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Cover: Ceiling above the entry stairs to the Supreme Court of the United States. Photography by Kassia E.G. Smith.
Trusts Used in Medicaid Planning:
The Doherty Challenge to Irrevocable Income Only Trusts and Its Aftermath

By William J. Brisk and Rebecca M. Flewelling

I. Introduction

The first scholarly discussion of “Medicaid planning” appeared in the Massachusetts Law Review in 1981. It answered a seemingly simple question: how could clients arrange their finances so that, if they experienced a long stay in an expensive nursing home, Medicaid (the program in the commonwealth later called “MassHealth”) would cover their expenses. With the average cost of a Massachusetts nursing home ranging from $300 to $425 per day (depending on whether semi-private or private rooms are used and the city in which the nursing home is located), how to qualify for Medicaid is an important topic for attorneys and their elder clients.

“Medicaid planning” was initially criticized as unethical in some circles; critics complained that a program designed to protect the “medically needy” from the ever-increasing costs of long-term care was subverted when people with ample savings could nevertheless transfer assets and then qualify for public benefits. The rallying cry of those who supported harsh restrictions on who could apply for long-term care Medicaid was that it was necessary to close loopholes that allowed “Millionaires on Medicaid.”

While MassHealth’s eligibility standards are far from simple (the relevant regulations run some 200 printed pages while treatises on the topic have exceeded 800 pages), qualifying for MassHealth long-term care benefits depends upon two general rules. First, one cannot apply for Medicaid until one’s “countable assets” are reduced to $2,000. If married, the non-institutionalized spouse can retain an additional $119,220 in “countable assets.”

Some Medicaid planning therefore consists of re-characterizing assets so that, in Medicaid terms, they are no longer “countable.” Re-characterizing assets is achieved by using countable assets to purchase non-countable assets such as a residence (which is non-countable if its equity is $814,000 or less or if a spouse, minor child, disabled child, or co-owning sibling continues to reside in the house). Countable assets may be spent down on items for the benefit of the applicant. Purchasing an immediate annuity (converting countable assets into a stream of income) hastens qualifying for Medicaid in Massachusetts and in most other states, which base eligibility on assets, not income.

The other rule, which took effect well after Medicaid was initiated in 1965, is known popularly as the “look back,” which penalizes outright transfers to others. For several years, one could transfer assets above the bare minimums allowed to applicants and their spouses on one day, and apply for Medicaid the next. The evolution of Medicaid eligibility requirements consists of changes in the “look back” provisions. The first prohibition against transferring assets was enacted federally, in effect authorizing Medicaid caseworkers to review all financial records of an applicant to determine if he or

7. MassHealth opts for the highest amounts allowed by the federal Centers for Medicare and Medicaid Services.
she made gifts (transferred “for less than fair-market value” in the regulatory language) during the previous 12 months. Each such transfer made the applicant ineligible beginning on the date of the actual transfer, for a period determined by the size of the transfer divided by the “average cost of a nursing home in that state or area.”

For example, if David made gifts totaling $40,000 on a given date, he could successfully apply for Medicaid 200 days later if the “average cost of a nursing home” in his state or area was $200 a day and by then his (and his wife’s) assets were below the “countable assets” standards.

Medicaid planners soon began to calculate “half a loaf,” in which they considered the countable assets their clients owned, the difference between their income and their expenses. Applying the “average cost of a nursing home,” they could then determine, to the dollar, how much a client could gift while retaining sufficient resources to cover expenses during the penalty period.

“Half a loaf” planning continued unabated as the look back period was extended, first to 18 months, then to 24 months and then to 36 months, for any transfers to trusts. In 2006, however, under the Deficit Reduction Act of 2005, not only was the look back extended to 60 months for all transfers, but, more significantly, the penalty period did not begin to run when the gifts were made but, rather, when the applicant was “otherwise qualified.” For a while, elder law attorneys and others were baffled by the meaning of “otherwise qualified,” hoping that it might mean, for example, when the applicant’s health had deteriorated so much that he/she had to move to a nursing home. Soon, it became evident, however, that “otherwise qualified” referred to the time that the applicant (and the applicant’s spouse) owned assets equal to or less than the maximum countable assets exceeding the limits imposed by rule number 1, discussed above. The 2006 change simply eliminated the ability to conduct “half a loaf” planning—at least in Massachusetts.

In the absence of a national policy to provide appropriate health care for all citizens, the 34 years since William Talis wrote his 1981 article have seen a host of new restrictions challenging the resourcefulness of “elder law attorneys” who study the law to find some way that their clients can qualify for support before they are completely impoverished, so that they can provide adequately for spouses or children despite the rising cost of nursing home care. The increasing cost of Medicaid, shared by states and the federal government, has significant budgetary impact, posing the possibility that states, in particular, might run out of funds or increase tax burdens, given the sheer numbers of people whose medical needs increase, at the same time that private rates in nursing homes increase at about twice the average rate of inflation.

Attorneys advising clients well in advance of their need for long-term care often recommend funding irrevocable trusts to hold assets that eventually would be passed down to children or others, but would provide income for the grantors; as long as transfers to such trusts were made beyond the look back, aging clients could maintain their lifestyles while providing, ultimately, for their families. The effectiveness of such trusts was tested in a landmark case Cohen v. Commissioner of the Division of Medical Assistance. In Cohen, the court consolidated four cases in which drafters had arranged that the grantors’ rights to principal would terminate when a certain period passed (usually the look back) or the grantor entered a nursing home, etc. The Supreme Judicial Court upheld MassHealth’s determination to ignore defined “exculpatory clauses” used in four cases, thus simply declaring that the principal of such trusts could be counted among the applicant’s assets. Cohen, decided nearly two decades ago, remains controlling law in Massachusetts, establishing the principle, in effect, that specific terms in a trust should be interpreted in light of public policy. Under the Cohen analysis, if the trustee has “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.” In other words, if the trustee could possibly distribute trust principal to the Medicaid applicant, the entire trust is considered countable. Interpreting the federal statute, Title 42 United States Code, section 1396p(d)(3)(B), and the Massachusetts Regulation, 130 Massachusetts Code of Regulations 520.023(C)(1) (a), Cohen set forth the “any circumstances” test, meaning that the maximum amount (princial or income) to be deemed available to the grantor is the greatest amount the trustees in any circumstances have direction to disburse. Since Cohen, attorneys successfully qualified their clients for Medicaid by transferring assets to an Irrevocable Income Only Trust (IIOT) from which the applicant would continue to receive income but could not receive any of the trust


12. The penalty period for transfers made after February 8, 2006 begins to run on “the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described [above] based on an approved application for such care but for the application of the penalty period, whichever is later . . . .” 42 U.S.C. §1396p(c)(1)(D) (emphasis added).

13. New York practitioners, for example, continue the “half a loaf” practice, known locally as the “rule by halves.”

14. Glenworth, supra note 10, found that the annual cost of nursing homes in the United States during the previous five years had increased by 3.91 percent annually for semi-private rooms and 4.19 percent for private rooms.

15. An article written prior to the decision of the Appeals Court in Doherty v. Dir. of the Office of Medicaid, 74 Mass. App. Ct. 439 (2009), expressed enthusiasm for such irrevocable trusts: “The income only version [of the Irrevocable Pure Grantor Trusts] ensures the grantor retains the right to the income from the assets transferred to the trust, but protects the principal.” David J. Zumpano C.P.A., Esq., “Irrevocable Pure Grantor Trusts: The Estate Planning Landscape Has Changed,” 61 Syracuse L. Rev. 119, 139 (2010). The article did caution readers, however, that drafters should “examine the many legitimate reasons to create an Irrevocable Pure Grantor Trust, review them with the client, and choose the features that best meet the client’s goals.” Id. at 137.

16. 423 Mass. 399 (1996) (consolidated cases brought by Mary Cohen, Lillian Walker, Sydney A. Comines and John Kokoschka presenting varieties of what were then called “convertible trusts”).

17. Id. at 413.

18. Id. at 405-07.
principal, and then by waiting out the five-year look back period.\textsuperscript{19}

In 2009, MassHealth denied Muriel Doherty Medicaid benefits because it determined that all of the assets in her IIOT were countable. The Appeals Court confirmed, however, in \textit{Doherty v. Director of Office of Medicaid}, that “self-settled, irrevocable trusts may, if so structured, so insulate trust assets that those assets will be deemed unavailable to the settlor.”\textsuperscript{20}\n
MassHealth Medicaid decisions following \textit{Doherty} demonstrate extremely close scrutiny of the use of IIOTs, resulting in denials to most grantors. In fact, from 2011 to July of 2014, of the cases that have been appealed to the Fair Hearings (administrative adjudications), 32 have been denied and 23 have been upheld. The result is that not only has MassHealth become much more critical of IIOTs, but that a minority of Fair Hearings overturn such denials.\textsuperscript{21}

When attorneys submit MassHealth applications on behalf of their clients, the caseworker decides on his or her own whether to send the application for review to MassHealth’s legal office, which, if it denies the applicant, issues a memorandum (referred to as the “Legal Memorandum”) explaining why the trust is countable. The memorandum begins with a “Recommendation” section, simply stating that the assets in the specific trust are countable in an eligibility determination. Next, there is a “Facts” section that outlines a few details of the case, such as when the trust was established, the terms of the trust, and the value of the trust assets. Finally, there is an “Analysis” section, which in the vast majority of cases seems to start out with, “An applicant for MassHealth benefits has the burden to prove his or her eligibility for Medicaid.”\textsuperscript{22} This section also often quotes \textit{Lebow v. Commissioner of the Division of Medical Assistance}, in stating,

\begin{quote}
[T]he 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 \textit{inter vivos} trust, whereby funds appear to be out of the individual’s control, yet generally are administered by a family member or loved one.\textsuperscript{23}
\end{quote}

The memorandum will then list the applicable legal statute (Title 42 United States Code, section 1396p(d) (2012)), and explain that the instrument has to be read as a whole based on \textit{Doherty}.\textsuperscript{24} MassHealth’s legal department will refer to various provisions in the trust that render it countable, such as, “based on Article X, the trustee can use all trust principal to purchase an annuity based on the life expectancy of the applicant, payable directly to the applicant as the annuitant, rendering the value of principal available.”\textsuperscript{25} The memorandum will then conclude by saying “Accordingly, X trust is countable in an eligibility determination.”\textsuperscript{26}

Recently, the number of cases being sent to MassHealth’s legal department, rather than simply being handled by the caseworker, exploded. Many attorneys throughout the elder law community noticed that \textit{Doherty} has become a convenient precedent relied upon by MassHealth’s legal department when reviewing any IIOT. Attorneys are fearful that \textit{Doherty} contained the wrong facts and the wrong trust provisions to establish precedent for the use of meritorious IIOTs and applying for MassHealth benefits. The problem attorneys are facing now is the level of uncertainty involved in whether certain trusts are going to be deemed countable or not countable by MassHealth. This article aims to reduce that level of uncertainty among elder law attorneys.

Trusts, especially when they are self-settled, cannot protect against creditors. For example, a beneficiary of a real estate trust, who had filed for bankruptcy, had been granted a general power to appoint over a designated portion of the trust’s principal.\textsuperscript{27} The trust’s spendthrift provision attempted to prevent him and the trust beneficiaries from assigning interests in the trust to other parties, thus protecting the trust property from creditors.\textsuperscript{28} The judge ruled, however, that the power of appointment, although it was never exercised, gave the beneficiary so much control over trust principal that it rendered the spendthrift provision unenforceable, further stating that the power of appointment defeats the spendthrift provision.\textsuperscript{29}

The trust was therefore available to the beneficiary’s creditors.

Warren E. Agin, a Boston bankruptcy lawyer who represents both creditors and debtors and who also does bankruptcy trustee work, said the decision is a continuation of a line of decisions … standing for the proposition that if the person setting up a trust has the ability to control where the money eventually will go, the bankruptcy trustee and creditors can reach trust assets.\textsuperscript{30}

After analyzing why, in \textit{Doherty}, the court deemed the entire trust corpus “countable” for Medicaid purposes (Section II), this article provides a brief summary of the 55 recent fair hearing decisions referencing \textit{Doherty} (Section III) and then analyzes the 32 Fair Hearing decisions that upheld denials based on reasoning found in \textit{Doherty} (Section IV). Section V analyzes the 23 Fair Hearing decisions that overturned denials, holding that the trusts, in effect, irrevocably separated grantors from the principal in their trusts despite \textit{Doherty}, leading to some interesting and useful distinctions. Section VI finds some common ground between the various decisions,

\begin{thebibliography}{99}
\bibitem{19} The optimism surrounding Irrevocable Income Only Trusts was highlighted in a 2001 case, pointing out that clients could now achieve the multiple objectives of preserving assets while minimizing tax liability, protecting assets against the possibility of long-term care costs, and retaining control for the grantor. For an explanation of that case, see Billie M. Castle, “Income-Only Trusts: A Win-Win-Win Option in Estate Planning,” 3 Marquette Elder’s Advisor, no. 1, 2001, at 58.
\bibitem{21} See Appendix A to this article for a statistical presentation of all Fair Hearings decisions rendered from 2010 to June 30, 2014, and note a slow trend in 2014, towards acceptance by Fair Hearing officers of IIOTs.
\bibitem{22} See, e.g., Legal Memorandum of the MassHealth Legal Dept., Appeal No. 1313685 (2013).
\bibitem{23} Id. at 3 (quoting Lebow v. Comm’r of the Div. of Med. Assistance, 433 Mass. 171, 172 (2001)).
\bibitem{24} Id. at 5.
\bibitem{25} Id.
\bibitem{26} Id.
\bibitem{28} Id. at 1.
\bibitem{29} Id. at 3.
\bibitem{30} Id. at 3.
\end{thebibliography}
leading to discussion of the terms that should not be used in future IIOTs and what terms may lead to greater success. This article concludes (Section VII) by assessing the present efficacy of IIOTs, recommending ways to overcome MassHealth’s nearly blanket aversion to them, and offering suggestions to attorneys representing clients who have already executed IIOTs. Finally, this article presents in Appendix A (section VIII) three charts summarizing the 55 Fair Hearing Decisions from 2011 to July of 2014 that implemented Doherty.31 Charts I and II show which specific provisions included in trust documents are most likely to lead to the denial or approval of the trust when analyzing Medicaid eligibility. Chart III shows the number of cases, in total, which are denied or approved per year.

II. DOHERTY

In July of 1981, Muriel Doherty (“Muriel”) and her husband established a family trust. Muriel’s husband died in 1987, and in April 2000, she amended the existing family trust to make it irrevocable.32 She declared herself the sole settlor, removed herself as trustee, and appointed her niece and nephew as trustees.33 In December 2005, Muriel entered a nursing home. In April 2006, five years after she had amended her trust and the look-back period had expired, she filed a long-term care application for MassHealth, seeking benefits beginning March 15, 2006, five years after the trust became irrevocable.34 On July 5, 2006, MassHealth denied Muriel’s application. She appealed, and on December 14, 2006, a hearing officer upheld MassHealth’s denial.35

MassHealth had reviewed her irrevocable trust to determine whether any portion of the trust principal36 could under any circumstances be paid to or for Muriel’s benefit, ultimately deciding that Muriel’s trust assets were countable, thus disqualifying her from Medicaid for exceeding the financial threshold. MassHealth pointed to various trust provisions when explaining why it believed that Muriel could, under certain circumstances, receive or invade trust principal despite prominent language in trust Article V.A.2 stating that under no condition were the trustees to make distributions of trust principal to Muriel or on behalf of Muriel.37 MassHealth refused to rely solely on that clause, in isolation from other clauses in the trust. In addressing whether its terms allowed trust principal to be distributed to Muriel, MassHealth based its decision on its interpretation and understanding of the trust instrument as a whole. Accordingly, a “blanket” disclaimer similar to the one in trust Article V.A.2 was not sufficient, by itself, to prevent counting assets in a trust for purposes of MassHealth qualification.

The purpose of the trust was to “supplement, but not 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 government, insurance, and charitable sources.”38 Such language is commonly used in Special Needs Trusts as, indeed, was other language in the Doherty trust: “Trust shall be used in ways that will best enable the [settlor] [Muriel] to lead as normal, comfortable and fulfilling life as possible,” and that “the trustee shall accumulate the trust principal to the extent feasible, due to the unforeseeability of the [settlor]’s future needs . . . . [A]ccumulation or use of the trust is to be determined without regard to the interests of the remaindermen.”39 The Superior Court interpreted this article to contradict the “income only” provision, reaching the conclusion that this language enabled trustees to invade trust assets for Muriel’s benefit.40 The Appeals Court reached a similar conclusion, stating that the trust vehicle as a whole “evidences Muriel’s expectation or intent that the trustees will invade trust assets when necessary to ensure Muriel’s comfort.”41 MassHealth viewed this language as manifesting Muriel’s intention to transfer her assets to the trust solely for the purpose of qualifying for Medicaid, while retaining the ability to receive assets for purposes other than paying for nursing home care.

Muriel also retained a power to “appoint any part or all of the principal of the trust fund to any one or more of Muriel’s descendants or siblings.”42 This provision, read in conjunction with other provisions in the trust document, further highlighted the control Muriel had over the trust. Muriel retained an additional right to remain in her home (which had been deeded to the trust) and, additionally, the trustees could not sell her home without her permission. Muriel’s right to remain in the home coupled with her ability to control its sale amounted to control over trust principal. Although the court did not specifically address this provision, it was cited as being in direct conflict with the provision prohibiting Muriel from receiving trust principal.43

Much was made of a common, boilerplate provision in the trust, giving the trustees power 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.”44 MassHealth found that under this provision trustees might interpret principal as income in favor of Muriel. The Appeals Court reasoned that, despite doubts the trustees would “willy-nilly” characterize principal as income, this provision added to suspicion that trust assets might be distributed in the future to Muriel.45

31. Appendix A is included at the end of this article.
35. Id.
36. On March 2, 2006, the trust assets were valued at $631,365.62 ($266,517.38 in bank accounts and $364,848.24 due on a promissory note). Id. at *4 n.3. This promissory note was an issue as Muriel’s niece and nephew were appointed her nieces and nephews as trustees.
40. Id. at *10–11.
42. Id. at 441 (internal quotation marks omitted). This is a fairly common provision in irrevocable trusts to allow the settlor some flexibility regarding remainder beneficiaries if their conditions change.
The trust allowed trustees, in their sole discretion, to “pay over and distribute the entire principal of [the] trust fund to the beneficiaries thereof, free of all trusts,” so long as the trustees, in [their] sole judgment determine that the ‘fund created … shall at any time be of a size which … shall make it inadvisable or unnecessary to continue such trust fund.”46 Muriel argued that the limitation allowing distribution of trust principal only to the “beneficiaries thereof” meant only to the beneficiaries of the trust principal, and not to herself, because the other provisions in the trust explicitly excluded her as a beneficiary of trust principal.47 Both the Superior and Appeals Courts disagreed, explaining that they did not see “beneficiaries thereof” as limiting the class of beneficiaries, and therefore interpreting trust Article XXII to mean that Muriel could receive trust principal, should the trustees terminate the trust during her lifetime.48

In sum, the Appeals Court concluded that various provisions in the trust gave Muriel access to trust principal under the “any circumstances” test. It therefore affirmed MassHealth’s decision finding the trust countable, and disqualifying Muriel from receiving Medicaid benefits.

III. BRIEF SUMMARY OF RECENT FAIR HEARING DECISIONS49

Of the 55 decisions reviewed from 2011 until July of 2014 invoking Doherty, 32 affirmed a caseworker’s denial of benefits and 23 Fair Hearing decisions overruled such denials.50 Three of the cases were denied in part (upholding the countability of a trust) but remanded in part with respect to other issues. Although these Fair Hearing decisions are not precedents that can be strictly relied on in later cases, Hearing officers are required to state reasons for each decision, and therefore a brief summary of each decision provides attorneys with an understanding and knowledge of why certain trusts, since Doherty, were either approved or denied.51

IV. FAIR HEARING APPEALS DENIED

It should be noted that in virtually all cases, the hearing officer gave serious consideration not only to the caseworker’s position, but also to that of MassHealth’s legal department, which consistently enunciated the following rationales, summarized in bold:

Some trusts provided trustees with such potentially broad authority (“a peppercorn of discretion,” harking back to Cohen) to “defeat Medicaid eligibility standards,” denying the trust’s integrity. The following cases found that distributions of principal were or could have been made to the grantor.

a. Distributions that do not distinguish between principal and income are, since Doherty, likely to be considered available to the grantor. Although a trust stated that no principal could be distributed to the donors, standard boilerplate language stating that, “in making payments or distributions of income or principal, the trustee may deposit the same in any account in the name of a beneficiary, or may make payment or distribution to the beneficiary directly” proved fatal.52 The hearing officer found that failure to distinguish between income and principal beneficiaries meant that the principal could be distributed to the applicant, as she is indeed a “beneficiary” of the trust due to her right to receive income.53

b. A hearing officer affirmed MassHealth’s denial because the applicant’s irrevocable trust authorized the trustee to use trust principal “if appropriate in [the trustee’s] sole and absolute judgment” to cover the applicant’s spending money, food, clothing, shelter, health services, items for food and employment, etc.54 A provision authorizing the trustee to use trust principal to purchase a permanent residence for the applicant also troubled the same hearing officer.55

c. Prior to resigning as trustee in 2011, the applicant as trustee and beneficiary had broad discretion simply to pay over trust principal to himself.56 When the applicant resigned, the trustee was given authority to sell trust assets with the applicant’s assent. Furthermore, the hearing officer stated that following the death of the applicant’s spouse, the applicant became the sole vested beneficiary of the trust and as such, the trust assets were countable to the applicant in a MassHealth eligibility determination.57

Broad authority to terminate a trust and, in so doing, distribute at least a portion of principal to the grantor, led to characterizing an ostensibly irrevocable trust to be in fact “revocable.”

46. Id. at 441 (emphasis added). This also is a common provision in such trusts but, here, the ultimate determination to undifferentiated “beneficiaries” proved fatal.

47. Id. at 442 n.6.


49. 42 C.F.R. §431.246 requires each state participating in the Medicaid program to maintain “a Hearing system,” meeting the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970). Following a favorable Fair Hearing decision the agency must take corrective action, including payments retroactive to the date of the incorrect action. 42 C.F.R. §431.246.

50. The authors were able to obtain every hearing decision from the beginning of 2011 through July 30, 2014 by going to the MassHealth Board of Hearings Office located in Quincy, Mass., the only place where one can access all hearings on appeal, and grouped into folders according to the years in which they were heard. Two searches were made in the “2011,” “2012,” “2013” and “2014” folders: one search for “irrevocable trust” to sort through the relevant cases, and one search for “Doherty” to find all cases that referenced Doherty. To protect privacy, no case in the database refers to the name of the applicant.


53. Id. at 10. In fact, in 2006, the trustee made a transfer of trust principal to the applicant’s personal account. When the applicant resigned, the trustee was given authority to sell trust assets with the applicant’s consent. Furthermore, the hearing officer stated that following the death of the applicant’s spouse, the applicant became the sole vested beneficiary of the trust and as such, the trust assets were countable to the applicant in a MassHealth eligibility determination.


55. Id. at 7. The trustee had transferred 1 percent interest in the real estate to the applicant’s disabled sister and the hearing officer remanded this portion of the appeal because the transfer had happened too close to the hearing, but the appeal was denied with regard to the countability of the trust.


57. Id. at 7. MassHealth interpreted a trust provision directing the trustee to hold trust assets for the benefit of the beneficiaries as meaning the trustee was to hold trust assets for the benefit of the applicant since she was the sole beneficiary of the trust. Id. at 3.

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a. MassHealth concluded that the trustees retained as much authority over the funds as they would have had if the funds had not been in trust, due to the fact that the trustees could withdraw all funds on deposit in any bank in the name of the trust. The hearing officer reasoned that because the trust could be terminated at any time by the trustees and the proceeds were to be used to pay and discharge all debts, liabilities and obligations of the trustees, this rendered the trust revocable pursuant to 130 Mass. Code Regs. §20.023(B).59 Furthermore, MassHealth and the hearing officer agreed that the applicants were the current trustees because their resignations were ineffective, due to a trust provision providing that amendments required a majority of the beneficiaries, which the applicants did not obtain.60

b. In Appeal Number 1305949, a trust delayed the distribution of assets until the applicant died.61 The hearing officer concluded, however, that if the trust terminated during the applicant’s lifetime, the assets would revert back to the applicant since there was no provision detailing asset distribution in this situation. This, according to the hearing officer, made the trust “revocable” and its assets therefore countable.62

c. Another MassHealth denial occurred in 2013 because the trustee had the power to terminate the trust when it was “no longer economical” or was “inadvisable to administer,” as well as the authority to convert assets into income-producing property, loan the applicant funds equal to the value of the trust assets, and make distributions to or for the benefit of one or more trust beneficiaries to the complete exclusion of others.63 The hearing officer opined that the trustee’s power to make discretionary distributions (to favor some beneficiaries over others) could result in distributing all of the trust to the applicant.64

d. A hearing officer upheld MassHealth’s decision deeming an irrevocable trust countable because trustees could terminate the trust at the death of the applicant or, if in the trustees’ “sole discretion,” its existence would jeopardize the applicant’s eligibility to receive Medicaid benefits.65 While the trust provided for what would happen if the trust were terminated after the applicant’s death, it did not set rules for distribution of principal should the trust be terminated while the applicant was alive.66

e. Because of a broad clause stating that the “donor(s) reserves in himself/herself/themselves the right to benefit from and enjoy the assets held in this trust for the remainder of his/her/their natural life,” a hearing officer determined that a grantor and his wife retained sufficient control over the trust assets to effectively render the trust revocable and therefore countable.67

Grantors who retained powers such as to change ultimate beneficiaries (through retained powers of appointment), terminate the trust, or convert principal to income, effectively retain access to at least part of the principal.

a) Where a grantor reserved a power to appoint, either by will or during her lifetime, any or all of the principal or income of the trust to any beneficiary, MassHealth decided that the grantor was the sole vested beneficiary due to the fact that she was the only one entitled to mandatory (income) distributions.68 The hearing officer argued she could use her power of appointment to receive both the trust’s income and principal.69

b) MassHealth and the hearing officer similarly concluded that a trust was countable due to the applicant’s authority, as both a grantor and trustee, to convert assets to income-producing property, and to sell, mortgage, lease and collect rent on property, and due to the fact that the applicant, after conveying his home to the trust, continued to pay taxes and homeowner’s insurance on the property.70

c) A hearing officer found a trust countable because in analyzing the totality of the circumstances, he found that the trustee’s power to allocate capital gain to income rather than principal, reclassify capital gain as income, and use trust property to pay for the grantor’s funeral expenses, created circumstances where trust principal could be reached by the applicant.71 The hearing officer also scrutinized the trustee’s authority to purchase annuities and similar investments for the grantor, as well as the grantor’s ability to reacquire any trust property by substituting other property of equivalent value.72

Other trusts were denied because the grantor and the trustees retained too much power over the trust. Combining a grantor’s power of appointment with a trustee’s authority to terminate the trust was considered over-reaching.

59. Id.
60. Id.
62. Id. at 9-10.
64. Id. at 9–10.
66. MHAD: FHA No. 1204615 at 10.
69. Id. at 7–8; see 42 U.S.C. §1396p(d)(3)(B)(i) (“[I]f 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, and payments from that portion of the corpus or income. . . .”). The decisions noted the “any circumstances” test mandated by both federal and state law effectively creates a presumption that a self-settled, inter vivos trust established by an applicant or spouse or funded with an applicant’s assets is countable in an eligibility determination.
72. Id.
a. Similar to *Doherty*, an applicant transferred her residence into an irrevocable trust. The hearing officer cited the amount of control the applicant retained over the property (including right to reside in the home during her lifetime, veto power over any potential sale, right to rent the property, a limited power to appoint trust principal to charitable or nonprofit organizations, and authority to require the trustee to terminate the trust and distribute principal to the applicant’s children), concluding that “these powers of appointment and dissolution firmly underscore the appellant’s lack of true divestment of the trust principal.”

b. In Appeal No. 1308251, an applicant established an irrevocable trust, into which she deeded her property. As in *Doherty*, the grantor reserved the right to eliminate any beneficiary or to reallocate part or all of the interest of any beneficiary. MassHealth not only considered the grantor the sole, vested, lifetime beneficiary of the trust, but, because the trustee was authorized “to sell or offer to sell for cash or for creditor installments, at public or private sale, to grant options to purchase, and to convey or exchange, any and all of the property at any time forming a part of the trust asset,” inferred that the grantor retained substantial control over trust principal. The decision specifically noted that when the home held by the trust was sold, $90,000 of the proceeds was used to pay off the applicant’s mortgage.

c. The hearing officer in Appeal No. 1305018 concluded that because the applicant was a beneficiary of the trust, the trustee’s ability to apply any or all of the income or principal of the trust to or for the benefit of any beneficiary meant that trust principal could be made available or used for the applicant’s benefit. The hearing officer also noted the applicant’s control over trust principal due to her power to demand the trustee transfer any trust asset in exchange for assets of equivalent value.

d. A trust with similar provisions used in *Doherty* (Appeal No. 1104515) was deemed countable. The purpose of the trust was to manage the applicant’s assets and to use them to allow the applicant to live in the community for as long as possible. The hearing officer noted the applicant’s right to use and occupy any residence, a power to appoint any part of the trust property to the applicant’s living issue, their spouses, or charitable organizations, and the trustee’s ability to terminate the trust if its existence would jeopardize the applicant’s eligibility to receive Medicaid benefits. The hearing officer also noted the trustee’s broad powers, including discretion to sell, mortgage, or lease the trust property and to determine what portion of the trust assets was to be designated as income or principal.

e. Because a grantor could appoint trust property to any of her living children or to a charity, a hearing officer ruled that the grantor retained significant control over the trust property and no one but the grantor had a vested interest in the trust during the grantor’s lifetime. The hearing officer also found that because the trust could terminate upon determination that the trust threatened the appellant’s eligibility for government assistance, the trust principal would revert to the settlor/applicant since no other avenue for distribution was provided.

f. A hearing officer found a trust countable due to the trustee’s broad powers to borrow or lend trust property and convert liquid assets to income producing property such as an annuity, as well as the grantor’s ability to access principal by substitution. Furthermore, the hearing officer emphasized that because the trust could be terminated if Medicaid eligibility was in jeopardy, it was deemed countable.

g) In a 2014 decision, a trust was found countable because of the trustee’s broad powers to make distributions of principal and income in proportions as the trustee deemed desirable, and the right to terminate the trust should it impact the applicant’s eligibility for Medicaid. The hearing officer noted the trustee’s unfettered discretion to determine the size of a distribution to the applicant, as well as the applicant’s retention of various powers and duties as trustee.

**Many denials focused on the trustee’s authority to convert assets into an income stream (often using the example of purchasing an annuity).**

a. The hearing officer found a trust countable because the trustee reserved authority to (1) convert principal to income-producing assets and make distributions of that income to the applicant, and (2) make unsecured loans of principal. Furthermore, the grantor could borrow any part of the trust estate directly or indirectly, provided there was adequate interest and security, which was left to the broad discretion of the trustee to determine.

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74. *Id.*
76. *Id.* at 6. The applicant argued that the right to eliminate beneficiaries and reallocate interest of the beneficiaries did not make the applicant the sole, vested, lifetime beneficiary. The hearing officer did not address the issue of the beneficiary’s being the sole lifetime beneficiary.
77. *Id.* at 3. It is hard to imagine why this was thought necessary.
79. *Id.*
81. *Id.* at 6.
82. *Id.* at 7.
84. *Id.* at 24
86. *Id.* at 14.
88. *Id.* at 6.
90. *Id.* at 8.
b. In a 2013 case, MassHealth and the Hearing officer agreed that the applicant’s power to demand the trustee transfer any trust asset in exchange for assets of equivalent value, terminate the trust at the applicant’s discretion, and determine allocations of income and principal, rendered the trust principal within the applicant’s control. MassHealth further pointed out that the trustees had power to convert trust principal to income-producing property, such as an annuity, which could then be made payable to the applicant as the income beneficiary.

c. A hearing officer found a trust countable because the trustee was able to reinvest trust property into income-producing investments and allocate such disbursements between income and principal. It was also noted that the grantor retained too much control over trust property, including the right to reside in the home, claim it as her primary residence, and direct the trustee to sell real estate or veto any such sale.

Typically, IIOIs allow for partial distributions of principal to the grantor’s children or others. MassHealth views such provisions as too clever.

a. The hearing officer believed the applicant’s power to appoint principal or income to the applicant’s issue might allow the applicant to regain ownership of the trust principal, since there was nothing preventing the children from conveying the property back to the applicant, free of trust. The hearing officer also interpreted the applicant’s ability to order the trustee to exchange assets for assets of equivalent value to mean that the applicant could instruct the trustee to return her former residence to her without breaching the trustee’s fiduciary duty. Finally, the hearing officer explained that the trustee’s power to convert trust principal to income-producing investments enabled the trustee to sell the applicant’s former home and purchase an annuity or other income-producing investment vehicle.

b. Another irrevocable trust stated that “during the Donors’ lifetimes, the trustee may make such payments of trust principal to, or for the benefit of, such living persons as the trustee shall select from a class consisting of the Donors’ issue. …” Under this provision, the trustee paid legal fees totaling $5,000 incurred by the applicant. “If paying [applicant’s] legal fees did not result in a breach of the trustee’s fiduciary duty to the [other] designated class of beneficiaries, there is no reason to conclude that similar disbursements from principal for applicant’s benefit would breach the trustee’s fiduciary duty.”

Some of the challenged trusts were drawn to favor the interests of the life beneficiary over remaindermen, or were drafted in a way that gave the grantor access to principal and income until he or she actually needed public benefits.

a. A hearing officer concluded that an applicant had access to principal where the trustee was directed to accumulate trust principal to the extent feasible, due to the unforeseeability of the settlor’s future needs without regard to the interest of the remaindermen.

b. In another case, granting a trustee broad powers over trust assets (including power to manage, sell, invest, assign, mortgage or dispose of the trust estate, power to determine who was entitled to distributions and what proportions they would take, and power to determine what was income or principal) rendered the trust countable for eligibility purposes. This particular trust was available to the applicant before her nursing facility institutionalization, suggesting that the principal was formerly available for the applicant’s benefit while residing in a community setting. The hearing officer stated that by choosing to create this specific trust, instead of creating a life estate, the applicant explicitly gave herself more power and discretion, and she now needed to accept the burdens or benefits that her irrevocable trust arrangement created.

c. Although an applicant was found eligible for MassHealth, a hearing officer nevertheless upheld a caseworker’s determination that the applicant was entitled to continue receiving income from the trust, ignoring a trust provision mandating that once the applicant became a permanent resident of a long-term care facility, income was only to be distributed to the non-institutionalized spouse.

d. One hearing officer considered a trust countable because the trustee could terminate it if, in the trustee’s opinion, the trust might be considered countable. Furthermore, the applicant retained too much control over trust principal by way of her power to appoint both income and principal to one or more of the legatees (the donors’ three children and their issue) and her right to live rent-free in the home.

92. Id. at 3–4.
94. Id. at 9–10.
95. MHAD: FHA No. 1306280, at 10–12 (Mass. Oct., 2013). This trust was originally approved, but after review as part of a MassHealth asset verification project, the applicant’s benefits were terminated.
96. Id. at 11.
97. Id. at 12.
99. Id.
100. Id. at 9.
104. Id. at 9.
107. Id.
e. A trust was also deemed countable because of its purpose, which was to provide for appellant’s care, coupled with the trustee’s broad authority to deal with trust assets, including its ability to convert trust principal into income-producing property and to make unsecured and secured loans without the necessity of notice to the beneficiaries. The hearing officer concluded that the applicant, as trustee, could make the entire trust corpus available to herself without constraint or consent of the other beneficiaries.

Trusts holding residences are particularly vulnerable.

a. An applicant reserved a life estate in her residence, transferring the remaining interest to her children as trustees of a reality trust. The beneficiary of the reality trust was a family trust, of which the applicant was the income beneficiary. MassHealth argued that assets held by the reality trust, upon its termination, would be conveyed to the family trust and, because the applicant was the only beneficiary of the family trust, the question as to the applicant’s eligibility hinged on her ability to access trust principal of the family trust. The hearing officer ultimately concluded that there were circumstances where the remainder real estate interest, if distributed from the reality trust to the family trust, could be made available to the applicant because the trustees could “allocate and convert the value of the real estate interest into a different amount of income.”

b. In another MassHealth denial, the applicant had placed her former home into a reality trust. A separate irrevocable trust, which was established by the applicant and of which she was a trustee, was sole beneficiary of the reality trust. The applicant could terminate the trust and the assets from the reality trust would then be distributed to the irrevocable trust. A hearing officer affirmed the caseworker’s decision that enabling a trustee to determine what constitutes income and principal, coupled with authority to purchase life insurance, annuities, endowment policies or other forms of life insurance “on the life or lives of any beneficiary, or on the life of others, for the benefit of any beneficiary,” enabled the trustee to convert trust assets into income for the benefit of the applicant.

c. When an applicant sought to distinguish Doherty, the hearing officer ultimately found a trust was a “Medicaid Qualifying Trust,” because the trustees had discretion to pay to the applicant, as grantor, the trust’s principal within 30 months after the grantors had deeded real estate to the trust.

d. A hearing officer concluded a trust was countable solely because the grantor’s home was available to him for his use, and he maintained title and rights to use of the home even when he became institutionalized. The decision explained that if any portion of the home could be made available to the applicant, then the entirety of the home asset should be found countable.

V. Fair Hearing Appeals Approved

The few earlier Fair Hearing decisions overruling denials of benefits, as well as an increasing number of recent reversals, do not always distinguish themselves from earlier denials. For example: The mere retention of a right to use and occupy a home placed into an IIOT did not always render it ineffective.

a. MassHealth had concluded that the applicant had an interest in the trust property because she had the right to use and occupy the property. A hearing officer disagreed, however, holding that the agency failed to show how the applicant’s use and occupancy of the home could be equated to access to trust assets. The case was returned to MassHealth to consider the applicant’s eligibility without counting the trust.

b. A hearing officer in a 2014 decision found that MassHealth again failed to demonstrate how the applicant’s right to use, possess and enjoy the property held in trust rendered the trust countable. Furthermore, the hearing officer concluded that MassHealth failed to demonstrate how omitting a provision concerning principal distributions during the lifetime of the applicant made the trust countable.

c. A Fair Hearing officer also concluded that a trust was not countable simply because the trust held real property, noting that the applicant was not a beneficiary of the trust and therefore had no authority to terminate the trust. Furthermore, a second trust set up by the same applicant was found not countable, even though the grantor had the right to remove any trustee, and the trustee had broad powers such as distributing income in his/her sole discretion (with limitations if such distributions would disqualify the applicant for Medicaid or MassHealth benefits), terminating the trust, and making secured or unsecured loans to any person. The hearing officer concluded that this authority did not constitute the “peppercorn” of discretion MassHealth was searching for.

109. Id. at 7.
111. Id. at 5.
112. Id. at 5–6.
114. Id. at 9.
115. Id. at 10–11. Medicaid Qualifying Trusts (MQTs) are also “countable” assets. See 130 MASS. CODE REGS. 520.022(B) (Medicaid Qualifying Trust). Such trusts actually disqualify the settlor for Medicaid.
116. See 130 MASS. CODE REGS. 520.022(B) (Medicaid Qualifying Trust).
119. Id.
121. Id. at 4–5.
123. Id. at 5.
125. Id. at 10.
d. Similarly, a 2014 decision concluded that a Realty Trust was not countable because the applicant had no ability to revoke the trust due to the fact that another trust, and not the applicant, was the beneficiary.\textsuperscript{126} Furthermore, the hearing officer concluded that neither a grantor’s retention of a power of appointment and right of substitution, nor the trustee’s power to determine what part of the trust property is income or principal, to borrow or lend any amount, or to sell, mortgage or exchange property, amounted to the “peppercorn” of discretion which MassHealth claimed was present.\textsuperscript{127}

e. A hearing officer concluded that a trust was not countable merely because real estate was placed in the trust, stating that because the trustees only have discretion to distribute intangible trust assets but not realty or the income of realty, there were no circumstances where the applicant could access the trust principal.\textsuperscript{128}

Similarly, trusts which allow for termination under specific conditions, have been viewed as effective.

a. After a majority of beneficiaries decided to terminate a trust, the trustee was to distribute trust property to the beneficiaries as tenants in common, in proportion to their respective interests.\textsuperscript{129} A caseworker had ruled that because the children’s interests were subject to the applicant’s life estate, the children’s beneficial interests were merely contingent, leaving the applicant as the sole vested lifetime beneficiary who could distribute assets to herself.\textsuperscript{130} The hearing officer disagreed, stating that not only were the beneficiaries’ interests vested — as it was certain the children would acquire the property upon the applicant’s death — but the trust also listed the beneficiaries and did not further specify the nature of their beneficial interest.\textsuperscript{131} The fact that the applicant owned a life estate did not change the beneficiaries’ interests in the property.

b. A hearing officer concluded that a trust was irrevocable and was not countable because although the trustee had the right to terminate the trust prior to the applicant’s death, this trust, unlike the trust in \textit{Doherty}, made it clear that upon termination of the trust, the trust assets would not be distributed to the applicant under any circumstances.\textsuperscript{132} The hearing officer also noted that the applicant’s special power of appointment was not tantamount to ownership of trust property.\textsuperscript{133}

c. Furthermore, in a decision released in December of 2014 (outside of the study period of this article but interesting to note nonetheless), a hearing officer disagreed with MassHealth and concluded that although the beneficiary could terminate the trust, neither the applicant nor his spouse was a beneficiary of the trust, and therefore they could not claim any authority to unilaterally terminate the trust.\textsuperscript{134} The hearing officer elaborated, stating that even if the trust were terminated, the trust explicitly limited distributions to the applicant and his spouse to income only.\textsuperscript{135}

Most of the cases which held \textit{Doherty} did not control distinguished their interpretation of trusts from \textit{Doherty} and its progeny. Specifically, many reversals recognized that power to convert principal to income-producing assets was acceptable if the rest of the trust explicitly prohibited distribution of principal to the applicant, so that the trust was not countable.

a. One hearing officer concluded that although the trustees had broad authority over trust assets (allowing the trustee to convert assets into income-producing investments), that alone did not render the trust countable when the rest of the trust was explicit that no principal was to be distributed to the applicant.\textsuperscript{136} MassHealth argued, unsuccessfully, that the grantor could not credibly claim the real estate was available to her while she wanted to reside there, but unavailable if she moved to a nursing home (and sought Medicaid coverage). MassHealth also argued in vain that any payments made by the applicant during the look-back period for maintenance or expenses related to the real estate held by the irrevocable trust were disqualifying transfers.\textsuperscript{137}

b. MassHealth considered another irrevocable trust countable because the applicant retained inter vivos and testamentary powers to appoint income and principal to legatees (which the trust clearly indicated did not include the applicant), and because the trustee could convert assets to income.\textsuperscript{138} MassHealth also stated that because the trust was not required to pay premiums on the applicant’s life insurance policy, the obligation was left to the applicant.\textsuperscript{139} The hearing officer disagreed, concluding that the ambiguity that existed in \textit{Doherty} did not exist in this case; instead, the hearing officer concluded that the trustee’s power to determine what was income and what was principal merely authorized the trustee to use his best judgment in good faith.\textsuperscript{140}

\textsuperscript{126} MHAD: FHA No. 1401798, at 6–7 (Mass. May, 2014).

\textsuperscript{127} Id.

\textsuperscript{128} MHAD: FHA No. 1403093, at 6 (Mass. Aug., 2014).

\textsuperscript{129} MHAD: FHA No. 1201761, at 3 (Mass. Nov., 2012).

\textsuperscript{130} Id. at 4.

\textsuperscript{131} Id. at 7–8.

\textsuperscript{132} MHAD: FHA No. 1318124, at 12 (Mass. June, 2014).

\textsuperscript{133} Id.

\textsuperscript{134} MHAD: FHA No. 1409508, at 10 (Mass. Dec., 2014).

\textsuperscript{135} Id.

\textsuperscript{136} MHAD: FHA No. 1214578, at 5–6 (Mass. Nov., 2012). The “broad authority” given to the trustees referenced in this sentence was “to hold, manage, control, improve, sell, change, grant, convey, deliver, . . . or otherwise deal with or dispose of any property in the trust estate.” Id. at 3.

\textsuperscript{137} Id.


\textsuperscript{139} Id. at 3.

\textsuperscript{140} Id. at 5.
c. A case worker counted another irrevocable trust because it held the applicant’s home, which the trustee sold to purchase an annuity whose periodic payments funded a trust account. MassHealth reasoned that since the annuity was purchased from proceeds when the home was sold, the applicant’s right to occupy the property during her life had been per force expanded to, in effect, the equivalent of full ownership. The hearing officer disagreed, reasoning that once the real estate was converted to liquid assets, trust provisions giving the applicant the right to reside in the home were no longer relevant, as she no longer owned real estate for her own use. Her equitable interests in the property no longer pertained to proceeds from its sale.

d. In another decision, MassHealth denied an applicant who had created a trust authorizing the trustee to “hold, purchase, dispose of or otherwise deal with life insurance, annuities, endowment policies or other forms of insurance on the life or lives of any beneficiary or beneficiaries, or on the life or lives of others, for the benefit of any beneficiary of the trust.” The hearing officer, unlike in many other decisions that have come before the Board of Hearings, concluded that although the trustee did have the power to convert principal to income (e.g., using trust principal to purchase an annuity), this would only render income from the annuity available to her, while the trust, not the applicant, would own the annuity.

e. A hearing officer’s decision in 2014 suggests a trend away from rubber stamping the Legal Office’s opinions about trusts. It concluded, contrary to MassHealth’s argument, that the mere fact that trustees could use trust principal to purchase an annuity did not render the trust countable, because the trustee would only be permitted per the terms of the trust to distribute the annuitized interest to the applicant, rather than to the full annuity payment. Furthermore, the hearing officer found that the applicant’s right to occupy any real estate and special power of appointment did not create circumstances where principal would be available to the applicant.

f. In yet another recent decision, the mere fact that principal may be invested in an annuity did not mean that the entire principal itself may be distributed to the applicant, according to the hearing officer. The hearing officer also concluded, contrary to MassHealth’s arguments, that the applicant’s power of appointment did not reach the sufficient control over trust property needed to render the trust countable. Furthermore, the applicant’s right to reside in any residential property held in trust, the power to replace a trustee, and a veto power over the trustee’s disbursement of assets to himself, did not change the limitation on the trustee’s distributing only income to the applicant.

g. Another hearing officer concluded that the trustees’ right to use trust assets to purchase an annuity is standard language found in most trust documents, that it “simply details the trustees’ duties and responsibilities to maintain the trusts,” and that regardless, the trustees are “limited to and bound by their fiduciary obligations to all beneficiaries not just the Appellant . . . .” The hearing officer also rejected MassHealth’s contention that the applicant’s right to reside in the home, and the right of any of the beneficiaries to terminate the trust, rendered the trust revocable.

h. Another hearing officer concluded that a grantor’s retention of a special power of appointment, coupled with a trustee’s ability to purchase an annuity for the applicant, did not render the trust countable. The decision emphasized that the special power of appointment limited potential beneficiaries to the applicant’s issue and, therefore, the trustee was bound by his fiduciary obligations to all beneficiaries. There was no “peppercorn” of discretion, as MassHealth suggested.

i. Another hearing officer ruled that a trust was not countable, notwithstanding the trustee’s ability to invest principal into an annuity, the applicant’s testamentary power of appointment, and the trustee’s right to satisfy the debts of the applicant’s probate estate and estate taxes, because the trust made clear that the applicant was entitled to income only. This decision may have special meaning to those defending IIOTs for both its reasoning (that seems to contradict Doherty and its language stating that, while “it is undeniable that Appellant placed the property in trust to gain certain tax advantages and to avoid having it count for MassHealth eligibility purposes, should she ever need institutionalized care,” the principal is not under any circumstances reachable by the applicant.

j. Contrary to MassHealth’s assertion that, by the terms of a trust, a trustee could purchase an annuity to benefit the applicant (according to explicit powers of investment in the trust), a hearing officer concluded that the purpose behind this power was to “preserve, maintain or improve” trust assets, rather than investing in an annuity. The hearing officer also noted that a special power of appointment did not give the applicant the power to appoint trust property to herself, and that the applicant’s expressed intent to be treated as the owner of the trust for federal income tax purposes did

142. Id. at 4.
143. Id. at 9.
145. Id. at 5–6. This outcome clearly differs from other decisions in both reasoning and result. It provides a useful explanation for advocates.
147. Id.
149. Id. at 5. The right to reside in any residential property held in trust was not considered a problem because no residential property is or ever had been held by the trust.
151. Id. The trust was not considered revocable because upon termination, the trust assets would pass to another trust as opposed to reverting back to the applicant.
154. Id. at 11.

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not amount to sufficient control over trust property to render the trust countable.156

Even if a child accepted distribution of principal to pay for her mother’s assisted living expenses, two recent decisions held that the remaining principal in the trust was not countable.

a. MassHealth considered a trust countable because of the actions of the beneficiaries rather than the language of the trust itself. The applicant’s daughter, a principal beneficiary of the trust, used her receipt of a distribution of principal to pay her mother’s assisted living fees.157 The hearing officer concluded that MassHealth had incorrectly based its decision on the actions of the beneficiary rather than on the language of the trust and, since there was no proof of an agreement between the applicant and the daughter to compel the daughter to expend distributions to which she was entitled for her mother’s care, the trust was not available to the grantor. This distinction may also be of considerable importance to advocates.

b. In a similar case, a hearing officer concluded that although the applicant’s daughter used part of a principal payment to herself to pay for the applicant’s (mother’s) nursing facility expenses, the trust was not deemed countable because there was no evidence that the daughter had any legally-binding duty or contractual obligation to spend her distributions towards the applicant’s nursing facility expenses.158 Furthermore, the applicant’s power of appointment was testamentary, as opposed to inter vivos, and therefore she had no ability to receive trust principal by way of her power of appointment.159

When faced with a trust designed to distribute income to the grantor and which gave the grantor substantial powers (the right to occupy the family home, a power of appointment, the right to appoint a trustee and the right to reacquire trust assets by substituting assets of equal value) some hearing officers still held that the trust principal was not available to the applicant.

a. A caseworker rejected an application because the applicant retained too much control over the trust (right to occupy the home, power of appointment, and ability to appoint a new trustee).160 The hearing officer reversed, concluding that MassHealth had failed to prove how the right to appoint a trustee, the right to income and occupancy of the home, amounted to access to principal.161

b. MassHealth denied an applicant who had a special power of appointment, the rights to reside in her home and substitute assets of equal value, and controlled the sale of the home.162 The hearing officer disagreed, stating that the trust provisions, taken as a whole, did not constitute access to trust principal. The hearing officer explained that the applicant could not take back the real estate held in the trust unless she replaced it with something of equal value, nor could the trustee re-convey the real estate to the applicant without violating the trust or his fiduciary duties.163

c. A hearing officer in 2014 concluded that the right of the applicant to consent to the distribution of principal to her issue did not create circumstances where she had direct access to principal, because the decision to make the distribution of principal to the applicant’s issue remained with the trustee, the applicant’s issue were the only listed beneficiaries, and the applicant only had the right to consent to the decision of the trustee.164 Furthermore, the hearing officer concluded that, contrary to MassHealth’s arguments, the trustee’s ability to purchase an annuity did not give the applicant access to principal, and the omission of a provision providing for the distribution of principal to any beneficiary did not make the trust countable.165

The right to remove a trustee, in itself, did not render the trust ineffective for MassHealth purposes.

MassHealth denied a husband and wife Medicaid benefits, simply because they retained the right to remove any trustee. The hearing officer disagreed, concluding that MassHealth failed to demonstrate how the power to remove a trustee coincided with the ability to access trust assets.166 The hearing officer reasoned that regardless of the power to remove a trustee (and the opportunity to reside in their former home), the couple only had access to trust “income.”167

VI. ANALYSIS

What is striking about a number of recent Fair Hearing decisions that reversed case workers’ denials is that the language in trusts involved in those cases did not differ from objectionable provisions in trusts that had been previously denied. For example, grantors who retained a right to occupy the home and the ability to appoint a new trustee were said to have too much control over trust property in several cases that were denied.168 Nevertheless, similar language was accepted in later cases.169

156. Id.
159. Id.
160. MHAD: FHA No. 1303305, at 3–4 (Mass. May, 2013). This appeal concluded that the trust was not countable but upheld denial on other grounds (the fact that the applicant had failed to spend down assets outside the trust). Id. at 7.
161. Id. at 6.
163. Id. at 8.
165. Id.
167. Id. at 5.
The greatest inconsistency arose in cases that considered a common provision that allows trustees to convert principal to income-producing investments. Fair Hearings regularly approved denials based almost solely on the presence of this power in a scrutinized trust.\textsuperscript{170} Yet hearing officers approved trusts with similar language, especially recently. Indeed, one held that even if principal was converted to income by way of an annuity, only the income would be available to the applicant and the trust, rather than the applicant, would own the annuity.\textsuperscript{171} One hearing officer found that even when a trustee was granted discretion to distinguish income from principal, the trustee was bound to apply her best judgment and good faith, consistent with the trust’s overall purpose.\textsuperscript{172} Assuming good faith, the decision follows, the actual principal was not available to the grantor.

VII. Conclusion

This detailed analysis of how MassHealth, and particularly Fair Hearings, have dealt with irrevocable trusts since \textit{Doherty} has implications for attorneys engaged in preparing such instruments, those whose files include executed Irrevocable Trusts which may be tested in the future, and, finally, those called on to advocate on behalf of existing Irrevocable Income Only Trusts (IIOTs) that may have been prepared prior to \textit{Doherty}. Attorneys of all three categories, we believe, will derive useful information from this article, but how they use that information may differ according to their situations.

While \textit{Doherty} itself provided a number of cautions for those who created IIOTs, hindsight afforded by subsequent Fair Hearing decisions suggests clauses that should not be included in trusts, if an intent of the trust is to facilitate qualifying for MassHealth by transferring assets whose principal will not be needed to pay for long-term care within five years. Drafters used to including clauses to cover all possible contingencies need to curb such instincts because, as \textit{Doherty} and the contested cases since have shown, thoughtless inclusion of what may seem to be innocent boilerplate may produce disasters. Remember that merely titling a trust “Irrevocable” and “Income Only” is not sufficient to assure that assets within the trust are not counted by MassHealth. Remember, also, that if any portion of trust principal can, under any circumstances, be considered available to the grantor, the trust will fail to achieve its goal.

Don’t rely on the title of the trust or even on a prominent article that recites that the grantor concedes all rights to principal. We now know that MassHealth’s Legal Office will scrutinize trusts to determine whether, under any circumstance, assets are accessible to a MassHealth applicant.

Language taken from Special Needs Trusts (“The trust is for the sole benefit of X” or “the trustee shall apply assets for the benefit of X so that he can lead as normal, comfortable, and fulfilling life as possible”) is generally desirable for those trusts,\textsuperscript{173} but such broad discretion over both principal and income to enhance the beneficiary’s life, for that very reason, enables MassHealth to view such discretion as tantamount to giving the grantor access to principal, no matter who serves as trustee. At the very least, it could be plausibly argued that principal could be expended on medical needs, notwithstanding a contrary provision in the same document.

Powers of appointment, at least those that can be construed as “general,” are inimical to IIOTs used in MassHealth planning. Indeed, some later cases invalidated IIOTs as shelters for principal when distributions were made to the children of a grantor, while the grantor remained alive, because the children could, and in at least one case did, invade principal to pay for the grantor’s care. General language that allows the grantor, or even someone else, to change beneficiaries (usually by a power of appointment) will be carefully scrutinized.

Seemingly innocuous clauses — commonly found in boilerplate — that permit the trustee to determine what is principal and what is income, ought to be avoided, if possible, not because they per se grant the grantor access to principal, but because they have led to MassHealth denials. The point may be argued in future cases, but attorneys advising families do not want to draft clauses that later become problematic, regardless of the ultimate outcome.

\textit{Doherty} substantially punished an overly broad use of the term “beneficiary” to include the grantor herself as one of the persons who would benefit from an early termination of the trust. It is possible that \textit{Doherty} might never have achieved its notoriety if the drafter had simply stated that if the trust had to be terminated, contingent or remainder beneficiaries would receive their shares. Post-\textit{Doherty} trusts may allow for early termination but only if the grantor cannot, in any conceivable way, benefit from that termination.

MassHealth and Fair Hearings have a right to inquire not only about the trust’s language, but also about how it has been managed. If principal has been distributed to a grantor’s children, for example, who, in turn, paid some of the grantor’s medical expenses, the instrument itself will be suspect and its protection of assets may fail. If there have been distributions (even partial) of principal to, for example, a grantor’s children, expect to be questioned on whether such distributions were used to benefit the grantor, thus invalidating the trust itself.

Post-\textit{Doherty} denials were significantly affected by terms that gave trustees discretion to determine what was considered principal and what was considered income, coupled with authority to convert assets into an income stream. The use of principal to purchase an annuity for the benefit of the grantor, or even the authority to do so, was disastrous in several cases and is, alas, too clever by half according to multiple Fair Hearings.

And, finally, a significant number of trusts that included residences as part of their principal faltered when MassHealth determined that the grantor retained control over the sale or use of the property and thus could conceivably benefit from part of the principal. While the decisions are not explicit, it is possible that MassHealth and hearing officers feared that a beneficiary with only a life interest in his home could nevertheless be entitled to a proportional share of proceeds from its sale while still alive. The safer course of action is not to convey residences to such trusts or, if there are compelling reasons for placing such property in a trust, place it in one that solely serves those purposes. In most such cases, the only advantage sought by such a conveyance is to avoid an estate lien that MassHealth would impose on a residence held by a MassHealth beneficiary.


Attorneys who drafted IIOTs for clients who might someday apply for MassHealth should, if they have not already, review their files and determine whether the trusts will encounter problems if submitted with a MassHealth application. If time is of no concern and if the original trust would allow, such trusts might be “decanted,” that is, transferred to another irrevocable trust established for similar purposes but without terms that will excite MassHealth caseworkers or hearing officers. Some trusts allow for amending “administrative” provisions without jeopardizing the irrevocable nature of the trust. Many of the features which MassHealth has found obnoxious — determining what is principal and what is income, terminating the trust before the grantor dies, or even converting investments to annuities — can reasonably be considered “administrative.”

Finally, knowledge of the decisions since Doherty may help those who advocate for applicants at Fair Hearings, and even in Superior Court, both procedurally and substantively. First, well before a Fair Hearing, advocates should demand copies of any legal memoranda used in determining that a trust violated Doherty or Cohen and, equally important, the nature of the violation. If MassHealth does not make such a document available until just before the actual hearing, ask for a postponement until you have the opportunity to thoroughly review the memorandum for its legal reasoning and, in many cases, for whether it treated, with particularity, the specific trust in question. Check for the date that the memorandum was issued. Was it, in fact, the basis for a caseworker’s denial, or merely an after-the-fact rationale for denial? Memoranda used in some hearings seem to be designed to question virtually all trusts, rather than the one being adjudicated. MassHealth’s decisions should be based on the specific trust, not on a general analysis of “similar” trusts.

Although we have already started to see an increase in the success rate of Fair Hearing appeals, some recent court decisions show that many questions regarding irrevocable trusts and MassHealth applications remain unanswered. As discussed below, one case, O’Leary v. Director of Office of Medicaid, was a positive outcome for the applicant. However, two other cases, Sands and Roche, yielded different results. In Ware v. Gulda, a 1954 decision, the court held that a creditor of a settlor who created a trust for his or her own benefit, and which gave the trustee sole discretion as to trust payments of income and principal, could reach the trust corpus to the maximum amount that the trustee could pay to or for the benefit of the settlor. This decision remains consistent with the concept of preventing a settlor from placing property in trust to keep it beyond the reach of creditors or to qualify for Medicaid.

MassHealth had denied applicant O’Leary, concluding that because the trustee could apply any or all of the income or principal of the trust to or for the benefit of any beneficiary, the trustee had a peppercorn of discretion to pay trust principal to the applicant. The judge disagreed, stating that a court or agency must discern the settlor’s intent from the instrument as a whole and that this particular trust “takes great pains to ensure that there is no discretion to distribute principal to the grantor.” The judge pointed out that the ambiguity of one clause raised by the defendant should not be the basis for the plaintiff’s denial, again emphasizing that the trust, taken as a whole, made it clear that no principal could be distributed to the applicant. Responding to MassHealth’s argument that permitting a trustee to replace an asset owned by the trust with a different asset of equal value should render the trust countable, the judge concluded that such substitutions are still bound by the restriction that no principal would be distributed to the applicant.

In Roche, however, the same judge seized on the fact that the trust gave the trustees both the authority to convert principal into an income-producing investment and the additional discretion to determine what is income and what is principal. The applicant argued that even if the trustee could convert principal to income-producing investments (such as annuities), this should not render the asset countable: “[E]stablished principles of trust law would not allow the exchange of the house to provide an annuity and distribution of income to the plaintiff as the trust would then be in breach of the trust terms and obligations to the remainder beneficiaries.” This argument failed to alter the judge’s reasoning that the two discretionary authorities, taken together, might permit the trustee to distribute assets, in another form, to the settlor.

Concern over whether a trustee could invest principal into an annuity that could allow the settlor, in effect, to recoup his principal had arisen in another administrative appeal, Sands, which also upheld MassHealth’s decision to deny the applicant Medicaid benefits, pointing out that the Sands Trust bore some resemblance to the trust in Doherty. The judge emphasized that it did not matter whether the trustee could distribute the entire annuity, but rather what the applicant might under any state of affairs receive in the full discretion of the trustee. The judge focused on the trustee’s ability to convert trust principal into an annuity, or another investment tool, in concluding that the trustee had the power to provide the applicant with substantial funds from the trust. The judge also supported his decision finding the trust countable by citing the

174. Id. at 92 n.5 (“Better that a trust advisor, trust protector, or other third party exercise this authority — either directly or through a power of appointment — to maintain checks and balances over the trustee.”). Pennell further observes that under Uniform Trust Code §§411–416 such “[a] special provision is not needed to empower the trustee (or any other interested party) to petition a state court to reform a trust. . . .” Id.


180. Id. at 4.


182. Roche, No. WOCV2013-02261A.


184. Id. at 5.

185. Sands v. Exec. Office of Health and Human Servs., No. SUCV 2013-3537-A (Mass. Super. Ct. April 28, 2014). Recent Fair Hearings have pointed out that even if a trustee exercised such authorities, the trustee would be obliged to distribute only the income portion of the annuity to the settlor. See MHAD: FHA No. 1403170 (Mass. April, 2014).


187. Id. at 11.
applicant’s dominion over trust corpus, by way of his ability to eliminate or reallocate the interests of beneficiaries, and to approve or veto distributions by the trustee to remaindermen who would be entitled to such distributions if she were to die.  

These cases and Fair Hearing decisions indicate that Doherty continues to affect Fair Hearings and courts, which remain receptive to arguments that Irrevocable Income Only Trusts demand scrutiny. A more receptive climate seems to be evinced in more recent decisions, but estate planners and MassHealth applicants should be wary of relying on irrevocable trusts in their MassHealth planning. Enhanced advocacy, as well as tighter drawn instruments, have gradually succeeded, but this particular area of trust law remains mired in inconsistency.

VIII. Appendices

The Fair Hearing decisions cited in this article can be found at MassHealth’s office in Quincy. While administrative decisions do not have full precedential value, they can be persuasive and, in preparing for a Superior Court action, divergence from a norm can be the basis for refuting a rogue administrative finding.

Chart I

Chart I reflects the problematic provisions in each decision, namely those provisions that both MassHealth and the hearing officer concluded rendered the trust countable or, in the cases which over-ruled denials, provisions MassHealth had found problematic but which were found acceptable by a hearing officer. Scrutinized trusts included other provisions, of course, but we ignored them if they were not relevant to MassHealth’s or a hearing officer’s decision.

In most of the cases upholding a denial, the decision pointed to a trustee’s ability to convert principal to income-producing products as being tantamount to giving grantors access to principal. Quite consistently, hearing officers equated authority to purchase annuities to control over principal. Another authority common to such trusts, granting trustees the right to terminate a trust and distribute principal outright to beneficiaries, raised problems for many applicants, because MassHealth argued that once the trust terminated, assets could be distributed to the applicant. Another feature of challenged trusts was the grantor’s right to occupy a home placed into the trust; what is interesting is that many of the approved trusts contained the right to live in the home or control the sale of the property. This suggests that although five years may have passed since the home was transferred, MassHealth will consider the home an included asset; hearing officers generally seem to disagree with this conclusion, however.

Among the 55 Fair Hearing decisions, 18 were decided in Chelsea, 16 in Tewksbury, 16 in Springfield, and only three in Taunton and two in Revere. Among the 18 cases decided in Chelsea, seven were approved and 11 were denied, a 39 percent rate of successful appeals. Among the 16 cases decided in Tewksbury, eight were approved and eight were denied, giving appeals a 50 percent success rate in Tewksbury. Of the 16 cases decided in Springfield, the success rate was also 50 percent, as eight were approved while eight were denied. All Fair Hearing decisions filed in the Taunton and Revere departments were denied. It would appear, based on the total failure of appeals in Taunton and Revere, that caseworker denials in those MassHealth Enrollment Centers (MECs) were validly decided.

It is also interesting to note the number of months the applicant privately paid before applying for MassHealth-Medicaid benefits. Did MassHealth or the hearing officer take into consideration whether the applicant attempted to pay for his/her nursing home care before applying for medical assistance, or simply applied for benefits immediately on admission to a nursing home? In most of the cases, applicants submitted their MassHealth applications within six months of admission to a nursing home. This did not seem to drastically affect the decisions of the hearing officers, as the applicants who were ultimately denied benefits privately paid for anywhere from zero to 36 months. Similarly, applicants of decisions approved by the hearing officers privately paid for anywhere from zero to 72 months.

Chart II

Chart II reflects the trust provisions included in the various hearing decisions and the total number of cases, as well as their corresponding decision numbers, that were denied or approved. Unlike Chart I, the provisions reflected in this chart do not indicate that the cases were denied because of the particular provisions noted, but simply show the provisions included in the trusts that were ultimately denied or approved. At first glance, one might conclude that about one hundred cases are referenced in this chart, however only the same 55 cases are referenced. The reason for the double counting is that for each provision on the left, the chart shows which of the 55 cases, included the provision in its trust. Since Fair Hearing decisions do not refer to all of the provisions of the trust, nor were the trust documents themselves available, many provisions that could have been included in the trust are not reflected below. It is safe to conclude, however, the most relevant and influential provisions in the trust that MassHealth and the hearing officer focused on in their decisions were mentioned in the Hearing Decision and are thus reflected in the chart below.

Chart II makes it quite clear that MassHealth and hearing officers often deny trusts that grant the trustee the ability to convert trust principal to income; however, this trend has started to turn around since 2014. The grantor’s control over trust real estate also appeared in many denials. Twenty cases that gave the applicant the right to reside in the home and/or control the sale of the property were denied, while 14 cases with similar provisions were approved. Giving the grantor a power of appointment was commonly used; 14 of the trusts that did include this power were denied, and 14 were approved. Most significantly, trusts allowing a trustee to terminate the trust were almost always denied. This chart enables attorneys to see the number of cases that contained certain provisions and were ultimately denied or approved. In looking at this chart, it is apparent which provisions should be avoided, or at the very least handled with extreme care, and which provisions historically did not surface.

188. Id. at 12.
190. Fair Hearing Appeal Nos. 1201407 & 1201408 were decided in Taunton and Chelsea, but were grouped together as one appeal. In determining the location of this appeal in our analysis regarding the MassHealth Enrollment Centers (MEC), it was treated as two separate decisions; one in Taunton and one in Chelsea.
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191. Unique denial refers to those that were not denied or approved based on similar provisions analyzed in Doherty.
192. T=Taunton, S=Springfield, C=Chelsea, TK=Tewksbury, R=Revere.
193. The approximate number of months the applicant privately paid before applying for benefits. NP=Not Provided.
194. Applicant was denied after eight months; decision does not indicate the date of the application.
195. This trust was originally approved, but after review as part of a MassHealth asset verification project, the applicant’s benefits were terminated.

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### Chart I (cont.): Trust Provisions that Caused the Outcome for Each Fair Hearing Decision

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<th>Trustee could substitute property of equivalent value</th>
<th>Grantor power of appointment</th>
<th>Trustee could convert principal into income-producing product (determine income from principal)</th>
<th>Trustee (or grantor, as trustee) had ability to invest/reinvest trust property</th>
<th>Retained right to occupy, control over-sale, mortgage, etc. of real estate</th>
<th>Trust did not distinguish principal from income beneficiaries for distributions</th>
<th>Trustee could make unsecured loans, sell, mortgage, lease trust property</th>
<th>Trust could accumulate principal to extent feasible for applicant's future needs/make distributions of principal without regards to other beneficiaries</th>
<th>Grantor had right to eliminate beneficiary or reallocate interest</th>
<th>Grantor could borrow trust principal and/or remove/appoint new trustee</th>
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<tr>
<td>1314721</td>
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<td>TK 6</td>
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<td>1401170</td>
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<td>X</td>
<td>C 1</td>
</tr>
</tbody>
</table>

Trusts Used in Medicaid Planning / 111
<table>
<thead>
<tr>
<th><strong>PROVISION</strong></th>
<th><strong>DENIALS</strong></th>
<th><strong>APPROVALS</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Trustee has right to convert principal to income/allocate income and principal</td>
<td>22 CASES</td>
<td>12 CASES</td>
</tr>
<tr>
<td>208209, 1216681, 1217298, 1211060, 1211362, 1308251, 1104515, 1119248, 1303150, 1305949, 1306089, 1306280, 1306727, 1307413, 1308151, 1401264, 1401492, 1401212, 1403514, 1308755, 1313685, 1222688</td>
<td>1311906, 1115916, 1311826, 1401798, 1401521, 1403170, 1402476, 1401539, 1402348, 1318124, 1314721, 1401170</td>
<td></td>
</tr>
<tr>
<td>Grantor has a power of Appointment</td>
<td>14 CASES</td>
<td>14 CASES</td>
</tr>
<tr>
<td>1208209, 1211060, 1104515, 1110974, 1305018, 1305949, 1306089, 1306280, 1401492, 1401212, 1403514, 1308755, 1404274 &amp; 1404275</td>
<td>1213366, 1215864, 1303305, 1115916, 1401798, 1401521, 1403170, 1402476, 1401539, 1402348, 1306967, 1318124, 1314721, 1401170</td>
<td></td>
</tr>
<tr>
<td>Grantor retains control over real estate — right to occupy, consent required to sell property, mortgage, rent, pay taxes, direct trustees to use proceeds from sale to purchase and hold title, etc.</td>
<td>20 CASES</td>
<td>14 CASES</td>
</tr>
<tr>
<td>1216681, 1211060, 1308251, 1104515, 1110974, 1111829, 1119248, 1305949, 1306089, 1306280, 1401492, 1401212, 1403514, 1308755, 1313685, 1403851, 1404274 &amp; 1404275</td>
<td>1200356, 1213366, 1215864, 1303305, 1205462, 1311826, 1401798, 1401521, 1403170, 1402476, 1401539, 1402348, 1403093, 1306967, 1318124</td>
<td></td>
</tr>
<tr>
<td>Trust attempts to limit distributions or terminate</td>
<td>7 CASES</td>
<td>1 CASE</td>
</tr>
<tr>
<td>1204615, 1104515, 1110974, 1311737, 1401492, 1021232 &amp; 1214622, 1403851</td>
<td>1311826</td>
<td></td>
</tr>
<tr>
<td>Broad trustee powers with distributions to beneficiaries (e.g., supporting applicant’s food, health services, buy real estate, pay debts) or trust did not specify that applicant was not a “beneficiary” of the trust principal distributions</td>
<td>9 CASES</td>
<td>1 CASE</td>
</tr>
<tr>
<td>1221777, 1111829, 1305018, 1306727, 1307413, 1308151, 1401264, 1401492, 1401212, 1403514, 1308755, 1313685, 1403851</td>
<td>311826</td>
<td></td>
</tr>
<tr>
<td>Grantor can borrow/make loans on trust principal or reacquire particular trust assets by substituting assets of equivalent value</td>
<td>8 CASES</td>
<td>3 CASES</td>
</tr>
<tr>
<td>1217298, 1217298, 1305949, 1307413, 1215864, 1401212, 1403514, 1222688</td>
<td>1303305, 1401798, 1401170</td>
<td></td>
</tr>
<tr>
<td>Trustees can terminate the trust (either at the trustee’s discretion or the grantor’s right to order the trustee)</td>
<td>10 CASES</td>
<td>3 CASES</td>
</tr>
<tr>
<td>1201407 &amp; 1201408, 1204615, 1211060, 1303150, 1104515, 1305949, 1306089, 1308151, 1401492, 140385</td>
<td>1201761, 1311826, 1318124</td>
<td></td>
</tr>
<tr>
<td>Grantor can eliminate any beneficiary or reallocate part or all of interest of any beneficiary</td>
<td>1 CASE</td>
<td>2 CASES</td>
</tr>
<tr>
<td>1308251</td>
<td>1403170, 1402476</td>
<td></td>
</tr>
<tr>
<td>Grantor retains a life estate</td>
<td>3 CASES</td>
<td>3 CASES</td>
</tr>
<tr>
<td>1211060, 1308151, 1222688</td>
<td>1201761, 1311826, 1318124</td>
<td></td>
</tr>
<tr>
<td>Trustee has power to exchange principal for assets of equivalent value, right to sell, purchase and convey, mortgage, lease, invest/reinvest property, make secured or unsecured loans, etc.</td>
<td>16 CASES</td>
<td>13 CASES</td>
</tr>
<tr>
<td>1217298, 1308251, 1303150, 1305949, 1306089, 1306280, 1307250, 1307413, 1308151, 1401264, 1401492, 1401212, 1403514, 1308755, 1313685, 1222688</td>
<td>1201761, 13113366, 1214578, 1115916, 1311826, 1401798, 1401521, 1403170, 1402476, 1401539, 1402348, 1403093, 1314721, 1401170</td>
<td></td>
</tr>
<tr>
<td>Trustee is to accumulate principal to the extent feasible due to the unforeseeability of the settlor’s future needs without regard to interest of the remaindermen/best enable the applicant to lead as normal, comfortable and fulfilling life as possible</td>
<td>3 CASES</td>
<td>3 CASES</td>
</tr>
<tr>
<td>1119248, 1303150, 1308151</td>
<td>1201761, 1311826, 1318124</td>
<td></td>
</tr>
</tbody>
</table>
Chart III shows the percentage of appeals approved by hearing officers per year. In 2011, only two MassHealth *Doherty*-related denials were appealed and both were denied. In 2012, 47 percent of cases appealed were denied. The year 2013 was very troublesome for attorneys and their clients as hearing officers agreed with MassHealth in most situations, reversing denials in only 29 percent of appeals. In the first six months of 2014, however, 59 percent of appeals have been approved. This trend may be significant since, if continued, it will mean that hearing officers are becoming skeptical when confronting caseworkers’ denials and MassHealth legal department memoranda. The significance of the fact that *Doherty*-related denials were reversed in 2014 more than in any other year since the *Doherty* decision is, of course, subject to speculation. It does appear, however, that improved advocacy on behalf of applicants, and the tendency of MassHealth’s legal office to broad-brush its approach by repetitively submitting similar memoranda rather than analyzing each trust on its own, may create a new environment for Irrevocable Income Only Trusts.

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NUMBER OF CASES DENIED</th>
<th>NUMBER OF CASES APPROVED</th>
<th>PERCENTAGE APPROVED</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>2</td>
<td>--</td>
<td>0%</td>
</tr>
<tr>
<td>2012</td>
<td>8</td>
<td>7</td>
<td>47%</td>
</tr>
<tr>
<td>2013</td>
<td>15</td>
<td>6</td>
<td>29%</td>
</tr>
<tr>
<td>2014 (6 months only)</td>
<td>7</td>
<td>10</td>
<td>59%</td>
</tr>
</tbody>
</table>

**Office Locations**

<table>
<thead>
<tr>
<th>PROVISION</th>
<th>TOTAL APPEALS</th>
<th>PERCENTAGE APPROVED</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHELSEA</td>
<td>18</td>
<td>39%</td>
</tr>
<tr>
<td>Tewksbury</td>
<td>16</td>
<td>50%</td>
</tr>
<tr>
<td>SPRINGFIELD</td>
<td>16</td>
<td>50%</td>
</tr>
<tr>
<td>TAUNTON</td>
<td>3</td>
<td>0%</td>
</tr>
<tr>
<td>REVERE</td>
<td>2</td>
<td>0%</td>
</tr>
</tbody>
</table>
Civil Law — When to Appeal from a Final Decision — After a Decision on the Merits, or After a Subsequent Decision Concerning Attorney’s Fees?


When should a losing party file a notice of appeal: after a decision on the merits but while a motion for legal fees is pending, or after a subsequent decision awarding attorney’s fees? The United States Supreme Court answered this question in *Roy Haluch Gravel Co. v. Central Pension Fund of the International Union of Operating Engineers & Participating Employers (Haluch)*, and held that a notice of appeal should be filed after the merits decision, regardless of whether there is an outstanding request for attorney’s fees that is based on a statute, a contract or both. The case has important implications for all parties engaged in civil litigation in federal court.

**Factual and Procedural Background**

The underlying case involved a lawsuit filed by several unions (Funds) against their employer, a landscape supply company (Haluch), claiming that Haluch failed to make certain contributions that violated both the Employee Retirement Income Security Act of 1974 (ERISA) and a collective bargaining agreement (CBA). As part of their damages, and in accordance with both ERISA and the CBA, the Funds sought attorney’s fees, auditor’s fees and costs. After the bench trial, the District Court judge made a few comments to the parties concerning the Funds’ request for attorney’s fees: “[u]nder our rules . . . if there is a judgment for the plaintiffs, typically a motion for attorney’s fees can be filed shortly thereafter”; “[o]n the other hand, attorney’s fees is part of the damages potentially here”; and, offering the Funds the option of filing their fee request with their proposed findings of fact and conclusions of law, or “wait[ing] to see if I find in your favor and submit the fee petition later on.” Thereafter, the Funds filed a motion seeking attorney’s fees and costs totaling $143,600.44 and arguing that Haluch was liable pursuant to ERISA, with a supporting affidavit citing the CBA.

On June 17, 2011, the District Court issued a memorandum and order finding that the Funds were entitled to certain unpaid contributions. That same date, the District Court issued a judgment in favor of the Funds in the amount of $26,897.41 (collectively, “the June 17 order”). The District Court did not rule on the Funds’ pending motion for attorney’s fees until July 25, 2011, when it awarded the Funds $34,688.15 for attorney’s fees and costs (“the July 25 order”). At the end of the July 25 Order concerning attorney’s fees and costs, the District Court stated “for the first time that ‘[t]his case may now be closed.’” On August 15, 2011, the Funds filed a notice of appeal relating to both decisions. One week later, Haluch filed a cross-appeal.

On appeal, the First Circuit Court of Appeals agreed with the Funds that they filed a timely appeal with respect to both the June 17 order and the July 25 order. The First Circuit considered rule 4 of the Federal Rules of Appellate Procedure, which, in most cases, requires a notice of appeal in a civil case “be filed with the district clerk within 30 days after entry of the judgment or order appealed from.” Because Haluch filed its notice of appeal on August 15, 2011 — within 30 days of the July 25 order — the First Circuit recognized that the issue was whether the notice of appeal was timely with respect to the June 17 order.

Next, the court considered Title 28 United States Code, section 1291, the statute that confers the courts of appeals with jurisdiction over “final decisions of the district courts,” to determine whether the June 17 order was a “final decision.” The controlling case on this

2. Id.
3. Id.
4. Id.
5. Id. at 778.
7. Id.
8. Id.
13. Id. at 5.
15. Id.
issue, *Budinich v. Becton Dickinson & Co. (Budinich)*,\(^{16}\) involved a plaintiff who waited to file a notice of appeal until after the district court’s order relating to attorney’s fees based upon a state fee-shifting statute.\(^{17}\) The Supreme Court held in *Budinich* that the plaintiff filed an untimely notice of appeal with respect to the underlying merits judgment.\(^{18}\) Recognizing the confusion within the courts of appeals concerning this issue since *Budinich*, the First Circuit distinguished the current case from *Budinich* by focusing on the fact that the Funds’ request for attorney’s fees derived from a contract (the CBA), instead of a statute, as in *Budinich*.\(^{19}\) The First Circuit rejected Haluch’s argument that *Budinich* created a bright-line rule that a district court judgment, despite an unresolved request for statutory-based attorneys’ fees, was a “final decision” for purposes of Title 28 United States Code, section 1291.\(^{20}\) The First Circuit concluded that attorney’s fees were an element of the Funds’ contractual damages, and, therefore, “the damages award was incomplete and the judgment was not final” until the District Court issued the July 25 order.\(^{21}\)

**SUPREME COURT ANALYSIS**

Reversing the decision of the First Circuit, the Supreme Court resolved the unsettled issue of “whether and when an unresolved issue of attorney’s fees based on a contract prevents a judgment on the merits from being final.”\(^{22}\) At the outset, the Supreme Court quoted the controlling statute and appellate rule, Title 28 United States Code, section 1291 and rule 4 of the Federal Rules of Appellate Procedure.\(^{23}\) The Supreme Court recognized that it was undisputed that the notice of appeal (filed on August 15, 2011) was not filed within 30 days of the July 25 order, but that it was filed within 30 days of the July 25 order.\(^{24}\) Accordingly, the Supreme Court decided the same issue as the First Circuit: “whether the June 17 order was a final decision for purposes of § 1291.”\(^{25}\)

The Funds’ primary argument was that the June 17 order was not final because some of the requested auditor’s and attorney’s fees were incurred before filing the lawsuit.\(^{26}\) The Supreme Court rejected this argument as well, stating that it was “inconsequential” that some of the fees were incurred before a complaint was filed.\(^{37}\) Moreover, the court recognized that although technically pre-complaint, these fees were incurred during the preliminary steps of litigation, such as through investigating, conducting preliminary legal research, and drafting demand letters and the initial complaint.\(^{28}\)

**IMPLICATIONS OF HALUCH**

The important lesson of *Haluch* is clear: to preserve a party’s appellate rights, civil practitioners need to file a notice of appeal from an adverse merits decision within 30 days, notwithstanding any outstanding request for attorney’s fees. As a consequence, civil practitioners should be aware of the need to file a second notice of appeal after the subsequent decision concerning attorney’s fees. Although *Haluch* results in filing two notices of appeals, rather than just one, a party and counsel benefit from the predictability and clarity of this decision.

Ann Hetherwick Cahill

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21. *Id.* at 7.
23. *Id.* at 779.
24. *Id.*
25. *Id.*
26. *Id.* at 780.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
38. *Id.*
Title Insurance Coverage

GMAC Mortgage LLC v. First American Title Insurance Co. and Deutsche Bank National Association v. First American Title Insurance Co.

GMAC Mortgage LLC v. First American Title Insurance Co., followed shortly by Deutsche Bank National Association v. First American Title Insurance Co., had some significant things to say about the coverage of title insurance. Although closely related, we review the opinions consecutively.

First: the facts that spawned the GMAC Mortgage LLC (GMAC) dispute with First American Title Insurance Co. (First American). Elizabeth Moore and her husband, Thomas, lived in a house in Billerica, title to which stood in the name of Thomas. In 2001, in connection with a refinancing of the property with GMAC, Thomas executed a deed to himself and Elizabeth, as tenants by the entirety. Contemporaneously, Thomas executed a mortgage to GMAC that secured the refinancing note to GMAC.

At the loan closing, First American, through an agent, issued to GMAC a policy insuring that the mortgage by Thomas had given GMAC good record title. It hadn’t. By error, the deed that created the tenancy by the entirety was recorded before the mortgage. Thomas Moore died in 2007. As a tenancy by the entirety carries with it a right of survivorship, when Thomas died, record title vested in Elizabeth Moore, who had signed neither the note nor the mortgage, and rendered defective the title upon which Thomas’s mortgage was based.

After the death of her husband Thomas, Elizabeth Moore continued making mortgage payments — until she ran out of money. The note and mortgage that Thomas had given went into default and GMAC began steps towards mortgage foreclosure. So doing, Moore complained in Count 1, caused her severe emotional distress. As a second count, Elizabeth’s complaint alleged that GMAC had unlawfully retained $39,776 in mortgage payments that Elizabeth had paid but did not owe. As a third count complained that GMAC’s assertion of rights to move against Elizabeth on the note and mortgage signed only by her deceased husband was an unfair and deceptive act and, accordingly, she was entitled under Massachusetts General Laws chapter 93A to multiple damages and reimbursement of her legal fees and costs.

Once again, GMAC turned to First American, this time to defend it against Moore’s claims on the ground that those claims were consequentially related to the title defect. Under the title policy, First American had the options of: (i) paying GMAC what was due on Thomas’s mortgage note in exchange for an assignment of the note and mortgage — a somewhat unpalatable choice; (ii) negotiating a subordination of Elizabeth’s rights to the GMAC mortgage; or (iii) bringing an action to cure the title. First American chose the third option. More specifically, First American brought an action in the land court, on behalf of GMAC, to either reform the Thomas Moore mortgage deed so that both Thomas and Elizabeth Moore appeared as grantors or to subordinate, on equitable grounds, Elizabeth Moore’s interest in the Billerica property to GMAC’s mortgage; put another way, to correct the error in the sequence of recording and to give the mortgage its intended primacy.

First American’s action in the land court provoked a backfire action in superior court by Elizabeth Moore against GMAC, charging GMAC with harassing Elizabeth Moore by taking steps to foreclose the mortgage on her property in the face of the legal impediment to foreclosure. So doing, Moore complained in Count 1, caused her severe emotional distress. As a second count, Elizabeth’s complaint alleged that GMAC had unlawfully retained $39,776 in mortgage payments that Elizabeth had paid but did not owe. As a third count complained that GMAC’s assertion of rights to move against Elizabeth on the note and mortgage signed only by her deceased husband was an unfair and deceptive act and, accordingly, she was entitled under Massachusetts General Laws chapter 93A to multiple damages and reimbursement of her legal fees and costs.

3. GMAC, 464 Mass. at 735.
4. Id. at 735-36.
5. Id. The mortgagor was actually a predecessor corporation, but we refer to GMAC throughout to simplify the narrative. Id.
7. GMAC, 464 Mass. at 736.
8. Id.
11. Id.
14. American Land Title Association Form No. 1056.92.
16. Id.
17. Id. at 733-34.
18. Id. at 734.
19. Id.
20. Id.
responded that its title policy did not require it to defend or bear the cost of defending claims against its insured that sounded in tort, money had and received, and violation of a consumer protection statute, i.e., for damages not caused by reason of a defect in the real estate title First American had insured. GMAC removed to the United States District Court for the District of Massachusetts the land court case, the superior court case, and the question raised by First American, whether the title policy obliged it to defend GMAC or bear GMAC’s cost of defending against Moore’s non-title claims.

It was the position of GMAC that First American was bound by what the insurance treatises and the cases refer to as the “in for one, in for all” rule, a pungent expression of the principle that if an insurer is bound to defend its policy holder against a claim because “the allegations of the complaint are reasonably susceptible of an interpretation that they state or adumbrate a claim covered by the policy terms,” the insurer must also defend against all claims that arise in the litigation, including counterclaims, even though those other claims may not be in the scope of the policy’s coverage.

The District Court judge (Young, J.) decided that the title policy did not oblige First American to defend GMAC against Moore’s non-title claims, first because the title policy expressly limited the insurer’s defense obligations to claims adverse to the title of the insured; and, second, the “in for one, in for all” principle had been developed entirely in the context of general liability insurance policies.

As, however, the questions decided were of first impression in Massachusetts decisional law, the judge certified the following questions to the Supreme Judicial Court in accordance with Rule 1:03:

1. Under Massachusetts law, when there is an overlap between one or more of counts of the complaint and the terms of the standard title insurance policy, does the insurer have a duty to defend the insured against all claims in the action?

2. Under Massachusetts law, when a title insurance contract gives the insurer the right to engage in litigation to cure a defect covered by the policy, does an insurer initiating litigation have a duty to defend the insured against all reasonably foreseeable counterclaims?

The Supreme Judicial Court answered “No” to both questions. Section 4 of the title policy requires the insurer to:

“... provide for the defense of an insured in litigation in which a third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by the policy.”

That language sharply limits the scope of the title insurer’s obligations. It does not cover all collateral damage that may befall the insured, such as the tort, money had and received, and chapter 93A claims visited upon GMAC by Elizabeth Moore. GMAC made the argument — and not a shabby one — that there was a direct line of causation between the title defect insured against, the consequent ill-founded foreclosure action against Moore, and her counterattack.

The response of the Supreme Judicial Court was not merely textual, i.e., the circumscribed defense obligation expressed in the title policy. The court’s opinion emphasized the limited scope of what a title policy insures. It is an agreement to indemnify the policy holder against loss through defects in title. The court observed that before issuing a policy, a title insurer commissions a title report designed to reduce the risks to known ones, whereas a general liability insurer takes on, within the scope of its coverage, unknown risks and charges annual premiums. Because the risk in a title policy is narrow and can be examined, title insurers generally charge a single premium payment for coverage over an indefinite period.

As further reason not to apply “in for one, in for all,” the court wrote: “[B]ecause title issues are discrete, they can be bifurcated fairly easily from the related claims . . . thus, the central policy behind ‘in for one, in for all’ — that parsing multiple claims is not feasible — is not implicated to the same extent as in the general liability context.”

The second question certified by the District Court judge asked whether First American’s choice of a litigation option to cure the title defect invoked the “in for one, in for all” principle. The Supreme Judicial Court concluded that it did not; it was GMAC’s ill-advised foreclosure actions before the title defect was repaired that brought on Elizabeth Moore’s action, not the court procedure to cure the title defect. If litigation initiated by a title insurer induced a compulsory counterclaim, the court said it might conclude that the title insurer had a duty to defend against the compulsory counterclaim. That, the court said further, was unlikely because actions to cure title were generally brought in the land court, a court of limited jurisdiction, such that it could not entertain most counterclaims; hence the counterclaims would not be compulsory. Elizabeth Moore’s non-title claims were illustrative. None were within

23. Id.

24. The machinery for consolidating the land court and superior court cases in the superior court was in motion but had not completed the process before removal of the entire litigation to the federal court. Id. (citing Mass. Gen. Laws. ch. 211B, §9(six) (West 2014)).

25. GMAC, 464 Mass. at 734.


29. GMAC, 464 Mass. at 735.

30. Id.

31. Id. at 738 n.5.

32. Id. at 739 (citing B. Burke, LAW OF TITLE INSURANCE §2.01[A], at 2-5 (3d ed. Supp. 2012)).


34. Id. at 741.

35. Id. at 735.

36. Id. at 743.

37. Id. at 743-44.
the jurisdiction of the land court.

To some degree, the rationale of the court has a labored feel — less than inevitable. What most seems to drive the court’s opinion is its “touchstone, that title insurance is unlike general liability insurance in that title insurance coverage is narrow. . . .” What the decision adds up to is that title insurance is a distinct animal in the insurance bestiary.

Even as the court embraced the touchstone, it gave itself some running room: “We acknowledge the paucity of cases involving the scope of title insurance defense. Indeed, we may revisit the question whether ‘in for one, in for all’ should apply in the unique, title insurance context if lessons that emerge from practice so warrant.”

A scant three months later, the court had occasion to restate its conclusion about the distinctive and narrow scope of title insurance in Deutsche Bank National Assoc. v. First American Title Insurance Co. First American had issued a title policy on June 6, 2006, in connection with the purchase of a residential property by Karla Brown. The policy insured that a first mortgage given by Brown to secure a purchase money loan of $374,000 from Accredited Home Lenders Inc. gave the mortgagee a valid first lien.

By 2009, Deutsche Bank had become the second in a succession of assignees of Brown’s note and mortgage. In May of that year, Brown brought an action to have the mortgage note declared void and the mortgage given to secure it rescinded. Brown included Deutsche Bank as a defendant. She alleged she was the victim of a predatory lending scheme that had lured her into loans on which she was bound to default. Her complaint included charges of misrepresentation, unconscionable and unlawful loan fees, infliction of emotional distress, and unfair and deceptive business practices.

Deutsche Bank called upon First American to defend the validity of the mortgage security not only for the debt recited in the mortgage, the title company has no duty to “explain the legal effect of liens or encumbrances excepted from the coverage.” In that case, the title policy did not even narrow coverage to the effects in the title conveyed by the mortgage; it does not insure the mortgage grantor — about which a title insurer would be ill equipped to inform itself. The standard ALTA loan policy insures against defects in the title conveyed by the mortgage: it does not insure the validity of the underlying debt.

Indeed, the standard policy excludes coverage of damages suffered by the insured by reason of governmental regulation (e.g., zoning laws) or, as in Somerset Savings Bank v. Chicago Title Insurance Co., the inhibition of the right to build imposed by Massachusetts General Laws chapter 40, section 54A, on land once used for, or appurtenant to, a railroad right of way. When a title policy reports a mortgage as an encumbrance, i.e., a lien for the amount recited in the mortgage, the title company has no duty to “explain the legal effect of liens or encumbrances excepted from the coverage.” In Private Lending & Purchasing, Inc. v. First American Title Insurance Co., the mortgage contained a “dragnet clause,” i.e., a clause that made the mortgage security not only for the debt recited in the mortgage but for all other debts, due or to become due, of the borrower to the lender.

Of those additional debts to the lender, the borrower had plenty, enough such that Private Lending could not recover on its loan. Private Lending claimed against the title insurance policy and received a “no coverage” response. Private Lending counter-attacked with claims of breach of contract, negligent misrepresentation, negligence, and violations of Massachusetts General Laws chapters 93A

38. Id. at 742, and treatises there cited.
40. 465 Mass. 741 (2013). The plaintiff’s name is an inconsequential misnomer. Deutsche Bank was acting as trustee of the Morgan Stanley IXIS Real Estate Capital Trust 2006-2, and the name of the trustee was, in fact, Deutsche Bank National Trust Co. Id. at 743.
41. Id. at 743.
42. Id.
43. Id.
44. Id.
45. Id. at 743-44.
49. Id. at 744.
50. Id.
51. Id. at 746 (quoting GMAC Mortgage LLC v. First American Title Insurance Co., 464 Mass. 733, 740 (2013)).
56. Id. at 532 n.1.
57. Id. at 533-36.
58. Id. at 536.
59. Id.
and 176D.59 All those the Appeals Court rejected.

By its terms, the standard title policy lists encumbrances and expressly excludes the consequences of those encumbrances from coverage.60 The listing of encumbrances in Schedule B of the policy, e.g., a mortgage in the original amount of $50,000, does not explain the terms of the mortgage; they “are words of identification, not words of limitation.”61 In the absence of an agreement to the contrary, i.e., deviation from the default mode of standard title insurance policies, the insurer has no duty to investigate and report the effect of an encumbrance on the marketability or value of the real estate.

To an unschooled buyer or lender, the limited coverage of the standard title insurance policy is likely to be an unpleasant surprise. It becomes the duty of buyer’s or lender’s counsel to investigate the potency of excepted encumbrances, or at least explain to the client the limits of coverage because, as previously observed, a title insurance policy is a distinct animal in the insurance bestiary.

Rudolph Kass

60. Id. at 537.
BOOK REVIEW

America’s Forgotten Constitutions: Defiant Visions of Power and Community
by Robert L. Tsai (Harvard University Press) 2014

What does it mean to be an American? In our multi-cultural nation, this question brings forth a diversity of responses. But many agree that Americans may be best described as many people united (e pluribus unum) by adherence to the beliefs and structure of government set forth in the nation’s two foundation documents: the Declaration of Independence and the United States Constitution (along with its first 10 amendments, the Bill of Rights). These documents together articulate a framework of government and a vision of individual rights designed to place governance firmly in the hands of the people.

Both the Declaration of Independence and the Constitution were revolutionary when written. The Declaration announced the birth of a new nation, one — despite the existence of race-based slavery — dedicated to the proposition that “all men are created equal.” In an era of monarchical rule, the Constitution placed fundamental authority in “We the People.” The Bill of Rights promised prevention of governmental incursion into one’s private life and associations.

Given the primacy and radicalism of our founding documents, it is not surprising that political dissenters throughout American history have turned to constitution writing as a means of self-expression.1 In America’s Forgotten Constitutions, Robert Tsai, a professor of law at American University, uses the constitution-writing efforts of eight groups of dissenters to explore their unique attributes and visions.2 Tsai examines eight movements that range in time from the early 19th century to the 21st century, and in place from New England to the Pacific Northwest.

Tsai’s book generally succeeds as a profile of important dissent movements in American history told through the unusual perspective of each group’s founding documents. His work falls short when he attempts to create a theoretical framework that effectively analyzes and compares each group’s constitution. The movements are so disparate that Tsai’s theoretical stamps typically amount to no more than a short-hand description of the characteristics he finds most salient to each movement’s efforts. Also, the relative success of each group had little to do with the specific provisions of its constitution, but depended instead on its ability to recruit followers and on the extent to which the national government viewed the dissenting movement as a threat to its own order. In addition, on a more technical note (but one of importance to the reader), Tsai’s failure to include an appendix containing each constitution he discusses is a frustrating omission. This review is supplemented by my own reading of these documents.

Four of the communities that Tsai explores, John Brown’s Liberator, the Southern Confederacy, the 1968 Republic of New Afrika, and the Aryan Pacific Northwest Homeland of 2006, are focused on race. This comes as no surprise, as race-based divisions are the fault line running through the history of the United States.

Most people associate John Brown with militant actions against white, pro-slavery settlers in the Kansas territory during the 1850s and, most famously, his raid in Harpers Ferry, Virginia in 1859. Tsai focuses instead on a constitutional convention called by Brown and held in Chatham, Canada, in 1858, one year after the United States Supreme Court’s ruling in the Dred Scott case.3 In that case, the Supreme Court held that no black person, even one born free, could ever be a citizen of the United States, and invalidated all Congressional acts that had attempted to restrict the spread of slavery to new territories. On the heels of Dred Scott, Brown gathered together 34 black men and 13 white men to draft when they called the Provisional Constitution and Ordinances for the People of the United States.4

Tsai explains that prior to calling the constitutional convention, Brown had drafted a new Declaration of Liberty, which asserted the natural rights of all people to freedom and to “break that odious yoke of oppression, which is so unjustly laid upon them by their fellow countrymen.”5 The Provisional Constitution expanded upon this theme in its preamble. Explicitly referencing the United States Constitution, Brown’s radical constitution proclaimed that “we the people” includes both “citizens of the United States” and “the oppressed people who, by a recent decision of the Supreme Court, are declared to have no rights which the white man is bound to respect.”6

The Provisional Constitution established a three-branch system of government (executive, legislative, and judicial), albeit with some differences in selection methods and term length from what is found in the national constitution. It further provided for the confiscation of all property of slaveholders, and required that office holders possess “first-rate moral and religious character.”7 Tsai labels this constitution one of “ethical sovereignty,” as it sought to codify a commitment to certain ethical principles.8

1. Dissenters have also written birth announcements based on our own Declaration of Independence. Tsai discusses some examples. The most famous and influential example is the Declaration of Sentiments and Resolutions adopted at the Seneca Falls Convention in 1848.
2. Robert L. Tsai, America’s Forgotten Constitutions: Defiant Visions of Power and Community (Harvard Univ. Press 2014) (hereinafter America’s Forgotten Constitutions at ___).
4. America’s Forgotten Constitutions at 85.
5. Id. at 88.
6. Id. at 92.
7. Id. at 93.
8. Id. at 93–95.
Tsai briefly describes how Brown used the Provisional Constitution to seek financial and political supporters. When Brown came to Boston to seek funds from abolitionist radicals, he presented the Provisional Constitution to demonstrate the seriousness of his scheme. According to Tsai, the Provisional Constitution presented reformers with a “glimpse of the end goal: a society repopulated by formerly kidnapped and dehumanized individuals molded into citizens capable of self-governance.”

Brown’s raiders failed at Harpers Ferry, although the attempt, coupled with the disparate regional reactions to it and Brown’s subsequent trial and execution, brought the nation one large step closer to war. Tsai notes that the Provisional Constitution figured at Brown’s trial as the charge of treason rested in part upon his attempt to form an unrecognized government. While John Brown’s constitution died with him, his death inspired new converts to the northern abolitionist movement.

While Brown’s constitution was designed for a nation that had eradicated slavery, the constitution adopted by the seceding southern states in March of 1861 sought to protect and perpetuate slavery. The Constitution of the Confederate States provided for the perpetuation of negro slavery, the right of slave owners to bring their slaves to any other state, and the return of fugitive slaves. Although this constitution did not explicitly endorse white supremacy, Confederate vice-president Alexander Hamilton Stephens quickly announced the values it was designed to protect: “Our new Government’s … foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and normal condition.” This constitution also asserted the “sovereign and independent character” of each state.

President Lincoln, of course, denied the legitimacy of the breakaway Confederacy and went to war to preserve the Union. (Lincoln did not expand the aims of war to include the end of slavery until September 1862, when he announced that an Emancipation Proclamation would become effective on January 1, 1863). As Tsai notes, the Confederacy’s view of white solidarity was challenged by internal divisions within the southern states based on class and state citizenship. Poor whites who owned no slaves had to remain convinced that a slave-based economy benefited them, while the governmental structure had simultaneously to both safeguard state’s rights and grant the central government the ability to wage war and conscript soldiers. However, it was ultimately the Union Army’s successes and not any weakness of the Confederate Constitution that led to the failure of the Confederacy.

Tsai’s categorization of the Confederate Constitution as an example of “cultural solidarity” intended to protect a people’s distinct identity serves as a useful moniker but little more. Tsai relies on this short-hand description to describe two contemporary examples of constitution writing where he claims the dissidents’ primary purposes are preservation of a distinct “cultural” identity.

A century after the Civil War, a group of black separatists created the constitution of the Republic of New Afrika (RNA). RNA leaders intended that a new republic would be created from Alabama, Georgia, Louisiana, Mississippi and South Carolina, and largely funded by several hundred billion dollars in reparations paid by the United States government for the sins of slavery and segregation. Meeting in Detroit, the group adopted a Declaration of Independence that set forth three goals: to free American blacks from oppression; to promote the personal dignity of the individual and protect his natural rights; and to support co-operative economics and community self-sufficiency.

Reflecting a commitment to African roots, the RNA’s constitution was known as the “Code of Umojo.” It rejected the United States Constitution’s commitments to individualism, and instead endorsed values of community. Drawing from such disparate philosophers as Jean Jacques Rousseau, Karl Marx and Malcolm X, the Code of Umojo claimed that the “implementation of socialist policies would spark the ethical transformations of the citizenry, with ‘purified social relationships’ as the primary means of preserving good order.” The RNA Constitution promised to establish and maintain the RNA government “as a force for unity and liberation of the New Afrikan people in North America, to succeed in the struggle for independence of African people throughout the world, and to contribute to world revolution.”

Tsai discusses the cycle of conflict and violence that quickly impeded the growth of the RNA movement. In 1969, Detroit police raided a black church during the first New Afrikan Nation Day Celebration. An ensuing gun battle led to the death of a police officer and injuries to four RNA members. Subsequently, the movement made plans to purchase 20 acres of land in Mississippi from a black farmer and designate that land as the capital of the RNA. But Mississippi state officials were determined to prevent the movement from gaining a foothold in their state, and the Mississippi attorney general obtained an injunction prohibiting the RNA from operating in the state. As Tsai tells the story, further conflict with state officials, coupled with internal divisions and changing national politics, led the RNA to remain a small, largely underground movement.

In addition to the black separatist movement, the late 20th century also witnessed the growth of white separatist movements. In 1996, white supremacists adopted an Aryan Declaration of Independence, which was followed in 2006 by a proposed Constitution of an all-white Northwest American Republic (NAR). A creature of the Internet age, this constitution was drafted and circulated electronically to members of the Aryan community, some of whom were imprisoned. Feedback could be submitted online as well as via telephone and the United States postal service. Aryan activist Harold Covington commented that because of constant surveillance of white extremists, “the feds probably have more of a complete record

9. Id. at 100.
12. America’s Forgotten Constitutions at 145.
of our new nation’s first constitutional debate than we do.”

The NAR constitution made “whiteness” the prerequisite for citizenship. It proclaimed that its new republic would be a homeland for white people, defined to include persons of “unmixed caucasian racial descent from any one of the historic family of European nations” but to exclude Jews, who were not considered white. Like the RNA constitution, the NAR constitution was, according to Tsai, another example of cultural sovereignty. Tsai notes that today’s white separatists remain part of an underground community, “biding their time while stoking disaffection among working-class Americans.”

Tsai addresses certain governmental features of each group’s proposed constitution. To lawyers, the role of the federal judiciary is likely of particular interest. Ever since Chief Justice John Marshall asserted the Supreme Court’s authority to interpret the law, many Americans have sought to restrict the power of unelected judges. The dissident groups proved no exception. In the wake of the Dred Scott case, John Brown’s constitution, which provided for an elected supreme court and denied life tenure to its judges, was designed to guarantee that judges would be firmly subservient to the electorate. The Confederates, who had benefitted from a federal judiciary friendly to the interests of slaveholders, largely left the federal judiciary intact, although they barred it from hearing cases based on diversity jurisdiction and limited judges to controversies in law (as opposed to in law and equity).

The constitutions of the modern race-based movements explicitly eschewed judicial review. Both reflected a distrust of “judicial elites,” and a commitment to guard against the risk of appointing judges who might turn out to have an independent streak. The RNA constitution provided for 12 elected judges (who would serve six year terms) to serve on a 12-member “People’s Court.” But the People’s Court would not have the final word on cases of “national importance.” Instead, the People’s Center Council, the supreme legislative body, could hear appeals from the People’s Court, thereby “creating a direct legislative check on judicial overreaching.”

The Aryan constitution also reflected a distrust of the judiciary. Stripping all courts of judicial review, national courts were explicitly denied “any policy-making role” and would serve only to make “the determination of fact in criminal cases or non-criminal matters such as property ownership, inheritance, etc.”

In addition to the four constitutions discussed above, Tsai also explores pioneer separatists (the Republic of Indian Stream in the 1830s), utopian socialists (the Icarian Nation established in 1848), Native American separatists (the Sequoyah Convention of 1905) and idealists determined to draft a constitution for a post-World War II order governed by agreed-upon legal norms (the World Constitution of 1947). The eight dissident movements he profiles are so disparate, however, that it is hard draw any firm conclusions based upon a comparison of their constitution-writing efforts. Tsai does not explain with any conviction why he chose these eight groups beyond offering that “[t]he constitutions selected for this volume appeared at historically important movements,” including “westward expansion, industrialization and urbanization, America’s reckoning with slavery, the forced integration of Indian tribes, the end of the Second World War, the ascendance of civil and human rights.” Tsai is correct that moments of tension and transformation gave rise to “discord over fundamental values,” but the groups he examines are so varied in terms of size, longevity, and lasting influence that it is hard to know what broader conclusions to draw from these selected case studies.

Despite these shortcomings, Tsai’s book is well worth reading. It serves as a reminder to us that American history is scattered with dissident groups that have sought to operate outside the political mainstream. Ironically, however, these movements, despite their rejection of this nation’s prevailing governmental institutions, have nevertheless demonstrated their fidelity to the nation’s values by engaging in a collective process of constitution writing. By illuminating this feature of America’s dissident movements, Tsai provides a new and creative way in which to understand these often-overlooked movements throughout American history.

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