Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Denied	**Appeal Number:**	1215370
Decision Date:	3/5/13	**Hearing Date:**	09/20/2012
Hearing Officer:	Rebecca Brochstein	**Record Open Date:**	10/19/2012

Appearances for Appellant:

Appearances for MassHealth:
Paul Keegan, Chelsea MEC

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

APPEAL DECISION

Appeal Decision:	Denied	**Issue:**	Long-term care eligibility
Decision Date:	3/5/13	**Hearing Date:**	09/20/2012
MassHealth's Rep.:	Paul Keegan	**Appellant's Reps.:**	
Hearing Location:	Chelsea MassHealth Enrollment Center		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapters 118E and 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated June 7, 2012, MassHealth approved the appellant's request for long-term care benefits because of a disqualifying transfer of resources (Exhibit 1). A timely request for fair hearing was filed on the appellant's behalf on June 13, 2012 (Exhibit 2).[1] Denial of an application for benefits is a valid basis for appeal (130 CMR 610.032). After hearing on September 20, 2012, 2012, the record was held open for the appellant's attorney to respond to MassHealth's legal memorandum (Exhibits 11 and 12).

Action Taken by MassHealth

MassHealth denied the appellant's application for long-term care benefits because of disqualifying transfer of resources.

[1] The appellant died on May 1, 2012. Her attorney filed a copy of the Voluntary Administration with the Board of Hearings on August 6, 2012. See Exhibit 3.

Issue

The appeal issue is whether the appellant should be subject to a disqualification period for a transfer of resources because her husband purchased an annuity.

Summary of Evidence

An eligibility worker from the Chelsea MassHealth Enrollment Center appeared at the hearing and testified to the following: The appellant was admitted to a nursing facility on February 12, 2012. A MassHealth long-term care application was filed on her behalf on April 13, 2012, seeking coverage as of March 23, 2012. The appellant died on May 1, 2012.

Based on a recommendation from the legal unit, MassHealth determined that the appellant had transferred $99,700 because her husband (JTL), who lived in the community, entered into a private annuity agreement with a third party (TA).[2] The "Immediate and Irrevocable Private Annuity Agreement", which was executed on March 22, 2012, includes the following relevant provisions (with emphasis in original):

- RECITALS:
  A. Annuitant [JTL] is the owner of property (the "Property") which is described more fully as the sum of **$99,700.00 (ninety-nine thousand seven hundred dollars)** and desires to sell Annuitant's interest in such property.
  B. Annuitant desires to be assured of a steady, fixed annual income, for retirement for the next **twenty-four (24) months**;
  C. Obligor [TA] wishes to acquire the Property and is willing to make fixed monthly payments to the Annuitant for the next **twenty-four (24) months** in exchange for the Property. In the event the Annuitant does not survive the term, such payments shall be to the designated beneficiaries.
  The age of the Annuitant does not permit the purchase of an annuity from a commercial provider.
  This agreement is made in conformity with 130 CMR 520.077(J)(2), (4) and (5);
  D. This agreement shall be valid and effective upon the signature of the parties and will bind those parties who have signed the document.

- AGREEMENTS:
  Section 1: Sale of Property for Annuity: Annuitant will sell the Property for Obligor's promise to pay Annuitant **Four Thousand One Hundred Fifty-Four Dollars and 25/100 cents ($4,154.25), on the twenty-second (22nd) of each month beginning on April 22, 2012 and continuing until March 22, 2014 (a total of 24 months)** in accordance with

[2] TA is described in the record as the community spouse's "nephew-in-law" and also as a retired accountant. See Exhibits 7 and 10.

the payment schedule attached and incorporated into this Agreement as Schedule A. The obligation hereunder shall be irrevocable.

The parties hereby expressly agree that upon the death of the Annuitant prior to June 20, 2016 [sic[3]], the remaining payments shall be made to the designated beneficiaries. The designated beneficiaries shall be **Sixty Percent (60%) to [JFA], Ten Percent (10%) to [FG], Ten Percent (10%) to [PG], Ten Percent (10%) to [AA], and Ten Percent (10%) to [GPA].** In the event that any of the designated beneficiaries predecease the Annuitant, such predeceased designated beneficiary's share shall pass, in equal shares, to the then-living issue of such deceased designated beneficiary, by right of representation, otherwise it shall pass equally to the surviving beneficiaries named in this Agreement. Obligor shall be absolutely liable for the payments due under Section One and such payments are in no way contingent upon the future earnings, if any, from the Property transferred to the Obligor.

The Annuity Agreement is provided in return for a single purchase payment. No additional purchase payment will be accepted or permitted.

Section 2: Unsecured Promise: Obligor's promise to pay is totally unsecured. Annuitant retains no security interest, encumbrance, lien or pledge with respect to the Property transferred to the Obligor hereunder.

* * *

Section 4: Miscellaneous:

This Agreement, and the parties' rights and liabilities under it, shall be construed under the laws of the Commonwealth of Massachusetts. . . .

The Annuity Agreement includes a 20-day right of examination. This means that within the first 20 days, the Annuitant may return the Annuity Agreement and receive 100 percent of his single premium. Following the expiration of the Right to Cancel period, this Annuity Agreement may not be revoked, cancelled, exchanged, surrendered, transferred, collaterally assigned, borrowed against or returned for a refund of premium paid.

I direct that this Annuity Agreement be non-commutable, non-assignable, irrevocable, and the Annuity cannot be transferred, surrendered, or commuted prior to the end of the payout period. I acknowledge and agree that this Annuity Agreement now has no cash value or surrender value.

In the event of occurrence of any one or more of the following events of default with respect to the undersigned, or any endorser or guarantor hereof, namely: the failure of the undersigned to pay any amount due hereunder upon the due date thereof and within 15 days after notice of such default; declaration of insolvency; assignment for the benefit of creditors' appointment of a receiver or filing of a petition in bankruptcy or under any

[3] It is not clear what relevance the date of June 20, 2016, has to this case, as the annuity payments were due to end on March 22, 2014.

> insolvency law, then, all amounts payable on this agreement shall become immediately due and payable without demand or notice of any kind.
> In the event that a dispute arises under this agreement, the prevailing party is entitled to recover reasonable costs and attorney's fees.
> Neither the Annuitant nor the Obligor may amend or change any designation under this Annuity Agreement. . . .

Attached to the annuity agreement is a document entitled "Annuity Amendment", signed by JTL and TA on April 7, 2012. The document states as follows:

> We, [TA]. . . and [JTL] . . . hereby amend the Immediate and Irrevocable Private Annuity Agreement dated March 22, 2012 relative to the following clause:
>
> Agreements: Section 1:
>
> The parties hereby expressly agree that upon the death of the Annuitant, such payments shall be made to the designated beneficiaries. The designated beneficiary shall be **THE COMMONWEALTH OF MASSACHUSETTS IN THE FIRST POSITION FOR THE TOTAL AMOUNT OF MEDICAL ASSISTANCE PAID ON BEHALF OF [Appellant]** otherwise in undivided shares to, **Sixty Percent (60%) to [JFA], Ten Percent (10%) to [FG], Ten Percent (10%) to [PG], Ten Percent (10%) to [AA], and Ten Percent (10%) to [GPA].** Obligor shall be absolutely liable for the payments due under Section One and such payments are in no way contingent upon future earnings, if any, from the Property transferred to the Obligor.

See Exhibit 7.[4]

The MassHealth worker submitted into evidence a memorandum from the agency's legal unit, which recommended the purchase of the private annuity be treated as a disqualifying transfer. In her memo, the MassHealth attorney contended that the private annuity agreement is a disqualifying transfer of resources because it is not an "annuity" because it was not established in accordance with the state laws and regulations governing annuities. She argued that the agreement is not a valid, binding instrument with fair market value, and that it is not reasonably enforceable by the appellant or her spouse. The MassHealth attorney also pointed out that even though the annuity was by its terms irrevocable, the parties to the agreement executed an amendment to name the Commonwealth as a remainder beneficiary; she argued that because the parties are "clearly able to alter the 'irrevocable agreement' at will in attempt to comply with a MassHealth regulation, then nothing precludes them from rescinding the document and returning the money." See Exhibit 5.

[4] The attorney initially gave the hearing officer a copy of the "Annuity Amendment" which was dated May 7, 2012. He then took this page back and submitted an identical document which instead bore the date of April 7, 2012. He contended that the discrepancy was the result of a scrivener's error.

The appellant was represented at hearing by an attorney and a paralegal. The attorney stated that it was "impossible" for the community spouse to purchase a commercial company due to his age, and that he decided instead to enter into a private annuity agreement. The attorney contended that the annuity complies with federal and state law, as it is irrevocable, nonassignable, and actuarially sound, and as the Commonwealth is the remainder beneficiary. He pointed to a 2011 Superior Court decision involving a private annuity, in which the court held that the annuity had fair market value and was reasonably enforceable under the terms of 130 CMR 520.007(J)(4). He noted that the language of the annuity in this case is identical to that of the annuity in the Superior Court case. See Exhibit 8. The attorney also pointed out that the Chelsea MassHealth Enrollment Center previously allowed another annuity (for a different applicant) that was the same type as this one.[5] He argued that this was an arms-length transaction and that the intent was to receive fair market value.

The record was held open for the appellant's attorney to review MassHealth's legal memorandum and to submit a reply brief. That brief, which largely restated arguments from the hearing memorandum, also addressed the issue of the annuity amendment naming the Commonwealth as a beneficiary. The appellant's attorney conceded that the annuity contract did not allow such amendments, and submitted the following "Acknowledgement" that was signed by the annuitant (community spouse) and the obligor on September 26, 2012 (during the record-open period):

> We, [obligor] and [annuitant] understand that the annuity we executed on March 22, 2012 may not be revoked, cancelled, exchanged, surrendered, transferred, collaterally assigned or returned for a refund of premium paid. We understand that it is non-commutable, non-assignable and cannot be commuted prior to the end of the payout period. We further understand the annuity has no cash value or surrender value.
>
> We understand that the amendment we attempted to make on April 7, 2012 to change the beneficiary of the annuity may not be allowed as the annuity is non-assignable, irrevocable, and the Annuity cannot be transferred, surrendered, or commuted prior to the end of the payout period. We understand the original beneficiaries, as stated in the annuity of March 22, 2012, remain in effect. (Exhibit 12)

The attorney argued that the nullification of the amendment has no impact on the case, however, because "**[a]nnuities purchased by the Community Spouse ARE NOT required to name the Commonwealth as beneficiary**" (emphasis in original).[6] He contended that the annuity as

[5] The attorney submitted documents pertaining to this other applicant, who was also a client of his firm. He stated that he had permission from that client to offer the documents, which were not redacted in any way, as evidence in this hearing. However, the file does not reflect any evidence of authorization. To protect the privacy of the other client, these documents have not been entered into the record in this case.

[6] The attorney submitted a copy of a 2007 email message from the Office of Medicaid's Director of

originally drafted fully complies with state and federal law for purposes of Medicaid eligibility.

Findings of Fact

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

1. On February 12, 2012, the appellant was admitted to a nursing facility.

2. On March 22, 2012, the appellant's spouse, who remained in the community, entered into an "Immediate and Irrevocable Private Annuity Agreement" with TA. The annuity includes the following provisions:

    a. The community spouse (annuitant) agreed to pay $99,700 in exchange for monthly payments of $4,154.25 for a term of 24 months.

    b. If the community spouse died before June 20, 2016 [sic], the remaining payments would be made to five individuals who were named as "designated beneficiaries."

    c. The annuity agreement is "non-communitable, non-assignable, irrevocable" and "cannot be transferred, surrendered, or commuted prior to the end of the payout period. . . . Neither the Annuitant nor the Obligor may amend or change any designation under this Annuity Agreement."

    d. In the event of default, "all amounts payable on this agreement shall become immediately due and payable without demand or notice of any kind."

3. On or about April 7, 2012, the community spouse and TA executed an "Annuity Amendment." This document purported to amend the annuity contract to designate the Commonwealth of Massachusetts in the first position for the total amount of medical assistance paid on behalf of the appellant, and "otherwise" to the "designated beneficiaries" named in the original document. Another copy of this document produced at hearing (but not submitted into evidence) was dated May 7, 2012.

Federal and National Policy Management to a third party (presumably another local attorney), apparently in response to the questions the attorney had raised about annuities purchased by a community spouse. The message includes the following text: ". . . [I]f the community spouse is not receiving any MassHealth benefits and the community spouse is the owner and annuitant of the commercial annuity, so that the institutionalized spouse has no interest under the annuity contract, the current policy is not to require the community spouse to complete an ANN-2 or name the Commonwealth as the remainder beneficiary. If, however, the community spouse were to apply for MassHealth benefits or if a review of the contract or other factors indicated that the institutionalized spouse did have an interest under the annuity, the Office of Medicaid could require, as a condition of eligibility, the completion of an ANN-2 and the naming of the Commonwealth as the beneficiary in the proper position." See Exhibit 12.

4. On April 13, 2012, a MassHealth long-term care application was filed on the appellant's behalf, seeking coverage as of March 23, 2012.

5. The appellant died on May 1, 2012.

6. On June 7, 2012, MassHealth denied the appellant's long-term care application because it determined that the appellant and/or her community spouse had transferred $99,700 by entering into the annuity agreement.

7. On June 13, 2012, the appellant filed a timely appeal of the MassHealth denial.

8. Hearing was held on September 20, 2012. The record was held open after hearing for the appellant to respond to MassHealth's legal memorandum.

9. On September 27, 2012, the community spouse and the obligor executed an "Acknowledgment" in which they expressed their understanding that the amendment naming the Commonwealth as the primary remainder beneficiary was unsound. They acknowledged that "the original beneficiaries as stated in the annuity of March 22, 2012, remain in effect."

10. The Commonwealth is not a beneficiary of the annuity.

Analysis and Conclusions of Law

MassHealth considers any transfer during the appropriate look-back period by the nursing-facility resident . . . of a resource, or interest in a resource, owned by or available to the nursing-facility resident . . . 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). 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).

In addition to the permissible transfers described at 130 CMR 520.019(D), MassHealth will not impose a period of ineligibility for transferring resources at less than fair-market value if the resident or the spouse demonstrates to MassHealth's satisfaction either that the resources were transferred exclusively for a purpose other than to qualify for MassHealth, or that the nursing-facility resident or spouse intended to dispose of the resource at either fair-market value or for other valuable consideration. 130 CMR 520.019(F).

Additional MassHealth rules governing the purchase of annuities are found at 130 CMR 520.007(J)(2). For annuities established after February 8, 2006, the following regulations apply:

(a) The purchase of an annuity will be considered a disqualifying transfer of assets unless

1. the Commonwealth of Massachusetts is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual;
2. the Commonwealth of Massachusetts is named as such a remainder beneficiary in the second position after the community spouse, or minor or disabled children; or
3. the Commonwealth of Massachusetts is named as such a remainder beneficiary in the first position if the community spouse or the representative of any minor or disabled children in 130 CMR 520.007(J)(2)(a)2 disposes of any such remainder for less than fair-market value.

(b) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(1) and (J)(2)(a) and is irrevocable and nonassignable, or unless the annuity satisfies 130 CMR 520.007(J)(2)(c).

(c) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(2)(b), or unless the annuity names the Commonwealth of Massachusetts as a beneficiary as required under 130 CMR 520.007(J)(2)(a) and the annuity is

1. described in Section 408(b) or (q) of the Internal Revenue Code of 1986;
2. purchased with the proceeds from an account or trust described in Section 408(a), (c), or (p) of the Internal Revenue Code of 1986;
3. purchased with the proceeds from a simplified employee pension described in Section 408(k) of the Internal Revenue Code of 1986; or
4. purchased with the proceeds from a Roth IRA described in Section 408A of the Internal Revenue Code of 1986.

In addition, 130 CMR 520.007(J)(4) sets forth requirements for transactions involving future performance. Under that section:

> 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.

In this case, MassHealth determined that the husband's purchase of an annuity resulted in a

transfer of resources for less than fair market value. MassHealth's primary objections to the annuity are (1) that it is not in fact a legitimate "annuity," as it was not established in accordance with the laws governing annuities; (2) that it has no fair market value; and (3) that it is not embodied in a valid and legally binding contract that is reasonably enforceable.

MassHealth's preliminary argument in this case is that the instrument at issue is not an "annuity" under Massachusetts law, in part because the parties to the agreement are not licensed to sell annuities in the Commonwealth. MassHealth regulations at 130 CMR 515.001 define an "annuity" as, simply, "a legal instrument that makes payments for a designated period of time or for life, regardless if the payments are principal, interest, or both." This broadly-worded definition, which does not on its face preclude private or non-commercial agreements, covers the type of instrument used by the community spouse and the obligor in this case. For MassHealth purposes, it is therefore subject to the agency regulations governing annuities. See also O'Brien v. Div. of Med. Assistance, Mass. Super No. SUCV2010-2995, June 28, 2011 (Quinlan, J.) (recognizing that annuity agreements between family members are not automatically disqualifying for MassHealth purposes).

Of particular note here is 130 CMR 520.007(J)(2)(a)(1), which requires, in relevant part, that the Commonwealth of Massachusetts be "named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual" (or in the second position after the community spouse, or minor or disabled children). The annuity agreement as originally drafted did not name the Commonwealth as a remainder beneficiary. Shortly after the agreement was signed, the community spouse and TA executed a purported "amendment" to the original agreement, naming the Commonwealth as the remainder beneficiary in the first position. In so doing, they ignored language in the underlying agreement which prohibited them from making any such amendments. After MassHealth pointed out this inconsistency in its hearing memo, the appellant's attorney conceded the point during the record-open period and submitted a new document, entitled "Acknowledgement," in which the community spouse and TA expressed their understanding that the "original beneficiaries, as stated in the annuity of March 22, 2012, remain in effect."

There is no dispute that the Commonwealth is not a remainder beneficiary of this annuity. Yet the appellant now argues, for the first time, that annuities purchased by a community spouse are not required to name the Commonwealth as a remainder beneficiary. This contention seems incongruous with the argument presented at hearing (i.e., that the annuity complied with MassHealth regulations in part because it named the Commonwealth as the first remainder beneficiary). At the very least, it stands in contrast to the deliberate efforts undertaken to amend the annuity agreement, albeit ineffectively, weeks after its execution.

More importantly, the appellant has identified no legal basis for this assertion. Nor is one apparent. There is nothing in 130 CMR 520.007(J)(2), for example, which distinguishes between annuities purchased by an applicant and by a community spouse. In determining whether there

has been a disqualifying transfer of resources during the relevant look-back period, MassHealth manifestly reviews transfers made by either "a nursing-facility resident **or spouse**" (emphasis supplied). See 130 CMR 520.019(C); see also 42 USC 1396p(c)(1)(F). The only hint of debate on the issue comes in the form of a 2007 email message from a policy administrator at the Office of Medicaid, who stated that then-"current" MassHealth policy was not to require a community spouse who purchased an annuity (and was not him- or herself receiving MassHealth benefits) to name the Commonwealth as a beneficiary.[7] See Exhibit 12. Whether this was agency practice in 2007, the regulations plainly allow MassHealth to consider as disqualifying any actions taken by either the applicant or his or her spouse, and, as part of this, to require that annuities purchased by a community spouse comport with the provisions of 130 CMR 520.007(J)(2). The annuity here does not meet those regulatory requirements.

As the annuity fails to comply with the criteria of 130 CMR 520.007(J)(2), it is not necessary to address the issues of fair market value and reasonable enforceability. This appeal is denied.[8]

[7] The appellant's attorney did not specifically discuss this portion of the email message, instead focusing on a later statement that if the community spouse were to apply for MassHealth benefits, the Office of Medicaid would require the Commonwealth be named as the beneficiary in the proper position. He contended that "[i]t seems that the Commonwealth would want the impossible. An annuity where the beneficiary can be modified at the Commonwealth's leisure, but not that of the Annuitant!" See Exhibit 12. To the extent it matters here, I do not read the MassHealth administrator's message in this way. Rather, I read it to describe two separate scenarios, with different sets of hypothetical players – one where a community spouse/annuitant was not receiving MassHealth benefits, and the other where a community spouse was seeking or receiving coverage. At any rate, there is no evidence that the appellant's attorney ever saw or relied upon the contents of this email message in facilitating annuity agreements involving a community spouse, such as the one at issue here. Again, the fact that the parties executed an amendment attempting to name the Commonwealth as remainder beneficiary suggests that he actually presumed the opposite.

[8] The appellant's attorney contended that MassHealth erred by not granting a hardship waiver to the appellant. See Exhibit 7. There is no evidence that the appellant has filed a written request for a hardship waiver, or that MassHealth has denied any such request. See 130 CMR 520.019(L). The appellant's attorney also claims that MassHealth "is discriminating against appellant based on Appellant's age as Appellant is unable to obtain commercial annuity that complies with MassHealth regulations due to the advanced age of the Appellant." Notably, it was not the appellant, but her community spouse, who purchased the annuity in this case. In any case, determining whether MassHealth regulations violate state or federal law is beyond the scope of the hearing officer's authority, but the issue is subject to judicial review in accordance with 130 CMR 610.092.

Orders for MassHealth

None.

Notification of Your Right to Appeal to Court

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

Rebecca Brochstein
Hearing Officer
Board of Hearings

cc: Chelsea MEC