COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12200

MARY E. DALEY
Plaintiff - Appellant

v.

DIRECTOR OF THE OFFICE OF MEDICAID
Defendant - Appellee

&

No. SJC-12205

LIONEL C. NADEAU
Plaintiff - Appellant

v.

DIRECTOR OF THE OFFICE OF MEDICAID
Defendant - Appellee

ON APPEAL FROM FINAL JUDGMENTS OF THE
WORCESTER SUPERIOR COURT

Brief of THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, INC. - AMICUS CURIAE

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BRIEF OF *AMICUS CURIAE*
NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, INC.,
IN SUPPORT OF APPELLANTS LIONEL NADEAU AND MARY E. DALEY
FOR REVERSAL

The National Academy of Elder Law Attorneys, Inc. (NAELA), submits this brief in support of Appellants' requests that this Court reverse the lower courts' entries of summary judgment in favor of the Respondents (referred to collectively as MassHealth).

IDENTITY OF *AMICUS* AND ITS INTEREST IN THESE CASES

The National Academy of Elder Law Attorneys, Inc. (NAELA), is a professional organization of attorneys concerned with legal issues affecting the elderly and disabled, including Medical Assistance (Medicaid). 42 U.S.C. §§ 1396 et seq. NAELA's mission is to provide a professional center, including public interest advocacy, for attorneys whose services are intended to enhance the lives of people with special needs and of all people as they age. Since its inception in 1989, NAELA has grown to a membership of 4,448 attorneys as of October 2016, in all fifty states (466 in the Massachusetts chapter of NAELA), the District of Columbia, and three foreign countries.

NAELA is interested in the consistent, reliable, and proper interpretation of federal Medicaid law. Other courts have found NAELA amicus briefs helpful in resolving

the matters before them,[1] and its participation in this matter will contribute to an even more thorough, careful decision.

The board of directors of NAELA has authorized the undersigned attorneys to file this brief on its behalf. No money or consideration of any kind was contributed to fund the preparation or submission of this brief.

QUESTION PRESENTED

> Does Federal Medicaid law permit MassHealth to count a personal, non-transferable, unmarketable right in real property and a bare life estate as if they were worth 100% of the value of the underlying real properties?

SUMMARY OF THE ARGUMENT

MassHealth correctly states that Lionel Nadeau's only right under his trust is to "use and occupy" his former home, a non-marketable limited interest under a trust. MassHealth applies to this familiar, limited interest the language of its own, unique policy that a home held in an

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[1] See e.g., *Hughes v. McCarthy*, 734 F.3d 473, 480-481 (6th Cir. 2013); *DeCambre v. Brookline Housing Authority*, 826 F.3d 1, 15 n. 17 (2016), *petition for cert. pending*, No. 16-495 (Sup. Ct.); *Zahner v. Secretary, Pennsylvania Dept. of Human Services*, 802 F.3d 497, 508 n. 14 (3rd Cir. 2015); *Saccone v. Board of Trustees of Police and Firemen's Retirement System*, 219 N.J. 369, 377-378, 98 A.3d 1158, 1163 (2014).

irrevocable trust "that is available according to the terms of the trust is a countable asset," 130 CMR § 520.023 (C)(1)(d), asserting that it can count the property as an available asset valued at its full fair market value. James Daley conveyed his former home to an irrevocable trust, retaining for himself a life estate only, that is, the right to exclusive possession (with his co-life tenant spouse) for the remainder of his life. MassHealth applies the same policy to say it allows them to count the home at its full fair market value.

This policy violates federal Medicaid law. MassHealth can be no more restrictive than federal law in how it determines the value of income and resources, and federal law, as well as Massachusetts law, recognizes that a life estate or a right of "use and occupancy" of an elderly individual has no market value.

MassHealth attempts to avoid that limitation by finding that a home held in trust that can be lived in is "available" under the federal Medicaid trust rules. That claim is flatly contrary to well-established rules that distinguish income from principal: the use of income from an income-only trust does not render the trust principal available. Life estates and "use and occupancy" rights are income interests - they "use" the principal but leave it

intact when terminated - and treating the full fair market of the home as available because the home can be used for a limited period of time violates this long-standing federal law and policy.

ARGUMENT

Through an artful series of steps, MassHealth seeks to justify counting a right to use and occupy and a bare life estate at the full fair market value of the underlying real properties. Citing a variety of authorities, they say use can constitute "payment," that the "payment" is available, that the underlying asset that is "used" is thus also available and can be counted. Many of the defects in its reasoning have been noted and explained by the other parties and the other amicus. In this brief, after first reviewing the broad role of Medicaid in the United States today, NAELA will review the required approach to asset valuation and then focus on the Medicaid trust rules.

I. Background of the Medicaid Program

MassHealth in its brief reviews the history of Medicaid and cites mostly 20th century decisions that emphasize the program's origins as a poverty program. Brief of the Defendant-Appellant in *Nadeau v. Thorn* (hereinafter MassHealth Brief) at 12-16. This is correct as far as it goes, but it is incomplete.

A. The roles of Medicaid and private long term care insurance in meeting the needs of elderly Americans.

Medicaid has become, despite its roots as a poverty program, the primary source of payment for long term institutional care - for both the elderly and young but permanently disabled - in the United States today.[2] Congress has sometimes initiated expansion and sometimes responded to public pressure, but whatever the impetus, there has been a slow but steady conversion of the program. Indeed, at the outset, Medicaid's coverage of long term care was limited; it was broadened in 1967 to be the benefit we know today.[3] As then constituted, Medicaid would often require the impoverishment of both spouses before one could

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[2] In 2013, Medicaid paid for 51% of all long term care "services and supports," which includes non-nursing home benefits; "other public" (primarily Medicare), paid 21%; out of pocket, 19%; and private insurance, only 8%. Erica L. Reaves and Marybeth Musumeci, "Medicaid and Long-Term Services and Supports: A Primer," Table 3, Kaiser Family Foundation, December 15, 2015, available at http://kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/, (last accessed December 11, 2016).

[3] Prof. Sidney D. Watson, "From Almshouses to Nursing Homes and Community Care: Lessons from Medicaid's History," 26 Georgia State University Law Review 937, 955-956, 957-958 (Spring 2010), available at http://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2416&context=gsulr, (last accessed December 12, 2016).

become eligible for benefits. See e.g., *Bianconi v. Preston*, 383 F.Supp.2d 276, 277 (D. Mass. 2005).

In 1988 Congress changed Medicaid into a poverty-*avoiding* program for married individuals where one spouse required long-term care. *Id.*; see also *Wisc. Dept. of Health and Family Services v. Blumer,* 534 U.S. 473, 479-480 (2002). In 1993, Congress extended Medicaid eligibility to *any* disabled person who needed benefits, conditioned primarily upon eventual repayment of Medicaid through a special needs trust.[4] The trust and transfer rules reflect a compromise of conflicting goals, allowing people to protect assets but not without limit.[5] In 2006, Congress accepted the use of "Medicaid-qualified

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[4] The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) established three self-funded trusts as exceptions to the generally unfavorable treatment of trusts in the context of Medicaid eligibility. Congress sought to enhance the quality of life for individuals with disabilities by allowing a vehicle for them to set aside funds to be used responsibly to supplement needs not met by public benefits. "Congress balanced the needs of disabled individuals with the state's interests through the post-mortem repayment requirements." In 1999, Congress extended these protections to SSI. *See* Mary E. O'Byrne, Esq., "Use of Special Needs Trusts in Maryland to Preserve Assets for Future Needs and Permit Continuing Eligibility for Public Benefits," Maryland ABLE Task Force, June 29, 2015, available online.

[5] *Heyn v. Director of the Office of Medicaid,* 89 Mass. App. Ct. 312, 314 (2016).

annuities," only imposing requirements designed to limit the benefits to spouses and disabled children of the Medicaid beneficiary.[6] At the same time it also addressed, specifically, the treatment of life estates in real property, 42 U.S.C. § 1396p(c)(1)(J)(2012), but made no further changes to the use of trusts in Medicaid planning. Finally, in the Affordable Care Act, Congress extended general Medicaid benefits (to be sure, not long term or other institutional care) based only on taxable income, eliminating for many the resource or asset test.[7]

While Congress was extending the availability of Medicaid for long term care to meet the needs of tax- and premium-paying citizens of moderate means, the private long term care insurance (LTCI) market was imploding.[8]

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[6] See *Zahner,* 802 F.3d at 501; respecting spouses and disabled children, see 42 U.S.C. § 1396p(c)(1)(F)(ii)(2012).

[7] "The MAGI-based [modified adjusted gross income] methodology [for Medicaid Expansion eligibility under the ACA] does not allow for an asset or resource test." Medicaid.gov/Medicaid/Eligibility, available at https://www.medicaid.gov/medicaid/eligibility/index.html, (last accessed December 11, 2016).

[8] A National Association of Insurance Commissioners (NAIC) report puts it more gently ("significant contraction"), but the table of individual market sales shows a drop of 78% -- from 754,000 in 2002 to 129,000 in 2014. NAIC, The State of Long Term Care Insurance, pp. 7, 10 (May, 2016) (NAIC Report), available at http://naic.org/documents/cipr_current_study_160519_ltc_insurance.pdf, (last

Never a major source of payment,[9] and in fact never likely to be,[10] insurers are now withdrawing from the market,[11]

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accessed December 10, 2016). Earlier this year Investment News reported that "sales have dropped precipitously over the past several years, due to … persistently low interest rates and demographic trends" from 750,000 in 2000 to 105,000 in 2015. *See* Greg Iacurci, "Long-term-care insurance market seeks rapid decline," Investment News, July 21, 2016, available at http://www.investmentnews.com/article/20160721/FREE/160729979/long-term-care-insurance-market-sees-rapid-decline, (last accessed December 11, 2016).

[9] There were 1.8 million nursing home residents in 2010; as of 2016, only 250,000 were receiving long term care insurance benefits of any kind. *See* H. Stephen Kaye, et al., "Long-Term Care: Who Gets It, Who Provides It, Who Pays, and How Much?" 29 HealthAffairs 11, January 2010, http://content.healthaffairs.org/content/29/1/11.full (last accessed December 11, 2016); *see also* NAIC Report, footnote 8, at p. 8.

[10] Joshua A. Wiener, et al., "Medicaid Spend Down: Implications for Long-Term Care Services and Support and Aging Policy," (March 2013), p. 5, available at http://www.thescanfoundation.org/sites/default/files/tsf_ltc-financing_medicaid-spend-down-implications_wiener-tumlinson_3-20-13.pdf, (last accessed December 11, 2016) ("voluntary enrollment into private or public insurance [is] unlikely to attract enough people to reduce the nation's dependency on Medicaid for LTSS financing").

[11] John Hancock, "one of the largest long-term care insurance providers in the United States with over 1.2 million outstanding policies," pulled out of the market just last month. *See* Jamie Hopkins, "John Hancock Withdrawing From Long-Term Care Market," Forbes, November 20, 2016, available at http://www.forbes.com/sites/jamiehopkins/2016/11/10/john-hancock-withdrawing-from-long-term-care-market/#193713aa232b, (last accessed December 11, 2016). The largest single insurer, Genworth, has been close to doing so, and continues to struggle. *See* Howard Gleckman, "What Does Genworth's Bad News Mean for the Future of Long-Term Care

raising rates precipitously, or cutting back on benefits and offerings. There are many reasons for these developments, including the low level of income from traditionally secure investments, the low drop-out rate (rather ironically), and increasing longevity among the more affluent people who can afford the insurance. At best, this insurance is aimed at the "middle affluent," those with average income of $132,000 per year in 2014, only about 17 percent of the overall target market.[12]

The modest homes at issue in these two cases reflect that these are not people who could afford the high cost of LTCI premiums. The reality is that many prudent people of modest means, after a lifetime of saving and paying health insurance premiums, see no reasonable alternative

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Insurance?" Forbes, November 19, 2014, available at http://www.forbes.com/sites/howardgleckman/2014/11/19/what-does-genworths-bad-news-mean-for-the-future-of-long-term-care-insurance/#657bf3d85fd1, (last accessed December 11, 2016) ("the firm is facing enormous pressure from Wall Street to stop selling LTC policies").

[12] Although written from the insurers' actuaries' perspective, this report acknowledges the problem of "rate shock" and the many causes of why the product is not more widely sold. *See* Larry Rubin, et al., "An Overview of the U.S. LTC Insurance Market (Past and Present)," Society of Actuaries, p. 4 (2014), available at https://www.soa.org/Library/Monographs/Retirement-Systems/managing-impact-ltc/2014/mono-2014-ltc-manage-narva.pdf., (last accessed December 10, 2016).

than to plan to use Medicaid long term care benefits if and when they require such care before they pass away.

The issue these cases present is whether they can rely on consistent, reasonable application of mandatory federal law and standards in doing so.

B. The recognition of Medicaid estate planning.

Massachusetts courts have come to recognize the prudence and pervasiveness of Medicaid estate planning, as Congress has allowed it and as the Nadeaus and the Daleys practiced it here. As the Appeals Court said in the most recent Medicaid trust case of *Heyn v. Director of the Office of Medicaid*:

> We are called upon yet again to review a determination that assets within a self-settled irrevocable inter vivos trust should be treated as available to the trust grantor for payment of nursing home expenses (and, correspondingly, render the grantor ineligible for Medicaid benefits)...
>
> ... The legislative history and case law concerning the treatment of self-settled trusts reflect awareness of the possibility that comparatively affluent individuals might avail themselves of such trusts as an estate planning tool, in order to qualify for benefits. The resulting law reflects a compromise, with provisions for so-called "look back" periods for transfers of assets...and strict requirements governing the extent to which assets must be unavailable to the settlor in order to avoid being treated as "countable assets" for purposes of Medicaid eligibility... [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.

Heyn, 89 Mass. App. Ct. 312, 314 (2016).

Numerous other courts have come to recognize the centrality of Medicaid benefits among those needing long term care, and the propriety of planning for it. In 2000, the New York Court of Appeals acknowledged that "a competent, reasonable individual in the position of the incapacitated person would" engage in Medicaid planning in similar circumstances. See *In re Shah*, 95 N.Y.2d 148, 160 (N.Y. 2000). In 2004, the New Jersey Supreme Court, acting unanimously, applied to Medicaid planning the well-established standards concerning gifts by guardians in tax matters:

> [W]hen a Medicaid spend-down plan does not interrupt or diminish a ward's care, involves transfers to the natural objects of a ward's bounty, and does not contravene an expressed prior intent or interest, the plan, *a fortiori*, provides for the best interests of the ward and satisfies the law's goal to effectuate decisions an incompetent would make if he or she were able to act.

See *In the Matter of Mildred Keri*, 181 N.J. 50, 62-63, 853 A.2d 909 (2004). "Financial planning is inherent in the Medicaid scheme." See *Zahner*, 802 F.3d at 509. Medicaid planning is no longer the exclusive province of elder law attorneys, but rather part of the full arsenal of cost-savings strategies that estate planners now use every

day, incorporated into appropriate uniform laws[13] and estate planning advice. Indeed, a trustee who fails to make use of Medicaid and similar public benefits may be in breach of its fiduciary duties to its beneficiary.[14]

In that spirit, courts have rejected agency efforts based on their view of what Congress should do to deny statutory rights. In *Zahner v. Secretary,* the United States Court of Appeals rejected the lower court's goal of closing perceived loopholes. *Zahner* stated that Courts are:

> not ... to compensate for an apparent legislative oversight by effectively rewriting a law to comport with one of the perceived or presumed purposes motivating its enactment (internal citations omitted). ... [W]e do not create rules based on our own sense of the ultimate purpose of the law being interpreted, but rather seek to implement the purpose

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[13] *See generally,* Uniform Law Commission, Uniform Guardianship and Protective Proceedings Act (1997), authorizing gifts by guardians to obtain eligibility for government benefits; *see also* Uniform Laws Annotated Supp. 2000, pp. 14-144, 156-157 and § 411(c)(1) and (3).

[14] *Dept. of Social Services v. Saunders,* 247 Conn. 686 (Conn. 1999); *Quillin v. Estate of Woodward,* 2009-Ohio-2409 (Ohio Ct. App. 5th Dist. 2009); *Liranzo v. LI Jewish Education/Research* (N.Y. Sup.Ct., Kings Cty., No. 28863/1996, June 25, 2013) (corporate trustee's failure to ascertain availability of public benefits and spending funds for goods and services available from Medicaid was a breach of its duties of diligence, loyalty, and prudence), discussed in, Robert M. Freedman, *et al.*, "Analyzing the Unique Duties and Obligations of Special Needs Trusts," SchiffHardin, September 16, 2013. This was previously available on-line but appears not to be at present.

of Congress as expressed in the text of the statutes it passed.

Zahner, 802 F.3d 497, 509 (2015); see also *James v. Richman*, 547 F.3rd 214, 219 (3rd Cir. 2008), cited with approval, *Weatherbee v. Richman*, 595 F.Supp. 607, 614 (W.D.Pa. 2009), *aff'd*, 351 F.Appx 786 (3rd Cir. 2009). This Court and lower Massachusetts courts have followed suit, rejecting efforts to count trust principal that is not, in fact, available. See *Guerriero v. Commissioner of the Division of Medical Assistance*, 433 Mass. 628, 635 (2001), and *Heyn*, 89 Mass. App. Ct. at 319. At the same time, this Court and lower courts have allowed MassHealth to count trust principal when it is in fact available. See *Lebow v. Commissioner of the Division of Medical Assistance*, 433 Mass. 171, 178 (2001); see also *Doherty v. Director of the Office of Medicaid*, 74 Mass.App.Ct. 439, 441 (2009).

It is against this backdrop of well-established law that the Court must address MassHealth's new reading of a regulation that undoes the plans of so many citizens.

II. MassHealth's methodology for determining the value of assets and income can be no more restrictive than the federal Supplemental Security Income (SSI) program.

The ultimate question is the value of what Mr. Nadeau and Mr. Daley have that affects their eligibility for Medicaid long term care benefits. There are three distinct

questions buried in that larger question. The first is, what is the value of what they own? The second is, if there is any value, is it "available" (which may include items "deemed" available)? The third is, if available, is it countable? In reverse order, a home or automobile may be valuable and available, but they are not countable because they are excluded by statute. 42 U.S.C. § 1382b(a)(1) and (2)(A).[15] Similarly, a life estate in property may be available, but since there is no market for life estates owned by elderly men, it has no market value, and so is worth $0.

There is no dispute that the actual market value of the right to use and occupy and of the life estate is *de minimis;* MassHealth never claims otherwise. Rather, the question is whether it will be allowed to find in the federal Medicaid trust rules a justification for imputing

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[15] We do not disagree with the argument that MassHealth was attempting to change policy by deleting its prior definition of "available," but that definition put the cart before the horse. "Availability" is a question of fact determined under appropriate legal standards; "countable" is a conclusion of law as to what income or assets are taken into consideration - "counted" - in determining eligibility under a means-tested program. See *Emerson v. Wynia,* 754 F.Supp. 705, 706 (D. Minn. 1991), rev'd on other grounds, *Emerson v. Steffen,* 959 F.2d 119 (8th Cir. 1992). As illustrated in the example in the text, principal or income that is available may not be counted, because it is excluded, for example, or for some other reasons, but principal or income that is not available (nor deemed

the full fair market value of trust property to an elderly nursing home residents' limited right of use. MassHealth plays with the meaning of "available" - as in, do you have a room available to rent? - and attempts to convert that into "available" in the proper public benefit sense. But really, what is available to Mr. Nadeau or Mr. Daley? The answer, plainly, is the use of their former homes for the remainder of their lives. The proper question then is, what would someone - the proverbial willing buyer - pay for this use? MassHealth avoids those questions and the result is a clear violation of federal Medicaid rules that should not be allowed to stand.

A. MassHealth's methodology for valuing assets can be no more restrictive than that of the SSI program.

In determining income and resource eligibility for Medicaid benefits, 42 U.S.C. §§ 1396 *et seq.*, a State must employ a methodology that is "no more restrictive" than the methodology that is employed under the federal Supplemental Security Income ("SSI") program, 42 U.S.C. §§ 1982 *et seq.*, for determining income and resource eligibility. 42 U.S.C. §§ 1396a(a)(10)(C); *see also* 42 U.S.C. § 1396a(r)(2)(A)("may be less restrictive, and

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available) is never counted.

shall be no more restrictive"). A methodology is no more restrictive "if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance." *James v. Richman*, 547 F.3d 214, 218 (3d Cir. 2008). This is called "comparability" in Medicaid parlance. The methodology used to determine income and resource eligibility for the Medicaid program must be comparable to the rules used to determine income and resource eligibility for the SSI program, but in any event no more restrictive.

1. ***Non-trust property.*** Under SSI, a "resource" is cash or other asset that an individual owns and could convert to cash to be used for maintenance and support. 20 C.F.R. § 416.1201(a). The individual must have the right, authority, or power to liquidate the property for it to be considered a resource. 20 C.F.R. § 416.1201(a)(1). "Income" is anything an individual receives in cash or in kind that he can use to meet his needs for food and shelter. 20 C.F.R. § 416.1102. Consistent with this mandate, the federal Medicaid agency, the Center for Medicare and Medicaid Services (CMS), says a "payment" from a trust may include use and occupancy in real property, State Medicaid

Manual [SMM], § 3259.1.A.8,[16] which makes sense because it *is* the right to shelter. What CMS did not answer in the SMM is how to value that right.

Comparability requires MassHealth to use a method of assessing the value of a life estate so that "no individuals who are otherwise eligible [under the SSI standard] are made ineligible for such assistance."

2. *Trust property*. Since 2000, SSI and Medicaid have been under comparable trust rules.[17] The Social Security Administration, which administers SSI, says that where a trust that is not a resource to the individual holds title to a house, the house would not be a resource to the individual. POMS SI § 01120.201.F.1.[18] The trust's

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[16] CMS' State Medicaid Manual reflects its view federal law and policy to be followed by states in operating their Medicaid programs; it is comparable to the POMS. For a discussion on the POMS, refer to note 18, below.

[17] *See* 42 U.S.C. § 1382b(e), which is essentially identical to 42 U.S.C. § 1396p(d), and specifically cross-references it, *id.*, § 1382b(e)(5).

[18] POMS (Program Operations Manual System) is the manual that SSA workers use in administering the SSI program, and is entitled to substantial deference as long as the POMS section is reasonable and consistent with the statute it is implementing. *Draper v. Colvin*, 779 F.3d 556, 560-61 (8th Cir. 2014); *Lopes v. Dep't of Soc. Servs.*, 696 F.3d 180, 186 (2d Cir. 2012); *Clark v. Astrue*, 602 F.3d 140, 144 (2d Cir.2010); *Bubnis v. Apfel*, 150 F.3d 177, 181 (2d Cir.1998).

ownership of a home that the individual uses is not income to the individual: the beneficiary of a trust has an equitable ownership interest in the trust principal, POMS SI § 01110.515.C.2, and an individual who is the beneficiary of a trust does not receive income if living rent-free in a home owned by the trust. POMS SI § 01120.200F.2.[19]

B. The limited interests of a personal right to use and occupancy or a life estate of an elderly person have no market value.

1. ***Use and occupancy.*** "Use and occupancy," though common and long-standing, is not the creature of any one area of the law. It may be found in deeds, and trusts, as here, or it may present questions arising under eminent domain.[20] Whatever its source, it does convey some rights (and possibly liabilities), and the economic value of any legal right is, ultimately, a question of fact: what would

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[19] This is not inconsistent with the more general provisions that talk about "use the assets of the trust to meet ... shelter needs ....," POMS SI § 01120.201.D.1.a. That means that if principal can be expended to meet food and shelter needs, it is available; it does not mean that the use of income generated by the principal - comparable to the rental value of real property - to pay rent makes the principal available. This is discussed in more detail below.

[20] *U.S. v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946).

a willing, well-informed buyer pay to a willing, well-informed seller for the good or service to be exchanged? It was just such a question that the Supreme Court addressed in a series of eminent domain decisions. Where there is a right to use and occupancy for a fixed term of years, there is a determinable market value. *U.S. v. General Motors Corp.*, 323 U.S. 373, 374-375, 377-378, 65 S.Ct. 357, 358, 359, 156 A.L.R. 390 (1945).

But the indeterminate and highly uncertain term of the right when it is for the life of an elderly person, and not for a fixed term, affects its value. Given the spend-thrift clause in the trust, and other considerations, it is hard to imagine that Mr. Nadeau's right of use could be sold. To be sure, MassHealth *could* require evidentiary proof that the value is $0 - that is, proof that no one is willing to pay any amount in cash (above the cost and inconvenience of moving) to move into the home of a 91-year-old man[21] where that right terminates at the moment of his death, and the purchasers instantly become trespassers. Just as engineers do not redesign the wheel every day when they go to work, so courts and agencies do not require proof of the commercial value of a specific type

[21] He was 89 years old as of April 1, 2014. MassHealth Brief at 2.

of right every time its value is at issue when logic or experience says it is worth nothing. That would be a fool's errand.

The Social Security Administration has made just such a determination for the SSI program with respect to the right to use and occupancy for life. Unlike a life estate owner who has the right to exclusive possession, and so could in theory rent the property out, the Social Security Administration has said:

> [a]n individual who merely has the right to use property, e.g., ... the right to live in a home for the rest of his life, does not have an ownership interest. One distinguishing factor is that a life estate may be sold or otherwise transferred. Permissive use, however, would not be a legally transferable right, i.e., the parent [with the right to use and occupy] may not sell his permissive right to live in the home to a third party.

POMS SI DEN 01140.110.A.1.

This Court came to the same conclusion long ago. In *Hesseltine v. Partridge*, 236 Mass. 77 (1920), a will granted the widow of the testator the use and occupancy of a home as long as she wanted to live there. *Id.* at 79, 81. The Court concluded that the remainderman's ownership of the house was "subject to the personal right of the widow to use and occupy it" and the widow's "privilege of the use of this property as a residence [for life only] was an interest in real estate of an unascertained, and probably,

indeterminate value." *Id.*; see also *Hershman-Tcherepnin* v. *Tcherepnin*, 452 Mass. 77, 87-88 (2008) (a use and occupancy right is the right to reside in real property).

The lower court in *Nadeau* erred in concluding that the retention of the use and occupancy right in the trust made the corpus a countable resource. A use and occupancy interest cannot be liquidated and paid to the applicant and so provides no circumstances under which trust principal could be paid to the applicant. As stated in the POMS, *supra,* it does not give an individual an ownership interest in the property, and as this Court said, it has at best an "unascertained, and probably indeterminate, value." *Hesseltine*, 236 Mass. at 81.

2. *Life estate*. The SSI rules similarly require that a life estate be recognized to have little if any market value.[22] Indeed, here, the life estate in *Daley* is home property and where it is exempt, "valuation is not necessary." POMS SI § 01110.515.B.1.a. If the life estate could be sold, it would be valued at its sales price, not more, but the practical reality - which is what counts here

[22] There are slight differences between life estates and "use and occupancy" making the life estate less valuable, if anything, because of the life tenant's duty not to commit waste, *e.g.*, maintaining insurance of any structures and paying real property taxes.

– is that a life estate owned by an elderly individual could not be sold at any price and, if not, its value is $0. POMS SI § 01140.044.A.1 and 2. Not seeking to re-prove the value in each case, state Medicaid agencies have said that life estates in residential property have no market value.[23]

This is reflected in Massachusetts case law. A life tenant has a present possessory interest in the property, "a right to the exclusive possession of the land," while the remaindermen holds the legal title to the property, with "possession [at] the death of the life tenant." See *Hershman-Tcherepnin*, 452 Mass. at 88 & n.20, citing *Daley v. Daley*, 308 Mass. 293, 307 (1941). The life tenant is responsible for property taxes. See *Bates v. Sharon*, 175 Mass. 293, 295 (1900). A life tenancy is a form of an equitable ownership interest in real property in which the

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[23] See e.g., Maryland Medical Assistance Manual, § 800.8(b). pp. 829-830:

> Based on verifications obtained over a period of time throughout Maryland, it has been determined that most life estates with limited powers are not marketable in this State at this time. … . Under these conditions, the value of a life tenant's share of a life estate with limited powers should be considered a countable resource with a fair market value of $0. Please note that this is not an exclusion.

https://mmcp.dhmh.maryland.gov/SiteAssets/SitePages/Medical%20Assistance%20Eligibility%20Updates/Section%20800-%20Resources.pdf (accessed December 11, 2016).

life tenant retains the duty to pay the taxes and certain expenses of maintaining the property for the duration of his residence in the property. Such a right, especially held by an elderly nursing home resident, has no value.

There is no market for the sale or even rental of the use of such real property and MassHealth does not argue or even suggest otherwise. SSI would value it as $0, and nothing elsewhere in federal law allows MassHealth to disregard this conclusion under the SSI comparability requirement. The actual value of the interest controls.

III. MassHealth improperly reads the federal Medicaid trust statute to allow it to attribute to Mr. Nadeau and Mr. Daley values that are not, in fact, available, flatly contrary to the words and meaning of federal law and policy.

MassHealth attempts to circumvent the mandatory SSI comparability rule by its own additional regulation, dropped in among the regulations it is permitted - indeed, required - to follow. This additional regulation provides that "[t]he home ... held in an irrevocable trust that is available according to the terms of the trust is a countable asset." 130 C.M.R. § 520.023(C)(1)(d).

The first question is what it means for a home to be "available," and not just available, but available

"according to the terms of the trust."[24] MassHealth says it means "available" using "a plain meaning definition," not the Medicaid-based meaning, and which it says is "the right to use and take advantage of the property." This, MassHealth says, is supported by "dictionary definitions [that 'available'] means 'accessible for use; at hand,' or, in some circumstances, simply 'beneficial.'" This is accurate only in the sense in which Mr. Nadeau, when he was younger and healthier, might go to a hotel and ask if it had a room "available." That is the only sense in which his former home is "available."

Even accepting that argument on its own terms, however, it proves too much and runs flat into a restriction in federal law that MassHealth is not allowed to violate.

The linchpin of MassHealth's argument is that because the house in trust can be used, it is a "payment" *of* the house. According to MassHealth, the house is "available," so MassHealth is allowed to treat the entire house as

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[24] Application of this regulation in *Daley* seems entirely inappropriate since the Daley's rights arise only from the deed and not from or "according to" the trust. The trustee would appear to have no authority to allow or not allow the Daleys to reside there; at most, as owner of the remainder interest, it might have standing to prevent the Daleys from committing waste. *Matteson v. Walsh*, 79 Mass. App. Ct. 402 (2010). To the extent this disposes of MassHealth's claim in *Daley*, the balance of this discussion applies only to *Nadeau*.

available for Medicaid purposes and, if not excluded, countable not just for the value of the use allowed, but at its full fair market value. MassHealth Brief at 22.

But that is not what the federal Medicaid trust statute says. Congress has addressed specifically and, aided by CMS, clearly how to count the assets and income generated by a self-settled irrevocable trust.

MassHealth is not free to disregard these rules. Indeed, it has adopted them as its own. Principal or income that cannot be distributed is treated as transferred and subject to the anti-transfer rules. 130 C.M.R. § 520.023(C)(2). If principal or income could be paid to or for the benefit of the individual, it is countable, 130 C.M.R. § 520.023(C)(1)(a), otherwise not.

Under these rules, Mr. Nadeau's former home cannot be distributed to him and it is plainly not available[25] to him

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[25] "Available" is a term of art in public benefits law meaning, as to income, for example, "whether income ... had actually been received by, and therefore was actually available to, the recipient," even though subject to a court order to be paid out. *Emerson v. Steffen*, 959 F.2d 119, 122 (8th Cir. 1992); *cf.*, *Schweiker v. Gray Panthers*, 453 U.S. 34, 101 S. Ct. 2633, 69 L.Ed.2d 460 (1981) ("available" income can include income "deemed" available pursuant to specific Congressional authority). It is usually used in the context of money or things that can be converted to cash, but can include "in-kind" income; indeed, SSI has voluminous regulations on "ISM" - in-kind support and maintenance that counts as income subject to limits. See POMS SI § 00835.000 *et seq.*

at its fair market value. It is principal and cannot be distributed; likewise, the remainder interest in the Daley trust cannot be distributed. In each situation, the real property is the principal of the trust, that which is to be distributed to the remainderman on the death of the life tenants.

Throughout the statute, income and principal are treated separately, as they are throughout the public benefits system[26], and in estates and trusts generally.[27] If principal *itself* cannot be distributed to the individual, it is treated as disposed of as of the time it became unavailable, 42 U.S.C. § 1396p(d)(3), and thus is not counted. The fact that the trust might throw off income, and that that income might be distributed, does not make the *principal* available. This was spelled out in detail in

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[26] This distinction was essential to the recent First Circuit decision, *DeCambre v. Brookline Housing Authority*, 826 F.3d 1 (2016), *petition for cert. pending*, No. 16-495 (Sup. Ct.), requiring BHA to follow guidelines from the U..S. Dept. of Housing and Urban Development and count distributions of income, but not principal, from a special needs in determining Section 8 housing benefits. 826 F.3d at 14-15.

[27] The significance reflected by nothing so much as the presence of a uniform law for the very purpose of addressing the many issues affected by the significance of whether something is income or principal.

a letter from the director of the federal Medicaid agency to an elder law attorney:

> You interpret [Section 1396p(d)(3)(B)(ii)][28] as meaning that, if a person establishes an irrevocable trust guaranteeing the income of the trust to him or herself for life, but excluding distribution of trust corpus to him or herself, the corpus of the trust will not be considered an available resource to the individual after the applicable transfer-of-assets period. ... You have asked us to confirm your interpretation.
>
> Your understanding of the statutory requirements is essentially correct. ...
>
> ... [W]here a portion of a trust cannot, under any circumstances, be distributed to or for the benefit of the grantor, that portion is *never* considered an available resource to the grantor. Rather, the value of that portion of the trust is treated as a transfer of asset for less than fair market value.

Letter from Sally Richardson, Director, Medicaid Bureau, to Ellice Fatoullah, December 23, 1993 (emphasis added), reprinted in The Elder Law Report, February 1994, p. 2 (included in Addendum, at "Add." 1).

The use of real property or a life estate interest is the equivalent of income. See *Hinckley v. Clarkson*, 331 Mass. 453 (1954), cited with approval, *Bernat v. Kivior*,

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[28] We have used bracketed changes to state more clearly the federal agency's position. As a review of the original letter shows, Ms. Fatoullah had the right result but cited the wrong subparagraph; Medicaid Director Sally Richardson directed her to the correct subsection; we have inserted Ms. Richardson's reference to *that* subsection.

22 Mass.App.Ct. 957, 958, 494 N.E.2d 425, 426 (1986). To be sure, different policies in different areas of the law might counsel different approaches; income for SSI purposes is not the same as income for tax purposes, reflecting as they do different policy goals.[29] But in this area, CMS and SSI have attempted to follow state law, as indeed they must to the extent Congress intended to layer federal rights and responsibilities on top of existing state law. See *Lewis v. Alexander,* 685 F.3d 325, 332, 344 (3rd Cir. 2012) ("Congress did not pass a general body of trust law, estate law, or property law when enacting

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[29] SSI treats as income anything of value that is received that can be used for the purchase of food or shelter, including gifts, inheritances and life insurance proceeds, none of which are subject to income tax for a variety of public policy reasons. Conversely, in implementation of the goals of tax policy, certain types of first-party trusts are treated as identical to the owners, so-called "grantor" trusts, so that all income of such trusts is taxed directly to the owners, see I.R.C. §§ 671-676. SSI and Medicaid have different trust rules, so that the assets and income of trusts that meet the definition of special needs trusts under 42 U.S.C. 1396p(d)(4)(A) and (C) are *not* counted for SSI or Medicaid purposes, even though they are all grantor trusts under I.R.C. §673(a) and (c). To the extent the lower courts relied in part on the use of a common estate tax planning device, the administrative power under I.R.C. §675(4)(C), to confirm grantor trust status, it erred. That power- the right to purchase property from the trust at its fair market value- is used exactly *because* it does not give the settlor anything with which to purchase food or shelter, the SSI test. We are unaware that SSI ever raised this administrative power as creating a problem for the exempt treatment of special needs trusts.

Medicaid. It relied and continues to rely on state laws governing such issues."). *Id.* at 347.

Under Massachusetts law, the real property held by the trustee -- transferred by the transferor to the trustee and to be delivered to the remainderman after the life tenants' deaths -- *is* principal. *See* M.G.L. c. 203D, §§ 2, 13(1) (Massachusetts Principal and Income Act). As Medicaid Bureau director Richardson said, principal that cannot be distributed is *never* available, and the fact that it provides or generates income that is available is irrelevant.

MassHealth's contrary view (cf. MassHealth Brief at 22-23) is not entitled to deference. This is a matter of federal law and policy, where State [Medicaid] plans must conform to standards set by the Federal agency. 42 U.S.C. 1396a(a)(17)(B). Federal and state courts alike have held that a state agency is not entitled to deference with respect to the laws and policies of the federal government, *a fortiori* when in conflict with the federal agency. See *DeCambre v. Brookline Housing Auth.*, 826 F.3d at 19; see also *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-1496 (9th Cir. 1997); *Turner v. Perales*, 869 F.2d 140 (2d Cir. 1989); *Dutton v. Dep't of Social Welfare*, 168 Vt. 281, 721 A.2d 109 (1989). This Court has recognized the validity of

Perales and its decisions are consistent with the general rule. In *Tarin v. Commissioner of the Division of Medical Assistance*, this Court relied on the federal agency's binding interpretation, already acknowledged by three federal courts of appeals, and noted that the state regulations mirrored their federal counterparts. 424 Mass. 743, 750-752 (1997).[30] And in *MCI Communications Corp. v. Dept. of Telecommunications & Energy*, where the federal agency had determined a specific rate-making issue was "best left to State regulatory authorities," the Court "would accord deference to the [state] department's interpretation commensurate with that delegation." 435 Mass. 144, 151 (2001).

The profound error of MassHealth's new policy is easily shown by a simple illustration. Consider the result if the trustee of Mr. Nadeau's trust were to sell the former home, converting his interest into a right to income during his lifetime, perhaps to pay his rent in an apartment. The result for Mr. Daley would be similar: distribution of net income, only. The Fatoullah letter plainly shows that federal law absolutely prohibits counting the principal in either case as available. MassHealth attempts to get a

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[30] Cf., *Haley v. Commissioner of Public Welfare,* 394 Mass.

contrary result based on the different form of the assets held by the trustee, but there is no legal basis for doing so. The general use in federal advisories about what might be "payments" or how principal might be "used" cannot overcome the clear and specific mandate of the federal statute as explained by competent federal authorities.

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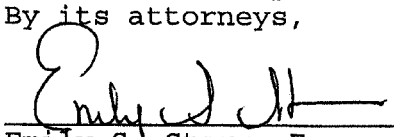
466 (1985).

CONCLUSION

MassHealth's attempt to reach in and count as an available asset at its full fair market value real property that can be used only in a certain way, for an uncertain time, is plainly contrary to SSI policy and contrary to federal Medicaid trust law. MassHealth is bound by federal law to count only the value of what is available as a practical matter, and MassHealth does not claim that someone would pay more than $150,000 for the use of a modest home for the remainder of a 91 year-old-man's life. The alternative theory - counting principal as available because income can be distributed - is an option Congress rejected, and this Court should as well.

Respectfully Submitted
National Academy of Elder Law Attorneys,
By its attorneys,



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Dated: December 19, 2016

CERTIFICATION OF COMPLIANCE WITH RULES OF COURT PURSUANT TO RULE 16(k)

I, Emily S. Starr, certify that the brief of the Amicus Curiae in support of the appellant complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Emily S. Starr

ADDENDUM TABLE OF CONTENTS

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

December 23, 1993

Dear Ms. Fatoullah:

I am responding to your letter asking us to confirm your understanding of the meaning of section 13611(b) of the OBRA 93, as codified in section 1917(d)(3)(B)(i) of the Social Security Act (the Act). This section discusses treatment of irrevocable trusts for purposes of determining eligibility for Medicaid.

Briefly, the cited section provides that if there are any circumstances under which payment from an irrevocable trust could be made to or for the benefit of the individual, actual payments made are considered to be income to the individual. Payments that could be made, but are not, are considered resources to the individual. Payments made for any purpose other than to or for the benefit of the individual are treated as a transfer of assets under section 1917(c) of the Act.

You interpret this part of the statute as meaning that, if a person establishes an irrevocable trust guaranteeing the income of the trust to him or herself for life, but excluding the distribution of the trust corpus to him or herself, the corpus of the trust will not be considered an available resource to the individual after the applicable transfer-of-assets waiting period (which you believes to be 60 months). You have asked us to confirm your interpretation.

Your understanding of the statutory requirements is essentially correct. However, as a technical point, we would note that the appropriate statutory reference dealing with the situation you describe is section 1917(d)(3)(B)(ii) rather than subsection (i). Subsection (ii) deals specifically with trusts where there is some portion of the trust from which distributions cannot, for any reason, be made to or for the benefit of the grantor. In this situation, the 60-month transfer-of-assets waiting period to which you refer applies. The section you referenced in your letter actually deals with trusts where some distribution can be made to or for the benefit of the grantor. In such situations, the portion that could be distributed is counted as a resource to the individual. Where distributions can be made, the waiting period for treatment as transfers of assets of distributions made to or for someone other than the grantor is 36 months.

Also, you should understand that where a portion of a trust cannot, under any circumstances, be distributed to or for the benefit of the grantor, that portion is never

considered an available resource to the grantor. Rather, the value of that portion of the trust is treated as a transfer of assets for less than fair market value. An individual who transfers assets for less than fair market value can still be eligible for Medicaid. However, the Medicaid program will not pay for the cost of various long-term-care services, including nursing facility care. The length of time for which payment of services would be denied would depend on the value of the transferred asset (or, in the situation you describe, the value of that portion of the trust which cannot be paid to or for the benefit of the grantor)

.

I hope this information is useful to you.

Sincerely,
Sally K. Richardson
Director
Medicaid Bureau

Social Security

Program Operations Manual System (POMS)

SI 00835.000 Living Arrangements and In-Kind Support and Maintenance

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Forms SSA-8006-F4, SSA-8008, and SSA-8011

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Social Security

Program Operations Manual System (POMS)

TN 34 (01-93)

SI 01110.515 Ownership in Fee Simple or Less Than Fee Simple

A. Definitions

1. FEE SIMPLE

Fee simple ownership means absolute and unqualified legal title to real property. The owner(s) has unconditional power of disposition of the property during his or her lifetime. Upon his or her death,property held in fee simple can always pass to the owner's heirs. Fee simple ownership may exist with respect to property owned jointly or solely.

2. LESS THAN FEE SIMPLE OWNERSHIP

a. Life Estate - A life estate confers upon one or more persons (grantees) certain rights in a property for his/her/their lifetimes or the life of some other person. A life estate is a form of legal ownership and usually created through a deed or will or by operation of law. See B. below.

b. Equitable ownership - An equitable ownership interest is a form of ownership that exists without legal title to property. It can exist despite another party's having legal title (or no one's having it). See C. below.

B. Policy— Life Estate

1. RIGHTS OF LIFE ESTATE OWNER

a. What Owner Can Do

Unless the instrument (will or deed) establishing the life estate places restrictions on the rights of the life estate owner, the owner has the right to possess, use, and obtain profits from the property and to sell his or her life estate interest. See SI 01140.110 on determining the value of a life estate in nonhome real property. (A life estate in home property is an excluded resource and valuation is not necessary.)

b. What Owner Cannot Do

A life estate owner owns the physical property only for the duration of the life estate. The owner generally can sell only his or her interest; i.e., the life estate. The owner cannot take any action concerning the interest of the remainderman.

2. REMAINDER INTEREST

a. Future Interest in Physical Property

A life estate instrument often conveys property to one person for life (life estate owner) and to one or more others (remaindermen) upon the expiration of the life estate. A remainderman has an ownership interest in the physical property but without the right to possess and use the property until termination of the life estate.

b. Sale of Remainder Interest

Unless restricted by the instrument establishing the remainder interest, the remainderman is generally free to sell his/her interest in the physical property even before the life estate interest expires. In such cases, the market value of the remainder interest is likely to be reduced since such a sale is subject to the life estate interest.

3. EXAMPLE

Mr. Heath, now deceased, had willed to his daughter a life estate in property which he had owned in fee simple. The will also designated Mr. Heath's two sons as remaindermen. Ms. Heath has the right to live on the property until her death at which time, under the terms of her father's will, the property will pass to her brothers as joint tenants.

C. POLICY — EQUITABLE OWNERSHIP INTEREST

Basically, existence of an equitable ownership interest is determined by a court of equity. However, under certain circumstances, an adjudicator can conclude that an equitable ownership interest exists and make a resources determination accordingly.

1. Unprobated Estate

For SSI purposes, an individual may have an equitable ownership interest in an unprobated estate if he or she:

- is an heir or relative of the deceased;
- receives income from the property; or
- has acquired rights in the property due to the death of the deceased in accordance with State intestacy laws.

SI 01120.215 contains instructions on how to determine whether an interest in an unprobated estate is a resource.

2. Trust

A trust is a right of property established by a trustor or grantor. One party (trustee) holds legal title to trust property which he or she manages for the benefit of another (beneficiary). The beneficiary does not have legal title but does have an equitable ownership interest.

SI 01120.200 contains instructions concerning the income and resources treatment of trusts in the SSI program.

3. Equitable Home Ownership

An individual may acquire an equitable ownership interest in his or her home through personal considerations or by performing certain activities such as:

- making mortgage payments or paying property taxes;
- making or paying for additions to a shelter; or
- making improvements to a shelter.

SI 01130.100C.4.. contains instructions on how to determine whether equitable ownership in home property exists.

D. REFERENCES

The following references pertain to trust situations:

- Financial institution/conservatorship accounts, SI 01140.200 - SI 01140.215
- Property held under a State's Uniform Gift to Minors Act, SI 01120.205
- Situations involving an agent acting in a fiduciary capacity on behalf of another party, SI 01120.020

F. Policy - Home ownership/purchase of a home by a trust

1. Home as a resource

If the trustee of a trust which is not a resource for SSI purposes purchases and holds title to a house as a home for the beneficiary, the house would not be a resource to the beneficiary. It would also not be a resource if the beneficiary moved from the house. The trust holds legal title to the house, therefore, the eligible individual would be considered to be living in his or her own home based on having an "equitable ownership under a trust."

If the trust is a resource to the individual, the home is subject to exclusion under SI 01130.100.

2. Rent-free shelter

An eligible individual does not receive in-kind support and maintenance (ISM) in the form of rent-free shelter while living in a home in which he or she has an ownership interest. Accordingly, an individual with "equitable home ownership under a trust" (see SI 01120.200F.1.) does not receive rent-free shelter. Also, because we consider such an individual to have an ownership interest, payment of rent by the beneficiary to the trust has no effect on the SSI payment.

3. Receipt of income from a home purchase

Since the purchase of a home by a trust for the beneficiary establishes an equitable ownership interest for the beneficiary of the trust, the purchase results in the receipt of shelter in the month of purchase that is income in the form of ISM (see SI 00835.400). This ISM is valued at no more than the presumed maximum value (PMV).

Even though the beneficiary has an ownership interest in the home and, if living in the home, does not receive ISM in the form of rent-free shelter, purchase of the home or payment of the monthly mortgage by the trust is a disbursement from the trust to a third party that results in the receipt of ISM in the form of shelter. (See SI 01120.200E.1.b.)

a. Outright purchase of a home

If the trust, which is not a resource, purchases the home outright and the individual lives in the home in the month of purchase, the home would be income in the form of ISM and would reduce the individual's payment no more than the PMV **in the month of purchase only,** regardless of the value of the home. (See SI 01120.200E.1.b.)

b. Purchase by mortgage or similar agreement

If the trust, which is not a resource, purchases the home with a mortgage and the individual lives in the home in the month of purchase, the home would be ISM in the month of purchase. Each of the subsequent monthly mortgage payments would result in the receipt of income in the form of ISM to the beneficiary living in the house, each valued at no more than the PMV (see SI 01120.200E.1.b.).

c. Additional household expenses

If the trust pays for other shelter or household operating expenses, these payments would be income in the form of ISM in the month the individual has use of the item (see SI 00835.350). Countable shelter expenses are listed at SI 00835.465D.

If the trust pays for improvements or renovations to the home, e.g., renovations to the bathroom, to make it handicapped accessible or installation of a wheelchair ramp or assistance devices, etc., the individual does not receive income. Disbursements from the trust for improvements increase the value of the resource and, unlike household operating expenses, do not provide ISM. (See SI 01120.200E.1.c.)

D. Policy on the treatment of trusts

1. Revocable trusts

a. General rule for revocable trusts

In the case of a revocable trust established with the assets of the individual, the entire corpus of the trust is a resource to the individual. However, certain exceptions may apply. (See SI 01120.203A).

NOTE: The exceptions in SI 01120.203A only apply to counting a trust under the statutory provisions of section 1613(e) of the Act. A trust that meets the definition of a resource is still countable and must be developed under SI 01120.200.

b. Relationship to transfer penalty

Any disbursements from a trust that is a resource that are not made to, or for the benefit of, the individual (SI 01120.201F.1. in this section) are considered a transfer of resources. (For transfer of resource provisions, see SI 01150.100).

c. Example

Willie Jones is a young adult with mental retardation. Mr. Jones had a revocable trust established after 1/1/00. All but $5,000 of funds in the trust had been spent on Mr. Jones' behalf. His mother files for SSI for him and is told that he is not eligible because of the money in the trust. His mother takes $4,500 of the money and makes a down payment on a new car that she says she will use to transport Mr. Jones. However, she registers the car in her own name. Even though his mother will use the car to transport Mr. Jones, the purchase of the car is a transfer of resources since the car does not belong to him. (For policy on purchases for the benefit of the individual and titling of property, See SI 01120.201F.1. in this section).

2. Irrevocable trusts

a. General rule for irrevocable trusts

In determining whether an irrevocable trust established with the assets of an individual is a resource, we must consider how payments from the trust can be made. If payments from

the trust could be made to or for the benefit of the individual or individual's spouse (SI 01120.201F.1. in this section), the portion of the trust from which payment could be made that is attributable to the individual is a resource. However, certain exceptions may apply (see SI 01120.203).

b. Circumstance under which payment can or cannot be made

In determining whether payments can or cannot be made from a trust to or for the benefit of an individual (SI 01120.201F.1.), take into consideration any restrictions on payments. Restrictions may include use restrictions, exculpatory clauses, or limits on the trustee's discretion included in the trust. However, if a payment can be made to or for the benefit of the individual under **any** circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. in this section applies (i.e., the portion of the trust that is attributable to the individual is a resource, provided no exception from SI 01120.203 applies).

c. Examples

- An irrevocable trust provides that the trustee can disburse $2,000 to, or for the benefit of, the individual out of a $20,000 trust. Only $2,000 is considered to be a resource under SI 01120.201D.2.a. in this section. The other $18,000 is considered to be an amount which cannot, under any circumstances, be paid to the individual and may be subject to the transfer of resources rule in SI 01120.201E in this section and SI 01150.100.
- If a trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday, the entire $50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource.
- An individual establishes an irrevocable trust with $10,000 of his assets. His parents contribute another $10,000 to the trust. The trust only permits distributions to, or for the benefit of, the individual from the portion of the trust contributed by his parents. The trust is not subject to the rules of this section. The portion of the trust contributed by the individual is subject to evaluation under the transfer of resources rules in SI 01150.100 (see also SI 01120.201E in this section). The portion of the trust contributed by his parents is subject to evaluation under SI 01120.200.

3. Types of payments from the trust

a. Payments to an individual

Payments are considered to be made **to the individual** when any amount from the trust, including amounts from the corpus or income produced by the trust, are paid directly to the individual or someone acting on his or her behalf, e.g., guardian or legal representative.

b. Payments on behalf of or for the benefit of an individual

See SI 01120.201F.1. in this section. Also, for more instructions on disbursements from trusts, see SI 01120.201I in this section.

4. Placing excluded resources in a trust

If an individual places an excluded resource in a trust and the trust is a countable resource, the resource exclusion can still be applied to that resource. For example, if an individual transfers ownership of his or her excluded home to a trust and the trust is a countable resource, the home is still subject to exclusion under SI 01130.100. (For a discussion of ownership of a home by a trust and the effect of payment of home expenses by the trust, see SI 01120.200F).

5. Trust rules versus transfer rules for assets in a trust

When an individual transfers assets to a trust, he or she generally transfers ownership of the asset to the trustee. In some cases, this could be considered a transfer of resources. In order to avoid both counting a trust as a resource and imposing a transfer of resources penalty for the same transaction**, the trust provisions take precedence over the transfer provisions**. If there are portions of the trust that cannot be counted as a resource, then the transfer rules may apply to that portion of the trust.

F. Policy for the benefit of or on behalf of or for the sole benefit of an individual

1. Trust established for the benefit of or on behalf of an individual

Consider a trust established **for the benefit** of an individual if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment.

Likewise, consider payments to be made **on behalf of,** or **to or for the benefit of** an individual, if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment.

For example, such payments could include purchase of food or shelter, or household goods and personal items that count as income. The payments could also include services for medical or personal attendant care that the individual may need which does not count as income.

NOTE: These payments are evaluated under regular income-counting rules. However, they do not have to meet the definition of income for SSI purposes to be considered to be made **on behalf of,** or **to or for the benefit of** the individual.

If funds from a trust that is a resource are used to purchase durable items, e.g., a car or a house, **the individual (or the trust) must be shown as the owner of the item** in the percentage that the funds represent the value of the item. When there is a deed or titling document, the individual (or trust) must be listed as an owner. Failure to do so may constitute evidence of a transfer of resources.

2. Trust established for the sole benefit of an individual

a. General rule regarding sole benefit of an individual

Consider a trust established **for the sole benefit of** an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life.

Except as provided in SI 01120.201F.2.b. in this section and SI 01120.201F.2.c. in this section, do not consider a trust that provides for the trust corpus or income to be paid to or for a beneficiary other than the SSI applicant/recipient to be established for the sole benefit of the individual.

b. Exceptions to the sole benefit rule for third party payments

Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:

- Payments to a third party that result in the receipt of goods or services by the trust beneficiary;
- Payment of third party travel expenses which are necessary in order for the trust beneficiary to obtain medical treatment; and
- Payment of third party travel expenses to visit a trust beneficiary who resides in an institution, nursing home, or other long-term care facility (e.g., group homes and assisted living facilities) or other supported living arrangement in which a non-family member or entity is being paid to provide or oversee the individual's living arrangement. The travel must be for the purpose of ensuring the safety and/or medical well-being of the individual.

NOTE: If you have questions about whether a disbursement is permissible, please request assistance from your regional office.

c. Exceptions to the sole benefit rule for administrative expenses

The trust may also provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust. In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust.

NOTE: You should not routinely question the reasonableness of a trustee's compensation. However, you should consider the factors above to determine if there is a reason to question the reasonableness of the fees or compensation.

d. Trusts that previously met the requirements to be excepted under section 1917(d)(4)(A) or (C) of the Act

If a trust previously determined to be exempt from resource counting under section 1917 (d)(4)(A) or (C) contains a third party travel expense provision(s) that must be amended in order to conform with the third party travel expense provisions in SI 01120.201F.2.b., it must be amended within 90 days. That 90-day period begins on the day the recipient or representative payee is informed that the trust contains a third party travel expense

provision(s) that must be amended in order to continue qualifying for the exception under Section 1917(d)(4)(A) or Section 1917(d)(4)(C).

Do not count a previously exempted trust as a resource during the 90-day amendment period. If the trust still fails to meet the requirements of this section after the expiration of the 90-day amendment period, begin counting the trust as a resource under normal resource counting rules.

NOTE: Each previously excepted trust is permitted only one 90-day amendment period to conform with the third party travel expense provisions in SI 01120.201F.2.b. in this section.

SI 01140.044 Resources With Zero Value

A. Policy

1. Effect of a CMV of Zero

Property that meets the definition of a resource (SI 01110.100 B.1.) is a resource even if it has no value to count; i.e., has a CMV of zero (SI 01110.100 B.2.).

2. Unsuccessful Attempts to Sell

An unsuccessful attempt to sell property at its estimated CMV may suggest that the property has a lesser CMV than estimated, but does not necessarily mean that the property has no CMV at all.

Social Security

Program Operations Manual System (POMS)

SI DEN01140.110 Life Estates

See SI 01140.110

A. Definition

1. A life estate is an ownership interest in real property. The right of ownership exists for the lifetime of an individual or individuals. Upon the death of the individual(s) the ownership passes to the "remainderman." The owner(s) of a life estate is called a "life tenant" or "tenant for life." An individual who merely has the right to use property, e.g., an adult child promises a parent the right to live in a home for the rest of his life, does not have an ownership interest. One distinguishing factor is that a life estate may be sold or otherwise transferred. Permissive use, however, would not be a legally transferable right, i.e., the parent may not sell his permissive right to live in the home to a third party.
2. An individual may receive a life estate interest through a deed or grant, through an oral agreement or State law. In most instances, however, he or she cannot pass the life estate interest on to his or her heirs.

B. Development/documentation

1. Conveyance through a deed or grant

a. In most cases a life estate can only be conveyed by deed or other grant. It is immaterial whether the life tenant transfers the property and reserves a life estate or whether the life estate is granted to the tenant by a third party. Accept without further development any document presented by the claimant which:

(1) Is a deed or uses the language of a deed;

(2) Specifically grants a life estate; and

(3) Is recorded with the registrar of deed or other proper authority.

b. If a life estate is alleged but the document does not conform to all the criteria listed above, submit the case to the ARC, Programs for a review by the staff and/or the Office of Chief Counsel.

2. Conveyance through an oral transaction

Oral transactions ordinarily are not recognized as establishing a life estate; however, there are some exceptions. If a life estate is alleged and the allegation appears to be supported by other evidence, submit the case as in SI DEN01140.110b.1, step b.

3. Conveyance Through State Law

Some states recognize a widow(er)'s homestead interest as equivalent to a life tenancy. There are also situations when both parents are deceased in which a life estate may be conveyed to a child. Submit all cases of this nature to the ARC, Programs for review and possible referral to the Office of Chief Counsel.