

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2155002
<b>Decision Date:</b>	9/17/2021	<b>Hearing Date:</b>	08/02/2021
<b>Hearing Officer:</b>	Paul C. Moore	<b>Record Closed:</b>	09/09/2021

**Appellant Representatives:**




**MassHealth Representatives:**

Karen Redman, Senior Policy Analyst, Member Policy Implementation Unit; Kathleen Racine, Senior Policy Analyst, Member Policy Implementation Unit (both by telephone; Ms. Racine observing only)



*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	<b>Issue:</b>	Period of Ineligibility, Hardship Waiver
<b>Decision Date:</b>	9/17/2021	<b>Hearing Date:</b>	08/02/2021
<b>MassHealth Reps.:</b>	Karen Redman et al.	<b>Appellant Reps.:</b>	
<b>Hearing Location:</b>	Board of Hearings (remote)		

## 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 June 2, 2021, MassHealth notified the appellant that it denied her request for a hardship waiver of a period of ineligibility due to a disqualifying transfer of resources, because she had not met the requirements of 130 CMR 520.019(L) (Exhibit 1). The appellant through legal counsel appealed this decision to the Board of Hearings (BOH) on July 1, 2021 (130 CMR 610.015(B); Exhibit 2). An appeal hearing was held on August 2, 2021, and the hearing officer left the record of the appeal open for the appellant to submit additional evidence, and for MassHealth to respond. The hearing officer also briefly reopened the record of the appeal for the submission of additional and clarifying information on September 8, 2021. After receiving such information, the hearing officer closed the record of the appeal on September 9, 2021.

Denial of a hardship waiver is valid grounds for appeal to BOH (130 CMR 610.032; 130 CMR 520.019(L)(5)).

## Action Taken by MassHealth

MassHealth determined that the appellant was ineligible for a hardship waiver of a period of ineligibility due to a disqualifying transfer of resources, because she had not met the requirements of 130 CMR 520.019(L).

## Issue

Whether MassHealth was correct in determining that the appellant is not eligible for a hardship waiver of a period of ineligibility due to a disqualifying transfer of resources, because she had not met the requirements of 130 CMR 520.019(L).

## Summary of Evidence

The MassHealth representative, a senior policy analyst from the member policy implementation unit, appeared by telephone and testified to the following: the appellant, who is over age 65, submitted an application for MassHealth coverage in January, 2020, seeking coverage for a nursing-facility stay beginning on [REDACTED]. MassHealth reviewed the application and deemed it incomplete, and sent a request for additional information to the appellant on April 8, 2020. No response was received, and therefore MassHealth issued a denial of the appellant's application due to missing verifications on May 13, 2020. The appellant appealed this denial to the BOH. MassHealth received additional verifications from the appellant on August 5, 2020; at that point, MassHealth agreed to honor the appellant's January, 2020 application date. MassHealth sent a second request for verifications to the appellant on August 5, 2020, as a result of which MassHealth learned about a purported transfer of resources for less than fair-market value, made by the appellant during the 60-month lookback period preceding the date of her application. The resource transferred by the appellant, according to the MassHealth representative, was a home with an assessed value of \$813,000.00. As a result of this transfer, MassHealth calculated a period of ineligibility for MassHealth coverage for the appellant, to run from April 1, 2020 through December 10, 2025. A notice to this effect was sent to the appellant on January 8, 2021 (Testimony).

The appellant filed an appeal of the January 8, 2021 denial notice with the BOH, and an appeal hearing was held on February 22, 2021. The appellant argued, during the appeal, that the transfer of the home was to an adult caretaker child who was living in the appellant's home for at least two years before the date of the appellant's admission to a nursing facility, and who provided care to the appellant that allowed her to live at home rather than in a nursing facility; therefore, the appellant reasoned, the transfer was permissible under 130 CMR 520.019(D). However, according to the MassHealth representative, the hearing officer who heard the appeal denied it, finding that the appellant did not live in the home with her adult caretaker child for a period of two years immediately preceding her admission to the nursing facility, making the adult caretaker transfer exception at 130 CMR 520.019(D)(6)(d) inapplicable (Testimony, Ex. 6).<sup>1</sup>

Following the denial of the appellant's appeal, the appellant, through her attorneys, filed a written request with MassHealth for a hardship waiver of the period of ineligibility, on April 23, 2021 (Ex. 10).<sup>2</sup> The request for a hardship waiver noted in relevant part:

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<sup>1</sup> The undersigned hearing officer entered a copy of the March 24, 2021 appeal decision concerning the disqualifying transfer, Appeal No. 2100997, into the record as exhibit 6.

<sup>2</sup> The appellant's attorneys stated that the appellant did not file a complaint for judicial review in superior court

Under the MassHealth 'caretaker child' exception, 130 CMR 520.019(D)(6)(d) the property located at [REDACTED] was transferred [REDACTED] by deed dated October 4, 2019.

[REDACTED] provided assistance to [the appellant] for many years in order to prevent her from needing long-term care. [The appellant] was on the verge of going to a nursing home facility, but thanks to [REDACTED] care, her condition was improved enough to when the time came, in 2015, the family was able to only have her placed in an Assisted Living Facility which was private paid from 2015 through 2017. Saving 2 years of payments that could have been in a nursing home, and consequently, delaying a subsidized long-term care payment request to the state. . .

A copy of the deed, birth certificate, verification of residency (license and voter's registration), 2019 assessed property value, and a letter from the Physician stating that [REDACTED] care allowed [the appellant] to delay her admittance to a nursing home as much as possible, are submitted herewith. . . . The transfer did not happen with the purpose of qualifying for Medicaid.

MassHealth still does not agree with the permissibility of the transfer, even though it was done completely under MassHealth's rules.

We are now requesting a hardship waiver 130 CMR 520.019(L)(1), and we affirm that all the circumstances exist:

- (a) The denial of MassHealth would deprive the nursing-facility resident of medical care such that his or her health or life would be endangered, or the nursing-facility resident would be deprived of food, shelter, clothing, or other necessities such that he or she would be at risk of serious deprivation.
- (b) Documentary evidence has been provided that demonstrates to the satisfaction of the MassHealth agency that all appropriate attempts to retrieve the transferred resource have been exhausted and that the resource or other adequate compensation cannot be obtained to provide payment, in whole or part, to the nursing-facility resident or the nursing facility.
- (c) The institution has notified the nursing-facility resident of its intent to initiate a discharge of the resident because the resident has not paid for his or her institutionalization.
- (d) There is no less costly noninstitutional alternative available to meet the nursing facility resident's needs.

(Ex. 10)

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following the appeal decision issued in appeal number 2100997.

<sup>3</sup> Initials are used to preserve confidentiality.

On June 2, 2021, MassHealth sent a denial notice to the appellant, notifying her that “the hardship waiver is denied because [she] has not met the requirements of 130 CMR 520.019(L)” (Ex. 1).

The MassHealth representative testified that the hardship waiver was denied because the appellant did not provide any documentation that any of the conditions listed at 130 CMR 520.019(L) had been met, such as a statement that the appellant would be placed in medical peril if she were denied MassHealth coverage for nursing-facility services, that attempts to retrieve the transferred resource have been made, or that the nursing facility has notified the appellant of its intent to discharge her for non-payment (Testimony).

The MassHealth representative stated that the home in [REDACTED] was initially owned by a trust, transferred via deed from the trustee, [REDACTED], to the appellant on October 4, 2019, and was conveyed by the appellant to [REDACTED] via quitclaim deed for consideration of \$1.00 on the same date.<sup>4</sup> The MassHealth representative testified that [REDACTED], in turn, sold the [REDACTED] home to a third party on November 25, 2019 for \$801,000.00 (Testimony).

The appellant’s attorney stipulated that the appellant did not live at the [REDACTED] home continuously for the two years immediately prior to her admission to a nursing facility in 2017 (Testimony).<sup>5</sup>

The hearing officer marked as exhibit 2A a letter from the appellant’s attorneys, which accompanied the request for fair hearing on the hardship denial received on July 1, 2021. The letter states in relevant part:

[The appellant] suffers from various conditions that require constant monitoring that can only be done by a Nursing Facility. The following conditions she currently faces are listed below:

- **Hypertension** – which needs to be controlled timely with medications administered by the nursing facility staff;
- **Diabetes** – she is constantly monitored and medicated by the facility;
- **Body’s left side paralyzed due to a stroke, which brings a series of assistance needs** – (a) [the appellant] is on blood thinners, which must be monitored frequently to ensure that medications are in the therapeutic range; (b) she is unable to move herself around in her wheelchair, so she needs help to be pushed everywhere; (c) she is also unable to cut her own food, meaning that the staff at [the nursing facility] do this for her;
- **She is extremely frail even to do assisted standing transitions** – she needs a Hoyer lift to get in and out of bed. She also needs to use the bedpan instead of the commode chair for urination and bowel movements. All monitored and ensured to happen as she needs by the nursing facility.

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<sup>4</sup> [REDACTED] is another one of the appellant’s sons, and is her attorney-in-fact (Ex. 3).

<sup>5</sup> The appellant’s attorney testified that the hearing officer in Appeal No. 2100997 also found that the [REDACTED] home was not the appellant’s principal residence at the time of the transfer to [REDACTED] however, the decision in Appeal No. 2100997 does not explicitly address this issue.

- **Frequent urinary tract infections** – whenever they happen, it needs immediate medical care and medication.
- **Depression** – constantly medicated and monitored to manage the symptoms of depression.

(Ex. 2A) (bolded in original)

Further, the July 1, 2021 attorney submission states that:

On June 15, 2021, a notice was sent to [REDACTED] . . . requesting either the house or the proceeds of the sale be returned to [the appellant's] name. Our office has been trying to retrieve the asset back, but we have not received any response nor the amount back from [REDACTED]. Copy of the certified letter sent to [REDACTED] and confirmation that it was delivered is submitted herewith. . . To date we have not heard back from him.

(*Id.*).<sup>6</sup>

One of the appellant's attorneys testified that this letter to [REDACTED] was sent by certified mail, and the attorney submitted documentation reflecting that the letter had been delivered to [REDACTED]'s new address by the U.S. postal service on June 18, 2021 (Ex. 2A). The hearing officer inquired if the appellant's attorneys had followed up on their June 15, 2021 letter to [REDACTED] with a telephone call to [REDACTED]. One of the attorneys stated that she had not, and her supervising attorney testified that his practice does not make "dunning calls" to individuals (Testimony).

The July 1, 2021 attorney letter (Ex. 2A) also states:

As mentioned in Item 1, [the appellant] needs constant skilled care that can only be provided by a Nursing Home facility. According to Genworth Financial's 2020 Cost of Care Survey, the average monthly cost of nursing home care in Massachusetts is \$12,623.00 for a semiprivate room and \$13,535.00 for a private room. [The appellant] cannot afford these amounts; all she can afford is the current Patient Paid Amount that she has been paying monthly to the nursing home in the amount of \$5,326.63, coming straight from her income – which is all she has.

(*Id.*)

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<sup>6</sup> The attorney's letter to [REDACTED] states in pertinent part: "As I am sure you are aware, our office represents [the appellant] in her process to qualify for MassHealth Medicaid so her long-term nursing home care is paid on her behalf. In order to help her qualify for these benefits, her [REDACTED] was transferred to you for only a \$1.00 under the childcare giver (*sic*) exception. Unfortunately, due to [the appellant] having lived at an assisted living facility prior to going into the nursing home, MassHealth sees the house transaction as invalid. Thurs (*sic*), in order for [the appellant] to qualify for MassHealth Medicaid, we will need you to either return the house back to her, individually, or return the proceeds to her. Once the gift has been returned, the transaction will be cured, and she should be able to obtain her benefits" (Ex. 2A).

Finally, the July 1, 2021 letter from the attorney (Ex. 2A) states that [REDACTED] one of the appellant's sons, received a letter from the nursing facility business office manager informing him of their intent to discharge the appellant "due to non-payment of her institutionalized care" (*Id.*). The relevant letter was appended to the July 1, 2021 request for hearing, and the hearing officer marked this letter separately as exhibit 5. The June 14, 2021 letter from the facility business officer manager to [REDACTED] states in relevant part:

We have received confirmation from [the appellant's attorney's] office that you have been denied benefits from MassHealth for a second time for [the appellant], who currently resides here. [The appellant] has been a resident here with non-payment to the nursing home effective April 1, 2020. Her level of care is according to MassHealth's care level of an R which is \$239.94 a day. Even though you are keeping up with the patient paid amount to the nursing home for her care (\$5,326.63), this is not adequate for the cost and care of [the appellant] on a daily basis.

For the time frame from 4-1-2020 thru 6-30-2021, this amount is calculated at 456 days at the MassHealth rate of \$239.94 per day, for a total of \$109,412.64 that has not been paid to [the facility] for her care. As we are a non-profit nursing home and we continue to pay for [the appellant] on a daily basis, this non-payment has put [the facility] in a position of hardship.

Therefore, due to non-payment for [the appellant] for her institutionalized care here. . . from April 2020 until present, we are now informing you of our intent to discharge her for Non-Payment. In compliance with related guidelines and regulations, more information about this process will be forthcoming in the weeks ahead.

(Ex. 5)<sup>7</sup>

At the close of the hearing, the appellant's attorneys requested additional time to submit a letter from the nursing facility physician documenting the risks the appellant would face if she were denied MassHealth coverage, and to submit documentation that all appropriate attempts to retrieve the transferred resource have been exhausted. The hearing officer agreed to hold the record open for three weeks, or until August 23, 2021, for this purpose, and to give the MassHealth representative one additional week, or until August 30, 2021, to respond whether MassHealth might alter its decision to deny the appellant's hardship waiver (Ex. 7).

On August 13, 2021, the hearing officer received by e-mail from a paralegal working with the appellant's attorneys copies of (1) an August 3, 2021 letter from the nursing facility's medical director, [REDACTED] about the appellant; (2) additional correspondence, dated August 5, 2021, sent by the appellant's attorneys to [REDACTED]; and (3) a notarized affidavit of one of the appellant's attorneys dated August 5, 2021 (Ex. 8). These documents were also sent via e-mail to the

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<sup>7</sup> The MassHealth representative stated she had not received a copy of this letter, so the hearing officer forwarded her a copy by e-mail following the hearing on August 2, 2021.

MassHealth representative.

The August 3, 2021 letter from the facility's medical director reads in pertinent part:

I am writing this letter concerning my patient [the appellant]. . .

[The appellant] was first admitted to [the facility] in 2017 as a result of numerous medical conditions, including physical limitations. Since then, her health has continued to decline, and it is clear that her needs may only be met by 24/7 care such as those provided by a skilled nursing facility. [The appellant] would be at enormous risk for additional health complications without round-the-clock care. In my opinion, it would be unsafe for [the appellant] to attempt to return to living in the community, even if such an option existed.

(Ex. 8A)

The August 5, 2021 letter from the appellant's attorney to [REDACTED] states as follows:

This is a follow up to the letter I sent on June 15, 2021 regarding [the appellant], in her process to qualify for MassHealth Medicaid. As you will recall, in order to help her qualify for these benefits, her [REDACTED] was transferred to you for only a \$1.00 under the childcare giver (*sic*) exception.

I am writing to you again to state that we need you to return the proceeds of the sale of the house immediately to [the appellant], so she does not lose her benefits. If the funds are not returned to her, there is a high chance she will lose all benefits she currently receives and will need to find a new place to receive care of which she is not able to afford.

(Ex. 8B)

Finally, the August 5, 2021 notarized affidavit from one of the appellant's attorneys reads:

I have sent [REDACTED] two letters, the first being dated June 15, 2021 and the second one dated August 5, 2021, in an attempt to retrieve the proceeds from the sale of [the [REDACTED] home] of which (*sic*) was transferred to [REDACTED] for \$1.00 under the childcare giver (*sic*) exception. I have informed him as well as his brother [REDACTED], that in order for [the appellant] to receive any benefits from the state, [REDACTED] must return the proceeds from the sale of the home. At this time no one has heard anything from [REDACTED] in regard to returning the proceeds.

(Ex. 8C)

On August 31, 2021, the hearing officer received e-mail correspondence from the MassHealth representative, which was copied to one of the appellant's attorneys, stating: "MassHealth has



reviewed the additional documents submitted. . . .Our decision on the hardship request is unchanged” (Ex. 9).<sup>8</sup>

## **Findings of Fact**

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

1. The appellant, who is over age 65, was admitted to a long-term care facility in 2017 (Testimony, Ex. 8A).
2. The appellant submitted an application for MassHealth coverage in January, 2020 (Testimony).
3. The appellant is seeking coverage for her nursing-facility stay effective [REDACTED] (Testimony).
4. In connection with the January, 2020 application, MassHealth sent a request for additional information to the appellant on April 8, 2020 (Testimony).
5. MassHealth received no response to its inquiry from the appellant, so MassHealth issued a denial notice to the appellant on May 13, 2020 for missing verifications (Testimony).
6. The appellant filed an appeal of the May 13, 2020 denial notice with the BOH (Testimony).
7. The appellant produced some of the missing verifications on August 5, 2020, and MassHealth then agreed to honor the appellant’s January, 2020 application (Testimony).
8. On January 8, 2021, MassHealth issued a notice denying the appellant’s January, 2020 application due to a purported transfer of resources for less than fair-market value, made by the appellant during the 60-month lookback period preceding the date of her application (Testimony).
9. The resource transferred by the appellant, according to the MassHealth representative, was a home with an assessed value of \$813,000.00 (Testimony).
10. As a result of this transfer, MassHealth calculated a period of ineligibility for MassHealth coverage for the appellant, to run from April 1, 2020 through December 10, 2025 (Testimony).

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<sup>8</sup> MassHealth’s record-open response was one day late, but is accepted for inclusion in the record nonetheless.

11. The appellant filed an appeal of this denial with the BOH (Testimony).
12. An appeal hearing was held on February 22, 2021 on Appeal No. 2100997, at which the appellant argued that the transfer of the home was to an adult caretaker child, [REDACTED] who was living in the appellant's home for at least two years before the date of the appellant's admission to a nursing facility, and who provided care to the appellant that allowed her to live at home rather than in a nursing facility, purportedly making the transfer permissible under 130 CMR 520.019(D) (Ex. 6).
13. The BOH hearing officer who heard Appeal No. 2100997 denied it, finding that the appellant did not live in the home with her adult caretaker child for a period of two years immediately preceding her admission to the nursing facility, making the adult caretaker transfer exception at 130 CMR 520.019(D)(6)(d) inapplicable (Testimony, Ex. 6).
14. A written decision on Appeal No. 2100997 issued on March 24, 2021 (*Id.*).
15. The appellant did not file a complaint for judicial review of this appeal decision in Superior Court (Testimony).
16. The appellant, through her attorneys, filed a written request with MassHealth for a hardship waiver of the period of ineligibility, on April 23, 2021 (Ex. 10).
17. In order for a member to qualify for a hardship waiver of a period of ineligibility, MassHealth regulations specify a number of conditions to be met, including that the denial of MassHealth would deprive the nursing-facility resident of medical care such that his or her health or life would be endangered, that all appropriate attempts to retrieve the transferred resource have been exhausted and that the resource or other adequate compensation cannot be obtained to provide payment for nursing-facility services, that the nursing facility has notified the resident of its intent to initiate a discharge on the basis of non-payment, and that there is no less costly noninstitutional alternative available to meet the nursing facility resident's needs (Testimony).
18. On June 2, 2021, MassHealth issued a denial notice of the appellant's request for a hardship waiver of the period of ineligibility, finding that the appellant had not shown that she meets any of the conditions required for a hardship waiver (Testimony, Ex. 1).
19. The appellant filed a timely appeal of this notice with the BOH on July 1, 2021 (Testimony).
20. The home in [REDACTED] was initially owned by a trust, transferred via deed from the trustee, [REDACTED], to the appellant on October 4, 2019, and was conveyed by the

appellant to [REDACTED] via quitclaim deed for consideration of \$1.00 on the same date (Testimony, Ex. 10).

21. [REDACTED] sold the [REDACTED] home on November 25, 2019 to a third party for \$801,000.00 (Testimony).
22. The appellant's attorneys sent two letters to [REDACTED], asking [REDACTED] to return the home to the appellant individually or to return the sale proceeds of the [REDACTED] home to the appellant, one letter on June 15, 2021 and the second on August 5, 2021 (Exhibits 2A, and 8).
23. [REDACTED] had not responded to the attorney's letters as of August 5, 2021 (Testimony, Ex. 8C).
24. The appellant suffers from a number of serious health conditions, including hypertension, diabetes, depression, and frequent urinary tract infections (Ex. 2A).
25. The appellant is transferred to and from her bed via Hoyer lift, and requires extensive assistance with her activities of daily living, such as eating and toileting (*Id.*).
26. An August 3, 2021 letter from [REDACTED] the facility's medical director, states as follows: "[The appellant] was first admitted to [the facility] in 2017 as a result of numerous medical conditions, including physical limitations. Since then, her health has continued to decline, and it is clear that her needs may only be met by 24/7 care such as those provided by a skilled nursing facility. [The appellant] would be at enormous risk for additional health complications without round-the-clock care. In my opinion, it would be unsafe for [the appellant] to attempt to return to living in the community, even if such an option existed" (Ex. 8A).
27. A June 14, 2021 letter from the facility's business office manager to [REDACTED], the appellant's attorney-in-fact, states that the appellant owes \$109,412.64 (MassHealth rate) to the facility for the period [REDACTED] through 6/30/2021, and that due to the appellant's failure to pay for her care at the facility, the facility intends to initiate a discharge of the appellant (Ex. 5).
28. The appellant has been paying an estimated monthly Patient-Paid Amount to the facility in the amount of \$5,326.63, directly from her income (Exhibits 2A and 5).
29. The appellant cannot afford to pay privately for nursing facility care in Massachusetts, and has no other assets (Ex. 2A).

## **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 noninstitutionalized 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 to this case (130 CMR 515.002).

The regulations at 130 CMR 520.019 apply to nursing-facility residents as defined at 130 CMR 515.001 requesting MassHealth 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). Under this section, 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 (130 CMR 520.019(B)).

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)).

MassHealth considers certain transfers as permissible (130 CMR 520.019(D)). Such permissible transfers include a transfer of resources to the spouse of the nursing-facility resident, a transfer from the spouse to a third-party for the benefit of the spouse, a transfer to a permanently and totally disabled or blind child, a transfer to a trust for the sole benefit of a permanently and totally disabled person who was under 65 years of age, a transfer to a pooled trust created for the sole benefit of the nursing-facility resident, and a transfer to the nursing-facility resident's child 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.

A prior BOH hearing decision held that the transfer in question, from the appellant to [REDACTED] in October, 2019, was not permissible, because the appellant was not living in the transferred resource (the [REDACTED] home) for two years immediately prior to her admission to a nursing facility in 2017; instead, she lived in an assisted living facility from 2015 to 2017. Based on this finding, MassHealth's decision to impose of a period of ineligibility based on the assessed value of the appellant's former home (\$813,000.00) was upheld.

The current appeal does not, and may not, relitigate the merits of the prior appeal. Instead, the appellant seeks to challenge MassHealth's denial of a hardship waiver requested by the appellant of the period of ineligibility, following the denial of the previous appeal.

Pursuant to 130 CMR 520.019(L)(1), "Waiver of the Period of Ineligibility due to Undue Hardship:"

MassHealth may waive a period of ineligibility due to a disqualifying transfer of resources if ineligibility would cause the nursing-facility resident undue hardship. MassHealth may waive the entire period of ineligibility or only a portion when all of the following circumstances exist:

- (a) The denial of MassHealth would deprive the nursing-facility resident of medical care such that his or her health or life would be endangered, or the nursing-facility resident would be deprived of food, shelter, clothing, or other necessities such that he or she would be at risk of serious deprivation.
- (b) Documentary evidence has been provided that demonstrates to the satisfaction of the MassHealth agency that all appropriate attempts to retrieve the transferred resource have been exhausted and that the resource or other adequate compensation cannot be obtained to provide payment, in whole or part, to the nursing-facility resident or the nursing facility.
- (c) The institution has notified the nursing-facility resident of its intent to initiate a discharge of the resident because the resident has not paid for his or her institutionalization.
- (d) There is no less costly noninstitutional alternative available to meet the nursing facility resident's needs.

Undue hardship does not exist when imposition of the period of ineligibility would merely inconvenience or restrict the nursing-facility resident without putting the nursing facility resident at risk of serious deprivation (130 CMR 520.019(L)(2)).

Where MassHealth has issued a notice of the period of ineligibility due to a disqualifying transfer of resources, the nursing-facility resident may request a hardship waiver. For transfers occurring on or after February 8, 2006, nursing facilities may apply for a hardship waiver on behalf of a resident, with the consent of the nursing-facility resident or the resident's authorized representative. (130 CMR 520.019(L)(3)). If the nursing-facility resident feels the imposition of a period of ineligibility would result in undue hardship, the nursing-facility resident must submit a written request for consideration of undue hardship and any supporting documentation to the MassHealth Enrollment Center listed on the notice of the period of ineligibility within 15 days after the date on the notice (130 CMR 520.019(L)(4)). Within 30 days after the date of the

nursing-facility resident's request, MassHealth will inform the nursing-facility resident in writing of the undue-hardship decision and of the right to a fair hearing (130 CMR 520.019(L)(4)).

Also, pursuant to 130 CMR 520.019(L)(5):

The nursing-facility resident may appeal the MassHealth agency's undue-hardship decision and the imposition of a period of ineligibility by submitting a request for a fair hearing to the Office of Medicaid Board of Hearings within 30 days after the nursing-facility resident's receipt of the MassHealth agency's written undue-hardship notice, in accordance with 130 CMR 610.000: MassHealth: Fair Hearing Rules.

A letter from the appellant's physician reflects that she has a number of medical conditions, and physical limitations that may best be addressed at a skilled nursing facility. The physician's letter does not specifically identify her medical conditions; however, other information, from one of the appellant's attorneys, reflects that she has diagnoses of hypertension, diabetes, urinary tract infections, and depression, all of which are managed at the nursing facility. Although such evidence would be entitled to more weight if its direct source was her physician, and not her attorney, there is no dispute that the appellant has serious medical issues such that her health or life would be endangered if she did not receive care from a skilled nursing facility.

In addition, the letter from the physician is clear that her medical conditions have gotten worse, not better, since her nursing facility admission in 2017.

Moreover, this is not a matter of a mere "inconvenience" to the appellant. I therefore find that the condition set forth at 130 CMR 520.019(L)(1)(a) to qualify for a hardship waiver has been satisfied.

Next, the appellant's attorneys supplied documentary evidence that they have written to [REDACTED] on at least two occasions in an attempt to retrieve the transferred asset, *to wit*, the [REDACTED] home or the sale proceeds of the [REDACTED] home. [REDACTED] no longer owns the [REDACTED] home; he sold it to a third party a month after he acquired it. What is not known is the disposition of the sale proceeds. Although other methods of contacting [REDACTED] (such as calling him) have evidently not been attempted, and litigation against [REDACTED] has not been considered to date, I find that sufficient documentary evidence has been provided demonstrating that all appropriate attempts to retrieve the transferred resource have been exhausted. It is abundantly clear that [REDACTED] does not wish to cooperate in assisting the appellant in the MassHealth application process, and the evidence shows that the appellant has no other assets. Thus, I conclude that the condition set forth at 130 CMR 520.019(L)(1)(b) has also been satisfied.

Next, the facility business office manager has apprised the appellant's attorney-in-fact, by letter, that it intends to initiate a discharge of the appellant because she has not paid for her institutionalization, and owes the facility well over \$100,000.00 at the MassHealth daily rate.

Thus, I find that the condition set forth at 130 CMR 520.019(L)(1)(c) has also been met.

Finally, the letter from the appellant's physician evidences that the appellant needs round-the-clock care at a skilled nursing facility; there is no less costly noninstitutional alternative (such as an assisted living facility) available to meet her needs. Therefore, I conclude that the appellant has also met the condition set forth at 130 CMR 520.019(L)(1)(d).

MassHealth's decision to deny the appellant's request for a hardship waiver of the period of ineligibility was incorrect.

This appeal is APPROVED.

## **Order for MassHealth**

Deem the appellant eligible for MassHealth long-term coverage as of [REDACTED], if she is otherwise eligible. Send notice of implementation only, without appeal rights.

## **Implementation of this Decision**

If this decision is not implemented within thirty 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: Sylvia Tiar, Tewksbury MEC  
Karen Redman, Senior Policy Analyst, Member Policy Implementation Unit, 100 Hancock Street, 8<sup>th</sup> Fl, Quincy, MA 02171