

**COMMONWEALTH OF MASSACHUSETTS**

COUNTY OF SUFFOLK

SUPERIOR COURT  
DOCKET NO: 1884CV00129

JEAN MAAS, and  
HENRY and EVA HIRVI,

Plaintiffs

v.

MARYLOU SUDDERS,  
Secretary of the Executive Office of  
Health and Human Services,

And

KIM LARKIN,  
Director of the Board of Hearings  
of the Office of Medicaid of the  
Executive Office of Health and  
Human Services

Defendants

---

**SECOND AFFIDAVIT OF JOHN D. WELCH IN SUPPORT OF  
MOTION FOR CLASS CERTIFICATION**

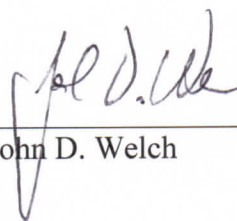
I, John D. Welch, swear and affirm as follows:

1. I am an attorney in good standing, licensed to practice in the Commonwealth of Massachusetts, with a principal place of business at 70 Washington Street, Suite 402, Salem, Massachusetts.
2. I represent John DeFazzio, age 75, who was a resident of Chestnut Wood Nursing and Rehabilitation from November 16, 2016 to June 26, 2017. He filed an application for long term care MassHealth benefits on December 22, 2017.
3. On November 30, 2011 he established Kovatsi-Stanton Irrevocable Trust (an irrevocable income only trust) the provisions of which incontrovertibly place the trust principal beyond the reach and control of the settlor. A copy of the trust was submitted with the application.

4. By notice dated April 4, 2017 his application was denied. Notice attached as Exhibit A.
5. The notice fails to give a clear statement of the specific reasons for the denial of benefits with the result that eligibility for benefits will not be granted until the alleged excess assets are spent down to \$2,000.00.
6. The notice is unlawful and defective in violation of federal Medicaid law at 42 CFR 431.210(b), which requires that notice of an action by MassHealth “give a clear statement of the specific reasons for the action” by the agency. It is also in violation of MassHealth’s own regulations which provide at 130 CMR 610.026(A)(2) that the notice must contain “the reasons for the intended action.”
7. With respect to the denial of benefits, the notice states only that the application was denied for excess assets in the amount of \$214,301.96 and cites the regulation regarding the asset limit of \$2,000, 130 CMR 520.003, 520.004. The notice also contains information as to how to appeal the adverse decision.
8. The MassHealth Caseworker made this determination independently and did not ask the MassHealth Legal Unit to review the trust.
9. The matter was then appealed to the Board of Hearings and a hearing was held July 19, 2017 before Rebecca Brockstein.
10. A denial was issued September 7, 2017. See Exhibit B
11. The appeal was not denied based upon the issues presented by the parties. In fact, the Hearing Officer specifically states in the Decision that the Trust provision relied upon by MassHealth to deny eligibility “does not allow the appellant to use trust assets for his own benefit.” Thus, the Appeal should have been approved.
12. Instead, the Hearing Officer’s Decision denying the Appeal concludes that “... a separate provision of the trust that was not flagged by MassHealth *is* problematic for the appellant. Paragraph 20 provides that “[T]he Trustee may, **with consent from the beneficiaries**, (emphasis added) alter, amend, or add to this Declaration of Trust.” Under this provision, the “Trustee” (currently the appellant and his two children, collectively) has the authority, with the consent of the beneficiary – the appellant’s daughter, who is also a trustee – to change the terms of the trust.” Importantly, there is nothing in this provision which would prevent such an amendment from adding or removing a beneficiary, or otherwise changing the scheme of beneficial interests. Consequently, the trustees could amend the schedule of beneficial interests to remove his daughter and make the appellant the sole beneficiary of the trust. He would then have full access to trust principal. (Hearing decision page 7)

13. I submitted a Request for Rehearing September 20, 2017 (attached as Exhibit C) to Director Daniel Tisei through MassHealth's Chief Counsel. I have received no response in the intervening seven months.
14. The conclusions drawn by the Hearing Office are completely contrary to well-settled Trust law.
15. The Hearing Officer's Denial is based upon trust provisions and legal conclusions not raised or discussed at the Hearing.
16. The hearing Officer gives no explanation why the qualifying language "with the consent from beneficiaries" was not considered.
17. The Hearing Officer does not mention that the appellant is actually one of three co-trustees without power or authority to act independently.
18. The Hearing Officer's Decision violates 130 CMR 610.065 (A)(8) which requires the decision to be based on the issues and evidence raised at the Hearing. M.G.L. c. 118E § 48
19. The agency and the hearing officers dealing with the administrative appeals pursuant to G.L. c. 118E section 48, have a duty to strive to act on bases that are uniform and predictable. *Hercules Chemical Company v. Department of Environmental Protection*, 76 Mass. 627, 636 (2005). If the agency has acted for reasons that are extraneous to the prescriptions of the regulatory scheme, but are related, rather, to an ad hoc agenda, then the agency has acted arbitrarily because the basis for the action is not uniform, and, it follows, is not predictable. *Faford v. Conservation Commission of Reading*, 41 Mass.App.Ct. 565, 568 672 N.E.2d 21 (1996)

SIGNED under the pains and penalties of perjury this 4<sup>th</sup> day of May, 2018.

  
\_\_\_\_\_  
John D. Welch

Ch. Rehab

CHELSEA OFFICE  
45 - 47 SPRUCE STREET  
CHELSEA MA 02150-3675

FP

Commonwealth of Massachusetts  
Executive Office of Health  
and Human Services  
Office of Medicaid  
www.mass.gov/masshealth

111

Tel: (800) 322-1448  
TTY: (888) 665-9997  
Fax: (617) 889-3285

Medicaid ID : [REDACTED]



556/D \*000685\*

[REDACTED]  
70 WASHINGTON ST #402  
SALEM MA 01970

RECEIVED  
APR 07 2017

Attn: PARENT CARE USA Re: Notice sent to JOHN DEFAZIO

Date: 04/04/2017

Notice: 57615750

SSN: XXX-XX-[REDACTED]

Dear JOHN DEFAZIO

Important! This health-care benefits notice tells you the decisions we have made about certain programs that you may be eligible for. Please read the whole notice to find out about your health-care benefits.

**MassHealth Long-Term-Care Services in a Nursing Facility**

MassHealth has reviewed your application for MassHealth long-term-care services which you filed on 02/28/2017. You are not eligible for MassHealth long-term-care services for the following reasons:

**Reason and Manual Citation**

You have more countable assets than MassHealth benefits allow. 130 CMR 520.003 520.004

**What Happens Next?**

You must spend \$214,301.96 of your assets. You can spend the excess assets on your needs, but you cannot give them away.

You must show MassHealth within the next 30 days that you have lowered your assets to \$2,000.00.

continued...

RIS  
04/17

The bills we can count include doctor and hospital visits, health insurance premiums, nursing home care, medicines, and medical equipment. We cannot count any part of bills that are covered by other health insurance.

The calculation page at the end of this notice shows how we counted your assets. After you have lowered your assets and become eligible for MassHealth, you may have to give your nursing facility part of your income every month to help pay for your care.

MassHealth Community-based Services

MassHealth has decided that the following members of your family are not eligible for MassHealth for the following reasons.

| Name            | SSN/DOB | Medicaid ID |
|-----------------|---------|-------------|
| DEFAZIO, JOHN J | XXX-XX- | [REDACTED]  |

Reason and Manual Citation

You have more countable income and assets than MassHealth benefits allow. 130 CMR 520.002 520.028 520.003 520.004

You have more countable income than MassHealth Standard or Limited benefits allow. You have a deductible of \$14,836. The deductible period is 02/01/2017 to 08/01/2017. If you meet your deductible, you may be able to get your benefits by sending us bills for medical services you got before or during the deductible period. The bills may be for you or your family members, and must add up to or be more than the deductible amount. The calculation page at the end of this notice shows how we counted your income. 130 CMR 520.002 520.028

You have more countable assets than MassHealth Standard or Limited benefits allow. If you reduce your assets to \$2,000 within the 30-day time frame, you may be eligible for MassHealth benefits based on the date of your application. But if you do not reduce your assets to \$2,000 within the 30-day time frame, MassHealth will use as the date of your application the date you submit all of the required verifications that show you have reduced your assets to \$2,000. The calculation page at the end of this notice shows how we counted your assets. 130 CMR 520.003 520.004

Call the phone number at the top of this notice if you have any questions about this notice. If you don't have a copy of the Member Booklet, please call to request one. It has important information about MassHealth coverage and rules.

For information about appealing our decisions, see the Request for a Fair Hearing page of this notice.

Health Safety Net

The Health Safety Net will not pay for services given to the individual(s) listed below. This is because your family's income is over 300% of the federal poverty level (see 101 CMR 613.00 and the sections that follow). You must pay for services you get at a hospital or community health center. Please call the number at the top of this notice if you have any questions about this decision.

|                 |         |             |
|-----------------|---------|-------------|
| Name            | SSN     | Medicaid ID |
| DEFAZIO, JOHN J | XXX-XX- | [REDACTED]  |

If you have questions about this Health Safety Net decision, please call the number at the top of this notice. If you do not agree with this Health Safety Net decision, you may contact the Health Safety Net, Attn: HSN Grievances, 100 Hancock Street, 6th Floor, Quincy, MA 02171, or you can call them at 1-877-910-2100.

Health Connector

The Connector has decided that the following individual(s) are not eligible for Commonwealth Care health insurance because your family's income is over 300% of the federal poverty level (see 956 CMR 3.04).

|                 |         |             |
|-----------------|---------|-------------|
| Name            | SSN/DOB | Medicaid ID |
| DEFAZIO, JOHN J | XXX-XX- | [REDACTED]  |

If you have any questions about your eligibility, please call the number at the top of this notice.

How We Counted Your Assets

|                                  |            |            |
|----------------------------------|------------|------------|
| <b>MA Countable Assets</b>       |            |            |
| Life Insurance:                  | 0.00       |            |
| PNA Account:                     | 0.00       |            |
| Auto Value:                      | 0.00       |            |
| Bank Account:                    | 1,001.96   |            |
| Real Estate Value:               | 0.00       |            |
| Other:                           | 215,300.00 |            |
| Total Asset Amount:              | 216,301.96 | 216,301.96 |
| MA Asset Limit for Household(1): |            | 2,000.00   |
|                                  |            | -----      |
| Excess Asset Amount:             |            | 214,301.96 |

How We Counted Your Income

|  |          |           |
|--|----------|-----------|
| <b>Unearned Income:</b>                  |          |           |
| Unearned Income                          | 4,089.00 |           |
| PCA Disregard                            | 815.00   | -815.00   |
|  |          | -----     |
| Total UIN Amount:                        | 3,274.00 | 3,274.00  |
| <b>Earned Income:</b>                    |          |           |
| Earned Income Amount:                    | 0.00     |           |
| Unearned Income Disregard:               | 0.00     | 0.00      |
| Earned Income Disregard:                 | 0.00     | 0.00      |
|  |          | -----     |
| Countable Earned Income Amount:          | 0.00     |           |
| Half Countable Earned Inc Amount:        | 0.00     | +0.00     |
|  |          | -----     |
| Total Earned Income Amount:              | 0.00     | 0.00      |
|  |          | -----     |
| Total Countable Income Amount:           |          | 3,274.00  |
| MA Income Standard For Household Size(1) |          | -522.00   |
|  |          | -----     |
| Monthly Gross Deductible Amount:         |          | 2,752.00  |
| Health Insurance Premium Amount:         |          | -182.78   |
| Medicare Self Pay Amount:                |          | -96.50    |
|  |          | -----     |
| Monthly Net Deductible Amount:           |          | 2,472.72  |
|  |          | -----     |
| Total Deductible Amount:                 |          | 14,836.00 |

Monthly Deductibles

|  |          |
|--|----------|
| Deductible Month (1) and Amount: 02/17 | 2,472.72 |
| Deductible Month (2) and Amount: 03/17 | 2,472.72 |
| Deductible Month (3) and Amount: 04/17 | 2,472.72 |
| Deductible Month (4) and Amount: 05/17 | 2,472.72 |
| Deductible Month (5) and Amount: 06/17 | 2,472.72 |
| Deductible Month (6) and Amount: 07/17 | 2,472.72 |

**Office of Medicaid  
BOARD OF HEARINGS**

**Appellant Name and Address:**

John DeFazio  
c/o Nancy DeFazio  
33 Tozer Road  
Beverly, MA 01915

|                         |                    |                       |            |
|-------------------------|--------------------|-----------------------|------------|
| <b>Appeal Decision:</b> | Denied             | <b>Appeal Number:</b> | 1707091    |
| <b>Decision Date:</b>   | SEP 07 2017        | <b>Hearing Date:</b>  | 07/19/2017 |
| <b>Hearing Officer:</b> | Rebecca Brochstein |                       |            |

**Appearances for Appellant:**  
John Welch, Esq.

**Appearances for MassHealth:**  
Joann Araujo-Moniz, Taunton MEC



*Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Office of Medicaid  
Board of Hearings  
100 Hancock Street  
Quincy, MA 02171*



## Issue

The appeal issue is whether MassHealth correctly determined that assets in trust are countable to the appellant and that he therefore has excess assets.

## Summary of Evidence

An eligibility worker from the Taunton MassHealth Enrollment Center appeared at the hearing by telephone and testified as follows: The appellant was admitted to a long-term care facility on November 16, 2016. A MassHealth long-term care application was filed on his behalf but denied for missing verifications; the denial was not appealed. A re-application was filed on February 28, 2017, seeking coverage as of December 3, 2016. In processing the case, MassHealth determined that the appellant retained access to funds in a trust and therefore had assets above the MassHealth limit. On April 4, 2017, MassHealth denied the appellant's application on the basis of excess assets in the amount of \$214,301.96. See Exhibit 1.

The documents in evidence reflect the following history regarding the trust: On November 30, 2011, the appellant established The Irrevocable [D] Realty Trust ("the trust"), naming himself and his two children collectively as the "Trustee." The provisions of the trust include the following:

WHEREAS, the Donor may transfer property to the Trustee simultaneously herewith (in which case, it will be listed on a schedule designated "Schedule A") and may from time to time assign, transfer or pay over to the Trustees other property, real or personal, that may by [sic] transferred to the Trustees hereunder in trust for the sole benefit of the individuals or entities listed on the Schedule of Beneficiaries this day executed by the Trustees, in the proportions stated in said Schedule.

### IRREVOCABILITY

The donor expressly waives any and all right which he may have, by operation of law or otherwise, to revoke, alter, amend or otherwise change this Indenture of Trust or any of the provisions hereof.

We [donor and children] hereby declare that we and our successors in trust will hold any and all property, real and personal, that may by [sic] transferred to us as Trustees hereunder in trust for the sole benefit of the individuals or entities listed on the Schedule of Beneficiaries this day executed by the Donor, in the proportions stated in said Schedule.

1. (a) The name of this Trust shall be the Irrevocable [D] Realty Trust
- (b) The term "Trustees" when used in this instrument shall each include both

as the sole beneficiary of the trust. On December 1, 2011, the appellant deeded his interest in a condominium to the trust. The assessed value of the property is \$215,300. See Exhibit 5.

The MassHealth representative argued that the trust assets are countable to the appellant because of language in Paragraph 3 that give the Trustee “full power and discretion, as if absolute owner,” to take a wide array of actions with respect to the trust property. She suggested that this provision allows the appellant to use the trust assets for his own benefit.<sup>2</sup>

The appellant was represented at hearing by an attorney. He argued that the property in the trust is not countable to the appellant because the terms of the trust do not allow him to access the principal. He stated that the appellant’s role as trustee is to hold the trust assets not for himself, but for the sole benefit of the beneficiaries listed on the Schedule of Beneficiaries. With regard to Paragraph 3, the attorney maintained that this is simply typical trust language that enumerates trustee powers. He also emphasized that the appellant has no right to revoke, alter, or amend the trust.<sup>3</sup> The attorney submitted a legal memorandum setting forth these arguments in some greater detail. See Exhibit 7.

### **Findings of Fact**

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

1. On November 30, 2011, the appellant established The Irrevocable [D] Realty Trust, naming himself and his two children collectively as the “Trustee.” The trust terms include the following:
  - a. “The donor expressly waives any and all right which he may have, by operation of law or otherwise, to revoke, alter, amend or otherwise change this Indenture of Trust or any of the provisions hereof.” (Preamble)
  - b. Donor and children “hereby declare that we and our successors in trust will hold any and all property, real and personal, that may by [sic] transferred to us as Trustees hereunder in trust for the sole benefit of the individuals or entities listed on the Schedule of Beneficiaries this day executed by the Donor, in the proportions stated in said Schedule.” (Preamble)
  - c. “The term ‘Trustees’ when used in this instrument shall each include both singular

---

<sup>2</sup> The MassHealth representative indicated that she had made this determination independently and had not asked the MassHealth Legal Unit to review the trust.

<sup>3</sup> The attorney noted that the appellant has been discharged from the nursing facility and is now living in the condominium that is in the trust.

7. A MassHealth long-term care application was filed on his behalf but denied for missing verifications. The denial was not appealed.
8. On February 28, 2017, a re-application was filed on the appellant's behalf, seeking coverage as of December 3, 2016.
9. In reviewing the long-term care application, MassHealth determined that the appellant had access to the trust assets.
10. On April 4, 2017, MassHealth denied the appellant's application on the basis of excess assets of \$214,301.96.

### **Analysis and Conclusions of Law**

Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual. 130 CMR 520.023. For property held in a revocable trust – defined in 130 CMR 515.001 as “a trust whose terms allow the grantor to take action to regain any of the property or funds in the trust” – the rules are as follows (130 CMR 520.023(B)):

- (1) The entire principal in a revocable trust is a countable asset.
- (2) Payments from a revocable trust made to or for the benefit of the individual are countable income.
- (3) Payments from a revocable trust made other than to or for the benefit of the nursing-facility resident are considered transfers for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).
- (4) The home or former home of a nursing-facility resident or spouse held in a revocable trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).

For an irrevocable trust – defined as “a trust that cannot be in any way revoked by the grantor” – the amount countable to an applicant is determined as follows (130 CMR 520.023(C)):

- (a) Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset.
- (b) Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income.
- (c) Payments from the income or from the principal of an irrevocable trust made to another and not to or for the benefit of the nursing-facility resident are considered

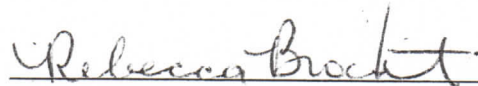
Because the trust can be amended to give the appellant full access to the trust principal, his available assets exceed the regulatory limit set forth in 130 CMR 520.003. This appeal is therefore denied.

### **Order for MassHealth**

None.

### **Notification of Your Right to Appeal to Court**

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.



Rebecca Brochstein  
Hearing Officer  
Board of Hearings

cc: Taunton MEC

John Welch, Esq.  
Meyers & Welch, Attorneys at Law  
70 Washington Street, Suite 402  
Salem, MA 01970



MEYERS & WELCH  
ATTORNEYS AT LAW

*Of Counsel*  
Andrew Graves Christensen

Sandra L'Italien, Paralegal

Sharon D. Meyers\*  
John D. Welch\*\*

Honorable John C. Stevens, III, Retired  
Practice Limited to Mediation and Arbitration

E-mail: [jwelch@meyersandwelch.com](mailto:jwelch@meyersandwelch.com)

Tel: (978) 745-0575

Fax: (978) 745-6757

## REQUEST FOR REHEARING

September 20, 2017

Daniel Tsai, Director  
Sharon Boyle, Chief MassHealth Counsel  
Executive Office of Health and Human Services  
Office of Medicaid  
One Ashburton Place, 11<sup>th</sup> Floor  
Boston, MA 02108

RE: John DeFazio  
APPEAL: 1707091

Dear Director Tsai:

Please accept this as a Request for Rehearing in the above matter.

This case involves the question of whether assets transferred to an irrevocable trust are countable resources for MassHealth eligibility.

The facts are as follows:

1. Mr. DeFazio is 74 years old and resided at Chestnut Woods Nursing and Rehabilitation in long term care from November 16, 2016 until June 26, 2017. Prior to that he resided at home and in various facilities intermittently.
2. He has two children: Nancy DeFazio, and Robert DeFazio. Nancy has been acting as his Attorney-in-Fact since November 6, 2015.
3. On November 30, 2011 Mr. DeFazio executed the Irrevocable DeFazio Realty Trust as Donor and Trustee naming his daughter Nancy V. DeFazio as the 100% beneficiary and relinquishing all right to "revoke, alter, amend or change" any

70 Washington Street, Suite 402, Salem, Massachusetts 01970-3520  
6 Harris Street, Newburyport, Massachusetts 01950

\*Admitted in Vermont

\*\*Admitted in Maine

provisions of the trust and agreed to hold the property as Trustee “for the sole benefit of the individuals or entities listed on the Schedule of Beneficiaries.”

4. Prominent on the first page of the trust instrument is the clear language:  
  
“The donor expressly waives any and all right which he may have, by operation of law or otherwise, to revoke, alter, amend or otherwise change this Indenture of Trust or any of the provisions hereof.”
5. The appellant and his two children are all trustees of the Irrevocable DeFazio Realty Trust.
6. The condominium was transferred to the trust by deed dated December 1, 2011.
7. Mr. DeFazio filed an application for Long Term Care December 22, 2016 seeking coverage as of December 3, 2016.
8. After processing, the application was denied April 4, 2017 for excess assets citing the trust.
9. The MassHealth Caseworker made this determination independently and did not ask the MassHealth Legal Unit to review the trust.
10. The matter was then appealed to the Board of Hearings and a hearing was held July 19, 2017 before Rebecca Brockstein.
11. A denial was issued September 7, 2017.
12. The appeal was not denied based upon the issues presented by the parties. In fact, the Hearing Officer specifically states in the Decision that the Trust provision relied upon by MassHealth to deny eligibility “does not allow the appellant to use trust assets for his own benefit.” Thus, the Appeal should have been approved.
13. Instead, the Hearing Officer’s Decision denying the Appeal concludes that “... a separate provision of the trust that was not flagged by MassHealth *is* problematic for the appellant. Paragraph 20 provides that “[T]he Trustee may, **with consent from the beneficiaries**, (emphasis added) alter, amend, or add to this Declaration of Trust.” Under this provision, the “Trustee” (currently the appellant and his two children, collectively) has the authority, with the consent of the beneficiary – the appellant’s daughter, who is also a trustee – to change the terms of the trust.” Importantly, there is nothing in this provision which would prevent such an amendment from adding or removing a beneficiary, or otherwise changing the scheme of beneficial interests. Consequently, the trustees could amend the schedule of beneficial interests to remove his daughter and make the appellant the sole beneficiary of the trust. He would then have full access to trust principal. (Hearing decision page 7)

14. The conclusions drawn by the Hearing Office are completely contrary to well-settled Trust law.
15. The Hearing Officer's Denial is based upon trust provisions and legal conclusions not raised or discussed at the Hearing.
16. The hearing Officer gives no explanation why the qualifying language was not considered. i.e.
17. The Hearing Officer does not mention that the appellant is actually one of three co-trustees without power or authority to act independently.
18. The Hearing Officer's Decision violates 130 CMR 610.065 (A)(8) which requires the decision to be based on the issues and evidence raised at the Hearing.

ISSUE PRESENTED:

**Whether the trust in question is countable in determining the MassHealth long term care eligibility for Mr. DeFazio.**

ARGUMENT

For the trust in question to be disqualifying it would need to be a Medicaid Qualifying Trust (MQT). However, to be a MQT the trust would need to name the applicant as a beneficiary which it does not.

**1. The Hearing Officer mistakenly analyzes the Trust in question as a Medicaid Qualifying Trust (MQT).**

The trust in this case is not a Medicaid Qualifying Trust (MQT) for the following reasons:

- A MQT is "a revocable or irrevocable trust ... funded by the individual ... under which the individual is a beneficiary ..." and the trustee has any discretion to distribute trust property to the individual as a beneficiary ..." (130 CMR 520.022(B), Emphasis added).
- The applicant is not, and never has been, a beneficiary of the trust so the maximum amount of the trust assets that may be distributed to the applicant assuming the full exercise of the trustee's discretion is zero.
- In order to be a MQT the applicant must be a beneficiary.
- If the applicant is not a beneficiary of the trust it cannot, by definition, be a MQT.

2. **The trust does not give the trustee authority to change the beneficiary designation AND the trustee alone cannot amend the trust (there are three trustees) AND he cannot change the beneficiary designation unilaterally without breaching his fiduciary duty to the beneficiary.**
- Despite the Hearing Officer's finding that the applicant can add himself as a beneficiary, this is simply not the case.
  - The Hearing Officer ignores language in the trust which requires the trustees to have the consent of the beneficiary to alter, amend or add to the trust.
  - Furthermore, the trust has three trustees, and the trust does not give any of them the authority to act unilaterally.
  - A general grant of authority to alter, amend or add to a trust is insufficient to grant a trustee the authority to change a beneficiary.
  - The MassHealth regulations properly define a revocable trust as "... a trust whose terms allow the grantor to take action to regain any of the property or funds in the Trust" 130 CMR 515.001 (Emphasis added).
  - Only the donor can revoke ("To annul or make void by recalling or taking back, cancel, rescind, repeal, reverse" Black's Law Dictionary) the trust and only if he reserves the power to do so in the trust instrument. No such power exists here.
  - The Hearing Officer concluded that: "The appellant's attorney correctly points out that the appellant cannot, in his capacity as *donor* of the trust, revoke or amend the trust provisions unilaterally..."
  - The Hearing Officer's conclusion that the trustee "may act to amend the trust in his capacity as a trustee" is completely erroneous.
  - If the donor does not retain the power to amend or revoke, the trust is irrevocable and not countable.
  - A trustee holds assets for the sole benefit of the beneficiaries.
  - The discretionary administrative powers given to the trustee must be exercised solely in the interest of the beneficiaries.
  - Amendment would require the trustee to breach his fiduciary duty to the beneficiary by making the applicant the beneficiary, thereby giving away that which was irrevocably entrusted to him for the sole benefit of the beneficiary thereby exposing the trustee to civil liability.



- Even if the beneficiary agreed to allow the appellant to alter, amend or add this would be insufficient. There are three trustees, the trust does not give any of them the authority to act independently and therefore **all the trustees** would have to agree.
- Additionally, the trust document would need to contain the specific power to amend to change the beneficiaries for the change to be permissible.
- The Hearing Officer's conclusion that the trustee is granted the power to alter, amend or revoke because of the **absence** of language not granting such powers is the reverse of how powers are granted in a trust and is therefore erroneous.
- There is no discretion appellant can exercise that would allow him to force the beneficiary AND other trustees to consent.

### 3. The Hearing Officer Violated Appellant's Due Process Rights.

In addition to the errors above, the Hearing Officer violated appellant's due process rights.

- By her own admission the Hearing Officer denied the appeal based upon a provision "not flagged by MassHealth".
- Under 42 C.F.R. 435.913(a) the "agency must include in each applicant's case record facts to support the agency's decision on his application."
- The denial notice issued by a Medicaid agency must "detail[] the reasons" sufficiently enough for the affected person to challenge both the application of the law to the person's factual circumstances and the "factual premises" of the state's action. Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970).
- Thus, the hearing was supposed to be about the agency's stated position. Under 130 CMR 610.012(C)(1), "[t]he decision of the hearing officer is based only on those matters that are presented at the hearing," and under 130 CMR 610.065(A)(8), the hearing officer is required "to render a fair, independent, and impartial decision based on the issues and evidence presented at the hearing."
- The hearing officer illegally engaged in making her own eligibility determination instead of performing her proper role of reviewing whether the agency had made the eligibility determination correctly, so the hearing decision should be reversed.

CONCLUSION

The trust clearly and unequivocally states in its third paragraph: "The donor expressly waives any and all right which he may have, by operation of law or otherwise, to revoke, alter, amend or otherwise change this Indenture of Trust or any of the provisions hereof."

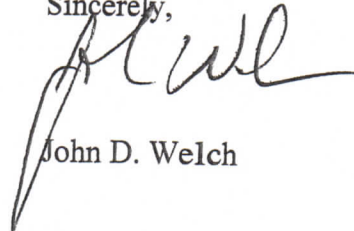
The Hearing Officer acts outside her role as arbiter to provide her own advocacy regarding the outcome of this case. Furthermore, the analysis the Hearing Office provides completely ignores the qualifying language in paragraph 20 of the trust (which she relies upon exclusively) which states that the trustees can only act "**with consent from the beneficiaries.**" She simply misses or ignores the fact that there are **three** trustees of this trust, none with the power to act independently. Finally, the Hearing Officer ignores state law which allows only the grantor/donor the authority to alter, amend or revoke a trust and then only if it is reserved in the trust. She correctly points out that, as donor, the appellant has no power to amend but then erroneously claims that he could do so as trustee.

Any one of the above errors is dispositive.

The trustee is bound by reasonable accounting principles and practices and state law and appellant has absolutely no discretion to invade the principle of the trust and therefore the Hearing Officer was erroneous in her assertion that he could do so.

Pursuant to the provisions of 130 CMR 610.091, the Appellant respectfully requests a Rehearing or the appeal be approved.

Sincerely,



John D. Welch

Cc: Nancy DeFazio  
Robert DeFazio