

**Office of Medicaid
BOARD OF HEARINGS**

Appeal Decision:	Denied	Appeal Number:	1805795
Decision Date:	6/5/18	Hearing Date:	03/28/2018
Hearing Officer:	Christopher Jones	Record Open to:	05/11/2018

Appearance for Appellant:

Appearance for MassHealth:
Lindsay Gallant (Phone)



*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

Appeal Decision:	Denied	Issue:	LTC – Transfer
Decision Date:	6/5/18	Hearing Date:	03/28/2018
MassHealth’s Rep.:	Lindsay Gallant	Appellant’s 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 November 28, 2017, MassHealth approved the appellant for long-term-care benefits starting on September 14, 2017, but imposed a period of ineligibility running from October 12, 2016 to September 13, 2017 due to a disqualifying transfer of assets. Exhibit 2; 130 CMR 520.019. The appellant, through her guardian, filed this appeal in a timely manner on December 27, 2017. Exhibit 2; 130 CMR 610.015(B). Denial of assistance is valid grounds for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth imposed a 336-day period of ineligibility because the appellant’s daughter withdrew \$119,000 from a joint bank account after her mother entered the nursing facility.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.019, in determining that the appellant improperly disposed of assets in order to qualify for MassHealth benefits.

Summary of Evidence

The appellant is over the age of 65, and she entered a nursing facility on April 29, 2016. On December 20, 2016 an application for long-term-care benefits was submitted on the appellant's behalf, and the nursing facility is seeking benefits starting August 26, 2016. The MassHealth representative explained that the appellant and her daughter had a joint bank account, and on May 20, 2016, the appellant's daughter withdrew \$119,000 from the joint bank account. The appellant's daughter has not participated in the appellant's application for long-term-care benefits, rather a guardian has been appointed to advocate for the appellant.

MassHealth had originally denied the appellant's application on May 15, 2017 due to excess assets, but it rescinded its notice and agreed to continue processing the December 2016 application during an appeal of that denial. MassHealth's representative explained that a long-term-care applicant is considered to have complete ownership over any cash held in a joint bank account, unless the co-owner submits proof of what portion of the money did not belong to the applicant. The appellant's daughter never submitted any evidence that the money was actually hers, so MassHealth had to treat all of it as the appellant's.

MassHealth's representative submitted a worksheet that shows how she calculated the appellant's start date of September 13, 2017. This worksheet shows that the appellant had \$24,662.15 on September 1, 2016. On September 13, 2016, the appellant used \$9,085 to make funeral arrangements, leaving her with \$15,577.15. Ignoring the \$2,000 asset limit, MassHealth divided the remaining \$13,577.15 by the nursing facility's private pay rate of \$330 and determined that the appellant could have privately paid for 41 days, rounding down, in order to become asset eligible. MassHealth then divided the disqualifying transfer amount of \$119,000 by \$354, which is the average daily rate for nursing facilities across Massachusetts, and determined the period of ineligibility to be 336 days, rounding down. Because the application was not filed until December 2016, the earliest possible start date available for MassHealth benefits was September 1, 2016, and MassHealth used it as the starting point for determining the date of the appellant's eligibility. September 1, plus 41 days equaled October 12, and October 12 plus 336 days resulted in a benefits start date of September 13, 2017. See Exhibit 3.

The appellant's representative at the hearing agreed with MassHealth's presentation of the facts, and that the only issue in dispute is how the \$119,000 withdrawal should be treated by MassHealth. Because the appellant's daughter took the money, the appellant's representative argued that the appellant did not "intend" to transfer the money impermissibly. The appellant's representative testified that the appellant's guardian called the police regarding the withdrawal, but was told that the matter was not criminal because the appellant's daughter was a co-owner of the account, and therefore the money was hers and it could not be considered stolen. Because of this, there is no police report documenting the disagreement over ownership. The appellant's representative did not contend that the money did not actually belong the appellant's daughter and agreed that the money was rightfully the appellant's. The appellant's representative was asked if any further actions had been taken by the appellant to attempt to recover the money, such as filing a civil suit to establish

the ownership of the money. She testified that no such action had been taken, but asked that the record be left open for her to explore the possibility with a lawyer.

The record was left open for the appellant to document any additional efforts to attempt to establish that the \$119,000 withdrawal should not be considered a disqualifying transfer. The appellant's representative requested an extension of the record open period so that the appellant could pursue legal action against her daughter. It became apparent once the complaint was drafted that the appellant was not suing her daughter, but rather that the nursing facility was suing the appellant and her daughter. The appellant's representative explained that this was a factor of ease, as the guardian would need to go back to probate court for additional authority to pursue the lawsuit herself, and the appellant's representative confirmed that the guardian intended on consenting to the suit, or filing a cross-claim against the appellant's daughter. The attorney hired by the nursing facility explained the following in an email to the appellant's representative:

Neither you nor the nursing home have legal authority to sue [the appellant's daughter] on [the appellant's] behalf (that lies entirely with Cheri Myette, Conservator). However, the nursing home does have the right to sue [the appellant] in contract, and to join [the appellant's daughter] "to the extent that she has authority over [the appellant's] funds". Presumably, this suit will cause [the appellant's] Conservator to bring a crossclaim against [the appellant's daughter] on behalf of her ward ([the appellant]). I have called the conservator twice, but she has not returned my phone calls.

See Exhibit 5.

Based upon this presentation of the lawsuit to recover the funds, the appellant's representative was informed that the record open period would not be extended, and a decision would be issued.

Findings of Fact

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

1. The appellant is over the age of 65, and she entered a nursing facility on April 29, 2016.
2. The appellant's daughter withdrew \$119,000 from a bank account she jointly owned with her mother on May 20, 2016. The appellant has made no attempt to document that this money belonged solely to the appellant's daughter.
3. On December 20, 2016 an application for long-term-care benefits was submitted on the appellant's behalf, and the nursing facility is seeking benefits starting August 26, 2016.
4. Through a notice dated November 28, 2017, MassHealth approved the appellant for long-term-care benefits starting on September 14, 2017. This start date is premised upon the

earliest available benefits date of September 1, 2016, a 41-day excess assets start date, and a 336-day period of ineligibility.

5. The appellant timely appealed on December 27, 2017.
6. The only dispute between the parties is the 336-day period of ineligibility arising from the \$119,000 withdrawal by the appellant's daughter.
7. The record was left open for the appellant to document that the \$119,000 should not be treated as a disqualifying transfer.
8. The appellant's representative attempted to document this by submitting proof that the nursing facility filed suit against the appellant and her daughter under a contract theory for damages.

Analysis and Conclusions of Law

An individual applying for MassHealth long-term-care benefits must have countable assets below \$2,000. 130 CMR 520.003(A). If an applicant has assets above this threshold, their earliest eligibility start date is either:

- (a) as of the date the applicant reduces his or her excess assets to the allowable asset limit **without violating the transfer of resource provisions** for nursing-facility residents at 130 CMR 520.019(F); or
- (b) as of the date, described in 130 CMR 520.004(C), **the applicant incurs medical bills that equal the amount of the excess assets** and reduces the assets to the allowable asset limit within 30 days after the date of the notification of excess assets.

130 CMR 520.004(A)(1). "In no event will the first day of eligibility be earlier than the first day of the third month before the date of the application, if permitted by the coverage type." 130 CMR 520.004(C)(2).

The above regulations explain why the agency used October 12, 2016 as the earliest possible start date for the appellant's benefits. September 1, 2016 was the "the first day of the third month" before December 2016, and the appellant's incurred medical bills, in the form of private pay days at the nursing facility, only exceeded her excess assets on October 12, 2016. The appellant's funeral or burial arrangements are considered "to have been in existence on the first day of the third month before the application," and do not impact the start date calculation. See 130 CMR 520.008(F)(3).

The reason the appellant has an additional 336- day period of ineligibility arises under the disqualifying transfer rules. A disqualifying transfer can only occur if a countable asset is transferred. Countable assets "include assets to which the applicant or member or his or her spouse would be entitled whether or not these assets are actually received when failure to receive such

assets results from the action or inaction of the applicant, member, spouse, or person acting on his or her behalf.” 130 CMR 520.007. MassHealth’s regulations specifically describe how certain assets are to be counted. For bank accounts, “the entire amount on deposit is considered available to the applicant or member, except when assessing assets in accordance with 130 CMR 520.016.^[1]” 130 CMR 520.005(C). MassHealth “considers funds in a bank account available only to the extent that the applicant or member has both ownership of and access to such funds.” 130 CMR 520.007(B)(2).

No evidence was offered into the record showing that this money was not the appellant’s and that the amount in the bank account should not be considered entirely a countable resource. The issue then turns to whether the transfer of resources was legitimate, not gratuitous, or for less than fair-market value. 130 CMR 515.001, 520.007; and G.L. ch. 118E, § 20.

Federal Medicaid law, 42 USC §1396p(c)(1)(A), states that if an institutionalized individual (or spouse) transfers assets for less than fair-market value on or after the look-back date the applicant is ineligible for long-term-care services for a defined period. If an applicant or member has transferred resources for less than fair-market value, MassHealth long-term-care benefits may not be paid until a period of ineligibility has been imposed and expires. See 42 USC §1396p(c)(1)(A) (2010); G.L. 118E, § 28. The federal law is reflected in MassHealth regulations 130 CMR 520.018 and 520.019, which provide that a disqualifying transfer exists where an applicant transfers an interest during the appropriate look-back period for less than fair-market value. “A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available,” unless the transfer is “listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019([K]).”² 130 CMR 520.019(C).

There is no evidence regarding the appellant’s frame of mind, one way or the other, with regard to her daughter’s action. The record was left open to allow the **appellant** the opportunity to establish why this should not be treated as a disqualifying transfer, including pursuing legal action to recover the money. Had the appellant initiated the law suit, it would have raised additional questions about whether the assets were inaccessible under 130 CMR 520.006, or perhaps weighed in favor of the appellant establishing that there was no intent to qualify for MassHealth, under 130 CMR 520.019(D) by allowing her daughter to abscond with the funds without recourse.

Instead, the **nursing facility** filed suit under a contractual theory against the appellant and her daughter. If this suit is successful, then the **nursing facility** will recover the money. As the **appellant** is not taking any action, this matter has moved beyond the issue of MassHealth eligibility. The nursing facility’s legal claim is the appropriate course of action for when

¹ 130 CMR 520.016 allows for bank accounts that a jointly owned by spouses to be treated differently.

² As published, the last cross-reference is to subsection (J) and is likely a typographical error. Subsection (J) specifically **includes** as disqualifying transfers of home equity loans and reverse mortgages if transferred for less than fair market value. Subsection (K), however, **exempts** listed transactions from the period of ineligibility.

MassHealth coverage has been conclusively denied.³ Because the appellant has not taken any action to recover the funds herself, MassHealth was correct to treat the amount as a disqualifying transfer, and this appeal is DENIED.

Order for MassHealth

None.

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.

Christopher Jones
Hearing Officer
Board of Hearings

³ If anything, this lawsuit may be premature so long as this decision was pending, as this decision is the agency's final determination regarding whether the appellant has coverage for the time period that the facility is suing to be paid on its contract claim. See 130 CMR 450.203. As this decision upholds the agency's determination, the matter is likely moot.