

APPEAL DECISION

Appeal Decision:	APPROVED IN PART; DENIED IN PART; REMAND	Issue:	LTC – Multiple Trusts – Excess Assets – Annuity Purchase – DQ Transfer
Decision Date:	NOV 10 2014	Hearing Dates:	04/17/2014 & 05/15/2014
MassHealth Reps.:	J. Sherman & R. Olivera	Appellant Reps.:	E. Correira, Esq. & D. Correira, Esq.
Hearing Location:	Taunton 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 January 22, 2014, MassHealth denied Appellant's request for Standard Long-Term Care benefits and announced a penalty period to be determined based on a \$32,434.48 amount. See Exhibit 3; 130 CMR 515.008; 130 CMR 516.001; 130 CMR 516.006; 130 CMR 520.018.

Appellant, through her attorney, filed a timely request for a Fair Hearing with the Board of Hearings on February 14, 2014. See Exhibit 1 and 130 CMR 610.015(B). The appeal request was initially dismissed by the Board of Hearings on February 20, 2014 due to the failure to submit a copy of the notice being appealed; this dismissal was subsequently vacated when Appellant's counsel submitted a copy of the January 22, 2014 notice. See Exhibits 2 and 3; 130 CMR 610.034; 130 CMR 610.035; 130 CMR 610.048.

A hearing was initially scheduled in this matter on April 17, 2014. See Exhibit 4. At the first hearing date, the MassHealth Representative indicated that the first denial notice of January 22, 2014 had been issued prematurely as there was a trust issue and that MassHealth wanted to amend

its decision. At this first hearing, MassHealth presented a copy of a new notice, dated April 15, 2014, which was marked as Exhibit 12, and which MassHealth indicated was effectively replacing the earlier denial notice dated January 22, 2014.¹ The April 15, 2014 notice indicated that the applicant was not eligible for LTC benefits because *“Your available assets of \$313,986.40 exceed the Masshealth limit of \$2000.00. Also you have transferred assets totaling \$32,434.48. Penalty to be determined once assets reduced.”* See Exhibits 12 and 13. MassHealth also presented a legal memorandum (Exhibit 9) regarding the analysis of the trust(s) at the first hearing date.

At the first hearing date on April 17, 2014, the Appeal Representative (who was appearing telephonically) confirmed that Appellant would want to appeal the more recent (April 15th) notice, even though neither he nor the Appellant had yet received this amended denial notice. The Hearing Officer indicated that he would take jurisdiction over the April 15, 2014 notice opted to continue the hearing to a second date per 130 CMR 610.072 to allow both parties time to prepare and review the materials submitted at the first hearing date.²

A second hearing date was held on May 15, 2014. See Exhibit 14. At the conclusion of the hearing, the record was left open per 130 CMR 610.081 to allow Appellant time to submit additional documentation regarding an accounting of one of the trust’s assets as well as additional documentation related to an annuity. See Exhibit 17.

Challenging a MassHealth denial or determination of the scope of medical assistance is a valid basis for appeal to the Board of Hearings. See 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied Appellant’s application for LTC benefits due to issues regarding a trust, which led to a countable asset issue, and an annuity, which had led to a disqualifying transfer issue.

Issues

What portion, if any, of the trust assets are countable and do they raise any issues pertaining to eligibility for LTC benefits? In addition, does the annuity issue present a problem pertaining to LTC eligibility and if so, has Appellant taken any corrective action regarding this particular asset? Based on those issues, what is the earliest possible eligibility date for Appellant?

Summary of Evidence

¹ The MassHealth Representative at the first hearing date indicated that the MEC worker assigned to the application had erroneously sent out the first notice at a time when MassHealth should have still waiting for its Legal Department to opine over the countability of the trust asset before issuing its final determination.

² At the April 17, 2014 hearing date, the Hearing Officer indicated that there would be an appeal over the second (April 15, 2014) notice. Despite this indication, on April 25, 2014, the Appeal Representatives filed a formal request for a hearing on the April 15, 2014 hearing. See Exhibit 13. This second appeal request has been consolidated into the current appeal request per 130 CMR 610.073 and was not assigned a separate appeal number.

Summary of Evidence

On September 13, 2013, Appellant was admitted and medically institutionalized in a skilled nursing facility (SNF). On November 27, 2013, Appellant, then an 86-year old widowed female, filed an application with MassHealth seeking LTC benefits to assist with payment of her stay in the SNF. Appellant is a Medicare recipient and, at some point in the past, was seeking a LTC benefit start date of December 1, 2013.

The denial notices at issue in this appeal mentioned separate eligibility issues involving an annuity and a series of trusts belonging to or created by Appellant, and they are discussed in greater detail below:

Annuity

On June 11, 2012, Appellant purchased an annuity at age 84 from American Equity Investment Life Insurance Company for a premium of \$142,141.03. The annuity agreement called for monthly payments of \$1,328.81 to be made to Appellant over a 10-year period, resulting in 120 payments totaling \$159,457.20, with the first payment beginning on July 11, 2012.

At the time of its initial January 15, 2014 denial notice, MassHealth calculated that this purchase during the regulatory look-back period (five years prior to the date of application and institutionalization, which, in this case, began on and after November 27, 2008) presented a problem. That is because MassHealth initially calculated that, under the SSA tables, Appellant's life expectancy would be 6.88 years and she could thus expect to receive in return a total of \$109,706.55 on the annuity during the remainder of her lifetime; such a calculation is required by the regulation on annuities. Because this \$109,706.55 in expected lifetime return was less than the \$142,141.03 purchase price, MassHealth initially believed it had to impose a penalty period for the difference of \$32,434.48 per the applicable 130 CMR 520.007(J) regulation. Using a \$300/day penalty divisor, MassHealth indicated on the initial denial notice that there would be a 108-day penalty period which would run and expire on March 23, 2014, with potential LTC eligibility starting the following date.

At the first hearing, MassHealth explained that there were three significant issues which would have a substantial effect on the original denial notice, and that MassHealth wanted to amend its denial notice. See Exhibit 13, containing amended notice. The first issue or error was MassHealth had incorrectly determined Appellant's life expectancy when it used 6.88 years in the calculation. Per the Social Security Actuarial Life Expectancy tables (entered into the record as Exhibit 7), the life expectancy of an 84-year old female was 7.26 years, and not 6.88 years.³ As a result, on Exhibit 8, MassHealth re-calculated and found that an individual with 7.26 years of expectancy needed to receive a monthly total of \$1,631.53/month from an annuity in order to make it actuarially sound and sufficient under the agency's annuity regulations. Because Appellant was set to actually receive \$1,328.81, MassHealth calculated that the difference over a 7.26 year span would be \$26,374.71 and the penalty amount would be less. See Exhibit 8 for entirety of

³ It is unclear from where this 6.88 years figure was derived, as it appears nowhere in the chart on Exhibit 7.

calculation, none of which was disputed at hearing.⁴ [Because of other issues concerning excess assets discussed *infra*, MassHealth did not calculate a new penalty expiration date on its amended denial notice.]

In its memorandum within Exhibit 15, Appellant's counsel indicate that Appellant "*does not dispute Mass Health's separate denial of benefits...related to her purchase of a commercial annuity...that does not conform to the requirements of 130 CMR 520.007(J) because of a miscalculation of life expectancy by a financial planner...*" See Exhibit 15 containing Appellant's Memorandum (with no numbered pages but on page 2). This statement is related to the length of the annuity payout period.⁵

At the various hearing date, MassHealth stated that there was a more considerable problem with the annuity which could potentially make the entirety of the annuity purchase disqualifying. Namely, the annuity, purchased in June of 2012, did not name the Commonwealth of Massachusetts as the appropriate primary beneficiary on the annuity should the Appellant predecease the final annuity benefit payment. The parties agreed that this would cause the entirety of the annuity purchase to violate 130 CMR 520.007(J)(2)(a) and be disqualifying. During the hearing, the Appeal Representatives indicated that the member could and would change the primary beneficiary status to the Commonwealth to prevent such a problem, and the record was left open at the conclusion of the second hearing date in part to allow Appellant time to make such a corrective document. On June 19, 2014, Appellant submitted documentation showing that her children were no longer the primary beneficiaries on the annuity as of May 15, 2014, and that they were only secondary beneficiaries. The new primary beneficiary was listed as "*Commonwealth of MA – Office of Medicaid, to the extent it has subsidized long term care benefits under the Medical Assistance Program on behalf of the annuitant.*" See change-of-beneficiary paperwork in Exhibit 18.

The third and most significant issue with the original MassHealth decision was that there were assets held in a series of trusts.

Trusts

Prior to issuing the original January 22, 2014 denial notice, MassHealth was aware of the existence of at least one trust settled by the Appellant, and the agency was awaiting a legal opinion on the countability of any trust assets as to Appellant at the time it issued that first denial notice on the annuity. MassHealth testified at the first hearing that the MEC worker initially handling this application had prematurely sent out the January 22, 2014 denial notice before the Legal Unit had finished its review on the trusts.

As of the first hearing date, MassHealth's Legal Unit had completed its determination that the

⁴ MassHealth never calculated a number of days for the penalty period but did, on the first notice indicate that the penalty would expire on March 23, 2014. See Exhibit 3, which also verifies that the penalty divisor would be \$300.00/day.

⁵ While the Memorandum in Exhibit 15 indicated that it would not dispute the \$32,438.48 penalty, it is logical to assume that Appellant would of course more prefer and accept the lesser penalty of \$26,374.41, the figure arrived at when the MassHealth life expectancy math error was removed from the calculation process.

assets in the trust(s) were countable and, as a result, the April 15, 2014 amended denial notice made mention of “available assets totaling \$313,986.40.

This \$313,986.40 in assets referenced on the second April 15, 2014 denial notice is the sum total of two assets – (1) a real estate property asset valued at \$218,000, consisting of Appellant’s former residence, and (2) \$95,886.40 in assets within a Franklin Templeton investment account. The home is held in an irrevocable trust named after Appellant (hereafter referred to as the Realty Trust), and the investment account is the asset within the other trust which is also named after Appellant with a nominal reference to being an Income trust (hereafter referred to as the Income Trust). Both of these two trusts were established by the Appellant on November 17, 2004, prior to the five-year regulatory look-back period.

The Appellant is the Grantor/Settlor of both trusts, and the named Trustee of both trusts.

Under Article 3 of both Trusts, the Appellant/Grantor has no right to alter, amend, modify or revoke either trust.

Article 4 of the Realty Trust (titled “Administration During the Grantor’s Lifetime”) reads as follows:

The Trustee shall hold the trust property, together with any other property, which may be transferred to the Trustee by the Grantor, in trust for the benefit of the Grantor’s descendants as follows: for the benefit of the Grantor’s children...if they are living, or if they are not living, for the benefit of their then living descendants, per stirpes should any one of them predecease the Grantor. During the Grantor’s lifetime, the Trustee shall apply or apply for the benefit of the Grantor’s beneficiary the net income, but not principal, at least quarterly, so long as said amount is equal to or in excess of one hundred dollars (\$100) and so long as said beneficiary or the descendant of a beneficiary is at least eighteen (18) years old. Any undistributed income shall be added to the next payment period and accumulated with income from the latter period in order to provide a distribution sum.

Article 4 of the Income Trust (titled “Administration During the Grantor’s Lifetime”) reads differently and as follows:

The Trustee shall hold the trust property, together with any other property, which may be transferred to the Trustee by the Grantor, in trust for the benefit of the Grantor as follows: During the Grantor’s lifetime the Trustee shall apply or apply for the benefit of the Grantor the net income, but not principal, at least quarterly, so long as said amount is equal to or in excess of one hundred dollars (\$100). Any undistributed income shall be added to the next payment period and accumulated with income from the latter period in order to provide a distribution sum.

It appears from a review of the MassHealth Legal memorandum that the arguments and sections quoted within the MassHealth memorandum were written as if only the terms of the Income Trust

existed.⁶

Article 5 of both trusts governs the distribution of trust assets upon Appellant's passing. Article 5.1 of both Trusts gives instructions for such a Power of Appointment and states that the Appellant retains a power which can be exercised during her lifetime but which may only be used to appoint the premises or trust to "any one or more of the issue of the Grantor, siblings or the spouses or surviving spouses of any of the foregoing persons (except the Grantor)..." Article 5.2 states that any trust assets not appointed under Article 5.1 shall be distributed to Appellant's three children.

Article 6 of both trusts discusses the right to name and remove Trustees.

Article 11 of both trusts discusses the broad powers and authority of the Trustee to deal with the Trust assets.

Article 13 of both Trusts has an identical section titled "Restrictions Regarding Real Estate" which reads as follows:

During the lifetime of the Grantor, the Trustees shall not mortgage, encumber, sell or dispose of the principal residence or other real estate of the Grantor or interest therein without the written consent of the Grantor or the Grantor's Executors including her attorney-in-fact, it being the Grantor's intention to retain such residence and real estate for her benefit during her lifetime, without the right of partition and without the right to rents

Article 14 of both Trusts has an identical section titled "Reservation of Life Estate" which reads as follows:

The Grantor reserves the right to the use and occupancy of the real estate during her lifetime, with the Grantor to pay all maintenance and repairs, water and sewer charges, insurance charges, and taxes related to said premises, if he (sic) shall so elect. At any time the Grantor's right of use of the premises shall not include the right collect rent therefrom. In addition, for further clarification, during the life of the Grantor, she shall have the right to possession or enjoyment of any real estate, which constitutes the principle residence. Nothing herein shall be construed to limit the ability of the Trustees to alienate, sell or convey the real estate or any interest therein, or to lease, mortgage, or demise any or all of the premises, so long as the provisions stated above are met.

⁶ The MassHealth Legal Memorandum describes the assets as though they were held in a single trust, but testimony revealed that there were actually three trusts. One of the three trusts is a revocable trust that contained no corpus at any relevant time and requires no further discussion. The MassHealth Representative at the first hearing was aware of the existence of multiple trusts, but no request was made at that time or subsequently at the second hearing day for time for MassHealth to amend or clarify its legal analysis. The two irrevocable trusts which are at issue have similar, if not identical, language for the most part, and while the trusts hold different assets (e.g. one holds a real estate asset, one holds an investment account), the majority of the arguments presented by MassHealth could logically and somewhat consistently be applied to both of the trusts. However, the agency's arguments based on Article 4 run into multiple problems because they are based on incorrect language.

Article 15 of both Trusts are identical and discuss how the Appellant “...intends that she be treated as the owner of the Trust Estate (both income and principal) for income tax purposes under one or more of Sections 671 through 678 of the Internal Revenue Code” and how the Appellant may “borrow the corpus of income or income of this Trust without adequate security”

The Realty Trust’s sole asset in the corpus at all relevant times is the Appellant’s former residence, which was transferred into the Trust in 2004. Testimony at hearing indicated that Appellant has lived in the residence for some period of time between her 2004 conveyance and her 2013 SNF admission, and that the Appellant has never collected or received rent from anyone who may have lived there with her or at separate times.

The Income Trust’s corpus has one asset - the Templeton investment account. Appellant’s counsel concedes that Appellant is the income beneficiary of that Income Trust. At hearing, Appellant’s representative indicated that there have been no income distributions made from that Investment account over the years, and that includes a time period spanning the past five years prior to the application. From November 2008 through March 2014, there have been monthly dividends totaling \$19,950.49 which have been reinvested into the Income Trust and, in its most recent submission (Exhibit 18), the Appeal Representative conceded that Appellant will not dispute that her failure to avail herself of that resource would, like the amount at issue for the annuity, constitute a separate disqualifying transfer in the amount of \$19,950.49. See Exhibit 18.⁷

Both sides raised multiple legal arguments in their respective papers submitted at hearing. The most pertinent of the arguments will be addressed as needed in the “Analysis and Conclusions of Law” section below.

Findings of Fact

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

1. On November 17, 2004, the Appellant established two irrevocable trusts - an Income Trust and a Realty Trust. (Testimony and Exhibits 10, 11, and 15)
2. As verified by a deed filed on December 1, 2004 with the Bristol County Registry of Deeds, title of Appellant’s residence was transferred to the Realty Trust. This is the only known asset of the Realty Trust. (Testimony and Exhibits 11 and 15)

⁷ In its memorandum in Exhibit 9, page 9, fn. 5, MassHealth notes that the failure to distribute income to the applicant and instead add it back to the principal would possibly be a disqualifying transfer of resources under 130 CMR 520.019. The \$19,950.49 figure is consistent with the mathematical summary and the records provided by Appellant’s Appeal Representative in Exhibit 18 during the Record Open period, which tracks the monthly income and sums it up by year and for the time period. I have double-checked the math and find it exact and without error. The period of Nov. 2008 through March 2014 was selected because (1) November 2008 was five years prior to the Appellant’s first application for LTC benefits and (2) March 2014 was the month in which MassHealth’s first denial notice suggested that Appellant may be potentially eligible for LTC benefits.

- a. The value of the real estate, according to the parties, is \$218,000. (Testimony and Exhibits 11, 12, 13 and 15)
- b. Article 4 of the Realty Trust (“Administration During the Grantor’s Lifetime”) reads as follows:

The Trustee shall hold the trust property, together with any other property, which may be transferred to the Trustee by the Grantor, in trust for the benefit of the Grantor’s descendants as follows: for the benefit of the Grantor’s children...if they are living, or if they are not living, for the benefit of their then living descendants, per stirpes should any one of them predecease the Grantor. During the Grantor’s lifetime, the Trustee shall apply or apply for the benefit of the Grantor’s beneficiary the net income, but not principal, at least quarterly, so long as said amount is equal to or in excess of one hundred dollars (\$100) and so long as said beneficiary or the descendant of a beneficiary is at least eighteen (18) years old. Any undistributed income shall be added to the next payment period and accumulated with income from the latter period in order to provide a distribution sum. (Exhibit 11)

3. On December 29, 2004, Appellant authorized the transfer of a Franklin Templeton Investment Account to the Income Trust. This is the only known asset of the Income Trust. (Testimony and Exhibits 10 and 15)
 - a. From November 2008 through March 2014, there have been monthly dividends totaling \$19,950.49 which have been reinvested into the Income Trust. (Testimony and Exhibit 18)
 - b. Article 4 of the Income Trust (“Administration During the Grantor’s Lifetime”) reads differently and as follows:

The Trustee shall hold the trust property, together with any other property, which may be transferred to the Trustee by the Grantor, in trust for the benefit of the Grantor as follows: During the Grantor’s lifetime the Trustee shall apply or apply for the benefit of the Grantor the net income, but not principal, at least quarterly, so long as said amount is equal to or in excess of one hundred dollars (\$100). Any undistributed income shall be added to the next payment period and accumulated with income from the latter period in order to provide a distribution sum. (Exhibit 10)

4. Under Article 3 of both Trusts, the Appellant/Grantor has no right to alter, amend, modify or revoke either trust. (Exhibits 10 and 11)
5. Article 14 of both Trusts has an identical section titled “Reservation of Life Estate” which reads as follows:

The Grantor reserves the right to the use and occupancy of the real estate during her lifetime, with the Grantor to pay all maintenance and repairs, water and sewer charges, insurance

charges, and taxes related to said premises, if he (sic) shall so elect. At any time the Grantor's right of use of the premises shall not include the right collect rent therefrom. In addition, for further clarification, during the life of the Grantor, she shall have the right to possession or enjoyment of any real estate, which constitutes the principle residence. Nothing herein shall be construed to limit the ability of the Trustees to alienate, sell or convey the real estate or any interest therein, or to lease, mortgage, or demise any or all of the premises, so long as the provisions stated above are met. (Exhibits 10 and 11)

6. On June 11, 2012, Appellant purchased an annuity at age 84 from American Equity Investment Life Insurance Company for a premium of \$142,141.03. The annuity agreement called for monthly payments of \$1,328.81 to be made to Appellant over a 10-year period, resulting in 120 payments totaling \$159,457.20, with the first payment beginning on July 11, 2012. (Exhibit 6)
7. As of June 11, 2012, the life expectancy of an 84-year old female according to the SSA tables as 7.26 years. (Testimony and Exhibit 7)
8. As of the first hearing date, the annuity did not name the Commonwealth of Massachusetts as holding any type of beneficiary interest on the annuity payments if and when the Appellant passes. (Testimony and Exhibit 6)
 - a. During the Record Open period, the Appellant submitted proof into the record that the annuity in question had the primary beneficiary upon death changed, as of May 15, 2014, to "*Commonwealth of MA – Office of Medicaid, to the extent it has subsidized long term care benefits under the Medical Assistance Program on behalf of the annuitant.*" (Exhibit 18)
9. On November 27, 2013, Appellant, then an 86-year old widowed female, filed an application seeking LTC benefits with MassHealth with a desired start date of December 1, 2013. (Testimony and Exhibit 5, 6, 7, and 8)
10. Through a notice dated January 22, 2014, MassHealth denied Appellant's request for Standard Long-Term Care benefits and announced a penalty period to be determined based on a \$32,434.48 amount. (Testimony and Exhibit 3)
 - a. Appellant timely appealed the January 22, 2014 notice to the Board of Hearings, leading to this current appeal. (Exhibits 1 and 3)
 - b. The January 22, 2014 notice was inadvertently sent out by MassHealth prior to a review of the various trust instruments and full assessment of countable assets, leading to a MassHealth need to amend its January 22, 2014 notice. (Testimony)
11. On April 15, 2014, MassHealth issued a new notice on this application, which indicated that the applicant was not eligible for LTC benefits because "*Your available assets of \$313,986.40 exceed the Masshealth limit of \$2000.00. Also you have transferred assets totaling \$32,434.48. Penalty to be determined once assets reduced.*" (Testimony and Exhibits 12 and 13)

- a. Appellant submitted a request to the Board of Hearings which was a timely appeal of this April 15, 2014 re-determination notice. (Testimony and Exhibit 13)
- b. At hearing, MassHealth testified that there was an error regarding the transfer amount of \$32,434.38 announced in the April 15, 2014 and that the amount of the transfer related to the annuity purchase which would need to be addressed if and when the excess asset was resolved was \$26,374.71. (Testimony and Exhibit 8)
- i. The two sides agree that there will potentially be some disqualifying transfer related to the term of the annuity payouts, which exceed the Appellant's life expectancy according to the SSA tables. (Testimony and Exhibits 6, 7, 8, and 15)

Analysis and Conclusions of Law

Before turning to the more substantive issues raised by the parties related to eligibility, it is first noted that there was one claim raised in Appellant's pre-hearing memorandum (Exhibit 15) suggesting a procedural due process violation by the agency which was based on the various denial notices. That argument stated in part that "*at this time, MassHealth should be prevented from challenging [Appellant's] eligibility for long-term care benefits based upon the existence of the Trusts. MassHealth had already reviewed and approved the Trusts when it issued the first Denial Notice.*" Leaving aside the fact that the second sentence is simply not factually accurate, I am not persuaded by that line of argument for multiple reasons. The main reason is that 130 CMR 515.010 is an applicable regulation that effectively allows MassHealth to recover from the Appellant for LTC benefits that may have been erroneously approved or awarded by the agency. The regulation reads:

515.010: Recovery of Overpayment of Medical Benefits

The MassHealth agency has the right to recover payment of medical benefits to which the member was not entitled at the time the benefit was received, **regardless of who was responsible** and whether or not there was fraudulent intent. No provision under 130 CMR 515.010 will limit the MassHealth agency's right to recover overpayments.

(Emphasis added.)

Thus, even if there was an approval date given on the first denial notice⁸ and even if such an approval was erroneous or overlooked some eligibility issues, the regulatory law still allows MassHealth to take any appropriate and corrective administrative action to properly account for any issues raised by the multiple trusts. Thus, MassHealth should be to amend and correct its position.

Additionally, Appellant also timely appealed the first denial notice to the Board of Hearings, thereby putting the entirety of the decisions made on this LTC application under the jurisdiction of the Board of Hearings. In applying the regulations that affect the decision made on this application for LTC, benefits, the Board of Hearings is not bound by prior administrative mistakes, errors, or

⁸ It is noted that there was no approval or start date of benefits in this matter announced on that first denial notice.

miscalculations made by either side that have a material effect on the appropriateness of the requested benefits; instead the Board of Hearings is obligated to apply the law correctly. See 130 CMR 610.082(C).⁹ To not allow for any such obvious administrative errors to be corrected at the Fair Hearing level would simply create added inefficiency that would not only fail to serve either party, but would also violate one of the purposes of the Fair Hearing Rules. See id.; see also 130 CMR 610.065(A)(8) (containing regulatory statements about how Fair Hearing decision outcomes must be made in accordance with the law).

The Appeal Representative's submission in Exhibit 15 also contains a line of argument and exhibits suggesting that the memorandum of the MassHealth attorney in this case may violate Massachusetts Rule of Professional Conduct 3.3 ("MRPC 3.3") and be representative of the agency's attempt to "foist a policy scam". In that portion of the Appellant's memorandum, the argument also contains the following sentence about the MassHealth memorandum: "*MassHealth makes several other interesting arguments but they are not rooted in legal analyses; in fact, they do no rise to the level of a high school debater, the memorandum is 'mere 'gobblygook' (sic) purported to be the 'brainstorm of an Oxford scholar,' it is not, it is an embarrassment to the legal profession.*" See Exhibit 15, last two unnumbered pages in that memorandum and sub-Exhibit 12 of that submission (containing copy of MRPC 3.3). Because the Board of Hearings is not the proper forum for resolving claims pertaining to professional conduct, that line of argument will not be further addressed in this decision.¹⁰

Turning to the more substantive and developed dispute between the two parties, there appear to be two general areas of dispute between the parties. The first issue involves whether any part of the agency's denial can be supported because Appellant has countable assets that exceed the \$2,000 asset limit. See 130 CMR 520.003 (announcing \$2,000 asset limit for single applicants like Appellant seeking LTC benefits). If there is such an excess asset issue, then any legitimate issue related to the second area of dispute – namely any disqualifying transfer – is only a secondary or future concern, because one cannot fully and properly assess a penalty until the applicant otherwise reduces assets to become eligible. See 130 CMR 520.004(A)(1) (requiring excess assets issues to be resolved to obtain eligibility) and 130 CMR 520.019(G)(3) (delaying the start of any penalty period until a member is otherwise eligible for benefits). If and when there is no excess asset issue, then and only then does the issue about a disqualifying transfer of potentially countable assets be completely handled.¹¹ That two-step frame of analysis is logical, as a single applicant like Appellant must first show that he or she has assets below \$2,000 before a complete decision can be made as to whether any such reduction of excess assets beyond that \$2,000 were potentially disqualifying. See 130 CMR 520.004(A)(1)(a). It is also premature to do the analysis of any

⁹ See also e.g., BOH Fair Hearing decisions 1402188 and 1203102 (containing examples of Fair Hearing decisions written by the undersigned Hearing Officer in which the penalty periods were properly increased or decreased to account for an initial MassHealth miscalculation regarding the scope or number of days within a penalty period).

¹⁰ Aside from arguably the last sentence (or run-on set of sentences) quoted from Exhibit 15 within this Analysis paragraph, I find nothing in the many written pages submitted from both sides that goes beyond the line of zealous advocacy or which is indicative of the existence of a violation of an ethical or professional norm. For the most part, I found the writings and arguments submitted by both sides to be thorough, understandable, and made in good faith.

¹¹ In this appeal, due to the faulty notices, MassHealth prematurely sent out a denial related to the disqualifying transfers even though it had not yet finished its review of the countability of the potential asset resources in the trusts.

disqualifying transfer question when there are excess assets because the spenddown of an excess asset may, if not done properly, add to the disqualifying transfer determination. See id. Accordingly, the countability of any resources in trust must be analyzed and completed prior to looking at any issue involving the annuity purchase and/or any other actions possibly related to a disqualifying transfer.

In determining the countability of assets, certain assets (such as cash, bank accounts, and securities) are more liquid and tend to lend themselves to easier financial analysis. See 130 CMR 520.007. Generally, real estate-related resources are among the most complicated type of assets to be analyzed due to the variety of regulations that can apply depending on the circumstances. See 130 CMR 520.007 through 130 CMR 520.008. However all such assets, when they are put into a trust or series of trusts, require additional analysis under the MassHealth trust-related financial regulations found at 130 CMR 520.021 through 130 CMR 520.024. When a real estate resource is put into a trust, many of the provisions of the real estate rules in 130 CMR 520.007 and 130 CMR 520.008 do not apply.

Turning to the MassHealth regulations regarding trusts, we find the following:

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

The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will. Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual.

(A) Look-Back Period for Transfers into or from Trusts.¹²

...

(B) Revocable Trusts.

...

(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

¹² Although the transfer rules will only come into play later, it is noted here that the transfer of the real estate took place prior to the beginning of the five year look-back period, and there can thus be no potential disqualifying penalty issue for the transfer of this real estate interest. See 130 CMR 520.019(B); 130 CMR 520.023(A) and (C)(2) (containing consistent statements indicating that the look-back period will not reach the 2004 transfer for this 2013 MassHealth application).

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).**

...

520.024: General Trust Rules

130 CMR 520.024 applies to trusts whether or not established by will and whether or not established by the individual or spouse.

(A) Irrevocable Trust.

(1) The assets and income held in an irrevocable trust established by the individual or spouse that the trustee is required to distribute to or for the benefit of the individual are countable.

(2) Payments from the income or principal of an irrevocable trust established by the individual or spouse to or for the benefit of the individual are countable.

(3) The assets and income held in an irrevocable trust established by other than the individual or spouse that the trustee is required to distribute to the individual are countable.

(4) Payments from the income or the principal of an irrevocable trust established by other than the individual or spouse to the individual are countable.

(B) Home in Trust: Community-Based Individuals. For an applicant or member who is not a nursing-facility resident, the principal place of residence held in a revocable or irrevocable trust is a noncountable asset...

(C) Home in Trust: Cure.

(1) If the MassHealth agency has denied or terminated MassHealth because the home or former home in trust is considered an excess asset, the MassHealth agency will rescind that action if the home or former home has been removed from the trust and returned to the nursing-facility resident in accordance with the full cure rules at 130 CMR 520.019(K).

(2) When the home or former home is removed from a trust, as determined by the MassHealth agency, the MassHealth agency will redetermine eligibility using the rules at 130 CMR 520.007(G)(8) and the full cure rules at 130 CMR 520.019(K).

(3) When the home or former home has been removed from the trust, the MassHealth agency may place a lien in accordance with 130 CMR 515.012. ...

(Emphasis added.)

With regard to the real estate property in the Realty Trust, I find sufficient evidence to conclude that the terms of the Realty Trust simply do not allow for any “*portion payable*” of the trust asset to be given to the Appellant. In contrast to the Income Trust, the Appellant is not listed as either an income beneficiary or a principal beneficiary on this Realty Trust.

The MassHealth argument in its memorandum in Exhibit 9 is unsound, as it states in its “**Facts**” section that “*Pursuant to Article 4, the applicant is also the Beneficiary of the Trust and it states that during this applicant’s lifetime, the Trustee shall pay or apply for the benefit of the applicant the Trust Income, but not the principal, a least quarterly.*”. That statement is not consistent with what Article 4 of the Realty Trust actually says. Instead the Realty Trust reads as follows:

“The Trustee shall hold the trust property, together with any other property, which may be transferred to the Trustee by the Grantor, in trust for the benefit of the Grantor’s descendants as follows: for the benefit of the Grantor’s children...if they are living, or if they are not living, for the benefit of their then living descendants, per stirpes should any one of them predecease the Grantor. During the Grantor’s lifetime, the Trustee shall apply or apply for the benefit of the Grantor’s beneficiary the net income, but not principal, at least quarterly, so long as said amount is equal to or in excess of one hundred dollars (\$100) and so long as said beneficiary or the descendant of a beneficiary is at least eighteen (18) years old. Any undistributed income shall be added to the next payment period and accumulated with income from the latter period in order to provide a distribution sum.” (Exhibit 11)

The first sentence quoted above from Article 4 identifies the class of beneficiaries on this Realty Trust to be the Grantor’s descendants. The second sentence, although it uses the somewhat confusing term “*Grantor’s beneficiary*”,¹³ does nothing to redefine the class of beneficiaries so that it now includes the Grantor. Accordingly, in this case, I find the Appeal Representative correctly argues and points out that the Appellant is neither an income beneficiary nor a principal beneficiary of the Realty Trust. There is no other language in the Realty Trust which shows how

¹³ There does appear to be a drafting flaw, as the term “Grantor’s beneficiary” instead of “beneficiary(ies)” creates some ambiguity due to the likely unnecessary reference of the word “Grantor’s”. However, MassHealth did not explain or show how the term “Grantor’s beneficiary” could be interpreted as being the Grantor based on any other language in this or other Articles of the Realty Trust, especially as there are no rights or sections about amending the class of beneficiaries. More importantly any interpretation of that second sentence as making the Grantor a beneficiary would make the trust completely inconsistent, as it would clash and create a huge inconsistency with the sentence that immediately precedes it which chose not to name and include the Grantor. Thus the argument put forth by MassHealth on this point is not persuasive.

Per fn. 6, it appears that the MassHealth arguments and memorandum may better apply only to the terms in the Income Trust. However, the MassHealth Representative(s) from the MEC, prior to the first April 2014 hearing, were well aware of the existence of multiple trusts as it was MassHealth who mentioned the number of the trusts to the Hearing Officer on that first hearing day. It was assumed that the MassHealth memorandum provided on that day would speak to all of the trusts. It did not and MassHealth made no effort at either hearing date to indicate that the analysis would have to be revised. As MassHealth prepared a denial notice on April 15, 2014 that indicated that both of the two trusts’s assets should be countable, it is not too much to expect that the memorandum produced on April 17, 2014 should have addressed all of the trusts at issue, including the Realty Trust.

Appellant may be able to receive some "*portion payable*" from the Realty Trust. She is not entitled to any rents from the Realty Trust per Article 14, and she has no alienable life estate interest. There is no language indicating a right to amend or change the beneficiaries. There is also no ability to liquidate or convert the trust corpus into something (e.g. an annuity) which would then in turn produce income or other aid for the Appellant, as she is not an income beneficiary. There is also no evidence presented in the record which shows that Appellant is not abiding by the terms of the trust and that therefore the terms of the trusts are being followed and used by the Appellant/Trustee or family in an arbitrary manner (i.e. there is no evidence that Appellant is collecting rent from the property, which would be a violation of later Articles of the Realty Trust, etc.). I also find nothing in 130 CMR 520.024 which applies to this case and makes any part of the real estate resource in the Realty Trust countable to the Appellant.

Therefore, I conclude that under the terms of the Trust, there is no evidence that there is any "portion" of the Realty Trust which is "payable" to the Appellant; I will note that while the regulation in 130 CMR 520.023(C)(1)(d) is somewhat vague as to what "*available*" means in terms of the former home,¹⁴ the fact that the entire subsection in the regulation at 130 CMR 520.023(C)(1) is titled "*Portion Payable*" suggests that, for there to be a finding of countability and availability, there must be some circumstances in the trust language which gives an LTC applicant some colorable claim and ability to receive some form of payment from the resource in the trust corpus. This is also consistent with 42 U.S.C. §1396p(d)(3)(B)(ii), quoted by MassHealth in its memorandum, which uses the phrase "*...payment from the trust...*" to describe the "any circumstances" test. As to this particular Realty Trust, I agree with the arguments raised by the Appeal Representative that the remainder of the Realty Trust is particularly written and structured so that no such circumstances exist.

Although both sides, particularly MassHealth, touch on many understandable public policy and purpose-type arguments about the roles of trusts, the rights of trust creators, and/or how self-settled trusts may (or may not) affect individual Medicaid eligibility, I find that majority of the arguments raised by both sides stray too far from the "*portion payable*" argument of 130 CMR 520.023(C)(1) and I find no need to address them all in much greater detail due to the language in Article 4 and the remainder of the Realty Trust. However, as I ruled in favor of Appellant, I will briefly discuss the more salient of the MassHealth arguments which I do not find persuasive on this particular trust.

I find the tax consequences power, such as the applicant's ability to claim the property on her personal tax return under Article 15, as that does not result in making the real estate asset "payable" to the applicant. Further, with regard to the borrowing powers in Article 11 of the Trustee, I will note that any sort of hypothetical loan would not turn the trust corpus over to the applicant; instead the Appellant would hypothetically have a new resource but also a

¹⁴ The introductory statement to 130 CMR 520.023 states in part, after quoting 42 U.S.C. §1396p, the following: "*...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.*" The use of the word "*available*" in the last clause is not particularly helpful in offering guidance of how to interpret the word "*available*" earlier in that sentence.

corresponding debt. Perhaps more importantly, as Appellant is not any type of beneficiary on the trust, the circumstances of the trust language indicate that she would not be legally permitted to be the beneficiary of such a loan secured by the Trust.

For these reasons, I conclude that the entirety of real estate interest held by the Realty Trust should not be countable to Appellant. This portion of the appeal as to the \$218,000 asset held by this Realty Trust is thus APPROVED.

In contrast, the analysis of the Income Trust is much easier. Here the corpus of the Income Trust consists of an asset that is a financial investment account, which, like cash, more easily lends itself to separate divisions into income and principal. I also find that the Appellant is clearly entitled to payments from the "income" of the trust but not entitled to the principal. This is based on a reading of Article 4 of the Income Trust, which lists the Appellant as the sole income beneficiary and her children as the principal beneficiaries.

Applying 130 CMR 520.023(C) is easy; the income of the Templeton investment account that is in the Income Trust is possibly payable to the Appellant. Therefore, the investment income must be treated as a countable asset under 130 CMR 520.023(C)(1).

[At hearing it was initially raised by the Hearing Officer, incorrectly upon review, that the failure of the Appellant to avail herself of the Income Trust's dividends over the year might be a position disqualifying transfer. That was a statement with which the Appellant's counsel also eventually agreed. See June 16, 2014 cover letter in Exhibit 18, confirming that the reinvestment of the dividend income into the account is potentially disqualifying. However, 130 CMR 520.023(C)(1)(a) and 130 CMR 520.023(C)(1)(b) distinguish between available trust income that has never been paid out and that trust income which has been paid out. Because it has not been paid out, 130 CMR 520.023(C)(1)(a) applies, and that portion must be totaled and treated as a countable asset under the law as it is written. This is also consistent with the general rule of MassHealth which treats interest or monthly deposits as income in the month it is received and then as an asset thereafter. See also 130 CMR 520.009(E) (confirming a similar rule for lump sum benefits). Had the title to the investment account been transferred from the Income Trust to a third party (i.e. a child, or a new trust in which the Appellant had no interest) in the past, it would not be a countable asset, but would potentially set up a disqualifying transfer scenario. Similarly if this is what is done in the future, it will raise the issue of a disqualifying transfer. See 130 CMR 520.023(C)(1)(c) and (C)(2). However because the Income Trust was created and/or funded prior to the November 2008 look-back period and has not been transferred to date, it is not subject to any of the transfer regulations at this current time.]

As detailed in the Summary, the total of the income-not-taken from the Income Trust during the look-back period in 130 CMR 520.019(B), from November 2008 from March 2014, is \$19,950.49. This amount is a countable asset and, because the asset limit is \$2,000, Appellant has an excess asset problem which will prevent eligibility at this time. I do not find the principal amount of this Income Trust to be countable and therefore this portion of the appeal is APPROVED IN PART as the excess asset amount on the April 15, 2014 notice has been reduced and DENIED

IN PART as there is evidence of countable assets greater than \$2,000.

Because there are excess assets from the Income Trust, Appellant is entitled to a spenddown period under 130 CMR 520.004(A) which would allow her to preserve the November 2013 application month at issue. This spenddown period is also necessary because, due to the premature notice sent out by MassHealth in January which was based on a disqualifying transfer, Appellant never received an excess asset notice that gave her 30 days to remedy the situation.¹⁵

Therefore, the Orders below will allow Appellant 30 days to verify the reduction of countable assets below the \$2,000 asset limit. Appellant should note that the evidence suggests that there almost certainly have been additional monthly dividends on the Templeton investment account of the Income Trust which belong to Appellant, and that any spenddown effort will have to account for any additional Income Trust resources gained since March 2014, as those also belong to Appellant. The Appellant will not have to spenddown verify income received in the month prior to the date of any spenddown verification submitted to MassHealth; however, if the trust remains an income-producing device, MassHealth will, eventually upon resolution and potential future approval, have to add any current and future income from that trust to the Appellant's countable income and PPA.¹⁶ Alternatively if Appellant wants to choose to resolve her "spenddown" issue by having the Trust completely transfer its assets and effectively wind up the Income Trust in a permissible manner, that may resolve the on-going nature of the problem, but will naturally result in a future disqualifying transfer issue about any income received from November 2008 through the date of transfer.

In conclusion, barring some future and acceptable cure, it is noted that there will also be at least one undisputed disqualifying transfer issue if and when the excess assets are spenddown; that transfer issue is related to the timing and length of the annuity payment schedule and 130 CMR 520.007(J)(1)(b), and the Appeal Representative has admitted to a potential problem with that issue. See Exhibit 15, unnumbered page 2. During such a future time, MassHealth will also have a chance to weigh in on whether there is an issue related to the remainder interest language of the annuity, although Appellant's attempt to correct this issue via the beneficiary designation change in Exhibit 18 looks like it will resolve any issue about compliance with 130 CMR 520.007(J)(2).

Based on the above, the appeal is APPROVED IN PART; DENIED IN PART; and REMANDED in accordance with the Orders below.

¹⁵ The MassHealth notice in Exhibit 15 makes no mention of any amount of countable assets related from bank accounts, Personal Needs Account, countable life insurance and car assets, or any of the other assets sometimes listed on a typical excess asset notice. Accordingly, I will conclude that there are no other countable and excess assets other than that resulting from the Income Trust.

¹⁶ This is somewhat complicated due to the constant income and naturally changing values in the Income Trust, but, if the Appellant wanted to (1) set up an Income Trust that produced such variable, regular income and resources; (2) not avail herself of such financial resources during the look-back period; and (3) apply to MassHealth for financial assistance with LTC benefits, then the Appellant must expect to bear the consequences of a slightly more complicated spenddown required by the MassHealth regulations.

Order for Appellant

If Appellant desires to preserve her November 2013 SMBR application date, she must, within 30 days of the date of this decision resolve her current excess asset issue pursuant to 130 CMR 520.004 by submitting verification to the attention of the MassHealth Representatives at Taunton MEC which shows both (1) the countability of the income/resources generated and belonging to her from the Income Trust from November 2008 through the date of this decision, and (2) a proper spenddown and/or reduction of an appropriate portion of that countable resource from the Income Trust. It is noted that Appellant may retain \$2,000 in countable assets per 130 CMR 520.003.

If Appellant fails to take such action within 30 days of the date of this decision, the decision to deny MassHealth due to excess assets will remain in place. Any reduction of assets beyond 30 days will generate a new application date and may require a new LTC application and Supplement if requested by MassHealth.

Order for MassHealth

For current and future purposes of countable resources, do not treat any portion of the Realty Trust as countable. As to the Income Trust, only treat the income portion of this trust's corpus as countable to the Appellant, but do not treat the principal portion as countable to the Appellant. Income that is generated, received and/or retained by the Income Trust in a given month should be treated as income in the month that it is received and as an asset thereafter per 130 CMR 520.023(A)(1).

If Appellant complies with her Order above in a timely manner and provides evidence of being below the \$2,000 asset limit, then MassHealth must make a new LTC application while preserving the November 2013 month of application. At such time when assets are reduced, MassHealth must, within 30 days of the date of such verification, issue a new eligibility determination notice which may contain an updated and amended disqualifying transfer determination which accounts for any issue regarding the annuity purchase, its current terms and any new potential transfer issue. Such notice must have the usual appeal rights.

If Appellant does not comply with her Order above in a timely manner, MassHealth need take no further action on this application and may continue to deny Appellant for LTC benefits due to excess assets.

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.

Implementation of this Decision

If this decision is not implemented within 60 days after the date of this decision,¹⁷ you should contact the Appeals Coordinator at your MassHealth Enrollment Center, who is identified below. 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.



Christopher S. Taffe
Hearing Officer
Board of Hearings

cc: Justine Ferreira, Appeals Coordinator @ Taunton MEC

Katy Schelong, Esq. @ MassHealth Legal

¹⁷ Although 130 CMR 610.086(A)(1) mentions 30 days for the agency to comply, this period of time has been increased from 30 days to 60 days to account for the 30 additional days given for Appellant to first take action in her Order. **Finally, the parties may, by mutual agreement, extend any of the deadlines within the above Orders. To that end, due to the specific application history and nature of the asset within the Income Trust, both sides are strongly encouraged to consider granting reasonable extensions of any time frame within those Orders if the other side shows evidence of a good-faith attempt to comply with a deadline but is delayed due to reasons or circumstances beyond control of a party or for other good cause.**