



Elder law bar: MassHealth 'war on trusts' rages on

Lawyers claim agency routinely ignores adverse precedent

By: Kris Olson © August 22, 2019

Two years ago, after the Supreme Judicial Court handed down its decision in *Daley v. Secretary of the Executive Office of Health and Human Services*, elder law attorneys feared the ruling would do little to quell MassHealth's so-called "war on trusts."

Those fears have been realized and then some, it seems.

In *Daley*, the SJC held that when a settlor retains a life estate or otherwise reserves the right to occupy his home as part of an irrevocable trust, he does not make the equity in the home a countable asset for the purpose of determining eligibility for MassHealth long-term care benefits. The ruling endorsed the position of a majority of MassHealth hearing officers who had reviewed the issue.



"Not only is MassHealth ignoring basic trust law but more specifically recent SJC cases decided in the public benefits, asset protection and divorce arenas. And it is doing so by misrepresenting the law at administrative hearings and in Superior Court."

— David J. Correia, Boston

While attorneys differ on whether MassHealth has relented on the precise issue in *Daley*, they agree that the "war on trusts" has continued unabated on other fronts, with MassHealth's lawyers regularly employing what some say are unethical tactics.

Short memories

MassHealth's primary transgression is that it simply ignores unfavorable precedent, whether it comes after an applicant who disagrees with a MassHealth decision requests a "fair hearing," from the Superior Court, or even the SJC and Appeals Court, lawyers say.

MassHealth lawyers then re-litigate those same losing issues over and over, hoping to find the rare hearing officer who will accept their arguments.

"Not only is MassHealth ignoring basic trust law but more specifically recent SJC cases decided in the public benefits, asset protection and divorce arenas. And it is doing so by misrepresenting the law at administrative hearings and in Superior Court," says Boston attorney David J. Correia.

According to Plymouth lawyer Brian E. Barreira, MassHealth is fully aware that 20 previous applicants may have won on a particular issue. Yet when the 21st applicant comes along, not only does the agency issue and defend its denials, it fails to disclose those previous 20 losses.

Worcester attorney Lisa M. Neeley represented the plaintiff in the *Daley* companion case *Nadeau v. Thorn*. Neeley says she, too, has seen MassHealth "repackage" losing arguments in new forms.

For example, Neeley cites a current spate of cases involving a settlor's ability to appoint assets to nonprofit organizations or their children, which persist despite a clear ruling from the Appeals Court in 2016 in *Heyn v.*

Director of the Office of Medicaid that such a power does not make the trust principal countable.

"Those arguments have been lost time and time again," she says.

In fact, Neeley herself prevailed on the issue once the SJC remanded *Nadeau* and the hearing officer found *Heyn* to be controlling.

While MassHealth attempts to paint each trust as unique in some way, Neeley says there is not a lot of variation in how trusts are constructed.

"You see different wording, but ultimately they mean the same things," she says.

That MassHealth lawyers make the same arguments over and over again is not only frustrating to members of the bar on the other side of the case, it is not fair to Massachusetts citizens, says Nicholas G. Kaltsas of Worcester, one of the attorneys in the *Daley* case.

"They're hurting them the most, and I can't understand why," he says.

Ethical violation?

In a recent blog post, Barreira writes that because a fair hearing decision is the agency's final decision under G.L.c. 118E, §48, a MassHealth lawyer cannot withhold adverse rulings under Rule 3.3(a)(3).

Barreira quotes from a treatise on ethics in which the authors point out that the duty to reveal administrative rulings "is of greater practical significance, precisely because they are less likely to be discovered by the tribunal itself."

Meanwhile, according to Barreira, on the rare occasion that MassHealth does prevail on a trust challenge, MassHealth has no problem calling those victories to the attention of hearing officers or Superior Court judges in future cases.

MassHealth spokesperson Elissa Snook says "claims that MassHealth attorneys are acting unethically during the fair hearing process are without any merit."

Some hearing officers do manage to discern the state of the law, despite MassHealth's best efforts to the contrary, lawyers say.

For example, in two separate decisions issued this past May and June, hearing officer Susan Burgess-Cox noted that MassHealth had failed to distinguish the trusts at issue from either *Daley* or *Heyn*.

In one of the decisions, Burgess-Cox writes that the SJC in *Daley* highlighted the U.S. Supreme Court's admonition against states "conjuring fictional sources of income and resources by imputing financial support from persons who have [no] obligation to furnish it."

"That is exactly what MassHealth is attempting to do in its arguments raised in this case," Burgess-Cox writes.

Attorneys on the other side of the cases say they detect a strategy in the continued, stubborn refusal of MassHealth attorneys to heed what would seem to be clear direction from the state's appellate courts.

"When an attorney sees the same basic trust or trust language being repeatedly challenged by the commonwealth but with little success, one can only assume the game being played is to frustrate qualified applicants who are fearful of litigation and its costs," Correia says. "It's the kind of tactic you see in unmeritorious civil litigation by unscrupulous lawyers."

Barreira agrees, calling it "a strategy that's got to come from the top."

But Snook, the MassHealth spokeswoman, says the agency determines whether an irrevocable trust is countable toward Medicaid eligibility in accordance with federal law.

"Prior fair hearing decisions from the Board of Hearings are specific to each applicant and do not have any binding effect on another

Possible remedies

For the time being at least, David J. Correia says his Boston firm has adjusted to the state of play and supplements

applicant's eligibility determination," she writes in an email.

Snook also cites the Board of Hearings regulations, 130 CMR 610.085(A)(2), which state: "Facts found and issues decided by the hearing officer in each case are binding on the parties to that case and cannot be disputed again between them in any other administrative proceeding."

But Correira says that he and his colleagues have discerned a "significant contrast" between how legal personnel of the Medicaid agencies in Massachusetts and Rhode Island conduct their inquiries and the legal positions they ultimately take.

Dubious precedent

Instead of effectively distinguishing the case before her from recent SJC and Appeals Court decisions, Burgess-Cox notes in one of her recent decisions that MassHealth had relied on decisions that predated *Daley* and *Heyn*, along with text from a manual.

But sometimes MassHealth attorneys are reaching even further to find precedent that suits their cause.

Correira points to a recent case of his in which MassHealth tried to argue that the settlors' special power of appointment made the property in their irrevocable trust countable in assessing their MassHealth eligibility, an argument that the Appeals Court had seemingly rejected in *Heyn*.

To bolster that argument, MassHealth cited to the New Hampshire Supreme Court's 2016 decision in *Petition of Estate of Thea Braiterman*, despite the fact that the special power of appointment in *Braiterman* allowed the settlor to create a legal obligation to return or use the principal for her benefit, a key difference from the trusts in *Heyn* and in Correira's clients' case.

Hearing officer Stanley Kallianidis accepted Correira's argument, but Neeley, too, says she has seen MassHealth attempt to rely on *Braiterman* to try to avoid the implications of *Heyn*.

Questionable checklist

In his blog post, Barreira highlights the fact that another attorney recently unearthed a possible smoking gun in MassHealth's attack on trusts.

While reviewing a file, that attorney discovered a "Legal Review Form for Trusts," apparently designed for MassHealth screening workers to send to the agency's lawyers to seek guidance on whether a trust should be treated as a countable asset.

"As you can see, there are some specific issues on the checklist that the MassHealth lawyers don't seem to want to let go of despite their countless losses," Barreira writes.

The form is tantamount to "illegal, unwritten trust regulations," which are virtually impervious to judicial review, according to Barreira.

clients' applications for long-term care benefits with a concise memorandum of law, summarizing why applicants' trusts should not be counted against them.

Two years ago, a MassHealth spokesperson told Lawyers Weekly that the agency believed it was imperative to take a hard look at applications "to ensure that scarce federal and state resources are preserved for those without means."

But Worcester attorney Lisa M. Neeley notes that the state is also expending considerable resources defending MassHealth's dubious denials. Moreover, applicants are merely doing what the law has long allowed. If Congress disfavored Medicaid planning, it had multiple opportunities to do something about it when it revised the statute multiple times, she notes.

Practitioners say MassHealth's approach is also leaving nursing homes and assisted living facilities in the lurch in terms of receiving payment for their services.

Neeley says it is not uncommon for a nursing home to get antsy and move for guardianship or initiate collection actions, which the applicant then has to fend off while still doing battle with MassHealth.

The current state of affairs — in which two identical trusts could receive far different treatment — makes it hard to advise clients, Neeley adds.

Plymouth lawyer Brian E. Barreira says he has heard suggestions that perhaps ethics charges should be filed against MassHealth's attorneys. Thus far, he has resisted that idea.

"We shouldn't have to do that," he says.

In theory, the federal government is supposed to be auditing MassHealth to ensure that it is spending federal money prudently and not improperly denying federal benefits to those who qualify for them, Correira says.

He suggests that perhaps the state's delegation in Congress could be prevailed on to push for a hard look at MassHealth's

"If the positions in this Law Review Form for Trusts were in regulation form, as they should be, citizens could challenge them through a declaratory judgment under Massachusetts General Laws, Chapter 30A, Section 7," he writes.

Barreira has been down the declaratory judgment road before. In a case involving an applicant who had been denied benefits despite a trust that was "word for word" identical to the one in *Daley*, Barreira persuaded Superior Court Judge Douglas H. Wilkins to agree that MassHealth's denial notices lacked the "clear statement of the specific reasons" for the denial of benefits required under federal law.

Prior to that 2018 decision, Barreira says that, somewhat nonsensically, applicants had been required to show up for a hearing to find out why they had been denied.

practices. But otherwise, there would seem to be no end in sight.

"I don't think it will stop until the Federal Center for Medicare and Medicaid Services does an internal investigation and administrative procedures review — or until there is a federal lawsuit," he says.

RELATED JUDICIAL PROFILES

WILKINS, DOUGLAS H.

Issue: AUG. 26 2019 ISSUE

YOU MIGHT ALSO LIKE



Lawyer beats the odds in erasing \$38K in student loan debt
⌚ August 22, 2019



Lawyers weigh in on the impact of the Boston Calling convictions
⌚ August 22, 2019

In #MeToo era, some lawyers fielding more 'reverse discrimination' queries
⌚ August 22, 2019

<p>Reputation 911 "WE MAKE YOU LOOK GOOD ONLINE" 1-866-My-Rep-911</p>	<p>REMOVAL & SUPPRESSION Of Negative Search Results LEGAL ISSUES • IMAGES • BAD PRESS</p>	<p>LEARN MORE</p>
--	---	--------------------------

Copyright © 2019 Massachusetts Lawyers Weekly

40 Court Street, 5th Floor,

Boston, MA 02108

(617) 451-7300

