

For Opinion See [908 N.E.2d 390](#)

Appeals Court Of Massachusetts.  
Muriel DOHERTY, Plaintiff-Appellant,  
v.  
DIRECTOR OF THE OFFICE OF MEDICAID FOR THE EXECUTIVE OFFICE OF HEALTH AND HUMAN  
SERVICES OF THE COMMONWEALTH OF MASSACHUSETTS, Defendant-Appellee.  
No. 2008-P-0939.  
September 19, 2008.

On Appeal from a Judgment of the Essex County Superior Court

Brief of the Appellee Director of the Office of Medicaid for the Executive Office of Health and Human Services  
of the Commonwealth of Massachusetts

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#### TABLE OF CONTENTS

TABLE OF AUTHORITIES ... ii

QUESTIONS PRESENTED. ... 1

STATEMENT OF THE CASE ... 1

Nature of the Case ... 1

Course of Proceedings Below. ... 2

Statement of Facts ... 5

1. Terms of the Trust ... 6

2. The Promissory Note ... 9

ARGUMENT ... 9

I. THE ENTIRETY OF THE TRUST IS A COUNTABLE ASSET IN DETERMINING DOHERTY'S MEDI-  
CAID ELIGIBILITY, BECAUSE THE TRUSTEES HAVE DISCRETION TO TREAT ALL TRUST ASSETS  
AS INCOME, AND MUST PAY ALL NET INCOME TO OR FOR THE BENEFIT OF DOHERTY. ... 11

II. THE NOTE IS A COUNTABLE ASSET IN DETERMINING DOHERTY'S MEDICAID ELIGIBILITY ...  
23

CONCLUSION ... 26

ADDENDUM

42 U.S.C. § 1396p(d)

130 Code Mass. Regs. § 520.023

42 U.S.C. § 1396a(k) (1988)

H.R. Rep. No. 99-265, pt. 1 (1985)

## \*ii TABLE OF AUTHORITIES

### Cases

*Box Pond Ass'n v. Energy Facilities Siting Bd.*, 435 Mass. 408 (2001) ... 23, 25

*Coggin v. Massachusetts Parole Bd.*, 42 Mass. App. Ct. 584 (1997) . ... 10

*Cohen v. Commissioner of Div. of Med. Assistance*, 423 Mass. 399 (1996) ... 12, 13, 15, 17, 18, 19

*Guerriero v. Commissioner of Div. of Med. Assistance*, 433 Mass. 628 (2001) ... 14

*Iodice v. Architectural Access Bd.*, 424 Mass. 370 (1997) ... 10

*Lebow v. Commissioner of Div. of Med. Assistance*, 433 Mass. 171 (2000) ... 11, 14, 18

*Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 713 (1988) ... 10

*Town of Falmouth v. Civil Serv. Con* 447 Mass. 814 (2006) ... 23

### Statutes

42 U.S.C. § 1396a(k) (1988) ... 15

42 U.S.C. § 1396a(k) (1) ... 12

42 U.S.C. § 1396p(d) ... 12

42 U.S.C. § 1396p(d) (3) (B) (i) ... 16, 18, 19

G.L. c. 30A ... 4

G.L. c. 30A, § 14 ... 9-10

\*iii G.L. c. 30A, § 14(7) ... 10

G.L. c. 30A, § 14 (7) (b) ... 10

[G.L. c. 30A, § 14 \(7\) \(c\) ... 11](#)

[G.L. c. 30A, § 14\(7\) \(g\) ... 11](#)

[G.L. c. 118E, § 9 ... 2](#)

[G.L. c. 118E, § 9A ... 2](#)

[G.L. c. 118E, §§ 11-12 ... 2](#)

[G.L. c. 203D, § 18\(a\) ... 25](#)

#### Rules and Regulations

[130 Code Mass. Regs. § 520.003 \(A\) \(1\) ... 2](#)

[130 Code Mass. Regs. § 520.022 ... 16](#)

[130 Code Mass. Regs. § 520.023\(C\) \(1\) \(a\) ... 16, 18](#)

#### Miscellaneous

[H.R. Rep. No. 99-265, pt. 1 \(1985\) ... 12](#)

#### **\*1 QUESTIONS PRESENTED**

1. Did the Superior Court properly affirm a decision by the Division of Medicaid (“MassHealth”) that Plaintiff Muriel Doherty (“Doherty”) is ineligible for Medicaid benefits based on the existence of the Muriel S. Doherty Irrevocable Family Trust (“Trust”), worth over \$600,000, of which Doherty is a lifetime beneficiary, where the provisions of the Trust require the trustees to pay all Trust income to Doherty, and grant the trustees discretion to decide what portion of the Trust constitutes income, and what portion of the Trust constitutes principal?

2. Did MassHealth properly conclude that the entirety of monthly payments to the Trust in repayment of a promissory note (“Note”) executed by the trustees is countable in determining Doherty's Medicaid eligibility?

#### STATEMENT OF THE CASE

##### Nature of the Case

This is an appeal from a judgment of the Essex County Superior Court (Welch, J.), affirming a decision by MassHealth that Doherty is not eligible for Medicaid benefits, because she has assets in excess of the program limits for Medicaid eligibility. \*2 Joint Appendix (“App.”) 33, 44. Doherty also appeals a portion of the decision by MassHealth that the entirety of the monthly payment to the Trust under the Note is countable in determining Doherty's Medicaid eligibility. App. 31. Because the Superior Court found Doherty completely ineligible for Medicaid benefits due to the Trust alone, it did not analyze in detail whether and to what extent the monthly payments to the Trust under the Note were countable in determining Doherty's eligibility. App. 44 n.6.

##### Course of Proceedings Below

Doherty first applied for Medicaid benefits on April 14, 2006, seeking payments from MassHealth -- which ad-

ministers Medicaid benefits in Massachusetts, see [G.L. c. 118E, §§ 9, 9A, 11-12](#) -- for long-term nursing home care effective March 15, 2006. App. 27, 37. MassHealth denied Doherty's application on the ground that the existence of the Trust meant she held assets in excess of the program limit of \$2,000. App. 28, 37. See [130 Code Mass. Regs. § 520.003\(A\) \(1\)](#) (establishing asset limit for individuals).

Doherty requested a fair hearing to appeal MassHealth's denial of Medicaid benefits; a hearing was held on September 7, 2006. App. 26. On December \*3 14, 2006, the fair hearing officer issued a decision affirming MassHealth's denial of Medicaid benefits. App. 24, 26, 37. The fair hearing officer reasoned that the language of the Trust designated Doherty a "beneficiary for life" of the Trust, required the trustees to accumulate principal "to the extent feasible" to meet Doherty's uncertain future medical needs, and granted the trustees discretion to terminate the trust at any time and distribute the proceeds to Doherty. App. 31. Accordingly, the assets of the trust (aside from the Note) were countable in determining Doherty's Medicaid eligibility, and placed her above the \$2,000 asset limit for such eligibility. Id.

The hearing officer separately analyzed the payments to the Trust under the Note. Id. The officer rejected Doherty's argument that only the portion of the monthly payment representing payment of interest is countable income for Doherty, while the portion representing repayment of principal should be excluded as "return on capital." Id. Because "[n]o distinction is made in the MassHealth regulations between income from principal payments and income from interest payments," even if such a distinction is \*4 recognized elsewhere (such as in federal income taxation), the entirety of the monthly payment under the Note was countable for Doherty. Id. The hearing officer therefore affirmed the decision of MassHealth, and denied Doherty's appeal. App. 32.

Doherty timely sought judicial review of MassHealth's decision in the Superior Court under G.L. c. 30A. Upon cross-motions for judgment on the pleadings, the court ruled that the entirety of the Trust was countable as an asset that placed Doherty above the asset cap for Medicaid eligibility. App. 34, 44. The court acknowledged that a provision of the Trust prohibited the trustees from paying any principal of the Trust to Doherty, but concluded that the Trust, read as a whole, granted the trustees, as well as Doherty, the power and discretion to disburse funds to Doherty, regardless of whether they are characterized as income or principal. App. 42-43. Of particular importance to the court were provisions of the Trust requiring the trustees to accumulate trust principal for Doherty's benefit, permitting Doherty to assign principal to any of her family members, and permitting the trustees to terminate the Trust at any time and distribute all trust assets to the \*5 beneficiaries. Id. Because of the broad discretion granted the trustees and Doherty to distribute Trust assets, the Court found that all of the Trust assets could be distributed to Doherty in the exercise of that discretion, and therefore all Trust assets could be considered in determining her Medicaid eligibility. App. 44. The court affirmed the agency's decision without addressing the impact of the Note on Doherty's eligibility. Id. & n.6.

Doherty timely lodged an appeal with this Court.

#### Statement of Facts

On July 15, 1981, Doherty and her husband established the Trust, then named the William A. Doherty and Muriel S. Doherty Family Trust. App. 34. Doherty's husband died in December 1987. Id. On April 12, 2000, Doherty amended and renamed the Trust, making her the sole settlor, removing herself as trustee, naming her niece and nephew as trustees and remaindermen, and making the trust irrevocable. App. 34-35. As of March 6, 2006, the Trust had assets worth \$631,365.62, which included several bank accounts totaling \$266,517.38, and the balance remaining on the Note, which totaled \$354,848.24. App. 37 n.3.

**\*6** 1. Terms of the Trust

The purpose of the Trust is set forth in Article II of the Trust. It states that the Trust is meant to

supplement, but not to supplant, what benefits and services the SETTLOR may from time to time be eligible to receive by reason of her age, disability, or other factors, from federal, state and local governmental, insurance, and charitable sources. ... It is recognized further that governmental and charitable programs contain many gaps which, if not addressed, would greatly reduce the possibility of the SETTLOR maintaining herself as independently as possible, and having the capacity to meet her future needs adequately for medical, residential, personal, and other services.

App. 2. The Trust states that its proceeds shall

be used in ways that will best enable the SETTLOR to lead as normal, comfortable and fulfilling life as possible; that, regardless of future health status, she be cared for at home or in any event in the most normal and home-like environment possible and consistent with her needs for treatment and care.

Id. To these ends, the trustees are obligated to “accumulate principal to the extent feasible, due to the unforeseeability of the SETTLOR’s future needs ... without regard to the interests of the remaindermen.” Id.

Under the terms of the Trust, Doherty is to receive the entire net income from the Trust during her lifetime. Trust Art. V, App. 3. The Trust further states, however, that “the TRUSTEE shall make \*7 no distributions of principal from the Trust, to or on behalf of the SETTLOR.” Id. The trustees may make payments of principal to themselves, as beneficiaries, as they deem “necessary or desirable for their maintenance in health and reasonable comfort and their education, including college and professional education.” Id. A schedule submitted by Doherty reveals that the Trust paid Doherty \$26,939.19 in “income” in 2005, or \$2,244.93 per month. App. 19. The record contains no indication of how much the Trust paid Doherty in subsequent years, nor does it reveal whether or how much principal was paid out to the trustees.

Doherty reserves several powers under the Trust. For example, she reserves the power at any time “to appoint any part or all of the principal of the Trust fund” to certain of her family members. Trust Art. IV, App. 3. She also has the right to remain in her residence in Andover, Massachusetts during her lifetime; if she assents, the trustees may sell the residence and place the proceeds of the sale in the Trust. Trust Art. V, App. 4.

The remainder of Trust powers and discretion are vested in the trustees. See Trust Arts. XII, XIV, \*8 App. 6-12 (powers of trustees). “In extension and not in limitation of the powers given [the trustees] by law or other provision of this instrument,” the trustees have the powers, “in each case to be exercised from time to time in the discretion of the TRUSTEES and without notice or order or license of Court”:

To determine all questions as between income and principal and to credit or charge to income or principal or to apportion between them any receipt or gain and any charge, disbursement or loss as is deemed advisable in the circumstances of each case as it arises, notwithstanding any statute or rule of law for distinguishing income from principal or any determination of the Courts.

Trust Art. XIV, XIV(H), App. 8, 9. All powers and discretion given the trustees under the Trust shall be exercisable in his or her sole discretion, and all his or her decisions and determinations (including determinations of the meaning and reference of any ambiguous expression used in this instrument) made in good faith and in the exer-

cise of reasonable judgment shall be conclusive upon all persons...

Trust Art. XV, App. 12. Finally, the trustees have the power to terminate the Trust

[i]f, in the opinion of the TRUSTEE, any Trust fund created hereunder shall at any time be of a size which in the sole judgment of the TRUSTEE shall make it inadvisable or unnecessary to continue such Trust fund ... [and] the TRUSTEE, in its sole discretion, may pay over and distribute the entire principal of such Trust \*9 fund to the beneficiaries thereof, free of all trusts.

Trust Art. XXII, App. 15.

## 2. The Promissory Note

On May 18, 2004, Doherty's niece and nephew, as trustees of the Trust, executed the Note, in which they agreed to repay a loan of \$425,000 from the Trust at an interest rate of 6% in monthly installments beginning June 1, 2004. App. 17-18 (Note). The monthly payment under the Note is \$4,718.39. App. 17. The trustees are required to repay the Note in full by May 1, 2014. *Id.* According to an amortization schedule submitted by Doherty, a portion of each monthly payment represents repayment of principal, while a portion represents payment of interest. App. 20-23. Over time, the amount of the monthly payment representing repayment of principal grows, while the portion representing payment of interest diminishes. See *id.*

## ARGUMENT

MassHealth's decision to exclude Doherty from Medicaid -- a program designed to provide health care for the poor -- based on the fact that she is a lifetime beneficiary of a Trust worth over \$600,000, should be upheld. Judicial review under \*10G.L. c. 30A, § 14, is limited. Doherty bears the burden of demonstrating the invalidity of MassHealth's decision. *Coggin v. Massachusetts Parole Bd.*, 42 Mass. App. Ct. 584, 587 (1997) . In reviewing the agency's decision, the Court is required to give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it by statute. G.L. c. 30A, § 14; *Iodice v. Architectural Access Bd.*, 424 Mass. 370, 375-76 (1997) . The Court may not substitute its judgment for the agency's, and must defer to the agency as the sole judge of the credibility of witnesses and weight of the evidence before it during the administrative proceeding. *Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 713, 721 (1988)

To prevail, Doherty must show that her substantial rights were prejudiced because the agency's decision violated one or more of the standards of review from G.L. c. 30A, § 14(7). Relevant here, Doherty must establish that MassHealth's decision was in excess of its statutory authority, based upon an error of law, or was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* § 14 (7) (b), \*11 (c), (g). Because Doherty. cannot make any of these showings, the decision of MassHealth should be affirmed.

### I. THE ENTIRETY OF THE TRUST IS A COUNTABLE ASSET IN DETERMINING DOHERTY'S MEDICAID ELIGIBILITY, BECAUSE THE TRUSTEES HAVE DISCRETION TO TREAT ALL TRUST ASSETS AS INCOME, AND MUST PAY ALL NET INCOME TO OR FOR THE BENEFIT OF DOHERTY.

Under the unambiguous terms of the Trust, because the trustees have discretion to allocate Trust assets between principal and income, Trust Art. XIV(H), App. 9, the entirety of the Trust could, under circumstances permitted by the Trust, be deemed income available to Doherty. It was therefore proper for MassHealth to count the en-

tirety of the Trust in determining Doherty's Medicaid eligibility.

The Medicaid program is designed to provide health care for the poor. [Lebow v. Commissioner of Div. of Med. Assistance](#), 433 Mass. 171, 172 (2000). Under the program, “[i]ndividuals are expected to deplete their own resources before obtaining assistance from the government.” *Id.* As the court observed in *Lebow*, however:

The unfortunate reality is that some individuals with significant resources devise strategies to appear impoverished in order to qualify for Medicaid benefits. One such strategy is to transfer assets into an inter vivos trust, whereby funds appear to be out of the \*12 individual's control, yet generally are administered by a family member or loved one.

*Id.* Congress has expressed its disapproval of such strategies, stating that “when affluent individuals use ... trusts and similar techniques to qualify for [Medicaid], they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable ....” H.R. Rep. No. 99-265, pt. 1, at 72 (1985).

The statute resulting from Congress's attempt to close this loophole in the Medicaid laws is the one that the parties agree applies to the Trust, 42 U.S.C. § 1396p(d). See Brief of Plaintiff/Appellant Muriel Doherty (“Br.”) at 13 (citing statute). The statute was originally codified in 1986 at 42 U.S.C. § 1396a(k) (1). In 1993, the statute was amended, and the statute as amended was codified at 42 U.S.C. § 1396p(d). The statute as amended applies to all trusts created after 1993. [Cohen v. Commissioner of Div. of Med. Assistance](#), 423 Mass. 399, 406 (1996). The parties agree that because the Trust was amended and rendered irrevocable in 2000, the statute as amended in 1993 applies.

\*13 Applying the pre-1993 version of the statute with the intent of Congress in mind, the Supreme Judicial Court developed a framework for determining whether and how much of an irrevocable trust could be counted in determining an individual's Medicaid eligibility. First, the Court determined whether the trust is a “Medicare Qualifying Trust” (“MQT”) by inquiring whether the settlor may receive payments under the trust, and whether the trustee has any discretion in making payments, i.e., “the conditions for distribution may not be completely fixed for all circumstances.” [Cohen](#), 423 Mass. at 413. If the trust qualified as an MQT, the Court then proceeded to determine how much of the trust is available to the Medicaid applicant by determining the greatest amount that the trustees “in any set of circumstances” might have discretion to pay out to the beneficiary. *Id.* “If there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility.” *Id.*

Utilizing this framework, the Court held in *Cohen* that the entire amount of several self-settled trusts \*14 was countable in determining the settlors' Medicaid eligibility, where the trusts gave trustees discretion to disburse trust proceeds to the settlors, but purported to deny the trustees any discretion to disburse such proceeds when doing so would render the settlors ineligible for government assistance. 423 Mass. at 407, 415-24. Similarly, in *Lebow*, the Court ruled that the entirety of a self-settled trust was countable as an asset of the settlor, even though the trustee (the settlor's grandson) irrevocably withdrew his consent to disburse trust proceeds to the settlor (a prerequisite to payment of such proceeds to the settlor), because the trustee retained the power to amend the trust at any time, and could, in the exercise of that power, eliminate the consent requirement and distribute proceeds to the settlor. 433 Mass. at 173-74, 176. In contrast, in [Guerrero v. Commissioner of the Division of Medical Assistance](#), 433 Mass. 628 (2001), the Court ruled that a self-settled trust was not a countable asset of the settlor, because the settlor had irrevocably waived and renounced any right to future payment under the trust, effectively divorcing the settlor from the \*15 trust, and neither the settlor nor the trustee had any power

to amend the trust. *Id.* at 629, 632-33.

All of these cases applied the pre-1993 version of the statute, which provided that “the amounts from the trust deemed available to a grantor [in determining Medicaid eligibility] is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee ....” 42 U.S.C. § 1396a(k) (1988), cited in *Cohen*, 423 Mass. at 404 (emphasis added). The post-1993 version of the statute, which governs the Trust at issue here, removes the reference to trustee discretion, eliminating the need to determine whether the Trust constitutes an MQT, and directing this court to include as a countable asset any portion of the Trust that may, under “any circumstances,” be paid to Doherty. 42 U.S.C. § 1396p(d)(3) (B) (i). See *Cohen*, 423 Mass. at 413 n.20 (“It is the requirement of that peppercorn of discretion that the 1993 amendment removes, providing that eligibility is to be measured by the maximum amount available under the trust under any circumstances, whether or not the trustee enjoys \*16 any discretion.”). The current version of the statute, in full, provides that if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual....

*Id.* § 1396p(d) (3) (B) (i) (emphasis added). MassHealth has promulgated a cognate regulation for trusts established after 1993, providing that [a]ny 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.

130 Code Mass. Regs. § 520.023 (C) (1) (a). Compare *id.* § 520.022 (governing trusts created before 1993)

Application of the current statute and regulation compels inclusion of the entirety of the Trust as an asset belonging to Doherty in determining her Medicaid eligibility. Doherty argues that because the Trust requires the trustees to pay all net income to her, and purports to prohibit the trustees from paying any principal to her, the trustees have no discretion whatever in making payments, and therefore the principal of the Trust should be excluded in determining Doherty's Medicaid eligibility. \*17 *Br.* at 17-18. While this argument may have had some traction prior to 1993, it is completely foreclosed by the amendment to the Medicaid law in that year. As the Court recognized in *Cohen*, the 1993 amendment to the Medicaid law made clear that “eligibility is to be measured by the maximum amount available under the trust under any circumstances, whether or not the trustee enjoys any discretion.” 423 Mass. at 413 n.20; see also *id.* at 406-07.

While it is true that Article V contemplates paying all of the trust income to Doherty but none of the trust principal, this distinction is rendered purely formal by Article XIV(H), which gives the trustees unfettered discretion [t]o determine all questions as between income and principal and to credit or charge to income or principal or to apportion between them any receipt or gain and any charge, disbursement or loss as is deemed advisable in the circumstance of each case as it arises....

App. 9. Under this provision, the trustees could designate the entirety of the Trust as income, and thus the entirety of the Trust would be available to Doherty, rendering the distinction in Article V between principal and income a mere formality. There are circumstances, therefore, under which the entire corpus of the Trust could be available to Doherty, and \*18 therefore the entirety of the Trust is countable in determining her Medicaid eligibility. 42 U.S.C. § 1396p(d) (3) (B) (i) ; 130 Code Mass. Regs. § 520.023(C) (1) (a); *Cohen*, 423 Mass. at 406-07, 413 n.20.



Whether or not the trustees actually designate the entirety of the Trust as income is irrelevant. The question is whether “there is any state of affairs, at any time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor.” [Lebow](#), 433 Mass. at 177-78 (emphasis in original). Because the answer to that question is yes in this case, “those assets will count in calculating the grantor's Medicaid eligibility.” *Id.* at 178.

Doherty's reliance upon Cohen for the proposition “that a trust might be written to deprive the trustee of any discretion (for instance allowing the payment only of income) and that such a limitation would be respected” in determining Medicaid eligibility, 423 Mass. at 418, quoted in *Br.* at 15, is misplaced. As an initial matter, the trusts at issue in Cohen were not analyzed under the 1993 amendment to the Medicaid law, which as discussed above eliminates any reference \*19 to trustee discretion, and provides that if trust funds are available to the settlor under “any circumstances,” then those funds will be considered available to the settlor in determining Medicaid eligibility. 42 U.S.C. § 1396p (d) (3) (B) (i) ; see [Cohen](#), 423 Mass. at 406-07, 413 n.20.

Furthermore, the very trust under consideration by the Court in Cohen when it used the language quoted by Doherty (the Comins trust) illustrates well that the entirety of the Trust must be counted in determining Doherty's Medicaid eligibility. The Comins trust, a self-settled trust worth over \$300,000, attempted to create a distinction between trust income and principal. [Cohen](#), 423 Mass. at 416-19. It required the trustee to pay income to the settlors until they became institutionalized, at which point the trustee had discretion to pay income only to the extent necessary to provide benefits and services not otherwise available from other sources (such as Medicaid). *Id.* at 416-17. As for trust principal, the settlors could request proceeds in writing and the trustee was obligated to pay such proceeds, provided the settlors were not institutionalized. *Id.* at 417. The trustee also had discretion, until a certain point \*20 in time, to pay from principal amounts necessary to provide the settlors with benefits and services not available from other sources (such as Medicaid). *Id.* The Court looked past the principal-income distinction, ruling that because the entirety of the income and principal could, in the full exercise of the trustee's discretion, be paid to the settlors, the entirety of the trust was a countable asset. *Id.* at 419. While the Court acknowledged that limitations on trustee discretion in the trust instrument will be respected, it went on to note that the grantor of a trust has a powerful incentive to provide his trustee leeway to respond to emergency and unexpected circumstances, and whatever amounts susceptible to such leeway are attributed to the beneficiary and are counted as fully available to the grantor.

*Id.* at 418-19.

The Trust in this case operates in the same manner. Though it creates an ostensible distinction between income, which the trustees must pay to Doherty, and principal, which the trustees may not, Trust Art. V, App. 3, it gives the trustees absolute discretion to determine what portion of the Trust constitutes income, and what portion constitutes principal. *Id.* Arts. XIV(H), XV, App. 9, 12. It does so in order to give the trustees flexibility to \*21 respond to Doherty's uncertain future needs, *id.* Art. II, App. 2, with the express purpose of maximizing the benefits available to Doherty through “federal, state and local governmental” sources, *id.*, App. 1. It explicitly references “gaps” in governmental programs which, if not exploited or “addressed” by the trustees, would require Doherty to pay for medical care and other services herself, a scenario the Trust seeks to avoid to the maximum extent possible. Trust Art. II, App. 2.

Other provisions reinforce the flexibility that is the centerpiece of the Trust. As MassHealth and the Superior Court recognized, the Trust encourages the trustees to “stockpile” Trust principal to account for the “unforeseeability of [Doherty's] future needs.” Trust Art. II, App. 2; App. 31, 43. It would make no sense to re-

quire the trustees to accumulate Trust principal for Doherty's future needs if those proceeds could not be accessed to provide for such needs. App. 31, 43. The mechanism through which Doherty can access those proceeds is Article XIV(H), which grants the trustees discretion “[t]o determine all questions between income and principal,” App. 9, i.e., to decide how much of the Trust shall be \*22 allocated to principal, and how much shall be allocated to income, see *id.*

Article XXII permits the trustees, in their discretion, to terminate the Trust and disburse Trust proceeds to the beneficiaries if the Trust “shall at any time be of a size which in the sole judgment of the TRUSTEE shall make it inadvisable or unnecessary to continue such Trust fund.” App. 15. Doherty is undoubtedly a beneficiary of the Trust. Trust Arts. II, v, App. 1-3. MassHealth concluded that Article XXII provided additional support for treating the entirety of the Trust as an asset belonging to Doherty, because “the trustee has unfettered discretion to terminate the trust at any time, and for any reason, and to pay over the principal to [Doherty] during her life.” App. 31.

Because there is no limitation on the trustees' discretion in deciding questions of allocation between Trust principal and income, Trust Arts. XIV, XIV(H), XV, App. 8-9, 12, the trustees could, if circumstances warranted, designate 100% of the Trust as income, and therefore available to Doherty immediately, or upon termination of the Trust. Therefore, 100% of the Trust should be considered an asset belonging to \*23 Doherty, rendering her ineligible for Medicaid payments.

Accordingly, MassHealth's determination, after applying the Medicaid statute and MassHealth regulations, that the entirety of the Trust is countable in determining Doherty's Medicaid eligibility, should be affirmed on judicial review. See, e.g., [Town of Falmouth v. Civil Serv. Comm'n](#), 447 Mass. 814, 821 (2006) (“A state administrative agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing.”); [Box Pond Ass'n v. Energy Facilities Siting Bd.](#), 435 Mass. 408, 416 (2001) (“An agency's interpretation of its own regulation and statutory mandate will be disturbed only if the interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious.” (citations and internal quotation marks omitted))

## II. THE NOTE IS A COUNTABLE ASSET IN DETERMINING DOHERTY'S MEDICAID ELIGIBILITY.

Although Doherty is ineligible for Medicaid benefits based upon the existence of the Trust standing alone, should the Court choose to analyze the Note separately, it should conclude that the entirety of the monthly payment to the Trust under the Note is \*24 available to Doherty. Doherty's argument that only the portion of the monthly payment representing payment of interest on the Note (as opposed to repayment of principal) should be countable, Br. at 27-29, finds no purchase in any of MassHealth's regulations. As the agency concluded, “[w]hile a bifurcated view [of promissory notes into interest and principal] may be allowed for purposes of calculating federal income tax liability, there is no provision in the MassHealth regulations that allows a similar dissection when assessing Medicaid eligibility.” App. 31. This is essentially what the Superior Court concluded, stating that it need not address whether the Note is properly considered an “annuity,” because “payments made under the Note -- whether principal or interest -- are countable.” App. 44 n.6.

This Court should reach the same result. Regardless of the terminology used to characterize the Note, there is no basis in the MassHealth regulations or any other provision of law governing Doherty's Medicaid's eligibility for making a distinction between repayment of loan principal, on one hand, and payment of loan interest, on the other. Doherty argues that there is such a provision of law, \*25G.L. c. 203D, § 18(a), which requires trustees to treat interest payments as trust income, and repayment of principal as trust principal. *Id.*, cited in Br. at 29 n. 10.

Even if this provision applies to the Trust, it would not stop the trustees from later exercising their power to designate the entirety of the Trust as income available to Doherty, should her medical and other needs necessitate such a designation. Trust Art. XIV(H), App. 19. Article XIV(H) allows the trustees to exercise such a power “notwithstanding any statute or rule of law for distinguishing income from principal or any determination by the Courts.” Id.

MassHealth applied its own regulations and determined that there was no basis for excluding repayment of principal under the Note from the assets available to Doherty. The Superior Court agreed. Because this conclusion is not patently wrong, unreasonable, arbitrary, whimsical, or capricious, it should be affirmed by this Court. [Box Pond Ass'n, 435 Mass. at 416.](#)

## 26CONCLUSION

For the reasons set forth above, this Court should affirm the decisions of the Superior Court and MassHealth.

Muriel DOHERTY, Plaintiff-Appellant, v. DIRECTOR OF THE OFFICE OF MEDICAID FOR THE EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES OF THE COMMONWEALTH OF MASSACHUSETTS, Defendant-Appellee.

2008 WL 4618627 (Mass.App.Ct. ) (Appellate Brief )

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