

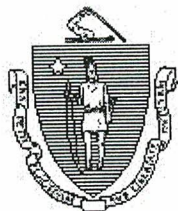
# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Approved in part; Remand	<b>Appeal Number:</b>	1804277
<b>Decision Date:</b>	4/20/18	<b>Hearing Date:</b>	03/06/2018
<b>Hearing Officer:</b>	Paul C. Moore	<b>Record Closed:</b>	04/06/2018

**Appellant Representative:**

**MassHealth Representative:**  
Yisell Medina



*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>	Approved in part; Remand	<b>Issue:</b>	Revising a Trust; Eligibility Start-Date
<b>Decision Date:</b>	4/20/18	<b>Hearing Date:</b>	03/06/2018
<b>MassHealth Rep.:</b>	Yisell Medina	<b>Appellant Rep.:</b>	
<b>Hearing Location:</b>	Taunton MassHealth Enrollment Center		

## Authority

This hearing was conducted pursuant to Massachusetts General Laws (“G.L.”) Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

## Jurisdiction

Through a notice dated December 28, 2017, MassHealth notified the appellant that she is not eligible for MassHealth long-term care services because she did not submit all verifications needed to decide her eligibility (Ex. 1). In addition, the notice apprised the appellant that she is not eligible for community-based MassHealth services because she has more countable assets than program limits allow (*Id.*). The appellant timely appealed this notice to the Board of Hearings (BOH) on January 29, 2018 (130 CMR 610.015(B); Ex. 2). Denial of assistance is valid grounds for appeal to the BOH (130 CMR 610.032).

## Action Taken by MassHealth

MassHealth determined that the appellant does not qualify for long-term care coverage or for community-based services due to excess assets.

## Issue

The appeal issue is whether MassHealth correctly determined that the appellant does not qualify for MassHealth benefits.

## Summary of Evidence

The MassHealth representative from the Taunton MassHealth Enrollment Center testified that the appellant, who is over 65 years of age and unmarried, submitted an application for MassHealth long-term care services on July 25, 2017. The appellant is a resident of a nursing facility, and is seeking MassHealth coverage for her stay beginning April 4, 2017 (Testimony, Ex. 5). The MassHealth representative testified that the appellant's application was originally denied for missing verifications, adding that the appellant appealed that denial, an appeal was held, and MassHealth agreed to honor the appellant's July, 2017 application. MassHealth learned that the appellant was the settlor and beneficiary of a trust created in 2009, the M.W. Irrevocable Trust ("the trust"), which it deemed countable to the appellant. A copy of the trust was submitted into evidence. MassHealth received a listing of trust assets from the co-trustee, E.W., contained in two brokerage accounts and one bank account, and MassHealth subsequently sent the over-assets notice at issue in this appeal.<sup>1</sup> The trust assets are valued at \$368,147.85, according to MassHealth, and the appellant also has a bank account at Bank of America with a current balance of \$695.53, which, when added, yields total assets of \$368,843.38. Because the appellant is allowed to keep \$2,000.00 to qualify for MassHealth, the appellant has excess assets of \$366,843.38, according to MassHealth (Testimony, Ex. 1).

The December 28, 2017 notice apprised the appellant that if she reduced assets within thirty days of the date of the notice, she may be eligible for MassHealth (Ex. 1).<sup>2</sup>

The appellant was represented at hearing by an attorney. He testified that under the terms of the trust, the co-trustees may pay trust principal to the appellant, so the appellant agrees with MassHealth that the trust assets are countable to her. However, he asserted that the appellant "cured" the trust by using a portion of the trust assets to purchase an irrevocable, pre-paid burial and funeral arrangement for the appellant with a total value of \$8,475.00, and by using the balance of the trust assets to fund a non-countable, charitable pooled trust account for the appellant, in the total amount of \$355,894.19. In support of the appellant's argument, the attorney produced an irrevocable pre-need funeral contract dated February 28, 2018, with a list of goods and services, entered into between the appellant's attorney-in-fact, E.W., and a funeral director (Ex. 7). In addition, the appellant's attorney submitted a copy of a notarized Instrument of Trust Assignment executed on February 7, 2018, signed by E.W. and D.W., the president of Planned Lifetime Assistance Network of Massachusetts and Rhode Island, Inc., a pooled trust ("PLAN") (Ex. 8). Further, the attorney produced copies of checks from the trust account at Needham Bank, payable to Webster Bank on behalf of PLAN; the first check is dated February 8, 2018 in the amount of \$100,000.00, and the second check is dated February 28, 2018 in the amount of \$255,894.19 (Exs. 9 and 10). The attorney represented that the value of the assets in the trust is now zero.

At hearing, there was no dispute that the appellant is disabled, and that she has no expectation of

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<sup>1</sup> Initials are used to protect confidentiality.

<sup>2</sup> The MassHealth notice refers to an application for long-term care services dated 12/13/17 (Ex. 1). However, testimony from MassHealth at hearing indicates that the operative application date is July 25, 2017.

returning to her home (Testimony).

Among other things, the Instrument of Trust Assignment provides, at Article 1, that PLAN is a Massachusetts nonprofit corporation and, at Article 4, that upon the appellant's death, the Commonwealth will be repaid "an amount equal to the total medical assistance paid on [the appellant's] behalf under the Massachusetts state plan or such other state plan under Title XIX of the Social Security Act" (Ex. 8).

Because the MassHealth representative had not yet reviewed the documents produced by the appellant's attorney at hearing, the hearing officer agreed to keep the record of this appeal open until March 20, 2018 for her to do so, and to respond whether assets have been reduced to \$2,000.00 or less, and if so, as of what date. Further, the hearing officer agreed to afford the appellant's attorney an opportunity to respond in writing on or before April 3, 2018 to MassHealth's determination regarding the date assets were reduced (Ex. 11).

On March 20, 2018, the hearing officer received an electronic mail (e-mail) correspondence from the MassHealth representative, stating: "I have reviewed the documents received and further information is needed. What I received does not fully verify that all funds from the countable trust have been reduced therefor (*sic*) cannot be determined that applicant meets the asset limit (\$2000) for a Nursing home member. I have reached out to [the appellant's attorney] letting him know what other documents are needed and that per the 'record open' agreement he has until on or before 4/3/2018 to respond" (Ex. 12).

On or about April 2, 2018, the hearing officer received correspondence and additional documents from the appellant's attorney, purporting to show the appellant's funding of her PLAN pooled trust account via a series of checks from the trust bank account, including a check in the amount of \$8,484.00 on March 21, 2018; that the balance as of March 21, 2018 for all trust accounts is currently zero; that E.W., who is a co-trustee, reimbursed himself from the trust bank account in the sum of \$900.00 on 2/20/2018, purportedly representing amounts he personally paid over three years for the appellant's cell phone service; and that E.W. paid himself a trustee fee of \$1,170.00 from the trust account on 2/20/2018, asserting, "[t]here has been considerable administrative work for trust over the past few months so E.W. has taken this modest fee for his time" (Ex. 13).<sup>3</sup> Other transfers from the trust account in January and February, 2018 included payments of legal fees (\$3,000.00); accountant fees (\$1,150.00); care manager fees (\$2,500.00, \$8,842.50, and \$1,000.00, respectively); and a payment to a co-trustee, B.W. (\$245.37). (*Id.*, Tab 3). The appellant's attorney's correspondence also states, "[i]t is our understanding that we have provided all verifications requested to show that the [trust] has been 'cured' pursuant to 130 CMR 520.019(K)(1)(b) and that all trust assets have been spent down or transferred to [PLAN]. Consequently, [the appellant] is eligible for MassHealth benefits as of April 1, 2017" (*Id.*).<sup>4</sup>

On or about April 3, 2018, the MassHealth representative sent the hearing officer an e-mail,

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<sup>3</sup> There is no language in the trust specifically authorizing an administrative fee or fees for the co-trustees.

<sup>4</sup> The additional documents show that as of February 28, 2018, the trust contained \$9.04 in one brokerage account (Ex. 13).

stating, "I have received from the Appellant rep. enough documentation on this appeal/case to show assets have been reduced. A new determination will be made" (Ex. 14).

In response to an e-mail inquiry from the hearing officer, the MassHealth representative indicated that MassHealth believes the appellant's assets were reduced as of 2/28/2018, which would be the appellant's coverage start-date (Ex. 15).

By e-mail dated April 3, 2018, in response to MassHealth, the appellant's attorney argued, "it is our position that MassHealth eligibility should be retroactive to the original application date because the [trust] has been 'cured' pursuant to 130 CMR 520.019(K)(1)(b) and that all trust assets have been spent down or transferred to [PLAN]. Consequently, [the appellant] should be eligible for MassHealth benefits as of the date requested on the initial application" (Ex. 16).

By e-mail dated April 3, 2018, the hearing officer asked the appellant's attorney and the MassHealth representative whether they agree that the correct regulation applicable to this proceeding is 130 CMR 520.019(K)(2), because MassHealth has already issued a notice of ineligibility to the appellant (Ex. 17).<sup>5</sup> In response to this e-mail from the hearing officer, the appellant's attorney argued via e-mail as follows: "It is our position that, if an appeal is filed, the notice of the period of ineligibility is stayed until the appeal decision is issued. Thus the appeal decision would begin the 60 day clock at that time, rather than upon the receipt of a denial notice. Any other reading of the regulation, would deny applicants the opportunity to an appeal at which they could make their case that a trust is noncountable. It would be a choice of either having the right to appeal or to cure. In this case, the trigger date should be the date of the hearing at which time we stipulated to the trust being countable. As the trust has been cured within 60 days of the stipulation, the original eligibility date should be used. . . . In the alternative, we would argue that we did not receive the notice until the week following the date on the notice and therefore it was cured within the 60 days. Lastly, if you do not agree with these positions, the appeal should be treated the same as a reapplication and benefits should be awarded back to November 1, 2017" (Ex. 18).

Finally, on April 6, 2018, the hearing officer received an e-mail from the MassHealth

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<sup>5</sup> 130 CMR 520.019(K)(2) states in relevant part: "After the issuance of the notice of the period of ineligibility, the nursing-facility resident may avoid imposition of the period of ineligibility in the following instances.

(a) Revising a Trust. If the nursing-facility resident revises a trust to comply with the criteria of a special-needs trust or a pooled trust as defined in 130 CMR 515.001: *Definition of Terms* and exempted in 130 CMR 520.019(D), the MassHealth agency will rescind the period of ineligibility as follows.

(i) The MassHealth agency will use the original application date if within 60 days after the date of the notice of the period of ineligibility, the nursing-facility resident provides proof that the trust has been revised to comply with the criteria of a special-needs trust or a pooled trust. The MassHealth agency may extend the original 60-day period for an additional 120 days, if court action is required to revise the trust, as long as the court action is filed within the 60-day period after the date of the notice of the period of ineligibility.

(ii) If after the 60th day after the date of the notice of the period of ineligibility, the nursing-facility resident provides proof that the trust has been revised to comply with the criteria of a special-needs trust or a pooled trust, the MassHealth agency will consider the trust revised as of the date the trust has been both revised and notarized."

representative, which was copied to the appellant's attorney, stating in relevant part: "In this case MassHealth does reconsider the original application date including the 3 months retro period (since appeals were timely filed) to determine what possible start date of benefit it would give using asset totals from those dates. I start my calculations with the farther date I can, [in] this case is 4/1/2017, calculation of total assets at that time (excess assets) give a future eligibility date of 11/8/2019. Then I calculate when the next significant amount of funds were spend down this date is 2/8/2018 when check for \$100,000 is written for the . . . pooled trust, calculation of total assets at that time (excess assets) give a future eligibility date of 2/22/2020. Then the following significant amount of funds spend down were on 2/28/2018 when check \$255,894.19 written for the . . . pooled trust, calculation of total assets at that time gives eligibility date of 2/28/2018 which is the best date for the applicant to begin benefits in comparison to the other dates previously mentioned. Therefore MassHealth will give 2/28/2018 as the benefit start date. An appeal may be filed once an approval is issued if in disagreement of benefit start date" (Ex. 19).

## Findings of Fact

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

1. The appellant is over 65 years of age, unmarried, and disabled, and resides in a nursing facility (Testimony).
2. On July 25, 2017, the appellant filed an application for MassHealth long-term care coverage (Testimony, Ex. 5).
3. The appellant is seeking MassHealth coverage for her stay beginning April 4, 2017 (Testimony, Ex. 5).
4. The appellant's application was originally denied for missing verifications, and she filed a timely appeal, as a result of which MassHealth agreed to honor the appellant's July, 2017 application (Testimony, Ex. 5).
5. The appellant was the settlor and beneficiary of a trust created in 2009, the M.W. Irrevocable Trust ("the trust"), which MassHealth deemed countable to the appellant (Testimony, Ex. 6).
6. MassHealth received a listing of trust assets from the trustee, contained in two brokerage accounts and one bank account, which MassHealth valued at \$368,147.85. The appellant also has a bank account at Bank of America that contained \$695.53 (Testimony, Ex. 1).
7. By notice dated December 28, 2017, MassHealth informed the appellant that she was not eligible for MassHealth due to excess countable assets of \$366,843.38 (Ex. 1).
8. The appellant filed a timely appeal of this notice with the BOH (Ex. 2).

9. On February 28, 2018, the appellant's attorney-in-fact entered into an irrevocable pre-need funeral contract with a funeral home, and a list of goods and services reflects that its total value is \$8,475.00, which was funded from trust assets (Ex. 7, Ex. 13).
10. The appellant transferred assets from the trust to a pooled trust account in her name, and a notarized Instrument of Trust Assignment was executed on February 7, 2018, signed by the appellant's attorney-in-fact, E.W., and D.W., the president of Planned Lifetime Assistance Network of Massachusetts and Rhode Island, Inc. ("PLAN") (Ex. 8).
11. The appellant funded her pooled trust account via a series of checks paid by the co-trustee to Webster Bank on behalf of PLAN, as follows: \$100,000 on February 8, 2018; \$255,894.19 on February 28, 2018; and \$8,484.00 on March 21, 2018 (Testimony, Exs. 9, 10, and 13).
12. The pooled trust Instrument of Trust Assignment provides, at Article 1, that PLAN is a Massachusetts nonprofit corporation and, at Article 4, that upon the appellant's death, the Commonwealth will be repaid "an amount equal to the total medical assistance paid on [the appellant's] behalf under the Massachusetts state plan or such other state plan under Title XIX of the Social Security Act" (Ex. 8).
13. E.W. a co-trustee, reimbursed himself from the trust bank account in the sum of \$900.00 on 2/20/2018, purportedly representing amounts he personally paid over three years for the appellant's cell phone service; and also paid himself a trustee fee of \$1,170.00 on 2/20/18 for "considerable administrative work for trust over the past few months" (Ex. 13).
14. Other transfers from the trust account in January and February, 2018 included payments of legal fees (\$3,000.00); accountant fees (\$1,150.00); care manager fees (\$2,500.00, \$8,842.50, and \$1,000.00, respectively); and a payment to a co-trustee, B.W. (\$245.37). (Ex. 13, Tab 3).
15. Following the appeal hearing, during a record-open period, MassHealth determined that the appellant is eligible for long-term care coverage effective 2/28/2018 (Ex. 15, Ex. 19).
16. As of February 28, 2018, the trust assets were as follows: (1) bank account zero; (2) first brokerage account zero; (2) second brokerage account \$9.04 (Ex. 13).

## **Analysis and Conclusions of Law**

MassHealth regulation 130 CMR 520.003(A) states that in order to qualify for MassHealth Standard to cover a nursing home stay, the total value of countable assets owned by or available to an unmarried individual may not exceed \$2,000.00.

MassHealth regulation 130 CMR 520.023, governing Trusts or Similar Legal Devices Created on

or after August 11, 1993, states in relevant part:

The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will. Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual.

...

(C) Irrevocable Trusts.

(1) Portion Payable.

**(a) Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset.**

(b) Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income.

(c) Payments from the income or from the principal of an irrevocable trust made to another and not to or for the benefit of the nursing-facility resident are considered transfers of resources for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(d) The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).

(2) Portion Not Payable. Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could not be paid under any circumstances to or for the benefit of the nursing-facility resident will be considered a transfer for less than fair-market value and treated in accordance with the transfer rules at 130 CMR 520.019(G).

(D) Exemptions to the Trust Rules.

**(1) Special-Needs Trusts and Pooled Trusts. Under federal trust exemption regulations at 42 U.S.C. 1396(p)(d)(4) special-needs trusts and pooled trusts as defined in 130 CMR 515.001: *Definition of Terms* are not subject to the income and asset countability rules at 130 CMR 520.023(B) and (C).**

**(2) Revision of a Trust to Comply with the Criteria of a Special-Needs or Pooled Trust. The MassHealth agency will not deny or terminate MassHealth due to excess assets if a trust is revised to comply with the criteria of a special-needs trust or a pooled trust in accordance with the rules at 130 CMR 520.019(J).**

(3) Burial Trust. A burial trust is a trust established to pay solely for various funeral and burial expenses of the individual or the spouse. An irrevocable burial trust meeting the criteria of 130 CMR 520.008(F) is not a countable asset.

MassHealth regulation 130 CMR 515.001 defines "pooled trust" as a trust that meets all the following criteria as determined by the MassHealth agency:



- (1) The trust was created by a nonprofit organization.
- (2) A separate account is maintained for each beneficiary of the trust, but the assets of the trust are pooled for investment and management purposes.
- (3) The account in a pooled trust was created for the sole benefit of the individual by the individual, the individual's parents or grandparents, or by a legal guardian or court acting on behalf of the individual.
- (4) 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. The trust may retain reasonable and appropriate amounts as determined by the MassHealth agency.
- (5) The individual was disabled at the time his or her account in the pool was created.

The parties agree that the trust assets in the instant appeal are countable to the appellant. However, the evidence shows that after the date of the notice of MassHealth ineligibility (December 28, 2017) and prior to the appeal hearing, the appellant transferred assets out of trust for a number of purposes, including to fund a pre-paid, irrevocable burial arrangement, and to fund a pooled trust account in her name.

MassHealth regulation 130 CMR 520.008(F) states in relevant part:

Funeral or Burial Arrangements.

- (1) The following funeral or burial arrangements for the applicant, member, or spouse are considered noncountable assets:
  - (a) any burial space, including any burial space for any immediate family member;
  - (b) one of the following:
    - (i) a separately identifiable amount not to exceed \$1,500 expressly reserved for funeral and burial expenses; or
    - (ii) life-insurance policies designated exclusively for funeral and burial expenses with a total face value not to exceed \$1,500;
  - (c) the cash-surrender value of burial insurance; and
  - (d) prepaid irrevocable burial contracts or irrevocable trust accounts designated for funeral and burial expense.**
- (2) Appreciated value or interest earned or accrued and left to accumulate on any contracts, accounts, or life insurance is also noncountable. If the applicant, member, or spouse uses any of these assets, including the interest accrued, for other than funeral or burial arrangements of the applicant, member, or spouse, the MassHealth agency considers the asset available and countable under the provisions of 130 CMR 520.007, 520.018, and 520.019.
- (3) The applicant, member, or spouse has the right to establish a burial arrangement or change the designation of his or her funds to a burial arrangement described in 130 CMR 520.008(F). If such arrangement is made within 60 days after the date that the applicant or member was notified of his or her right to do so, then the MassHealth agency considers the arrangement to have been in existence on the first day of the third month before the application.

(Emphasis added)

Next, MassHealth regulation 130 CMR 520.019, "Transfer of Resources Occurring on or after August 11, 1993," states in pertinent part:

(A) Payment of Nursing-Facility Services. The MassHealth agency applies the provisions of 130 CMR 520.018 and 520.019 to nursing-facility residents as defined at 130 CMR 515.001: *Definition of Terms* requesting MassHealth agency 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): *Home- and Community-Based Services Waiver-Frail Elder*.

(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.

(1) For transfers occurring before February 8, 2006, this period generally extends back in time for 36 months.

(2) For transfers of resources occurring on or after February 8, 2006, the period generally extends back in time for 60 months. The 60-month look-back period will begin to be phased in on February 8, 2009. Beginning on March 8, 2009, applicants will be asked to provide verifications of their assets for the 37 months prior to the application. As each month passes, the look-back period will increase by one month until the full 60 months is reached on February 8, 2011.

(3) For transfers of resources from or into trusts, the look-back period is described in 130 CMR 520.023(A).

(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). 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.

(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.

(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 agency 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 younger than 65 years old 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 younger than 21 years old, 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).**

...

(G) Period of Ineligibility Due to a Disqualifying Transfer.

(1) Duration of Ineligibility. If the MassHealth agency has determined that a disqualifying transfer of resources has occurred, the MassHealth agency will calculate a period of ineligibility. The number of months in the period of ineligibility

is equal to the total, cumulative, uncompensated value as defined in 130 CMR 515.001: *Definition of Terms* of all resources transferred by the nursing-facility resident or the spouse, divided by the average monthly cost to a private patient receiving nursing-facility services in the Commonwealth of Massachusetts at the time of application, as determined by the MassHealth agency.

(Emphasis added)

Here, the PLAN trust account into which the appellant transferred trust assets meets the definition set forth above of "pooled trust." Therefore, the transfers the appellant made to PLAN following the issuance of the notice of ineligibility were permissible transfers under 130 CMR 520.019(D). Further, I conclude that the transfer of \$8,475.00 from the trust to purchase a prepaid funeral and burial was also permissible under 130 CMR 520.019(D).

MassHealth regulation 130 CMR 520.019(K), "Exempting Transfers from the Period of Ineligibility," states as follows:

(1) During the Eligibility Process. To avoid the imposition of a period of ineligibility, the nursing-facility resident may take action during the determination of eligibility before the issuance of a notice of a period of ineligibility as follows.

(a) Revising a Trust. During the eligibility process, the nursing-facility resident may revise a trust to comply with the criteria of a special-needs trust or a pooled trust, as defined in 130 CMR 515.001: *Definition of Terms*. The use of resources to create these trusts are permissible transfers, in accordance with 130 CMR 520.019(D). The MassHealth agency will use the original application date if during the eligibility process the nursing-facility resident provides proof that the trust has been revised accordingly.

(b) Curing a Transfer. During the eligibility process, the full value or a portion of the full value of the transferred resources may be returned to the nursing-facility resident. The MassHealth agency will use the original application date and consider the transfer to have been eliminated or adjusted. The MassHealth agency will apply the countable assets rules at 130 CMR 520.007 and the countable income rules at 130 CMR 520.009 to the returned resources in determining eligibility.

**(2) After Issuance of the Notice of the Period of Ineligibility. After the issuance of the notice of the period of ineligibility, the nursing-facility resident may avoid imposition of the period of ineligibility in the following instances.**

**(a) Revising a Trust. If the nursing-facility resident revises a trust to comply with the criteria of a special-needs trust or a pooled trust as defined in 130 CMR 515.001: *Definition of Terms* and exempted in 130 CMR 520.019(D), the MassHealth agency will rescind the period of ineligibility as follows.**

**(i) The MassHealth agency will use the original application date if within 60 days after the date of the notice of the period of ineligibility, the nursing-facility resident provides proof that the trust has been revised to comply with the criteria of a special-needs trust or a pooled trust. The MassHealth agency may**

**extend the original 60-day period for an additional 120 days, if court action is required to revise the trust, as long as the court action is filed within the 60-day period after the date of the notice of the period of ineligibility.**

(ii) If after the 60th day after the date of the notice of the period of ineligibility, the nursing-facility resident provides proof that the trust has been revised to comply with the criteria of a special-needs trust or a pooled trust, the MassHealth agency will consider the trust revised as of the date the trust has been both revised and notarized.

(b) Curing a Transfer. If the full value or a portion of the full value of the transferred resources is returned to the nursing-facility resident, the MassHealth agency will rescind or adjust the period of ineligibility and will apply the countable-assets rules at 130 CMR 520.007 and the countable-income rules at 130 CMR 520.009 to the returned resources in the determination of eligibility. The MassHealth agency will rescind or adjust the period of ineligibility as follows.

(i) The MassHealth agency uses the original application date if the nursing-facility resident provides proof within 60 days after the date of the notice of the period of ineligibility that the transfer has been fully or partially cured. In the case of a partial cure, the MassHealth agency recalculates the period of ineligibility based on the transferred amount remaining after deducting the cured portion, beginning with the date of transfer or, for cures of transfers occurring on or after February 8, 2006, the later of the date of transfer or the date on which the individual would have otherwise been eligible.

(ii) If the nursing-facility resident provides proof later than the 60th day after the date of the notice of a period of ineligibility that the transfer has been fully or partially cured, the nursing-facility resident must reapply. The MassHealth agency recalculates the period of ineligibility based on the amount of the transfer remaining after the cure, beginning with the date of transfer or, for cures of transfers occurring on or after February 8, 2006, the later of the date of transfer or the date on which the individual would have otherwise been eligible.

(Emphasis added)

I do not agree with the appellant's argument that the 60-day clock to revise a trust to comply with the criteria of a pooled trust begins on the date when an appellant stipulates that a trust is countable, or that it begins when an appeal decision deems a trust countable. Instead, as set forth above, the 60-day clock to revise a trust to comply with the criteria of a pooled trust begins when MassHealth issues the notice of ineligibility -- in this case, on December 28, 2017. In this case, within 60 days following the date of the notice of ineligibility (February 28, 2018), the appellant revised the trust to comply with the criteria of a pooled trust, and partially cured transfers out of trust in the amount of \$364,369.10. However, there is insufficient information in the record for me to determine whether additional amounts transferred out of trust, including a purported trustee fee, care manager fees, legal fees, accountant fees, and purported reimbursement by the co-trustee of funds he advanced to pay the appellant's cell phone bills, were permissible transfers.

To the extent that the appellant timely revised the trust and partially cured transfers out of trust, this appeal is APPROVED in part, and remanded to MassHealth to determine whether the above-identified transfers were permissible.

## **Order for MassHealth**

Rescind denial notice of 12/28/2017. Deem the appellant to have timely revised the trust to comply with the criteria of a pooled trust, and to have cured transfers out of trust in the amount of \$364,369.10. Utilizing the July 25, 2017 application date, determine whether the appellant made any disqualifying transfers of resources out of trust. Send notice to the appellant informing her of the amounts of any disqualifying transfers of resources, and informing her of her eligibility start-date, including appeal rights.

## **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.

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Paul C. Moore  
Hearing Officer  
Board of Hearings

cc: Justine Ferreira, Appeals Coordinator, Taunton MassHealth Enrollment Center, 21 Spring Street, Suite 4, Taunton, MA 02780