that a distribution will be made under this Section to a person who is also a Trustee, then that person may not have any part in that decision. Distributions to said Trustee should be agreed to by the remaining beneficiaries.

8. Article XII of the Trust provides the following:

> The interest of any beneficiary of any trust shall not be anticipated, sold, transferred, alienated, encumbered nor in any other manner assigned by any beneficiary. Such interest shall not be subject to any legal process, bankruptcy proceedings or the interferences or control of creditors, spouses, or divorced spouses, governments or their agencies, or others, for the debts, obligations or activities of any beneficiary or beneficiary's legal representative.

9. The nursing facility where the appellant resides is not a nonprofit or a charity (Testimony).

Analysis and Conclusions of Law

In order to be approved for long-term care benefits, the total value of countable assets or resources owned by or available to the applicant may not exceed $2,000. See 130 CMR 520.003(A)(1). 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. See 130 CMR 520.023. With respect to Medicaid eligibility determinations involving irrevocable trusts created on or after August 11, 1993, federal law at 42 U.S.C. § 1396p(d)(3)(B) states:

> (i) if there are ***any circumstances under which payment from the trust could be made to or for the benefit of the individual***, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made ***shall be considered resources available to the individual***, and payments from that portion of the corpus or income—
>
> (I) to or for the benefit of the individual, shall be considered income of the individual, and
>
> (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and
>
> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

42 U.S.C. §1396p(d)(3)(B) (emphasis added).

Pursuant to the corresponding MassHealth regulation, the amount of an irrevocable trust countable to an applicant is determined as follows as follows:

> (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 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 are 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 (8).

130 CMR 520.023(C) (emphasis added).

MassHealth argues that the power of appointment in Section A of the Trust allows the appellant to access trust principal because she can appoint trust property to a nonprofit nursing facility to pay for her care. MassHealth further argues that the only limitation on this power of appointment is that the appellant has no controlling interest over the nonprofit or charity. MassHealth asserts that the power is not even limited by language prohibiting trust distributions for the appellant's benefit, rather the Trust simply states that "[p]rincipal shall not be distributed to the Settlor." As such, MassHealth argues that assets held in the Trust are countable based on Daley v. Sec'y of Executive Office of Heatlh & Human Servs., 477 Mass. 188, 203 (2017) and Nadeau v. Director of the Office of Medicaid, 477 Mass. 188 (2017). In addressing the power of appointment to a charity or nonprofit organization, the SJC states:

> First, the Nadeaus may "appoint ... all or any part of the trust property...to any one or more charitable or non-profit organizations" over which they have no controlling interest. Had Nadeau received care at a nursing home operated by a nonprofit organization, he could have used the assets of the trust, including his home to pay the nonprofit organization for his care. Because approximately one-fourth of the nursing homes in Massachusetts are operated by nonprofit organizations, albeit not the nursing home where he received care, it is appropriate for MassHealth *to consider whether this possibility fits within the "any circumstances" test.*

Daley, p. 16 (emphasis added)

In remanding the case to MassHealth, the SJC plainly states that the Nadeaus could have used Trust assets to pay for his care at a nursing home operated by a nonprofit organization; however, the SJC determined only that it is appropriate for MassHealth to consider whether this possibility fits within the "any circumstances" test. It is not enough for MassHealth to rely on the SJC's remand order to conclude that assets are countable simply because of the power to appoint to a charity or nonprofit. To that end, MassHealth must argue the reasons why a power to appoint to a charity or nonprofit organization renders assets available to the appellant, rather than circularly adopting the remand order as a maxim in concluding simply that it makes it available. The SJC provides no legal analysis or guidance with regard to this conclusion because the issue of whether or not the power to appoint assets to a charity or nonprofit organization was not adjudicated by the Daley Court.[1]

[1] The Daley Court concluded only "that neither the grant in an irrevocable trust of a right to use and occupancy in a primary residence deeded to that trust, nor the retention of a life estate in a primary residence after deeding it to such a trust, makes the equity in the home owned by the trust a countable asset for the purpose of determining an applicant's eligibility for long-term care benefits under the Federal Medicaid Act; therefore, this court vacated the judgments in two cases that relied on a finding that the home was a countable asset but remanded each matter for further findings regarding other possible sources of countable assets contained in the trust at issue in each matter." Daley, at 1-2.

The appellant disagrees with MassHealth's analysis and argues that while the appellant could presumably use this power to make a donative gift to a nonprofit nursing facility or to a pooled trust, neither the nursing facility nor the pooled trust organization would be under any obligation to use the trust assets to pay for the appellant's care. Additionally, the appellant argues that any attempt by the appellant to use the power of appointment to pay her nursing facility expenses would be a breach of fiduciary duty to the principal beneficiaries and in conflict with the spendthrift provision in Article XII.

The appellant has sufficiently demonstrated that her power of appointment does not create a circumstance where a payment from the Trust principal could be made to or for her benefit. The appellant's argument is supported by Heyn in that there is no evidence showing a clear path to the use of the funds by a charity or nonprofit organization on the appellant's behalf once the funds are appointed to a charity or nonprofit organization. Furthermore, read as a whole, the Trust does not allow for distributions of principal for the benefit of the applicant. To do so would be a breach of fiduciary duty.

Based on the arguments presented, the trust instrument does not present "any circumstances" that allow payment of trust assets to be made to or for appellant's benefit. Therefore, the Trust is not countable and the appeal is APPROVED.

Order for MassHealth

Rescind the notice dated April 26, 2018 and determine eligibility without regard to assets held in trust.

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.

Alexandra Shube
Hearing Officer
Board of Hearings

cc:
MassHealth Representative: Sylvia Tiar, Tewksbury MassHealth Enrollment Center, 367 East

Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

Lionel Nadeau
c/o Carol Olsta
38 Chadwycke Court
Valatie, NY 12184

Appeal Decision:	Approved	**Appeal Number:**	1408634.remand
Decision Date:	MAR 05 2018	**Hearing Date:**	12/18/2017
Hearing Officer:	Marc Tonaszuck	**Record Open to:**	01/18/2018

Appellant Representative:
Lisa Neeley, Esq.

MassHealth Representative:
Michael Somers, Esq.

MAR 07 2018

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171

REMAND APPEAL DECISION

Remand Appeal Decision:	Approved	**Issue:**	30A Remand; Long Term Care – Countable Assets
Decision Date:	MAR 05 2018	**Hearing Date:**	12/18/2017
MassHealth Rep.:	M. Somers, Esq.	**Appellant Rep.:**	Lisa Neeley, Esq.
Hearing Location:	Springfield MassHealth Enrollment Center		

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 06/27/2014, MassHealth denied the appellant's application for MassHealth Long-Term Care (LTC) Benefits because MassHealth determined that assets held in Trust are countable and exceed eligibility limits (130 CMR 520.003, 520.004; Exhibit A1). The appellant filed an appeal in a timely manner on 07/21/2014 (130 CMR 610.015(B); Exhibit A2). A hearing was held on 08/27/2014 after which the record remained open until 09/12/2014 to allow the appellant to review and respond to MassHealth's legal memorandum (Exhibits A3 and A4). On 11/28/2014, the Board of Hearings denied the appellant's appeal, concluding that MassHealth was correct in determining that Trust assets were countable and appellant's assets exceeded the $2,000.000 asset limit to establish eligibility for LTC benefits (Exhibit A5).

The appellant filed a c. 30A civil complaint with the Commonwealth of Massachusetts Superior Court Department of the Trial Court (Docket No. WOCV2014-02278) seeking judicial review of the denial of his appeal. The Superior Court upheld the denial and appellant sought further appellate review.

The Massachusetts SJC took direct appellate review on its own motion and combined it with another case with similar facts and issues of law (*Daley v. Secretary of the Executive Office of Health and Human Services, et al.*, 477 Mass. 188 (2017)). On September 6, 2017, the SJC reversed the Superior Court decision and remanded the case to

MassHealth for further proceedings consistent with its opinion (*Id.* at p. 204).

The SJC remanded the matter to the agency for consideration of two additional grounds[1] (Exhibit B5).

On 11/07/2017, MassHealth notified the appellant that it denied his application for LTC benefits because it found the value of the property held in Trust to be a countable asset in the appellant's eligibility determination and that his assets exceed the asset limit for him to be eligible for LTC benefits (130 CMR 52.003; Exhibit B1). The appellant appealed the denial in a timely manner on 11/24/2017 (Exhibit B2). The hearing was reconvened on 12/18/2017 in the Springfield MassHealth Enrollment Center (Exhibit B3). Both parties were represented by counsel at the reconvened hearing. The fair hearing record remained open until 01/18/2018 for the parties to exchange and submit post-hearing memoranda.

Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth LTC Benefits because MassHealth determined that assets held in Trust are countable to appellant and exceed eligibility limits.

Issue

The appeal issue is whether MassHealth properly applied the controlling regulations to accurate facts when it denied the appellant's application for MassHealth LTC Benefits upon determining that assets held in Trust are countable to the appellant and exceed the eligibility limit.

Summary of Evidence[2]

At the 08/27/2014 fair hearing it was established that that the appellant, a widower who was 89 years of age at the time, was admitted to the skilled nursing facility on 04/01/2014. He applied for MassHealth community benefits on 02/24/2014. The application was converted to a LTC supplement seeking a benefit start date of 04/13/2014 (Exhibit A6). In processing the application, MassHealth determined that the

[1] Prior to issuances of a new determination consistent with the SJC opinion, on September 22, 2017, the matter was remanded to the Board of Hearings (Exhibit B5). The Board responded by requesting MassHealth issue notice and appellant be provided with appeal rights if the agency determined the trust was still countable (Exhibit 6). MassHealth issued a notice on November 7, 2017 and appellant perfected an appeal (Exhibits B1 & 2). The hearing officer then provided the parties with notice of the date of the reconvened hearing and prehearing orders for the submissions by the parties (Exhibit B6A).

[2] The Summary of Evidence incorporates all arguments and submissions made at and after both the 08/27/2014 hearing and the 12/18/2017 reconvened hearing.

appellant's total countable assets exceed the eligibility asset limit and issued in "excess asset denial" on 06/27/2014 (Exhibit A1). According to the denial notice, MassHealth determined that the appellant has $168.15 in a bank account and $173,700.00 listed as "other" (*Id.*). The MassHealth representative[3] testified that the asset eligibility limit is $2,000.00 for a single individual.

The MassHealth representative further testified that the assets listed under "other" comprised the principle of a Trust ('the Trust") established by the appellant and his wife in 2001. The MassHealth representative submitted a copy of the Trust document along with a legal memorandum prepared by MassHealth's Legal Department which concluded that the Trust principal is countable for MassHealth eligibility purposes (Exhibit 6). The MassHealth representative also noted that the Trust explicitly identifies the appellant as an income beneficiary.

According to MassHealth's memorandum, on 03/27/2001, the appellant and his wife deeded to the Trust their real estate, the appellant's former home, located at 1075 School Street, Webster, Massachusetts. The appellant and his wife did not retain life estates under the deed. The MassHealth representative testified that the terms of the Trust allow the appellant discretion to exercise certain rights and control over the principle. She testified that the entire principal of the trust, the real estate valued at $173,700.00 is countable in an eligibility determination for LTC benefits. And as a result, the appellant was not eligible for LTC benefits because his assets exceeded the $2,000.00 limit for a single individual. MassHealth issued the denial notice and the appellant appealed to the Board of Hearings. The fair hearing was held and the Board of Hearings denied the appeal.

The appellant appealed the denial of his appeal to Superior Court. The case eventually made its way to the Supreme Judicial Court where it was consolidated with another case to become *Daley v. Executive Office of Health and Human Services*, 477 Mass. 188 (2017). In *Daley*, the SJC rejected the Agency's determination that the right to use and occupy the real property contained in the Trust rendered the full Trust principal countable for Medicaid (MassHealth) eligibility. However, the SJC also *sua sponte* offered two alternative rationales for why the Agency could find the assets in the Trust "countable" for Medicaid eligibility and it remanded the cases back to the Agency. After considering the two alternate rationales offered by the SJC, MassHealth issued a new determination on the appellant's original application and again denied it because the Agency found the full value of the Trust to be available under the SJC's new rationales.

MassHealth's attorney discussed the first alternative rational offered by the SJC, specifically, that if a Trust includes a provision whereby Trust assets can be appointed

[3] A MassHealth representative appeared telephonically at the 08/27/2014 hearing; however, she did not appear at the reconvened hearing. An attorney representing MassHealth appeared. An attorney representing the appellant appeared at the 08/27/2014; however, a different attorney appeared at the reconvened hearing.

to a non-profit organization, those Trust assets are available to use to pay a non-profit nursing home for long term care. According to the SJC, "had Nadeau received care at a nursing home operated by a non-profit organization, he could have used the assets of the Trust, including his home, to pay the non-profit organization for his care. The SJC reasoned that "because approximately one fourth of the nursing homes in Massachusetts are operated by non-profit organizations...it is appropriate for MassHealth to consider whether this possibility fits within the "any circumstances" test.

Second, according to MassHealth, the SJC explained in *Daley* that if a Trust is construed as a grantor trust, "with all income distributed to the grantors taxable to them, and the trustee may pay any tax liability arising from such distribution from the corpus of the Trust, then MassHealth may determine that this portion of the corpus is a countable asset under the "any circumstances" test and may ascertain the size of the portion of the corpus from which payment to the individual could be made in this circumstance by calculating the total amount of income tax that could be paid using principal over the lifetime of the trust.

At the reconvened hearing, MassHealth argued that the corpus of the Trust is countable because the appellant has the power to appoint the assets to a non-profit long-term care facility under Article 2.2 of the Trust. Alternatively, at least $6,808.00 is available under Article 6.4 of the Trust which allows the appellant to access the Trust principal to satisfy any income tax obligations that may have arisen or may yet arise in his lifetime. Counsel for MassHealth cited to the following provisions of the Trust:

Article 2.2

> During our lifetime we shall have the power to appoint from time to time, by an instrument in writing by ourselves or by our legal representative, all or any part of the Trust property then on hand to any one or more charitable or non-profit 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.

Article 6.4

> It is the intent of the grantors that this Trust be construed as a "grantors trust" under Internal Revenue Code section 677(a). All income distributed, held or accumulated by this Trust shall be taxable to us. Our trustee may, to the extent that the income of the Trust generates a tax liability for us, distribute to us such amounts of income or principal of the Trust as our trustee deems necessary to satisfy such tax obligations.

MassHealth's argued that the entire value of the Trust is countable because it is available for the appellant to use towards his long term care under provision 2.2 of the

Trust. Because there is a circumstance by which the assets are available to the appellant, whereby he could appoint Trust assets to a non-profit nursing home and those assets could be used for his care in the non-profit nursing home.

Second, MassHealth's argued that at least $6,808.00 of Trust principal is available because as a "grantor's trust," under Article 6.4, the trustee may use the Trust principal to satisfy any income tax obligation that arises due to income generated by the Trust. He argued that it is irrelevant that the Trust may not have yet produced income. Here, the corpus of the Trust is a piece of real property, a 4-bedroom home in Worcester County. Counsel argues that the rental value for one year is approximately $15,468. The appellant could be expected to live 4.4 years from the date of application when he was 89 years old. Therefore, he argued, at the time of application, there existed a set of circumstances by which the trustee could distribute approximately $6,808.00, which exceeds the $2,000.00 asset limit for long term care benefits.

The appellant was represented at the fair hearing by an attorney who testified that the value of the assets held in the Trust are not countable in an eligibility determination because the Trust does not provide any circumstances under which the appellant can receive distributions of Trust principal. Counsel offered that the home held in the Trust was sold on 09/11/2014 to a third-party buyer. The proceeds from the sale were $147,372.33 and that amount, plus the accumulated interests on that amount are currently held in a bank account under the Trust's name.

In addressing the first argument made by MassHealth, appellant's stated that the nursing facility in which the appellant resides is a for-profit organization and the appellant, pursuant to the terms of the Trust, is unable to appoint the Trust assets to that nursing home. Appellant's counsel argued that even if the appellant could appoint Trust assets to a non-profit nursing facility in which he may reside, that organization has no obligation to use the appointed assets for the appellant's benefit or care. The organization might use the appointed Trust assets for its general charitable purposes, which may or may not benefit the appellant. Because the appellant has a limited power of appointment of the Trust assets, this article does not render the assets a countable resource and there is no circumstance under which payment from the Trust could be made to or for the benefit of the appellant in this case.

Appellant's counsel next argued that the provision of the Trust that provides that the trustee may make a distribution to pay the appellant's income tax obligation generated by income distributed to him under the terms of the Trust does not render the corpus of the Trust a countable resource. In support of this argument, counsel submitted the appellant's federal income tax forms for years 2014, 2015, and 2016. She stated that the tax forms show that the appellant incurred no federal tax liability for those years because of a large medical expense deduction claimed as a result of his patient paid amount to the nursing home. His medical expense deduction eliminated any federal income tax that would have been owed. Counsel addressed MassHealth's argument

that rental income from the real estate previously held in the Trust would have generated income and a tax liability totaling $6,808.00. She provided hypothetical tax returns prepared by a Certified Public Accountant (CPA) for the years 2014-2016 that incorporated the hypothetical monthly rental income of $1,289.00, the number used by MassHealth. The CPA also used the appellant's actual medical expense deduction, which resulted in federal tax of $438.00 owed in 2014, $0.00 owed in 2015, and $0.00 owed in 2016. Counsel stated that if rental property depreciation were to be considered in 2014, the resulting tax liability for that year would have been reduced to $0.00. Even if there were a tax liability, it would have been so minimal that it could have been paid from the appellant's $2,000.00 asset allowance, eliminating the need for the trustee to make any distribution to him from the Trust.

Appellant's counsel concluded that there has been no income generated from the Trust assets because the property in the Trust was never rented and generated no income capable of distribution. Therefore the principal of the Trust is not countable in an asset eligibility determination.

Findings of Facts

By a preponderance of the evidence, I find the following:

1. The appellant, an 89 year old widower, was admitted to a skilled nursing on 04/01/2014.

2. The appellant filed an application for MassHealth benefits on 02/24/2014, seeking an eligibility start date of 04/13/2014.

3. Through the application process, MassHealth learned that on 03/27/2001, the appellant and his wife deeded the real estate in which they resided, located at 1075 School Street, Webster, Massachusetts (Webster property), in exchange for consideration of less than $100.00, to their daughter, as trustee of the Trust.

4. The Trust is irrevocable and was settled on 03/27/2001.

5. The assessed value of the Webster property is $173,700.00.

6. The appellant's wife died sometime subsequent to the establishment of the Trust and prior to the appellant's application for MassHealth LTC benefits.

7. The appellant and his late wife are the grantors of the Trust.

8. The appellant and his wife did not retain life estates under the deed; however, they continued to live in the Webster property.

9. MassHealth determined that the Trust principal, the Webster property, has a value of $173,700.00.

10. MassHealth determined that the appellant has $168.15 in a bank account.

11. MassHealth applied an eligibility limit of $2,000.00 in countable assets.

12. On 06/27/2014, MassHealth determined that the appellant's total countable assets exceed the $2,000.00 eligibility asset limit by $171,868.15 and issued in "excess asset denial" (Exhibit A1).

13. The appellant filed an appeal in a timely manner to the Board of Hearings on 07/21/2014 (130 CMR 610.015(B); Exhibit A2).

14. A hearing was held on 08/27/2014 after which the record remained open until 09/12/2014 to allow the appellant to review and respond to MassHealth's legal memorandum (Exhibits A3 and A4).

15. On 11/28/2014, the Board of Hearings denied the appellant's appeal, concluding that MassHealth was correct in determining that Trust assets were countable and appellant's assets exceed the asset limit to establish eligibility (Exhibit A5).

16. The appellant filed a GL c. 30A civil complaint with the Commonwealth of Massachusetts Superior Court Department of the Trial Court (Docket No. WOCV2014-02278) seeking judicial review of the denial of his appeal.

17. The Superior Court upheld the denial and appellant sought further appellate review.

18. The Massachusetts Supreme Judicial Court (SJC) took direct appellant review on its own motion and combined it with another case with similar facts and issues of law (*Daley v. Secretary of the Executive Office of Health and Human Services, et al.*, 477 Mass. 188 (2017)).

19. On September 6, 2017, the SJC reversed the Superior Court decision and remanded the case "to MassHealth" for further proceedings consistent with its opinion (*Id.* at p. 204).

20. On 11/07/2017, MassHealth notified the appellant that it again denied his application for LTC benefits because it found the value of the property held in Trust to be a countable asset in the appellant's eligibility determination and that his assets exceed the asset limit for him to be eligible for LTC benefits (130 CMR 52.003; Exhibit B1).

21. The appellant appealed the denial in a timely manner on 11/24/2017 (Exhibit B2).

22. The fair hearing was reconvened on 12/18/2017 in the Springfield MassHealth Enrollment Center (Exhibit B3).

23. Both parties were represented by counsel at the reconvened hearing.

24. Article 2.2 of the Trust states

> During our lifetime we shall have the power to appoint from time to time, by an instrument in writing by ourselves or by our legal representative, all or any part of the Trust property then on hand to any one or more charitable or non-profit 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.

25. Article 6.4 of the Trust states

> It is the intent of the grantors that this Trust be construed as a "grantors trust" under Internal Revenue Code section 677(a). All income distributed, held or accumulated by this Trust shall be taxable to us. Our trustee may, to the extent that the income of the Trust generates a tax liability for us, distribute to us such amounts of income or principal of the Trust as our trustee deems necessary to satisfy such tax obligations.

26. The nursing facility in which the appellant resides is a for-profit business.

27. According to MassHealth and undisputed by the appellant, the appellant's former home, which is the real estate that formed the corpus of the Trust, could be rented for $1,289.00 per month.

28. The appellant's tax liability using the hypothetical $1,289.00 monthly rental income, his medical expenses, and the rental property depreciation, would be zero for tax years 2014, 2015 and 2016.

29. On 09/11/2014 the real estate that had previously been held in Trust was sold to a third-party buyer. The proceeds from the sale of the home were $147,372.33 and that amount plus the accumulated interest are currently held in a bank account under the Trust's name.

Analysis and Conclusions of Law

There are no factual disputes in the case at hand; rather, the issues revolve around the interpretation of the language of the various Trust provisions and the applicable

regulations and case law. The Trust is properly considered in the context of both state and federal law applying to trusts created after 1993, including:

Federal law at 42 USC §1396p which states:

(d) Treatment of Trust amounts

(1)For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a Trust established by such individual.

(2)(A)For purposes of this subsection, an individual shall be considered to have established a Trust if assets of the individual were used to form all or part of the corpus of the Trust and if any of the following individuals established such Trust other than by will:

(i)The individual.
(ii)The individual's spouse.
(iii)A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.
(iv)A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a Trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the Trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to—
(i) the purposes for which a Trust is established,
(ii) whether the Trustees have or exercise any discretion under the Trust,
(iii) any restrictions on when or whether distributions may be made from The Trust, or
(iv) any restrictions on the use of distributions from the Trust.

(3) (A) In the case of a revocable trust—
(i) the corpus of the trust shall be considered resources available to the individual,
(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and
(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust—

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

Federal law at 42 U.S.C. 1396p (d)(3)(B)(i) states:

> *In the case of an irrevocable trust, if there are **any circumstances** under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income (emphasis added).*

MassHealth regulation 130 CMR 520.023 applies to trusts or similar legal devices created on or after August 11, 1993, states in pertinent part (emphasis added):

(C) Irrevocable Trusts.

(1) Portion Payable.

*(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 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 are 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).

At issue in the reconvened (remand) hearing is whether the following two Trust provisions result in some or all of the Trust principal being considered a countable asset in a MassHealth eligibility determination for the appellant's application for MassHealth long term care benefits.

Article 2.2

During our lifetime we shall have the power to appoint from time to time, by an instrument in writing by ourselves or by our legal representative, all or any part of the Trust property then on hand to any one or more charitable or non-profit 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.

Article 6.4

It is the intent of the grantors that this Trust be construed as a "grantors trust" under Internal Revenue Code section 677(a). All income distributed, held or accumulated by this Trust shall be taxable to us. Our trustee may, to the extent that the income of the Trust generates a tax liability for us, distribute to us such amounts of income or principal of the Trust as our trustee deems necessary to satisfy such tax obligations.

MassHealth initially denied the appellant's application for LTC benefits because it determined that the value of the appellant's prior home, the real estate held in the Trust, was a countable asset in an eligibility determination and the appellant's assets exceeded the $2,000.00 limit for LTC eligibility.

The appellant appealed the MassHealth denial and the appeal was denied by the Board of Hearings. After a GL c. 30A appeal, the Superior Court affirmed the MassHealth denial. The case was taken by the SJC on direct appellate review and combined with a case with similar facts and issues of law. The SJC vacated the judgment affirming this finding and remanded the matter to MassHealth to evaluate two other possible sources of countable assets. As earlier discussed, the terms of the Nadeau Trust permit the equity in the Nadeau home to be paid at the Nadeau's direction or for their benefit during their lifetimes in two circumstances.

> First, the Neadeau's may 'appoint . . . all or any part of the trust property . . . to any one or more charitable or non-profit organizations' over which they have no controlling interest. Had Nadeau received care at a nursing home operated by a nonprofit organization, he could have used the assets of the trust, including his home, to pay the nonprofit organization for his care. Because approximately one-fourth of the nursing homes in Massachusetts are operated by nonprofit organizations,[13] albeit not the nursing home where he received care, it is appropriate for MassHealth to consider whether this possibility fits within the 'any circumstances' test.
>
> Second, because the trust is intended to be construed as a "grantors trust" under the Internal Revenue Code, 26 U.S.C. § 677(a), with all income distributed to the grantors taxable to them, the trustee may pay any tax liability arising from such distributions from the corpus of the trust. MassHealth may determine that this portion of the corpus is a countable asset under the 'any circumstances' test and may ascertain, under § 1396p(d)(3), the size of the 'portion of the corpus from which . . . payment to the individual could be made' in this circumstance.

(See *Daley v. Secretary of the Executive Office of Health and Human Services, et al.*, 477 Mass. 188, 74 N.E.3d 1269).

MassHealth argued that under Article 2.2, the entire Trust principal is countable because the appellant has the power to appoint the Trust principal to a charitable or non-profit organization. MassHealth argued that even though the nursing facility in which the appellant resides is a for-profit organization, the fact that he could reside in a non-profit nursing facility and he could appoint the Trust principal to that non-profit, he has access to the full amount of the Trust principal, which would make it all countable.

Appellant argued that pursuant to the terms of the Trust, he is unable to appoint the Trust assets to the nursing home where he now resides because it is a for-profit organization. Further, even if the appellant could appoint Trust assets to a non-profit nursing facility in which he may reside, that organization has no obligation to use the appointed assets for the appellant's benefit or care. Rather the organization might use the appointed Trust assets for its general charitable purposes. Counsel argued that the

appellant has a limited power of appointment of the Trust assets, which does not render the assets a countable resource and there is no circumstance under which payment form the Trust could be made to or for the benefit of the appellant under Article 2.2.

MassHealth made a factual argument in asserting that the appellant may access Trust principal for his benefit and care under Article 2.2. MassHealth counsel proposed through an attenuated series of steps, that if the appellant moves to a nursing facility that is a charitable or non-profit organization, he may direct that Trust principal be appointed to that facility and that the facility may use that Trust principal for the appellant's care or benefit. Appellant's counsel stated that the appellant in this case has a limited special power of appointment and she cited to *Heyn v. Dir. Of Office of Medicaid* (89 Mass. App. Ct. 312, 318 (2016)), in which the Court held that the retained limited power of appointment had no bearing on the issue of whether the applicant for benefits retained any interest in the Trust that could have been deemed a countable resource for MassHealth long term care eligibility purposes.

The appellant's argument is supported by the plain reading of the Trust article as well as the case law, specifically *Heyn*. There is no evidence that if the appellant were to move to a non-profit nursing facility, and if he were to appoint Trust principal to that charitable or non-profit organization that the non-profit nursing facility would be allowed to or required to use the Trust principal for the appellant's benefit or care. Accordingly, there is no clear path by which the appellant, in complying with Trust terms and applicable law, may access Trust principal pursuant to this article. Appellant has met his burden of showing that MassHealth incorrectly determined that the Trust principal is countable pursuant to this Trust provision.

MassHealth next argued that Article 6.4 of the Trust would allow the appellant to generate income and a tax liability totaling $6,808.00, which is payable to the appellant from Trust principal. MassHealth asserted that the rental income from the real estate would be $1,289.00 per month. The tax liability for one year would be $1,547.00 and, during the course of the appellant's life expectancy (4.4 years), there is a set of circumstances by which the trustee could distribute at least $6,808.00 of Trust principal to the appellant to satisfy income tax obligations stemming from renting the property that formed the corpus of the Trust.

The appellant's counsel argued that, even using the set of circumstances used by MassHealth, specifically a monthly rental rate of $1,289.00, the appellant's tax liability would be offset by his medical expenses which include the monthly patient paid amount. In support, counsel submitted the appellant's actual tax returns from 2014-2016, as well as hypothetical tax returns prepared by a CPA using the hypothetical rental income. According to the calculations of the CPA, and incorporating a real estate depreciation of the rental property, the appellant would have zero tax liability for all dates in question. MassHealth has not demonstrated that the CPA or his conclusions are not credible. Therefore, the appellant has met his burden of demonstrating that the

appellant is unable to access the Trust principal pursuant to article 6.4.

Pursuant to the above two Trust articles, there is no set of circumstances under which the appellant is able to access the Trust principal for his benefit. For the reasons set forth above, this appeal is approved.

Order for MassHealth

Rescind denial notice dated 11/07/2017. Redetermine eligibility using the application date of 02/24/2014. Do not count Trust principal as an asset in an eligibility determination. Inform appellant of the eligibility determination and 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, Division of Medical Assistance, at the address on the first page of this decision.

Marc Tonaszuck
Hearing Officer
Board of Hearings

cc: MassHealth Representative: Dori Mathieu
MassHealth Representative: Justine Ferreira
Appellant Attorney: Lisa Neeley, Esq., Mirick O'Connell, 100 Front Street, Suite 1700, Worcester, MA 01608.

Restatement (First) of Property § 353 (1940)

Restatement of the Law - Property | October 2019 Update

Restatement (First) of Property

Division III. Future Interests

Part IV. Special Topics

Chapter 25. Powers of Appointment

Topic 7. Effectiveness of Appointments

§ 353 Attempts to Benefit Non-Objects of Special Powers—Appointment to Object in Consideration of Benefit Conferred Upon or Promised to a Non-Object

Comment:

Case Citations - by Jurisdiction

If the donee of a special power makes an appointment to an object of the power in consideration of a benefit conferred upon or promised to a non-object, the appointment is ineffective to whatever extent it was motivated by the purpose to benefit the non-object, except as stated in § 355 (fiduciaries and purchasers without notice).

Illustrations:

1. (Benefit conferred upon a non-object.) A by will transfers a fund in trust for B for life and then in trust for the children of B as B shall appoint and in default of appointment for the children of B equally.

I. B wants a divorce so that he may remarry. His wife, C, obtains a decree nisi but refuses to apply for a decree absolute unless B appoints the fund to the children of B and C. B appoints to the children of B and C in consideration of C applying for a decree absolute. The appointment is ineffective.

II. B and a child of B have a conversation in which B states that he will appoint the entire fund to the child if the child will pay B $500 per year so long as B lives, and the child states that he agrees to this. The child does pay B $500 per year until B's death. B by will appoints the entire fund to the child. The appointment is ineffective.

2. (Benefit promised to donee.) A by will transfers Blackacre to B for life, remainder to such children of B as B shall appoint and in default of appointment to the children equally. B makes an agreement with C, one of his children, in which C promises that if B will appoint to C, C will convey the appointed property to B. B appoints to C. C conveys to B. The appointment is ineffective.

3. (Benefit promised to non-object other than donee.) A by will transfers $100,000 in trust to pay the income to his wife, B, for life and then to pay the principal to such children or other kindred of B as B shall by will appoint and in default of appointment to A's next of kin. B informs C, a nephew, that she will

appoint $25,000 to him if C will pay $10,000 of this sum to B's second husband. C writes a letter promising to do so if such appointment is made to him. B dies, leaving a will which appoints $25,000 to C. It appears that a will executed before B's second marriage appointed $15,000 to C. The appointment is effective to the extent of $15,000, ineffective as to the balance.

Comment:

a. Rationale. Where an appointment is made to an object in consideration of a benefit conferred upon or promised to a non-object an element is injected into the motivation of the exercise of the power which is foreign to the intent of the donor in creating the power for the benefit of the objects. Therefore, to whatever extent the appointment is induced by such a motive, it is ineffective.

b. Source, destination and nature of the benefit. The benefit which is conferred or promised usually comes from the appointee (Illustration 1-II, 2 and 3) but may come from a third person (Illustration 1-I). The person upon whom the benefit is conferred or to whom it is promised may be the donee (Illustrations 1 and 2) or some other non-object (Illustration 3). The benefit conferred or promised is often the transfer of all or part of the property appointed (Illustrations 2 and 3) but it may consist of the transfer of other property (Illustration 1-II) or the doing of an act unrelated to any property (Illustration 1-I).

c. Evidence as to the existence of a promise. Where the donee seeks to benefit a non-object through an appointment to an object who promises to confer the desired benefit, neither the promise itself nor any reference to it ordinarily appears in the instrument of appointment. The promise may be oral or written. It is usually to the advantage of the appointee that the promise be concealed and the appointment held valid. These circumstances may render proof of the exact terms of the promise or the date upon which it was made difficult or impossible. However, the existence of such a promise may be inferred from the appointments made, the circumstances of the donee at the time of his appointment and the action of the appointee subsequent to appointment. While it is true that an appointee, after receiving the appointed property, is free to use it as he likes or give it to whom he chooses, nevertheless if, after receiving the property, he makes a gift to a non-object which is not readily explainable by the relations between the appointee and the non-object this is a circumstance tending to establish the existence of a promise to benefit the non-object.

Illustration:

4. A by will transfers a fund of $100,000 in trust to pay the income to B for life and then to pay the principal to such of B's children as B shall appoint and in default of appointment to the children equally.

I. B has two unmarried daughters for whom he has shown equal affection. He dies leaving an otherwise effective will by which he gives all his owned property to his widow and appoints $25,000 to daughter C and $75,000 to daughter D. Shortly after D receives the amount appointed to her she pays $50,000 of it to B's widow. A court is justified in finding as a fact that D promised B that she would pay $50,000 to the widow and that the desire to benefit the widow motivated that appointment to D to the extent of $50,000.

II. B has two sons in business. B by an otherwise effective deed appoints the entire fund to his son C, reserving a power to revoke the appointment. Son C executes an instrument assigning to B's wife $40,000 of the amount so appointed. A court is justified in finding as a fact that C promised B to assign $40,000; that the power of revocation was reserved to compel the performance of the promise; that the residue of $60,000 left with C was the inducement offered to C to make the promise; and that therefore the entire appointment is ineffective.

d. Benefit conferred upon or promised to an object of the power. The rule stated in this Section applies only where there is a benefit conferred upon or promised to a non-object. If an appointment is made to an object in consideration of a benefit conferred upon or promised to another object, there is no objection under the rules relating to the law of powers to the enforceability of the promise or the validity of the appointment, provided that the donee does not accomplish by this means a result which he is forbidden to accomplish by appointment.

Illustration:

5. A by will transfers a fund in trust to pay the income to B for life and then to pay the principal to such

children of B as B shall appoint and in default of appointment to the children equally.	
	I. B has a son, C, and an invalid daughter D. He otherwise effectively appoints the entire fund to C in consideration of C's promise to support D for the rest of her life in the manner to which she has been accustomed. The appointment is effective. II. B has two sons, C and D. C is the elder and is successful in business; D is younger and has shown a tendency to be a spendthrift. B otherwise effectively appoints the entire fund to C in consideration of C's promise to pay to D from time time so much of the fund as E, a trusted adviser of the family, shall think beneficial for D. The appointment is not open to any objection under the rule stated in this Section. However, it may be ineffective on the ground that the creation of a new power in such a person as E was not within the scope of the discretion given to B by A (see § 359, Caveat).

e. "To whatever extent it was motivated by the purpose to benefit the non-object." Where an appointment is made in consideration of a benefit conferred upon or promised to a non-object, the appointment is ineffective so far, but only so far, as the appointment was induced by the promise (Illustration 1). See § 352, Comment *b*.

f. Restitution of consideration. Restitution of the consideration given for the appointment may be obtained if the person who furnished it was ignorant of the defect in the transaction due to mistake of fact or law, but not if his conduct was consciously wrongful (see Restatement of Restitution, §§ 24, 48 and 140)

g. Unenforceability of the promise. A promise to benefit a non-object given in consideration of an appointment cannot be enforced either by the donee or the non-object sought to be benefited.

Case Citations - by Jurisdiction

C.A.3
S.D.Cal.
Mass.

C.A.3

C.A.3, 1952. Cit. in sup. Remainder interests in trust created by settlor were includible in his estate, where settlor's reserved power to terminate trusts, which was not merely surplusage, was not placed beyond settlor's recall until settlor's death. Hauptfuhrer's Estate et al. v. Commissioner of Internal Revenue, 195 F.2d 548, certiorari denied 344 U.S. 825, 73 S.Ct. 26, 97 L.Ed. 642.

S.D.Cal.

S.D.Cal.1948. Cit. in sup. In diversity case in California Federal District Court, where one of two co-trustees exercised a special power of appointment so as to benefit a non-object of the power, exercise of the power was a fraud, and California statute as to liability of consenting co-trustees applied. Horne v. Title Insurance & Trust Co. et al., 79 F.Supp. 91, 95.

Mass.

Mass.1943. Cit. in sup. Where donee having power of appointment contracted to transfer all rights of way of alimony, and if such transfer were impossible he would appoint funds to daughters, provisions of contract in will were ineffectual but residuary clause devising own property and that over which he had power to his children was a valid exercise of the special power. Pitman v. Pitman, 314 Mass. 465, 477, 50 N.E.2d 69, 76, 150 A.L.R. 509.

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Restatement (Second) of Property, Don. Trans. § 20.2 (1986)

§ 20.2 Appointment to Object for Benefit of Person Not an Object

If the donee makes an appointment to an object and the donee's purpose is to circumvent the donor's intention in limiting the appointment to specified objects, the appointment is ineffective to whatever extent it was motivated by that purpose except as stated in § 20.3 with reference to fiduciaries and § 20.4 with reference to purchasers without notice.

Comment:

a. Rationale. If the donee of a power is motivated, in making an appointment to an object, to circumvent the donor's intention of limiting the appointment to specified objects, the donee has injected an element into the decision to exercise the power that is foreign to the intent of the donor in creating the power for the benefit of the objects. Therefore, to whatever extent the appointment to the object is induced by such motive, it is ineffective.

The situations in which the donee may desire to use property covered by a power to confer benefits upon a non-object and the methods that a donee may use in seeking to accomplish this result are very numerous. Whenever an appointment is made to an object, it is probable that a considerable number of people will be indirectly benefited who are not objects of the power. They include the spouse and children of the object, the object's creditors, and the persons who will succeed to the object's property when the object dies. The fact that the donee has these derivative benefits incidentally in mind in making the appointment is not sufficient to cause the appointment to fail; it is only when the essential purpose of the donee is to confer such derivative benefits that the appointment fails under the rule of this section.

b. Motivation of appointment to object is to confer benefit on non-object. Fulfillment of the intent of the donor that property shall be devoted exclusively to the benefit of objects requires that appointments should be ineffective so far as they are motivated by the purpose of benefiting a non-object but does not require the entire appointment to be invalidated in all cases. Circumstances may indicate that the desire to benefit non-objects was the predominant motive for the appointment, that such desire affected only the amount of the appointment, or that such desire had no substantial effect. Ineffectiveness ensues only so far as necessary to neutralize the impropriety of motive. The object is entitled to receive the appointed property so far as the donee intended to give it to him or her beneficially and otherwise than as an inducement to confer the benefit upon the non-object.

The function of the court in all these cases is the same: to examine the substance of the appointment (regardless of its form) in the light of the circumstances of its formulation for the purpose of arriving at a conclusion as to what part of the appointment would have been made by the donee if there had been no desire on the donee's part to benefit the non-objects. The fact that in some cases evidence sufficient to justify a segregation of part of the appointment may be lacking does not justify a failure to make such a segregation when the language and circumstances indicate that a portion of the appointment was not infected by the improper motive.

The ascertainment of the motive of the donee involves a subjective test. Hence, only factors known to the donee can be considered in determining whether the donee was motivated in making the appointment to an object to confer a benefit on a non-object.

c. Appointment to object is made subject to condition precedent or subsequent that a benefit be conferred on non-object. If the instrument of appointment provides that the appointment to an object is subject to a condition precedent or condition subsequent that a specified benefit be conferred by the object on a non-object, there is no doubt that the donee is motivated to some extent in making the appointment by the purpose to benefit a non-object. The only issue is whether some part of the appointment is not infected by the improper motive. The condition precedent or condition subsequent, as the case may be, is invalid, and the appointment is effective and free of the condition to the extent the part not infected by the improper motive can be ascertained.

Illustrations:

1. O by will transfers property to T in trust. T is directed to pay the income to O's son, S, for life with power in S to appoint by deed or by will the trust corpus "to any one or more of S's children," and in default of appointment the trust property is to pass to S's children in equal shares. S by deed appoints $5,000 to one of his children upon condition that the child will become an endorser upon S's note for $5,000. The donee is motivated in making the appointment to his child by the purpose of conferring a benefit on himself, a non-object of the power. The appointment is ineffective in its entirety because there is no ascertainable portion of the appointment that is free of the improper motive. T should not honor the appointment as it is clear on its face that it is made for the purpose of benefiting a non-object. If T honors the appointment, T must restore to the trust the $5,000 distributed to S's child.

2. Same facts as Illustration 1 except that S by will appoints the trust property to his daughter Mary on condition that she execute in favor of S's estate a release of S's note for $75,000 that she holds. The trust property at S's death is valued at $100,000. S's wife is the residuary legatee under his will. There are no facts tending to show that S would have preferred Mary over the other objects of the power for any reason other than obtaining release of the note. The appointment is ineffective; Mary is entitled to collect the note; and the trust property passes in default of appointment to S's children, including his daughter Mary.

3. O by will transfers property to T in trust. T is directed to pay the income to O's wife, W, for life, then to distribute the trust property "to such of our children as W shall appoint by will, and in default of appointment to our children equally." O and W have two children, John and Mary. W remarries and has a child by her second husband. W's will appoints the trust property to her daughter Mary upon condition that she will transfer one-third of the trust property forthwith to W's child by her second marriage; and if Mary does not perform the condition, the trust property shall pass to W's son John. It is to be inferred from these facts that the share of the trust property that W intends Mary to keep is offered to her only as an inducement to comply with the condition. The appointment to Mary is ineffective, and the trust property passes in default of appointment to John and Mary in equal shares. The alternative outright appointment to John cannot stand as it is motivated by the purpose to induce Mary to comply with the condition that would benefit a non-object.

4. Same facts as Illustration 3 except that W's will appoints one-third of the trust property to her son John and two-thirds of the trust property to her daughter Mary on condition that Mary give one-half of what she receives to W's child by her second marriage. It is to be inferred that the appointment to Mary was motivated by the desire to benefit W's child by her second marriage only to the extent of one-half of the appointment to Mary. Consequently, the appointment to John of one-third of the trust property is effective and the appointment to Mary of one-half of two-thirds (or one-third) of the trust property is effective and ineffective as to one-third of the trust property, which one-third passes in default of appointment to John and Mary in equal shares. In this case the end result is the same if the entire appointment is ineffective and

the entire trust property passes to John and Mary under the gift in default of appointment. A difference in the final result would obtain if the taker in default of appointment included a person in addition to John and Mary, such as a third child of O and W.

d. Appointment to object is made subject to a charge in favor of non-object. If the instrument of appointment imposes a charge on the appointive assets in favor of a non-object, it is clear that the appointment was motivated to some extent by the purpose to benefit the non-object. The only issue is whether some part of the appointment is not infected by the improper motive and can stand. The charge is unenforceable in any event.

Illustrations:

5. O by will transfers Blackacre to O's daughter, D, for life, with remainder "to such of D's children as D shall appoint by will, and in default of appointment to D's children as tenants in common." D has three children. D by will appoints Blackacre to one of her children, charged with the payment of an annuity of $10,000 to D's husband, H. The net annual income from Blackacre is $20,000. There are no facts tending to show that D would have preferred one of her children over the other two for any reason other than that of having the annuity paid. The appointment is ineffective, and Blackacre passes in default of appointment to D's three children as tenants in common.

6. Same facts as Illustration 5 except that the child to whom D appointed Blackacre subject to the charge depended on D for support. Thus, it is to be inferred that D's improper motivation related to only the property funding the annuity, or one-half of the appointment. A one-half interest in Blackacre passes to the dependent child under the appointment, and the other one-half passes to the three children of D, including the dependent child, in default of appointment. Thus, the dependent child owns an undivided two-thirds interest in Blackacre, and each of the other two children owns an undivided one-sixth interest in Blackacre.

e. Appointment to object is made in trust for the benefit of a non-object. If the instrument of appointment imposes a trust on the appointive assets for the benefit of a non-object with an object as trustee, the appointment is motivated to some extent by the purpose to benefit the non-object beneficiary of the trust. There will be the issue whether some part of the appointment will stand as not being infected by the improper motive. The terms of the trust in favor of the non-object will be unenforceable in any event.

Illustration:

7. O by will transfers property to T in trust. T is directed to pay income to O's son, S, for life, then as S shall appoint by will "to one or more of S's issue, and in default of appointment, the trust property shall be distributed to S's issue then living, such issue to take per stirpes." S has three children, and each child of S has two children (grandchildren of S). S by will appoints the trust property to S's oldest child, John, in trust with directions to pay one-half of the income to S's wife, W, for life and to pay the other one-half of the income to himself and on the death of S's wife, W, to distribute the trust property to S's issue then living on a per stirpes basis. It is to be inferred from these facts that the only reason S's oldest child is preferred over the other issue of S during the lifetime of S's wife, W, is for the purpose of benefiting W, a non-object. The beneficial interest under the trust in favor of W is invalid. The appointment in trust is ineffective. The three children of S will take the trust property in default of appointment.

f. Appointment to object in consideration of benefit conferred upon or promised to non-object. Where an appointment is made to an object in consideration of a benefit conferred upon or promised to a non-object, an element is injected into the motivation of the exercise of the power which is foreign to the intent of the donor in creating the power for the benefit of the objects. Hence, under the rule of this section the appointment is ineffective to whatever extent it was motivated by such purpose. The benefit which is conferred or promised may come either from the object or from a third person. The person upon whom the benefit is conferred or promised may be the donee or some other non-object. The benefit conferred or promised may be the transfer of all or part of the property appointed, the transfer of other property, or the doing of an act unrelated to any property.

Where the donee seeks to benefit a non-object through an appointment to an object who promises to confer the desired benefit, the promise may not be mentioned in the instrument of appointment, as would be the case if it was oral or evidenced

by a separate writing. It will be to the advantage of the appointee that the promise be concealed and the appointment held valid. These circumstances may render proof of the exact terms of the promise, or the date upon which it was made, difficult or impossible. However, the existence of the promise may be inferred from the appointment made, the circumstances of the donee at the time of the appointment, and the action of the appointee subsequent to the appointment.

If the appointment is ineffective because made in consideration of a benefit conferred upon or promised to a non-object, restitution of the consideration given for the appointment may be obtained if the person who furnished it was ignorant of the defect in the transaction due to mistake of fact or law but not if such person's conduct was consciously wrongful.

The promise made to benefit a non-object given in consideration of an appointment cannot be enforced either by the donee or the non-object sought to be benefited.

Illustrations:

8. O by will transfers property to T in trust. T is directed to pay the income to O's son, S, for life, with power in S to appoint the corpus by deed or by will "to such one or more of S's issue as S shall determine, and in default of appointment the corpus shall pass on S's death to S's issue then living, such issue to take per stirpes." S and his wife, W, have a son and daughter. S wants a divorce, and W agrees to proceed with the divorce if, and only if, S appoints the trust property to their daughter. S makes the appointment, and W obtains the divorce. The conclusion is justified that the appointment is ineffective because the donee's purpose is to circumvent the donor's intention in limiting the appointment to specified objects.

9. Same facts as Illustration 8 except that S promises W to appoint the trust property to their daughter by his will if W will obtain the divorce. W obtains the divorce, and S in his will appoints the trust property to their daughter. The conclusion is justified that the appointment is ineffective because the donee's purpose is to circumvent the donor's intention in limiting the appointment to specified objects.

10. Same facts as Illustration 8 except that no promise was made by S to W in regard to any appointment if she obtained a divorce, but S informed their daughter that S would appoint by will $50,000 out of the trust property to the daughter if the daughter would promise to turn over $25,000 of that amount to W. The daughter sent a letter to S in which she said that if the appointment of the $50,000 was made, $25,000 of it would be turned over to W. W obtained a divorce from S. In his will S appointed $50,000 to the daughter who made the promise, and she turned over $25,000 to W. In a prior will, which was revoked by the will that appointed $50,000 to the daughter, S had appointed $25,000 to the daughter and nothing to his son. Under these facts it may be inferred that S would have preferred the daughter over his son to the extent of $25,000 even if the daughter had made no promise. The conclusion is justified that the appointment in S's will is effective to the extent of $25,000 and ineffective as to the balance.

11. Same facts as Illustration 10 except that there is no evidence of any promise by S's daughter to turn over to W $25,000 of the $50,000 appointed to her except that the daughter in fact did so. A court is justified in concluding that there was such a promise in light of the divorce plus the facts that S increased the amount of the appointment to the daughter in a prior will from $25,000 to $50,000 and the $25,000 was paid to W. The conclusion is justified that the appointment in S's will is effective to the extent of $25,000 and ineffective as to the balance.

g. Appointment under which appointive assets will be used to pay creditors of an object. Where the creditors of an object are not included as objects of the power, an appointment to an object to relieve the object of outstanding debt benefits not only the creditors but also the object. An appointment that is to have the consequence of relieving the object of debts may be ineffective to the extent the dominant purpose was to benefit the creditors rather than the object. The fact that the donee or some person with whose welfare the donee is concerned is the creditor of the object is a legitimate ground for an inference of improper motive.

Illustrations:

12. O by will transfers property to T in trust. T is given discretion "to pay the income and principal, from time to time, to such one or more of O's issue living from time to time as T in T's uncontrolled discretion may determine until the death of O's surviving child; on the death of O's surviving child, the then remaining trust property shall be distributed to O's issue then living, such issue to take per stirpes, and if no issue of O is then living, the same shall be distributed to the X charity." O has four children, and each

child has issue. A child of O tells the trustee he is heavily in debt; unless these debts are paid, the child will have to go into bankruptcy, and this will have adverse long-range consequences to the child's business opportunities. Neither T nor anyone T is concerned about is a creditor of the child. T distributes trust property to the child in the exact amount of the child's outstanding debts, and the child uses the distribution to pay the debts. The conclusion is justified that T was not motivated to any extent in exercising the power in favor of the child by the purpose of benefiting the child's creditors. The appointment is effective so far as the rule of this section is concerned.

13. Same facts as Illustration 12 except that T did not make a distribution of trust property to the child but paid the child's debts directly. Even though the power in form is exercised by making a direct payment to non-objects, the substance of what occurs is the same as Illustration 12, and the result is the same as the result in Illustration 12.

14. Same facts as Illustration 12 except that the principal creditors of the child are T's close relatives. A conclusion is justified that T is not motivated by an improper purpose in making the appointment to pay the child's debts in view of the child's concern expressed to T that the failure to pay the debts will seriously impair the child's business opportunities.

15. Same facts as Illustration 12 except that T appoints to the child only an amount equal to the debts the child owes to T's close relatives, and the money is used to pay just these creditors. The conclusion is justified that the appointment was motivated by the improper purpose of benefiting particular creditors of the child, and the appointment is ineffective.

h. Appointments to objects that are motivated by considerations other than the welfare of the object. The rule of this section stops short of invalidating all appointments which are dictated by considerations other than the welfare of the objects of the power. If the donee is the parent of the objects of the power, the mere creation of the power does not manifest an intent of the donor that the donee shall exclude from consideration those sentiments of personal affection, gratitude, or displeasure upon which parents often determine the disposition of their own property. Provided there is no essential purpose to benefit a non-object, the donee may be guided by considerations not germane to the well-being of the objects.

Illustrations:

16. O by will transfers property to T in trust. T is directed to pay the income to O's son S for life, with remainder to such of S's children as S may appoint by will. S has three children, two sons named John and James, and one daughter named Louise. S's will provides "I appoint one-half of the trust property to my son John in token of my appreciation for his devotion to my business, and I appoint the other one-half of the trust property to my daughter Louise because of the attention and kindness she has always shown me. I appoint nothing to my son James because I disapprove of his way of life." The appointment is not ineffective under the rule of this section.

17. O by will transfers property to T in trust. T is directed to pay the income to O's daughter D for life, with remainder to such of D's children as D may appoint by deed or will, with remainder in default of appointment to D's children. D has two children, one a son named Henry and the other a daughter named Jane. Henry has a wife and children of whom D is very fond. Henry has terminal cancer and is in a coma and not expected to live more than a few days. D exercises her power to appoint by deed the remainder of the trust property after her death to Henry, knowing that thereby she will assure that the remainder will pass for the benefit of Henry's wife and Henry's children to the exclusion of Jane. The conclusion is justified that D was motivated by an improper purpose, and the appointment is ineffective.

i. Appointment to object for purpose of benefiting another object. The rule of this section applies only where there is an attempt to confer a benefit on a non-object. If an appointment is made to one object for the purpose of conferring a benefit on another object, there is no objection to the appointment under the rule of this section. The donor of the power may in the instrument creating the power prohibit such appointment.

j. Cross-reference. The extent to which a fiduciary who carries out an appointment that is ineffective under the rule of this section may be liable is described in § 20.3. The protection given to a bona fide purchaser of property received by an object under an appointment that is ineffective under the rule of this section is considered in § 20.4.

Restatement (Third) of Property (Wills & Don. Trans.) § 19.15 (2011)

Restatement of the Law - Property | October 2019 Update

Restatement (Third) of Property: Wills and Other Donative Transfers

Division VI. Powers of Appointment

Chapter 19. Exercise of a Power of Appointment

Part D. Impermissible Appointments

§ 19.15 Appointment to Impermissible Appointee—"Fraud on the Power"

An appointment that benefits an impermissible appointee is ineffective.

Comment:

a. Rationale. The donor of a power of appointment sets the range of permissible appointees by designating the permissible appointees of the power. Any attempt by the donee to exceed that authority by an appointment that benefits an impermissible appointee is ineffective.

b. General powers. A general power under which the donee is free to appoint to himself or herself or to his or her estate has no impermissible appointee. Even if the instrument creating such a general power expressly excludes certain persons as permissible appointees of the power, the donee can make a direct appointment of a beneficial interest in favor of such excluded persons, because the donee could have achieved the same result by exercising the power in favor of the donee or the donee's estate and then disposing of it by deed or by will to the excluded persons (see § 19.13). A general power under which the donee is only authorized to appoint to the donee's creditors or the creditors of the donee's estate can only be exercised in favor of those creditors; any other appointment is to an impermissible appointee.

c. Nongeneral powers. The donee of a nongeneral power can make a valid appointment only to a permissible appointee (an object of the power). An attempted appointment to an impermissible appointee (a nonobject of the power) is ineffective.

d. Permissible appointees of nongeneral power. The 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 exclusion, the donor lists the persons to whom a valid appointment cannot be made. If they are defined by inclusion, the donor lists the persons to whom a valid appointment can be made.

If the permissible appointees are defined by exclusion, the list must include the donee, the donee's estate, and the creditors of either; otherwise, the power would be a general power. The common way of identifying the permissible appointees by exclusion is to authorize the donee to appoint to "any person other than the donee, the donee's estate, and the creditors of either." A nongeneral power to appoint to "any person other than the donee, the donee's estate, and the creditors of either"

gives the donee an almost unlimited choice of permissible appointees. The list of excluded persons may be expanded beyond just the donee, the donee's estate, and the creditors of either, however, and include other excluded persons. For example, the donee may be authorized to appoint to "any person other than the donee, the donee's estate, the creditors of either, my brother Bob, Bob's wife, Bob's descendants, and the XYZ Charity." An attempted appointment of a beneficial interest to any person that is excluded as a permissible appointee is ineffective.

If the permissible appointees are listed by inclusion, the list of permissible appointees must not include the donee, the donee's estate, and the creditors of either; otherwise the power would be a general power. A well-drafted list usually takes the form of a defined and limited class, such as "children," "grandchildren," "issue," "descendants," "brothers and sisters," "nieces and nephews," or "heirs." If, for example, the permissible appointees are the donee's descendants, an appointment to the donee's brother or sister is impermissible and ineffective. For the meaning of various class-gift terms, see Division V (Chapters 14 through 16). See also § 19.12(c) for the proposition that the descendants of a deceased permissible appointee of a nongeneral power are permissible appointees in certain circumstances.

e. Appointment in trust. The donee of a power to appoint may make an appointment in trust for the benefit of permissible appointees, unless the donor has manifested an intent to exclude an appointment in trust (see § 19.14). An appointment in trust necessarily involves a nominal direct appointment to an impermissible appointee, unless the trustee is a permissible appointee of the power. The appointment to an impermissible appointee-trustee, however, does not give the impermissible appointee a beneficial interest and hence does not violate the rule of this section.

f. Appointment to impermissible appointee at direction of permissible appointee. If the donee of a power makes a decision to exercise the power in favor of a permissible appointee, the permissible appointee may request the donee to transfer the appointive assets directly to an impermissible appointee. The appointment directly to the impermissible appointee in this situation is effective, being treated for all purposes as an appointment first to the permissible appointee, followed by a transfer by the permissible appointee to the impermissible appointee. The rule of this section does not prohibit the appointment.

g. Ineffective appointment to impermissible appointee. An attempted appointment of a beneficial interest to an impermissible appointee fails. The impermissible appointee receives no better title than the impermissible appointee would receive in any other case in which a nonowner purports to transfer property to another. If the donee attempts to make simultaneous appointments, some to permissible appointees and some to impermissible appointees, the ineffectiveness of the appointments to the impermissible appointees does not affect the appointments to the permissible appointees, unless the pattern of the appointments reveals that the donee would not have intended any appointment to stand unless all appointments were effective (see § 19.20).

h. Application of cy pres if appointment is to an impermissible appointee-charity. If the donee of the power appoints to one or more designated charities, and the donee appoints to a charity not designated as a permissible appointee of the power, the appointment to the impermissible appointee-charity is ineffective. The court, however, may apply cy pres in such situations and will select from among the charities that are the permissible appointees of the power the one or more that have charitable purposes similar to the charity selected by the donee as recipient of the appointive assets. On the cy pres doctrine, see Restatement Third, Trusts § 67.

Reporter's Note

1. Comparison with previous Restatements. Section 19.15 is consistent with Restatement Second of Property (Donative Transfers) § 20.1 and Restatement of Property § 351. The Restatement Second provided:

> ***§ 20.1 Appointment to Non-object***
>
> If the donee appoints a beneficial interest to a non-object, the appointment is ineffective.

End of Document

Restatement (Third) of Property (Wills & Don. Trans.) § 19.16 (2011)

Restatement of the Law - Property | October 2019 Update

Restatement (Third) of Property: Wills and Other Donative Transfers

Division VI. Powers of Appointment

Chapter 19. Exercise of a Power of Appointment

Part D. Impermissible Appointments

§ 19.16 Appointment to Permissible Appointee for Benefit of Impermissible Appointee—"Fraud on the Power"

Comment:

Reporter's Note

An appointment to a permissible appointee is ineffective to the extent that it was (i) conditioned on the appointee conferring a benefit on an impermissible appointee, (ii) subject to a charge in favor of an impermissible appointee, (iii) upon a trust for the benefit of an impermissible appointee, (iv) in consideration of a benefit conferred upon or promised to an impermissible appointee, (v) primarily for the benefit of the appointee's creditor, if that creditor is an impermissible appointee, or (vi) motivated in any other way to be for the benefit of an impermissible appointee.

Comment:

a. *Rationale.* If, in making an appointment to a permissible appointee, the donee's purpose was to circumvent the donee's scope of authority by benefiting an impermissible appointee (a nonobject), the donee has acted impermissibly. Therefore, to the extent that the appointment to the permissible appointee is induced by such a purpose, the appointment is ineffective.

Comments *b* through *f* cover the situations that most commonly arise and the devices that are most commonly employed to commit fraud on the power. Any appointment whose essential purpose is to benefit an impermissible appointee is to that extent ineffective even though these particular devices are not used; and Comment *g* so provides.

b. *Appointment to permissible appointee conditioned on permissible appointee conferring benefit on impermissible appointee.* If the instrument of appointment provides that the appointment to a permissible appointee is conditioned on the appointee conferring a benefit on an impermissible appointee, there is no doubt about the donee's motive. The only question is whether any part of the appointment is free from the improper motive.

Illustrations:

1. Donor died, leaving a will that devised property to Trustee in trust. Trustee is directed to pay the income to Donee (Donor's son) for life with power in Donee to appoint by deed or by will the trust principal "to any one or more of Donee's children," and in default of appointment the trust property is to pass to Donee's children in equal shares. Donee by deed appoints $5000 to one of his children upon condition that

the child will become an endorser upon Donee's note for $5000. The donee's purpose in making the appointment to his child is to confer a benefit on himself, an impermissible appointee of the power. The appointment is ineffective in its entirety, because no ascertainable portion of the appointment is free of the improper motive. Trustee should not honor the appointment, because it is made for the purpose of benefiting an impermissible appointee. If Trustee honors the appointment, Trustee must restore to the trust the $5000 distributed to Donee's child.

2. Same facts as Illustration 1, except that Donee by will appoints the trust property to his daughter Mary on condition that she execute in favor of Donee's estate a release of Donee's note for $75,000 that she holds. The trust property at Donee's death is valued at $100,000. Donee's wife is the residuary devisee under his will. There are no facts tending to show that Donee would have preferred Mary over the other permissible appointees of the power for any reason other than obtaining release of the note. The appointment is ineffective; Mary is entitled to collect the note; and the trust property passes in default of appointment to Donee's children, including his daughter Mary.

3. Donor died, leaving a will that devised property to Trustee in trust. Trustee is directed to pay the income to Donee (Donor's wife) for life, then to distribute the trust property "to such of our children as Donee shall appoint by will, and in default of appointment to our children equally." Donor and Donee have two children, John and Mary. Donee remarries and has a child by her second husband. Donee's will appoints the trust property to her daughter Mary upon condition that she will transfer one-third of the trust property forthwith to Donee's child by her second marriage; and if Mary does not perform the condition, the trust property shall pass to Donee's son John. It is to be inferred from these facts that the share of the trust property that Donee intends Mary to keep is offered to her only as an inducement to comply with the condition. The appointment to Mary is ineffective, and the trust property passes in default of appointment to John and Mary in equal shares. The alternative outright appointment to John cannot stand as it is motivated by the purpose to induce Mary to comply with the condition that would benefit an impermissible appointee.

4. Same facts as Illustration 3, except that Donee's will appoints one-third of the trust property to her son John and two-thirds of the trust property to her daughter Mary on condition that Mary give one-half of what she receives to W's child by her second marriage. It is to be inferred that the appointment to Donee was motivated by the desire to benefit Donee's child by her second marriage only to the extent of one-half of the appointment to Mary. Consequently, the appointment to John of one-third of the trust property is effective and the appointment to Mary of one-half of two-thirds (or one-third) of the trust property is effective and ineffective as to one-third of the trust property, which one-third passes in default of appointment to John and Mary in equal shares. In this case, the end result is the same if the entire appointment is ineffective and the entire trust property passes to John and Mary under the gift in default of appointment. A difference in the final result would obtain if the taker in default of appointment included a person in addition to John and Mary, such as a third child of Donor and Donee.

c. Appointment to permissible appointee subjected to a charge in favor of impermissible appointee. If the instrument of appointment imposes a charge on the appointive assets in favor of an impermissible appointee, there is no doubt about the donee's purpose. The only question is whether any part of the appointment is not infected by the improper motive and can stand. The charge is unenforceable in any event.

Illustrations:

5. Donor died, leaving a will that devised Blackacre to Donee (Donor's daughter) for life, with remainder "to such of Donee's children as Donee shall appoint by will, and in default of appointment to Donee's children as tenants in common." Donee has three children. Donee by will appoints Blackacre to one of her children, charged with the payment of an annuity of $10,000 to Donee's husband, H. The net annual income from Blackacre is $20,000. There are no facts tending to show that Donee would have preferred one of her children over the other two for any reason other than that of having the annuity paid. The appointment is ineffective, and Blackacre passes in default of appointment to Donee's three children as tenants in common.

6. Same facts as Illustration 5, except that the child to whom Donee appointed Blackacre subject to the charge depended on Donee for support. Thus, it is to be inferred that Donee's improper motivation related to only the property funding the annuity, or one-half of the appointment. A one-half interest in Blackacre passes to the dependent child under the appointment, and the other one-half passes to the three children of

Donee, including the dependent child, in default of appointment. Thus, the dependent child owns an undivided two-thirds interest in Blackacre, and each of the other two children owns an undivided one-sixth interest in Blackacre.

d. Appointment to permissible appointee in trust for the benefit of an impermissible appointee. If the instrument of appointment imposes a trust on the appointive assets for the benefit of an impermissible appointee with a permissible appointee as trustee, there is no doubt that the donee's motive is improper. The only question is whether any part of the appointment can be allowed to stand because not being infected by the improper motive. The terms of the trust in favor of the impermissible appointee are unenforceable in any event.

Illustration:

7. Donor died, leaving a will that devised property to Trustee in trust. Trustee is directed to pay income to Donee (Donor's son) for life, then as Donee shall appoint by will "to one or more of Donee's issue, and in default of appointment, the trust property shall be distributed to Donee's issue then living, such issue to take by representation." Donee has three children, and each child of Donee has two children (grandchildren of Donee). Donee by will appoints the trust property to Donee's oldest child, John, in trust with directions to pay one-half of the income to Donee's wife, W, for life and to pay the other one-half of the income to himself and on the death of Donee's wife, W, to distribute the trust property to Donee's issue then living by representation. It is to be inferred from these facts that the only reason Donee's oldest child is preferred over the other issue of Donee during the lifetime of Donee's wife, W, is for the purpose of benefiting W, an impermissible appointee. The beneficial interest under the trust in favor of W is invalid. The appointment in trust is ineffective. The three children of S will take the trust property in default of appointment.

e. Appointment to permissible appointee in consideration of benefit conferred upon or promised to impermissible appointee. An appointment to a permissible appointee in consideration of a benefit conferred upon or promised to an impermissible appointee is ineffective to the extent that it was motivated by the purpose to confer a benefit on the impermissible appointee. The rule applies whether the benefit that is conferred or promised came from the permissible appointee or from a third person, or whether the person upon whom the benefit is conferred or promised is the donee or some other impermissible appointee. The rule applies whether the benefit conferred or promised was the transfer of the property appointed, the transfer of other property, or the doing of an act unrelated to any property.

When the donee seeks to benefit an impermissible appointee through an appointment to a permissible appointee who promises to confer the desired benefit, the promise need not be expressed in the instrument of appointment, but may be oral or evidenced by a separate writing. Because validating the appointment will be to the advantage of the appointee, the parties to the agreement have an incentive to conceal the agreement. Such concealment may render proof of the exact terms of the promise, or the date upon which it was made, difficult or impossible. The agreement may be inferred from the appointment made, the circumstances of the donee at the time of the appointment, and the action of the appointee subsequent to the appointment.

If the appointment is ineffective because it was made in consideration of a benefit conferred upon or promised to an impermissible appointee, restitution of the consideration given for the appointment may be obtained if the person who furnished the consideration was ignorant of the wrongful character of the transaction but not if such person's conduct was knowingly wrongful.

The promise made to benefit an impermissible appointee given in consideration of an appointment cannot be enforced either by the donee or the impermissible appointee sought to be benefited.

Illustrations:

8. Donor died, leaving a will that devised property to Trustee in trust. Trustee is directed to pay the income to Donee (Donor's son) for life, with power in Donee to appoint the principal by deed or by will "to such one or more of Donee's issue as Donee shall determine, and in default of appointment the principal shall pass on Donee's death to Donee's issue then living, such issue to take by representation." Donee and his wife, W, have a son and daughter. Donee wants a divorce, and W agrees to proceed with the divorce if, and

only if, Donee appoints the trust property to their daughter. Donee makes the appointment, and W obtains the divorce. The conclusion is justified that the appointment is ineffective, because the donee's purpose is to circumvent the donor's intention in limiting the appointment to specified permissible appointees.

9. Same facts as Illustration 8, except that Donee promises W to appoint the trust property to their daughter by his will if W will obtain the divorce. W obtains the divorce, and Donee in his will appoints the trust property to their daughter. The conclusion is justified that the appointment is ineffective, because the donee's purpose is to circumvent the donor's intention in limiting the appointment to specified permissible appointees.

10. Same facts as Illustration 8, except that no promise was made by Donee to W in regard to any appointment if she obtained a divorce, but Donee informed their daughter that Donee would appoint by will $50,000 out of the trust property to the daughter if the daughter would promise to turn over $25,000 of that amount to W. The daughter sent an electronic message to Donee in which she said that, if the appointment of the $50,000 was made, $25,000 of it would be turned over to W. W obtained a divorce from Donee. In his will, Donee appointed $50,000 to the daughter who made the promise, and she turned over $25,000 to W. In a prior will, which was revoked by the will that appointed $50,000 to the daughter, Donee had appointed $25,000 to the daughter and nothing to his son. Under these facts, it may be inferred that Donee would have preferred the daughter over his son to the extent of $25,000 even if the daughter had made no promise. The conclusion is justified that the appointment in Donee's will is effective to the extent of $25,000 and ineffective as to the balance.

11. Same facts as Illustration 10, except that there is no evidence of any promise by Donee's daughter to turn over to W $25,000 of the $50,000 appointed to her except that the daughter in fact did so. A court is justified in concluding that there was such a promise in light of the divorce, plus the facts that Donee increased the amount of the appointment to the daughter in a prior will from $25,000 to $50,000 and the $25,000 was paid to W. The conclusion is justified that the appointment in Donee's will is effective to the extent of $25,000 and ineffective as to the balance.

f. Appointment primarily for the benefit of impermissible appointee-creditor of a permissible appointee. If the creditors of a permissible appointee are not permissible appointees of the power, an appointment to a permissible appointee to relieve the permissible appointee of outstanding debt benefits both the permissible appointee and the permissible appointee's impermissible appointee creditor. Such an appointment is ordinarily effective, because the appointment is primarily intended to be for the benefit of the permissible appointee. Nevertheless, circumstances can raise an inference that the appointment is primarily for the benefit of the permissible appointee's impermissible appointee-creditor. An inference of improper motive arises if the donee or some person with whose welfare the donee is concerned is the creditor of an appointee.

Illustrations:

12. Donor died, leaving a will that devised property to Trustee in trust. Trustee is given discretion "to pay the income and principal, from time to time, to such one or more of Donor's issue living from time to time as Trustee in Trustee's uncontrolled discretion may determine until the death of Donor's last surviving child; on the death of Donor's last surviving child, the then remaining trust property shall be distributed to Donor's issue then living, such issue to take by representation, and if no issue of Donor is then living, the same shall be distributed to the X charity." Donor has four children, and each child has issue. A child of Donor tells the trustee he is heavily in debt; unless these debts are paid, the child will have to go into bankruptcy, and this will have adverse long-range consequences to the child's business opportunities. Neither Trustee nor anyone Trustee is concerned about is a creditor of the child. Trustee distributes trust property to the child in the exact amount of the child's outstanding debts, and the child uses the distribution to pay the debts. The conclusion is justified that Trustee was not motivated, to any extent, in exercising the power in favor of the child by the purpose of benefiting the child's creditors. The appointment is effective so far as the rule of this section is concerned.

13. Same facts as Illustration 12, except that Trustee did not make a distribution of trust property to the child but paid the child's debts directly. Even though the power in form is exercised by making a direct payment to impermissible appointees, the substance of what occurs is the same as Illustration 12, and the result is the same as the result in Illustration 12.

14. Same facts as Illustration 12, except that the principal creditors of the child are Trustee's close

relatives. A conclusion is justified that Trustee is not motivated by an improper purpose in making the appointment to pay the child's debts in view of the child's concern, expressed to Trustee, that the failure to pay the debts will seriously impair the child's business opportunities.

15. Same facts as Illustration 12, except that Trustee appoints to the child only an amount equal to the debts the child owes to Trustee's close relatives, and the money is used to pay just these creditors. The conclusion is justified that the appointment was motivated by the improper purpose of benefiting particular creditors of the child, and the appointment is ineffective.

g. Other circumstances in which donee's motivation was to benefit impermissible appointee. Situations in which a donee may desire to use property covered by a power to confer benefits upon impermissible appointees and the methods for doing so are numerous. Comments *b* through *f* cover the situations most commonly arising and the devices most commonly employed. Any appointment whose essential purpose is to benefit an impermissible appointee is, to that extent, ineffective even though these common devices are not used.

Fulfillment of the intent of the donor that property be devoted exclusively to the benefit of permissible appointees requires that an appointment is ineffective so far as it is motivated by the purpose of benefiting an impermissible appointee. That policy does not require the entire appointment to be invalidated in all cases. Circumstances may indicate that the desire to benefit impermissible appointees was the predominant motive for the appointment, that such desire affected only the amount of the appointment, or that such desire had no substantial effect. Ineffectiveness ensues only so far as necessary to overcome the impropriety of motive.

Whenever an appointment is made to a permissible appointee, the appointee is free to use the appointed property as he or she wishes. The appointee is under no constraint to limit his or her uses of the appointed property for his or her exclusive benefit or for the benefit of other permissible appointees. The appointee can and may be likely to give, devise, or use the appointed property to or for the benefit of impermissible appointees, including his or her spouse, children, other family members, or favorite charities, even if they are not permissible appointees of the power. It can be expected that the donee understands this, and views such uses as benefiting the appointee. It would be unreasonable to invalidate an appointment merely on that ground, even if the donee knows or expects that the appointee intends, for example, to use the appointed property to buy a new car or remodel a room that will be used and enjoyed by impermissible appointee members of the appointee's family. It is only when the evidence establishes that the donee's essential purpose was to confer direct benefits on impermissible appointees that the appointment fails under the rule of this Comment.

The function of the court in all these cases is the same: to examine the substance of the appointment (regardless of its form), in the light of the circumstances of its formulation, for the purpose of arriving at a conclusion as to what part of the appointment would have been made by the donee if there had been no desire on the donee's part to benefit the impermissible appointees. The fact that, in some cases, evidence sufficient to justify a segregation of part of the appointment may be lacking does not justify a failure to make such a segregation when the language and circumstances indicate that a portion of the appointment was not infected by the improper motive.

In cases covered by this Comment *g*, the ascertainment of the motive of the donee involves a subjective test. Hence, only factors known to the donee can be considered in determining whether the donee was motivated in making the appointment to a permissible appointee to confer a benefit on an impermissible appointee.

In the typical situation in which the rule stated in this Comment is applicable, the donee appoints outright to a permissible appointee in the expectation that an impermissible appointee will indirectly receive the appointed property by descent (Illustration 16-II), gift (Illustrations 16-III and 16-IV), or otherwise. The rule applies whether or not the appointee is aware of the donee's purpose to benefit the impermissible appointee.

The factor that vitiates appointments that fall within the rule stated in this section and especially in this Comment is the purpose of the donee, a subjective element. The circumstances of the appointment are relevant only as they are known to the donee and permit drawing inferences regarding the state of his or her mind. Thus, in Illustration 16-II the relevant fact is, not that the appointee was in fact dying of an incurable disease, but that the donee thought he was so dying.

Illustrations:

16. Donor dies leaving a will that devises $100,000 in trust to pay the income to Donee for life and then to pay the principal to such children of Donee as Donee shall appoint and in default of appointment to Donee's children equally. Donee has two children, X and Y.

I. Donee is indicted for a criminal offense and his bail is fixed at $5000. He offers X as a surety on his bail bond. X is rejected on the ground that she does not own property equal to twice the value of the penal sum named in the bond. Donee by deed appoints $10,000 to X. X is accepted as surety on Donee's bond. The appointment is ineffective.

II. X is a child of 10, has an incurable disease, and is known to be dying. Her presumptive heirs are Donee and Y. Donee by deed appoints the entire fund to X. A court is justified in finding as a fact that the appointment was made for the purpose of causing half the fund to pass to Donee as one of X's heirs. If a court so finds, the appointment is ineffective.

III. Donee by deed appoints the fund to X pursuant to a written agreement by which X promises to transfer one-half of the fund to E, an impermissible appointee. The appointment is declared ineffective in a proceeding brought by Y. Donee then immediately appoints the fund to X outright by deed. There is evidence that Donee and X are of the same mind as to the desirability of benefiting E, but there is no evidence of any agreement as to the disposition of the fund appointed to X. A court is justified in finding as a fact that the purpose of the appointment to X was to confer a benefit upon E and that Donee relied upon X's known desire to benefit E to accomplish the purpose. If a court so finds, the appointment is ineffective.

IV. Donee by will appoints the entire fund to his daughter, X. In a proceeding by Y to have the appointment declared ineffective it appears that Donee was greatly disturbed about the financial condition of Donee's wife upon his death; that he wanted to make an appointment to Y on condition that Y transfer half the fund to Donee's wife but was advised that this would invalidate the appointment; that Donee arranged with his wife that, after his death, she should inform X that the reason for the appointment to her was that it would enable her to transfer half the fund to Donee's wife and that it was Donee's wish that she do so. The appointment is ineffective.

h. Appointments to permissible appointees that are motivated by considerations other than the welfare of the permissible appointee. The rule of this section stops short of invalidating all appointments that are dictated by considerations other than the welfare of the permissible appointees of the power. If the donee is the parent of the permissible appointees of the power, the mere creation of the power does not manifest an intent of the donor that the donee shall exclude from consideration those sentiments of personal affection, gratitude, or displeasure upon which parents often determine the disposition of their own property. Provided there is no essential purpose to benefit an impermissible appointee, the donee may be guided by considerations not germane to the well-being of the permissible appointees.

Illustrations:

17. Donor died, leaving a will that devised property to Trustee in trust. Trustee is directed to pay the income to Donee (Donor's son) for life, with remainder to such of Donee's children as Donee may appoint by will. Donee has three children, two sons named John and James, and one daughter named Louise. Donee's will provides, "I appoint one-half of the trust property to my son John in token of my appreciation for his devotion to my business, and I appoint the other one-half of the trust property to my daughter Louise because of the attention and kindness she has always shown me. I appoint nothing to my son James because I disapprove of his way of life." The appointment is effective under the rule of this section.

18. Donor died, leaving a will that devised property to Trustee in trust. Trustee is directed to pay the income to Donee (Donor's daughter) for life, with remainder to such of Donee's children as Donee may appoint by deed or will, with remainder in default of appointment to Donee's children. Donee has two children, one a son named Henry and the other a daughter named Jane. Henry has a wife and children of whom Donee is very fond. Henry has terminal cancer and is in a coma and not expected to live more than a few days. Donee exercises her power to appoint by deed the remainder of the trust property after her death to Henry, knowing that thereby she will assure that the remainder will pass for the benefit of Henry's wife and Henry's children to the exclusion of Jane. The conclusion is justified that Donee was motivated by an improper purpose, and the appointment is ineffective.

i. Appointment to permissible appointee for purpose of benefiting another permissible appointee. The rule of this section applies only when the donee attempts to confer a benefit on an impermissible appointee. The rule of this section does not invalidate an appointment to a permissible appointee for the purpose of conferring a benefit on another permissible appointee. The donor of the power may, in the instrument creating the power, prohibit such an appointment.

j. Cross-references. The extent to which a fiduciary who carries out an appointment that is ineffective under the rule of this section may be liable is covered in § 19.17. The protection given to a bona fide purchaser of property received by a permissible appointee under an appointment that is ineffective under the rule of this section is considered in § 19.18.

Reporter's Note

1. Comparison with previous Restatements. Section 19.16 is substantially consistent with Restatement Second of Property (Donative Transfers) § 20.2 and Restatement of Property § 352. Section 19.16 enumerates and prohibits the situations most commonly arising and the devices most commonly employed to benefit a nonobject. The Restatement Second included these situations in Comments *b-i*. Section 19.16 follows the Restatement § 352 and subsumes §§ 353 (Appointment to Object in Consideration of Benefit Conferred Upon or Promised to a Non-Object) and 354 (Appointment to Object for Purpose of Benefiting Non-Object). The black letter to § 19.16 does not list the exceptions of §§ 19.17 and 19.18. Those exemptions are noted in Comment *j*.

The Restatement Second provided:

> ***§ 20.2 Appointment to Object for Benefit of Person Not an Object***
>
> If the donee makes an appointment to an object and the donee's purpose is to circumvent the donor's intention in limiting the appointment to specified objects, the appointment is ineffective to whatever extent it was motivated by that purpose except as stated in § 20.3 with reference to fiduciaries and § 20.4 with reference to purchasers without notice.

UNIFORM TRUST CODE

(Last Revised or Amended in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINTH YEAR
ST. AUGUSTINE, FLORIDA
JULY 28 – AUGUST 4, 2000

WITH PREFATORY NOTE AND COMMENTS

April 10, 2020

performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

Comment

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act. *See also* John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 703(e).

SECTION 808. [RESERVED]

Legislative Note: *A state that has enacted the Uniform Directed Trust Act (UDTA) should repeal Section 808 and revise certain other provisions of the UTC as indicated in the legislative notes to the UDTA.*

2018 Amendment. Former UTC Section 808 was largely superseded by the Uniform Directed Trust Act (UDTA) in 2017. The UDTA addresses the subject of trust directors and directed trustees more comprehensively. Former subsection (a), addressing directions from the settlor of a revocable trust to the trustee, was revised for clarity and relocated to UTC Section 603 with other rules governing revocable trusts. Former subsections (b)-(d) were deleted.

Former UTC Section 808 provided as follows:

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

SECTION 809. CONTROL AND PROTECTION OF TRUST PROPERTY. A trustee shall take reasonable steps to take control of and protect the trust property.

Comment

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty of prudent administration as provided in Section 804. *See also* Sections 816(1) (power to collect trust property), 816(11) (power to insure trust property), and 816(12) (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. *See* Restatement (Second) of Trusts § 175 cmt. a, c and d (1959). This section, like the other sections in this article, is subject to alteration by the terms of the trust. *See* Section 105. For example, the settlor may provide that the spouse may occupy the settlor's former residence rent free, in which event the spouse's occupancy would prevent the trustee from taking possession.

SECTION 810. RECORDKEEPING AND IDENTIFICATION OF TRUST PROPERTY.

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

UNIFORM DIRECTED TRUST ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR
SAN DIEGO, CALIFORNIA
JULY 14 - JULY 20, 2017

WITH PREFATORY NOTE AND COMMENTS

February 8, 2019

SECTION 4. COMMON LAW AND PRINCIPLES OF EQUITY. The common law and principles of equity supplement this [act], except to the extent modified by this [act] or law of this state other than this [act].

Comment

This section confirms that the common law and principles of equity remain applicable to a directed trust except to the extent modified by this act or other law. For example, other than the safe harbor under Section 3(b) for a term of a trust that designates the trust's principal place of administration, the law of an enacting state by which principal place of administration is determined would continue to apply to a directed trust. Provisions such as this one are familiar from other uniform acts. *See, e.g.*, Uniform Powers of Appointment Act § 104 (2013); Uniform Trust Code § 106 (2000). The drafting committee contemplated that, by ordinary principles of statutory interpretation, other statutes pertaining to trusts such as the Uniform Trust Code (2000), Uniform Trust Decanting Act (2015), Uniform Principal and Income Act (1997), and Uniform Prudent Investor Act (1994), would continue to apply to a directed trust except as modified by this act.

SECTION 5. EXCLUSIONS.

(a) In this section, "power of appointment" means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property.

(b) This [act] does not apply to a:

(1) power of appointment;

(2) power to appoint or remove a trustee or trust director;

(3) power of a settlor over a trust to the extent the settlor has a power to revoke the trust;

(4) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

(A) the beneficiary; or

(B) another beneficiary represented by the beneficiary[under Uniform Trust Code Sections 301 through 305] with respect to the exercise or nonexercise of the power;

or

(5) power over a trust if:

(A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(B) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the United States Internal Revenue Code of 1986[, as amended][, and regulations issued thereunder][, as amended].

(c) Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.

Legislative Note: *A state that has not enacted Uniform Trust Code (Last Revised or Amended in 2010) Sections 301 through 305 should replace the bracketed language in subsection (b)(4)(B) with a cross reference to the state's statute governing virtual representation or should omit the bracketed language if the state does not have such a statute.*

A state that does not permit the phrase "as amended" when incorporating federal statutes or permit reference to "regulations issued thereunder" should delete the bracketed language in subsection (b)(5)(B).

Comment

This section excludes five categories of powers that the drafting committee concluded should not be covered by this act for reasons of policy, coverage by other law, or both. Questions regarding a power that falls within one of these exclusions, such as the duty of the holder of the power and the duty of a trustee or other person subject to the power, are governed by law other than this act.

(1) Power of appointment. Subsection (b)(1) excludes a "power of appointment," which is defined by subsection (a) to mean "a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property." This definition of "power of appointment" is based on the definition in Uniform Powers of Appointment Act § 102(13) (2013). The definition is consistent with what Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (2011), refers to as a "discretionary" power of appointment, that is, one in which "the donee may exercise the

power arbitrarily as long as the exercise is within the scope of the power."

Accordingly, if the terms of a trust purport to grant a person not serving as trustee a nonfiduciary power to direct distributions of trust property, under this act that power will be construed as a power of appointment governed by law other than this act, such as the Uniform Powers of Appointment Act (2013) and Restatement (Third) of Property: Wills and Other Donative Transfers §§ 17.1–23.1 (2011).

The exclusion prescribed by subsection (b)(1) applies only to a nonfiduciary power of appointment. It does not apply to a fiduciary power of distribution. Thus, if the terms of a trust grant a person a fiduciary power to direct a distribution of trust property, and the power is exercisable while the person is not serving as trustee, then the power is a power of direction subject to this act.

To resolve doubt about whether a power over distribution is a power of appointment or a power of direction, subsection (c) prescribes a rule of construction under which a power over distribution is a power of appointment, and so is not held in a fiduciary capacity, unless the terms of the trust provide that the power is held in a fiduciary capacity.

A power in a serving trustee to designate a recipient of an ownership interest in or a power of appointment over trust property can never be a power of direction, because a serving trustee can never be a trust director (see Sections 2(5) and (9)). Whether a power over distribution granted to a serving trustee is held in a fiduciary capacity (making it a fiduciary distributive power) or is instead a nonfiduciary power of appointment is governed by law other than this act, such as under Restatement (Third) of Trusts § 50 cmt. a (2003).

(2) Power to appoint or remove. Subsection (b)(2) excludes "a power to appoint or remove a trustee or trust director." This exclusion addresses the compelling suggestion to the drafting committee that granting a person a power to appoint or remove a trustee is a common drafting practice that arose separately from the phenomenon of directed trusts. Under prevailing law, the only limit on the exercise of a power to appoint or remove a trustee is that it "must conform to any valid requirements or limitations imposed by the trust terms." Restatement (Third) of Trusts § 37 cmt. c (2003). If the terms of the trust do not impose any requirements or limitations on the power to remove, then "it is unnecessary for the holder to show cause" before exercising the power. Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 11.10.2 (5th ed. 2006).

(3) Revocable trust. Subsection (b)(3) excludes a power of a settlor over a trust to the extent the settlor has a power to revoke the trust. The drafting committee intended that this exception would apply only to that portion of a trust over which the settlor has a power to revoke, that is, "to the extent" of the settlor's power to revoke.

Because the settlor of a revocable trust may at any time revoke the trust and take back the trust property, under modern law, including Uniform Trust Code § 603(a) (2004), the trustee's duties run to the settlor rather than to the beneficiaries. The trustee must "comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the

trustee's normal fiduciary duties." Restatement (Third) of Trusts § 74(1)(a)(i) (2007).

Without the exclusion of this subsection, the definitions contained in paragraphs (3), (5), and (9) of Section 2 could have been read to transform a settlor's power over a revocable trust into fiduciary powers of a trust director, thus subjecting the settlor to the fiduciary duties of a trust director under Section 8 and the trustee to the modified fiduciary duties of a directed trustee under Sections 9 through 11.

To the extent that a conservator or agent of the settlor may exercise the settlor's power to revoke, as under Uniform Trust Code § 602(e)–(f) (2001), subsection (b)(3) of this section would apply to the conservator or agent. A nonfiduciary power in a person other than the settlor to withdraw the trust property is a power of appointment that would fall within subsection (b)(1).

(4) Power of a beneficiary. Paragraph (4) excludes a power of a beneficiary to the extent that the exercise or nonexercise of the power affects (A) the beneficial interest of the beneficiary, or (B) the beneficial interest of another beneficiary who is represented by the beneficiary under virtual representation law.

Subparagraph (A) follows from traditional law, under which "[a] power that is for the sole benefit of the person holding the power is not a fiduciary power." Restatement (Third) of Trusts § 75 cmt. d (2007). Thus, for example, a power in a beneficiary to release a trustee from a claim by the beneficiary is excluded from this act. To the extent the power affects another person, however, then it is not for the sole benefit of the person holding the power. Hence, a power over a trust held by a beneficiary may be a power of direction subject to this act if it affects the beneficial interest of another beneficiary. For example, a power in a beneficiary to release the trustee from a claim by another beneficiary is not excluded by this paragraph unless the power to bind the other beneficiary arises by reason of virtual representation.

The same rules apply if the beneficiary's power is jointly held. Thus, for example, if the terms of a trust provide that a trustee may be released from liability by a majority of the beneficiaries, and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting as trust directors to the extent the release bound other beneficiaries by reason of the power other than by virtual representation. This act would therefore reverse the result in Vena v. Vena, 899 N.E.2d 522 (Ill. App. 2008), in which the court refused to enforce a provision for release of a trustee by a majority of the beneficiaries on the grounds that the minority beneficiaries did not have recourse against the majority for an abusive release. Under this act, the minority beneficiaries would have recourse against the majority for breach of their fiduciary duty as trust directors.

The carve-out for virtual representation in subparagraph (B) reflects the drafting committee's intent not to impose the fiduciary rules of this act on top of the law of virtual representation, which contains its own limits and safeguards. Without the exclusion of this subsection, the definitions contained in paragraphs (5) and (9) of Section 2 could have been read to transform a beneficiary who represented another beneficiary by virtual representation into a trust director.

By way of illustration, under Uniform Trust Code § 304 (2000), a beneficiary who suffers from an incapacitating case of Alzheimer's disease may sometimes be represented by another beneficiary in litigation against a trustee for breach of trust. In such a case, paragraph (4) of this section prevents the beneficiary who represents the beneficiary with Alzheimer's from being a trust director. Instead, the safeguards provided by the law of virtual representation will apply. Under § 304, for example, the representative beneficiary and the beneficiary with Alzheimer's disease must have "a substantially identical interest with respect to the particular question or dispute," and have "no conflict of interest" with each other.

(5) The settlor's tax objectives. Subsection (b)(5) excludes a power if (A) the terms of the trust provide that the power is held in a nonfiduciary capacity, and (B) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under federal tax law. This exclusion is responsive to multiple suggestions to the drafting committee that certain powers held by a person other than a trustee must be nonfiduciary to achieve the settlor's federal tax objectives.

For example, to ensure that a trust is a grantor trust for federal income tax purposes, a common practice is to include in the trust instrument a provision that allows the settlor or another person to substitute assets of the trust for assets of an equivalent value, exercisable in a nonfiduciary capacity. If the power to substitute assets is exercisable in a fiduciary capacity, the power will not cause the trust to be a grantor trust. Without the exception of subsection (b)(5), therefore, this common drafting practice might no longer ensure grantor trust status in a state that enacts this Act, and the tax status of existing trusts with such a provision would be thrown into disarray.

In light of the evolving nature of tax planning, the frequency of amendments to the tax law, and the potential for disagreement about which powers must be nonfiduciary to achieve the settlor's federal tax objectives, the drafting committee reasoned that a standard referring broadly to a settlor's tax objectives was preferable to a prescribed list of sections of the tax code.

The drafting committee deliberately opted to reference tax objectives only under federal law, thereby excluding tax objectives under state law. The concern was that some states levy a tax on income in a trust if the trust has a fiduciary in the state. If this exclusion reached state tax law, then in such a state a trust director could argue that the director is not a fiduciary, because the settlor would not have wanted the trust to pay income tax. The consequence would be to negate fiduciary status for virtually all trust directors in those states. The purpose of this exception is to protect normal and customary estate planning techniques, not to allow circumvention of the central policy choice encoded in Section 8 that a trust director is generally subject to the same default and mandatory fiduciary duties as a similarly situated trustee.

SECTION 6. POWERS OF TRUST DIRECTOR.

(a) Subject to Section 7, the terms of a trust may grant a power of direction to a trust director.

health care, the director is relieved from duty and liability under this act unless the terms of the trust provide otherwise.

This subsection addresses the concern that a health-care professional might refuse appointment as a trust director if such service would expose the professional to fiduciary duty under this act. For example, the terms of a trust might call for a health-care professional to determine the capacity or sobriety of a beneficiary or the capacity of a settlor. In making such a determination, under subsection (b) the health-care professional would not be subject to duty or liability under this act.

Although the professional would not be subject to duty or liability under this act, the professional would remain subject to any rules and regulations otherwise applicable to the professional, such as the rules of medical ethics. The professional would also be subject to the other provisions of this act that do not create a duty or liability, such as the rules of construction prescribed by Sections 6(b) and 16. Moreover, a trustee subject to a direction by a health-care professional under subsection (b) of this section is still subject to the duties under Section 9 to take reasonable action to comply with the professional's direction and to avoid willful misconduct in doing so.

Subsection (c)—no ceiling on duties. Subsection (c) confirms that the duties under this section are defaults and minimums, not ceilings. The terms of a trust may impose further duties in addition to those prescribed by this section.

SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.

(a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1), and the trustee is not liable for the action.

(b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) to the extent that by complying the trustee would engage in willful misconduct.

(c) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:

(1) the breach involved the trustee's or other director's willful misconduct;

(2) the release was induced by improper conduct of the trustee or other director in procuring the release; or

(3) at the time of the release, the director did not know the material facts relating to the breach.

(d) A directed trustee that has reasonable doubt about its duty under this section may petition the [court] for instructions.

(e) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

Legislative Note: *A state that has enacted the Uniform Trust Code (Last Revised or Amended in 2010) should move Section 808(a) into Section 603, delete Section 808(b) through (d), and add "subject to [insert cite to Uniform Directed Trust Act Sections 9, 11, and 12]," to the beginning of subsection (b)(2) of Section 105. Section 105(b)(2) prescribes the mandatory minimum fiduciary duty of a trustee, which is superseded with respect to a directed trustee by the willful misconduct mandatory minimum of this section.*

The term "court" in subsection (d) of this section should be revised as needed to refer to the appropriate court having jurisdiction over trust matters.

Comment

Duties of a directed trustee. This section addresses the duty and liability of a directed trustee. It should be read in conjunction with Section 10, which governs information sharing among directed trustees and trust directors, and Section 11, which eliminates certain duties to monitor, inform, or advise. The drafting committee contemplated that this section, along with Sections 10 and 11, would prescribe the mandatory minimum fiduciary duties of a directed trustee, displacing any contrary mandatory minimum such as under Uniform Trust Code § 105 (2005).

Subsection (a)—duty to take reasonable action; nonliability other than under subsection (b). Subject to subsection (b), subsection (a) requires a directed trustee to take reasonable action to comply with a trust director's exercise or nonexercise of the director's power of direction or further power under Section 6(b)(1) and provides that the trustee is not liable for so acting.

The duty of a trustee in subsection (a) to take reasonable action depends on context. A power of direction under which a trust director may give a trustee an express direction will require the trustee to comply by following the direction. A power that requires a trustee to obtain permission from a trust director before acting imposes a duty on the trustee to obtain the required permission. A power that allows a director to amend the trust imposes a duty on the trustee to take reasonable action to facilitate the amendment and then comply with its terms. The duty prescribed by subsection (a) is to take reasonable action to comply with whatever the terms of the trust require of a trustee in connection with a trust director's exercise or nonexercise of the director's power of direction or further power under Section 6(b)(1).