

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1105892
Decision Date:	9/27/11	Hearing Date:	07/06/2011
Hearing Officer:	Sara E. McGrath	Record Open to:	09/12/2011

Appellant Representative:

MassHealth Representative:
Patrick Devlin



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

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Eligibility
Decision Date:	9/27/11	Hearing Date:	07/06/2011
MassHealth Rep.:	Patrick Devlin	Appellant Rep.:	
Hearing Location:	Tewksbury MassHealth Enrollment Center	Aid Pending:	No

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 28, 2011, MassHealth denied the appellant's application for MassHealth benefits because MassHealth determined that the appellant's transfer of assets to a trust was a disqualifying transfer. (130 CMR 520.019; 130 CMR 520.016(B); Exhibit 1). The appellant filed this appeal in a timely manner on March 9, 2011. (130 CMR 610.015(B); Exhibit 2; Exhibit 3). Denial of assistance is valid grounds for appeal. (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth because MassHealth determined that the appellant's transfer of assets to a trust was a disqualifying transfer.

Issue

Whether MassHealth was correct in determining that the transfer made by the appellant was a disqualifying transfer?

Summary of Evidence

The MassHealth representative, from the Tewksbury MassHealth Enrollment Center, testified that MassHealth received an application for long-term care benefits on November 30, 2010. The appellant was represented by an attorney who appeared via telephone. MassHealth submitted a brief from their legal division which was incorporated into the record as Exhibit 3. The appellant is an over 65-year old woman who resides in a skilled nursing facility. The appellant is seeking MassHealth coverage to begin on August 14, 2010. On November 14, 2010, the appellant established a supplemental needs trust naming her disabled grandson as the beneficiary. The appellant transferred \$245,966.00 into the trust. On February 28, 2011, MassHealth denied the appellant's application for MassHealth long-term care benefits because it determined that this transfer was a disqualifying transfer. MassHealth calculated a penalty period from November 24, 2010 to May 9, 2013. (Exhibit 1).

MassHealth argues in its memorandum of law that the transfer to this trust is not permissible under the applicable regulations because it is not for the sole benefit of the appellant's grandson, citing the State Medicaid Manual, Health care Financing Administration Pub. 45-3, Transmittal 64 ("HCFA 64"). (Exhibit 3, p. 4). Specifically, MassHealth argues that the appellant has not established the actuarial soundness of the trust. MassHealth argues that if the trust pays the appellant's grandson on schedule such that the trust assets would be depleted during the grandson's lifetime, this would jeopardize the grandson's SSI eligibility and would thus violate the purpose of the trust, which is to supplement government benefits, not supplant them. Further, MassHealth argues that the trustee has sole discretion with regard to trust distributions, and could impliedly choose not to distribute any funds at all during the grandson's lifetime. This would mean that the contingent beneficiaries would benefit from the trust by receiving all of the trust funds, and therefore it would not be "for the sole benefit" of appellant's grandson. (Exhibit 3).

The appellant's attorney requested that the record be kept open until August 3, 2011 for the submission of a post-hearing memorandum of law. The hearing officer agreed, and the attorney submitted documentation in a timely manner. (Exhibits 5 and 6). Post-hearing, appellant's attorney submitted a memorandum of law which has been incorporated into the record as Exhibit 6. The attorney argues that the trustee must make mandatory distributions to or for the beneficiary that are actuarially sound. These distributions will not necessarily affect the grandson's SSI eligibility because the trustee is allowed to make payments "in-kind." Further, the trust provides that the State, up to the amount of Medicaid benefits paid on the individual's behalf, is the sole beneficiary after the death of the grandson, thereby satisfying the exception to the actuarially sound requirements of a sole benefit trust. (Exhibit 6). On August 11, 2011, MassHealth's legal division submitted a second memorandum of law.¹

In its memorandum, MassHealth argues that the transfer to the appellant's grandson is not permissible because the grandson is not the applicant, member, spouse, or any person, court or

¹ I note here that the record had officially closed on August 3, 2011, and the hearing officer did not receive an extension request from MassHealth. Nonetheless, I will accept this untimely MassHealth submission.

administrative body with legal authority to act on behalf of applicant, member or spouse. MassHealth argues that the MassHealth agency's use of the term "person" utilized in 130 CMR 520.019(D)(4) is not consistent with the federal statute or any sub-regulatory guidance which uses the term "individual," which MassHealth defines as the applicant, member, spouse, or any person, court or administrative body with legal authority to act on behalf of applicant, member or spouse. MassHealth argues that for the transfer to the trust to be permissible, the transfer would have had to have been to the appellant, the appellant's spouse, or the appellant's blind or disabled child. (Exhibit 8).

On August 17, 2011, the appellant's attorney requested that the hearing officer re-open the record pursuant to 130 CMR 610.081 so as to respond to the new arguments set forth in the August 11, 2011 MassHealth submission. (Exhibit 9). The hearing officer agreed to this request, and left the record open until September 12, 2011. (Exhibit 11). In the interim, on August 25, 2011, MassHealth's legal division submitted a copy of Savage v. Director of the Office of Medicaid, Worcester Super. No. 10-02298-A (August 17, 2011) (Lemire, J.). (Exhibit 10).

On September 12, 2011, the appellant's attorney submitted a memorandum. (Exhibit 12). He argues that federal Medicaid law permits transfer to a trust for the sole benefit of an individual under 65 years of age who is not the applicant, applicant's spouse, or applicant's child. He argues that MassHealth's position that the word "individual" in the federal statute only refers to the applicant, spouse, or child is unsupported by federal law. With reference to the Savage decision submitted by MassHealth, appellant's attorney argues that the Court took no issue with the fact that the transfer in that case was to a trust for the sole benefit of the applicant's disabled niece. (Exhibit 10). He states that the Savage decision should not carry any weight, as the facts are distinguishable. In that case, the trustee was not mandated to make distributions to the beneficiary. (Exhibit 12).

Findings of Fact

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

1. The appellant applied for long-term care benefits on November 30, 2010.
2. The appellant requested a start date of August 14, 2010.
3. On November 14, 2010, the appellant created a trust.
4. The sole beneficiary for the trust was the appellant's grandson.
5. The individual named as the beneficiary was a disabled adult under the age of 65.
6. The trust is an irrevocable trust giving the trustee the authority to distribute equal income and principal payments from the trust to the beneficiary over the beneficiary's lifetime with reference to the period life tables issued by the Social Security Administration. (Exhibit 3).

Analysis and Conclusions of Law

MassHealth administers and is responsible for the delivery of health-care services to MassHealth members. (130 CMR 515.002). The regulations governing MassHealth at 130 CMR 515.000 through 522.000 (referred to as Volume II) provide the requirements for non-institutionalized persons aged 65 or older, institutionalized persons of any age, persons who would be institutionalized without community-based services, as defined by Title XIX of the Social Security Act and authorized by M.G.L. c. 118E, and certain Medicare beneficiaries. (130 CMR 515.002). The appellant in this case is an institutionalized person. Therefore, the regulations at 130 CMR 515.000 through 522.000 apply. (130 CMR 515.002).

MassHealth considers any transfer during the appropriate look-back period by the nursing facility resident of a resource or interest in a resource, owned by or available to the nursing-facility resident 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). (130 CMR 520.019(C)). 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)).

Pursuant to 130 CMR 520.019(D), MassHealth considers the following transfers permissible. Additionally, transfers of resources made for the sole benefit of a particular person must be in accordance with federal law. (130 CMR 520.019(D)).

- (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.
- (7) The resources were transferred to a separately identifiable burial account, burial arrangement, or a similar device for the nursing-facility resident or the spouse in accordance with 130 CMR 520.008(F).

I find that the trust at issue here is a special-needs trust, and thus falls within the provisions of 130 CMR 520.019(D)(4)). A special-needs trust is defined as follows:

A special-needs trust is one that meets all the following criteria as determined by the MassHealth agency.

- (1) The trust was created for a disabled individual under the age of 65.
- (2) The trust was created for the sole benefit of the individual by the individual's parent, grandparent, legal guardian, or a court.
- (3) The trust provides that the Commonwealth of Massachusetts will receive amounts remaining in the account upon the death of the individual up to the amount paid by the MassHealth agency for services to the individual.
- (4) When the member has lived in more than one state, the trust must provide that the funds remaining upon the death of the member are distributed to each state in which the member received Medicaid based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on the member's behalf.

(130 CMR 515.001)

The trust here was created for the sole benefit of a disabled individual under the age of 65 by his grandparent, and provides that that the Commonwealth of Massachusetts will receive amounts remaining in the account upon the death of the individual up to the amount paid by the MassHealth agency for services to the individual. (Exhibit 3).

I agree with the appellant's attorney that the regulations do not specifically define the permanently and totally disabled "person" as the applicant, spouse or child. (130 CMR 520.019(D)(4)). In fact, in other parts of the same provision, the nursing facility resident (applicant), spouse, child or sibling

are specifically and separately referenced, which would be unnecessary if I accepted the MassHealth argument regarding the definition of “person.” (130 CMR 520.019(D)(4)). Additionally, the regulations governing MassHealth have definitions for special-needs trusts, pooled trusts, and trusts. (130 CMR 515.001).

130 CMR 520.019(D)(4) also requires that the trust be created for the sole benefit of the disabled person. MassHealth argues that the trustee in this case has sole discretion with regard to trust distributions, and could impliedly choose not to distribute any funds at all during the grandson’s lifetime. This would mean that the contingent beneficiaries would benefit from the trust by receiving all of the trust funds, and therefore it would not be “for the sole benefit” of appellant’s grandson. (Exhibit 3). I disagree. HCFA 64 sets forth the requirements of a sole benefit trust pursuant to federal law. The relevant language states as follows:

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.

(State Medicaid Manual , section 3257(B)(6) cited in Exhibit 6).

I agree with the appellant's attorney's position that the trust meets the requirements of HCFA 64 as a sole benefit trust. The trust contains express and specific language that provides for the spending of funds for the beneficiary on a basis that is actuarially sound based upon his life expectancy. Article 7.2 of the trust, regarding mandatory distributions, states that the trustee "shall distribute to the Beneficiary or use in the Beneficiary's behalf principal and income on a basis that is considered an actuarially sound manner based on the Beneficiary's life expectancy." (Exhibit 4, p. 4). The trust further explains how the trustee shall calculate the life expectancy of the beneficiary, which references Social Security Administration tables referred to in 42 U.S.C. section 1396. The trustee has no discretion to withhold payments to or for the benefit of the beneficiary. MassHealth argues that these distributions are not mandatory, and therefore not actuarially sound, because Article 7.3 of the trust provides discretionary language. However, Article 7.3 refers to discretionary distributions to the beneficiary that are above and beyond any mandatory distributions. (Exhibit 4, pp. 4-5).

Further, I do not agree with MassHealth that the trustee may elect to withhold distributions, because distributions would jeopardize the grandson's SSI eligibility, thus violating the purpose of the trust to supplement government benefits, not supplant them. Here, the trustee is permitted to make payments to the beneficiary "in-kind." The appellant's attorney argues that these type of payments will not affect the grandson's SSI eligibility, and this statement was not disputed by MassHealth. Further, Article 7.4 of the trust provides that the trustee may cause a limited benefit reduction in public program benefits if to do so would enhance the beneficiary's standard of living. (Exhibit 4, p. 5).²

I conclude that the November 14, 2010 transfer to the trust was permissible pursuant to 130 CMR 520.019(D)(4)). This appeal is APPROVED.

Order for MassHealth

Rescind notice dated February 28, 2011. Determine the appellant's eligibility for MassHealth without considering the transfer to a trust as a disqualifying transfer.

² HCFA provides an exception to the actuarially sound requirement which the trust designates the Commonwealth as the recipient of funds from the trust upon the death of the beneficiary. Appellant's attorney argues that Article 10 of the trust at issue here contains this "pay back" provision. (Exhibit 3, p. 8). In light of my conclusion that trust is actuarially sound, I find I need not reach this issue.

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.

Sara E. McGrath
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Dorothy Zamora, Appeals Coordinator, Tewksbury MassHealth Enrollment Center