

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court
SJC-12922

JOELLEN GUILFOIL, AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF DOROTHY E. FRANK,
PLAINTIFF-APPELLANT,

v.

MARYLOU SUDDERS, SECRETARY OF THE EXECUTIVE OFFICE
OF HEALTH AND HUMAN SERVICES
DEFENDANT-APPELLEE

ON APPEAL FROM A JUDGMENT OF THE WORCESTER SUPERIOR COURT

**BRIEF FOR
AMICUS CURIAE,
THE MASSACHUSETTS CHAPTER OF THE
NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
IN SUPPORT OF APPELLANT
JOELLEN GUILFOIL**

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae the Massachusetts Chapter of the National Academy of Elder Law Attorneys (“MassNAELA”) is a non-profit organization that was incorporated in 1992 to serve the legal profession and the public with the following mission:

- To provide information, education, networking, and assistance to Massachusetts attorneys, bar organizations, and other individuals or groups advising elderly clients, clients with special needs and their families;
- To promote high standards of technical expertise and ethical awareness among attorneys, bar organizations and other individuals or groups engaged in the practice of advising elderly clients, clients with special needs and their families;
- To develop public awareness and advocate for the benefit of the elderly, those with special needs and their families, by promoting public policies that support our mission; and
- To encourage involvement and enhance membership in, and to promote networking among members of, the National Academy of Elder Law Attorneys.

MassNAELA is a voluntary association whose members consist of a dedicated group of elder law and special needs attorneys across the Commonwealth of Massachusetts.

RULE 17(C)(5) DECLARATION

Amicus curiae and their counsel declare that they are independent from the parties and have no economic interest in the outcome of this case.

None of the conduct described in Mass. R. App. P. 17(c)(5) has occurred:

- (A) No party or party's counsel authored this brief in whole or in part;
- (B) No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;
- (C) No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and
- (D) No amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues; no amicus curiae or its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ISSUE ADDRESSED BY AMICUS CURIAE

The Court's Request for Amicus Input

The Court's request for Amicus Briefs identified the following question:

Where an applicant for MassHealth long-term care benefits is one of several beneficiaries of a real estate nominee trust; the applicant's beneficial interest in the trust consists of a life estate in the property; the other beneficiaries hold remainder interests in the property as joint tenants with rights of survivorship; and the nominee trust provides that it may be amended in a writing signed by all beneficiaries; whether the nominee trust is revocable and, therefore, the total value of the property is a countable asset for purposes of determining eligibility for MassHealth long-term care benefits.

Response of Amicus Curiae the Massachusetts Chapter of the National Academy of Elder Law Attorneys

Since at least the 19th century, Massachusetts attorneys have created vehicles nominally called “trusts” to hold title to real and personal property. Massachusetts’ appellate courts have always held that the beneficiaries of such instruments have an immediate, vested property interest in their share of the trust corpus. These courts have consistently referred to the trustees of these trusts as “agents” of the beneficiaries who can take substantive actions only at the direction of the beneficiaries. Thus, such trustees have no discretion whatsoever to distribute trust principal to the beneficiaries or the grantor.

Eventually, such vehicles came to be known as “nominee trusts.” A grantor who deeds property into such a trust immediately surrenders ownership to the beneficiaries. She may retain an interest, but even if she is also a trustee, she has control over no interest other than her own. As a grantor, she has no discretion to access any part of the trust corpus. As a beneficiary, she can take actions to remove her respective fractional share of the property from the trust, but can do no such thing relative to any other beneficiary’s share.

Thus, in this case, other than the life estate she retained, grantor Dorothy E. Frank (“Ms. Frank”) irrevocably transferred ownership of the real property in question to the Frank Family Trust (“the Frank Trust”). Either as trustee or grantor, she retained no control whatsoever over the other ownership interests reflected on the Schedule of Beneficiaries annexed to the trust instrument. Those interests are thus not countable assets for purposes of Ms. Frank’s Medicaid application, because she had no legal nor equitable claim to any of those interests, save her own life estate.

The fact that a nominee trust such as the one here can be terminated at will by any beneficiary does not derogate the property rights of those beneficiaries; to the contrary, this common characteristic of such trusts *protects* those rights by giving each beneficiary an absolute legal right to remove their

respective property interest – but their interest only – from the title-holding vehicle.

Because the nature of the trust here is so definitive as to whether Ms. Frank owns anything beyond her life estate, none of the Medicaid/MassHealth regulations that the Appellant Executive Office of Health and Human Services (“the Agency”) cites are relevant at all. It is not until page 21 of the Agency’s 30-page brief that the phrase “nominee trust” appears, and from there it quickly returns to an exegesis on Medicaid regulations. Indeed, while the Agency’s mastery of Medicaid arcana is amply apparent, it has made a perplexing decision to ignore the threshold issue in this case, one that is ultimately dispositive – whether real property deeded into a nominee trust may be reclaimed by a trustee or grantor.¹ It cannot.

¹ The Agency asserts that this Court must review this matter in an entirely deferential manner in light of MassHealth’s supposedly superior expertise and experience in applying its own regulations. It argues that this Court “must give substantial deference to [the] agency’s reasonable interpretation of the governing law.” *Agency Brief*, pages 18-19. In fact, the “governing law” is the relevant decisions of the Massachusetts’ appellate courts on nominee trusts. The Agency has skipped a step and ignored that the dispositive issue is one on which the Court owes no deference at all to an administrative agency.

That the Frank Trust may be amended in a writing signed by all beneficiaries does nothing more than create a theoretical circumstance where the beneficiaries might surrender their property interests to the grantor as an act of gratuitous generosity. Based on clear authority of Massachusetts' appellate courts, that hypothetical possibility does not render the respective property interests of those beneficiaries countable to the grantor, nor does it render the nominee trust revocable by the grantor.

Although not mentioned in its brief, MassHealth has lost cases with the exact same fact pattern as this case multiple times before the Office of Medicaid Board of Hearings ("the Board"), as discussed further herein. And yet, the Agency continues to deny applications based on the discredited and baseless theory that a grantor such as Ms. Frank can reclaim assets that she deeded into a nominee trust. The result has surely been thousands of dollars of unnecessary attorneys' fees for the families of applicants who are often impoverished and of

poor health.²

In short, to answer the Court's question, the beneficiaries in this case have vested interests in the real property held nominally by the Frank Trust, and those interests cannot be reclaimed by the person who deeded the property into the vehicle. The Frank Trust is freely terminable by any beneficiary, but this simply allows each beneficiary to retain control over *his or her own* interest, not the interests of other beneficiaries. The trustee has no substantive discretionary authority at all, and thus no power whatsoever to return trust property to the grantor.

Thus, as the law currently stands, the beneficiaries of the Frank Trust hold vested interests that cannot be reclaimed by the Frank Trust's grantor, nor anyone else. But if the Agency's view in this case were to prevail, the property rights of the Frank Trust's beneficiaries would become profoundly unsettled, along with hundreds – or more likely thousands – of other people in the

² The impact of the Agency's misguided practices on nominee trusts goes far beyond those existing beneficiaries of such trusts. Attorneys across the Commonwealth increasingly may advise clients to forego the use of nominee trusts – not because such trusts lack legal merit – but rather to help clients avoid having to defend such trusts against the Agency's attacks even when such attacks have no basis in fact or law. MassHealth's intransigent position likely has an outsize, extrajudicial effect in suppressing the use of nominee trusts despite them otherwise being an excellent tool for achieving privacy and flexibility for real estate ownership.

Commonwealth who have an interest in a nominee trust with multiple beneficiaries.

SUMMARY OF ARGUMENT

Vehicles akin to nominee trusts have been used in the Commonwealth in some form dating to the late 19th century to hold title to real and personal property. It is well-established that (1) the deeding of property into such trusts creates a vested property interest in the trust beneficiaries; (2) as a result, the grantors of such trusts have no right to reclaim such vested interests; (3) such trusts are not “true trusts,” but rather establish an agency relationship between the beneficiaries and the trustees; and (4) the trustees therefore can exercise only managerial duties and have no substantive control over the trust corpus.

Pages 15 through 20.

Standard nominee trusts, including the instrument in this case, allow any beneficiary to terminate such trusts at will, and thus to reclaim their respective interests in the real property. Without such power, the beneficiaries would not be able to remove their respective vested interests from the trust. *Pages 21 through 22.*

A fundamental distinction between a nominee trust, on the one hand, and standard revocable and irrevocable trusts on the other hand, is that a nominee trust “trustee” has no discretion to return principal to the grantor, or to any other

beneficiary. The Agency in this matter has ignored this fundamental distinction and has tried to kick up dust by claiming that nominee trusts are true trusts. In the service of this position, it cites cases involving conventional trusts that are irrelevant. Under existing Massachusetts law, there is no basis for the contention that a grantor of a nominee trust may reclaim any interest that she has not expressly retained. *Pages 23 through 28.*

The Agency also makes wildly implausible arguments about the amendability of the Frank Trust. Disregarding that Article VI of the Frank Trust authorizes amendment by all beneficiaries acting together, the Agency seizes upon a passing reference to amendability in Article III and remarkably contends that it gives any beneficiary plenary authority to seize the interest of another beneficiary. Such an interpretation would gravely unsettle the property interests not just of the Frank Trust beneficiaries, but of any person who has an interest in a nominee trust with multiple beneficiaries. *Pages 28 through 31.*

The Agency has lost cases involving this same fact pattern repeatedly before the Medicaid Board of Hearings, and yet has persisted in denying applications and forcing more needless litigation on this issue. *Pages 31 through 33.*

Finally, the Agency argues that because the trust beneficiaries could theoretically unite to gift their respective interests to Ms. Frank, all of those

interests should be countable to her. Such an interpretation has been clearly rejected by the Appeals Court, and the precedents of this Court are not to the contrary. *Pages 34 through 36.*

ARGUMENT

I. Ms. Frank’s Transfer of Her Real Property Into a Nominee Trust Created Vested, Alienable Property Rights in the Trust Beneficiaries, and Ms. Frank as Grantor Had No Right Whatsoever to Reclaim the Trust Corpus.

A. Nominee Trusts are Not “True Trusts,” But Are Title-Holding Vehicles Created for the Convenience and Privacy of Their Interest-Holders.

Vehicles nominally called “trusts” have been used to hold title to real and personal property in Massachusetts since at least the 19th century. As an early example, in *Bromley v. Mitchell*, 155 Mass. 509 (1892), this Court addressed a situation where a grantor had deeded mortgage notes and mortgage deeds into a vehicle nominally described as a trust. Despite the trust having “a very testamentary look,” the Court found that the transfer vested an immediate property interest in the beneficiary, and that there had been an “*absolute conveyance* of all the grantor’s property.” 155 Mass. at 511 (emphasis supplied). The Court found that “on the face of the deed, it is a conveyance operating at once and irrevocably.” *Id.* Distinguishing the trust from a standard revocable trust, this Court observed that “[t]his case is not like that of an instrument purporting to convey only such property as the grantor may own

at his death, *and leaving him with all the rights of ownership, and free to dispose of what he sees fit, meantime*” (emphasis supplied). *Id.* In other words, the instrument was entirely distinguishable from a revocable trust, where the grantor retains all discretion during her lifetime to reclaim the trust corpus or to change the dispositions established through the instrument. *Compare, e.g., Minot v. Tappan*, 127 Mass. 333, 336 (1879) (where distributions were discretionary with the trustees, beneficiary “had no vested interest which he could alienate”); *Old Colony Trust Co. v. Clemons*, 332 Mass. 535, 539 (1955) (where settlor retains right to revoke, he intends that beneficiary’s interest not vest until his death).

As another example, in *Williams v. City of Boston*, 208 Mass. 497 (1911) (“*Williams*”), this Court addressed such a vehicle that was established “for the purchase, development and disposition of the former site of the Museum of Fine Arts in Boston.” Exactly as in the Frank Trust, the beneficiaries (termed “shareholders” by this Court in *Williams*) had the right to amend or terminate the vehicle so as to reclaim their vested property interests:

The shareholders had a right to remove the trustees, and meetings of the shareholders were to be held at which the shareholders might authorize or instruct the trustees *in any manner and alter or amend the declaration of trust, or direct the trustees to end the trust, sell the property and distribute the proceeds.*

See 208 Mass. 497 and *Williams v. Inhabitants of Milton*, 215 Mass. 1, 7

(1913) (“*Inhabitants of Milton*”) (emphasis supplied).³ Again, this is the opposite situation from a standard revocable trust – or a standard irrevocable trust, for that matter – where the trustee has discretionary powers over the trust property, and where the trust is the legal owner. *See and compare Welch v. Boston*, 221 Mass. 155, 157 (1915) (“[i]t is one of the fundamental characteristics of trusts that the *full and exclusive legal title is vested in the trustee*”) (emphasis supplied); *McClintock v. Scahill*, 403 Mass. 397, 399 (1988) (trustee holds “full legal title to all property of a trust and the rights of possession that go along with it”).⁴

In a title-holding trust, by contrast, the interest-holders – nominally called “beneficiaries” in the contemporary setting – are the true owners. The trustee,

³ The *Inhabitants of Milton* case discusses the facts of *Williams v. City of Boston* in more detail than in the earlier opinion itself, stating that “the original papers in the case show these to have been the facts in the case, although they are not stated in the report of that decision.” 215 Mass. 1, 7. For clarity, *Williams v. City of Boston* is referred to herein as “*Williams*,” and the other case as “*Inhabitants of Milton*.”

⁴ *Williams* overall indicates that when the Court spoke of “shareholders,” it was speaking not of shareholders in a corporation, but rather the beneficiaries of the trust. The language used there also reflects that the term “beneficiary” has a unique meaning in the context of nominee trusts, and that such a beneficiary is much more like a partner or like a member of an LLC, with the trust instrument functioning effectively as an operating agreement.

for the convenience of the owners, holds title and performs administrative, managerial tasks. As this Court put it in *Williams*:

The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. *But speaking with accuracy he is an agent who for the principal's convenience holds the legal title to the principal's property.*

251 Mass. at 1 (emphasis supplied). The language of contemporary nominee trusts, including the one at issue in this case, embodies exactly these features.

Article IV(1) of Frank Trust provides that:

The Trustees shall hold the principal of this Trust and receive the income for the benefit of the Beneficiaries, and shall pay over the principal and income *pursuant to the direction of all of the Beneficiaries. . . .*

(Emphasis supplied). And Article VI provides that:

This Declaration of Trust may be amended from time to time by an instrument in writing *signed by all of the Beneficiaries* and delivered to the Trustees. . . .

(Emphasis supplied.)

In short, the facial language of the Frank Trust reflects the same features of an analogous trust construed by this Court more than a century ago. Both the instrument here and the one in *Williams* empower solely the beneficiaries to amend and terminate the trust, making it clear that they – not the grantor or the trustee – are the true, vested owners of the property in question. *See also Inhabitants of Milton*, 215 Mass. at 9, where this Court refers to the trustees of

such vehicles as “so-called trustees who are really managing agents.” The Court also pointed to the jurisprudence of 19th century England “[f]or two cases where the distinction between managing agents who hold the legal title and trustees properly so called is reaffirmed.” *Id.*

Because nominee trusts are so different from standard revocable or irrevocable trusts, the authors of the seminal 1976 treatise on the subject opined they are not “true trusts”:

Unlike in a “true trust”, the trustees of a nominee trust have no power, as such, to act in respect of the trust property, but may only act at the direction of (in effect, as agents for) the beneficiaries.

Birnbaum & Monahan, *The Nominee Trust in Massachusetts Real Estate Practice*, 60 Mass.L.Q. 364, 364-65 (1976).

In the contemporary setting, these principles have not changed. For example, the Appeals Court in *Goodwill Enterprises, Inc. v. Kavanagh*, 95 Mass. App. Ct. 856 (2019) found that:

There is logic in treating the beneficiaries of a nominee trust ‘as the true owners of the property for the purposes of liability as well as benefit’... This is precisely how we have treated the beneficiaries of a nominee trust.... We have treated the *beneficiaries of a nominee trust as the true owners of the trust’s property....*”

95 Mass. App. Ct. at 859 (internal citations omitted).

In short, there is a direct through-line from this Court’s jurisprudence in cases such as *Williams* and *Inhabitants of Milton*, and the Appeals Court’s analysis just last year in *Goodwill Enterprises*. The critical point is this: the beneficiaries of nominee trusts hold a vested interest in real property, as opposed to a contingent interest that is dependent upon discretionary acts by trustees. Nominee trustees do not have any discretion whatsoever over the trust property, but rather are best described as “managing agents.” *Inhabitants of Milton*, 215 Mass. at 9. Hence, nominee trusts are not “true trusts,” but are simply title-holding vehicles.⁵

⁵ The cases in which Massachusetts’ appellate courts have found the beneficiaries of nominee trusts to be the true legal owners of the trust property are many. Examples include:

- *Shamrock, Inc. v. Federal Deposit Ins. Corp.*, 36 Mass. App. Ct. 162, 166-167 (1994) (beneficiaries of nominee real estate trust held interest in real estate, not trustees, and creditors of trustees could not declare trust a sham);
- *Rent Control Bd. of Cambridge v. Praught*, 35 Mass. App. Ct. 290, 295, (1993) (where nominee trust held title to condominium unit, beneficiary of nominee trust “was quite capable of being regarded as the owner of [the unit] within the meaning of the rent control act”).

B. When a Nominee Trust Beneficiary Terminates the Trust, He Receives His Fractional Interest of the Trust Corpus as a Tenant in Common.

In their treatise, Attorneys Birnbaum & Monahan also observe that each beneficiary may terminate a nominee trust at any time, resulting in all beneficiaries receiving legal title to the trust property as tenants in common in proportion to their beneficial interests. *60 Mass.L.Q. at 365*. And that is exactly what Article V(1) of the Frank Trust in the present case authorizes:

This Trust may be terminated at any time by notice in writing from *any of the Beneficiaries*, provided that such termination shall be effective only when a certificate signed by the Trustees, shall be recorded with the Registry of Deeds.....In the case of any termination of the Trust, the Trustees shall transfer and convey the specific assets constituting the Trust Estate...*to the Beneficiaries as tenants in common in proportion to their respective interests* hereunder....

(Emphasis supplied.)

The language is explicit: “any” beneficiary may terminate the Frank Trust, thereby receiving their fractional interest as tenants in common. The reason for this is clear: if one is a vested owner of real property, he must have the right to freely dispose of that property. *See, e.g., Church v. Brown*, 247 Mass. 282, 285 (1924) (discussing conveyance of interests by tenants in common). Without such a termination provision, a nominee trust instrument would irrevocably create a form of joint ownership, leaving the beneficiaries

tethered to the trust and hence dependent upon an act by *all* of the beneficiaries to reclaim their respective interests.

Although the Schedule of Beneficiaries in the Frank Trust refers to each beneficiary as having an interest as “joint tenants with right of survivorship,” this is the case *only as long as the trust exists*. With any beneficiary having the right to terminate, they can reclaim their own interest at will, leaving all beneficiaries with separate interests as tenants in common. *Frank Trust, Art. V(1)*. With this having been accomplished, any owner can then alienate their respective interest. *See, e.g., Nickerson v. Nickerson*, 235 Mass. 348, 351 (1920) (respective shares of tenants in common “could be disposed of and title transferred by deed in proper form”).

C. The Distinction Between a Nominee Trust and a “True Trust” is Entirely Settled Law.

In summary, the distinction between a nominee trust, on the one hand, and a standard revocable or irrevocable trust, on the other hand, is extremely clear. With a nominee trust, each owner has a vested property interest and therefore a unilateral right to terminate the trust so as to reclaim their interest. In a standard revocable trust, by contrast, it is the grantor who is the true owner and who has discretion over the trust property. *See Old Colony Trust Co.*, 332 Mass. at 539 (where settlor retains right to revoke, he intends that beneficiary’s interest not vest until his death).

With an irrevocable trust, meanwhile, the question of whether the grantor can have the trust principal returned to her – and whether the trust assets are countable to a Medicaid applicant – turns on whether the trustee has discretion to return any portion of the trust principal to the grantor. *See Daley v. Executive Office of Health and Human Services*, 477 Mass. 188, 195 (2017) (if the trustee has such discretion, “the entire principal of the trust will be deemed available to the applicant and therefore will be treated as a ‘countable asset,’ making the applicant ineligible for Medicaid benefits” (internal citations omitted)).

This Court and the Appeals Court, in adjudicating cases involving irrevocable trusts and MassHealth/Medicaid benefits, have necessarily waded

through a welter of complexities. *See Daley*, 477 Mass. at 188 (“[t]hese two cases require this court to navigate the labyrinth of controlling statutes and regulations to determine whether applicants are eligible for long-term care benefits under the Federal Medicaid Act....”). However, as illustrated throughout this Brief, with a nominee trust none of these complexities are present, given how clear-cut it is, based on the relatively simple structure of such instruments and on a robust body of caselaw, that a trustee has no discretion to return trust principal to the grantor.

When it comes to assessing the countability of trust property under MassHealth/Medicaid rules, the most fundamental distinction between a nominee trust and a “true trust” (whether revocable or irrevocable) is the discretion of a trustee. With revocable trusts, a grantor virtually always retains discretion to reclaim the trust corpus, making it uncontroversial that trust assets are countable Medicaid assets. With irrevocable trusts the question is often much closer, turning on whether the trustee retains some quantum of discretion to return principal to the grantor. *See Daley*, 477 Mass. at 195. But with nominee trusts – which commentators and courts agree are not “true trusts” at all – the question again becomes crystal clear. The trustee lacks any discretion to return the corpus to the grantor, and the grantor lacks any authority to reclaim it.

In *Lyons v. the Federal Savings Bank* 193 B.R. 637 (D. Bankr. 1995), Judge Feeney confronted a situation where a debtor claimed that a certain trust was a nominee trust. Rejecting this assertion, she explained the distinction thusly:

In the instant case, the beneficiaries... had no power to direct the trustees' activities....the trustees exercised "absolute and entire control ... of the trust res."....The beneficiaries' interests were solely equitable and subject to a spendthrift provision. Thus, the trustees did not act as agents for the beneficiaries and *the Trust cannot be characterized as a nominee trust.*

193 B.R. at 644 (internal cites omitted; emphasis supplied.)

In an effort to muddy the waters, the Agency in the present case asserts that "the SJC has long held that nominee trusts have been recognized as trusts in some cases and ignored in others." *Agency Brief*, page 27. For this proposition the Agency cites a single case, *Roberts v. Roberts*, 419 Mass. 685 (1995). This overlooks that this Court in *Roberts* found the nominee trust at issue to be entirely atypical, thus rendering standard legal principles concerning nominee trusts inapposite:

"Gifts over" are not typical of nominee trusts; nominee trusts do not normally provide for disposition of the res to anyone other than the beneficiaries. *Because the gift over is unrelated to a typical nominee trust... agency principles are not applicable.*

Id. at 688 (emphasis supplied).

In short, this Court in *Roberts* found that, based on the unusual attributes of the instrument in question, standard principles concerning nominee trusts were inapplicable. The nominee trust in the present case contains no such “gifts over” provision. For the Agency to point to *Roberts* as evidence that this Court has “long held” that nominee trusts can operate as standard revocable trusts is misleading. Ignoring a well-established body of jurisprudence on the topic, the Agency has cherry-picked a single case in which this Court in fact took pains to emphasize that the instrument at issue was not a typical nominee trust. And in support of its broad contention that “the SJC has long held that nominee trusts have been recognized as trusts in some cases,” the Agency in fact cites no further authority beyond *Roberts*.

D. The Grantor of a Nominee Trust Cannot Reclaim Any Portion of the Corpus that She Has Not Retained as Beneficiary.

In a Rule 1:28 decision, the Appeals Court addressed the circumstances of a grantor who tried to reclaim property that he had deeded into a nominee trust. *Mello v. Mello*, 63 Mass. App. Ct. 1116 (2005). As Ms. Frank did here, the grantor reserved himself a life estate after transferring the property into the holding vehicle. However, at some point after the creation of the trust, the grantor sought to convey the property to himself and his wife as tenants by the

entirety, thus reclaiming the corpus and divesting the remainder beneficiary.

63 Mass. App. Ct. 1116, *3.

Both the trial court and Appeals Court found that the grantor lacked the authority to convey the property. *Id.* The Court found that the grantor had irrevocably deeded the property to the beneficiaries of the trust, leaving him with nothing more than his retained life estate. Notwithstanding it being a Rule 1:28 decision, the opinion is directly on point, well-reasoned, and unsurprising in light of the language of the instrument, which in all material aspects is identical to the one here.

Mello also addressed the question of whether the putative purchaser should have known, upon review of the trust instrument on record at the Registry of Deeds, that the grantor lacked the authority to convey the life estate. The Appeals Court's answer was an emphatic "yes." The Court found that the answer was in fact obvious: "[t]he trust was recorded, and even a cursory reading of the recorded documents would have put a reasonably prudent person on notice of the limitations contained in the trust." *Id.*, *3. This underscores how well-settled it is that the beneficiaries of a nominee trust have a vested property interest that cannot be reclaimed by the grantor.

In short, the precedents of this Court, together with the plain language of the Frank Trust instrument, fully answer the question that the Court has

posed to *amici*. The persons listed on the Schedule of Beneficiaries for the Frank Trust are the “true owners” of the real estate nominally held by the Trust. They have vested, fully alienable interests that cannot be wrested away by Ms. Frank nor anyone else. They can reclaim their property interests – but theirs alone – through specific means of termination established in the Frank Trust instrument.

E. The Trust Instrument Here Was Amendable Only By All Beneficiaries Acting Jointly, and Such an Amendment Could Not Be Used to Change the Schedule of Beneficiaries.

The Agency hangs a great deal of its argument on the fact that the Frank Trust is amendable under certain circumstances. As an initial matter, it decontextualizes language in the instrument in an effort to create confusion and divert attention. Citing Article III of the Frank Trust, the Agency argues that “[t]his provision is explicit in granting *any* beneficiary, including Ms. Frank with her life-estate interest, virtually unfettered discretion to amend the Trust....it grants Ms. Frank the power to amend the Trust unilaterally, and hence, the power to access the entire Trust property.” *Agency Brief*, page 20 (emphasis in original). Thus, the Agency argues that pursuant to this provision, any beneficiary has plenary power to seize the trust corpus. And it bears repeating that this is exactly the Agency’s contention: “[t]his provision is explicit in granting *any* beneficiary....the power to amend the Trust

unilaterally, and hence, *the power to access the entire Trust property*” (emphasis supplied).

Reinforcing this point, the Agency also makes the following statement: “the Schedule of Beneficiaries – which establishes the identity of the beneficiaries of the trust and their form of equitable interest – *is easily changed by any beneficiary pursuant to Article III.*” *Agency Brief*, page 22.

The implications of these statements are staggering. It is undisputed that the Schedule of Beneficiaries reflects the ownership interests of the persons listed thereon. If *any* beneficiary can alter this Schedule, as the Agency insists, then the arrangements established by the Frank Trust are essentially anarchic, allowing any beneficiary to destroy the property interest of any other beneficiary. If that schedule is “easily changed by any beneficiary,” as the Agency contends, the beneficiaries would be reduced to scorpions in a bottle, fighting over who first amends the Frank Trust to extinguish the property interests of the other.

As the Agency is eventually forced to acknowledge at least in part, it is Article VI of the Frank Trust, not Article III, that formally establishes the procedure for amendments.⁶ And it is clear that Article VI (which is entitled

⁶ Article III, which is entitled “Beneficiaries,” on its face contains descriptive – not operational – language concerning amendments.

“Amendments”) requires unanimous action by all beneficiaries to amend the instrument: “[t]his Declaration of Trust may be amended from time to time by an instrument in writing *signed by all of the beneficiaries*” (emphasis supplied). The Agency’s assertion that Article III also sets forth a procedure for amendment – which it does not – is only slightly less fanciful than the argument that this Article gives each beneficiary plenary authority to seize the property interest of each other beneficiary. Moreover, it is also clear that the Schedule of Beneficiaries is a free-standing portion of the instrument, making it doubtful indeed that the schedule is subject to amendment at all.

Ultimately, there appears to be an absence of Massachusetts caselaw on the granular question of how nominee trusts are either terminated or amended. More than anything else, however, this would seem to indicate a lack of disputes over such provisions, and reflects that the operation of such instruments has not led to abundant litigation. This underscores that the Agency is fundamentally attempting to unsettle an area of law that is settled, simply as a means of denying MassHealth applications. And indeed, it is not unlikely that adopting the Agency’s interpretation here could lead to increased litigation among persons with interests in nominee trusts.

Arguably, this case calls not for any parsing of references of where the word “amend” appears in the Frank Trust instrument, but rather a broad

reiteration of the principles that the beneficiaries of nominee trusts hold vested property interests, and that neither amendment nor termination of those instruments allow any action by the grantor, the trustee, or any other beneficiary to take control of the property interest of any beneficiary.

Relatedly, the Agency also contends throughout its Brief that the beneficiaries have “equitable” interests only. *See, e.g., Agency Brief*, page 19. This is wholly inaccurate, and represents another effort by the Agency to divert the Court’s attention to revocable trust cases that are irrelevant here. An equitable interest in property arises when one is the current or contingent beneficiary of a revocable trust; the grantor and/or the trustee is the legal owner. But as more than a century of Massachusetts authority demonstrates, the beneficiaries of a nominee trust are the true owners of the real estate held by such a trust. *See Goodwill Industries*, 95 Mass. App. Ct. at 859 (“we have treated the *beneficiaries of a nominee trust as the true owners of the trust’s property....*”) (emphasis supplied).

F. The Board of Hearings and the Massachusetts Superior Court Have Consistently Ruled that Assets Transferred Into a Nominee Trust are Not Countable to a MassHealth Applicant.

The issue the Agency is litigating here is one on which it has lost repeatedly before the Medicaid Board of Hearings. The argument that a grantor can reclaim property that has been deeded into a nominee trust, thus rendering the entire trust corpus a countable asset to the grantor/applicant, has been consistently and resoundingly rejected by the Board. Yet, in the face of repeated losses in administrative hearings and without any bases in law or fact to support their argument, the Agency today continues to deny applications on this basis.

In *Appeal No. 1814090* (March 20, 2019), the Board addressed the circumstance of a settlor who, like Ms. Frank, had retained a life estate for herself as a beneficiary when she deeded her real property into a nominee trust. Construing an instrument with language functionally identical to the Frank Trust, the Board found that “since the entire amount that the Appellant could receive under the *trust is her life estate interest only, the remainder interest of the trust is not countable.*” (Emphasis supplied.)

The scenario of a life estate interest within a nominee trust was again addressed in *Appeal No. 1811262* (August 17, 2019). First, the Board concluded that “[t]he Nominee Trust’s holdings are *legally owned* by the

beneficiaries according to their interests as defined in the Schedule of Beneficiaries.” (This is in complete contradiction to the Agency’s contention here that the beneficiaries’ interests are equitable.) Second, the Board found that “[a] life estate is distinct from the remainder interest in the real property; its existence does not make the remainder interest in the property countable for MassHealth purposes.”

Appeal No. 1823773 (June 25, 2019) is another case where the Board expressly rejected the Agency’s assertion that the assets in a nominee trust were countable to a Medicaid applicant. In a nuanced discussion, the Hearing Officer addressed the terminable aspect of a nominee trust, and found that this feature does not allow a grantor to reclaim principal:

[The] power of termination on behalf of the beneficiary is not the same as a power of revocation. A power of revocation is a power of the settlor of the trust to nullify the trust. A power of termination is the power of a beneficiary to end the trust.

A final example is *Appeal No. 1905492* (June 4, 2019). Construing trust language that in material aspects is identical to that in the Frank Trust, the Hearing Officer stated: “I do not find any circumstances described in the terms of the nominee trust [] by which any of the resources of the nominee trust can be made available to the appellant.”

As discussed in more detail in the Appellant’s brief, the Agency’s arguments have met a similar fate at the Superior Court. Specifically, in

Cronin v. Commissioner, 2000 WL 1299483 (Mass. Super. 2000) and *Leger v. Commissioner*, No. 98-0768 (Mass. Super. 1998), the Superior Court found that assets in a nominee trust were not countable against a Medicaid applicant.

In short, virtually all available controlling and persuasive materials – ranging from the precedents of this Court stretching back more than a century; to learned commentary; to contemporary appellate caselaw; and to persuasive decisions of the Superior Court and Board of Hearings – indicate that the Agency’s arguments in this case are wholly without merit. The decisions of the Board and the Superior Court in the present matter are nothing short of extreme outliers, and contrary to settled law.

G. The Hypothetical Possibility That the Other Beneficiaries Could Give Their Interests to Ms. Frank Does Not Render the Trust Corpus Countable to Her.

In its decision below, the Trial Court treated as dispositive the fact that “[i]t is possible that the plaintiff could act in conjunction with the five other beneficiaries to amend the trust to further ‘regain any of the property or funds in the trust.’” *RA*, page 49 (internal citation omitted). Indeed, other than its entirely unsupportable assertion that her life estate would be countable against Ms. Frank’s MassHealth application, that is the sum total of the Trial Court’s

legal analysis.⁷

The Agency reiterates this same argument here, asserting that “the SJC has recognized that beneficiaries may voluntarily relinquish their interest back to the trust for the benefit of the grantor, and that this contingency renders the trust assets countable,” *Agency Brief*, page 22. The Agency cites *Lebow v. Comm’r of the Div. of Med. Assistance*, 433 Mass. 171 (2001), for this proposition. However, the Agency’s inapposite reliance on *Lebow* perpetuates its assertion of a false equivalence between a “true trust” and a nominee trust. Indeed, in *Lebow* the Agency cites a case involving a standard trust where the trustee was vested with discretion over the trust property, and was the legal owner. Importantly, this Court specifically found in *Lebow* that the trustee “could, at any time, exercise his power to amend the trust to....disburse trust assets to [the grantor].” 433 Mass. at 177. In sharp contrast, for the reasons elaborated in this Brief, the trustee of a nominee trust lacks any such discretion to return trust assets to the grantor. Simply put, *Lebow* and the Frank Trust are ships passing in the night.

⁷ As set forth in Appellant’s brief, it appears that the Agency has stipulated in another appellate case that life estates are not countable. Puzzlingly, however, the Agency asserts here that not only is the life estate countable, but “because Ms. Frank could regain part of her property...hence, the entirety of the Trust property was countable for Medicaid purposes for this reason as well.” *Agency Brief*, page 30. However, the Agency fails to cite any legal authority to support this conclusory proposition.

As to the Agency's related arguments that the beneficiaries could unite to reinstate the trust corpus to Ms. Frank, such acts of gratuitous generosity do not give rise to countable assets. The Appeals Court has held that "for purposes of computing countable assets, 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 v. Dir. of the Office of Medicaid*, 89 Mass. App. Ct. 312 (2016).

Finally, the Agency also points to language in the instrument stating that "[t]he parties hereunder recognize that if a sole Trustee and a sole Beneficiary are one and the same person, legal and equitable title hereunder shall merge as a matter of law." *Frank Trust, Article III(3)*. The Agency then says that "[i]n other words, the Trust permits a situation in which Ms. Frank could be the sole trustee and sole beneficiary, and in that circumstance, she would regain the entire property free of trust." *Agency Brief*, page 29.

This completely ignores the fact that the Frank Trust has a Schedule of Beneficiaries reflecting ownership interests of multiple persons. In no sense does the Frank Trust "permit[] a situation in which Ms. Frank could be the sole trustee and sole beneficiary." The other beneficiaries, as detailed above, have vested property interests. Such property interests cannot simply be waved out of existence by Ms. Frank, leaving her the sole beneficiary. The Frank Trust

language the Agency cites is standard nominee trust language, and is not a dispositive provision of the Frank Trust. Simply put, it does not operate independently of the Schedule of Beneficiaries to give a substantive right to the grantor or trustee. Here again, the arguments of the Agency appear intended to cast broad doubt upon the vitality and clarity of standard language that Massachusetts attorneys have been including in nominee trust instruments for many decades.

CONCLUSION

Amicus Curiae the Massachusetts Chapter of the National Association of Elder Law Attorneys respectfully requests that this Honorable Court enter judgment in favor of the Appellant, JoEllen Guilfoil, and enter such other relief as is just and proper.

Respectfully submitted,
MassNAELA,

By its attorneys,

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ADDENDUM

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The Nominee Trust in Massachusetts Real Estate Practice

By Robert L. Birnbaum and James F. Monahan*

The term "nominee trust" has great currency among Massachusetts real estate practitioners and the use of a "nominee trust" for holding title to real estate is quite common. However, the literature and cases in the Commonwealth are surprisingly devoid of reference to this device and there seems to be considerable confusion about its nature and the consequences of its use, especially in the areas of trustee and beneficiary liability and income taxation. The intention of this article is to dispel some of this confusion.

Nature and Use of Nominee Trusts

What is a "Nominee Trust"?

As used in this article, the term "nominee trust" means an arrangement for holding title to real property under which one¹ or more persons or corporations,² pursuant to a written declaration of trust, declare that they will hold any property that they acquire as trustees for the benefit of one or more undisclosed beneficiaries. The typical declaration of trust of a nominee trust, which will be recorded in the county in which the real property subject thereto is located³ will provide, *inter alia*, that:

1. The names of the beneficiaries are set forth on a "schedule of beneficial interests" which has been executed by the trustees and the beneficiaries and and filed with the trustees.

2. A trustee may be a beneficiary of the trust and exercise all rights of a beneficiary as if he were not a trustee.⁴

3. The trustees have no power to deal with any property subject to the trust except as directed by the beneficiaries.

4. Notwithstanding the provision described in (3), any disposition of the property subject to the trust by an instrument signed by a specified number of trustees who appear of record as such shall be conclusive in favor of any person relying on or claiming under such instrument, and no such person need inquire as to whether the terms of the trust have been complied with.

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1. Although a nominee trust may have only one trustee, it is usually more advantageous to provide for two or more. For example, with two or more trustees, the declaration of trust may provide that the substitution of a new trustee may be evidenced by the certificate of the remaining trustee or trustees thereby preserving the anonymity of the beneficiaries.
2. While corporations are not commonly used as trustees of nominee trusts, there is no question that a corporation may serve in such capacity. See *Trustees of Phillips Academy v. King*, 12 Mass. 546 (1815).
3. G.L. c.203, §2 provides that the recording of a declaration of trust concerning land in the registry of deeds in the county in which the land is located constitutes actual notice of the trust. G.L. c.203, §3 provides, in effect, that a trust concerning land will not affect a bona fide purchaser, or creditor, without notice of the trust.
4. One may be a trustee and a beneficiary of a trust, but no trust is created if one individual is the sole trustee and beneficiary. *Parker v. Converse*, 5 Gray 336 (1855).

5. The beneficiaries may terminate the trust at any time and upon such termination or the expiration of the term of the trust, the trustees shall transfer legal title to the trust property to the beneficiaries as tenants in common in proportion to their beneficial interests.

Obviously, the provision described in (3) is the key to the nominee nature of the trust. Unlike in a "true trust", the trustees of a nominee trust have no power, as such, to act in respect of the trust property, but may only act at the direction of (in effect, as agents for) the beneficiaries. As will be more fully discussed below, this provision — while necessary for the business purposes stated therein and perhaps helpful for state and federal income tax purposes⁵ — defeats the stated intention of creating a trustee-beneficiary relationship and creates instead, under Massachusetts law, the relationship of principal-agent (at least insofar as third parties are concerned).

Reasons for Using a Nominee Trust

The following are among the reasons for holding title in a nominee trust:

Anonymity of Ownership. Since the schedule of beneficial ownership is not recorded, the true owners of the property will not be apparent and their identities will therefore be shielded, however temporarily, from aggrieved tenants and creditors. Moreover, since the declaration of trust will provide that third parties may rely on the acts of the record trustees, it will not be necessary to reveal beneficial ownership even in a transaction in connection with the trust property, such as a sale. However, it should be noted that this anonymity may not be preserved against one seeking a judgment against the beneficiaries. Since, as will be more fully discussed below, the beneficiaries may be liable for the acts of the trustees in connection with the trust property, their identities would be discoverable in judicial proceedings seeking to enforce such liability.

Ease of Title Transferability. Since the declaration of trust is recorded and clearly states that third parties may rely without inquiry on the authority of the record trustees, the transfer or other disposition of the trust property is greatly facilitated. This element of the nominee trust is especially advantageous where there are numerous beneficial owners, because it eliminates the need to collect multiple signatures. Moreover, where the beneficial owner is a corporation the need for assurance of corporate authority is eliminated⁶ and, where the trust property constitutes all or substantially all of the assets of the corporation, use of the trust eliminates the need, on the sale of the real property, to obtain a stockholders' vote⁷ and, presumably, a Massachusetts excise tax waiver.⁸ It should be noted, however, that the risk of trustee action which is not

5. See following section.

6. Although G.L. c.155, §8 and c.156B, §115 simplify this problem by providing that any instrument purporting to affect an interest in real estate is binding on a corporation if signed by the president or a vice president and the treasurer or an assistant treasurer, evidence that the individuals signing the instrument actually hold the purported offices is still necessary.

7. See G.L. c.156B, §75.

8. See G.L. c.63, §76.

authorized by the beneficiaries, but is nonetheless binding on them with respect to third parties, is one which accompanies facility of title transfer.

Avoidance of Title Transfers. If title to real property is held in a nominee trust, the sale of the property can be effected by an assignment of the beneficiaries' interest in the trust to the purchaser⁹ and replacement of the trustees by the purchaser. Arguably, since no deed is delivered, no documentary stamps need be purchased.¹⁰ In addition, transfer in this manner might avoid the effect of mortgage provisions permitting acceleration of the maturity of the mortgage indebtedness on transfer of title and other types of restrictions on alienability. However, it should be noted that replacement of trustees will result in transfer of title to the new trustees and the language of the provision sought to be avoided must therefore be carefully scrutinized.

It should be emphasized that the nominee trust is not a vehicle for shielding the beneficiaries from liability to trust creditors. In a true trust, the trustee is personally liable for the trust debts, absent agreement with the creditor to the contrary,¹¹ and the beneficiaries are not liable to trust creditors although the trust property, as well as the trustee, may be.¹² However, because a nominee trust is not a trust under Massachusetts law, different rules of liability will apply, as discussed in the next section of this article.

Treatment of Nominee Trusts under Massachusetts Law.

Relations to Third Parties. One of the key elements of a "true trust" is

9. Unless prohibited by the declaration of trust, the interest of a beneficiary is assignable. See *Woodward v. Snow*, 233 Mass. 267 (1919).

10. See G.L. c.64D, §1.

11. See, e.g., *Anglo-American Direct Tea Trading Co. v. Seward*, 294 Mass. 349 (1936).

12. III, A. W. Scott, *The Law of Trusts* (hereinafter cited as *Scott on Trusts*), §267 (3d ed. 1967).

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that the management of the trust property is entrusted to the trustees,¹³ and therefore some uncertainty must arise as to the nature of a nominee trust, in which control and management are specifically reserved to the beneficiaries. The Massachusetts courts do not seem to have considered this question with respect to nominee trusts as that term is used here, *i.e.*, a bare title-holding arrangement. However, there is a long line of cases, beginning with *Hoadley v. County Commissioners*,¹⁴ considering the effect of a provision or provisions giving control of the trust property to the beneficial owners of "business trusts".¹⁵ After the decision in *Williams v. Inhabitants of Milton*¹⁶ (a case in which the arrangement in question was held to be a true trust), it was possible to state clearly the law in the Commonwealth with respect to such trusts. The Court in that case said:

Where persons associate themselves together to carry on business for their mutual profit, they are nonetheless partners . . . [even though] (1) their shares in the partnership are represented by certificates which are transferable and transmissible, and . . . (2) as a matter of convenience (if not of necessity in case of transferable and transmissible certificates) the legal title to the partnership property is taken in the name of a third person. The person in whose name the partnership property stands in such a case is perhaps in a sense a

13. *Williams v. Inhabitants of Milton*, 215 Mass. 1 (1913).

14. 105 Mass. 519 (1870).

15. Under Massachusetts law, the term "business trust" generally refers to a trust whose beneficial interests are represented by transferable certificates. See G.L. c.182, §1 and G.L. c.62, §1(j). Mere transferability of beneficial interests does not distinguish a "business" from an "ordinary" trust, because the latter's beneficial interests are transferable in the absence of a "spendthrift" provision. See *Woodward v. Snow*, 233 Mass. 267 (1919). (The basis of distinction between business and ordinary trusts is quite different under the IRC, as discussed *infra*.) In any event, business trusts were once quite widely used in Massachusetts to own and operate income-producing real estate, because prior to 1971 they could elect to be taxed, in which event dividends to stockholders were non-taxable. In light of the additional fact that before 1971 real estate rents were non-taxable under the Massachusetts income tax statutes, the use of a business trust gave its stockholders the advantages of a corporation without any tax detriment. See Barrett and DeValpine, "Taxation of Business Trusts and Other Unincorporated Massachusetts Entities with Transferable Shares", 40 B.U. Law Rev. 329 (1960). Because business trusts were most frequently used to own income-producing real estate, they were often called "real estate trusts", tending to create confusion between them and nominee trusts. At present, business trusts and their beneficiaries are taxed much like ordinary trusts. Compare G.L. c.62, §8 with the statutory provisions cited in notes 23, 24, and 25. Thus, for purposes of Massachusetts income taxation a business trust, like a "Subchapter S" corporation under the IRC, can offer the advantages of incorporation without "double taxation" of income, although, unlike the latter a business trust will not allow the "pass through" of losses to shareholders. A business trust may be denied certain tax advantages enjoyed by corporations under Massachusetts law, especially with respect to liquidations. *E.g.*, *B. W. Company, et al. v. State Tax. Comm.*, CCH Mass. Tax Rep. ¶200-431 (A. T. B. Dkt. No. 64523, June 30, 1975). Further confusion is engendered in this area by the term "real estate investment trust", which generally refers to a type of business trust that is defined by, and may escape federal income taxation by compliance with, the very specific provisions of IRC §§856-858.

16. 215 Mass. 1 (1913).

trustee. *But speaking with accuracy he is an agent who for the principals' convenience holds the legal title to the principal's property.*¹⁷ [Emphasis added.]

Put differently, the relationship created when legal title to property is held by one party for the benefit of another, but the control of the property remains in the beneficial owner, is one of principal-agent and not of beneficiary-trustee. If this is the case, it should follow that the rules concerning the liability of principal and agent to third parties should govern the liability of the beneficiaries and trustees of a nominee trust. If this were so, the trustee executing a contract would be personally liable, absent an exculpatory provision, and the beneficiaries would be liable as well.¹⁸ The foregoing conclusion, however, is called into question by a number of cases¹⁹ in which the court has simply ignored the existence of the trustee where the trust instrument contained a nominee provision, and imposed liability directly on the beneficial owners. Those cases purport to follow *Williams*, but in fact overlook the agency references contained in the case.²⁰ However, it is difficult to criticize the imposition of liability on the beneficiaries of a nominee trust, because there is logic in treating them as the true owners of the property for the purposes of liability as well as benefit.

Trustee/Beneficiary Relationship. Although there appears to be no Massachusetts case defining the relationship between the trustees and beneficiaries of a nominee trust, there seems to be no reason not to view it as a relationship of trust, honoring the intention expressed by the declaration of trust. But even if the trustees were held to be merely agents of the beneficiaries, their duties would nonetheless be those of fiduciaries.²¹

If, however, the relationship were held to be one of agency, a conveyancing problem might be created, because the death or incapacity of a principal ordinarily terminates an agency relationship²² and the identity of beneficiaries does not appear on any recorded document. While this problem may be resolved by the usual provision in a declaration of trust for a nominee trust, to the effect that third parties may rely without inquiry on the apparent authority of the trustees, the matter is not free from doubt.

16. 215 Mass. 1(1913).

17. *Id.* at 6.

18. *Norfolk County Trust Company v. Green*, 304 Mass. 406 (1939). The established rule that only parties named in a sealed instrument may sue or be sued thereon, as stated in this and other cases, has recently been discarded by the Supreme Judicial Court. *Nalbanian v. Hanson Restaurant and Lounge, Inc.*, Mass. Adv. Sh. 3368 (1975).

19. See, e.g., *Frost v. Thompson*, 219 Mass. 361 (1914), *First National Bank of New Bedford v. Chartier*, 305 Mass. 316 (1940).

20. Moreover, broad statements such as those found in *First National Bank of New Bedford v. Chartier*, 305 Mass. 316 (1940), that a partnership is created whenever the beneficial owners control the trust property, are clearly wrong when one considers a nominee trust having a single beneficiary or beneficiaries who are mere co-tenants.

21. 1, *Scott on Trusts*, §8.

22. *Restatement (Second) of Agency*, §120 (1957).

Federal and State Tax Treatment

Federal and state income tax considerations usually dictate the form in which co-investors in income-producing real estate associate themselves. Frequently — and almost invariably in “tax shelter” investments — tax planning mandates use of a partnership, in order to “pass through” to individual investors the net losses created by depreciation and other deductions, so that they may employ the losses to offset income from other sources. However, if real estate is producing taxable income, it may be most advantageous to place it in a corporation or business trust if the entity would be in a lower federal tax bracket than the individual shareholders.

In any event, it is vital that use of a nominee trust not upset a carefully-considered choice of business form, as might occur if the Massachusetts Department of Corporations and Taxation or the Internal Revenue Service were to contend successfully that the trust, rather than its beneficiary (or beneficiaries) is the actual owner-operator of the real estate.

Massachusetts Taxation

Under Massachusetts tax statutes, a trust is taxable, in effect, as if it were an individual.²³ Distributions to *individual* or business trust beneficiaries are tax-free to them to the extent that they have already been taxed to the trust,²⁴ but distributions to *corporate* beneficiaries are not so exempt.²⁵

Thus, if a nominee trust were held to be taxable as a trust under Chapter 62, any losses that it incurred would not be “passed through” to its beneficiary; and any distribution that it made to a corporate beneficiary would be fully taxable to it, even if the trust had already been taxed on the income from which it made the distribution. What is the risk that this misfortune will befall a nominee trust and its beneficiaries?

The Massachusetts Department of Corporations and Taxation (“the Department”) contends²⁶ that a trust that engages in “any activity other than the holding of bare legal title to property” is taxable as a trust. Among the activities that will, in the Department’s view, render a nominee trust taxable are the following:

- 1) maintaining a bank account;
- 2) collecting or receiving rent or other payments;

23. G.L. c.62, §10(a). G.L. c.62 is hereinafter referred to in the text of this article as “Chapter 62”.

24. G.L. c.62, §2 (a) (2) (C) excudes from the “gross income” of an individual income received from a fiduciary which is taxable to the fiduciary under other provisions of G.L. c. 62. §10(a) restates this exclusion. §8 provides, generally, that a business trust is taxed like an individual.

25. G.L. c.63, §30 fails to exclude from the “gross income” of a corporation income received from a fiduciary which is otherwise taxable to the fiduciary.

26. All quotations or views on nominee trusts that are attributed to the Massachusetts Department of Corporations and Taxation in this article were set forth in a memorandum dated January 6, 1975 prepared and distributed by the Massachusetts Bar Association’s Committee on Taxation. The purpose of the memorandum, which was based on conferences with the Commissioner of Corporations and Taxation, was to set forth the Commissioner’s views on nominee trusts in authoritative, though unofficial, form.

- 3) making disbursements or paying bills;
- 4) maintaining books;
- 5) owning other assets other than as a nominee.

On the other hand, the Department regards the following actions as incidental to title-holding; their performance by a nominee trust will not transmute it into a taxable entity:

- 1) having a name;
- 2) making a promissory note;
- 3) granting a mortgage;
- 4) immediate payment to beneficial owners of mortgage loan proceeds;
- 5) receiving a tax bill in its name;
- 6) executing a lease or leases of its property as lessor;
- 7) executing a petition for abatement of taxes assessed to it;
- 8) giving a deed or other instrument conveying an interest in its property;
- 9) executing a purchase and sale contract for sale of the real estate to which it holds title.

The Department's view is that if a nominee trust meets the foregoing tests of non-taxability, its trustees may simply ignore its existence for tax purposes, except that the Department requests that it file a "blank" trust income tax return on Form 2, together with a statement of the facts and circumstances upon which the trustees base their belief.

How sound are the Department's views? Chapter 62 contains no definition of the term "trust" or "trustee". Into this vacuum the Department has introduced a test that is strongly reminiscent of the "business activity" standard established in a line of federal cases involving the status of nominee corporations under the Internal Revenue Code. The fountainhead of this line of authority is *Moline Properties, Inc. v. Com'r*,²⁷ in which the U.S. Supreme Court stated that:

[t]he doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.²⁸

Although the *Moline Properties* test has been widely employed by the federal courts, its amorphous character has generated much confusion and doubt.²⁹ While the Department's listings of specific activities that purportedly do or do not constitute "the holding of bare legal title" eliminates

27. 319 U.S. 436 (1943).

28. *Id.*, at 438-39.

29. The leading cases are collected and analyzed in Kronovet, "Straw Corporations", J. Taxation (July 1973).

much uncertainty, it does so at the price of narrowing the range of operations of nominee trusts and thus impairing their utility.

Furthermore, the Department's position ignores a second important line of federal cases involving nominee corporations, in which the recognition of nominee status depended on the existence of any agency relationship between the nominee and the true owner. This line of cases is derived from the following *dictum* of the U.S. Supreme Court in *National Carbide Corp. v. Com'r*.³⁰

What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor . . . If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent.³¹

Because Chapter 62 does not define the terms "trust" or "trustee", the Department (and any taxpayer) seems free to refer to authorities outside that statute. These authorities (some of which involve taxation, although admittedly not income taxation), as suggested earlier in this article, hold that if the "beneficiaries" of a purported "trust" are entitled to control and direct the activities of the "trustees", the relationship is one of agency, not trust.

Federal Taxation

The use of a nominee trust creates different problems under the IRC. If a nominee trust were held to be a true trust, taxable as such, it seems clear that no adverse federal consequences would ensue, because IRC §678 provides as follows:

A person . . . shall be treated as the owner of . . . a trust with respect to which . . . such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself . . .

The beneficiaries of a nominee trust have the powers referred to in the foregoing quotation and would, therefore, be deemed the owners of the trust, as a result of which all of its income, credits, and deductions would "pass through" to them, just as if the trust did not exist.³² If the beneficiaries of a nominee trust are deemed the "grantors" of the trust, this tax treatment is even more assured.³³

However, it is doubtful whether a nominee trust would be deemed a trust under the IRC, even if it were so deemed under Massachusetts law. Treas.

30. 336 U.S. 422 (1949).

31. *Id.*, at 427. See also *Caswel Corp.*, 19 CCH T.C. Memo 757 (1960) and cases collected and analyzed in the article cited in n. 29.

32. IRC §671.

33. IRC §§673-677 enumerate a number of powers, retention of any of which by the "grantor" of a trust will cause him to be treated as the owner of the trust, taxable under IRC §671. The beneficiaries of a nominee trust clearly possess most of these powers, but, because a declaration of trust, rather than an inter vivos indenture or agreement, is used, it is not clear whether such beneficiaries would be "grantors", a term that is not defined in the IRC or in the Treas. Reg. under IRC §§671-678.

Reg. §301.7701-1(c) provides that "it is the Internal Revenue Code rather than local law which establishes the tests or standards which will be applied in determining the classification in which an organization belongs . . ." Although the IRC itself, like Chapter 62, contains no definition of the terms "trust" or "trustee", Treas. Reg. §301.7701-4(a) defines an "ordinary trust" as follows:

* * * [A]n arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries * * * [T]he beneficiaries of such a trust may be the persons who create it and will be recognized as a trust under the Internal Revenue Code if it was created for the purpose of protecting or conserving the trust property . . . Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that *the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility* and, therefore, are not associates in a joint enterprise for the conduct of business for profit. [Emphasis added.]

Of course, a nominee trust does not fit the foregoing definition, because the beneficiaries of a nominee trust control and direct the actions of the trustees and in no way resemble the passive recipients of benefits envisioned by the definition.

Moving on in the Treasury Regulations, we come to §301.7701-4(b), which defines a "business trust" as a trust that is:

created by the beneficiaries simply as a device to carry on a profit-making business which normally would have been carried on through business organizations that are classified as corporations or partnerships under the Internal Revenue Code. * * * The fact that an organization is technically cast in the trust form . . . will not change the real character of the organization if, applying the principles set forth in [Treas. Reg.] §301.7701-2 and §301.7701-3, the organization more nearly resembles an association or a partnership than a trust.

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This definition, too, fails to capture the essence of a nominee trust, which most emphatically is not itself "a device to carry on a profit-making business". In fact, the "device" of a partnership, business trust, or corporation, or an individual, is always present "behind" the trust. The declaration of trust which creates a nominee trust creates no "association" among the beneficiaries and does not define their rights *inter se* with respect to the control of the business. Decisions³⁴ that involve only a detailed trust instrument, with no separate agreement governing the relationship among the beneficiaries, so that analysis centers on the nature of the relationship created by the trust instrument itself, are not in point. In the one federal tax case in which the facts were squarely comparable to those that typically prevail when real estate investors use a nominee trust in Massachusetts, the Tax Court ignored the title-holding trust without discussing it, and addressed itself solely to the character of the "association" created by the agreement among the beneficiaries.³⁵ This approach seems entirely consistent with, and perhaps mandated by, the following factors: (i) the federal courts' "business activity" test; (ii) the federal courts' "agency" test; and (iii) the definition of a "business trust" in Treas. Reg. §301.7701-4(b).

Only two other types of unincorporated organization are defined by the IRC or the regulations: (1) an "association" taxable as a corporation and (2) a partnership. Treas. Reg. §301.7701-2 provides that two of the essential characteristics of an association and a partnership are "associates" and "an objective to carry on business and divide the gains there from." While the trustees of a nominee trust might be deemed "associates," they do not carry on a business for profit, and this lack seems determinative.

Consequently, it appears that the IRS, when a nominee trust is used, is precluded from upsetting real estate tax-planning, as it does in the case of straw corporations, by finding the straw or nominee to be, itself, a separate, taxable "organization" which is the beneficial owner of the property to which it holds title. When a nominee trust is employed, there is no entity to which the IRS might apply the *Moline Properties*³⁶ test of "business activity." The trust instrument that creates a nominee trust under Massachusetts common law is simply a species of contract that creates an agency relationship between the "trustees" and "beneficiaries," and the line of cases derived from *National Carbide Corp.*³⁷ ought to be followed. This conclusion assumes heightened importance in the light of recent decisions in which federal courts have refused to disregard the separate existence of straw corporations in factual situations that might well have been thought safe under earlier precedents.³⁸

34. *E.g.*, Rev. Rul. 64-220, 1964-2 Cum. Bull. 335.

35. Clyde W. Grove, 54 T.C. 799 (1070).

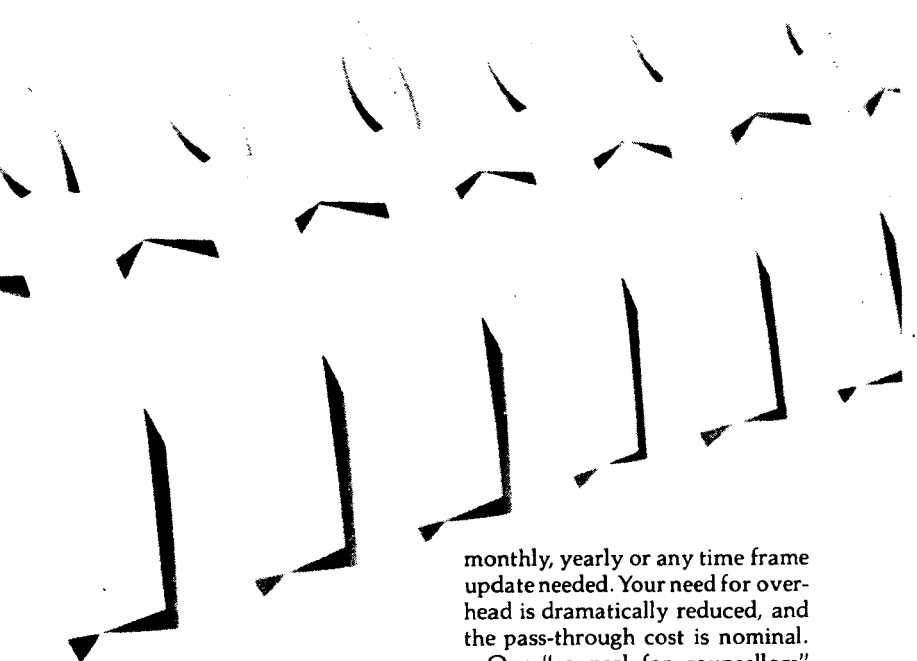
36. 336 U.S. 422 (1949).

37. 319 U.S. 436 (1943).

38. See *Collins v. U.S.*, 386 F. Supp. 17 (S.D. Ga. 1974), *aff'd* 514 F. 2d 1283 (5th Cir. 1975); *Harrison Property Mgmt. Co., Inc. v. U.S.*, 475 F. 2d 623 (Ct. Cl. 1973).

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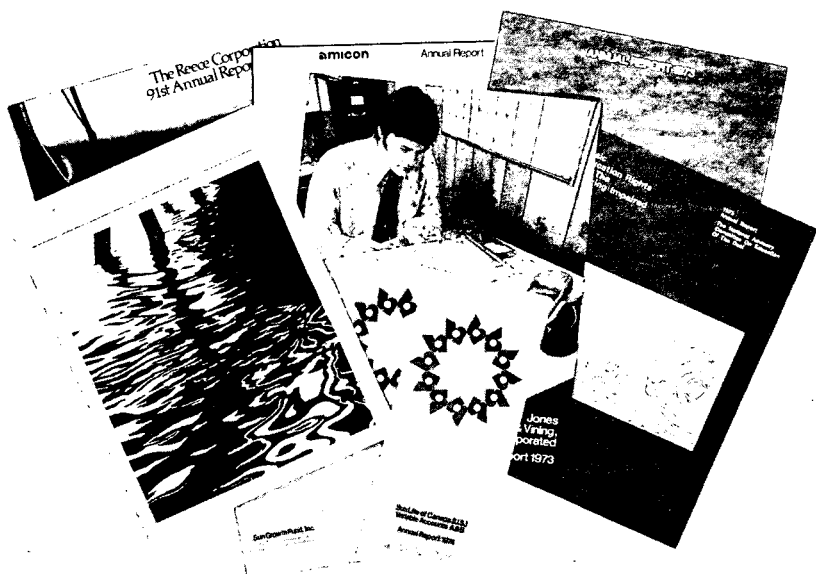
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**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



Appeal Decision:	Denied in part Approved in part	Appeal Number:	1814090
Decision Date:	MAR 20 2019	Hearing Date:	November 13, 2018
Hearing Officer:	Brook Padgett	Record Open:	January 14, 2019

Appellant Representative:

Brian Barreira, Esq.
Andrew Gallant, Esq.
John O'Brien, Esq.


MassHealth Representatives:

Gloria Medeiros, MassHealth Enrollment
Center Taunton
Michael Somers, Esq.



*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:	Denied in part; Approved in part	Issue:	130 CMR 520.023
Decision Date:	MAR 20 2019	Hearing Date:	November 13, 2018
MassHealth Reps.:	G. Medeiros, M. Somers, Esq.	Appellant Rep.:	B. Barreira, Esq.
Hearing Location:	Taunton		

Authority

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

Jurisdiction

The Appellant received a notice dated August 15, 2018, stating: "MassHealth has decided that you are not eligible for MassHealth because you have more countable assets than MassHealth benefits allow... The provisions of your trust under which trust principal can be paid too you or your spouse or can be paid for you or your spouse's benefit, include, but not limited to:

 Realty Trust

1. Article 2 – you can direct the Trustee to distribute trust income and principal of any amount to you; and
2. Article 3 – you can terminate the trust at any time and upon termination receive the entire trust principal as the 100% beneficiary of the trust during your lifetime. Regulations: 130 CMR 520.003, 130 CMR 520.023(B); 130 CMR 520.023(C)." (Exhibit 1).

The Appellant filed this appeal timely on August 17, 2018. (130 CMR 610.015(B); Exhibit 2). Denial of assistance is valid grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

The Appellant's long term care application was denied for being over the MassHealth asset limit.

Issue

Is the Appellant over the assets limit for long term care eligibility?

Summary of Evidence

MassHealth testified the Appellant applied for long term care benefits on March 02, 2018. MassHealth issued a denial of the application on April 26, 2018, stating the Appellant was over the MassHealth asset limit of \$2,000.00. Additional documentation was received on May 07, 2018, and a second denial was issued on May 11, 2018, for the same reason. On August 15, 2018, MassHealth generated a more detailed explanation of the Appellant's denial. (See Exhibit 1). Counsel for MassHealth argued the Appellant is applying for a program for the destitute while she has access to almost two million dollars in assets. The [REDACTED] Realty Trust ([REDACTED] RT) contains real estate valued at \$1.8 million. The Appellant has a life estate interest in the property which is currently valued at \$274,974.00 ($\$1,812,500 \times 0.15171 = \$274,974.00$)¹. The document titled DECLARATION OF TRUST Article 2 states "The Trustee shall hold the principal of this Trust and receive the income therefrom for the benefit of the beneficiaries, and shall pay over the principal and income pursuant to the direction of the beneficiaries" The Appellant is listed as beneficiary and as a result has access to the principal. Further Article 3 states "The Trust may be terminated at any time by the beneficiaries, or any one or more of them, by notice in writing to the Trustees, or by the Trustees by notice to the beneficiaries ...". The Appellant is a beneficiary so she without consent of any other party she has the ability to terminate the Trust and access the entire trust principal. MassHealth submitted into evidence an Appeal Worksheet, application dated March 02, 2018, SC-1, notice date March 22, 2018, April 26, 2018, May 11, 2018, August 15, 2018, property record card, Section 7520 Interest Rates, Table S, Quit Claim Deed, Declaration of Trust, Schedule of Beneficiaries, Amendment of Trust, Resignation of Trustee, Application Supplement E and mortgage. (Exhibit 4).

The Appellant was represented by counsel who was accompanied by Attorney Gallant and the Appellant's son and Attorney O'Brien via telephone. The Appellant argued the Trust dated and recorded on [REDACTED] 2005, is a nominee trust which holds title to the Appellant's primary residence and is a title-holding vehicle on the public record at the Registry of Deeds. The owners of the real estate per the terms of the nominee trust are the Appellant who owns a life estate interest and her son and [REDACTED] own all the vested remainder interest as disclosed on the Schedule of Beneficial Interests.² Counsel maintains it is well established under Massachusetts law that a Nominee Trust does not create a trust.³ It creates a principal-agent relationship and not a trustee-beneficiary relationship and only the owner of the Beneficial Interest can modify or transfer their ownership. Upon any termination of the Trust the Trustee must convey the property to the owners as provided by the Schedule of Beneficiaries. The Appellant's son and [REDACTED] have vested ownership interests

¹ Table S, is based on a single life factors table for an 85 year old individual with an interest at 2.8% (See Exhibit 4).

² The Appellant's son subsequently transferred 1% of his ownership interest to [REDACTED] Properties, LLC (SMG).

³ See Exhibit 5.

and neither the Appellant nor the Trustee have any method, explicit or implicit, to make them give away what they already own.

Attorney O'Brien the drafter of the Trust testified telephonically arguing that there was never any intention to provide the Appellant with access to the principal. Nominee trusts are not trusts in the true sense of the word as the document simply sets up an agency relationship and does not allow any activity without the Trustee approval. The Appellant submitted the following into evidence: *Medallion Realty Trust*, U.S. Bankruptcy Court, Massachusetts, March 21, 1990 Appeal No. 89-40143-MA; *FDIC v. Porter*, 46 Mass. App. Ct. 241 (1999); Massachusetts Law Quarterly article "The Nominee Trust in Massachusetts Real Estate Practice"; Directive 95-5: Deeds Excise on Transfer of beneficial Interests in Nominee Trusts May 09, 1995; Quit Claim Deed dated [REDACTED] 2005; [REDACTED] Realty Trust; Resignation of Trustee dated [REDACTED] 2018; and Schedule of Beneficiaries. (Exhibit 5).

At the request of the MassHealth representative the record remained open until December 13, 2018, to respond to the Appellant's argument. The record was extended until January 14, 2019 for the Appellant to respond to the MassHealth's December 13, 2018, submission. (Exhibit 6).

MassHealth responded within the required time limits arguing the Appellant has access to Trust principal for her own benefit under Article 2 which allows a beneficiary (of which the Appellant is one) to direct payment of principal to her. The first sentence of Article 2 states that the Trustees hold Trust principal for the benefit of the beneficiaries. MassHealth argues this sentence alone deems the entire Trust countable under the "any circumstances test" as the Trust explicitly states the Trustees hold the Trust principal for the benefit of the Appellant. Article 2 further states "The Trustees ... shall pay over the principal and income pursuant to the direction of the beneficiaries, and in the absence of such direction shall pay the income to the beneficiaries, in proportion to their respective interests..." MassHealth maintains that since the Appellant is a beneficiary, she can direct the Trustees to pay her any amount of principal she wants. Since the Trust states in the absence of any direction, payment will be made according to the beneficiaries respective interest; therefore the inverse applies that the beneficiary can direct the Trustees to pay to the Appellant more than her respective interest if she so chooses. Finally MassHealth argues if the Trust is found to be noncountable it should be determined the Appellant continues to own a life estate interest in the property.⁴ (Exhibit 7).

The Appellant's counsel responded to the MassHealth submission within the required time limits restating prior arguments that the maximum the Appellant has regarding the real estate is as a life tenant and her corresponding life estate interest. Since the nominee title-holding entity has been terminated, the Appellant holds a life estate as a matter of record title. The Appellant representative submitted into evidence the following: a Memorandum in Support; *Hirvi v. Sudders*, Order on Plaintiffs' Motion for Declaratory Judgement, Massachusetts Law Quarterly article "The Nominee Trust in Massachusetts Real Estate Practice"; *Medallion Realty Trust*, U.S. Bankruptcy Court, Massachusetts, March 21, 1990 Appeal No. 89-40143-MA; *In Re Eastmare Development Corp.*,

⁴ The Appellant has maintained that she intends to return home.

150 B.R. 495 (Bankr. D. Mass. 1993); *In Re Stoll*, 330 B.R. 470 (Bankr. S.D.N.T. 2005); Directive 95-5: Deeds Excise on Transfer of Beneficial Interests in Nominee Trusts May 09, 1995; and Quit Claim Deed dated January 10, 2019. (Exhibit 8A-D).

Findings of Fact

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

1. The Appellant is a single woman residing in a nursing facility who filed an application for MassHealth long term care benefits on March 02, 2018. (Exhibit 4).
2. On [REDACTED], 2005, the Appellant as grantor transferred real estate for the consideration of \$1.00 to the [REDACTED] RT. (Exhibit 4).
3. The entire corpus of the [REDACTED] RT is the assessed value of Appellant's primary residence valued at \$1.8 million. (Exhibit 4).
4. On May 25, 2005, the Schedule of Beneficiaries for the [REDACTED] RT lists the Appellant and her son as sole trustees of the Trust and the Appellant as owner of a life estate and her son as the owner of the remainder interest. (Exhibit 4).
5. On February 29, 2016, the Appellant resigned as Trustee of the [REDACTED] RT. (Exhibit 4).
6. On February 29, 2016, the Appellant's son conveyed 1% of the remainder interest to [REDACTED] Properties LLC. (Exhibit 4).
7. On February 29, 2016, the [REDACTED] RT Schedule of Beneficiaries lists beneficiaries as the Appellant as owner of a life estate, with the remainder interest of 99% to the Appellant's son 1% to [REDACTED]. (Exhibit 4).
8. MassHealth has valued the Appellant's life estate interest at \$274,974.00 ($\$1,812,500 \times 0.15171 = \$274,974.00$). (Exhibit 4).
9. The DECLARATION OF TRUST states:
 - 1. "The undersigned hereby DECLARE that they and their successors in trust will hold any and all property that may be transferred to them as Trustees hereunder for the sole benefit of the persons hereinafter call the beneficiaries whose names are set forth in a Schedule of Beneficial Interest signed by the Trustees in the proportions therein set forth. The Trust established hereunder shall be known as: [REDACTED] RT."
 - 2. "The Trustee shall hold the principal of this Trust and receive the income therefrom for the benefit of the beneficiaries, and shall pay over the principal and income pursuant to the directions of the beneficiaries, and in the absence of such direction shall pay the income to the beneficiaries, in proportion to their respective interests, at least yearly. ..."

- 3. "The Trust may be terminated at any time by the beneficiaries, or any one or more of them, by notice in writing to the Trustees, or by the Trustees by notice to the beneficiaries, ...". In case of any such termination, the Trustees shall transfer and convey the entire Trust Estate free and discharged of trust, but subject to any leases, mortgage, contracts, or other encumbrances on the Trust Estate, to the beneficiaries as tenants in common in proportion to their respective interests. (Exhibit 4).

10. On August 15, 2018, the Appellant's MassHealth application was denied for excess assets contained in the [REDACTED] RT. (Exhibit 1).

Analysis and Conclusions of Law

The Appellant is a resident of a nursing facility who applied for MassHealth benefits on March 02, 2018. On [REDACTED], 2005, the Appellant established a Trust; therefore, regulations at 130 CMR 520.023 (Trusts or Similar Legal Devices Created on or after August 11, 1993) are controlling.

Where an individual has established a trust, MassHealth and the courts consider whether "...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, (II) for any other purpose, shall be considered a transfer of assets by the individual. 42 U.S.C. §1396p(d)(3)(B)(i)⁵, 130 CMR 520.023(C)(1)(a).⁶ The effect of the "any circumstances" test is that if the trustee is afforded even a peppercorn of discretion" to make payment of principal to an applicant, or if the trust allows such payment based on certain conditions, then the entire amount that the applicant could receive under the trust is counted for MassHealth purposes.⁷

Whether the [REDACTED] RT is a realty trust or a nominee trust the issue is whether the Appellant has the discretion to access principal within the trust for her own benefit. Article 2 states unequivocally that the Trustee shall pay over the principal and income pursuant to the directions of the beneficiaries. Further Article 3 states unequivocally that the Trust may be terminated at any time by any one or more of the beneficiaries. The Appellant has always been and continues to be a beneficiary of the [REDACTED] RT and therefore has the authority under Article 2 to request the Trustee pay over the principal to her and under Article 3 to dissolve the Trust and gain access to principal. In either instance the Appellant possesses a life estate interest with the remainder interest of the Trust held by her son and [REDACTED]. While this makes the entire amount that the Appellant could receive under the trust countable for MassHealth purposes, the Appellant's entire amount consists

⁵ *Heyn v. Director of the Office of Medicaid*, 89 Mass. App. Ct. 312, 315 & n.7 (2016).

⁶ Trusts or Similar Legal Devices Created on or after August 11, 1993 (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.

⁷ *Cohen v. Commissioner of the Div. of Med. Assistance*, 423 Mass. 413 (1996).

of only a life estate interest. Appellant can sell, mortgage or lease her life estate to pay for her nursing facility care.

As there are circumstances which give the Appellant the ability to access principal of the [REDACTED] RT then the entire amount that the Appellant could receive under the trust is counted for MassHealth purposes and this appeal is denied in part. Since the entire amount that the Appellant could receive under the trust is her life estate interest only, the remainder interest of the trust is not countable and this appeal is approved in part.

Order for the MassHealth

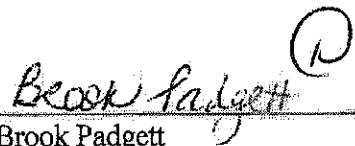
Redetermine Appellant's long term care eligibility after counting the Appellant's life estate interest.

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.

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.



Brook Padgett
Hearing Officer
Board of Hearings

cc: Taunton MEC

Michael Somers, MassHealth Assistant General Counsel

Brian Barreira, 118 Long Pond Road #206, Plymouth, MA 02360

Andrew Gallant, O'Brien and Associates, 10 Kearney Road, Suite 305, Needham, MA 02494

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1811262
Decision Date:	AUG 17 2018	Hearing Date:	06/20/2018
Hearing Officer:	Christopher Jones		

Appearance for Appellant:
Patrick G. Curley, Esq.
Martin , POA

Appearance for MassHealth:
Yous Khieu (Phone)



*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:	LTC – Assets/Trust
Decision Date:		Hearing Date:	06/20/2018
MassHealth's Rep.:	AUG 17 2018	Appellant's Rep.:	Pro se
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 March 23, 2018, MassHealth denied the appellant's application for MassHealth long-term-care benefits because MassHealth determined that the appellant had \$559,000 in "Other" countable assets. Exhibit 2; 130 CMR 520.003, 520.004. The appellant filed this appeal in a timely manner on April 19, 2018. Exhibit 2; 130 CMR 610.015(B). Denial of assistance is valid grounds for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied the appellant's long-term-care application because it determined that assets held in a trust established prior to 1993 were countable.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.022, in determining that the trust the appellant established prior to August 11, 1993 holds countable assets.

Summary of Evidence

The appellant is over the age of 65, and she entered a nursing facility on January 12, 2016. The application for long-term-care benefits was submitted on January 25, 2018, and the nursing facility

is seeking benefits to start as of February 1, 2018. The other countable asset of the appellant and her community spouse is a bank account with \$2,367.82. Exhibit 3.

On February 17, 1993, the appellant created an eponymous Nominee Trust and funded it with her interest in a piece of real estate.¹ The Nominee Trust includes the following relevant provisions:

SECTION THREE Beneficiaries

3.1 The term "Beneficiaries shall mean the persons and entities listed as Beneficiaries in the Schedule of Beneficiaries and in such revised Schedules of Beneficiaries

3.2 Decisions made and actions taken hereunder ... shall be made or taken ... by all of the Beneficiaries.

SECTION FOUR Powers of the Trustee

4.1 The Trustee shall hold the principal of this Trust and receive income therefrom for the benefit of the Beneficiaries, and shall pay over the principal and income pursuant to the direction of all of the Beneficiaries and without such direction shall pay the income to the Beneficiaries in proportion of their respective interests.

4.2 Except as hereinafter provided in case of termination of this Trust, the Trustee shall have no power to deal in or with the Trust Estate except as directed by all of the Beneficiaries. When, as, if and to the extent specifically directed by all of the Beneficiaries, the Trustee shall have the following powers:

4.2.1 to buy, sell, convey, assign, mortgage or otherwise dispose of all or any part of the Trust Estate and as landlord or tenant execute and deliver leases and subleases;

...

4.2.5 but the Trustee shall have no authority to maintain bank accounts in the name of the Trust or Trustee but they may maintain bank accounts in the name of the Beneficiaries.

SECTION FIVE Termination

5.1 This Trust may be terminated at any time by notice in writing from all of the Beneficiaries, provided that such termination shall be effective only when a certificate thereof signed by the Trustee, shall be recorded with the Registry of Deeds. ...

5.2 In the case of any termination of the Trust, the Trustee shall transfer and convey and otherwise distribute the specific assets constituting the Trust Estate ... pursuant to the direction of the Beneficiaries, to the Beneficiaries in proportion to their respective interests hereunder, or otherwise directed by all of the Beneficiaries

¹ This property interest was a one-quarter interest in a two-family home. This is discussed in more detail below.

See Exhibit 3; Exhibit 4.4.

Prior to the lookback period, the appellant's children held the entire beneficial interest, and the appellant was not a beneficiary of the Nominee Trust at all.² See Exhibit 4.8. The Schedule of Beneficiaries was amended on January 21, 2015, and the appellant and her husband were given a joint life tenancy. Exhibit 4.9. The appellant's son testified that they had conveyed the life estate interest to the appellant and her spouse because the children wanted to ensure a legal right to reside in the property, especially given the fact that the Nominee Trust only holds a 25% interest in the property. The appellant has since transferred her life estate interest to her husband in April of 2018. Exhibit 4.11. MassHealth's representative testified that the memorandum in Exhibit 3 was the same memorandum upon which the denial was based. He testified that this memorandum was not marked as attorney-client privileged, nor was it identified specifically as a confidential document.

MassHealth determined that the Nominee Trust was a countable trust, and it determined \$559,000 to be the value of the trust. This is the full assessed value of the real property in which the trust holds a 25% interest. As the appellant has a community spouse, the excess asset amount was calculated to be \$435,767.82. MassHealth's representative confirmed that he issued the denial notice based upon a legal memorandum he received from MassHealth's legal department. He offered a copy of this same memorandum into the record along with additional documentation at Exhibit 3.³

The appellant's attorney first argued that MassHealth's notice violates federal law because the notice provided by MassHealth did not provide "a clear statement of the specific reasons supporting the intended action." 42 CFR § 431.210. It was pointed out that MassHealth's regulations define what it believes the agency's noticing responsibilities to be at 130 CMR 610.026, and that the complete explanation of MassHealth's decision need only be presented "at or before the hearing" under 130 CMR 610.062.⁴ See also App. Memo., pp. 4-5.

The appellant's attorney further argued that MassHealth violated its own regulation at 130 CMR 610.050, which affords an appellant or their representative the right to make an appointment "to examine the entire contents of the appellant's case file, as well as all documents and records to be used by the MassHealth agency ... at the hearing."⁵ He testified that on April 18, 2018, he called MassHealth's representative to ask what the legal basis for the notice was. He was told that there was a memorandum from MassHealth's legal department that stated the trust was countable. When asked if he could receive a copy of the memorandum, MassHealth's representative stated that he

² The original Schedule of Beneficiaries was believed to have named the appellant as the sole beneficiary, but the appellant was unable to locate a copy.

³ Though admitted as part of Exhibits 3 and 4, both MassHealth and the appellant's memoranda will be referenced by name rather than exhibit number.

⁴ The appellant's attorney was informed that any argument that such practices were in violation of federal law would need to be addressed to a court of general jurisdiction.

⁵ See also 130 CMR 610.062(D) "The acting entity will: ... where the acting entity is the MassHealth agency, ensure that the case file is present at the hearing and that the appellant has adequate opportunity to examine it before and during the hearing..."

may not see the memorandum before the day of the hearing per MassHealth policy. The appellant's attorney asked if the memorandum would be accessible if he made an appointment to review the appellant's case file, and he was told that the memorandum would not be made available prior to the hearing.

MassHealth's representative testified that there is a MassHealth policy that legal memoranda are not to be provided to appellants prior to their hearing date. This policy was not offered into the record. MassHealth's representative again confirmed that he received one memorandum and no second memorandum was prepared for the hearing. MassHealth's memorandum is unsigned and undated, and it is not labeled confidential or attorney client privileged. The appellant's attorney asked that the memorandum be struck from the record because it was improperly withheld from the appellant's representatives in violation of MassHealth's regulations. The parties were informed that this matter would be taken under advisement and a ruling on the admissibility of MassHealth's memorandum would be issued as part of the fair hearing decision.

During the April 18 telephone call to the MassHealth representative, the appellant's attorney testified he attempted to explain that MassHealth's notice does not reasonably reflect the actual assets of the Nominee Trust. In 1988, the appellant's mother transferred a two-unit property to the appellant and her two sisters. One sister received a 50% interest, and the appellant and her other sister only received 25% interests. Therefore, when the appellant created the Nominee Trust, it was only ever funded with a 25% interest in the underlying property. At this time he also informed MassHealth that the appellant had transferred her life estate interest to her husband, and he is now the sole beneficiary of the life estate portion of the Nominee Trust's holdings. The appellant offered a life estate valuation of the quarter-interest in the property, which they valued at \$17,567.97. This information was submitted to MassHealth in April, but the appellant's attorney was told that the information would not be reviewed or responded to until shortly before the hearing. At the hearing, MassHealth's representative confirmed the appellant's attorney's recollection of the conversation, and he agreed that the correct asset amount would be 25% of the assessed value of the underlying real property: \$139,750.

MassHealth's memorandum was reviewed on the record. It identifies that the Nominee Trust was funded in February 1993, and therefore the pre-1993 Medicaid Qualifying Trust statute is the applicable law, and MassHealth references 130 CMR 520.022(B) and Cohen v. Div. of Med. Asst., 423 Mass. 399 (1996). The entirety of MassHealth's analysis follows:

In this case, the Trust is a Medicaid Qualifying Trust (MQT), since the Applicant is a Trust beneficiary and the Trustee has discretion to distribute the home or any sale proceeds to the Applicant and spouse. In determining whether or not a Trust is an MQT, the maximum amount which can be distributed assuming the full exercise of discretion by the trustees for the maximum amount is determinative. See 130 CMR 520.022(B)(2). Thus if there is a peppercorn of discretion, under any state of affairs, the Trust is countable. [citing Cohen.] In this case, for example, under the terms of the Trust, the Trustee, pursuant to beneficiary direction, has discretion to sell the home, (see 4.2) and under 4.1 could distribute the entire sale proceeds to the Applicant as

the 100% beneficiary during her lifetime. 4.1 has no limitation on the amount which the Trustee, pursuant to the direction of the beneficiary, could distribute to the Applicant. Accordingly, the entire Trust corpus could be distributed to the applicant under 4.1. Therefore, the entire Trust is a countable Medicaid Qualifying Trust. 130 CMR 520.022(B)(2).

MassHealth Memo., p. 3.

The appellant's attorney offered several arguments for why this position is unfounded. First, he argued a nominee trust is not a trust at all, but a principal (beneficiaries) – agent (trustees) relationship under Massachusetts common law. Massachusetts courts have long treated the beneficiaries as the true and absolute owners of trust-held real estate, and the trust document merely as documentation of the agent's powers in the absence of additional principal guidance. Therefore the Schedule of Beneficiaries identifies the actual ownership interest in the real property, and the case is more properly reviewed to determine if there were any impermissible transfers under 130 CMR 520.019. The appellant transferred her interest in the property to her children long before the lookback period, when she named her children as the sole beneficiaries of the Nominee Trust. The fact that the appellant's children gave her back a life tenancy means she can be, at most, deemed a joint-life tenant with her husband, and she has since transferred her lifetime interest to her husband. The appellant argues this final transaction is permissible under 130 CMR 520.019(D)(1). App. Memo., pp. 5-6. Therefore, if the appellant's spouse's life estate interest is countable, its valuation is less than \$20,000, which combined with the remaining \$2,367.82 in the bank, leaves the appellant's spouse well below the \$123,600 Community Spouse Resource Allowance. App. Memo., p. 7.

If the Nominee Trust were to be analyzed under the MassHealth trust rules, the appellant further argues it is not countable. The appellant points to the trust language and notes that the trustee is vested with **no** discretion whatsoever that is not first authorized by the beneficiaries. Therefore, neither the trustee nor the appellant and her spouse could effectuate a disbursement of principal out of the trust. Even if the Nominee Trust were terminated, the trustee is obligated to pay out to the beneficiaries according to their beneficial interest. The appellant's attorney objected to MassHealth's mischaracterization of the appellant's "Life Estate" interest as a 100% beneficiary during her lifetime. He argued that the Supreme Judicial Court has recognized the term Life Estate as having a specific legal meaning, even within MassHealth proceedings, that precludes the life tenant from receiving anything more than the portion of sales proceeds attributable to the value of their life estate. App. Mem., p. 8-9 (citing Daley v. EOHHS, 477 Mass. 188 (2017)).

The MassHealth representative was asked if he was able to determine whether MassHealth's legal memorandum attempted to claim that some lesser portion of the Nominee Trust's holdings were countable, or if MassHealth's sole position was that the entirety of the Nominee Trust's assets were countable. He confirmed that MassHealth's only argument is that the full 25% value of the property was countable.

Findings of Fact

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

1. The appellant is over the age of 65, and she entered a nursing facility on January 12, 2016. The application for long-term-care benefits was submitted on January 25, 2018, and the nursing facility is seeking benefits to start as of February 1, 2018.
2. Through a notice dated March 23, 2018, MassHealth denied the appellant's application for MassHealth long-term-care benefits because MassHealth determined that the appellant had \$559,000 in "Other" countable assets and a bank account with \$2,367.82, citing 130 CMR 520.003 and 520.004.
3. MassHealth's reason for denying the appellant's application was solely premised upon a legal memorandum sent to MassHealth's representative before March 23, 2018.
4. This memorandum is not labeled as protected by privilege or confidentiality reasons.
5. MassHealth refused to disclose this memorandum to the appellant, even with an appointment to review the appellant's case file under 130 CMR 610.050, based upon an unpublished and undisclosed MassHealth policy that legal explanations for why trusts are countable will not be provided prior to a fair hearing.
6. On February 17, 1993, the appellant funded a Nominee Trust with a 25% interest in a two-family house.
7. The terms of the trust as outlined above are incorporated herein as facts.
8. For all relevant times up to January 21, 2015, the appellant's children were the only beneficiaries of the Nominee Trust.
9. On January 21, 2015, the appellant's children added their mother and step-father as joint life tenant beneficiaries to the property within the Nominee Trust.
10. At hearing MassHealth's representative confirmed that the appropriate valuation of the Nominee Trust's assets was \$139,750, or one-quarter of the total assessed value of the two-family property. He further confirmed that MassHealth's sole claim with regard to countable assets is that the full asset amount is countable.

Analysis and Conclusions of Law

The appellant argues that MassHealth has failed to provide adequate notice in accordance with federal law because MassHealth's notice did not provide "[a] clear statement of the specific reasons supporting the intended action" and did not cite the "[t]he specific regulations that support... the

action.”⁶ 42 CFR § 431.210(b)-(c). This regulation is mirrored in MassHealth’s own definition of “Adequate Notice”:

(A) A notice concerning an intended appealable action must be timely as stated in 130 CMR 610.015, and adequate in that it must be in writing and contain:

- (1) a statement of the intended action;
- (2) the reasons for the intended action;
- (3) a citation to the regulations supporting such action;
- (4) an explanation of the right to request a fair hearing; and
- (5) the circumstances under which assistance is continued if a hearing is requested.

130 CMR 610.026(A).

In my view, these rules governing notice are broad and require only a statement of the intended action (that the applicant’s application for benefits is denied), the reason (the applicant has countable assets in excess of the asset limit), and the regulations that support this action. In this specific case, the appellant is correct that MassHealth notice partially runs afoul of the requirements. MassHealth’s notice only identifies the asset limit regulations to indicate the basis of its decision. No reference is made to 130 CMR 520.022, which was ultimately the legal basis relied upon by MassHealth.⁷

The appellant is also correct that MassHealth violated its obligation to engage in “discovery”:

The appellant and his or her appeal representative will have reasonable opportunity to examine the entire contents of the appellant’s case file, **as well as all documents and records to be used by the MassHealth agency or the Health Connector at the hearing.** An appointment must be scheduled in advance with the appropriate MassHealth Enrollment Center (MEC) for examination of the case file.

130 CMR 610.050(A) (emphasis added).

⁶ The appellant also claims that federal law requires at least 10-days advance notice before the date of action. App. Memo., p. 4 (citing 42 CFR § 431.211). However, this advance notice requirement is predicated upon the definition of “date of action” which is defined as “the intended date on which a termination, suspension, reduction, transfer or discharge becomes effective.” 42 CFR § 431.201. This makes sense as it is impossible for the agency to provide advance notice of its intent to deny an application, and advance notice is only needed for members already receiving benefits.

⁷ This particular noticing issue is already being challenged in a court of appropriate jurisdiction. See Maas v. Sudders, Sup. Ct. CA Nos. 18-129-D, 18-845-D (Wilkins, J. June 22, 2018). The justice there found MassHealth’s notices in trust cases to be in violation of federal law because they do not provide “clear statement of the specific reason” for the agency’s action as required by 42 CFR § 431.210. 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. Further, the insufficiency of the notice could not be “cured” by providing a full explanation at a later time, in part because providing clear and specific reasons in a notice reduces delays in processing the applicant’s case and checks the agency’s ability to act arbitrarily through ad hoc rationalizations. Slip op. at 5-12.

The legal memorandum supplied by MassHealth was the sole basis upon which the agency determined the Nominee Trust held countable assets. This memorandum is not protected by an attorney-client privilege or any other claim to confidentiality. The reason for refusing to disclose the memorandum was an internal policy that applicants may not receive the memorandum prior to a fair hearing, but a copy of this policy was not offered into the record. The facts in this case are not a scenario where MassHealth's legal department offered a tentative justification in a privileged communication with the expectation that a more fulsome explanation would be provided at hearing. Therefore, the memorandum was a document to be used by MassHealth at the hearing within the definition of 130 CMR 610.050(A), and there was no legal basis presented at the hearing for refusing the appellant access to the document as part of discovery.⁸

The appellant asks that their remedy be that MassHealth's memorandum be struck as the "document ... to be used by the MassHealth agency ... at the hearing" to which the appellant was denied access. Generally, any prejudice to the appellant may be alleviate by requiring either appropriate notice to be issued by the agency or to otherwise ensure that the appellant is afforded the opportunity to adequately respond to the agency's undisclosed reasoning.⁹ Such a procedural outcome would only create further delay in addressing the substantive question of whether the Nominee Trust holds countable assets. Therefore, MassHealth's memorandum is admitted into the record over the appellant's objections with the specific finding that the agency failed in its regulatory obligations to explain the basis of its action or allow an applicant to discover the basis upon which the agency's decision was made.

With regard to the merits of the case, the purpose of Medicaid is "to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves." Cohen v. Comm'r of the Div. of Med. Asst., 423 Mass. 399, 404 (1996) (quoting H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1, at 72 (1985)). To limit benefits only to those who truly do not have the resources to provide for their care, MassHealth requires an individual over the age of sixty-five to have less than \$2,000 in assets to qualify for benefits. 130 CMR 520.003. The applicant becomes eligible for LTC service "as of the date the applicant reduces his or her excess assets to the allowable asset limit without violating the transfer of resource provisions for nursing-facility residents" 130 CMR 520.004(A)(1)(A). An individual requesting long-term care benefits must not have given away assets within the previous five years in order to qualify, and assets held in certain trusts will also be counted as accessible by the appellant. See 130 CMR 520.019(B); 130 CMR 520.021 – 520.024.

Starting in 1986, the federal government started taking steps to prevent people with assets from creating trusts that allowed the grantor to be eligible for public benefits while still retaining the possibility of benefiting from those assets. See Cohen, 423 Mass. at 403. These rules have evolved

⁸ Jurisdiction in a fair hearing is tightly limited to appealable actions by the MassHealth agency. 130 CMR 610.032. Fair hearing decisions are also limited to the parties to the particular appeal. 130 CMR 610.085(A)(2). Even if a fair hearing decision finds that the agency has acted inappropriately, equitable remedies like injunctive relief are not available.

⁹ It is worth noting that the remedy in Maas was to require the agency to reissue adequate notices to the two named plaintiffs, and otherwise provide adequate notice going forward.

over the last 30 years, but the amendments to the federal statute in 1993 were made prospective only. See Cohen, 423 Mass. at 406-407. The relevant statute at play for the trust here is the federal statute which was passed in 1986, referred to as the Medicaid Qualifying Trust ("MQT") statute. Id. at 404-407; 42 USC § 1396a(k) (1986). The entirety of subsection (k) reads:

(k)(1) In the case of a Medicaid qualifying trust (described in paragraph (2)), **the amounts from the trust deemed available to a grantor, for purposes of subsection (a)(17), is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor.** For purposes of the previous section, the term 'grantor' means the individual referred to in paragraph (2).

(2) For purposes of this subsection, a 'medicaid qualifying trust' is a trust, or similar legal devise, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust **and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.**

(3) This subsection shall apply without regard to

(A) whether or not the Medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this title; or

(B) whether or not the discretion described in paragraph (2) is actually exercised.

(4) The State may waive the application of this subsection with respect to an individual where the State determines that such application would work an undue hardship.

Pub. Law 99-272, § 9506, 100 Stat. 210 (April 7, 1986) (emphasis added).

The MassHealth regulations governing trusts created before 1993 are as follows:

520.022: Trusts or Similar Legal Devices Created before August 11, 1993

* * *

(B) Medicaid Qualifying Trust.

(1) A Medicaid qualifying trust is a revocable or irrevocable trust or similar legal device, created or funded by the individual or spouse, other than by a will, under which

(a) the individual is a beneficiary of all or part of the discretionary or required payments or distributions from the trust; and

(b) **a trustee or trustees are permitted to exercise any discretion to make payments or distributions to the individual.**

(2) The maximum amount of payments or fair-market value of property that may be permitted under the terms of the trust to be distributed to the

individual assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the individual is countable in the determination of eligibility.

(3) The fair-market value of the home or former home of the nursing-facility resident in a Medicaid qualifying trust is a countable asset and is not subject to the exemptions described at 130 CMR 520.007(G)(2) or 520.007(G)(8).

130 CMR 520.022(B) (Feb. 28, 2014) (emphasis added).

The highlighted text above makes clear that a necessary condition of an MQT is that the trustee be vested with authority to determine payments in accordance with instructions outlined in the trust. The Nominee Trust affords the trustee virtually no discretion, and all distribution provisions are explicitly predicated upon authorization by the beneficiaries. For this reason, the Nominee Trust is not an MQT.

Because the Nominee Trust does not qualify as an MQT, the appellant is correct that the Nominee Trust is simply an agent-principal relationship. The Nominee Trust's holdings are legally owned by the beneficiaries according to their interests as defined in the Schedule of Beneficiaries.¹⁰ Therefore, prior to 2015 the appellant had no countable interest in the quarter-interest that the Nominee Trust held in her home. In 2015, the appellant acquired a life estate in this quarter-interest. A life estate is an asset distinct from the remainder interest in the real property; its existence does not make the remainder interest in the property countable for MassHealth purposes. See Daley v. EOHHS, 477 Mass. 188, 203-204 (2017). Therefore, the appellant is correct that the Nominee Trust's quarter-interest in the appellant and her spouse's community home is not countable as available in its entirety to the appellant, and this appeal is APPROVED.

The fact that the appellant transferred her beneficial interest in the real property to her husband within the look-back period should have no impact on her eligibility for benefits. "The MassHealth agency considers the following transfers permissible. Transfers of resources made for the sole benefit of ... the spouse of the nursing-facility resident or to another for the sole benefit of the spouse." 130 CMR 520.019(D). However, the appropriate course of a Medicaid application allows the agency first to deny an application for excess assets before it is expected to determine whether any disqualifying resource transfers occurred. See 130 CMR 520.004(A)(1). Future MassHealth determinations, however, must be in compliance with the outcome of this decision: the appellant's only countable interest in the property was a joint-life estate; she transferred her interest in this property to her community spouse.

¹⁰ I have heretofore universally accepted the argument that a nominee trust creates an agent-principal relationship rather than a true trust. See e.g. Appeal No. 1702593 (Oct. 27, 2017); Appeal No. 1714393 (Mar. 14, 2018). This does not mean that any trust labeled a nominee trust will necessarily be treated thus. Language in a purported nominee trust could create a more traditional trust relationship where it creates either donative intent (i.e. the trust property was truly given to the trust and not to the beneficiaries) or independent authority vested in a trustee.

Order for MassHealth

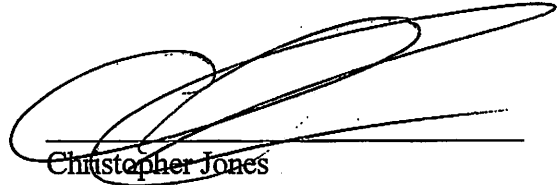
Continue processing the appellant's application in accordance with this decision.

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.

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.

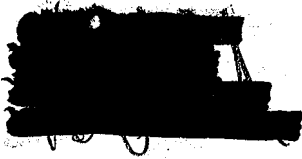


Christopher Jones
Hearing Officer
Board of Hearings

cc: MassHealth Rep: Sylvia Tiar, Tewksbury MEC, 367 East Street, Tewksbury, MA, 01876
MassHealth Rep: Chelsea MEC
Appellant's Atty: Patrick G. Curley, Esq. One Common St. Wakefield, MA 01880

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Numbers:	1823773 & 1824521
Decision Date:	JUN 25 2019	Hearing Date:	01/09/2019
Hearing Officer:	Scott Bernard	Record Open to:	01/23/2019

Appearance for Appellant:
Todd Lutsky, Esq.

Appearance for MassHealth:
Yisell Medina, Taunton 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:	LTC Assets Trust
Decision Date:	JUN 25 2019	Hearing Date:	01/09/2019
MassHealth's Rep.:	Yisell Medina	Appellant's Rep.:	Todd Lutsky, Esq.
Hearing Location:	Taunton 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 October 25, 2018 (LZH¹ Denial Notice), MassHealth denied LZH's application for Long Term Care (LTC) benefits because MassHealth determined that he had countable assets exceeding the countable asset limit. (See 130 CMR 520.003, 520.004, Exhibit 1). Through a notice dated October 25, 2018 (AH Denial Notice), MassHealth denied AH's application for LTC benefits because she had countable assets exceeding the countable asset limit. (See Ex. 8; 130 CMR 520.003; 520.004).

In separate notices dated October 25, 2018 (Trust Notices), MassHealth notified LZH and AH that the assets of a trust were countable because it was revocable.² (See 130 CMR 520.023(B); 520.522(A); Ex. 2; Ex. 9). On November 20, 2018, the appellants submitted timely requests for a fair hearing. (Ex. 3; Ex. 4; Ex. 10; Ex. 11). The appeals have been consolidated in accordance with 130 CMR 610.073.³

Denial of assistance is valid grounds for appeal. (See 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellants' applications for MassHealth LTC benefits because it determined that a nominee trust was revocable and the assets contained therein countable.

¹ The appellants LZH and AH are spouses and will be referred to by their initials for reasons of clarity and confidentiality.

² The Trust Notices list LZH as the applicant but are addressed separately to LZH and AH. (See Ex. 2; Ex. 9).

³ See below.

Issue

Whether the nominee was revocable and the assets contained therein countable; and whether the appellants total countable assets exceeded the asset limit for LTC benefits.

Summary of Evidence

The appellants LZH and AH, spouses who are both over the age of 65, submitted applications for LTC benefits on September 10, 2018, requesting a coverage start date of June 1, 2018. (Ex. 2; Ex. 9; Ex. 17). MassHealth issued notices denying the appellants' applications on October 25, 2018 because they were each \$124,619.22 over the countable asset limit. (Ex. 1; Ex. 8). The appellants' assets consisted of bank accounts totaling \$8,218.44 and two trusts with a total value of \$245,020.⁴ (Ex. 1; Ex. 8). The appellant's representative submitted bank statements for the two accounts indicating that one carried a balance of \$1,301.31, and the other carried a balance of \$0.22 as of November 1, 2018.⁵ (Ex. 21).

The first trust was the H.⁶ Family Irrevocable (HFI) Trust, which the appellants established on August 11, 2011 with LFL named as the trustee. (Ex. 18A, pp. 1, 45-46). The relevant sections of the HFI Trust are as follows:

...

4. Irrevocability.

The Donors expressly waive any and all right which they 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.

5. Payments During Life of Either Donor

...

.02 Out of each share, the Trustee shall pay to the applicable Donor the net income, if any at least quarter annually, outright and free of trust.

.03 The Trustee shall have no power to make any distributions of principal to or for the benefit of the Donors. The Donors irrevocably and unequivocally waive, renounce, and disclaim any and all right, title or interest which the Donors may have now or in the future in the principal of the trust.

⁴ MassHealth assessed half of the total of each asset to the individual spouses. (Ex. 1; Ex. 8).

⁵ The appellant's representative also stated that MassHealth misconstrued who owned which account. As the value of the bank accounts is less than \$2,000 in total, and this decision does not turn on the value of the accounts, this will not be explored further in this decision.

⁶ Where, as here, the name of the appellants or others is used, an initial will be substituted for reasons of privacy.

.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 the class consisting of the issue of the Donors then living from time to time.

.05 Notwithstanding the foregoing, each of the Donors reserves a limited or special power of appointment, exercisable during life 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 appointments, conditions or limitations to charitable organizations other than governmental entities...

12. Exercise of Discretion and Powers by Trustee

...

.03. 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 Donor to be ineligible for any health, medical, social, residential and personal benefits and services which may be available from any governmental source nor shall be exercised to fulfill a legal obligation of the Donor to the Donor's children, or otherwise...

19. Vacancies and Succession of Trustee

...

.07 Each Donor reserves the right to remove and replace any Trustee with or without cause; provided, however, for such time as both Donors are living and have legal capacity, such right shall be exercised only by mutual agreement of the Donors. In no event may either Donor serve as Trustee hereunder...

24. Trustee's powers

[The Trustee shall have the power]

.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 the Donor, any beneficiary or any other person for the benefit of any beneficiary and to pay the premiums and costs therefore 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. (Ex. 18A).

On September 5, 2014, MAL, the appellants' daughter, became the trustee of the HFI Trust. (Ex. 18B). According to an affidavit dated October 19, 2018, MAL swore under the pains and penalties of perjury that the HFI Trust did not contain, nor had ever contained any financial accounts. (Id.). The Schedule of Beneficiaries for the HFI Trust listed the appellant's as income beneficiaries and the issue of the

appellants, MAL, and LH (the appellants' son) as the principal beneficiaries. (Id.).

The second trust was the Nominee Realty (NR) Trust⁷, which LFL established on August 11, 2011 with himself as trustee. (Ex. 19A). The NR Trust stated the following:

...

3. Beneficiaries

3.1 The term "beneficiaries" shall mean the persons and entities listed as beneficiaries in the Schedule of Beneficiaries and in such revised Schedule of Beneficiaries, from time to time hereafter executed and delivered as provided above and the respective interests of the Beneficiaries shall be as therein stated and such Schedule of Beneficiaries shall always be considered a part hereof.

3.2 Decisions made and actions taken hereunder, including the execution of documents, shall be made or taken, as the case may be as directed by all of the Beneficiaries.

4. Powers of Trustees

4.1 The Trustee(s) shall hold title to the principal of this Trust and receive the income therefrom as agent and custodian for the benefit of the Beneficiaries. This Trust is established for the convenience of the Beneficiaries and is not intended to create a trust relationship hereby. In the event a Beneficiary is a Trust, the Trustee(s) hereunder shall hold title to the principal of this Trust for the benefit of and as agent for such Beneficiary and the disposition of income and principal shall be in accordance with the terms of said Trust in proportion to the respective interests of said Trust in this Nominee Trust.

4.2 Except as hereinafter provided in case of the termination of this Trust, the Trustee(s) shall have no power to deal in or with the Trust Estate except as directed by all of the Beneficiaries...

5. Termination

5.1 This Trust may be terminated at any time by notice in writing from all of the Beneficiaries, provided that such termination shall be effective only when a certificate thereof signed by the Trustee(s), shall be recorded with the Registry of Deeds. Notwithstanding any other provision of this Agreement and consistent with the intention of the undersigned that this Agreement not violate any applicable Rule Against Perpetuities, this Trust shall terminate in any event TWENTY (20) years from the date of the death of the original Trustee named in this instrument.

5.2 In the case of any termination of the Trust, the Trustee(s) shall transfer and convey

⁷ The actual title of the NR Trust contains the address of the real property it holds, which, for reasons of privacy, has been excluded.

the specific assets constituting the Trust Estate, subject to any leases, mortgages, contracts or other encumbrances on the Trust Estate, to the to the Beneficiaries as tenants as provided in the Schedule of Beneficiaries, otherwise as tenants in common, in proportion to their respective interests hereunder, provided, however, the Trustee(s) may retain such portion thereof as is in its opinion necessary to discharge any expense or liability, determined or contingent of the Trust.

6. Amendments

The agency relationship created hereunder may be amended from time to time by an instrument in writing signed by all of the Beneficiaries and delivered to the Trustee(s)...but no amendment shall change any beneficiary's interest in this trust... (Ex. 19A).

On September 5, 2014, MAL became the trustee of the NR Trust. (Ex. 19B). On October 19, 2018, MAL signed a sworn affidavit stating that the sole asset in the NR Trust was a piece of property located in Pembroke⁸ and that the NR Trust does not contain nor had ever contained any financial accounts. (Id.). Two schedules of beneficiaries for the NR Trust, both dated August 11, 2011, were also entered into the record. (Ex. 19B). The initial schedule of beneficiaries (entitled "Schedule of Beneficiaries") divided the beneficial interest 50% each to AH and LZH. (Id.). The second (entitled "First Revised Schedule of Beneficiaries") gave 100% ownership interest to the HFI Trust. (Id.).

The MassHealth representative stated that MassHealth conceded that the HFI Trust was not countable. (Ex. 18A). The MassHealth representative contended, however, that the NR Trust was revocable under paragraphs 5.1 and 5.2 concerning termination, and therefore the NR Trust was countable in its entirety.

The appellants' representative stated that the NR Trust was a nominee realty trust. It is not a true trust. The purpose of such a nominee trust is to hold title to property with the trustee as the agent of the beneficiaries. In this case, the property was the appellants' former home, and the sole beneficiary was the HFI Trust. The appellants' representative stated that with a nominee trust the beneficiary has all the authority to deal with the trust property and the trustee has no authority except as directed by the beneficiary, citing paragraph 4.2. The appellants' representative stated that even though the NR Trust is silent as to its revocability, this is not the same as allowing the donor the power to revoke the trust. The appellant's representative stated that at the time the NR Trust was drafted in 2011, the law governing trusts in Massachusetts was that if the trust instrument was silent as to whether the trust was revocable, the trust was irrevocable, which is the opposite of the law as it stands today.⁹ The appellants' representative took pains to emphasize that the NR Trust did not give the beneficiary a right to revocation but rather termination. He stated that in a revocation, the trust corpus would return to the donor. Since the NR Trust contained a power of termination, the trust property, as stated in the NR Trust, would go to the beneficiary if it was terminated. Since the only beneficiary of the NR Trust is the HFI Trust, the NR Trust's property would not revert to the donors but would become an asset of the

⁸ As stated above, the street address of that property is in the actual title of the NR Trust.

⁹ The appellant's representative stated that G.L. c. 203E, the Uniform Trust Code, did not come into effect until 2012.

HFI Trust. The appellants' representative stated that the HFI Trust was irrevocable, and that the appellant's were only the income beneficiaries of that trust. Therefore, the appellant's could not reach the corpus of the NR Trust under any circumstances. The appellants' representative cited to several Board of Hearings decisions in support of his conclusion.

Findings of Fact

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

1. The appellants LZII and AII, spouses who are both over the age of 65, submitted applications for LTC benefits on September 10, 2018, requesting a coverage start date of June 1, 2018. (Ex. 2; Ex. 9; Ex. 17).
2. MassHealth issued notices denying the appellants' applications on October 25, 2018 because they were each \$124,619.22 over the countable asset limit. (Ex. 1; Ex. 8).
3. The appellant's assets consisted of bank accounts totaling \$8,218.44 and two trusts with a value totaling \$245,020. (Ex. 1; Ex. 8).
4. As of November 1, 2018, the value of the bank accounts had been reduced to \$1,301.53 total. (Ex. 21).
5. The first trust was the HFI Trust, established on August 11, 2011, the relevant portions of which state the following:

...

4. Irrevocability.

The Donors expressly waive any and all right which they 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.

5. Payments During Life of Either Donor

...

.02 Out of each share, the Trustee shall pay to the applicable Donor the net income, if any at least quarter annually, outright and free of trust.

.03 The Trustee shall have no power to make any distributions of principal to or for the benefit of the Donors. The Donors irrevocably and unequivocally waive, renounce, and disclaim any and all right, title or interest which the Donors may have now or in the future in the principal of the trust.

.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

the class consisting of the issue of the Donors then living from time to time.

.05 Notwithstanding the foregoing, each of the Donors reserves a limited or special power of appointment, exercisable during life 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 appointments, conditions or limitations to charitable organizations other than governmental entities...

12. Exercise of Discretion and Powers by Trustee

...

.03. 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 Donor to be ineligible for any health, medical, social, residential and personal benefits and services which may be available from any governmental source nor shall be exercised to fulfill a legal obligation of the Donor to the Donor's children, or otherwise...

19. Vacancies and Succession of Trustee

...

.07 Each Donor reserves the right to remove and replace any Trustee with or without cause; provided, however, for such time as both Donors are living and have legal capacity, such right shall be exercised only by mutual agreement of the Donors. In no event may either Donor serve as Trustee hereunder...

24. Trustee's powers

[The Trustee shall have the power]

.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 the Donor, any beneficiary or any other person for the benefit of any beneficiary and to pay the premiums and costs therefore 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. (Ex. 18A).

6. MAL is the current trustee of the HFI Trust. (Ex. 18B).
7. The appellants are the income beneficiaries of the HFI Trust, and their issue, MAL, and LH are the principal beneficiaries. (Id.).

8. The second trust was the NR Trust, which was also established on August 11, 2011, and which stated the following:

...

3. Beneficiaries

3.1 The term "beneficiaries" shall mean the persons and entities listed as beneficiaries in the Schedule of Beneficiaries and in such revised Schedule of Beneficiaries, from time to time hereafter executed and delivered as provided above and the respective interests of the Beneficiaries shall be as therein stated and such Schedule of Beneficiaries shall always be considered a part hereof.

3.2 Decisions made and actions taken hereunder, including the execution of documents, shall be made or taken, as the case may be as directed by all of the Beneficiaries.

4. Powers of Trustees

4.1 The Trustee(s) shall hold title to the principal of this Trust and receive the income therefrom as agent and custodian for the benefit of the Beneficiaries. This Trust is established for the convenience of the Beneficiaries and is not intended to create a trust relationship hereby. In the event a Beneficiary is a Trust, the Trustee(s) hereunder shall hold title to the principal of this Trust for the benefit of and as agent for such Beneficiary and the disposition of income and principal shall be in accordance with the terms of said Trust in proportion to the respective interests of said Trust in this Nominee Trust.

4.2 Except as hereinafter provided in case of the termination of this Trust, the Trustee(s) shall have no power to deal in or with the Trust Estate except as directed by all of the Beneficiaries...

5. Termination

5.1 This Trust may be terminated at any time by notice in writing from all of the Beneficiaries, provided that such termination shall be effective only when a certificate thereof signed by the Trustee(s), shall be recorded with the Registry of Deeds. Notwithstanding any other provision of this Agreement and consistent with the intention of the undersigned that this Agreement not violate any applicable Rule Against Perpetuities, this Trust shall terminate in any event TWENTY (20) years from the date of the death of the original Trustee named in this instrument.

5.2 In the case of any termination of the Trust, the Trustee(s) shall transfer and convey the specific assets constituting the Trust Estate, subject to any leases, mortgages, contracts or other encumbrances on the Trust Estate, to the Beneficiaries as tenants as provided in the Schedule of Beneficiaries, otherwise

as tenants in common, in proportion to their respective interests hereunder, provided, however, the Trustee(s) may retain such portion thereof as is in its opinion necessary to discharge any expense or liability, determined or contingent of the Trust.

6. Amendments

The agency relationship created hereunder may be amended from time to time by an instrument in writing signed by all of the Beneficiaries and delivered to the Trustee(s)...but no amendment shall change any beneficiary's interest in this trust... (Ex. 19A).

9. MAL is the current trustee of the NR Trust. (Ex. 19B).
10. The sole asset in the NR Trust is a piece of property located in Pembroke. (Ex. 19; Ex. 19B).
11. MassHealth conceded that the HFI Trust was not countable. (Testimony of the MassHealth representative).
12. The HFI Trust is the sole beneficiary of the NR Trust. (Ex. 19; Ex. 19B).

Analysis and Conclusions of Law

The Board of Hearings may respond to multiple hearing requests by conducting one hearing when the issues of fact are common to all the appeals. (130 CMR 610.073(A)(2)). The appellants submitted separate hearing requests concerning two MassHealth denial notices. The MassHealth denial notices and the appeals concerned the value of assets that MassHealth asserts are held in common. Based on the commonality of the issues presented in the two notices, the two separate appeals have been consolidated for the purposes of this decision.

When an individual applies for MassHealth coverage for individuals over the age of 65, MassHealth must consider whether the applicant is financially eligible for MassHealth. (130 CMR 520.001). One component of financial eligibility is the level of an applicant's countable assets. (130 CMR 520.002; 130 CMR 520.003). In order to qualify for MassHealth Standard as a nursing facility resident, the total value of countable assets owned by or available to an individual may not exceed \$2,000.00. (130 CMR 520.003(A)(1); 130 CMR 520.516(A)). Countable assets are all assets that must be included in the determination of eligibility. (130 CMR 520.007). Countable assets include the value of the principal and income of a revocable or irrevocable trust, which are counted in accordance with 130 CMR 520.021 through 520.024. (130 CMR 520.007(I)).

The General Trust Rules at 130 CMR 520.024(A) state the following concerning Irrevocable Trusts, in pertinent part:

- (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.

...

The MassHealth regulation concerning trusts created on or after August 11, 1993¹⁰ contains the following relevant provisions:

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.

(1) Look-Back Period.

(a) For transfers made before February 8, 2006 [Not applicable]...

(b) The look-back period is 60 months

(i) 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;

(ii) 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

(iii) 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

¹⁰ The regulations regarding trusts created before April 7, 1986 and August 11, 1993 (130 CMR 520.022) do not apply to this case because the trusts at issue in this appeal were created on August 11, 2011. (See Ex. 18; Ex. 18A; Ex. 18B; Ex. 19; Ex. 19A; Ex. 19B).

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 520.007(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 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)...

A preponderance of the evidence supports the contention that the NR Trust is not revocable. In arguing that the NR Trust was revocable (and thereby countable) MassHealth relied upon paragraphs 5.1 and 5.2. The beneficiaries have the right to terminate the trust by notice in writing to the trustee. The appellants' representative, however, rightfully pointed out that this power of termination on behalf of the beneficiary is not the same as a power of revocation. A power of revocation is a power of the settlor of the trust to nullify the trust. The power of termination, as described in the NR Trust, is the power of the beneficiary to end the trust. The result of a revocation would be that the asset of the NR Trust would return to the settlor. The result of a termination, as described in the NR Trust, would be delivery of the NR Trust property to the sole beneficiary, which is the HFI Trust. A termination of the NR Trust therefore does not necessarily result in the appellants having access to the assets of the NR Trust.

A preponderance of the evidence also supports the contention that even if the NR Trust is terminated, the appellant would not be able to access the trust assets through the HFI Trust. The appellants' representative argued, and MassHealth conceded that the HFI Trust is irrevocable and non-countable. The language of the HFI Trust bears this out. Article 4 of the HFI Trust states that the donors (LZH

and AH) expressly waive any and all right that they may have by operation of law or otherwise to revoke, alter, amend or otherwise change the trust or any provision thereof. Article 5 again states that while the trustee shall pay the appellants net income, the trustee is explicitly forbidden to make any distributions of principal to the appellants. The HFI Trust does reserve to the appellants a limited power of appointment to appoint the remaining principal and undistributed income to charitable institutions, but this does not describe a circumstance under which the appellants could access the trust corpus. The HFI Trust is irrevocable and non-countable. The NR Trust is also irrevocable, albeit terminable. However, if the NR Trust is terminated, the corpus of that trust becomes the property of the HFI Trust, which, again, is non-countable.

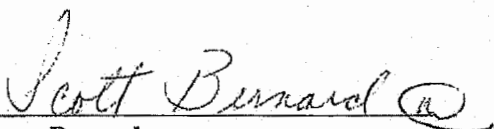
Since the property held in trust is non-countable, and the total of the appellants' other assets is less than \$2,000, the appeal is APPROVED.

Order for MassHealth

Rescind the eligibility notices dated October 25, 2018, and proceed to determine eligibility for LTC benefits.

Implementation of this Decision

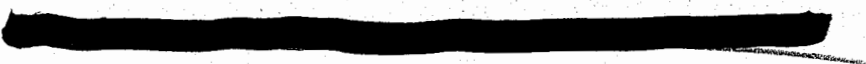
If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.


Scott Bernard
Hearing Officer
Board of Hearings

cc:

Justine Ferreira, Taunton MassHealth Enrollment Center, 21 Spring St., Ste. 4, Taunton, MA, 02780

Todd Lutsky, Cushing & Dolan, PC, 375 Totten Pond Road Suite 200, Waltham, Massachusetts 02451

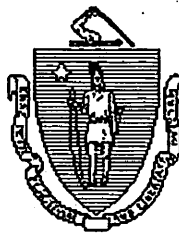


Office of Medicaid BOARD OF HEARINGS

Appeal Decision:	Approved	Appeal Number:	1905492
Decision Date:	6/4/19	Hearing Date:	05/14/2019
Hearing Officer:	Patricia Mullen		

Appearances for Appellant:

Appearance for MassHealth:
Gessica Brunot, 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:	Trust assets
Decision Date:	6/4/19	Hearing Date:	05/14/2019
MassHealth's Rep.:	Gessica Brunot, Chelsea MEC	Appellant's Reps.:	
Hearing Location:	Taunton 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 March 5, 2019, MassHealth denied the appellant's application for MassHealth Standard benefits for long term care residents because MassHealth determined that the appellant had assets in a countable trust which exceed the MassHealth limit. (see 130 CMR 520.023 and Exhibit 1). MassHealth determined specifically that 25% of a nominee trust was countable because there are circumstances under which the trust principal can be paid to the appellant under sections 3.3, 4.1, 5.1, and 5.2 and the First Amended Schedule of Beneficiaries. (Exhibit 5, p. 9). The appellant filed this appeal in a timely manner on March 18, 2019. (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 Standard for long term care residents.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.023, in determining

that assets held in a nominee trust are countable to the appellant.

Summary of Evidence

The appellant was represented at the hearing by his attorney, his Power of Attorney (POA) who is also his son, his daughter, and the business office manager from his skilled nursing facility (SNF). MassHealth was represented telephonically by a worker from the MassHealth Enrollment Center (MEC) in Chelsea. The MassHealth representative stated that the appellant is a single individual and submitted a MassHealth application on January 10, 2019 seeking a December 24, 2018 MassHealth start date. (Exhibit 5, p. 4). The appellant was admitted to the SNF from the hospital on November 23, 2018. (Exhibit 5, p. 4). The MassHealth representative stated that MassHealth determined that The Family Nominee Trust¹ (hereinafter “the nominee trust”) was countable to the appellant.

The nominee trust was established on July 1, 1997 and on that same day, the appellant transferred the remainder interest of his primary residence into the nominee trust, after retaining a life estate interest for himself. (Exhibit 5, pp. 15, 18, testimony). The real estate property has a tax assessed value of \$240,000.00. (Exhibit 5, p. 19). The nominee trust and deed were recorded with the Registry of Deeds on September 18, 1997. (Exhibit 5, p. 10). The appellant is the sole trustee of the nominee trust and the original beneficiaries were his 4 children. (Exhibit 5, p. 15; Exhibit 7). After the death of one of the appellant’s children, the Schedule of Beneficial Interests was amended on November 21, 2007, listing the appellant’s 3 children, then living, as beneficiaries with each getting a 33.33% beneficial interest of the assets held by the nominee trust. (Exhibit 7).

The declaration of the nominee trust states that trust property “shall be held in trust, for the sole benefit of the individuals or entities listed in the Schedule of Beneficiaries in the proportions stated in said Schedule which Schedule has this day been executed by the Beneficiaries and filed with the Trustees...” (Exhibit 5, p. 10).

Section 3 of the nominee trust is entitled “Beneficiaries”. (Exhibit 5, p. 11). Section 3 states:

3.1 The term “Beneficiaries” shall mean the persons and entities listed as Beneficiaries in the Schedule of Beneficiaries and in such revised Schedule of Beneficiaries, from time to time hereafter executed and delivered as provided above and the respective interests of the beneficiaries² shall be as therein stated.

3.2 Decisions made and actions taken hereunder (including without limitation, amendment and termination of this Trust; appointment and removal of Trustees; directions and notices to Trustees; and execution of documents) shall be made or taken, as the case may be, by majority vote, in writing, of the beneficiaries.

¹ The title of the nominee trust contains the appellant’s family name which is left out of this decision for privacy and confidentiality purposes.

² The nominee trust terms are recorded verbatim here and any inconsistencies in grammar or capitalizations were at the hand of the drafter of the nominee trust. (Exhibit 5).

3.3 Any trustee may without impropriety become a Beneficiary hereunder and exercise all rights of a beneficiary with the same effect as though he or she or it were not a Trustee. The parties hereunder recognize that if a sole Trustee and a sole Beneficiary are one and the same person, legal and equitable title hereunder shall merge as a matter of law.

(Exhibit 5, p. 11).

Section 4 of the nominee trust is entitled "Powers of Trustees". (Exhibit 5, p. 12). Section 4 states in part:

4.1 The Trustees shall hold the principal of this Trust and receive the income therefrom for the benefit of all of the Beneficiaries, and shall pay over the principal and income pursuant to the direction of the majority of the Beneficiaries and without such direction shall pay the income to the Beneficiaries in proportion to their respective interests.

4.2 Except as hereinafter provided in case of the termination of this Trust, the Trustees shall have no power to deal in or with the Trust Estate except as directed by the majority of the Beneficiaries. When, as, if and to the extent specifically directed by the majority of the Beneficiaries, the Trustees shall have the following powers:

4.2.1 to buy, sell, convey, assign, mortgage or otherwise dispose of all or any part of the Trust Estate and as landlord or tenant execute and deliver leases and subleases;

4.2.2 to execute and deliver notes for borrowing for the majority of the Beneficiaries;

4.2.3 to grant easements or acquire rights of easements and enter into agreements and arrangements with respect to the Trust Estate;

4.2.4 to endorse and deposit checks in an account for the benefit of the Beneficiaries;

4.2.5 but the Trustees shall have NO AUTHORITY TO MAINTAIN BANK ACCOUNTS IN THE NAME OF THE TRUST OR TRUSTEES but the Beneficiaries may maintain bank accounts in the name of the Beneficiaries. In the event of a violation of this subparagraph, the Trustees shall indemnify and save harmless the Beneficiaries from any liability resulting therefrom, including taxes and accounting expenses.

(Exhibit 5, p. 12; emphasis in the original document).

Section 5 of the nominee trust is entitled "Termination". (Exhibit 5, p. 13). Section 5 states:

5.1 This Trust may be terminated at any time by notice in writing from the majority of the beneficiaries, provided that such termination shall be effective only when a certificate thereof signed by the Trustees, shall be recorded with the Registry of Deeds. Notwithstanding any other provision of this undersigned that this Trust, and consistent with the intention of the

undersigned that this Trust cannot violate the Rule Against Perpetuities, this Trust shall terminate in any event TWENTY (20) years from the date of the death of the last surviving Trustee of the original Trustees named in this instrument.

5.2 In the case of any termination of the Trust, the Trustees shall transfer and convey the specific assets constituting the Trust Estate, subject to any leases, mortgages, contracts, or other encumbrances on the Trust Estate, to the Beneficiaries as tenants in common in proportion to their respective interests hereunder, or as otherwise directed by the majority of the Beneficiaries, provided, however the Trustees may retain such portion thereof as in their opinion necessary to discharge any expense or liability, determined or contingent, of the Trust.

(Exhibit 5, p. 13).

Section 6.1 of the nominee trust states:

This Declaration of Trust may be amended from time to time by an instrument in writing signed by the majority of the Beneficiaries and delivered to the Trustees, provided in each case that the amendment shall not become effective until the instrument of amendment or a certificate setting forth the terms of such amendment, signed by the Trustees, is recorded with the Registry of Deeds.

(Exhibit 5, p. 13).

The MassHealth representative stated that the MassHealth legal department determined that sections 3.3, 4.1, 5.1, and 5.2 of the nominee trust create circumstances whereby the appellant could access the trust assets. The MassHealth representative noted that MassHealth legal determined that 25% of the total nominee trust assets of \$240,000.00 were countable to the appellant. The MassHealth representative stated that MassHealth counted total nominee trust assets of \$60,000.00 (\$240,000/4) which exceed the MassHealth limit of \$2,000.00.

The appellant's attorney noted that MassHealth has not argued what specifically in the listed nominee trust provisions creates a circumstance whereby trust assets could be made available to the appellant. The appellant's attorney stated that he can only guess on what MassHealth is arguing here. The hearing officer asked the appellant's attorney to explain why section 3.3 of the nominee trust would not allow the appellant, as trustee, to make himself a trust beneficiary. The appellant's attorney stated that the language in section 3.3 of the nominee trust is standard language in every nominee trust and the provision is there to acknowledge that it is acceptable for a trustee to also be a beneficiary. The appellant's attorney explained that in the event a trustee of the nominee trust was to be named a beneficiary, he or she could continue to act in his or her capacity as trustee. The appellant's attorney noted that the fact that it is not improper for an individual to be both trustee and beneficiary of the nominee trust does not mean the appellant can make himself a beneficiary of this trust. The appellant's attorney stated that the nominee trust is a title holding vehicle and the beneficiaries, the appellant's 3 children, are the true owners of the property. The appellant's attorney noted further that the nominee trust holds a remainder interest in the real estate property,

while the appellant holds a life estate interest. The appellant's attorney submitted a legal memorandum, an article from Massachusetts Law Quarterly, and a directive from the Massachusetts Department of Revenue with regard to nominee trusts. (Exhibits 8, 9, 10). The appellant's attorney also submitted Superior Court decisions with regard to MassHealth trust notices. (Exhibits 11, 12).

In the legal memorandum, the appellant's attorney wrote that a nominee trust is an entity created for the purpose of holding legal title to property and trustees of a nominee trust have only perfunctory duties and no power to act with respect to the trust property, unless directed by the beneficiaries. (Exhibit 8, p. 2). The appellant's attorney noted that Massachusetts case law consistently treats nominee trusts as mere agency relationships and trustees of nominee trusts are seen as agents rather than trustees. (Exhibit 8, pp. 2-3; Roberts v Roberts, 410 Mass. 685 (1995); Apahouser Lock & Sec. Corp v. Carvelli, Mass. App. Ct. 385 (1988)). The appellant's attorney argued that the trustee of the nominee trust is actually an agent and does not have independent authority or discretion to act in any manner with regard to trust property. (Exhibit 8, p. 5). The appellant's attorney noted that the beneficiaries are the owners of the property held by nominee trust and only a beneficiary can modify or transfer his/her/it ownership interest, not the trustee. (Exhibit 8, p. 5).

The appellant's attorney argued further that even if the nominee trust in this appeal were considered to be a true trust rather than agency relationship, neither the trustee nor the appellant, as grantor, has any power to take the vested ownership interests away from the beneficiaries. (Exhibit 8, p. 10). The appellant's attorney cited to Daley v. Secretary of the Executive Office of Health and Human Services, 477 Mass. 188 (2017) in which the SJC stated "[b]y declaring the equity in a home owned by an irrevocable trust to be actually available to an applicant where the trustee has no power to sell the home and distribute the proceeds to the applicant under any circumstance, Massachusetts is effectively 'conjuring [a] fictional' resource by 'imputing financial support' from a person who has no authority to furnish it." (Exhibit 8, p. 10; Daley at 202-203). The appellant's attorney noted that because the trustee of the nominee trust has no power to sell the appellant's former residence and distribute proceeds to the appellant under any circumstance, MassHealth is imputing financial support from a person who has no authority to furnish it. The appellant's attorney argued that there are no circumstances set forth in the terms of the nominee trust that would allow for trust assets to be available to the appellant under any circumstances.

The appellant's attorney stated further that the appellant's daughter and son/POA have lived with him in his former primary residence for 13 and 10 years respectively. The appellant's attorney argued that in the event the nominee trust is deemed countable by hearing decision, the appellant's daughter would qualify as a caretaker child and his son is disabled, allowing for a permissible transfer of the former primary residence to them. (Exhibits 13, 14).

Findings of Fact

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

1. The appellant is a single individual and submitted a MassHealth application on January 10, 2019 seeking a December 24, 2018 MassHealth start date.
2. The appellant was admitted to the SNF from the hospital on November 23, 2018.
3. The nominee trust was established on July 1, 1997 and on that same day, the appellant transferred the remainder interest of his primary residence into the nominee trust, after retaining a life estate interest for himself.
4. The real estate property has a tax assessed value of \$240,000.00.
5. The nominee trust and deed were recorded with the Registry of Deeds on September 18, 1997.
6. The appellant is the sole trustee of the nominee trust and the original beneficiaries were his 4 children; after the death of one of the appellant's children, the Schedule of Beneficial Interests was amended on November 21, 2007, listing the appellant's 3 children as beneficiaries with each getting a 33.33% beneficial interest of the assets held by the nominee trust.
7. MassHealth determined that 25% of the total nominee trust assets of \$240,000.00 were countable to the appellant.
8. MassHealth determined that sections 3.3, 4.1, 5.1, and 5.2 of the nominee trust created circumstances whereby the appellant could access the trust assets

Analysis and Conclusions of Law

The total value of assets owned by an institutionalized individual must not exceed \$2,000.00. (130 CMR 520.016(A)).

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. (130 CMR 520.007(I)).

Treatment of Trusts

130 CMR 520.021 through 520.024 explains how to treat the principal of and payments from a revocable or irrevocable trust established by the individual or by the spouse. 130 CMR 520.024(A) also includes trusts established by other than the individual or spouse and trusts whether or not established by will. In the event that a portion of 130 CMR 520.021 through 520.024 conflicts with federal law, the federal law supersedes. (130 CMR 520.021).

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. 130 CMR 520.023.

The amount of an irrevocable trust countable to an applicant is determined 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 520.007(G)(8).

130 CMR 520.023(C)(1).

MassHealth argues that sections 3.3, 4.1, 5.1, 5.2, and the First Amended Schedule of Beneficial Interests of the nominee trust create a circumstance under which 25% of the nominee trust principal could be paid to and/or used for the appellant's benefit. The appellant's attorney is correct in his assertion that MassHealth has provided no argument as to what specifically in these nominee trust provisions make 25% of the nominee trust assets countable to the appellant.

The language in section 3.3 of the nominee trust pertains to a situation where the majority of beneficiaries might vote to make the trustee a beneficiary of the trust and what that action would mean with regard to legal and equitable title of the trust property. Section 3.3 of the nominee trust does not give a trustee discretion to make him or herself or any other individual a beneficiary of the trust.

Section 4.1 of the nominee trust states that the trustee shall pay over principal and income pursuant to the direction of the majority of the beneficiaries. The appellant is not a beneficiary of the nominee trust and this provision does not create a circumstance under which the nominee trust principal could be paid to him or on his behalf.

Sections 5.1 and 5.2 of the nominee trust set forth the requirements for termination of the nominee trust. Under these terms, the termination must be in writing from the majority of beneficiaries and the assets are to be distributed to the beneficiaries as tenants in common in proportion to their respective interests. The appellant is not a beneficiary of the nominee trust and sections 5.1 and 5.2 do not create a circumstance making nominee trust assets available to the appellant.

Without the benefit of any clear argument from MassHealth, I can only assume that MassHealth determined that the appellant, as trustee, could make himself a beneficiary under section 3.3 of the nominee trust and thus enjoy all the beneficial interests set forth in sections 4.1, 5.1, and 5.2 of the nominee trust. Further, if the appellant made himself a beneficiary, it would be in proportion to the 3 beneficiaries already listed in the Schedule of Beneficial Interests, thus giving him a 25% interest.

As noted above, section 3.3 does not give the trustee of the nominee trust discretion or power to name himself a beneficiary of the nominee trust. A thorough reading of the nominee trust shows that only the beneficiaries have the discretion and authority to act with regard to the nominee trust assets. The trustee has "no power to deal in or with the Trust Estate except as directed by the majority of the Beneficiaries." (Exhibit 5, p. 12). The appellant, as trustee and/or grantor, has no authority to name himself a beneficiary of the nominee trust and has no power to direct the beneficiaries to name him a beneficiary.

Based on the above, I do not find any circumstances described in the terms of the nominee trust, by which any of the resources of the nominee trust can be made available to the appellant. Accordingly, the assets held in the nominee trust are not countable to the appellant and his total assets are less than \$2,000.00. The appeal is approved.

Order for MassHealth

Modify the notice dated March 5, 2019 and do not count the nominee trust assets in determining the appellant's total countable assets. Determine if the appellant was otherwise eligible for MassHealth on December 24, 2018.

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.

Patricia Mullen
Hearing Officer
Board of Hearings

CERTIFICATION

I, C. Alex Hahn, Esq., certify that this brief complies with the relevant rules of court pertaining to the preparation and filing of briefs. Those rules include Mass. R. App. P.16 (a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21(redaction).

Compliance with the applicable length limit of Rule 20(a)(2) was ascertained as follows. Times New Roman, a proportionally-spaced font, was used. The portions of this Brief that are required by Rule 16(a)(5)-(11), including headings, footnotes, and quotations, contain fewer than 7,500 words.

Signed under the pains and penalties of perjury,

/s/ C. Alex Hahn, Esq.

C. Alex Hahn, Esq.

Dated: September 30, 2020

CERTIFICATE OF SERVICE

I, C. Alex Hahn, Esq. hereby certify that I have this day caused a copy of this pleading to be served on all counsel of record via efilema, the efilings portal for the Massachusetts Appeals Court.

Signed under the pains and penalties of perjury,

/s/ C. Alex Hahn, Esq.

C. Alex Hahn, Esq.

Dated: September 30, 2020