

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	1700338
<b>Decision Date:</b>	3/23	<b>Hearing Date:</b>	02/14/2017
<b>Hearing Officer:</b>	Marc Tonaszuck		

**Appellant Representative:**

**MassHealth Representative:**  
Patricia Lemke



*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>	3/23	<b>Hearing Date:</b>	02/14/2017
<b>MassHealth Rep.:</b>	P. Lemke	<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

By a notice dated 12/05/2016, MassHealth informed the appellant that it denied her 11/04/2016 application for long term care (LTC) benefits because she recently gave away or sold assets to become eligible for MassHealth long term care services. MassHealth calculated a period of ineligibility from 11/01/2016 to 03/02/2017 (130 CMR 520.018, 520.019; Exhibit 1). A request for a fair hearing was filed in a timely manner on the appellant's behalf on 12/28/2016 (Exhibit 2). Denial of assistance is valid grounds for appeal (130 CMR 610.032).

### Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth long term care benefits and imposed a period of ineligibility from 11/01/2016 to 03/02/2017.

### Issue

Was MassHealth correct in denying the appellant's application for LTC benefits and imposing a period of ineligibility from 11/01/2016 to 03/02/2017?



## Summary of Evidence

The MassHealth representative testified that an application for long term care (LTC) benefits was submitted on behalf of the appellant on 11/04/2016. She was admitted to the skilled nursing facility on 06/28/2016 and that facility is requesting MassHealth payment for 11/01/2016 (Exhibit 5). Upon review of the information provided by the appellant with her application and the additional information provided in response to the requests for information, MassHealth determined that transfers took place during the 60-month look back period which MassHealth determined were disqualifying transfers of assets. Specifically, on 07/18/2015, the appellant transferred \$43,500.00 from her Chicopee Savings Bank account to her nephew/POA for "payback for services rendered." The nephew/POA submitted an affidavit that states that the appellant transferred her home to him and to his siblings on 08/15/2000, while retaining a life estate. At the time the appellant had been recently widowed and was not capable of maintaining her home alone. According to the affidavit the appellant relied on her nephew/POA to oversee her household repairs and lawn and yard care. He installed an alarm system, handled the appellant's finances and transported her for shopping, doctors' appointments and hair appointments. He also took her on family vacations. He described that he had a joint account with the appellant and on 07/18/2015 she asked him to withdraw \$53,500.00. \$9,500.00 was to be used to renovate her bathroom and \$44,000.00 was for "all of the time, effort and years of care [he] provided to [the appellant] since her husband passed away." He states that at the time, she continued to live in her home without any intention of entering a facility, hoping to remain in her home. He also stated that she would not have been able to remain in her home without his assistance in her daily life and that he never received any money from the appellant for any of the care or help that he provided to her. The money she transferred to him was to allay a financial hardship he was experiencing. "She wanted to help me and she also wanted to pay me for all of the care and assistance I provided to her since her husband passed away" (Exhibit 5).

The MassHealth representative testified that the \$9,500.00 was determined to be a permissible transfer; however the \$43,500.00 was a disqualifying transfer of resources because the appellant did not receive fair market value in exchange for the resources. As a result, she calculated a 121 day period of ineligibility, using the average daily private rate, beginning on the date the appellant was otherwise eligible for payment of benefits and ending on 03/02/2017 (Exhibit 1).

The appellant's nephew/POA appeared at the fair hearing and testified with the assistance of his attorney. He did not object to the application date, the date the appellant was otherwise eligible or how MassHealth calculated the period of ineligibility. Counsel spoke first and stated that he did not participate in the appellant's estate planning or in the application process; he became involved in this case after the appellant's application was denied by MassHealth. The nephew/POA testified that the transfers at issue in this appeal took place when the appellant was living independently. There was

not thought of institutionalization. The money was not given as a gift in contemplation of her application for MassHealth benefits. The nephew/POA testified that the appellant is now 96 years of age. He testified to the facts that are in his affidavit. At the time of the transfers, the appellant had been taken to the hospital for a hole in her stomach. She recovered; however she was not strong. The appellant told the nephew/POA that the appellant told him that she wanted him to have the money; however he was self-employed and had had a bad year. He never asked for reimbursement for the services he provided to her over the years. He testified that the money averages out to about \$60.00 per week for 15 years of assistance.

## Findings of Fact

Based on a preponderance of the evidence, I find:

1. The appellant, a single woman who is 96 years of age, was admitted to a skilled nursing facility on 06/28/2016 (Testimony; Exhibit 5).
2. An application for long term care (LTC) benefits was submitted on behalf of the appellant on 11/04/2016, seeking a benefits start date of 11/01/2016 (Testimony; Exhibit 5).
3. MassHealth determined that there was a disqualifying transfer of resources totaling \$443,500.00 during the 60-month look back period (Testimony).
4. By a notice dated 12/05/2016, MassHealth informed the appellant that it denied her 11/04/2016 application for LTC benefits because she recently gave away or sold assets to become eligible for MassHealth long term care services. MassHealth calculated a period of ineligibility from 11/01/2016 to 03/02/2017 (Testimony; Exhibits 1 and 5).
5. The appellant was represented in these proceedings by her nephew/POA and an attorney representing him (Testimony; Exhibits 2 and 4).
6. On 07/18/2015, the appellant transferred \$43,500.00 from her Chicopee Savings Bank account to her nephew/POA, with whom she shared the joint account (Testimony).
7. At the time of the transfer, the appellant was 94 years of age (Testimony).
8. Prior to the time of the transfer, the appellant had been hospitalized for a "hole in her stomach." She recovered; however she was not strong (Testimony).
9. The nephew/POA provided services to the appellant, including transporting her to



appointments, accompanying her on vacations, and overseeing household and yard services (Testimony).

10. At the time of the transfer, the nephew/POA had experienced a "bad year" in his business at which he was self-employed (Testimony).
11. The appellant did not dispute the amount of the transfer, the date of the transfer, the average daily private rate, MassHealth's calculation of the period of ineligibility, or the date the appellant was otherwise eligible for payment of MassHealth benefits (Testimony).
12. Any transfer during the look-back period for less than fair-market value is a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D).

## **Analysis and Conclusions of Law**

The intent of any transfer within the look back period is always subject to review and within MassHealth's purview in an eligibility determination.

### 130 CMR 520.016: Long-Term Care: Treatment of Assets

130 CMR 520.016 describes the treatment of countable assets when one member of a couple is institutionalized, the post-eligibility transfer of assets, and the allowable income deductions for applicants and members who are residents of a long-term-care facility.

- (A) Institutionalized Individuals. The total value of assets owned by an institutionalized single individual or by a member of an institutionalized couple must not exceed \$2,000.

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 (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).

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)).

520.019: Transfer of Resources Occurring on or after August 11, 1993

(A) Payment of Nursing-Facility Services. The MassHealth agency will apply the provisions of 130 CMR 520.018 and 520.019 to nursing-facility residents as defined at 130 CMR 515.001 requesting MassHealth payment for nursing-facility services provided in a nursing facility or in any institution for a level of care equivalent to that received in a nursing facility or for home- and community-based services provided in accordance with 130 CMR 519.007(B).

(B) Look-Back Period. Transfers of resources are subject to a look-back period, beginning on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard. This period generally extends back in time for 36 months. For transfers of resources occurring on or after February 8, 2006, the period extends back in time for 60 months. The look-back period for transfers of resources from a revocable trust to someone other than the nursing-facility resident, or transfers of resources into an irrevocable trust where future payment to the nursing-facility resident is prevented, is 60 months.

(C) Disqualifying Transfer of Resources. 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).<sup>1</sup> 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.

(D) Permissible Transfers. The MassHealth agency considers the following transfers permissible. Transfers of resources made for the sole benefit of a particular person must be in accordance with federal law.

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<sup>1</sup> 130 CMR 520.019(J) involves home equity loans and reverse mortgages and are not at issue in the instant appeal.



- (1) The resources were transferred to the spouse of the nursing-facility resident or to another for the sole benefit of the spouse. A nursing-facility resident who has been determined eligible for MassHealth payment of nursing-facility services and who has received an asset assessment from the MassHealth agency must make any necessary transfers within 90 days after the date of the notice of approval for MassHealth in accordance with 130 CMR 520.016(B)(3).
- (2) The resources were transferred from the spouse of the nursing-facility resident to another for the sole benefit of the spouse.
- (3) The resources were transferred to the nursing-facility resident's permanently and totally disabled or blind child or to a trust, a pooled trust, or a special-needs trust created for the sole benefit of such child.
- (4) The resources were transferred to a trust, a special-needs trust, or a pooled trust created for the sole benefit of a permanently and totally disabled person who was under 65 years of age at the time the trust was created or funded.
- (5) The resources were transferred to a pooled trust created for the sole benefit of the permanently and totally disabled nursing-facility resident.
- (6) The nursing-facility resident transferred the home he or she used as the principal residence at the time of transfer and the title to the home to one of the following persons:

- (a) the spouse;
- (b) the nursing-facility resident's child who is under age 21, or who is blind or permanently and totally disabled;
- (c) the nursing-facility resident's sibling who has a legal interest in the nursing-facility resident's home and was living in the nursing-facility resident's home for at least one year immediately before the date of the nursing-facility resident's admission to the nursing facility; or
- (d) the nursing-facility resident's child (other than the child described in 130 CMR 520.019(D)(6)(b)) who was living in the nursing-facility resident's home for at least two years immediately before the date of the nursing-facility resident's admission to the institution, and who, as determined by the MassHealth agency, provided care to the nursing-facility resident that permitted him or her to live at home rather than in a nursing facility.

(F) Determination of Intent. In addition to the permissible transfers described in 130 CMR 520.019(D) MassHealth will not impose a period of ineligibility for transferring resources at less than fair-market value if the nursing-facility resident or the spouse demonstrates to the MassHealth agency's satisfaction that:

- (1) the resources were transferred exclusively for a purpose other than to qualify for MassHealth; or
- (2) the nursing-facility resident or spouse intended to dispose of the resource at either fair-market value or for other valuable consideration. Valuable

consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.

Regulations at 130 CMR 520.007(J)(4) address transactions involving future performance as follows:

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.

The State Medicaid Manual reads, in pertinent part, the following:

The following definitions apply to transfers of assets.

1. Fair Market Value. Fair market value is an estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria you use in appraising the value of assets for the purpose of determining Medicaid eligibility.

Note: For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the compensation received for the asset must be in tangible form with intrinsic value. A transfer for love and consideration, for example is not considered a transfer for fair market value. Also, while relatives and family members legitimately can be paid for care they provide to the individual, HCFA presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However an individual can rebut this presumption with tangible evidence that is acceptable to the State. For example, you may require that a payback arrangement had been agreed to in writing at the time services were provided.

*(Department of Health and Human Services Health Care Financing Administration Transmittal No. 64. November, 94.)*

MassHealth determined that there was a disqualifying transfer of resources totaling \$43,500.00 during the 60-month look back period. The transfer was made to the appellant's nephew/POA on 07/18/2015. At the time the appellant was 94 years of age and had recently been hospitalized for a "hole in her stomach." She recovered; however



according to the nephew/POA she was "not strong," even though she continued to live on her own. The appellant's nephew/POA testified and provided an affidavit that stated he provided many services to the appellant, including transporting her to appointments, overseeing household and yard services and accompanying her on vacations. He asserted that the payment he received from the appellant was for "payback for services rendered." MassHealth determined that the transfer did not meet the above regulations for a permissible transfer and was a disqualifying transfer because the appellant did not receive fair market value in exchange for the resources she transferred.

The appellant's argument is twofold: first, that the appellant received fair market value of services in exchange for the money she gave to her nephew/son; and second, that the transfer was made for a purpose exclusively other than to qualify for MassHealth benefits. The evidence in the hearing record does not support either of appellant's arguments. A transfer that is made for the appellant's benefit and in exchange for fair market value is not a disqualifying transfer. In the instant case, the appellant has not shown that the value of the services he provided to the appellant equal or exceeded the amount of the transfer. He did not keep a record of what services were provided, when they were provided and what a reasonable or comparable rate of pay is for such services. Additionally, there was no evidence in the hearing record to suggest that the appellant ever intended to pay the appellant for his services at the time the services were provided. There was no written instrument showing that the appellant ever expected to pay the nephew/POA for the services he provided to her. The services were provided for free in the past. Thus, the appellant has not shown that the transfer was in exchange for fair market value.

Since the resources were not transferred for fair market value, I next look to the appellant's argument that there was no intent to qualify for MassHealth benefits. According to the above regulation, MassHealth will not impose a period of ineligibility for transferring resources at less than fair-market value if the appellant demonstrates to the MassHealth agency's satisfaction that the resources were transferred exclusively for a purpose other than to qualify for MassHealth. Further, the appellant has not shown that the transfer was made for a purpose exclusively other than to qualify for MassHealth benefits. At the time of the transfer, the appellant was 94 years of age and had recently been hospitalized for a "hole in her stomach." According to testimony, the appellant recovered but was "not strong." Based on the appellant's advanced age and her health, I conclude that the appellant has not demonstrated that the transfer was exclusively for a purpose other than to qualify for MassHealth. Accordingly, this appeal is denied.

## **Order for MassHealth**

None.

## **Notification of Your Right to Appeal to Court**

If you disagree with this decision, in part or whole, 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

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Marc Tonaszuck  
Hearing Officer  
Board of Hearings

cc: