

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	1502486
<b>Decision Date:</b>	7/28/15	<b>Hearing Date:</b>	04/16/2015
<b>Hearing Officer:</b>	Marc Tonaszuck	<b>Record Open to:</b>	06/19/2015

**Appellant Representative:**

**MassHealth Representative:**  
Debbie Farias



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

# APPEAL DECISION

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Long Term Care
<b>Decision Date:</b>	7/28/15	<b>Hearing Date:</b>	04/16/2015
<b>MassHealth Rep.:</b>	D. Farias	<b>Appellant Rep.:</b>	
<b>Hearing Location:</b>	Springfield MassHealth Enrollment Center		

## Authority

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

## Jurisdiction

Through a notice dated 02/12/2015, MassHealth denied the appellant's application for MassHealth Long-Term Care (LTC) Benefits because MassHealth determined that the appellant recently gave away or sold assets to become eligible for MassHealth long term care service and MassHealth calculated a period of ineligibility from 08/01/2014 to 08/24/2015 (130 CMR 520.018; Exhibit 1). The appellant filed this appeal in a timely manner on 02/24/2015 (130 CMR 610.015(B); Exhibit 2). Denial of assistance constitutes valid grounds for appeal (130 CMR 610.032). A hearing was held on 08/27/2014 after which the record remained open until 09/12/2014 to allow the appellant to review and respond to MassHealth's legal memorandum and for MassHealth to file a reply (Exhibits 3, 7-9).

## Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth LTC Benefits because MassHealth determined that there was a disqualifying transfer of resources resulting in a period of ineligibility from 08/01/2014 to 08/24/2015.

## **Issue**

The appeal issue is whether MassHealth properly applied the controlling regulations to accurate facts when it denied the appellant's application for MassHealth LTC Benefits upon determining that there was a disqualifying transfer of resources resulting in a period of ineligibility from 08/01/2014 to 08/24/2015.

## **Summary of Evidence**

The MassHealth representative testified that the appellant, a single woman, who is 86 years of age, was admitted to the skilled nursing facility on 12/17/2013. An application for MassHealth long term care (LTC) benefits was submitted on the appellant's behalf on 10/02/2014, seeking an eligibility date of 08/01/2014 (Exhibits 5 and 6).

On 10/07/2014, MassHealth sent a request for verifications (VC-1) to the appellant. The requested verifications were not received by MassHealth within the requested time frame and the application was denied on 11/14/2014 for failure to provide verifications. The appellant appealed that determination and on 01/29/2015 all necessary verifications were received by MassHealth. The instant denial involves a disqualifying transfer of resources, specifically income from a trust that has since been terminated.

The appellant is the grantor and the sole lifetime beneficiary of the Trust she established on 03/25/1993 and funded with her assets. The Trust terminated on 12/31/2013. The value of the corpus of the Trust at the time of the termination was \$611,000.00. The assets were distributed to the appellant's children. Pursuant to the terms, prior to the termination of the Trust, the trustee paid the appellant the income from the Trust \$17,480.00 per year. Apparently this income was used to pay for her nursing facility care.

MassHealth argues that the Trust was a Medicaid Qualifying Trust and pursuant to MassHealth regulations the appellant was an income beneficiary. The termination of the Trust rendered the Trust income no longer available and is a disqualifying transfer of resources. The amount of the disqualifying transfer, \$120,786.80, was calculated based on the total amount of income expected to be transferred during the appellant's life, according to life expectancy tables. At the time of the termination of the Trust, the appellant was 85 years of age and had a life expectancy of 6.91 years. The income reported on the appellant's 2013 tax returns generated from the Trust was \$17,480.00. The value of the disqualifying transfer of income based on her life expectancy would

therefore be \$120,786.80 (\$17,480.00 X 6.91).<sup>1</sup>

The transfer amount was divided by the average daily private rate for a nursing facility for a period of ineligibility of 389 days, beginning the date the appellant was otherwise eligible for benefits, 08/01/2014, the date she requested. The appellant will be eligible for MassHealth LTC benefits on 08/25/2015 (Exhibits 1 and 5).

The appellant was represented by her daughter/POA<sup>2</sup> and an attorney who represents the POA. Counsel argued that the cessation of the income to the appellant is not a disqualifying transfer of assets. He also argued that MassHealth erred both in applying current laws against the termination of the appellant's interest in the Trust and in its valuation of such transfer. Counsel states that MassHealth must apply the law in effect on March 1993, and only that law, in its assessment of the Trust. Medicaid Qualifying Trust law in effect as of 03/25/1993 requires MassHealth to ignore discretionary language in the Trust that limits the ability of the Trustee to distribute income to the appellant. He also argues that the Trustee had no discretion as to the Trust's termination and as such the Trust's termination provision does not constitute an "exculpatory" provision, therefore MassHealth erred in disregarding the termination provision and imputing lifetime income to the appellant. Finally, counsel asserted that if MassHealth determines a disqualifying transfer took place, her retained right to the income from the trust constitutes a life estate for the purposes of Medicaid and MassHealth incorrectly determined the value of the transfer. It should be \$72,821.64 based on a life estate interest.<sup>3</sup>

## Findings of Facts

By a preponderance of the evidence, I find the following:

1. The appellant, an 86 year old single woman, was admitted to a skilled nursing facility on 12/17/2013.
2. The appellant filed an application for MassHealth benefits on 10/02/2014, seeking an eligibility start date of 08/01/2014.

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<sup>1</sup> MassHealth's summary is based on the testimony of the MassHealth representative at the fair hearing as well as the MassHealth legal memorandum submitted at hearing, and the reply filed during the record open period (Exhibits 5, 7 and 9).

<sup>2</sup> See Exhibit 4.

<sup>3</sup> The appellant's summary is based on the testimony provided at hearing by counsel as well as his post-hearing memorandum submitted during the record open period (Exhibits 7 and 8).

3. On 03/25/1993, the appellant established a Trust and contemporaneously funded the Trust with various securities.
4. The appellant is the grantor of the Trust.
5. The appellant's daughter is the trustee of the Trust.
6. The appellant is an income beneficiary of the trust.
7. The appellant's children are named beneficiaries of the trust.
8. The trustee terminated the trust on 12/31/2013.
9. The appellant privately paid for her nursing home care until July 2014.
10. Article Two A. states, "During the life of the grantor, the trustee shall, at least quarterly expend as much of the net income of the Trust property as she in her sole discretion deems necessary for the care, comfort, health, maintenance, and welfare of the grantor..."
11. Article Four A. states, "Upon the placement of the primary beneficiary in a nursing facility or upon the death of the primary beneficiary, this Trust shall terminate and the trustee shall distribute the principal and remaining accrued and accumulated income to [the three children]."
12. As of 2013, the Trust contained approximately \$611,065.94 in assets.
13. The appellant's 2013 US 1040 tax form shows that she received income from the Trust in the amount of \$17,480.00 in 2013.
14. At the time the Trust terminated, the appellant was 85 year of age.
15. The Social Security Administration's Period Life Table designates the life expectancy of an 85 year old female as 6.91 years.
16. The average private daily rate for a nursing facility is \$310.00.
17. Through a notice dated 02/12/2015, MassHealth denied the appellant's application for MassHealth LTC Benefits because MassHealth determined that the appellant made a disqualifying transfer totaling \$120,786.80 to become eligible for MassHealth long term care service and MassHealth calculated a

period of ineligibility from 08/01/2014 to 08/24/2015.

## Analysis and Conclusions of Law

MassHealth considers any transfer during the appropriate look-back period by the nursingfacility resident or spouse of a resource, or interest in a resource, owned by or available to the nursingfacility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) for less than fairmarket 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 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)).

A disqualifying transfer of resources is defined at 130 CMR 520.019:

(C) Disqualifying Transfer of Resources. The MassHealth agency considers any transfer during the appropriate look-back period by the nursingfacility resident or spouse of a resource, or interest in a resource, owned by or available to the nursingfacility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) for less than fairmarket 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). **The MassHealth agency may 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.** Action taken to avoid receiving a resource may include, but is not limited to, waiving the right to receive a resource, not accepting a resource, agreeing to the diversion of a resource, or failure to take legal action to obtain a resource. In determining whether or not failure to take legal action to receive a resource is reasonably considered a transfer by the individual, the MassHealth agency will consider the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.

(Emphasis added.)

Regulation 130 CMR 520.019(G)(3), effective February 8, 2006, provides in pertinent part:

- (1) Begin Date. For transfers occurring before February 8, 2006, the period of ineligibility will begin on the first day of the month in which resources have been transferred for less than fairmarket value. For transfers occurring on or after February 8, 2006, the period of ineligibility will begin 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. For transfers involving revocable trusts, the date of transfer is the date the payment to someone other than the nursing-facility resident or the spouse is made.

In the instant case, the appellant was the income beneficiary of a Trust that terminated in the same month she was admitted to the nursing facility. There is no dispute that she received income from the Trust and that in 2013 that income was \$17,480.00. MassHealth correctly determined that the termination of the Trust was an action that was “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,” pursuant to the above regulation.

Counsel for appellant argues that the terms of the Trust required that the Trust terminate when the appellant was admitted to the nursing facility. I agree with MassHealth that the trustee was not required to terminate the Trust at that time; the terms set forth in Article Four A give the trustee the option of terminating the Trust either when the appellant was institutionalized or when she dies. However, whether the termination of the Trust upon the appellant’s admission to the nursing facility is discretionary or mandatory, this Trust provision is an exculpatory provision meant to defeat MassHealth eligibility standards and as a matter of law are disregarded (Cohen v. Comm’r of the Div. of Med. Assist., 423 Mass. 399, 413, 416, 418, 419-420, 424 (1996)). As a result, MassHealth’s determination that the termination of the trust resulted in a disqualifying transfer of resources is supported by the facts in the hearing record as well as the regulations.

MassHealth determined that the amount of the disqualifying transfer was the amount of income that the appellant received according to her most recent tax form, multiplied by her life expectancy. Appellant’s counsel would like MassHealth to use the same formula used to value a life estate in real property. Since this case involves no real property whatsoever, I find MassHealth’s use of the Social Security Administration life expectancy tables to be appropriate. At the time of the termination of the Trust, the

appellant was 85 years of age. Her life expectancy was 6.91 years. In 2013 she received \$17,480.00 from the Trust income. MassHealth correctly calculated a disqualifying transfer amount of \$120,786.80 ( $\$17,480.00 \times 6.91$ ), thereby warranting a penalty period.

Counsel asserts that “the transfer penalty did not exist in federal law at the time the appellant established the Trust” and that MassHealth does not have authority to apply current federal and state transfer of resources provisions to the transactions. I disagree. It is not the establishment or funding of the trust that was the disqualifying transfer in this case; but the termination of the Trust in 2013, well within the appropriate look back period as established by the MassHealth regulations.

MassHealth determined that the \$120,786.80 disqualifying transfer resulted in a period of ineligibility that would run for 389 days, by dividing the transfer amount by the average private daily rate for nursing facility care, \$310.00. The appellant was otherwise eligible for MassHealth benefits on the date requested, 08/01/2014. Thus, MassHealth correctly informed the appellant that she was not eligible for MassHealth LTC benefits and that the period of ineligibility would run from 08/01/2014 to 08/24/2015.

This appeal is therefore denied.

## **Order 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.

Marc Tonaszuck  
Hearing Officer  
Board of Hearings



cc: