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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1677CV00599

SARAH YANOW

vs.

OFFICE OF MEDICAID and another¹

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

Plaintiff Susan Yanow ("Yanow") seeks judicial review, pursuant to G.L. c. 118E, § 47, and G.L. c. 30A, § 14, of a decision the Office of Medicaid Board of Hearings ("Board") issued denying Yanow's application for Medicaid² long-term care benefits. In addition to a claim for judicial review, Yanow's Complaint For Judicial Review ("Complaint") asserts a claim against the defendants, under 42 U.S.C. § 1983, for redress of the violation of her right to due process by the Board's alleged arbitrary and capricious conduct in denying the long-term care benefits.

Yanow asserts that the Board: (a) erred as a matter of law in determining that assets held in The Yanow Family Trust ("Trust") are "countable assets" for Medicaid eligibility purposes; and, (b) acted arbitrarily and capriciously in making said determination. The defendants claim that the Board properly interpreted provisions of the Trust instrument and concluded that the trust assets (which are valued at \$235,000.00) are "countable" under the law applicable to Medicaid eligibility determinations.

¹ Kristin Thorn, Director of the Office of Medicaid, Executive Office of Health and Human Services.

² "Medicaid . . . , 42 U.S.C. §§ 1396 et seq., is a cooperative State and Federal program to provide medical assistance to needy individuals." Tarin v. Commissioner of the Div. of Medical Assistance, 424 Mass. 743, 746 (1997). The Medicaid program in Massachusetts is known as MassHealth. Thus, the court will use the terms Medicaid and MassHealth interchangeably in this decision.

On March 1, 2018, the court conducted a hearing on Yanow's Motion For Judgment On The Pleadings. After careful and thorough review of the parties' memoranda, pleadings, and the administrative record, Plaintiff's Motion For Judgment On The Pleadings is **ALLOWED** in part and **DENIED** in part.

The standard of review for an administrative agency decision is well-known. Pursuant to G. L. c. 30A, § 14(7), this court may reverse, remand, or modify an agency decision only if the decision is "based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." Mass. Inst. of Tech. v. Dep't of Pub. Utils., 425 Mass. 856, 868 (1997).

The parties agree that Yanow may not have access to more than \$2,000.00 of "countable assets" to be eligible for Medicaid long-term care benefits. See 130 Code Mass. Regs. § 520.016(A). Yanow funded and established the Trust, which is irrevocable, in 2009. She is neither a trustee nor a beneficiary of the Trust.³ However, Yanow is entitled to distributions of income from the Trust and the Trust instrument grants her the right to occupy any real estate which the Trust owns.⁴

"[T]he effect of the provisions of self-settled irrevocable inter vivos trusts on eligibility for Medicaid benefits has been the subject of considerable discussion." Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312, 314 (2016). "Nonetheless, it is settled that, properly structured, such trusts may be used to place assets beyond the settlor's reach and without adverse effect on the settlor's Medicaid eligibility." Id. Generally speaking, "assets must be made unavailable to the settlor in order to avoid being treated as 'countable assets' for purposes of Medicaid eligibility." Id.

In Heyn, the Appeals Court, like this court, was "called upon [] to review a determination [by the Board] 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)." Id. at 312 – 313. Heyn observed that:

³ Yanow's children and grandchildren are the beneficiaries.

⁴ The Trust does not, and has not, owned any real estate.

[F]or purposes of determining eligibility for Medicaid benefits, 'countable assets' [of a trust established after 1993] include any portion of the trust principal that could '**under any circumstances**' be paid 'to or for [the] benefit [of]' [the Medicaid applicant]. . . . Such circumstances need not have occurred, or even be imminent, in order for the principal to be treated as 'countable assets'; it is **enough that the amount could be made available to [the applicant] under any circumstances.**⁵

Id. at 315 (emphasis added) (internal citations omitted).⁶

Here, in determining that the Trust assets are "countable," the Board's hearing officer ruled, notwithstanding that Article 2.1 of the Trust prohibits the distribution of principal to Yanow, that "the Trust provisions considered collectively allow circumstances in which [Yanow] can access Trust principal."⁷

Article 4(h) of the Trust instrument grants the trustees the power "to determine what part of the trust property is income and what part is principal." The hearing officer ruled that this provision⁸ could allow the trustees to convert Trust principal (which cannot be distributed to Yanow pursuant to Articles 2.1 and 2.3) into Trust income (which can be distributed to Yanow pursuant to certain Trust provisions). On this basis, when applying the "any circumstances" test, the hearing officer determined that the Trust corpus is available to Yanow and thus, concluded it is a countable asset. See

⁵ This is known as the "any circumstances test." Daley v. Secretary of the Executive Office of Health and Human Services, 477 Mass. 188, 193 - 194 (2017) (internal citations omitted).

⁶ The parties agree, and the Board observed in its decision, that "countable" income is not at issue. That is likely because "[t]he 'any circumstances' test is qualified by an important caveat: if the amounts that may be paid to the Medicaid applicant come only from the income of the trust, those income payments do not render the principal of the trust available as an asset; rather, they are treated as income that may affect the amount of Medicaid benefits to be received but not the applicant's eligibility for such benefits." Daley v. Secretary of the Executive Office of Health and Human Services, 477 Mass. 188, 194 (2017).

⁷ The hearing examiner ruled correctly that "[i]n assessing whether the trust would allow distribution of principal to [the applicant] 'under any circumstances,' we construe its provisions in light of the trust instrument as a whole." Heyn, 89 Mass. App. Ct. at 315.

⁸ In her decision, the hearing officer cited Article 2.1 as the Trust provision that grants the trustees the authority to label "assets coming into" the Trust as income or principal. (See Board's Appeal Decision, p. 14). However, Article 4(h), not Article 2, is the provision that grants the trustees such powers.

Daley, 477 Mass. at 196 (“If the grantor of the irrevocable trust leaves open even a ‘peppercorn’ of discretion for the trustee to pay the grantor from the principal of the trust under any circumstance, the entire principal of the trust will be deemed available to the applicant and therefore will be treated as a ‘countable asset,’ making the applicant ineligible for Medicaid benefits.”).

Yanow argues that the pertinent provisions of the Trust and the hearing officer’s interpretation thereof are substantially similar to those in Heyn in which the Appeals Court reversed the Board’s denial of Medicaid because “a hearing officer of the MassHealth board of hearings erroneously concluded that the trust at issue permitted its trustee to distribute proceeds from the sale of trust assets to the grantor in certain circumstances.” Id. at 313. The court agrees.

In Heyn, the trust instrument granted the trustees the authority “to determine, in accordance with reasonable accounting principles and practice and state law, what shall belong and be chargeable to principal and what shall belong and be chargeable to income.” Id. at 316 (internal citation omitted). Moreover, like here, in Heyn “the hearing officer suggested that the trustee could sell the property, invest the proceeds in an annuity, and then treat the resulting annuity payments as income eligible for distribution.” Id. at 317.

The Heyn court held that the hearing officer’s “analysis misapprehends the nature of annuity payments” because only a portion of each annuity payment is a return of principal “while the remainder of the principal investment remains in the annuity contract, accruing income.” Id. at 317. Furthermore, Heyn found that the aforementioned provision granting the trustees the right to allocate assets between principal and income does not result in circumstances in which the trust corpus could be made available to the Medicaid applicant because, according to the trust instrument, “the trustee’s authority in that respect is expressly constrained by ‘reasonable accounting principles and practice **and state law.**”⁹ Id. at 318 (emphasis in the original).

⁹ Although the pertinent provision of the Trust instrument at issue in this case (i.e., Article 4(h)) does not state that the trustees’ powers to allocate assets between interest and principal are constrained by state law, Article 7.6 requires the Trust to “be construed, governed, and administered in accordance with Massachusetts law.” Therefore, like the trust instrument in

The court further ruled that "the allocation of annuity payments as between principal and income is governed by G.L. c. 203D, § 18(a), which creates a statutory presumption that any amount received by the trust, not expressly characterized as dividend or interest income, shall be allocated to principal." *Id.* at 318.¹⁰ As such, the court finds that the Heyn case controls in this matter and the Board erred as a matter of law when it denied Yanow's application for Medicaid long-term care benefits on the basis of its determination that Trust assets are countable assets.¹¹

Heyn, G.L. c. 203D, § 18(a), would apply to the characterization of payments received by the Trust that are not obviously dividend or interest income.

¹⁰ The Board's decision that the Trust's corpus is available to Yanow and, thus, it is a countable asset rests on an additional basis: Yanow's right to use and occupy real estate owned by the Trust. The defendants, however, concede that the Supreme Judicial Court recently held that such a right does not render trust assets as "countable." See Daley v. Secretary of the Executive Office of Health and Human Services, 477 Mass. 188, 199-205 (2017) (concluding that neither grant in an irrevocable trust of a right of use and occupancy in a primary residence to an applicant, nor retention by an applicant of a life estate in his or her primary residence makes the equity in the home owned by the trust a countable asset for purpose of determining Medicaid eligibility for long-term care benefits).

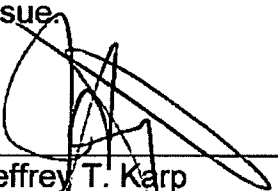
¹¹ The Board makes several legal arguments not made before the hearing officer and not addressed in her decision in support of affirmation of the Board's eligibility determination. (See §§ VI, VII, VIII, XII, and XIV of The Agency's Post-Daley Opposition To Applicant's Motion For Judgment On The Pleadings). However, "arguments not made before an administrative agency generally cannot be raised on appeal." Rivas v. Chelsea Hous. Auth., 464 Mass. 329, 36 (2013); see also Lincoln Pharmacy of Milford, Inc. v. Commissioner of the Div. of Unemployment Assistance, 74 Mass. App. Ct. 428, 436 (2009) ("A party is not entitled to raise arguments on appeal that could have been raised, but were not raised, before the court below."). Moreover, the court declines to address these arguments because it is uncertain if it has the authority to affirm the Board's decision on a legal basis not reached in the final agency decision. Compare NSTAR Elec. Co. v. Dep't of Pub. Utils., 462 Mass. 381, 387 n. 3 (2012) ("While we can conduct a meaningful review of 'a decision of less than ideal clarity if the agency's path may reasonably be discerned,' we will not 'supply a reasoned basis for the agency's action that the agency itself has not given.'") (internal quotations and citations omitted), with Hickey v. Commissioner of Pub. Welfare, 38 Mass. App. Ct. 259, 264 (1995) ("We think the principle of appellate review, that a correct decision may be sustained on appeal on any sound basis, . . . is equally applicable to review of administrative agency action by a judge of the Superior Court.").

Finally, after thorough review of the record, the court disagrees with Yanow that the Board's decision was arbitrary and capricious. Thus, as she conceded at the hearing, without such a finding, Count II of the Complaint, which is a claim under § 1983 due to the Board's alleged deprivation of Yanow's due process rights, must fail as a matter of law. Therefore, that count of the Complaint must be dismissed.

ORDER

For the above reasons, the Plaintiff's Motion For Judgment On The Pleadings is **ALLOWED** as to Count I of the Complaint and **DENIED** as to Count II. The decision of the Office of Medicaid Board of Hearings is **VACATED**.

A **JUDGMENT** in favor the plaintiff on Count I of the Complaint vacating the Board's decision and a **JUDGMENT OF DISMISSAL** on Count II of the Complaint shall issue.



Jeffrey T. Karp
Associate Justice, Superior Court
Dated: March 7, 2018