COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SJC-13059

PATRICIA A. FOURNIER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EMILY MISIASZEK,
PLAINTIFF-APPELLEE,

v.

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

ON APPEAL FROM A JUDGMENT OF THE WORCESTER SUPERIOR COURT

BRIEF FOR
AMICUS CURIAE,
MASSACHUSETTS CHAPTER OF THE
NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
IN SUPPORT OF APPELLEE
PATRICIA A. FOURNIER

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IDENTITY AND INTEREST OF AMICI 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

Amici 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 amici curiae, their members, or their 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.

ISSUES ADDRESSED BY AMICUS CURIAE

The Court's Request for Amicus Input

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

> **Whether assets held in an irrevocable trust that permits the grantor to appoint principal to a non-profit organization or charity satisfy the "any circumstances" test, such that they are countable assets for purposes of determining the grantor's eligibility for Medicaid benefits. See 42 U.S.C. § 1396p(d)(3)(B); 130 Code Mass. Regs. § 520.023 (C) (1) (a).**

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

The "any circumstances" test is not satisfied simply because an irrevocable trust, through a narrow and limited power of appointment, permits the grantor to appoint principal to a non-profit organization or charity. Nothing in the trust instrument at issue here reflects a non-charitable purpose of allowing the grantor to use trust funds to pay for nursing home services. Also, any such effort by a grantor would need to be effectuated by a trustee. And for a trustee to do so would breach her fiduciary duties to the grantor and any remainder beneficiaries; would defeat a primary purpose of the

trust; and would also be barred by statute. Finally, it is not plausible that a charitable organization would imperil its tax-exempt status by collecting a *sub rosa* payment for services cloaked as a charitable donation.

MassHealth is doing here what the U.S. Supreme Court and this Court have both termed the "conjuring [of] fictional sources of income and resources" to justify the denial of applications for public services. *Heckler v. Turner*, 470 U.S. 184, 200 (1985); *Daley v. Executive Office of Health and Human Services*, 477 Mass. 188, 195 (2017) (by declaring that a home was countable even where the trustee lacked any power to distribute principal to the grantor, MassHealth was "effectively 'conjuring [a] fictional' resource (the applicant's home)….")

Here the "conjured resource" is once again "fictional" because Patricia A. Fournier, the trustee ("the Trustee") of the Theodore F. Misiaszek and Emily M. Misiaszek Irrevocable Trust ("the Trust") is legally barred from effectuating any appointment of Trust principal to a nursing home in exchange for residential services for the grantor, Emily M. Misiaszek ("Ms. Misiaszek").

One need go no further than page 8 of MassHealth's brief to learn why its arguments must fail. There, MassHealth acknowledges that "[t]his case involves Plaintiff-Appellee Emily Misiaszek's creation of a trust….*designed to shield her assets from being counted in the Medicaid eligibility analysis*." (Emphasis supplied.) Indeed, one of the purposes of the Trust was to allow Ms. Misiaszek to qualify for Medicaid without the loss of her home, a purpose that is common and lawful. However, for the Trustee to render payment to a nursing home in exchange for residential services would disqualify Ms. Misiaszek from receiving MassHealth services and ensure that her assets were not protected. The Trustee is thus legally barred from taking such an action. In short, the scenario MassHealth posits is speculative and implausible in the extreme, given that no reasonable trustee would or lawfully could take such an action.

The precise language of the "any circumstances" test is critical, albeit a particular phrase of the statute not focused on by the parties. 42 U.S.C. § 1396p(d)(3)(B)(1) provides that "if there are any circumstances under which *payment from the trust could be made* to

or for the benefit of the individual, the portion of the corpus from which ... *payment to the individual could be made* shall be considered resources available to the individual[.]" (Emphasis supplied.) The phrase "payment could be made" underscores that, notwithstanding any effort by the grantor to appoint principal to a charitable entity, someone must be doing the "paying." That person is the trustee; only she, as the legal owner of the assets in a trust that all parties agree is irrevocable, can "make payment" to a nursing home. And she is legally barred from doing so by statute and by the plain language and overall meaning of the Trust, which prevents distributions of principal being made for the benefit of the grantor.

Under MassHealth's interpretation, the "any circumstances" test is bounded only by its own imagination. But in the cold light of reality, the scenario posited by MassHealth is a practical and legal impossibility, and thus does not satisfy the "any circumstances" test.

ARGUMENT

I. The Trustee, Whose Actions Would Be Required to Effectuate any Appointment of Principal to a Non-Profit in Exchange for Services, is Legally Barred From Doing So.

A. The Trustee is Precluded by the Trust Language from Making a Payment that Would Personally Benefit Ms. Misiaszek, as This Would Thwart a Key Purpose of the Trust.

This Court has stated clearly, on multiple occasions that "[i]t is fundamental that a trust instrument must be construed to give effect to the intention of the donor as ascertained from the language of the whole instrument considered in the light of circumstances known to the donor at the time of its execution." *Ferri v. Powell-Ferri*, 476 Mass. 651, 654 (2017) (internal citation omitted). MassHealth's argument turns on conjuring an intent on the part of the Grantor that is reflected nowhere in the Trust instrument.

As an initial matter, the facial purpose of the clause of the Trust at issue here (in Article 2.2) is to allow charitable contributions; there is nothing in this provision, nor anywhere else in the instrument, reflecting an intention to allow the Grantor to use her limited power of appointment to compensate a nursing home for

services rendered, nor to use that limited retained power for any purpose other than a purely charitable one. Nor does anything in the Trust give Ms. Misiaszek the power to bargain on her own behalf, with the entirety of the Trust in fact reflecting an intent to preclude self-interested actions.

An irrevocable trust such as the one at issue here serves several purposes, including allowing a trustee to manage assets, as well as allowing a grantor to make charitable contributions and to achieve certain tax benefits. But another critical purpose of the Trust is freely acknowledged by MassHealth: "This case involves Plaintiff-Appellee Emily Misiaszek's creation of a trust…..designed to shield her assets from being counted in the Medicaid eligibility analysis." *See MassHealth Brief*, page 8.

In identifying this as a purpose of the Trust, MassHealth appears to believe it has uncovered something improper that should impel this Court to find that Ms. Misiaszek's application for services was properly denied. But in truth, there is nothing nefarious about such a purpose, and estate planning attorneys do not furtively draft such trusts in the dead of night. As the Appeals Court put it *Heyn v.*

Dir. of the Office of Medicaid: "It is settled that, properly structured, such trusts may be used to place assets beyond the settlor's reach and without adverse effect on the settlor's Medicaid eligibility." 89 Mass. App. Ct. 312, 314 (2016). And if a "properly structured" trust has such a purpose, it stands to reason that a Trustee cannot lawfully take actions that would defeat that same purpose.

Congress' enactment of the "any circumstances" test of 42 U.S.C. § 1396p(d)(3)(B)(i), along with the five-year "look back" requirement in 1396p(c)(1)(B)(i), was an express acknowledgment that such trusts can be lawfully utilized to qualify for Medicaid while also protecting assets. Section 1396p(d) makes specific reference to "irrevocable trust[s]" and establishes the circumstances in which assets in such a trust are either countable or not countable to a Medicaid applicant. Stated another way, it is beyond doubt that Congress intended to allow use of irrevocable trusts for Medicaid planning, albeit with restrictions. *See Heyn*, 89 Mass. App. Ct. at 314 ("[t]he resulting law reflects a compromise, with provisions for so-called 'look back' periods….and strict requirements governing the extent to which assets must be made unavailable to the settlor….").

Irrevocable trusts are also used to lawfully mitigate the impact on families from "estate recovery," a practice authorized by Congress through 42 U.S.C. § 1396p(b) and implemented by the Legislature through M.G.L. c. 118E § 31. Medicaid applicants who wish to continue living in their homes may do so without "spending down" that asset, but after their deaths MassHealth may levy on the applicant's home. However, properly structured irrevocable trusts can also mitigate the impact of estate recovery. *See Daley,* 477 Mass. at 495 (discussing use of irrevocable trusts for such purpose).

The premise of MassHealth's arguments in this and similar cases is that Medicaid planning is odious enough that this Court should circumscribe the practice as much as possible, essentially out of moral obligation and irrespective of Congress's clear intent to allow this practice with certain restrictions. However, policy arguments by MassHealth and others against such trusts – claiming that they constitute an inequitable raid on treasury funds earmarked for persons of need – are not without thoughtful critique. *See Estate Recovery: An Analysis Of Different State Approaches And Changes*, 16 NAELA Journal 17 (2020). Some officials and lawmakers have their

own concerns; in 2002, the State of West Virginia sued to resist the Congressional requirement of estate recovery, claiming that it caused "widespread clinical depression in aged and disabled nursing home residents." *State of West Virginia v. U.S. DHHS*, 289 F.3d 281 (4th Cir. 2002). More recently, the Louisiana Legislature, in enacting its own Medicaid estate recovery program, specifically referenced "the state's long tradition of protecting the citizens' rights to home ownership and the state's interest in assuring the transfer of real property within family units." *La. Rev. Stat. Ann § 153.4.C* (2018). Finally, the Massachusetts Legislature has itself tread with caution, limiting estate recovery to probate assets owned by the individual Medicaid recipient at death, and excluding non-probate assets. *See Mass. Gen. Laws. c. 118E, §31(c).*

In short, viewpoints on the policy and public health implications of Medicaid planning are not monolithic. And while the commitment of MassHealth to the Commonwealth's fisc is understandable, its exclusive occupancy of the moral high ground on this issue is not unquestioned. In any event, that the use of such trusts is authorized by Congress, and has been validated in appropriate circumstances by

the Commonwealth's appellate courts, is not something MassHealth can seriously deny. *See Heyn*, 89 Mass. App. Ct. at 314 ("[i]t is settled that, properly structured, such trusts may be used to place assets beyond the settlor's reach and without adverse effect on the settlor's Medicaid eligibility").

Further, no one contests that trustees are required to comply with their fiduciary duties and other obligations, some of which arise directly from statute, as discussed below. *See Guerriero v. Div. of Medical Assistance*, 433 Mass. 628, 633 (2001) ("if the trustee violates any duty to a beneficiary, the trustee will be liable for "breach of trust"). And notably, Article 4.9 of the Misiaszek Trust states that "[a]ll powers and discretion given to our trustees are exercisable only in a fiduciary capacity, with reasonable discretion." Thus, the Trustee is required to conform her actions to the purposes of the Trust, and cannot undertake actions that were never intended by the Grantor and which are not contemplated by the instrument taken as a whole. *See Ferri*, 476 Mass. at 654. Simply put, no reasonable trustee could conclude that the Grantor intended to allow Trust

principal to be used for her own benefit, given that essence of the Trust is to preclude such a use.[1]

Finally, the parties do not disagree that a trustee is always the legal owner of assets in a trust. *See 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"). In short, Ms. Misiaszek has no legal title to the any of the Trust property, and cannot herself act to disburse funds. If she intends to appoint principal to a charity or non-profit, it is the Trustee, and the Trustee only, who can effectuate the appointment; literally and figuratively, she must write a check.

MassHealth tries to dance around this, but is eventually forced to grudgingly admit it:

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[1] Again, the question for the Court in construing any trust is to determine "the intention of the donor….in the light of circumstances known to the donor at the time of its execution." *Ferri*, 476 Mass. at 654. It is implausible that the Grantor, when the Trust was executed in 2002, contemplated using Article 2.2 as a means for paying for nursing home services.

> While it might be necessary for the Trustee to take some action to *implement* Misiaszek's exercise of the power of appointment, the important point for these purposes is that the power could be effectively exercised without requiring Misiaszek herself to "direct" the Trustee within the meaning of G.L. c. 203E, § 808.

MassHealth Reply Brief, page 20. The first sentence in this paragraph is a clear admission that the Trustee would need to engage in an affirmative, intentional act to accomplish the appointment to the charitable or non-profit organization. The language of the federal statute at issue here, 42 U.S.C. § 1396p(d)(3)(B)(1), also contemplates this step; assets are countable "if there are any circumstances under which *payment from the trust could be made* to or for the benefit of the individual."[2]

MassHealth thus admits, albeit backhandedly and in the most elliptical fashion, that "payment from the trust" can be made only by the Trustee. But once it is acknowledged that an action by the

[2] The Supreme Court of North Dakota, in a case addressing whether assets were countable to a Medicaid applicant, stated that "the focus is on an applicant's *actual and practical ability* to make an asset available as a matter of fact, not legal fiction." *Post v. Cass County Social Services,* 556 N.W.2d 661, 664 (N.D. 1996). (Emphasis supplied.) The phrase "actual and practical ability" underscores that certain specific, practical steps must be taken to disburse funds.

Trustee is necessary – an independent action that is cabined, and in this case precluded, by her fiduciary duties – it becomes clear that the "any circumstances" test is not satisfied here. MassHealth's argument is premised entirely on a presumption – not a remotely plausible one – that the Trustee would breach those same duties by contravening the Trust's plain language, ignoring the Grantor's intentions, and undermining the Trust's intended purposes.

It is not entirely clear what MassHealth means when it asserts that "the power could be effectively exercised without requiring Misiaszek herself to 'direct' the Trustee." In what is essentially a non-sequitur, MassHealth next argues that no direction by Ms. Misiaszek is required because "the Trustee would simply be acting pursuant to her own independent duties to administer the trust." But this overlooks that the Trustee is not an automaton required to act on any wish of the Grantor, especially one that would defeat a primary purpose of the Trust. In fact, the opposite is true; it cannot be seriously denied that the Trustee's "independent duties" require her to act in a fiduciary capacity, in accordance with both the Trust language and applicable Massachusetts laws governing trustees. *See*

Trust, *Article 4.9* and *M.G.L. c. 203E § 815(b)* ("[t]he exercise of a power shall be subject to the fiduciary duties prescribed by this article").

Again, MassHealth is not seriously arguing, and could not argue, that the Grantor could appoint principal to a nursing home without some intervening act by the Trustee. All irrevocable trusts have trustees, who are neither free-ranging creatures nor mere appendages of a grantor. Nor does the Grantor's limited power of appointment here authorize her to force the Trustee to do something that would violate fiduciary duties. If the Grantor felt that the Trustee were engaged in nonfeasance by refusing to pay funds to a nursing home in exchange for services for their Grantor, her remedy would be to bring a suit for breach of fiduciary duty. Such a suit would certainly fail, given that those duties in fact *preclude* the Trustee from effectuating such payments.

B. For the Trustee to Effectuate Such a Payment to a Nursing Home Would Also Violate Her Duties to the Remainder Beneficiaries.

It is undisputed that, if MassHealth can lawfully deny Ms. Misiaszek's application, she would then be required to "spend down" the Trust corpus before qualifying for Medicaid. But to allow the entire Trust corpus to be consumed on nursing home services, in a self-thwarting manner that also compromises Ms. Misiaszek's Medicaid eligibility, would serve the interests of neither her nor the remainder beneficiaries.

If the Trustee were to take such an action, what would happen then cannot be seriously doubted. The remainder beneficiaries would sue the Trustee, claiming that her disbursement of funds to the nursing home breached her fiduciary duties to them. *See Guerriero*, 433 Mass. at 633 ("if the trustee violates any duty to a beneficiary, the trustee will be liable for "breach of trust"). It is not clear what the defense to such a suit could be. The Trustee could not simply throw up her hands and blame this state of affairs on the Grantor, as nothing in Ms. Misiaszek's limited power of appointment allows her to force the Trustee to do something unlawful or foolish.

To the contrary, the Trustee is both the legal owner of the Trust assets and an independent actor who must comply with her own legal duties and obligations. *See Guerriero*, 433 Mass. at 633.

Parenthetically, it seems likely that even a *bona fide* charitable contribution, one made without any expectation of something in return, would be scrutinized to some degree by the Trustee, in light of her duties to the remainder beneficiaries and her obligation to exercise "reasonable discretion" as required by Article 4.9 of the Trust. For example, a bequest of the entire Trust corpus to a non-profit organization, while it would not impact Ms. Misiaszek's eligibility for services, would leave nothing for remainder beneficiaries. The point is this: the Trustee's actions are governed by fiduciary duties to the Grantor and the remainder beneficiaries. She must exercise her duties "in accordance with reasonable discretion," and cannot abuse that discretion.

C. The Trustee's Duties Arise Not Only From the Trust Language and Common Law, but From Statute.

Various provisions of the Massachusetts Uniform Trust Code also govern the Trustee's actions here. M.G.L. c. 203E § 105 establishes "the duty of a Trustee to act in good faith and in

accordance with the *terms and purposes of the trust* and the interests of the beneficiaries." (Emphasis supplied.) Further, for a Trustee to exercise any power, M.G.L. c. 203E § 815(b) requires that fiduciary duties be consulted: "[t]he exercise of a power shall be subject to the fiduciary duties prescribed by this article." To determine those fiduciary duties, the Trustee is required to read the trust as a whole. *See Ferri*, 476 Mass. at 654. Again, if the Trustee determines that a self-serving exercise of a power of appointment is inconsistent with the "terms and purposes of the trust," she cannot lawfully take such an action.

In short, a panoply of statutory provisions, together with the provisions of the Trust itself, establish that the Trustee must act in accordance with her fiduciary duties and in harmony with the overall purpose of the Trust. The purpose of allowing charitable contributions is readily apparent; by contrast, the notion of allowing bargained-for exchange by the Grantor, and the use of trust principal to underwrite self-serving transactions, can be discerned nowhere in the instrument.

II. It is Extremely Doubtful that Either the Grantor or the Non-Profit Could Lawfully Enter an Agreement to Exchange Trust Principal for Residential Services.

It is also doubtful that the Grantor herself could lawfully act to defeat the purposes of the Trust. A plain reading of Article 2.2 is that it contemplates charitable contributions, and nothing more; assuming this is true, then an effort by the Grantor to use her limited power of appointment to pay for services would be *void ab initio*.

The scenario posited by MassHealth also overlooks the problems that could be caused to a non-profit organization by entering into such an agreement with Ms. Misiaszek. A non-profit or charitable entity receives a preferred tax status under Section 501(c)(3) of the Internal Revenue Code that would certainly be in doubt if it started receiving payments for services cloaked as charitable contributions. This would violate what is known as the "private benefit doctrine," which precludes a charity from providing a substantial economic benefit to individuals who do not exercise any control over the organization. *See MCLE Nonprofit Organizations*, Chapter 14 ("[a]n organization that serves private interests or

confers a benefit on a for-profit entity or a private person may be precluded from exemption in the first instance or, if it is already exempt from taxation, face intermediate sanctions or loss of tax exemption").

And even if the Grantor sought to frame the appointment of principal not as a charitable contribution but as a straightforward payment for services, it is unlikely that a non-profit even then would agree to receive such payments. The non-profit would be aware that it was receiving funds based on a limited power of appointment, one on its face intended to allow charitable contributions, not arms-length commercial relationships. Such a transaction could easily open up the non-profit to allegations of exploitation or impropriety.

Nor would the nursing home have any way of knowing how the Trust was treating the payment for tax purposes. If the Trustee were to make a payment for services based on Article 2.2, but the Grantor were to still take a charitable deduction based on the payment, this would be entirely unlawful under the Internal Revenue Code. It is far-fetched that a charitable entity would enter into such a fraught and parlous relationship with the Grantor; as

such, a reasonable application of the "any circumstances" test cannot embrace such a speculative scenario.

III. *Daley*, Far From Announcing a New Rule, Simply Left a Question Open.

The Hearing Officer's decision in the present case, which was adverse to the applicant/grantor, turned entirely on this Court's statement in *Daley v. Executive Office of Health and Human Services*:

> The Nadeaus may "appoint . . . all or any part of the trust property . . to any one or more charitable or non-profit organizations" over which they have no controlling interest…it is appropriate for MassHealth to consider whether this possibility fits within the "any circumstances" test.

477 Mass. at 203.

The Hearing Officer treated this statement as a binding and dispositive holding, and thus ruled that the full value of the Grantor's home was a countable asset, based on the theoretical possibility that she could appoint assets to the nursing home in exchange for services.

MassNAELA believes that this statement in *Daley*, far from being a definitive statement of law, simply left open a question that

the Court can at its pleasure resolve. In this case and others, MassHealth has used this dictum as a tool to deny applications. This case represents an opportunity to clarify this statement, particularly since the relevant language of the instant trust is identical to the one in *Daley*.

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 Appellee, Patricia A. Fournier, and enter such other relief as is just and proper.

Respectfully submitted,
MassNAELA,

By its attorneys,

/s/ C. Alex Hahn, Esq.

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Dated: March 17, 2021

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. Century Schoolbook, 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.

Pursuant to Rule 16(a)(8), in light of the Argument section of this brief being less than 4,500 words, a Summary of Argument was not included in this brief.

Signed under the pains and penalties of perjury,

/s/ C. Alex Hahn, Esq.

C. Alex Hahn, Esq.

Dated: March 19, 2021

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 efiling portal for the Massachusetts Appeals Court.

Signed under the pains and penalties of perjury,

/s/ C. Alex Hahn, Esq.

_____
C. Alex Hahn, Esq.

Dated: March 19, 2021