

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Denied; Remand	Appeal Number:	1600269
Decision Date:	5/18	Hearing Date:	02/02/2016
Hearing Officer:	Thomas J. Goode	Record Open to:	03/11/2016

Appellant Representatives:

MassHealth Representative:
Karen Ryan, Tewksbury MEC



*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; Remand	Issue:	Resource Transfer
Decision Date:	5/18	Hearing Date:	02/02/2016
MassHealth Rep.:	Karen Ryan	Appellant Rep.:	
Hearing Location:	Tewksbury MassHealth Enrollment Center Room 2	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 December 11, 2015, MassHealth denied Appellant's long-term care application because MassHealth determined that there had been a disqualifying resource transfer totaling \$272,286 resulting in an ineligibility period starting August 1, 2015 through December 26, 2017 (see 130 CMR 520.007, 520.019 and Exhibit 1). Appellant filed this appeal in a timely manner on January 5, 2016 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032). A hearing was held on February 2, 2016. The hearing record remained open until March 11, 2016 to allow Appellant counsel and MassHealth to submit additional verifications and legal memoranda, which were timely received.

Action Taken by MassHealth

MassHealth denied Appellant's long-term care application because MassHealth determined that there had been a disqualifying resource transfer totaling \$272,286 resulting in an ineligibility period starting August 1, 2015 through December 26, 2017.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.007, 520.019 in determining that there had been a disqualifying resource transfer totaling \$272,286 and resulting in an ineligibility period starting August 1, 2015 through December 26, 2017.

Summary of Evidence

The MassHealth representative testified that Appellant is 93 years old, and was admitted to a skilled nursing facility on February 4, 2014. An application for MassHealth long-term care benefits was submitted on September 11, 2015, seeking MassHealth eligibility effective August 1, 2015. There is a community spouse, who is also 93 years old. Appellant has privately paid the nursing facility \$283,932 through July 31, 2015. The application dated September 11, 2015 was denied on December 11, 2015 due to disqualifying resource transfers pursuant to 130 CMR 520.019, and provisions of 130 CMR 520.007(J) with regard to a promissory note and private annuity. During a hearing record open period, the parties resolved issues pertaining to a \$1,000 transfer to Appellant's daughter, and accepted the terms of a revised \$6,000 promissory note. (Exhibit 6) The issue on appeal involves only a private annuity.

On July 15, 2015, the community spouse transferred \$265,886 to an irrevocable trust. Under Article Fourth, the purpose of the Trust is to fund an immediate, single premium, irrevocable annuity issued by Appellant's daughter as Trustee. The annuity contract provides for a 2.5% interest rate, which will equate to monthly payments of \$24,832 per month over a 12-month period from August 15, 2015 through July 15, 2016. There is a restrictions endorsement that states that the contract may not be surrendered, transferred, collaterally assigned, amended, or returned for a return of the premium paid. The contract is irrevocable and has no cash surrender value. The primary beneficiary is the Commonwealth of Massachusetts in the first position, for at least the total amount of medical assistance paid on behalf of the annuitant and/or the annuitant's spouse. The contingent beneficiary is Appellant's daughter individually. The annuity contract states that in the event of failure of any one or more of the events of default, all amounts payable shall become due and payable to the payee, which is the community spouse. Events that are considered defaults by the Issuer are: a failure to pay any amount due on the due date and within 15 days after notice of such default; a declaration of insolvency; the assignment for the benefit of creditors; or the appointment of a receiver or filing of a petition in bankruptcy or under any insolvency law.

MassHealth Position

MassHealth argues that the private annuity arrangement does not satisfy 130 CMR 520.007(J)(4) in that the issuer, Appellant's daughter, has not provided any evidence that she is legally licensed to issue annuities in the Commonwealth of Massachusetts. MassHealth argues that the annuity does not appear to be reasonably enforceable by either Appellant or the community spouse. MassHealth argues that because the Issuer is the daughter, it is not credible to assert that the community spouse would enforce the contract in any meaningful way. As such, the arrangement evidences intent to pass funds along family lines and circumvent MassHealth estate recovery provisions. The annuity

contract is payable over the course of one year, and in the event of default, the entire amount is due to the community spouse. MassHealth asserts that if the daughter defaulted on the annuity after MassHealth eligibility had been established, the Commonwealth could be divested of any possible payback as primary beneficiary. The annuity is a private, inter-family, unsecured agreement; and it has no credible ascertainable fair market value, and therefore does not meet requirements under 130 CMR 520.007(J)(4). As a result, the spouse's resource transfer is disqualifying under 130 CMR 520.019(C).

MassHealth argues further that the Center for Medicare & Medicaid services, (CMS, formerly HCFA) refers to commercial annuities in its discussions of annuities in its subregulatory guidance to states.¹ MassHealth argues that a commercial annuity, unlike a private annuity, has the backing of the issuing institution and third party oversight to enforce its provisions. A private annuity could be more easily used to evade the Medicaid payback and disqualifying transfer provisions, and the Medicaid asset and spousal allowance limits, because an individual could set up an unsecured private document, label it as an annuity, and use the document to hide assets, evade payback recovery, and pass assets along family lines. Accordingly, since the annuity in this case is private, unsecured, and has no independent 3rd party oversight, it must be evaluated within this non-commercial context, and with cognizance of the purposes of the Medicaid program.

MassHealth also argues that it is unclear whether the private annuity language requires that only the community spouse or applicant will receive payments during their lifetime. It is also not clear that the annuity requires enforcement of the Commonwealth payback language. MassHealth argues that the annuity relieves the daughter/Issuer in her role as Issuer/Trustee of the Trust, with regard to oversight of annuity payment obligations. Further, the daughter is sole Trustee of the Trust. There is no third party oversight regarding her Trustee payments to her father/community spouse, who is the Trust income beneficiary. Under Trust Part C, entitled *Finality of Trustee's Judgment: Trustee's liability*, there is no bond or security on the Trustee's actions and no responsibility to any beneficiary on actions taken with Trust property. In the event any funds are left in the Trust upon the Trust's termination, the Trust also states that the daughter/Trustee receives the remainder. Therefore, the daughter as Trustee/Issuer, could default on her obligations to make payments to the community spouse or the Commonwealth, and also not enforce any of the annuity consequences of such default. She could retain the funds until Trust termination because of the above language in the annuity and Trust, and her multiple roles under the documents as sole Trustee and Issuer and daughter/Trust remainder beneficiary. Under these provisions, and given the family context, the payments to the spouse or the Commonwealth could be evaded without independent oversight. The daughter as Trustee and Issuer, could default on making annuity payments to the community spouse, and all amounts would then become immediately due to the spouse. Such a scenario would mean that the entire annuity

¹ Citing transmittal #64 at page 3-3-109.15: "When an individual purchases an annuity, he or she generally pays to the entity issuing the annuity (e.g., a bank or insurance company) a lump sum of money, in return for which he or she is promised regular payments of income in certain amounts."

funds would go to the spouse and ultimately his estate. This would be another example of the annuity language providing the family a way to evade the payback clause to the Commonwealth.

MassHealth argues that O'Brien v. the Division of Medical Assistance, Suffolk, Superior Court Civil Action No. 10-02995A, is a non-reviewed Superior Court case involving its own set of facts and that fair hearings decisions raised by Appellant have no precedential value. MassHealth asserts that there have been numerous cases and fair hearings which have been entirely consistent with MassHealth's findings in the instant case, specifically citing O'Connor v. Office of Medicaid, Worcester County, Superior Court Civil Action No. 080647, in which the court agreed with the MassHealth agency's assessment that a private annuity did not have fair market value. MassHealth argues further that Margaret Wilson v. Thomas Dehner Suffolk, Superior Court Civil Action No. 08-5304G, August 5, 2009, also supports the MassHealth position that the annuity does not have fair market value.

Appellant's Position

Appellant argues that due to the advanced age of the community spouse, a commercial company would not issue an annuity to him. Appellant argues that the goal motivating the private annuity arrangement is to allow the community spouse to stay at home for as long as possible and prevent the need for skilled nursing care. The community spouse and his children want to be sure that he has sufficient assets to keep him as healthy as possible so that he can continue to live at home with the assistance of home health aides, and if necessary, move to an assisted living facility. Appellant argues that the private annuity was necessary because a commercial company would not issue an annuity that meets requirements outlined at 42 USC 1396(c)(1)(F) and (G) and 130 CMR 520.007(J) as the shortest term offered was 4 years. Therefore, only a private annuity would accomplish the goal of providing additional funds for the community spouse. Appellant argues that annuity funds are held in an account established for the irrevocable trust, which was established for the sole purpose of holding and protecting the annuity funds from potential claims of the community spouse's daughter. The annuity funds are not commingled with the Trustee's personal funds and the required payments are made directly to the community spouse's personal account.

Appellant argues that in drafting the private annuity, exact language was used from a commercial annuity to establish the Default by Issuers language, and therefore the annuity is reasonable and legally enforceable. If the daughter defaults, the entire amount becomes due and payable to the community spouse under the contract. Appellant argues that the fact that there is a Trust holding the annuity funds also gives the community spouse an additional legal remedy through the Probate Court to enforce the terms of the Trust. Appellant asserts that the annuity at issue was drafted in reliance on O'Brien v. the Division of Medical Assistance, Suffolk, Superior Court Civil Action No. 10-02995A, and fair hearing decision 0141098. (Exhibit 8, at Exh. 4, 5) Appellant argues that in O'Brien, the Court concluded that similar default language rendered the annuity legally and reasonably enforceable. Moreover, the O'Brien Court concludes that simply because a private annuity cannot be sold on an open market does not mean that the annuity has no value. The value of the instant annuity is the return of the initial investment, plus \$7,267.95

interest.

Further, Appellant argues that the State must comply with federal regulations in order to participate in the Medicaid program. The word “commercial” does not appear in the federal or state regulations. Appellant argues that MassHealth cannot add the requirement that an annuity must be purchased from a company licensed to sell annuities in Massachusetts and still be in compliance with federal laws and regulations. In addition, purchasing an annuity that complies with 130 CMR 520.007 from a commercial issuer is an allowable action by any community spouse. However, because a commercial annuity was not available to the community spouse due to his age, denying the private annuity arrangement equates to “age discrimination.”

The community spouse testified that that he required approximately \$40,000 per year to meet his current living expenses, and that his care needs and living expenses will continue to increase. Should the community spouse require nursing facility placement, the remaining income generated by the annuity would be used to pay for his facility based care, and he would not be able to apply for MassHealth benefits until he had expended his assets to the required limit.

Findings of Fact

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

- 1) Appellant is 93 years old, and was admitted to a skilled nursing facility on February 4, 2014.
- 2) An application for MassHealth long-term care benefits was submitted on September 11, 2015, seeking MassHealth eligibility effective August 1, 2015.
- 3) The application was denied on December 11, 2015 due to disqualifying resource transfers involving a promissory note and private annuity. Issues pertaining to a \$1,000 transfer to Appellant’s daughter, and a \$6,000 promissory note were resolved.
- 4) The community spouse is 93 years old, and lives in his private home.
- 5) Appellant has privately paid the nursing facility \$283,932 through July 31, 2015.
- 6) On July 15, 2015, the community spouse transferred \$265,886 to an irrevocable trust.
- 7) Appellant’s daughter is the sole Trustee of the irrevocable Trust.
- 8) Appellant’s daughter is the remainder beneficiary of the Trust.
- 9) The purpose of the Trust is to fund an immediate, single premium, irrevocable annuity.
- 10) The annuity was issued by Appellant’s daughter as Trustee.

- 11) Appellant's daughter is not licensed to issue annuities in the Commonwealth of Massachusetts.
- 12) The annuity contract provides for a 2.5% interest rate, which will equate to monthly payments of \$24,832 per month over a 12-month period from August 15, 2015 through July 15, 2016.
- 13) The annuity contains a restrictions endorsement that states that the contract may not be surrendered, transferred, collaterally assigned, amended, or returned for a return of the premium paid.
- 14) The annuity contract is irrevocable and has no cash surrender value.
- 15) The primary beneficiary of the annuity is the Commonwealth of Massachusetts in the first position, for at least the total amount of medical assistance paid on behalf of the annuitant and/or the annuitant's spouse.
- 16) The contingent beneficiary of the annuity is Appellant's daughter individually.
- 17) The annuity contract states that in the event of the failure of any one or more of the events of default occur, then all amounts payable shall become due and payable to the payee, which is the community spouse.
- 18) Events that are considered defaults by the Issuer are: a failure to pay any amount due on the due date and within 15 days after notice of such default; a declaration of insolvency; the assignment for the benefit of creditors; or the appointment of a receiver or filing of a petition in bankruptcy or under any insolvency law.
- 19) The Payment section of the annuity states: "The issuers are not required to verify the validity or effect of a trust, the scope of a trustee's authority, or a trust's use of payments according to the terms of the trust agreement. Payment made to a trust will release the Issuers of all contractual obligations to the extent of the payment."

Analysis and Conclusions of Law

With regard to annuities, the following federal law applies:

42 USC 1396p(c)(1)(F)-(G) follows in relevant part:

(F) For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless—

- (i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual under this subchapter; or*
 - (ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.*
- (G) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this subchapter unless—*
- (ii) the annuity—*
 - (I) is irrevocable and nonassignable;*
 - (II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and*
 - (III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.*

MassHealth regulations governing annuities are found at 130 CMR 520.007(J), below in relevant part:

- (2) Treatment of Annuities Established on or after February 8, 2006. In addition to the requirements in 130 CMR 520.007(J)(1), the following conditions must be met.*
- (a) The purchase of an annuity will be considered a disqualifying transfer of assets unless*
 - (i) the Commonwealth of Massachusetts is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual;*
 - (ii) the Commonwealth of Massachusetts is named as such a remainder beneficiary in the second position after the community spouse, or minor or disabled children; or*
 - (iii) the Commonwealth of Massachusetts is named as such a remainder beneficiary in the first position if the community spouse or the representative of any minor or disabled children in 130 CMR 520.007(J)(2)(a)(ii) disposes of any such remainder for less than fair-market value.*
 - (b) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(1) and*

(J)(2)(a) and is irrevocable and nonassignable, or unless the annuity satisfies 130 CMR 520.007(J)(2)(c).

(c) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(2)(b), or unless the annuity names the Commonwealth of Massachusetts as a beneficiary as required under 130 CMR 520.007(J)(2)(a) and the annuity is

(i) described in section 408(b) or (q) of the Internal Revenue Code of 1986;

(ii) purchased with the proceeds from an account or trust described in section 408(a), (c), or (p) of the Internal Revenue Code of 1986;

(iii) purchased with the proceeds from a simplified employee pension described in section 408(k) of the Internal Revenue Code of 1986; or

(iv) purchased with the proceeds from a Roth IRA described in section 408A of the Internal Revenue Code of 1986.

(4) Transactions Involving Future Performance. Any transaction that involves a promise to provide future payments or services to an applicant, member, or spouse, including but not limited to transactions purporting to be annuities, promissory notes, contracts, loans, or mortgages, is considered to be a disqualifying transfer of assets to the extent that the transaction does not have an ascertainable fair-market value or if the transaction is not embodied in a valid contract that is legally and reasonably enforceable by the applicant, member, or spouse. This provision applies to all future performance whether or not some payments have been made or services performed.

First, Appellant argues that in relying on 130 CMR 520.007(J)(4), MassHealth is taking a position that is more restrictive than federal law. While this regulation does not directly mirror the federal statute at 42 USC 1396p(c)(1)(F)(G), the hearing officer is specifically precluded from issuing a decision regarding the legality of federal or state law including, but not limited to, MassHealth or Connector regulations. If the legality of such law or regulations is raised, the hearing officer shall render a decision based on the applicable law or regulation as interpreted by the MassHealth agency or the Connector. Such decision shall include a statement that the hearing officer cannot rule on the legality of such law or regulation and shall be subject to judicial review in accordance with 130 CMR 610.092.

While Appellant correctly notes that neither federal law nor MassHealth regulations specifically exclude private annuities, there must be a determination that any annuity has fair market value² and

² Fair market value is defined at 130 CMR 515.001 as an estimate of the value of a resource if sold at the prevailing price. For transferred resources, the fair-market value is based on the prevailing price at the time of transfer. CMS (formerly HCFA), the federal agency tasked with administering the Medicaid program, defines Fair Market Value in Transmittal #64 as: "an estimate of the value of an asset, if sold at

is legally **and** reasonably enforceable. In this case, the daughter, in her capacity as the Trustee of an irrevocable trust that was established for the purpose of issuing the annuity to the community spouse in exchange for a \$265,886 premium payment, also acted as the Issuer of the annuity. In addition to her role as the sole Trustee, and Issuer of the annuity, the daughter is also the contingent beneficiary of the annuity, and the remainder beneficiary of the Trust. I agree with MassHealth that the daughter's multiple roles as daughter, sole Trustee, Issuer, sole contingent beneficiary of the annuity, and remainder beneficiary of the Trust, support the conclusion that the exchange was not for fair market value, and that the contract is not both legally and reasonably enforceable. The daughter's multiple roles greatly impact the terms of the section entitled Default by Issuers. In the event of default by the daughter as Issuer such that the daughter doesn't make a monthly payment to the community spouse, all amounts payable become immediately due and payable to the community spouse. However, if the daughter as Issuer defaults on a single monthly payment, it makes no sense that the daughter would then abide by these acceleration terms by paying over the entire amount to the community spouse when she had already defaulted on the monthly payment, particularly when the daughter, as sole remainder beneficiary of the Trust, stands to benefit from the default. It is difficult to envision a third party purchasing the annuity with terms so heavily skewed in the daughter's favor. Short of documentation that an investor had actually purchased this annuity, or in the alternative purchased in a genuine arm's length transaction, an annuity between family members exactly like it with the parties acting in the same roles and capacities, and with identical provisions, in effect showing that an investor put money on the table, I conclude that the annuity does not have fair market value at least equal to the resources transferred.³

I also find that while the terms of the annuity *may* be legally enforced by the community spouse in the event of default, due to the relationship between the parties, the terms of the purported annuity are not *reasonably* enforceable in that the community spouse is unlikely to enforce the terms of the contract by suing his daughter with the same degree of business objectivity as a third party, arm's length commercial lender. While the private annuity purports to have identical provisions as a commercial annuity, this in no way subjects the private annuity to similar licensing requirements, and regulatory oversight that govern a commercial annuity.

The appeal is DENIED in that the transfer of \$265,886 was not for fair market value, and the private annuity is not embodied in a valid contract that is legally and reasonably enforceable by the applicant, member, or spouse. MassHealth correctly determined that the transfer is a disqualifying resource transfer under 130 CMR 520.007(J), 130 CMR 520.019.

the prevailing price at the time it was actually transferred. Value is based on criteria you use in appraising the value of assets for the purpose of determining Medicaid eligibility." Social Security POMS, Section SI 01150.005 B1, which defines fair market value as the current market value of a resource at the time the resource is transferred.

³ See Wilson, and BoH Appeal No. 0804836 in which this hearing officer rejected expert testimony on the fair market value of a promissory note with similar terms and roles. There, as here, I am unpersuaded that the annuity has fair market value. As the facts in Wilson and the instant appeal are analogous, the O'Brien decision, on which Appellant heavily relies, carries no persuasive value that leads the undersigned to deviate from the reasoning outlined in Wilson.

The appeal is REMANDED to MassHealth to calculate a revised period of ineligibility excluding the value of the promissory note and \$1,000 transfer to Appellant's daughter.

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.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Sylvia Tiar, Tewksbury MEC