

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

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Appeal Decision:	Approved	Appeal Number:	1905721
Decision Date:	JUL 17 2019	Hearing Date:	05/14/19
Hearing Officer:	Stanley Kallianidis	Record Open Date:	06/13/19

Appellant Representative:

David Correia, Esq.

MassHealth Representatives:

Michael Somers, Esq., Joann Weldon, Taunton MEC



**Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, 6th Floor
Quincy, MA 02171**

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Trust Assets
Decision Date:	JUL 17 2019	Hearing Date:	05/14/19
MassHealth Reps.:	Michael Somers, Esq., Joann Weldon	Appellant Rep.:	David Correia, Esq.

Authority

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

Jurisdiction

Notice dated February 26, 2019 was sent to the appellant stating that MassHealth had denied her application for MassHealth benefits due to excess assets (Exhibit 1). The appellant filed this appeal on March 28, 2019 and, therefore, it is timely (see Exhibit 2 and 130 CMR 610.015).

A denial of MassHealth benefits is grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's MassHealth application due to excess assets.

Issue

Pursuant to 130 CMR 520.023(C), was MassHealth correct to count the assets of a trust in determining the appellant's eligibility?

Summary of Evidence

The MassHealth representative from the Taunton MEC testified that the appellant, a resident of a long-term care facility, filed her MassHealth application on January 14, 2019 (Exhibit 3). The appellant's application was denied due to excess assets. According to the denial letter, the excess assets were over the \$156,898.00 limit for a couple. The assets totaled \$285,318.00 and were from a trust valued at \$229,733.00, and other assets worth \$55,585.00 (Exhibit 1). Since the asset limit for a couple where one person is institutionalized is \$128,420.00, the only issue and dispute was over whether or not assets held in the trust are countable.

The MassHealth representative submitted the trust in question into evidence, the B. Irrevocable Trust (the Trust)¹. The appellant and her spouse as Settlers established the Trust on June 30, 1999. They were the original Trustees, with a daughter being named as successor Trustee. The beneficiaries are the appellant's children (Exhibit 4).

According to Article XVI, "the Settlers shall have no power to alter, amend, revoke, or terminate this trust, except the special power of appointment described herein."

According to Article XII: SPECIAL POWER OF APPOINTMENT

The Settlers reserve the power to appoint the premises or any other assets of the trust; or any portion thereof, outright or upon trusts, conditions, or limitation... to any one or more of the issue of the Settlers, siblings, or the spouses or surviving spouse of any of the foregoing persons (except the Settlers)... This power shall be exercisable during the lifetime of both Settlers or the survivor by notice to the Trustees... No exercise of this shall exhaust it, and unless this power is exercised by the will or codicil of the second Settlor to die, the deed recorded last shall control as to any ambiguities or inconsistencies...(Exhibit 4).

According to Article XI: MEDICAID PROVISION

For purposes of taxation in conformity with the provisions of Section 121 of the Internal Revenue Code of 1986, as from time to time amended, and any provision under 20 CFR Section 416.1246 (1989) and 20 CFR 416.1103 (1989)... the Medicare Catastrophic Coverage Act of 1988; ...or by any provisions adopted August 10, 1993 as part of the Omnibus Reconciliation Act of 1993... the Trustee may engage in any transaction to comply with said provisions (Exhibit 4)

¹ Initial is used for the full name for purposes of confidentiality.

The decision to count the assets of the Trust was specified in a separate notice sent out to the appellant on February 26, 2019. According to this notice, the Trust is a countable asset because of Articles XII, XVI, and XI, "because there are circumstances under which trust principal can be paid to and/or used for the benefit of you or your spouse" and "the Trustee can transfer Trust property to you or your spouse in order to comply with Medicaid or other law" (Exhibit 1, p. 3).

According to argument from MassHealth's attorney, the Trust is countable solely due to the language of Article XII which gives the appellant as Settlor a special power of appointment (Exhibit 4).

According to testimony from the appellant's attorney, the Trust is irrevocable. He objected to the denial notices because there was no specific reason given or a citation of a regulation or case law as to why the Trust is a countable asset. Also, he argued that the appellant has no right to any principal distributions from the Trust under Article XII. He submitted into the record a Massachusetts Bar Association booklet entitled "Asset Protection Trusts" in support of his claim (Exhibit 5).

The record was left open for one month for the appellant's attorney and for MassHealth legal to issue a memorandum of law. Both parties submitted a brief during the record-open period (Exhibit 6).

In a legal memo from MassHealth, the MassHealth attorney again cited the appellant's power of appointment under Article XII as to why the Trust is a countable asset. MassHealth argued that the appellant, because of the specific language "outright or upon trusts, conditions, or limitation," could "condition" or "limit" a payment of principal to her descendants with the requirement that it either be returned or be used for her benefit.

In further support of its determination, the MassHealth attorney cited the ruling of the court in *Petition of Estate of Thea Braiterman*, 145vA: 3d 682 (N.H. 2016), a New Hampshire Supreme Court decision, which found that a similar power of appointment made the trust in that case countable. Because in this case there is also a special power of appointment, the Trust is likewise countable. Also, there is no fiduciary duty because the power is the Settlor's not the Trustee's. He argued that the Trust in this case is different than the trust in *Heyn v. Director of Medicaid*, 89 Mass. App. Ct. 312, 318 (2016), because here the special power of appointment allows the Settlor to create a legal obligation to return or use principal for her benefit (Exhibit 7).

According to argument and a memo from the appellant's attorney, the appellant has no right to any principal distributions from the Trust just because she has a special or limited power of appointment. In accordance with Article XII, the appellant has no access to the funds due to the language of "except the Settlers," which means that the language of the clause does not apply to them. The appellant's attorney further argues that MassHealth's reliance on *Braiterman* is misplaced. The reason for this is in the *Braiterman* decision,

there is specific language that allows principal to be returned to the grantor². In this case, there is no such language. To the contrary, this Trust explicitly prohibits principal to be returned to the grantor. Finally, the appellant's attorney cited various other court and administrative rulings in support of not counting trust assets where there is a special power of appointment (Exhibit 8).

Findings of Fact

The record shows, and I so find:

1. The appellant applied for MassHealth on January 14, 2019 (Exhibit 3).
2. The appellant's application was denied due to excess assets that were over the \$156,898.00 limit for a couple (Exhibit 1).
3. The assets totaled \$285,318.00 and were from a trust valued at \$229,733.00, and other assets worth \$55,585.00 (Exhibit 1).
4. The trust in question is the B. Irrevocable Trust (Exhibit 4).
5. The appellant and her spouse as Settlers established the Trust on June 30, 1999. They were the original Trustees, with a daughter being named as successor Trustee. The beneficiaries are the appellant's children (Exhibit 4).
6. According to Article XVI, "the Settlers shall have no power to alter, amend, revoke, or terminate this trust, except the special power of appointment described herein" (Exhibit 4).
7. MassHealth's position as to why the Trust is countable is the language of Article XII which gives the appellant as Settlor a special power of appointment (Exhibit 4).
8. According to Article XII "The Settlers reserve the power to appoint the premises or any other assets of the trust, or any portion thereof, outright or upon trusts, conditions, or limitation... to any one or more of the issue of the Settlers, siblings, or the spouses or surviving spouse of any of the foregoing persons (except the Settlers)... (Exhibit 4).

² The language is as follows: "The Donor expresses the hope that if the Trust is terminated during the lifetime of the Donor, any person taking under this paragraph will use a portion of her gift to supplement the income and the governmental services to which the Donor may be entitled..."

Analysis and Conclusions of Law

MassHealth regulation 130 CMR 520.023(C)(1), Irrevocable Trusts states.

(a) Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit 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 appellant's January 14, 2019 application was denied due to excess assets. The assets totaled \$285,318.00 and are from a Trust valued at \$229,733.00, and other assets worth \$55,585.00. The only asset in dispute is the Trust, as the remaining assets are below the \$156,898.00 limit for a couple. The appellant and her spouse as Settlers established the Trust on June 30, 1999. They were the original Trustees, with a daughter being named as successor Trustee. The beneficiaries are the appellant's children. Because more than five years has elapsed between the creation of the Trust and the application date, its funding cannot be considered to be disqualifying transfer. No other transfers were raised at hearing. Therefore, there is no issue of disqualifying transfers for this appeal.³

³ 130 CMR 520.019(B)2: For transfers of resources occurring on or after February 8, 2006, the look-back period extends back in time for 60 months from the time the applicant both was a nursing home resident and had applied for MassHealth.

This leaves the issue of whether or not the principal of the Trust is available to the appellant "under any circumstances" and therefore countable. There is no dispute that the Trust is irrevocable. Similarly, there is no issue of countable income. The parties agreed that net income from the Trusts is available to the appellant as Settlor.

According to Article XII "The Settlers reserve the power to appoint the premises or any other assets of the trust, or any portion thereof, outright or upon trusts, conditions, or limitation... to any one or more of the issue of the Settlers, siblings, or the spouses or surviving spouse of any of the foregoing persons (except the Settlers)..."

MassHealth contended that the appellant, because of the specific language "outright or upon trusts, conditions, or limitation", could "condition" or "limit" a payment of principal to her descendants with the requirement that it either be returned or be used for her benefit. MassHealth relies on the ruling of the court in *Petition of Estate of Thea Braiterman*, 145vA, 3d 682 (N.H. 2016). This was a recent New Hampshire Supreme Court decision, which found that a grantor's power of appointment makes trust principal countable. MassHealth's attorney reasoned that, because, here, there is also special power of appointment, this Trust is countable as well.

On its face, the ruling is contrary to the *Heyn* case, which found that a power of appointment does not make trust principal countable. There the court 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 *Heyn* case is controlling as it is a Massachusetts decision, it is from a higher court, and it is on point. Also, as pointed out by the appellant's attorney, *Braiterman* is distinguished from the instant trust issue. The *Braiterman* case is unique in that there is specific language that allows principal to be returned to the Settlor. In this case, as in *Heyn*, there is no clause which allows the return of principal. Indeed, this Trust, in Article XII, explicitly prohibits principal to be returned to the Settlor.

In conclusion, the assets of the Trust are unavailable to the appellant based upon her special power of appointment, and based upon the above cited regulations, they should not have been counted in her eligibility determination.

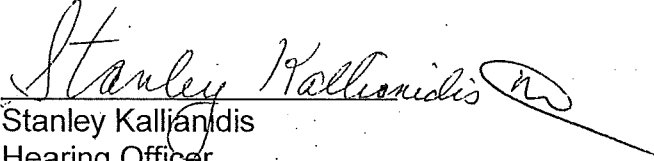
The appeal is therefore approved.

Order for MassHealth

Do not Count assets of Trust. Re-open appellant's application and re-determine eligibility for MassHealth.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this notice, you should contact your local office. 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.


Stanley Kallianidis
Hearing Officer
Board of Hearings