

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

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|----------------------------|---------------|---------------------------------|-------------------|
| Rehearing Decision: | Denied | Rehearing Appeal Number: | 0806071.rehearing |
| Decision Date: | 3/10/09 | Rehearing Date: | 03/03/2009 |
| Director: | Kim M. Larkin | Record Open: | 03/06/2009 |

Appellant Representative:

MassHealth Representative:
John Thomas, MEC at Springfield



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
Two Boylston Street
Boston, MA 02116*

REHEARING DECISION

| | | | |
|----------------------------|--|-------------------------|--|
| Rehearing Decision: | Denied | Rehearing Issue: | Asset Transfer; Penalty Disqualification Period |
| Decision Date: | 3/10/09 | Rehearing Date: | 03/03/2009 |
| MassHealth Rep.: | John Thomas | Appellant Rep.: | |
| Rehearing Location: | Springfield MassHealth Enrollment Center | | |

Authority

This rehearing was conducted pursuant to G.L. c. 118E, §47, and 130 CMR 610.091.

Jurisdiction

Through notice dated April 2, 2008, MassHealth denied the appellant's application for long term care benefits because the agency determined the appellant was disqualified from payment for nursing facility services because of impermissible asset transfers (130 CMR 520.019; Exhibit 1). Appellant filed this appeal in a timely manner on April 30, 2008 (130 CMR 610.015(B); and Exhibit 2). A denial for MassHealth benefits is valid grounds for appeal (see 130 CMR 610.032).

A fair hearing was held on June 26, 2008, the hearing record was left open until July 28, 2008 and a decision denying the appellant's appeal issued on September 29, 2008 (Exhibit 3).¹

On October 1, 2008, the appellant requested a rehearing (Exhibit 4). Pursuant to G.L. c. 118E, §47 and 130 CMR 610.091, by memorandum dated February 6, 2009, the Medicaid Director ordered the director of the Board of Hearings to conduct a rehearing of Appeal No. 0806071 (Exhibit 5). The director scheduled the rehearing date for March 3, 2009 after a February 5, 2009 notice to the

¹ The original fair hearing decision is marked as Exhibit 3.

parties (Exhibit 3). A prerehearing order issued to the parties on February 12, 2009 by facsimile and US mail to ensure an orderly presentation of the evidence at the rehearing (Exhibit 7).

Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth long term care benefits because it determined the appellant was disqualified from payment of nursing facility services for a penalty period because of impermissible asset transfers. A hearing decision issued denying the appellant's appeal. Appellant requested a rehearing and the Medicaid Director ordered the director of the Board of Hearings to conduct a rehearing of Appeal No. 0806071.

Rehearing Issues

The appeal issues are to consider whether the appellant's two annuities properly name the Commonwealth of Massachusetts as a beneficiary; whether the annuities otherwise conform to all MassHealth regulations governing an eligibility determination for long term care benefits; and if there is an impermissible transfer, what is the period of disqualification and when does the penalty period start.²

Summary of Evidence

² The rehearing order from the Medicaid Director states the issues for rehearing are "whether the two annuities properly name the Commonwealth of Massachusetts as a beneficiary in the first position and whether the annuities otherwise conform to all MassHealth regulations governing an eligibility determination for long term care benefits" (Exhibit 5). Based on the parties prerehearing submissions, it was clarified at the onset of the rehearing that the amended PLIC annuity does name the Commonwealth of Massachusetts as a beneficiary in the first position. The parties offered nothing at rehearing to evidence the PLIC annuity fails to conform to all MassHealth regulations. At rehearing the MassHealth representative testified it no longer considers the approximate \$40,000.00 PLIC annuity purchase an impermissible transfer. Additionally the parties clarified there is no dispute about the \$64,000.00 gift being an impermissible transfer. While the Krause annuity was amended to name the Commonwealth of Massachusetts as beneficiary in the first position, whether it otherwise conforms to all MassHealth regulations governing eligibility for long term care benefits remains in dispute for rehearing. And, while not specifically ordered in the rehearing order, because of the lapse of time and additional verification submitted by the appellant, to complete the determination of eligibility the start date of the disqualification period will be reached, as well as the period of the disqualification. MassHealth was provided with a record open period to submit its determination of the date the appellant is otherwise eligible for payment of long term care benefits and the period of disqualification (utilizing the total amount impermissibly transferred). MassHealth will provide its determination to the appellant, who declined at rehearing to comment or dispute the determination.

The appellant, a 91 year old female, was admitted to a nursing facility on November 17, 2006, applied for MassHealth long term care benefits on February 15, 2008 and is requesting eligibility effective January 14, 2008³ (Exhibit 9). After completing its financial eligibility review, MassHealth determined the appellant impermissibly transferred a total of \$166,500.00 in assets during the look-back period⁴ and is subject to a period of disqualification (Exhibit 1 *citing*, 130 CMR 520.019). Specifically, appellant verified the purchase of a commercial annuity from The Protective Life Insurance Company (“PLIC annuity”), on July 25, 2006 that failed to name the Commonwealth of Massachusetts as a beneficiary in the first position (purchased with approximately \$40,000.00); a gift to her siblings in the amount of \$64,000.00 on January 11, 2008; and another \$64,000.00 for purchase a private annuity (“Krause annuity”) on January 14, 2008⁵, which MassHealth challenged as not meeting the requirements of an annuity and that the Commonwealth of Massachusetts was not named as a beneficiary in the first position (Exhibit 9).

After the first hearing, appellant submitted evidence that the Commonwealth of Massachusetts is now named as a beneficiary in the first position in both the PLIC annuity and the Krause annuity.⁶

³ The application lists appellant’s admission to a nursing facility as “1/2007”, MassHealth testified to the actual admission date at rehearing relying on information from the nursing facility (Exhibit 9; MassHealth testimony). Appellant’s application requests an eligibility start date of January 22, 2008. However at rehearing, appellant argued that her assets were below the regulatory \$2,000.00 as of January 14, 2008 and thus she is otherwise eligible as of that date (Exhibit 8; Appellant counsel’s testimony).

⁴ For a transfer of a resource on or after February 8, 2006, the look-back period generally extends back in time for 60 months (130 CMR 520.019(B)(2)). The MassHealth agency is phasing in the 60 month look-back period in or on February 8, 2009; beginning on March 8, 2009 applicants for MassHealth will be asked to provide verifications of their assets for the 37 months prior to application; and for each month that passes, the look-back period will increase by one month until the full 60 months is reached on February 8, 2011 (*Id.*). Appellant’s transfers occurred well within the look-back period in effect with an application date of February 15, 2008.

⁵ The appellant withdrew \$64,000.000 from her bank account on January 14, 2008 to purchase the Krause annuity. The Krause annuity effective date is January 25, 2008 (Exhibit 8 at attachment E). The private annuity has a single premium of \$62,500.00 with a benefit term of 10 months and a total payout of \$62,643.40. Appellant asserts that \$1,500.00 of the originally withdrawn \$64,000.00 was paid as a consulting fee to Krause Annuity Services company. No verification of the services for such a fee were provided or verified and it is unclear who actually paid (*see specifically* n. 10 *infra*).

⁶ The hearing officer in the original hearing left the record open for appellant’s counsel to submit information about the annuities and the named beneficiaries. For some reason, appellant’s counsel submitted the information to MassHealth but not to the hearing record and made no request that MassHealth submit the additional information on appellant’s behalf to the hearing record. The result was that any evidence of amending the annuities was not before the hearing officer and was not considered in the first hearing (*see specifically*, 130 CMR 610.071(B)). MassHealth did review the submission prior to the rehearing and while there is no question on the amendment to the PLIC annuity in naming the Commonwealth of Massachusetts as a beneficiary in the first position, there are apparently two Krause

Based on the post hearing submissions by the appellant evidencing the PLIC annuity is irrevocable, non-assignable and names the Commonwealth of Massachusetts as the beneficiary in the first position, MassHealth testified this satisfies the requirements of 130 CMR 520.007(J)(1 & 2). Additionally, at rehearing, the appellant does not dispute the \$64,000.00 gift to her siblings is an impermissible transfer.

Accordingly, the issues that remain for rehearing are whether the Krause annuity conforms to all MassHealth regulations governing eligibility for long term care benefits, the amount of the transfers, the period of the disqualification and the start date of the period of disqualification.⁷ Both parties briefed the issue of the Krause annuity and offered arguments regarding the start date of the disqualification period (Exhibits 8 & 9).

According to MassHealth two months before⁸ applying for MassHealth long term care benefits, and while a long term resident of a nursing facility, the appellant gifted \$64,000.00 to her siblings on January 11, 2008, and on January 14, 2008, transferred another \$64,000.00 to Krause Annuity Services (Exhibit 9). Prior to the transfers, the appellant was the owner of the funds and the funds were available to pay for her care.

MassHealth argues, absent a permissible transfer or expense, excess resources (all amounts over the asset limit of \$2,000.00) are expected to be used to pay for the institutionalized individual's nursing facility care. An applicant whose countable assets⁹ exceed the asset limit may be eligible for MassHealth as of the date that he or she reduces the excess asset amount to the allowable asset limit without violating the transfer of resources provision for nursing facility residents (130 CMR 520.004(A)(1)(a)). According to MassHealth, a resident of a long term care facility whose resources (income and assets) are insufficient to pay for his or her medical care may apply for MassHealth (Exhibit 9, Respondent Memorandum dated February 24, 2009 *citing*, G.L. c. 118E, §9). However, an applicant may not voluntarily impoverish him/herself or enter into transactions void of fair market value in order to obtain Medicaid benefits (130 CMR 515.001). MassHealth's position is that both the gift and the purchase of the Krause annuity were impermissible transfers that result in a period of ineligibility (disqualification) because the appellant's acts resulted in

annuity applications, one that names appellant's brother and sister as primary beneficiaries and one that designates the Commonwealth of Massachusetts. Because of the determination *infra* exactly who is the named beneficiary of the Krause annuity need not be addressed. *See also*, n. 2 *supra*.

⁷ See n. 2 *supra*.

⁸ MassHealth legal unit's memorandum states the date of application as March 31, 2008. A copy of the application submitted to the rehearing record has a MassHealth Enrollment Center date stamp of February 15, 2008 with no testimony regarding a reapplication date. The use of an incorrect application date by MassHealth legal in its analysis does not deter from its argument on the timing of acts by the appellant regarding the transfer of assets and the inference with regard to the permissibility of the transfers to be drawn.

⁹ 130 CMR 520.007(B); 130 CMR 520.007(G); 42 USC 1396p(e)(5); and 20 CFR 416.1201(a).

making formerly available assets no longer available to pay for her care regardless of what is alleged to have been received in exchange (Exhibit 9, Memorandum *citing*, 130 CMR 520.019(C)).

MassHealth sets forth a memorandum of law regarding the Krause instrument and argues: (1) calling a private financial instrument an annuity does not make it an annuity (*see specifically*, Exhibit 9, Memorandum dated February 24, 2009 at pp. 5-8 and attachments, *citing*, 130 CMR 515.001 (definition of annuity); G.L. c. 175, §§3, 32, 132; 211 CMR 50 *et seq.*; G.L. c. 24A, §1; 130 CMR 520.019(C); G.L. c. 110A; and 42 USC 1396p(c)(2)(C)); (2) a private annuity is not a legally valid or binding instrument and has no fair market value (*Id.* at pp. 8-10 *citing*, 130 CMR 520.007(J)(4); 520.019(C); SSA Program Operations Manual System (POMS) SI 01150.005(C)(2), SI 01150.007; G.L. c. 93A, c. 176D, G.L. c. 155 and G.L. c. 167; *Cox v. Sec’y LA Dept. of Health & Human Serv.*, 939 So. 2d 550, 555 (2006); and *Drury v. Hartigan*, 312 Mass. 175, 177 (1942)); (3) the Krause instrument cannot be reasonably enforced by the appellant (*Id.* at pp. 11-13 *citing*, Restatement (Second) of Agency §§1, 13, 375; *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, 654 N.E. 2d 54, 60-61 (1995); *Makedonsky v. North Dakota Dept. of Human Services*, -- N.W. 2d -- (2008); *Schweiker v. Gray Panthers*, 453 U.S. 34, 48 (1981); 11 USC 362(a); 130 CMR 515.001, 520.007(J)(4); *Notarian v. Ohio Dept. of Human Serv.* (November 22, 2000), Cuyahoga App. No. 77032 Ohio App. Lexis 5468; and *Kopp v. Ohio Dept. of Jobs & Family Services*, 2002 WL 568190 (Ohio App. 8 Dist)); (4) the Krause instrument fails to meet the specific MassHealth regulations pertaining to annuities (specifically fails to meet the MassHealth annuity regulations and cannot be found to satisfy the requirements of the Deficit Reduction Act of 2005)(*Id.* at pp. 13-15 *citing*, 130 CMR 520.018, 520.019, 520.007(J), 520.007(I)(2), 520.007(J)(4); Deficit Reduction Act of 2005; 130 CMR 520.007(J)(2)(a)(i); G.L. c. 175; 11 CMR 49 *et seq.*; and 211 CMR 50 *et seq.*); (5) the instrument at issue and the fee paid to purchase it are not partial cures, and any monthly payments under the instrument do no render it valid (*Id.* pp 15-17 *citing*, 130 CMR 515.001, 520.007(J)(4); *Kelly v. Marks*, 428 Mass. 877(1999); 130 CMR 516.004; 42 USC 1396p(c)(2)(C)(iii); 130 CMR 520.026, 520.027; 520.035); and (6) a penalty period does not run while an individual is privately paying for nursing facility care (*Id.* at pp. 17-18 *citing*, 42 USC 1396p(c)(1)(D); 130 CMR 520.019(G)(3); *Shelaves v. Office of Medicaid*, Superior Court No. 2007-4453).

MassHealth concluded that pursuant to 130 CMR 520.019, the gratuitous transfer of \$64,000.00 from appellant to her siblings is a disqualifying transfer of resources, the Krause annuity is not a legally valid instrument and payment of \$64,000.00¹⁰ for it is a disqualifying transfer of resources

¹⁰ The appellant withdrew \$64,000.00 from her bank account on January 14, 2008 to purchase the Krause annuity, \$1,500.00 of the \$64,000.00 was for a “consulting” fee and the annuity purchase was \$62,500.00. Appellant argues that the annuity will yield appellant the full purchase price paid over 10 months, but does not account for the \$1,500.00 additionally transferred. Appellant’s counsel argued he paid the fee and was repaid by appellant’s brother out of the monies gifted to him. The explanation is curious because that still leaves \$1,500.00 from the January 14, 2008 withdrawal both unaccounted for and not returned by income payouts from the Krause annuity. Appellant received \$62,643.00 in Krause

that cannot act as a partial cure of any transferred resources (130 CMR 520.007(J)(4); 520.019(C)). MassHealth also concluded that the penalty period (period of disqualification) cannot begin to run for any of the disqualifying transfers until the appellant is otherwise eligible for MassHealth payment of long term care services (130 CMR 520.019(G)(3)).

During the record open period, MassHealth determined the begin date for the disqualifying transfer is July 12, 2008, and pursuant to 130 CMR 520.019(K)(1)(b), MassHealth considering a portion of the full value of the transferred resources to have been returned by the 10 months of income payments from the Krause annuity (\$62,643.00). Therefore, according to MassHealth the remaining transfer consists of \$64,000.00 transferred to appellant's siblings plus the \$1,357.00 (the difference between the withdrawal for the Krause annuity and what was paid out). Thus, the total remaining transfer of \$65,357.00 divided by the average daily cost of a nursing facility (\$256 for an application received after March 1, 2007 and before March 1 2008) imposes a disqualification period of 255 days which will run from July 12, 2008 through March 23, 2009 (Exhibit 10).

The appellant, through legal counsel argued that the Krause annuity complies with all of the requirements of 130 CMR 520.007(J) (Exhibit 8). The appellant challenges MassHealth's determination that the Krause annuity is not a legal, valid instrument as not supported by the facts or the law (Id. at p. 1). The appellant relies on a fair hearing decision, Appeal No. 0712088, issued on January 10, 2008, that stated if "an annuity meets the requirements of 130 CMR 520.007(J), it is a valid annuity without any investigation of intent" (Id. at attachment F). Additionally, appellant submits that all of the payments have been made in full on the Krause annuity and were used to pay for medical expenses, thus making MassHealth's argument that the Krause annuity is "an unenforceable contract moot, as the annuity company has met all of their contractual obligations to pay under the annuity contract" (Id. at p. 1). The appellant further asserts the \$1,500.00 paid to Dale Krause, Attorney at Law was for advice and a valid asset spend down expense. Lastly, appellant argues that the appellant's assets were below the asset limit of \$2,000.00 as of January 22, 2008¹¹ and that should be the date to begin the period of disqualification.

Appellant submitted updated copies of bank statements, nursing facility payments and pharmacy bill payments from January 1, 2008 to the present to verify current assets and payments (Exhibit 8).

MassHealth was provided until March 6, 2009 to submit its determination of the start date of the period of disqualification (Exhibit 10). Appellant waived any challenge or response.

Findings of Fact

annuity income.

¹¹ At hearing appellant alleged her assets were below the asset limit of \$2,000.00 and remains below the asset limit as of January 14, 2008, the date \$64,000.00 was removed to purchase the Krause annuity.

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

1. The appellant is a 91 year old female, who was admitted to a nursing facility for long term care on November 17, 2006.
2. The appellant applied for MassHealth long term care benefits on February 15, 2008 requesting a January 14, 2008 eligibility start date.
3. Appellant had total countable assets of \$166,500.00.
4. The appellant purchased a commercial annuity from The Protective Life Insurance Company, PLIC annuity for approximately \$40,000.00 on July 25, 2006.
5. The PLIC annuity is irrevocable, non-assignable and names the Commonwealth of Massachusetts as the beneficiary in the first position.
6. The PLIC annuity yields approximately \$666.61 per month.
7. On January 11, 2008, appellant transferred by gift \$64,000.00 to her siblings.
8. There is no dispute the gift of \$64,000.00 is an impermissible transfer that results in a period of disqualification.
9. On January 14, 2008 appellant transferred a total of \$64,000.00 to Krause Annuity Services, a non-commercial entity (\$62,500.00 for the Krause annuity and \$1,500.00 as a fee).
10. The Krause instrument evidences it is a private annuity with an effective date of January 25, 2008 to be paid out over a period of 10 months.
11. The total payout of the Krause annuity was \$62,643.40.
12. Appellant had available resources (income) to pay for her care until July 11, 2008 (Social Security income, pension income, PLIC annuity monthly income and Krause instrument payout).
13. The appellant is eligible for payment of MassHealth long term care benefits on July 12, 2008.
14. The date of the disqualification period begins on July 12, 2008.
15. The appellant is disqualified from MassHealth long term care benefits from July 12, 2008 to March 23, 2009 (impermissible transfer amount not otherwise returned via income,

\$64,000.00 gift, \$1,357.00 shortfall on Krause payout = \$65,357.00 ÷ \$256.00 for a total of 255 ineligible days).

Analysis and Conclusions of Law

MassHealth considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J). MassHealth may also consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident or spouse is or would be entitled if such action had not been taken. A disqualifying transfer may include any action taken which would result in making a formerly available asset no longer available (130 CMR 520.019(C)).

The appellant, a 91 year old female was admitted to a nursing facility on November 17, 2006. Appellant applied for MassHealth long term care benefits on February 15, 2008 seeking eligibility effective January 2008. In January 2008, one month prior to applying for MassHealth long term care benefits, the appellant transferred \$64,000.00 to her siblings and entered into a private financial arrangement (Krause annuity) to divest herself of an additional \$64,000.00 with the attempt to have the period of ineligibility based on the transfer (gift) run concurrently with the Krause annuity payments. There is no dispute the transfers occurred within the look-back period and the gift is impermissible. However, Appellant argued the Krause annuity complies with the MassHealth annuity regulation and is not an impermissible asset transfer. Her interpretation is based on a previous fair hearing decision that held if an annuity meets MassHealth regulatory requirements¹², no further investigation of other MassHealth regulations is necessary. With the Krause annuity not representing an impermissible asset transfer, the appellant asserts she reduced her assets below \$2,000.00 in January 2008, and that is the date she is eligible for MassHealth and the date the disqualification period for the gift of \$64,000.00 would begin.

Appellant's position that she could divest herself of available resources but cover the disqualified days using a financial tool like the Krause annuity (the "half-loaf") must fail. Specifically, the appellant relies on pre Deficit Reduction Act 2005 federal and state Medicaid regulations and fails to consider the failure of this annuity to meet MassHealth regulations and revisions to the regulations regarding private annuities. Appellant's attempt to gift for the sole purpose of obtaining MassHealth long term care benefits but not be penalized by having the penalty run concurrently must fail within the current state of the law.

The Medicaid program is a cooperative federal and state program that provides for payment of

¹² On its face this financial instrument would not meet MassHealth annuity regulations based on its purchase price and payout (see specifically, 130 CMR 520.007(J)(1)(b)).

medical services to eligible individuals (130 CMR 515.002(B)). In order to ensure federal funding for Medicaid, its programs and expenditures, the state's Medicaid program must meet all of the requirements of the federal Medicaid act and its implementing regulations (Id.). Accordingly, the Massachusetts Medicaid statute, G.L. c. 118E and its implementing regulations at 130 CMR have the primary intent of complying with federal law in order to receive federal reimbursement (Id.).

With the enactment of the Deficit Reduction Act of 2005,¹³ federal law requires states participating in the Medicaid program to impose a period of ineligibility "if [an applicant] . . . disposes of assets for less than fair market value on or after the look-back date" **and** it specifies how the length of ineligibility is determined (42 USC 1396p(c)(1)(A)(Emphasis added)). Additionally, the purpose of the Deficit Reduction Act of 2005 was to close loopholes and allow limited Medicaid resources to go to those in genuine need rather than allowing applicants with resources to qualify (Cong Record 109-S14209, December 21, 2005). The purpose of the legislation was to prevent applicants from intentionally protecting their assets in order to obtain Medicaid coverage (Cong Record 109-S14209, December 21, 2005).

The Krause annuity is a private agreement, (the appellant did not dispute that Krause is not a company in the business of annuities in the Commonwealth of Massachusetts) that is no more than an unenforceable, unsecured promise that ten monthly payments of \$6,264.34 might be made with a return that is \$1,356.60 less than the \$64,000.00 transferred. Appellant's only challenge to MassHealth determination was that it was moot because the 10 payments had been made. Simply because in hindsight appellant can evidence payment does not change the character of this agreement.

Pursuant to 130 CMR 520.007(J)(4)¹⁴,

Any transaction that involves a promise to provide future payments or services to an applicant, member, or spouse, including but not limited to transactions purporting to be annuities, promissory notes, contracts, loans, or mortgages, is considered to be a disqualifying transfer of assets to the extent that the transaction does not have an ascertainable fair-market value or if the transaction is not embodied in a valid contract that is legally and reasonably enforceable by the applicant, member, or spouse. This provision applies to all future performance whether or not some payments have been made or services performed.

¹³ The Deficit Reduction Act of 2005, Pub. L. 109-171.

¹⁴ A previous fair hearing decision binds the parties to that decision, thus a previous fair hearing decision does not carry precedent. However, with the same or similar fact pattern a previous fair hearing decision could be offered for its persuasive value in a subsequent fair hearing. Appellant did not offer any argument that the facts in the fair hearing decision that she relied upon to enter into the private annuity were the same or similar to the facts of this case and offered no legal argument on why 130 CMR 520.007(J)(4) would not apply.

The Krause annuity was entered into by appellant (or someone on her behalf) with an entity not licensed in the Commonwealth, making it legally invalid in the state of Massachusetts. Because of the agreement's invalidity, it cannot be found to have fair market value (Exhibit 9 *citing*, 130 CMR 520.007(J)(4)). In addition, appellant entered into this agreement solely for the purpose of establishing eligibility for MassHealth.

The MassHealth agency changed its regulations to mirror the changes in federal law that became effective February 8, 2006:

For transfers occurring before February 8, 2006, the period of ineligibility begins on the first day of the month in which resources have been transferred for less than fair-market value. For transfers occurring on or after February 8, 2006, the period of ineligibility begins on the first day of the month in which resources were transferred for less than fair-market value or the date on which the individual is otherwise eligible for MassHealth payment of long-term-care services, whichever is later.

(*See specifically*, 130 CMR 520.019(G)(3)).

At the time of rehearing, the appellant verified the return of \$62,643.40 of the transferred \$64,000.00 to the Krause annuity. Appellant updated her total countable assets, monthly income, medical debt incurred and all payments made for medical care. Utilizing the verifications, MassHealth determined the date appellant is otherwise eligible for MassHealth payment of nursing facility services as July 12, 2008 and the period of ineligibility is 255 days (Exhibit 10). According to MassHealth, while the total impermissible transfer amount totaled \$128,000.00, by the time of the rehearing, the appellant had a return of a portion of her resources that decreased the total impermissible transfer amount to \$65,357.00.¹⁵ Appellant did not dispute this outcome. Accordingly, the rehearing is denied. This decision supersedes the previous hearing decision.

Order for MassHealth

Establish the period of disqualification to run from the start date of July 12, 2008 for 255 days through, March 23, 2009.

¹⁵ It is important to note that at the time of application and the original eligibility determination in April 2008, MassHealth was correct that the act of giving away resources into a private annuity, regardless of what is alleged to be returned was nothing more than an impermissible asset transfer. However, it must be noted that by the date of the rehearing, appellant had a return of a resource, albeit in another form (asset versus income).

Notification of Your Right to Appeal to Court

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

Kim M. Larkin
Director
Board of Hearings

cc:

MEC at Springfield