

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Corrected Appeal Decision:	Approved	Appeal Number:	1605376
Decision Date:	9/9/16	Hearing Date:	05/27/2016
Hearing Officer:	Cynthia Kopka	Record Open to:	06/24/2016

Appellant Representative:

MassHealth Representative:
Kim McAvinchey (at hearing)
Karen Ryan



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

CORRECTED APPEAL DECISION

Corrected Appeal Decision:	Approved	Issue:	LTC eligibility
Decision Date:	9/7/16	Hearing Date:	05/27/2016
MassHealth Rep.:	Karen Ryan, Kim McAvinchey	Appellant Rep.:	
Hearing Location:	Tewksbury		

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 March 28, 2016, MassHealth denied Appellant's application for MassHealth benefits because Appellant's countable assets exceed MassHealth limits (Exhibit 1). Appellant filed this appeal in a timely manner on April 13, 2016 (Exhibit 2). 130 CMR 610.015(B). Denial of assistance is valid grounds for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied Appellant's application because Appellant's countable assets exceed MassHealth limits.

Issue

The appeal issue is whether MassHealth was correct in determining that a commercial rental property was a countable asset.

Summary of Evidence

The MassHealth worker assigned to the matter was unavailable on the date of the hearing.

MassHealth was represented at hearing by another worker who testified as follows. MassHealth received Appellant's application for long term care benefits on November 13, 2015. Applicant is a 73 year old man who was admitted to the facility on July 10, 2015. Appellant seeks October 13, 2015 as the start date of coverage. Appellant's spouse lives in the community.

On March 28, 2016, MassHealth denied the application because Appellant's countable assets exceed MassHealth's limit. MassHealth calculated the total countable assets as follows:

Asset	Value
Life insurance	11,573.00
Bank accounts (xx1584 and xx9062)	102,654.00
Trust	264,700.00
Total	378,927.00
Allowable limit	2,000.00
Spousal allowance	119,220.00
Over asset amount	257,707.00

The Trust contained a rental property ("the Property"), which MassHealth determined to be a countable asset. The spouse is the owner, trustee, and two-thirds beneficiary to the Trust. After the March 28, 2016 notice was issued, Appellant submitted information showing that the Property was transferred out of the Trust to a realty corporation ("the Corporation"). MassHealth does not consider this action a cure as defined by 130 CMR 520.024(C) or 130 CMR 520.019(K). If the Property is returned to the spouse, MassHealth will redetermine its decision by considering the Property noncountable and applying the rental income to the spouse (Exhibit 5).

Appellant's attorney appeared via telephone and testified as follows. The Property is not the home or former home of Appellant or his spouse, but is commercial rental property used for income. Appellant's attorney argues that the Property should not have been counted (regardless of it being held in the Trust) because it was business property from which Appellant's spouse derives income, as per 130 CMR 520.008(D). After receiving the denial, Appellant's spouse formed the Corporation and transferred the Property to the Corporation. Appellant's spouse is the president and sole stockholder of the Corporation. Appellant's attorney asserts that the MassHealth representative seeks to have the Property returned to Appellant's spouse so that MassHealth can lien the property, which Appellant's attorney argues is incorrect. Appellant's attorney argues that MassHealth has no right to lien the business property of Appellant's spouse. Appellant's spouse inherited the Property from family and leases it to commercial tenants. Appellant's attorney does not dispute that the Trust would not qualify as a Medicaid trust, but rather argues that the asset contained in the Trust should not be counted. Appellant's spouse relies upon the income received by the Property. Without the income, Appellant's spouse would require a higher spousal allowance, resulting in a lower patient paid amount. Appellant would be willing to cure the transfer if the regulations require and seeks guidance from the Board of Hearings about the issue.

The hearing record was held open to allow the MassHealth representative assigned to the case to review the record and respond, and for Appellant to provide further response if necessary. Per the hearing testimony and Exhibits 5 and 8, MassHealth's position is that the Trust is countable per 130 CMR 520.023 and 520.024. Specifically, the spouse is the income beneficiary and has power to revoke the trust pursuant to Article 8. Indeed the trustee exercised this power by removing the Property and transferring it to the Corporation, illustrating that the Property was accessible. As such, MassHealth determined that the Property was an asset of the Trust and the Trust is countable. Furthermore, the cure is not valid because the Property was not returned to the spouse, but transferred to the Corporation. If the Property was returned to the spouse's name, MassHealth could apply the regulations cited at 130 CMR 520.007(G) and 130 CMR 520.008(D) and determine whether the asset was a noncountable business asset essential for the spouse's self-support (Exhibits 5 and 8). However, because the Corporation is the owner, not the spouse, MassHealth considers the asset countable.

At hearing, Appellant reiterated that the Property is not the home or former home and that the spouse owns it by virtue of owning the stock certificate as the sole shareholder of the Corporation. Appellant asserts that regardless of whether the Property is held in a non-Medicaid approved trust, it is not countable because it is a business asset. Appellant submitted a synopsis of her position and accompanying documents (Exhibit 7). Appellant argues that pursuant to 130 CMR 520.008(D), business and non-business property essential to self-support are considered noncountable assets. The Property is a business asset necessary for the spouse's support and is therefore not a countable asset. Therefore, Appellant was never over the asset limit. As such, Appellant is not required to return the asset to the spouse to effect a cure because a cure is not necessary. Finally, the spouse is the sole stockowner as well as an officer of the Corporation (Exhibit 7). Appellant also sent a legal memorandum further clarifying the facts and law (Exhibit 9).

Findings of Fact

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

1. On November 13, 2015, MassHealth received Appellant's application for MassHealth long term care benefits.
2. Appellant entered the nursing facility on July 10, 2015 and seeks October 13, 2015 as the start date of coverage.
3. Appellant is 73 years old and has a spouse living in the community.
4. On March 28, 2016, MassHealth denied the application, having found that Appellant had more countable assets than MassHealth allows. Specifically, MassHealth determined that Appellant's countable assets were \$378,927.00 (\$257,707.00 over the asset limit) (Exhibit 1).

5. Appellant filed a timely appeal on April 13, 2016 (Exhibit 2).
6. At the time of MassHealth's decision, the Property was deeded to Appellant's spouse as trustee of the Trust (Exhibit 9).
7. Per the terms of the Trust, a revocable instrument, Appellant's spouse was beneficiary and trustee (Exhibit 9).
8. The Property is commercial rental property with a tax assessment value of \$264,700.00 (Exhibit 9).
9. The Property provides rental income to Appellant's spouse essential for her self-support.

Analysis and Conclusions of Law

Per 130 CMR 519.006, to qualify for MassHealth Standard coverage as a resident of a long term care facility, a member must meet the following requirements

(A) Eligibility Requirements. Institutionalized individuals may establish eligibility for MassHealth Standard coverage subject to the following requirements. They must

- (1) be younger than 21 years old or 65 years of age or older or, for individuals 21 through 64 years of age meet Title XVI disability standards or be pregnant;
- (2) be determined medically eligible for nursing-facility services by the MassHealth agency or its agent as a condition for payment, in accordance with 130 CMR 456.000: *Nursing Facility*;
- (3) contribute to the cost of care as defined at 130 CMR 520.026: *Long-Term-Care General Income Deductions*;
- (4) have countable assets of \$2,000 or less for an individual and, for married couples where one member of the couple is institutionalized, have assets that are less than or equal to the standards at 130 CMR 520.016(B): *Treatment of a Married Couple's Assets When One Spouse Is Institutionalized*; and
- (5) not have transferred resources for the sole purpose of obtaining MassHealth as described at 130 CMR 520.018: *Transfer of Resources Regardless of Date of Transfer* and 520.019: *Transfer of Resources Occurring on or after August 11, 1993*.

The assets of a married couple where one member is institutionalized are treated as follows:

- (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.
- (B) Treatment of a Married Couple's Assets When One Spouse Is Institutionalized.

(1) Assessment.

(a) Requirement. The MassHealth agency completes an assessment of the total value of a couple's combined countable assets and computes the community spouse's asset allowance as of the date of the beginning of the most recent continuous period of institutionalization of one spouse.

(b) Right to Request an Assessment. When one spouse has entered a medical institution and is expected to remain institutionalized for at least 30 days, either spouse may request the MassHealth agency to make this assessment, even if the institutionalized spouse is not applying for MassHealth Standard at that time. The period of institutionalization must be continuous and expected to last for at least 30 days.

(c) Right to Appeal. The MassHealth agency must give each spouse a copy of the assessment and the documentation used to make such assessment. Each spouse must be notified that he or she has the right to appeal the determination of countable assets and the community spouse's asset allowance when the institutionalized spouse (or authorized representative) applies for MassHealth Standard.

(2) Determination of Eligibility for the Institutionalized Spouse. At the time that the institutionalized spouse applies for MassHealth Standard, the MassHealth agency must determine the couple's current total countable assets, regardless of the form of ownership between the couple, and the amount of assets allowed for the community spouse as follows. The community spouse's asset allowance is not considered available to the institutionalized spouse when determining the institutionalized spouse's eligibility for MassHealth Standard.

(a) Deduct the community spouse's asset allowance, based on countable assets as of the date of the beginning of the most recent continuous period of institutionalization of the institutionalized spouse, from the remaining assets. The community spouse's asset allowance is the greatest of the following amounts:

- (i) the combined total countable assets of the institutionalized spouse and the community spouse, not to exceed \$109,560;
- (ii) a court-ordered amount; or
- (iii) an amount determined after a fair hearing in accordance with 130 CMR 520.017.

130 CMR 520.016.

Regulation 130 CMR 520.007 sets forth the rules regarding what assets MassHealth considers countable and provides the following guidance regarding real estate assets and assets held in trust:

(G) Real Estate.

(1) Real Estate As a Countable Asset. All real estate owned by the individual and the spouse, with the exception of the principal place of residence as described in

130 CMR 520.008(A), is a countable asset. The principal place of residence is subject to allowable limits as described in 130 CMR 520.007(G)(3). **Business or nonbusiness property as described in 130 CMR 520.008(D) is a noncountable asset.**

(2) Nine-Month Exemption. The value of such real estate is exempt for nine calendar months after the date of notice by the MassHealth agency, provided that the individual signs an agreement with the MassHealth agency within 30 days after the date of notice to dispose of the property at fair-market value. The MassHealth agency will extend the nine-month period as long as the individual or the spouse continues to make a good-faith effort to sell, as verified in accordance with 130 CMR 520.007(G)(4).

(3) Fair-Market Value and Equity Value. The fair-market value and equity value of all countable real estate owned by the individual and the spouse must be verified at the time of application and when it affects or may affect eligibility. For applications received on or after January 1, 2006, equity interest in the principal place of residence exceeding \$750,000 renders an individual ineligible for payment of nursing facility and other long-term-care services, unless the spouse of such individual or the individual's child who is younger than 21 years old or who is blind or permanently and totally disabled resides in the individual's home. The allowable equity interest amount will be adjusted annually, beginning in January 2011. The adjustment will be based year-to-year on the percentage increase in the Consumer Price Index.

...

(I) Trusts. The MassHealth agency counts the value of the principal and income of a revocable or irrevocable trust in accordance with 130 CMR 520.021 through 520.024.

(emphasis added).

Per 130 CMR 520.008, noncountable assets are those assets exempt from consideration when determining eligibility, and include the following:

(D) Business and Nonbusiness Property. Business and nonbusiness property essential to self-support and property excluded under an SSA-approved plan for self-support are considered noncountable assets.

Per Exhibits 5 and 8, MassHealth argues that the Trust "is considered to be a countable asset" based on regulations concerning trusts at 130 CMR 520.023 and 520.024.¹ Though Appellant does not dispute that the Trust is revocable and thus would not meet the criteria of a Medicaid-

¹ Though immaterial to the decision, the Trust was established in April 1991, making 130 CMR 520.022 the relevant regulation.

qualifying trust, Appellant asserts that the Trust is not the asset at issue; the Property is the asset. Per 130 CMR 520.007(G) and 520.008(D), the Property is a noncountable asset because it is a business asset essential for the spouse's self-support. MassHealth does not dispute that the Property is a business property essential for Appellant's spouse's self-support, but argues that the spouse does not own the property and therefore the analysis of 130 CMR 520.007(G) and 520.008(D) does not apply.

As the parties do not dispute the facts, the issue presented is whether a real estate asset that is otherwise not countable is rendered countable by virtue of being held in trust. Firstly, 130 CMR 520.008(D) does not state that a business property is only noncountable if it is owned by the applicant or spouse personally, not by a trust. Additionally, the federal Health Care Finance Administration (HCFA)² Transmittal No. 64, Section 3259.6(F) provides guidance on the matter, set forth in pertinent part:

Treatment of Trusts. – How a specific trust is counted for eligibility purposes depends on the characteristics of the trust. The following are the rules for counting various kinds of trusts.

...

F. Placement of Excluded Assets in Trust.--Section 1917(e) of the Act provides that, for trust and transfer purposes, assets include both income and resources. Section 1917(e) of the Act further provides that income has the meaning given the term in §1612 of the Act and resources has the meaning given that term in §1613 of the Act. The only exception is that for institutionalized individuals, the home is not an excluded resource.

Thus, transferring an excluded asset (either income or a resource, with the exception of the home of an institutionalized individual) for less than fair market value does not result in a penalty under the transfer provisions because the excluded asset is not an asset for transfer purposes. **Similarly, placement of an excluded asset in a trust does not change the excluded nature of that asset; it remains excluded.** As noted in the previous paragraph, the only exception is the home of an institutionalized individual. Because §1917(e) of the Act provides that the home is not an excluded resource for institutionalized individuals, placement of the home of an institutionalized individual in a trust results in the home becoming a countable resource.

(emphasis added).

Following the HCFA guidance, an excluded or noncountable asset is not rendered countable simply because it is held in trust. Furthermore, 130 CMR 520.008(D) does not exclude business property

² HCFA is the former name of the Center for Medicare and Medicaid Services ("CMS"), the federal agency tasked with administering the Medicaid program issued guidance

held in trust from consideration of what is noncountable. As such, an asset that is noncountable under 130 CMR 520.008(D) is not made countable by virtue of it being held by a trust that does not otherwise meet Medicaid qualifications.

Here, MassHealth bases its argument that the Property is countable because the Trust does not meet Medicaid qualifications. However, the fact that the Trust is deficient from a Medicaid perspective is immaterial, as MassHealth does not dispute Appellant's assertion that the Property is essential for Appellant's spouse's self-support. The undisputed evidence shows that the Property meets the criteria of a noncountable asset under 130 CMR 520.008(D) and MassHealth erred in counting the value of the Property, \$264,700.00, as part of Appellant's countable assets. As MassHealth incorrectly determined that Appellant's assets exceeded MassHealth's limits by \$257,700.00, this appeal is approved.

Corrected Order for MassHealth

Rescind the March 28, 2016 notice and proceed to determine eligibility.

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.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc: