

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



**Appeal Decision:** DENIED

**Appeal Number:** 2179400

**Decision Date:** 4/11/2022

**Hearing Date:** 01/19/2022

**Hearing Officer:** Christopher Taffe

**Record Open to:** 02/18/2022

**Appearance for Appellant:**



**Appearance for MassHealth:**

Jessica Barney of the Taunton MassHealth  
Enrollment Center (by 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

<b>Appeal Decision:</b>	DENIED	<b>Issue:</b>	LTC – Transfer – Life Estate
<b>Decision Date:</b>	4/11/2022	<b>Hearing Date:</b>	01/19/2022
<b>MassHealth's Rep.:</b>	J. Barney	<b>Appellant's Rep.:</b>	[REDACTED]
<b>Hearing Location:</b>	Taunton MassHealth Enrollment Center	<b>Aid Pending:</b>	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 17, 2021, MassHealth approved Appellant for Standard Long-Term Care (LTC) benefits with a start date of August 8, 2021 and a Patient Paid Amount of \$1,091.09/month. The approval notice also stated that Appellant was ineligible for benefits for the period from January 1, 2021 to August 7, 2021 due to a disqualifying transfer of assets. See 130 CMR 520.019 and Exhibit 1. An appeal was timely filed on Appellant's behalf on December 14, 2021. See Exhibit 1; 130 CMR 610.015.

On December 17, 2021, the Board of Hearings dismissed Appellant's appeal without prejudice based on Appellant's failure to include in the initial filing documentary proof that the health care proxy (which was submitted as proof of authority to request the appeal) was in effect. See 130 CMR 610.034; 130 CMR 610.035; and Exhibit 2. Appellant submitted the appropriate and needed paperwork on December 21, 2021 related to the health care proxy, and the dismissal was vacated on that date. See Exhibit 3; 130 CMR 610.035; 130 CMR 610.048.

A hearing was scheduled and held on January 19, 2022. At the conclusion of the hearing, the Appeal Representative requested and received approval for a Record Open period, until February 11, 2022, to submit a memorandum of support. See Exhibit 6; 130 CMR 610.081. Per a request of the Appeal Representative during the Record Open period, the record open period was further extended to February 18, 2022, and Appellant's side submitted a timely memorandum. See Exhibits 7 and 8.

Challenging the scope or start date of assistance in a MassHealth eligibility determination is a valid ground for appeal to the Board of Hearings. See 130 CMR 610.032.

## Action Taken by MassHealth

MassHealth approved Appellant for LTC benefits with a penalty period from January 1, 2021 to August 7, 2021, and with a benefit start date of August 8, 2021.

## Issue

Should there be a penalty period for a disqualifying transfer, and, if so, did the MassHealth agency assess a correct and proper penalty period based on the correct valuation of the property interest formerly held by Appellant?

## Summary of Evidence

Appellant is a woman who was admitted to her current skilled nursing facility on [REDACTED]. Per MassHealth testimony, Appellant's application indicated Appellant is seeking a LTC benefit start date of February 21, 2020.

Over a year after her admission, on April 2, 2021, MassHealth received an application for the agency's LTC benefits.<sup>1</sup> This April 2, 2021 application was then denied two times in the 2021 calendar year due to the failure to produce verification or requested information, but the April 2, 2021 application date was effectively protected as the result of two earlier Fair Hearing requests. Thus, the April 2, 2021 application date remains the controlling application date for the eligibility determination at issue in this current appeal.

The appeal issue involves a potential disqualifying transfer of the applicant's assets. Specifically, long before her nursing facility admission in 2020, Appellant previously resided in the community in her long-term residential home in [REDACTED]. In 1994, Appellant executed a quitclaim deed which reserved a life estate in that property for herself, with the remainder interest going to her two children as tenants-in-common. Appellant continued to live in the home from 1994 to 2020, up until the time of her nursing facility admission.

Over eight months after the Appellant was admitted to her nursing facility, on October 20, 2020, Appellant and her two children sold the entire fee of the property for \$ [REDACTED] to some unrelated

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<sup>1</sup> Per 130 CMR 516.006(A)(2), an application for Standard LTC benefits can only award coverage to three months before the month of application which in this appeal over an April 2021 application is January 1, 2021. Neither this appeal nor this application can address the need for benefits for any part of the admission that falls within the 2020 calendar year. The record is unclear as to why the application was filed more than one year later and why the nursing facility is still seeking payment as of February 2020. The benefit request date submitted by the nursing facility as part of this application claims the facility to date has not been paid for any part of the Appellant's institutionalization of more than 12 months prior to the application.

third parties.<sup>2</sup> The net proceeds of the sale were [REDACTED]. The two parties agreed at hearing that Appellant was entitled to some dollar amount of the net proceeds as the life estate interest holder, but the sides disagreed on the scope or exact dollar amount to which the Appellant was entitled, and whether there should be a penalty related to the amount she actually received.

Appellant was [REDACTED] years of age at the time of the real property sale in October 2020. At all times relevant to the application and appeal, she is a single or unmarried individual.

MassHealth believes that Appellant was entitled, via her life estate interest, to \$90,408.16 of the sale proceeds. To arrive at that number, the MassHealth testified that the agency followed the protocols, principles, and steps laid out in MassHealth Eligibility Operations Memo 19-12 (dated August 15, 2019, issued under the name of Heather Rossi, Deputy Policy Director for Eligibility). This Eligibility Operations Memo (EOM) states that the procedures are effective for all applications for MassHealth benefits from September 3, 2019 onward. This EOM also says that, in order to comply with federal guidelines received from the Centers for Medicare and Medicaid Services (CMS), the agency must use the Life Estate and Remainder Interest Tables of the Social Security Administration (SSA), found in the SSA's Program Operations Manual System (POMS).

MassHealth stated that, per the POMS and Appellant's age at the time of sale, the life estate figure was [REDACTED] and the remainder interest figure was [REDACTED] suggesting that Appellant should be entitled to just under [REDACTED] of the sale proceeds. See Exhibit 5, pages 3 through 4. [REDACTED] of the proceeds of [REDACTED] is \$90,408.16, and the agency thus believes that \$90,48.16 was the amount to which Appellant was entitled for her life estate interest. MassHealth noted that Appellant instead received only \$5,139.94 from the sale, resulting in a shortfall or difference of \$85,268.22, which, by not being given directly to the nursing facility resident, was effectively transferred to her children, the holders of the remainder interest, and thus this was a disqualifying transfer necessitating the penalty period. See Exhibit 5.

Per MassHealth Eligibility Operations Memoranda 20-17 (issued November 2, 2020) and Memoranda 21-20 (issued December 2020) the penalty divisor used for a LTC application filed in the month of April 2021 like the one at issue here, in which there is a disqualifying transfer, is \$391/day. Dividing the alleged penalty of \$85,268.22 by the divisor of \$391/day results in a penalty period of 218.1 days. MassHealth used this figure to impose a penalty of 219 days when it found ineligibility from January 1, 2021 to August 7, 2021.<sup>3</sup> Although Appellant and the nursing facility submitted a request seeking benefits into the prior year of 2020, due to the timing of the April 2021 application, she would not be possibly eligible for benefits before January 1, 2021, so the penalty period began to run on that January 1, 2021 date. See 130 CMR 516.006 and fn. 1, supra.

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<sup>2</sup> Although Appellant's name does not appear in the initial paragraph of the Quitclaim Deed as one of the grantors and the signature page of the Quitclaim Deed was not provided by either party, a paragraph at the bottom of page 1 of the Quitclaim Deed for the 2020 property sale (found in Exhibit 5) states that "[Appellant] hereby joins in this deed for the purposes of her life estate in the granted premises." (Bolded emphasis in original.)

<sup>3</sup> There is no regulatory guidance as to whether MassHealth must round up, round down, or round to the closest number when dealing with a penalty period of days with decimals or a portion of days. In this case, MassHealth's decision indicates that the agency either (1) chose to round up to 219 days, or (2) just added 218 days to the start date of January 1, 2021 and made August 7, 2021 the last day of the ineligibility period.

Appellant's counsel contends that the fair market value of Appellant's life estate interest should have been calculated differently and should have resulted in a much lower number, by using an older MassHealth EOM. Specifically, by using prior MassHealth EOM 07-18 (dated December 1, 2007), which uses Tiger Tables for its actuarial analysis, Appellant's Appeal Representative calculated a lower % figure for the value of the life estate interest of [REDACTED], which when applied to the sale proceeds figure would have resulted in a lower portion of the sale proceeds of the entire fee going to the Appellant, with that lower figure being \$5,139.94. See Page 2 of Appellant's Memorandum within Exhibit 8.<sup>4</sup> On October 29, 2020, less than one month after the property sale, Appellant received a transfer of exactly that amount, \$5,139.94, in her bank account. See Exhibit 5. Appellant's side thus contends that Appellant received appropriate value for her defeasible property interest.

Appellant's Memorandum in Exhibit 8 further contends that the agency's calculation and reliance on the 2019 EOM is "*patently wrong, unreasonable, arbitrary, and capricious in the face of federal and state statutes and regulations.*" and drastically overstates the real value of Appellant's life estate interest. Appellant cites to a Massachusetts Land Court case, Brennan v. Burke, 2019 Mass. LCR LEXIS 104 (June 13, 2019) which urges a lower calculation factor for a life estate interest, somewhat similar or analogous to the calculation laid out in Appellant's Memorandum. The Appellant's Memorandum also states that MassHealth's decision is in conflict with federal regulation 26 CFR 20.2031-7 (part of the Internal Revenue Code), stating in part that the POMS relied on by MassHealth are "*utilizing a ten percent (10%) interest rate*" in their calculations, while "*current IRS interest rate and methodology utilizes an interest of one and two tenth's percent (1.2%)*"; counsel for Appellant suggests that these issues all played a role resulting in MassHealth incorrectly overvaluing the life estate interest. See pages 6 through 8 of the Memorandum in Exhibit 8.<sup>5</sup>

Appellant's counsel also argues that the agency's reliance on the "*changed guidance*" in the 2019 EOM rises to the level of a regulation and thus violated the procedure requirements of the Commonwealth's Administrative Procedures Act, and that certain other actions should have been taken before the 2019 EOM was implemented.

In the post-hearing Memorandum, Appellant also raises an argument that the life estate value should be treated as an inaccessible asset. This is because, Appellant's counsel argues, the asset is now the subject of probate court proceedings due to a Probate Court filing, and thus it should be non-countable under the application of certain MassHealth regulations.<sup>6</sup> The Memorandum contains

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<sup>4</sup> The submission in Exhibit 8 is a 37-page fax with a cover sheet, so certain page references may be made to the memorandum, while others may refer to the fax page number for clarity.

<sup>5</sup> It is a bit unclear why the % described in Appellant's Memorandum is referred as an "*interest rate*" when the % involved in the calculation at issue is the percentage of ownership of the fee interest for the holders of the property interests. Interest rate percentages regarding the future value of present-day dollars do not appear to apply to the valuation issue in this appeal.

<sup>6</sup> It is unclear what the asset is here that would be the subject of this matter. If Appellant was approved for MassHealth LTC benefits (even with a penalty) she would have to have been verified being under \$2,000 in assets. Per the agency, the reason there is a penalty is because Appellant did not get the asset to which she was entitled, and

details on a Probate Court filing in [REDACTED] indicating that Attorney Neely (the same attorney who is the Appeal Representative in this matter) filed a Petition for Appointment of Conservator or for Single Transaction on [REDACTED]. Per Exhibit 8, the petition “*seeks the appointment of a single transaction conservator to establish a MARC Special Needs Pooled Trust for the benefit of the Appellant with her assets in excess of \$2,000, including the cash value of two life insurance policy and **any resulting value of her life estate.***” (Bolded emphasis added.) The docket sheet for the Probate Court action shows that appellant’s daughter is the Petitioner represented by Attorney Neeley, Appellant’s son is the Proposed Fiduciary, and Appellant herself is the Subject/Respondent. [These two children identified in the Probate Court filing are the same two children who were involved in the 1994 property deed and 2020 property sale.]

## Findings of Fact

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

1. In 1994, Appellant transfer her residential home to her two children via a conveyance that allowed her to retain a life estate in her residential property with the remainder interest going to her two children. (Testimony and Exhibits 5 and 8)
2. In [REDACTED] 2020, Appellant was admitted to her current skilled nursing facility where she has resided from then until the hearing date. (Testimony and Exhibits 5 and 8)
3. On [REDACTED] 2020, Appellant and her two children sold the entire fee of her residential home, resulting in net proceeds of [REDACTED]. (Testimony and Exhibits 5 and 8)
4. Appellant was unmarried and [REDACTED] years of age at the time of this real estate sale in [REDACTED] 2020. (Testimony and Exhibits 5 and 8)
5. In determining the value of Appellant’s life estate interest, MassHealth applied the calculation rules of EOM 19-12 to determine that Appellant had a life estate interest of \$90,408.16. (Testimony and Exhibit 5)
  - a. Appellant received \$5,139.94 from the real estate sale proceeds via a transfer to her bank account in late October 2020. (Testimony and Exhibit 5)
  - b. MassHealth thus calculated the difference, or \$85,268.22, as the amount of resource that Appellant did not receive and to which she was entitled from the sale proceeds of the

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this failure to avail or obtain the resource was deemed to effectively be a transfer. The agency is not claiming that Appellant is currently over asset, but instead the agency’s appealable action indicates that Appellant is under the asset limit due to a transfer penalty.

<sup>7</sup> This Probate Court filing initiating this matter was docketed in early January 2022, just over one week prior to the date of this appeal. This line of argument or Probate Court action was never mentioned or discussed by Appellant’s counsel at the Fair Hearing even when the Hearing Officer asked the parties near the conclusion of the January 19, 2022 hearing if there was anything else to be noted for this appeal.

home. (Testimony and Exhibit 5)

6. Appellant applied for MassHealth LTC benefits on April 2, 2021. The application and subsequent paperwork indicate Appellant is seeking a benefit start date from more than one year prior, with a benefit request start date of February 21, 2020. (Testimony and Exhibit 5)
7. Based on the shortfall and non-receipt of \$85,268.22 from the real estate sale proceeds, MassHealth calculated a disqualifying transfer penalty period of 219 days, finding that Appellant was ineligible for the period from her first date of potential eligibility (January 1, 2021) through August 7, 2021. (Testimony and Exhibit 5)
8. On November 17, 2021, MassHealth approved Appellant for Standard LTC benefits with a start date of August 1, 2021 and a Patient Paid Amount of \$1,091.09/month. (Exhibits 1 and 5)
9. Appellant timely appealed this November 17, 2021 notice, wishing to challenge the start date. There is no dispute about the PPA figure. (Testimony and Exhibits 1 and 8)
10. On [REDACTED] 2022, the Appeal Representative in this matter filed in Probate Court a Petition for Appointment of Conservator or for Single Transaction. (Exhibit 8)
  - a. The Probate Court docket sheet shows the Appeal Representative is Attorney for the Petitioner, who is Appellant's daughter who held part of the remainder interest. (Exhibit 8)
  - b. The Probate Court docket sheet for that action shows the son (who held the other part of the remainder interest) is the Proposed Fiduciary, and the Appellant is the Subject/Respondent. (Exhibit 8)
  - c. Per the Appellant's post-hearing Memorandum, the Probate Action "*seeks the appointment of a single transaction conservator to establish a MARC Special Needs Pooled Trust for the benefit of the Appellant with her assets in excess of \$2,000, including the cash value of two life insurance policy and any resulting value of her life estate.*" (Exhibit 8)

## Analysis and Conclusions of Law

Appellant has been institutionalized in a skilled nursing facility since February 2020. Over a year later, an application for MassHealth LTC assistance was filed in April of 2021. As to the start date of potential LTC benefits, for this April 2021 application, Appellant is seeking MassHealth to approve her for her earliest possible retroactive benefit date, which is January 1, 2021. See 130 CMR 516.006(A).

### 516.006: Coverage Date

#### (A) Start Date of Coverage.

*(1) For individuals applying for coverage, the date of coverage for MassHealth is determined by the coverage type for which the applicant may be eligible. 130 CMR*

519.000: MassHealth: Coverage Types describes the rules for establishing this date.

*(2) **The begin date of MassHealth Standard, Family Assistance, or Limited coverage may be retroactive to the first day of the third calendar month before the month of application, if covered medical services were received during such period, and the applicant or member would have been eligible at the time services were provided.** If more than one application has been submitted and not denied, the begin date will be based on the earliest application that is approved. Retroactive eligibility does not apply to services rendered under a home- and community-based services waiver provided under section 1915(c) of the Social Security Act.*

**(Bolded emphasis added.)**

Even though there is a benefit request date of February 21, 2020 submitted as part of the application on paperwork received from the nursing facility (indicating that the nursing facility is seeking payment as of February 21, 2020), MassHealth cannot assist with, or factor in, unpaid medical bills incurred during those last 11 months of the 2020 calendar year.

130 CMR 519.000 and 130 CMR 520.000 lay out the regulatory framework for certain clinical and financial eligibility requirements for individuals, like Appellant, seeking Medicaid or MassHealth LTC benefits to cover one's nursing facility stay. To ensure such benefits go to those in financial need in accordance with the purpose of the program, there are many rules regarding how many assets an applicant may have or retain, and how applicants may disburse their assets prior to a nursing facility admission.

519.006: Long-Term-Care Residents

*(A) Eligibility Requirements. Institutionalized individuals may establish eligibility for MassHealth Standard coverage subject to the following requirements. They must*

*(1) be younger than 21 years old or 65 years of age or older or, for individuals 21 through 64 years of age meet Title XVI disability standards or be pregnant;*

*(2) be determined medically eligible for nursing-facility services by the MassHealth agency or its agent as a condition for payment, in accordance with 130 CMR 456.000: Long Term Care Services;*

*(3) contribute to the cost of care as defined at 130 CMR 520.026: Long-Term-Care General Income Deductions;*

*(4) **have countable assets of \$2,000 or less for an individual** and, for married couples where one member of the couple is institutionalized, have assets that are less than or equal to the standards at 130 CMR 520.016(B): Treatment of a Married Couple's Assets When One Spouse Is Institutionalized; and*

*(5) **not have transferred resources for less than fair market value**, as described at 130 CMR 520.018: Transfer of Resources Regardless of Date of Transfer and 520.019: Transfer of Resources Occurring on or after August 11, 1993.*

**(Bolded emphasis added.)**

As to the asset limit referenced in 130 CMR 519.006(A)(4), MassHealth has an asset limit of \$2,000 for single/widowed applicants like the Appellant. See 130 CMR 520.003. There are restrictions regarding the spenddown of any excess countable assets, especially with regard for which past



medical expenses they may be used and whether they may be properly transferred. See 130 CMR 520.004. Before an individual will be approved for an LTC benefits, they must be found by the agency to be asset-eligible per 130 CMR 520.003. In this appeal, by the approval notice found in the November 17, 2021 appealable action, MassHealth determined Appellant was under the asset limit, albeit with a penalty related to the historical transfer of a resource. See Exhibit 1.

There is a dispute about the scope of assistance or benefit start date awarded by MassHealth. The dispute involves a penalty period related to an October 2020 disqualifying transfer of a resource that occurred during the five-year regulatory look back period of 130 CMR 520.019(B). Here it is the life estate interest asset that the agency claims was once an asset or resource of the Appellant's, that is now gone, and for which Appellant did not receive the full or appropriate value. Life estate interests held by a MassHealth applicant or member are important resources but are not treated like some other more ordinary countable assets like cash; that is because, once approved for MassHealth LTC benefits, the state may lien the life estate of any real estate interest to allow the agency to later recover the costs of medical benefits paid on behalf of that member. See 130 CMR 515.012(A); 130 CMR 520.007 (G)(1) through (12). In this case, due to the 2020 transfer, the agency has no property interest to lien.

The transfer of asset regulations most relevant to this appeal are found in 130 CMR 520.019, which reads in pertinent part as follows:

520.019: Transfer of Resources Occurring on or after August 11, 1993

...

(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.*

...

(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. ...*

...

*(I) **Transfer of Life-estate and Remainder Interest.** The rules pertaining to transfer of life-estate and remainder interest apply in instances involving remainder interest of property including life estates, annuities, wills, and trusts.*

*(1) The MassHealth agency considers a transfer of property with the retention of a life estate, as defined in 130 CMR 515.001: Definition of Terms, to be a transfer of resources. The difference between the fair-market value of the entire asset and the value of the life estate is called the remainder interest. The remainder interest is the amount considered to be transferred at less than fair-market value. The MassHealth agency will calculate the values of the remainder interest and the life estate in accordance with the life-estate tables, as determined by the MassHealth agency. If the language of the document creating the life estate explicitly states that the owner of the life estate has the power to sell the entire property (not simply the life estate), then the creation of this type of life estate will be treated as a trust.*

*(2) **If the nursing-facility resident's or the spouse's life-estate interest or property including the life-estate interest is sold or transferred, the value of the life-estate interest at the time of the sale or transfer is calculated in accordance with the life-estate tables, as determined by the MassHealth agency.** The MassHealth agency will attribute the value of the life-estate interest at the time of the sale or transfer to the person selling or transferring the life estate.*

*(3) The MassHealth agency considers the purchase of a life estate in another individual's home made on or after April 1, 2006, a disqualifying transfer, unless the purchaser resides in the home for a period of at least one year after the date of the purchase.*

**(Bolded emphasis added.)**

The parties all agree that Appellant should have received some amount of money for her life estate interest which was purchased and extinguished by the sale in October 2020, but the dispute in this Fair Hearing between the two sides is over the magnitude of that dollar amount. If the value is \$5,139.94 or less, then Appellant's side is correct, and there should be no penalty. If MassHealth is correct with its valuation, and Appellant was not properly compensated for her interest, then there would appear to be a basis to issue an appropriate penalty under the above regulations.

In determining the value of the life estate, the regulation states that the value will be calculated **"in accordance with the life-estate tables, as determined by the MassHealth agency."** (Bolded emphasis added.) See 130 CMR 520.019(I)(2). In this case all parties agree that the MassHealth worker mathematically applied the rule of Eligibility Operations Memorandum 19-12 without arithmetic error. In its introductory paragraph, EOM 19-12, found in part in Exhibit 5 and in its entirety in Exhibit 10,<sup>8</sup> states that MassHealth revised the methodology for calculating the value

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<sup>8</sup> The entire EOM 19-12 may be viewed at <https://www.mass.gov/doc/eom-19-12-calculating-the-value-of-a-life-estate-and-remainder-interest-0/download> (last viewed on March 17, 2022).

of life estates and other property interests to “align with federal guidelines”.

Throughout its eligibility determination processes, the MassHealth agency uses various Eligibility Operations Memoranda to offer guidance to its workers for carrying out and implementing certain eligibility decisions. For example, one of the more commonly used EOM in LTC applications and appeals is the EOM that is published on a regular and approximately annual basis, which updates and informs all of the average private paid cost in the Commonwealth. This information is then used by the MassHealth workers need to use as a divisor when doing the mathematical calculation of the number of days in a penalty period. The MassHealth worker used this very type of other EOM (Eligibility Operations Memo 21-20)<sup>9</sup> to calculate the specific scope, or 219-day period, for the penalty timespan in this appealable notice.

The Fair Hearing Rules suggest that, in this forum, MassHealth be offered some appropriate deference when relying on such EOM materials. See 130 CMR 610.082, which reads in relevant part as follows:

610.082: Basis of Fair Hearing Decisions

*(A) The hearing officer's decision is based upon evidence, testimony, materials, and legal rules, presented at the hearing, **including the MassHealth agency's interpretation of its rules, policies, and regulations.** Any evidence, testimony, materials, legal rules, or arguments presented after the close of the hearing will be excluded unless the record or hearing is reopened by the hearing officer pursuant to 130 CMR 610.081, or the parties stipulate procedures for response, or the parties otherwise waive the right to respond.*

*(B) The decision must be based upon a preponderance of evidence.*

*(C) The decision must be rendered in accordance with the law.*

*(1) The law includes the state and federal constitutions, statutes, and duly promulgated regulations, as well as decisions of the state and federal courts.*

*(2) **Notwithstanding 130 CMR 610.082(C)(1), the hearing officer must not render a decision regarding the legality of federal or state law including, but not limited to, the MassHealth regulations. If the legality of such law or regulations is raised by the appellant, the hearing officer must render a decision based on the applicable law or regulation as interpreted by the MassHealth agency. Such decision must include a statement that the hearing officer cannot rule on the legality of such law or regulation and must be subject to judicial review in accordance with 130 CMR 610.092.***

*(3) **The hearing officer must give due consideration to Policy Memoranda and any other MassHealth agency representations and materials containing legal rules, standards, policies, procedures, or interpretations as a source of guidance in applying a law or regulation.***

**(Bolded emphasis added.)**

Based on this, I conclude that MassHealth properly applied the calculations and steps required by

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<sup>9</sup> See <https://www.mass.gov/doc/eom-21-20-average-cost-of-nursing-facility-services-0/download> (last viewed on March 23, 2022). The 219-day period was calculated by taking the uncompensated amount, \$85,268.22, and dividing it by \$391/day, and getting a quotient between 218 and 219.

the current EOMs, as detailed in the Summary and Exhibit 5. It is also noted here that EOM 19-12 was supplemented and “supersede[d]” by EOM 20-16 (dated August 28, 2020); however, EOM 20-16 follows the same reliance on the POMS as EOM 19-12 and does not change the calculation or steps taken by the agency in this case.<sup>10</sup>

Appellant’s Memorandum argues that the agency unreasonably references and incorrectly uses the POMS while ignoring other federal regulations “cited therein”. See Page 6 of the Memorandum within Exhibit 8. On that same page, the Memorandum states:

*“...In EOM 20-16, MassHealth directs eligibility workers to utilize the applicable rates from the table published effective April 19, 1999 and nothing more in their calculations. See EOM-2016; see also SSI POMS 01140.120. While seemingly straightforward, such instruction ignores the regulatory citations to 26 C.F.R. 20.2031-7 referenced therein. See SSI POMS 01140.120. ...”*

This argument by Appellant is a bit unintuitive as to how some Internal Revenue regulations are “referenced therein”, and how the leap to 26 CFR 20.2031-7 is made. There is no mention of any Internal Revenue Code (IRC) regulation in the SSA webpage containing that specific cited POMS 01140.120.<sup>11</sup> Nor do any of the agency’s EOMs make any reference to 26 CFR or any other part of the IRC. It is however noted that both Eligibility Operations Memo 19-12 and 20-16 do cite and contain a link to the “Life Estate and Remainder Interest Table on the Social Security website.” See Exhibit 10, leading to a slightly different webpage found at <http://policy.ssa.gov/poms.nsf/lnx/0501140120> (last viewed on March 23, 2022). This SSA webpage, appears to supplement POMS SI 01140.120, and contains the percentages used by the MassHealth worker. Further, on the heading of the table within this webpage, there is a reference to the IRC section as one of this webpage’s “Citations”. See the website link above and Exhibit 5, page 3, which has the relevant portion of that webpage.

It is unclear why this SSA webpage cites to the Internal Revenue Code and what purpose, but the EOMs instruct the MassHealth worker to go to this very SSA page and use those percentages for life estate and remainder interests per the SSA website.<sup>12</sup>

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<sup>10</sup> Both EOM 19-12 and 20-16 are printed and found in their entirety in the record as Exhibit 10; these EOMs were respectively referenced but not included in full in the parties’ respective submissions in Exhibits 5 and 8. Although Appellant’s Memorandum is the first to mention EOM 20-16, there was no issue raised by Appellant as to any conflict between EOM 19-12 and 20-16 at hearing or in the Memorandum. EOM 20-16 appears to offer additional guidance as to how to calculate life estates when there are multiple life estate holders, such as in the case of a married couple who are both alive and who both reserved a life estate interest. The additional instructions of EOM 20-16 are not relevant here to this case with a single applicant, so the agency’s reliance on EOM 19-12 seems proper.

<sup>11</sup> See <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501140110DEN> (containing the cited POMS) (last viewed on March 22, 2022).

<sup>12</sup> The argument of Appellant’s counsel argument appears in part to be based on the contention that the state law and practice of the MassHealth agency is either incorrectly in conflict with or preempted by some relevant federal law or regulation, or that the federal law/publications issued by the SSA are inconsistent with federal tax law, and the latter should prevail and somehow result in a different calculation for this MassHealth application. It is not clear why the tax code should trump Social Security law or writings in the context of a dispute about a Medicaid application,

Appellant's memorandum in Exhibit 8 also cites to one 2019 Massachusetts Land Court decision (Brennan v. Burke) offering a different calculation of life estate interests in a case where multiple members of a family had life estate interests. However, that Land Court case makes no reference to a MassHealth application, nor does it involve a party who is a MassHealth applicant or beneficiary, so I find no conflict or sufficient relevance to the matter here. It is also noted that the Massachusetts Land Court case does not appear to use or reference the actuarial-related Tiger Tables involved in the older EOM (EOM 07-18) which appeared to be, based on how much money was in fact given to the Appellant, what Appellant's side believes the applicant was entitled to from the sale.

To the extent that these portions of Appellant's argument are claims that this MassHealth action and/or the relevant Eligibility Operations Memoranda conflict with state law, or other federal law and regulation (including the IRC), it is noted that Appellant may seek such judicial review of the legality or sufficiency of any MassHealth regulations or document in accordance with 130 CMR 610.092. See 130 CMR 610.082(C)(2) and (3). Similarly, Appellant's memorandum also argues that the reliance on, and publication of certain Eligibility Operations Memoranda violate a procedural requirement of the Administrative Procedures Act prior to implementation. See Page 7 of the Memorandum within Exhibit 8. If Appellant believes state law is being violated, such a challenge may be more appropriate in an alternative forum, including but not limited to the Superior Court, which has greater and more general jurisdiction powers than the Board of Hearings.

One other argument raised in the Memorandum under a section titled "*Retroactivity, Self-Serving and Double Jeopardy*" is that the 2019 Eligibility Operations Memorandum did not include an adequate phasing-in period. It is unclear why the 2019 (or subsequent) EOM(s) could not be used to address this 2020 application. The 2019 EOM was published more than 13 months prior to the sale of Appellant's real estate interest. Again, this issue can be addressed on a M.G.L. c.30A appeal if needed and appropriate.

Finally, Appellant's memorandum raises an unusual argument that the life estate asset should be treated as an "inaccessible asset" per 130 CMR 520.006. That regulation reads in part as follows:

520.006: Inaccessible Assets

(A) Definition. *An inaccessible asset is an asset to which the applicant or member has no legal access. The MassHealth agency does not count an inaccessible asset when determining eligibility for MassHealth for the period that it is inaccessible or is deemed to be inaccessible under 130 CMR 520.006.*

(B) Examples of Inaccessible Assets. *Inaccessible assets include, but are not limited to,*

*(1) property, **the ownership of which is the subject of legal proceedings** (for example, probate and divorce suits); and*

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especially as the federal Centers for Medicare and Medicaid Services (CMS) often reference and use Social Security materials for guidance in the context of long-term care applications for Medicaid programs.

*(2) the cash-surrender value of life-insurance policies when the policy has been assigned to the issuing company for adjustment....*  
(**Bolded** emphasis added.)

This inaccessible asset regulation often comes into play with MassHealth applications when the Appellant has excess assets and there is a question of whether a certain asset or assets should be countable or (temporarily) non-countable, and thus affect the finding of whether an applicant is asset-eligible. That does not appear to be very relevant here, as there is no excess asset due to the transfer. It is unknown why this is being raised for the first time in the post-hearing memorandum, and why this issue was not raised with the Hearing Officer at hearing, even though the Probate Court filing occurred before the hearing date.

There is no sign that there is a long-standing civil lawsuit where the family members are squabbling over who has the right to the \$85,268.22 amount at issue. If there were, in such a hypothetical, there may have been some possible opportunity to invoke 130 CMR 520.006(B)(1) and possibly claim it applied in some limited fashion to this application. Instead, the facts suggest this this Probate Court action is some sort of intrafamily agreement where the involved family members appear to be working in conjunction; the attorney for the mother in this Fair Hearing is listed as representing the daughter in the probate action. Further, even if the money were in Appellant's possession, or returned to Appellant's possession, there wouldn't appear to be anything "*disputed*" about the ownership to allow 130 CMR 520.006(A) to be invoked going forward to solve Appellant's asset eligibility.

Lastly, it is unclear why a Special Needs Pooled Trust is being created at this time in 2022 for the Appellant who is currently at least ■ years of age. The Appellant has been in a nursing facility for over two years, and, per the undisputed facts in the record from the parties, she has not paid for her nursing facility stay for over two years, or since February of 2020. Any countable asset belonging to Appellant in excess of the \$2,000 limit could certainly be used to satisfy at least some small portion of the debt owed to the medical providers and creditor who have been providing Appellant with comprehensive care and services for allegedly multiple years without payment. It is difficult to imagine what other special needs this applicant may have at the current time for which she may be saving some of her resources, and how those special needs may be more important or should be given a higher priority than the nursing home debt for which Appellant is seeking state-subsidized medical assistance.<sup>13</sup>

Based on the above analysis, I conclude that the MassHealth decision in this case is correct and supported by the regulations. This appeal is DENIED.

## Order for MassHealth

None.

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<sup>13</sup> In general, such special needs trusts may have greater and more appropriate value and use in Medicaid pre-planning, before an individual goes into a nursing facility, and before the applicant turns to the state to seek financial assistance with payment of his or her nursing facility stay.

## 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.

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Christopher Taffe  
Hearing Officer  
Board of Hearings

cc: Appeals Coordinator @ Taunton MEC