

**Office of Medicaid  
BOARD OF HEARINGS**

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	1812255
<b>Decision Date:</b>	OCT 31 2018	<b>Hearing Date:</b>	06/27/2018
<b>Hearing Officer:</b>	Rebecca Brochstein	<b>Record Closed:</b>	08/27/2018

**Appearances for Appellant:**

**Appearances for MassHealth:**  
Nereida Mercado, 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

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Long-term care eligibility
<b>Decision Date:</b>	OCT 31 2018	<b>Hearing Date:</b>	06/27/2018
<b>MassHealth's Rep.:</b>	Nereida Mercado	<b>Appellant's Reps.:</b>	
<b>Hearing Location:</b>	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 May 14, 2018, MassHealth denied the appellant's application for MassHealth benefits for the period of January 1, 2018, to February 9, 2025, because of disqualifying transfers of resources (Exhibit 1). The appellant filed a timely appeal on May 23, 2018 (Exhibit 3). Denial of an application for benefits is a valid basis for appeal (130 CMR 610.032).

### Action Taken by MassHealth

MassHealth denied the appellant's application for long-term care benefits because it determined that she transferred resources for less than fair market value. It calculated the period of disqualification between January 1, 2018, and February 9, 2025.

### Issue

The issue on appeal is whether MassHealth properly determined that the appellant transferred resources for less than fair-market value.

## Summary of Evidence

An eligibility worker from the Chelsea MassHealth Enrollment Center appeared at the hearing and offered evidence of the following: The appellant was admitted to a nursing facility on May 12, 2017. A long-term care application was submitted on her behalf on July 31, 2017. MassHealth denied the application because it determined that the appellant retained access to assets in an irrevocable trust created in 2007. The appellant filed an appeal of that determination, and the Board of Hearings denied the appeal in a decision dated February 15, 2018. See Exhibit 5. While that appeal was pending, on February 9, 2018, the appellant filed a new application. That application was denied for missing verifications. The verifications were subsequently provided, and the new application was re-logged on April 9, 2018.

On May 14, 2018, MassHealth denied the application because it determined that the appellant had transferred resources from the irrevocable trust (that had previously been deemed countable to the appellant) to her children. Specifically, the appellant transferred the home, valued at \$503,000, and funds from three separate Salem Five bank accounts in the amounts of \$144,831 (from account ending in #5357); \$48,400 (#0327); and \$745 (#1860). These assets from the irrevocable trust total \$696,976. The MassHealth representative testified that the agency also found the appellant had improperly transferred the proceeds of two Salem Five IRAs – one worth \$102,404 (account ending in #9748), and the other worth \$119,735 (#7193) – for an additional disqualifying transfer of \$222,139. The MassHealth representative indicated that the IRAs had been owned by the appellant's late spouse (who died in May 2017) and that the appellant was the original beneficiary of the accounts. Shortly before his death, the appellant and her husband moved to change the beneficiary of the accounts to a revocable trust that would instead benefit their children. When the spouse died, the proceeds were in fact distributed to the couple's children, making this a disqualifying transfer of resources.

The appellant was represented at hearing by an attorney and her daughter, who holds her power of attorney. Preliminarily, the attorney argued that the MassHealth denial notice provided insufficient information and stated that he had to contact MassHealth multiple times to get clarification. He complained that MassHealth has not been professional in his interactions with the agency. The attorney then argued that the assets in the trust are not countable to the appellant, the issue that was adjudicated by the February 2018 Board of Hearings decision. (The hearing officer reminded the attorney that that he could not relitigate that issue in this hearing, as his recourse had been to file a G. L. c 30A judicial review action at the time.)

The appellant's attorney argued that based on email correspondence from the MassHealth attorney in the previous appeal, it appeared MassHealth had conceded the two IRAs would not be considered the appellant's assets and, therefore, should not now be considered part of the disqualifying transfer. He displayed copies of email messages purporting to show that MassHealth did not intend to count the IRAs as part of the appellant's countable assets.

The record was held open until July 27, 2018, for the MassHealth eligibility worker to consult with the MassHealth attorney (who did not appear at the hearing) and to submit a memorandum to explain why the IRA accounts are included in the transfer of resources in light of the earlier email exchange highlighted by appellant's counsel. The appellant's attorney was given until August 27, 2018, to file a response brief. See Exhibit 8.<sup>1</sup>

In its post-hearing memorandum, MassHealth maintains that the two IRAs, which belonged to the appellant's spouse, were not part of the prior appeal and that neither MassHealth nor the hearing officer who handled that appeal made any determination relative to them.<sup>2</sup> MassHealth explains that the appellant's spouse had owned two IRAs and that his and the appellant's respective attorneys-in-fact had executed Change of Beneficiary Designation Forms to give the beneficial interest of the IRAs to a revocable trust; these proceeds were later transferred to the appellant's children. The agency determined that the appellant transferred her beneficial interest in the IRAs to the trust and then the children, and that this transfer was disqualifying for MassHealth eligibility purposes. See Exhibit 9.

Regarding the assets in the irrevocable trust, MassHealth argues that the Board of Hearings decision found those resources fully countable and that the appellant's subsequent transfer of those assets to her children was plainly disqualifying.<sup>3</sup> See Exhibit 9.

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<sup>1</sup> The appellant's attorney argued that the MassHealth memo was not filed timely and should therefore "not be allowed." See Exhibit 10. The MassHealth attorney filed his memorandum by email received at 9:05 a.m. on Monday, July 30, 2018, with a message that stated as follows: "I sent this e-mail out at noon on Friday [July 27, 2018, the due date]. I never received a message that it didn't go through but found it in my 'outbox' this morning. I am breaking it into two messages because of size of exhibits. Exhibit D will hopefully come through separately." A separate email attaching Exhibit D was sent at the same time. I find the MassHealth attorney's explanation as to the reason for the delay in his submission to be credible (noting that he sent it on Monday morning without prompting) and have accepted it into the record. See Exhibit 9.

<sup>2</sup> The MassHealth memo states that "MassHealth determined during the appeal proceeding that the spouse's IRA accounts were not Irrevocable Trust assets but were subject to disqualifying transfer of resources provisions once the applicant's countable assets were found to be at or below the \$2,000 asset limit." See Exhibit 9.

<sup>3</sup> The MassHealth memo included several attachments: The appellant's February 9, 2018, long-term care application; the deed conveying the home from the irrevocable trust to the appellant's children; the 2017 real estate tax bill; a Salem Five letter confirming the closure of three trust accounts (#5357, #0327, and #1860) as of February 16, 2018; Salem Five Designation of Beneficiary Form; a copy of the revocable trust; transaction histories of the two IRAs; an Inherited Individual Retirement Account Application showing the daughter as an inherited IRA owner; and an email from the appellant's counsel's law office regarding (in part) the rollover of the IRAs into individual accounts by the children. See Exhibit 9.

In his post-hearing response, the appellant's attorney argues that MassHealth erred in imposing a penalty period for impermissible transfers because the trustee – rather than seeking judicial review of the February fair hearing decision – instead “terminated the trust and made distributions permitted in the exercise of his fiduciary duty, to effectuate the purposes of the trust. . . .” He argues that the trustee exercised his authority as permitted by the terms of the trust by liquidating the trust assets and distributing them to the appellant's children. He maintains that the transfer of assets was not done by the applicant but by the trustee, as an exercise of his fiduciary duty, and that the transfer was “clearly permitted by the trust provisions.” See Exhibit 10.<sup>4</sup>

As to the IRA accounts, the appellant's attorney maintained, as he had at hearing, that MassHealth had determined the accounts were not included as assets that were countable to the appellant. He included in his submission a copy of the email from the MassHealth attorney to himself and the hearing officer in the first appeal, dated December 13, 2017, that he had referenced during the hearing in this appeal.<sup>5</sup>

### **Findings of Fact**

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

1. The appellant was admitted to a long-term care facility on May 12, 2017.
2. On July 31, 2017, a MassHealth long-term care application was filed on her behalf.
3. MassHealth denied the application in part because it determined that the appellant retained access to assets in an irrevocable trust created in 2007. The assets in the trust included a home and three bank accounts.

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<sup>4</sup> A substantial portion of the post-hearing memo once again raises issues that were adjudicated in the February 2018 Board of Hearings decision.

<sup>5</sup> The email from the MassHealth attorney states in relevant part as follows:

In regard to the IRA accounts, they are not a part of this appeal. The Hearing Officer was correct about that at the hearing but I could not [appreciate] the issue on the spot when confronted with the information for the first time. DQT determinations and notices are not made at a point in time that an applicant is not otherwise eligible. Since the irrevocable trust was never the beneficiary of the IRA accounts the two issues are not factually intertwined. We did not have this information prior to the hearing.

In order to be helpful, we did go ahead and take the step of analyzing the IRA issue and do believe that were the applicant be ever become asset eligible that a determination and notice of a DQT would follow based on the evidence provided at the hearing. (Exhibit 10)

4. The appellant filed an appeal of that determination, and the hearing was held on November 29, 2017.
5. On January 10, 2018, while the excess asset appeal was still pending, the trustees of the irrevocable trust conveyed the appellant's home to her children. The home was valued at \$503,000.
6. On February 9, 2018, the appellant filed a new long-term care application. It was subsequently denied for missing verifications.
7. On February 15, 2018, the Board of Hearings denied the excess asset appeal, concluding that she did in fact have access to the assets in the irrevocable trust.
8. On February 16, 2018, the three Salem Five accounts held by the irrevocable trust (#5357, #0327, and #1860) were closed. The assets in those accounts were distributed to the appellant's children.
9. On April 9, 2018, the February 9 long-term application was re-logged.
10. On May 14, 2018, MassHealth denied the application because it determined that the appellant had transferred available resources. MassHealth determined that the appellant transferred assets that were in the irrevocable trust as well as assets that were held outside of the trust.
  - a. The transferred assets that had been in the irrevocable trust were the appellant's former home and the three Salem Five accounts. The total value of these assets was \$696,976.
  - b. The transferred assets that were held outside the trust were the two IRAs that had been owned by the appellant's husband. The total value of these assets was \$222,139.
    - i. The IRAs had been owned by the appellant's husband prior to his death in May 2017.
    - ii. Seventeen days prior to the husband's death, on April 24, 2017, the attorneys-in-fact of the appellant and the husband signed a Salem Five Designation of Beneficiary Form to change the beneficiary of the IRAs from the appellant to a revocable trust.
    - iii. The children were the beneficiaries of the revocable trust and ultimately received the proceeds of the IRAs after the husband's death.

11. On May 23, 2018, the appellant filed a timely appeal of the May 14, 2018, denial notice.

### **Analysis and Conclusions of Law**

The MassHealth agency 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 (including the home or former home of 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). 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 considers the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available. 130 CMR 520.019(C).

At issue in this case is MassHealth's determination that the appellant transferred available assets for less than fair market value, resulting in a lengthy period of disqualification. MassHealth found that the appellant transferred assets that had been held in an irrevocable trust, which had previously been found countable to the appellant through a fair hearing decision that issued in February 2018. In addition, MassHealth determined that the appellant had transferred two IRAs that were held outside of the trust and were not the subject of the previous appeal. In total, MassHealth imposed a penalty period from January 1, 2018, to February 9, 2025.

#### **Trust Assets**

MassHealth first determined that the appellant's transfer of the assets held in the irrevocable trust was disqualifying. In a final agency decision dated February 15, 2018, the Board of Hearings determined that the assets in the trust were countable to the appellant. Importantly, the appellant's attorney did not seek judicial review of the BOH decision pursuant to G. L. c. 30A, nor did he file a request for a rehearing with the Medicaid director. See 130 CMR 610.091, 610.092. Still, he has sought through this proceeding (both at hearing and in his post-hearing memo) to relitigate the substantive issues underlying that decision. Under 130 CMR 610.085(A)(2), "[f]acts found and issues decided by the hearing officer in each case are binding on the parties to that case and cannot be disputed again between them in any other administrative proceeding." The appellant is firmly bound by the BOH decision that the assets in the irrevocable trust were countable to her for purposes of her MassHealth eligibility.

The substantive matter in the *current* appeal is MassHealth's determination that the appellant transferred those resources during the regulatory look-back period. The appellant does not contest that the trust assets (real estate and three bank accounts) were in fact liquidated and conveyed to the appellant's children. In fact, the house was taken out of the trust and deeded to the children while the last appeal was still pending, on the day the record-open period ended and more than a month before the decision issued.<sup>6</sup> The three bank accounts that were in the trust were closed the day after the BOH decision came out, and those proceeds were also given to the children.

Though he acknowledges the transfers occurred, the appellant's attorney argues that MassHealth should not impose a penalty period because the terms of the trust allowed him, consistent with his fiduciary duty as trustee, to liquidate the trust assets and distribute them to the appellant's children. But whether the trustee was acting within his powers is not at issue here. Rather, the question is whether this act – the distribution of the trust assets to the children – constituted a disqualifying transfer of resources under MassHealth regulations. The answer is undoubtedly yes. In simple terms, the appellant had access to \$696,976 in trust assets that were available to pay for her care, but she instead chose to give those resources away, thereby making them unavailable to her.<sup>7</sup> MassHealth properly considered the transfer of those assets to be disqualifying and imposed a penalty period accordingly.

### IRA Funds

The other aspect of MassHealth's transfer determination involved two retirement accounts that were originally in the name of the appellant's late husband and were held outside of the trust. Preliminarily, there was some dispute, originating in the first appeal, as to whether MassHealth had considered these assets to be countable to the appellant for eligibility purposes. This would be significant because had the assets been noncountable, their later transfer would not be disqualifying. The appellant argues that MassHealth conceded in an email exchange in the course of the first appeal that the assets were noncountable. However, it has become clear through the parties' post-hearing submissions that MassHealth was not actually making any determination about whether the assets were countable at the time of the first hearing – because by that point, *they were already owned by a third party* (the children). Rather, the assets would have been countable to the appellant (because they were owned by her spouse) for MassHealth eligibility purposes at an earlier date, but were *no longer* countable to her because they had already been transferred.<sup>8</sup> MassHealth's only point in the email exchange was that it was

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<sup>6</sup> It does not appear that the hearing officer in that case was ever made aware that the house had been taken out of the trust before her decision was rendered.

<sup>7</sup> There is no allegation that the trustee acted without the appellant's consent.

<sup>8</sup> The language cited by appellant's attorney from the February 2018 Board of Hearings decision supports this interpretation: "MassHealth has now determined that two other accounts [the IRAs] *are no longer*



reserving the right to make a later determination, once the appellant was asset-eligible, as to whether the transfer of countable assets had been disqualifying. That is precisely what is at issue in *this* appeal.

The only remaining question, therefore, is whether MassHealth correctly determined that the appellant transferred the IRAs by consenting to the change of beneficiary to the revocable trust, thereby giving up the funds she had the potential to receive upon her husband's death.<sup>9</sup> Apart from his unavailing position that the IRAs were noncountable assets, the appellant's attorney has not articulated a clear alternative legal argument to explain why the transfer of the IRAs in 2017 should not be considered disqualifying. And indeed, the plain language of the transfer regulations calls for the opposite result.

Under 130 CMR 520.019(C), MassHealth "may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility residence or spouse is or would be entitled if such action had not been taken." Among these actions is "agreeing to the diversion of a resource."<sup>10</sup> At the time the attorneys-in-fact of the appellant and her husband signed the form to change the beneficiary of the IRAs, it was not a certainty that, had she remained the beneficiary, he would have predeceased her and left her the proceeds from the accounts. As it happened, though, he died just 17 days after the form was signed. The direct result of the act of signing the form was to divert those funds from the appellant to her children (via the revocable trust). Under the broadly stated terms of the regulation, this constitutes an "action taken to avoid receiving a resource" to which the appellant would have been entitled had the action not been taken. Accordingly, MassHealth was justified in treating it as a disqualifying transfer of resources.

For the foregoing reasons, this appeal is denied.<sup>11</sup>

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*included as assets to the appellant*" (emphasis added).

<sup>9</sup> The record here is incomplete, but the evidence strongly suggests that the appellant herself was the original beneficiary. The appellant has not disputed this.

<sup>10</sup> The State Medicaid Manual (HCFA "Transmittal 64") also lists examples of actions which would cause income or resources not be received, and specifically includes "waiving the right to receive an inheritance." See Section 3257(B)(1)(3).

<sup>11</sup> The appellant's attorney also raised procedural issues involving the adequacy of MassHealth's notices. Through the hearing and the record-open process, the appellant's attorney has been given ample opportunity to understand MassHealth's position and time to submit a written response to the agency's legal memorandum. See Exhibits 8-10.

## Order for MassHealth

If the appellant provides proof within 60 days of the date of this decision that the transfers have been fully or partially cured, redetermine her long-term care eligibility using the re-log application date of April 9, 2018.

### 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