

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	0906681
<b>Decision Date:</b>	10/7/09	<b>Hearing Date:</b>	05/29/2009
<b>Hearing Officer:</b>	Marc Tonaszuck	<b>Record Open to:</b>	08/07/2009

**Appellant Representative:**

**MassHealth Representative:**  
Brian Boyer



*Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Office of Medicaid  
Board of Hearings  
Two Boylston Street  
Boston, MA 02116*

# APPEAL DECISION

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Long Term Care
<b>Decision Date:</b>	10/7/09	<b>Hearing Date:</b>	05/29/2009
<b>MassHealth Rep.:</b>	Brian Boyer	<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 February 24, 2009, MassHealth denied appellant's application for MassHealth long term care (LTC) benefits due to a disqualifying transfer of assets (see 130 CMR 520.019 and Exhibit 1). The appellant filed this appeal in a timely manner on March 25, 2009 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

## Action Taken by MassHealth

MassHealth denied appellant's application for MassHealth benefits due to a disqualifying transfer of assets, and calculated a period of ineligibility beginning on October 27, 2008 through August 12, 2012 due to disqualifying transfers of \$370,169.61.

## Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.019, in denying appellant's application for MassHealth benefits due to a disqualifying transfer of assets totaling \$370,169.61 and calculating a period of ineligibility beginning on October 27, 2008 through August 12, 2012.

## Summary of Evidence

The MassHealth representative testified that appellant filed an application for LTC benefits on January 13, 2009 (Exhibit 5). Appellant is 91 years of age, a widow and she has no children. She was admitted to the nursing facility on June 26, 2008. She privately paid for nursing care through October 26, 2008. The appellant's sister has two daughters. One of the daughters is under 65 years of age and has been determined to be disabled by the Social Security Administration ("Niece B"). On October 15, 2008, appellant's sister established two trusts, entitled "Investment Trust" and "Home Trust." The sister is the settlor of both trusts and the other niece ("Niece A") is the trustee of both trusts. The Niece B is the beneficiary of both trusts. On October 17, 2008, Niece A, as the appellant's attorney in fact, executed a deed transferring the appellant's real estate to herself as trustee of the Home Trust. Additionally, approximately \$65,000.00 of appellant's money was transferred to the Investment Trust. Because appellant had \$370,169.61 available to pay for her own nursing home expenses, but then transferred the assets to an irrevocable trust, she made a previously available resource no longer available and, as such, they were transfers for less than fair market value and considered disqualifying transfers. Further, the representative argued that the transfers to the trusts are not permissible transfers because they were not made pursuant to a Special Needs Trust, and they were transferred to the niece. Thus, the total amount of disqualifying transfers incurred a period of ineligibility beginning on October 27, 2008, the date appellant was otherwise eligible, until August 12, 2012 (Exhibits 5 - 11).

Counsel representing the appellant's power of attorney<sup>1</sup> appeared at the hearing. They testified that MassHealth's trust regulations state that transfers to a trust for the benefit of any disabled person who is under 65 years of age, is a permissible transfer. Additionally, both the Home Trust and the Investment Trust are trusts 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. As a result, the CMS State Medicaid Manual authorizes transfers, without imposition of period of ineligibility to trusts there the beneficiary is any disabled person under the age of 65. Counsel testified that appellant had assets of less than \$2,000.00 as of October 27, 2008.

The record remained open in this matter until July 7, 2009<sup>2</sup> for appellant's counsel to file a legal memorandum in support of their argument and until August 7, 2009 for

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<sup>1</sup> See Exhibits 2, 4A and 4B.

<sup>2</sup> The record open form that was issued at the hearing provided for a record open period through July 3, 2009 for appellant's counsel to file their memorandum (Exhibit 12). A request for an extension of time was submitted by appellant's counsel and, in the planned absence of the hearing officer, was granted by the Director of the Board of Hearings, to be extended until July 7, 2009 (Exhibit 13).

MassHealth's legal department to reply to appellant's memorandum of law (Exhibits 12 and 13).

On July 7, 2009, appellant's counsel filed their Memorandum requesting that no period of ineligibility be imposed for transfers by the appellant of \$370,169.81, with supporting attachments (Exhibit 14).

On August 7, 2009, MassHealth's Legal Department filed its Memorandum, in which counsel argued that the transfers to the trust were disqualifying transfers because the trusts are not for the sole benefit of the beneficiary (Exhibit 15).

## **Findings of Fact**

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

1. The appellant is 91 years of age, a widow and has no children. She was admitted to a skilled nursing facility on or about June 26, 2008.
2. The appellant privately paid for her nursing care through October 26, 2008.
3. On January 13, 2009, an application for LTC benefits was submitted on the appellant's behalf, requesting an eligibility start date of October 27, 2008.
4. On October 15, 2008, appellant's sister established two trusts, entitled "Investment Trust" and "Home Trust." The sister is the settlor of both trusts and one niece ("Niece A") is the trustee of both trusts. Another niece ("Niece B") is the beneficiary of both trusts.
5. Niece B is under 65 years of age and has been determined to be disabled by the Social Security Administration.
6. On October 17, 2008, Niece A, as the appellant's attorney in fact, executed a deed transferring the appellant's real estate, valued at \$304,500.00 to herself as trustee of the Home Trust. Additionally, \$65,669.61 of appellant's money was transferred to the Investment Trust.
7. A total of \$370,369.61 in resources was transferred to the two trusts.
8. Neither trust addresses the life expectancy of the beneficiary, Niece B.
9. The provisions of both trusts are substantially the same.
10. According to Article 5.1 of both trusts, "All funding of this trust from [Appellant]

shall be allocated as follows one-half of the value to the KMJ share and on-half of the value to the DAF share... During the life of [Niece A], all distributions to or for the benefit of [Niece A] shall first reduce the value of the KMJ share. Only once the KMJ share value is depleted shall distribution to or for the benefit of [Niece A] reduce the value of the DAF share.”

11. DAF are the initials of Niece A and KMJ are the initials of Niece B.
12. According to Article 5.1(b)(1) of both trusts, during Niece A’s life, “The trustee may pay to or for the benefit of [Niece A], or hold or acquire assets for her use using as much or as little, even as little as none, of the Trust property as the Trustee chooses in the Trustee’s sole, absolute, unfettered, and non reviewable discretion...”
13. According to Article 5.1(c) of both trusts, upon the death of Niece B, the trusts will terminate and the trust property may be distributed to the descendants of Niece B, to Niece A, or to the descendants of Niece A.
14. On February 24, 2008, MassHealth denied appellant's application for MassHealth benefits due to a disqualifying transfer of assets, and calculated a period of ineligibility beginning on October 27, 2009 through August 12, 2012 due to disqualifying transfers of \$370,169.61.
15. The average daily rate for private nursing facility care is \$267.00.

## **Analysis and Conclusions of Law**

At issue in this appeal is whether MassHealth correctly determined that disqualifying transfers took place when the appellant transferred a total of \$370,369.61 in resources to two trusts. The same beneficiary of both trusts is one of the appellant’s nieces, who is under 65 years of age and has been determined to be disabled. The transfers took place in or about October 2008, within the look-back period (see 130 CMR 520.019).

Both MassHealth and the appellant’s counsel refer to MassHealth regulations and the Department of Health and Human Services Health Care Financing Administration Transmittal No. 64, dated November 1994 (Transmittal #64) in their analyses, with both parties coming to different conclusions as to whether the transfers are disqualifying.

Regulations at 130 CMR 520.019(C) address disqualifying transfer of resources, as follows:

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.

Regulations at 130 CMR 520.019 address permissible transfers of assets as they pertain to the instant matter.

(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.

...  
(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...*

*(Emphasis added.)*

Transmittal #64 goes into a detailed explanation of the phrase “for the sole benefit” as follows:

6. For the Sole Benefit of -- A transfer is considered to be for the sole benefit of a spouse, blind or disabled child, or a disabled individual *if the transfer is arranged in such a way that no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.*

Similarly, a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual if the trust benefits no one but that individual, whether at the time the trust is established or any time

in the future. However, the trust may provide for reasonable compensation, as defined by the State, for a trustee or trustees to manage the trust, as well as for reasonable costs associated with investing or otherwise managing the funds or property in the trust. In defining what is reasonable compensation, consider the amount of time and effort involved in managing a trust of the size involved, as well as the prevailing rate of compensation, if any, for managing a trust of similar size and complexity.

A transfer, transfer instrument, or trust that provides for funds or property to pass to a beneficiary who is not the spouse, blind or disabled child, or disabled individual is not considered to be established for the sole benefit of one of these individuals. In order for a transfer or trust to be considered to be for the sole benefit of one of these individuals, *the instrument or document must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.*

An exception to this requirement exists for trusts discussed in §3259.7. Under these exceptions, the trust instrument must provide that any funds remaining in the trust upon the death of the individual must go to the State, up to the amount of Medicaid benefits paid on the individual's behalf. When these exceptions require that the trust be for the sole benefit of an individual, the restriction discussed in the previous paragraph does not apply when the trust instrument designates the State as the recipient of funds from the trust. Also, the trust may provide for disbursement of funds to other beneficiaries, provided the trust does not permit such disbursements until the State's claim is satisfied. Finally, "pooled" trusts may provide that the trust can retain a certain percentage of the funds in the trust account upon the death of the beneficiary.

*(Emphasis added.)*

By transferring \$370,369.61 to the two trusts, the appellant made formerly available assets no longer available. Additionally, because the appellant received nothing in return, the exchange was for less than fair market value. Unless the transfers meet the regulatory requirement of a permissible transfer, then they are disqualifying transfers.

According to Article 5.1 of both trusts, "All funding of this trust from [Appellant] shall be allocated as follows one-half of the value to the KMJ share and on-half of the value to the DAF share... During the life of [Niece A], all distributions to or for the benefit of [Niece A] shall first reduce the value of the KMJ share. Only once the KMJ share value is depleted

shall distribution to or for the benefit of [Niece A] reduce the value of the DAF share.” DAF are the initials of Niece A and KMJ are the initials of Niece B.

According to Article 5.1(b)(1) of both trusts, during Niece A’s life, “The trustee may pay to or for the benefit of [Niece A], or hold or acquire assets for her use using as much or as little, even as little as none, of the Trust property as the Trustee chooses in the Trustee’s sole, absolute, unfettered, and non reviewable discretion...”

According to Article 5.1(c) of both trusts, upon the death of Niece B, the trusts will terminate and the trust property may be distributed to the descendants of Niece B, to Niece A, or to the descendants of Niece A.

MassHealth argues, and I agree, that because the trustee of the two trusts has the power, pursuant to the above articles, to pay Niece B “as little as none” of the trust property during her lifetime; and because, upon the death of Niece B, any remaining trust property can potentially be distributed to Niece B’s descendants, Niece A, or Niece A’s descendants, that the transfers to the trusts were not “arranged in such a way that no individual or entity except the ... disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.”

Further, I agree with MassHealth’s counsel that the trusts contain no provision that provides for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. Thus, the trusts are not for the sole benefit of Niece B, and therefore, the transfers to the trusts do not fall within the definition of permissible transfers listed in regulations at 130 CMR 520.019. The total amount of the transfers to the trusts (\$370,169.61) is a disqualifying transfer that will incur a period of ineligibility.<sup>3</sup>

This appeal is denied.

## **Order for MassHealth**

None.

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<sup>3</sup> The appellant did not contest the MassHealth calculations of the length of time and start date of the period of ineligibility.

## **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.

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Marc Tonaszuck  
Hearing Officer  
Board of Hearings

cc: MassHealth Representative: Maryellen Sullivan