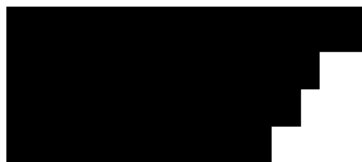


Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Dismissed in part,
Denied in part

Appeal Number: 2201123

Decision Date: 9/29/2022

Hearing Date: 09/12/2022

Hearing Officer: Paul C. Moore

Record Closed: 09/28/2022

Appearance for Appellant:



Appearance for MassHealth:

Karen Ryan, Tewksbury MassHealth
Enrollment Center (by telephone)



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street
Quincy, MA 02171*

APPEAL DECISION

Appeal Decision:	Dismissed in part, Denied in part	Issue:	Disqualifying Transfers of Resources
Decision Date:	9/29/2022	Hearing Date:	09/12/2022
MassHealth Rep.:	Karen Ryan	Appellant Rep.:	Counsel
Hearing Location:	Board of Hearings (remote)		

Authority

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

Jurisdiction

By a notice dated February 1, 2022, MassHealth informed the appellant that she is not eligible for MassHealth long-term care coverage because she failed to give MassHealth the information needed to decide her eligibility within the required time frame (Exhibit 9). By a second notice dated March 25, 2022, MassHealth informed the appellant that she is eligible for MassHealth long-term care coverage, but with a period of ineligibility due to a transfer of assets (Exhibit 1). The appellant filed timely appeals with the Board of Hearings (BOH) as to both notices on April 21, 2022 (130 CMR 610.015; Exhibit 2).¹

The BOH learned that the appellant passed away on February 6, 2022 (Exh. 3). The BOH held the appeals until a personal representative of the estate was appointed by the probate court on August 5, 2022 (*Id.*). A consolidated hearing on the merits of both appeals was then heard by the undersigned

¹ MassHealth Eligibility Operations Memo 20-09, “MassHealth Response to Coronavirus Disease 2019 (COVID-19),” issued April 7, 2020, states in relevant part: “In response to the current Coronavirus Disease 2019 (COVID-19) national emergency, MassHealth is implementing the following protocols to support the public health efforts to expedite medical care and maintain care for both new MassHealth applicants and existing members. Regarding Fair Hearings during the COVID-19 outbreak national emergency, and through the end of the month in which such national emergency period ends: All appeal hearings will be telephonic; **and Individuals will have up to 120 days, instead of the standard 30 days, to request a fair hearing for member eligibility-related concerns.**”

hearing officer on September 12, 2022.

At the close of the September 12, 2022 appeal hearing, the record was left open for both MassHealth and the appellant's estate to submit additional evidence for the hearing record. Documents were timely received, and the hearing officer closed the record of the hearing on September 28, 2022.

Limitation on the amount or scope of MassHealth assistance is a valid ground for appeal to BOH (130 CMR 610.032(A)).

Action Taken by MassHealth

MassHealth determined that the appellant is eligible for MassHealth coverage for a nursing home stay, but with a period of ineligibility due to disqualifying transfers of resources.

Issue

The issue is whether MassHealth correctly determined that the appellant made disqualifying transfers of resources to qualify for MassHealth.

Summary of Evidence

The MassHealth representative from the Tewksbury MassHealth Enrollment Center testified by telephone that the appellant, who was over 65 years old, filed an application for long-term coverage on December 16, 2021 (Testimony, Exh. 6). The appellant's estate is seeking coverage for the appellant's nursing home stay beginning on October 21, 2021. MassHealth initially denied the appellant's application by notice dated February 1, 2022 due to her failure to verify her income and assets (Exh. 9). Ultimately, all verifications were received, and MassHealth issued a new, substantive eligibility determination on March 25, 2022. According to the MassHealth representative, the appellant made disqualifying transfers of assets in 2020 and 2021, ostensibly for improvements made to someone else's home, in the total amount of \$26,500.00. MassHealth determined that the appellant had assets of \$8,108.00 in an account with [REDACTED] as of October 21, 2021, and \$1,649.00 in assets at [REDACTED] as of October 13, 2021, equivalent to \$9,757.00 in total assets. The appellant is allowed to keep \$2,000.00 in assets to qualify for MassHealth Standard for a nursing home stay. MassHealth determined that the appellant had excess assets as of the date coverage was sought, October 21, 2021, and divided her total assets by \$515.00 per day, the daily private pay rate at the nursing facility where the appellant resided, to calculate a spenddown. The MassHealth representative testified that the appellant's "otherwise eligible" date was November 9, 2021. Next, MassHealth divided \$26,500.00 (amount of disqualifying transfers) by the average daily cost to a private patient receiving nursing-facility services in the Commonwealth at the time of application, or \$410.00 per day. This yielded a 65-day penalty period, so the coverage start-date for the appellant's nursing facility stay is January 5,

2022 (Testimony, Exh. 1, Exh. 6).

The MassHealth representative acknowledged in her testimony that an error was made when calculating the appellant's "otherwise eligible" date of November 9, 2021. She testified that she should have divided \$9,757.00 less \$2,000.00, or \$7,757.00, by \$515.00 per day to calculate a spenddown of assets, which would have yielded a 16-day period of ineligibility. Thus, the appellant's "otherwise eligible" date would have been November 7, 2021 (16 days after October 21, 2021). The MassHealth representative acknowledged that this error, when corrected, will change the appellant's coverage start-date to late December, 2021; she asked the hearing officer for permission to recalculate the coverage start-date following the hearing (Testimony).

With regard to the disqualifying transfers of resources, the MassHealth representative testified that the appellant, or someone acting on her behalf, withdrew cash from two different bank accounts on a number of occasions during the five-year lookback period preceding the date of her application, as follows:

<u>Bank</u>	<u>Amount</u>	<u>Date</u>
██████████	\$6,000.00	August 25, 2020
██████████	\$8,000.00	October 22, 2020
██████████	\$7,000.00	January 21, 2021
██████████	\$5,500.00	April 16, 2021

(Testimony, Exh. 6, Exh. 11)

The MassHealth representative testified that the appellant's attorney produced a copy of a letter from a general contractor reflecting that a renovation to a home in ██████████ was completed for the total amount of \$21,000.00 (Exh. 7). The home belonged to another individual, ██████████, and according to the contractor's letter:

The scope of the work was to take their (*sic*) existing unfinished basement and transform the large space into a completely functional finished living space with having an elderly tenant occupying the space in mind. . .

(*Id.*)²

The MassHealth representative testified that on the dates of the cash withdrawals from the appellant's bank accounts, the appellant was living in senior housing in ██████████. Thus, the ██████████ home where the renovations occurred was not her primary residence. In addition, the MassHealth representative asserted that the appellant never lived at the ██████████ address prior to her passing

² Initials are used to protect confidentiality.

away (Testimony).³

The appellant's estate was represented at hearing by an attorney, who appeared by telephone. Prior to hearing, the estate's attorney submitted a legal memorandum and exhibits, which the hearing officer marked as Exhibit 7. In his memorandum, the estate's attorney asserted that the appellant was living alone in 2021, and had a day care companion, [REDACTED]. The estate's attorney added that:

In 2021 it became apparent that [the appellant] was in need of someone to be available to her full time in case of emergencies. It was decided that [the appellant] would transform [REDACTED] unfinished basement into a functional elderly occupied living space, as [REDACTED] was upstairs she would be available full time. Arrangements were made, the construction agreement was with an otherwise unrelated third party, [the appellant] paid \$21,000 and the work was completed.

. . . [B]ecause [the appellant] never lived in the refurbished apartment, she never received value for her payment pursuant to 130 CMR 520.019(C).

However, we contend that the Division never made a finding of intent as required under 520.019(F)(2). Said regulation requires that the Division not impose a period of ineligibility if it is shown that the member intended at transfer to receive fair market value for the transfer.

We believe that all the facts point to the conclusion that [the appellant's] intent at the time of transfer was to live in the refurbished basement, be watched over by [REDACTED] that such an arrangement was valuable to her and she intended to receive (while she never lived to receive) full value for her \$21,000 spent.

(Exh. 7)

The estate's attorney reiterated at the appeal hearing that the appellant funded the renovations in question with the intent of moving into the basement of the [REDACTED] home where [REDACTED] lived. [REDACTED] was the appellant's caregiver, prior to the appellant entering the nursing facility in [REDACTED]. The appellant's attorney called the personal representative of the estate, [REDACTED] (the appellant's nephew), as a witness. [REDACTED] testified that the appellant was his aunt and that he introduced the appellant to [REDACTED], with whom he is close friends. He testified that the appellant lived alone in senior housing in a dangerous neighborhood in [REDACTED], and had no close relatives nearby.⁴ He testified that [REDACTED] assisted the appellant on a daily basis to bathe, take her medications, and cook her meals. He, [REDACTED] and the appellant decided that it would be in the appellant's best interest to move into a renovated

³ The hearing officer pointed out that the cash withdrawals of \$26,500.00 exceed the sum of \$21,000.00 paid to the contractor to complete the renovations. Neither the estate's attorney, nor the witnesses, offered any argument or testimony on this issue.

⁴ [REDACTED] lives on [REDACTED] (Testimony, Exh. 3).

basement apartment in [REDACTED] home, where [REDACTED] could care for her more attentively (Testimony).

The estate's attorney also called [REDACTED] as a witness. [REDACTED] testified that she met the appellant in about 2019. She indicated that the appellant fell and fractured her hip in 2019. She was admitted to a hospital, and then to a rehabilitation facility thereafter. Following the appellant's discharge home to her apartment, [REDACTED] went to the appellant's apartment just about every day, and sometimes stayed there all night. At that time, [REDACTED] had full-time employment outside her home. [REDACTED] has two adult children. The appellant was diagnosed with pancreatic cancer prior to [REDACTED] meeting her, in approximately 2015. The appellant's health was declining rapidly throughout 2019 and 2020, she was incontinent of bowel and bladder, and her mobility was impaired. The appellant did not pay [REDACTED] to assist her. [REDACTED] loved the appellant like her mother. [REDACTED] is the sole owner of the home in [REDACTED] (Testimony).

[REDACTED] testified that the appellant added [REDACTED] as a co-owner of her bank accounts shortly after meeting her, although [REDACTED] could not recall exactly when. [REDACTED] paid the appellant's bills for her. She testified that discussions occurred with [REDACTED] and the appellant beginning in 2020 to pursue the option of having the appellant move into [REDACTED] home, and the appellant was amenable to this option. [REDACTED] withdrew cash from the appellant's bank accounts beginning in August, 2020, although the construction did not begin until the spring of 2021. The contractor was paid in cash. [REDACTED] stated that she withdrew the cash from the appellant's bank accounts "in preparation" for a contract being signed. She testified that she placed the cash in a safe in her home well before retaining and paying the contractor. While the construction on the basement apartment began in approximately February, 2021, the work was not finished until October, 2021. The basement apartment was accessible from the home's garage, and there were no stairs into the unit. [REDACTED] stated that the appellant fell again in the community in October, 2021, and reinjured her hip. She was again admitted to a rehabilitation facility, and subsequently to a long-term care facility. Unfortunately, the appellant passed away in early February, 2022. Thus, the appellant never reaped the benefit of living in the renovated basement unit in [REDACTED] home (Testimony).

[REDACTED] testified that the appellant never documented her wishes to finance a renovation of [REDACTED] home, and to move in with [REDACTED], in writing (Testimony).

The appellant's attorney asserted that under MassHealth regulation 130 CMR 520.019(F), MassHealth may not impose a period of coverage ineligibility if it determines that a member intended to dispose of a resource at either fair-market value, or for other valuable consideration. He asserted that MassHealth made no attempt to determine the appellant's intent when she authorized the cash withdrawals from her bank accounts. He also asserted that the appellant intended to receive fair-market value (FMV) from financing the renovations because she intended to live there and to be cared for by [REDACTED]. The fact that she did not actually obtain FMV from these transfers was solely due to the appellant's unexpected death. He argued that it is the appellant's intent at the time of the transfers that governs whether a transfer is "disqualifying" (Testimony).

At the close of the appeal hearing, the hearing officer left the record of the appeal open until September 26, 2022 for the appellant's estate to submit a copy of the entire construction contract [REDACTED] and [REDACTED] entered into with the general contractor for renovations to [REDACTED] home, and for the estate to submit a list of the appellant's medical diagnoses at the time of her admission to the nursing facility in [REDACTED]. The hearing officer also left the record of the appeal open for the MassHealth representative to recalculate the period of coverage ineligibility, if appropriate, and to submit copies of the appellant's bank statements reflecting the cash withdrawals MassHealth believes were disqualifying transfers of resources (Exh. 10). The hearing officer also agreed to extend the record-open period until October 11, 2022 for each party to comment in writing on the other party's record-open submission, if they chose to do so (*Id.*).

On September 13, 2022, the hearing officer received from the MassHealth representative, via e-mail, a revised calculation of the appellant's "otherwise eligible" coverage date, taking into account assets in her bank accounts as of October 21, 2021, less the cost of a funeral home contract entered into by [REDACTED] on the appellant's behalf with a value of \$2,550.00 (Exh. 11). The "otherwise eligible" date is revised to October 24, 2021; the disqualifying transfers of \$26,500.00 remain unchanged, with 65-day period of ineligibility. Thus, the new coverage start-date is December 28, 2021, according to the revised calculation (*Id.*). The MassHealth representative included with her submission copies of the relevant bank statements from [REDACTED] and [REDACTED], respectively, showing the total cash withdrawals of \$26,500.00 beginning in August, 2020 through April, 2021 (*Id.*). The co-owners listed on the bank account statements are the appellant and [REDACTED] (*Id.*).⁵

On September 19, 2022, the hearing officer received from the estate's attorney, by e-mail, a list of the appellant's admitting diagnoses when she entered the nursing facility in [REDACTED], as follows: Alzheimer's Disease; hypothyroidism; emphysema; chronic kidney disease; and secondary malignant neoplasm of ovary, liver, lung, bladder, and bone (Exh. 12A).⁶ The estate's attorney also produced a copy of a contract executed by [REDACTED], [REDACTED] and the contractor, on April 25, 2021 (Exh. 12B).⁷ The contract states in relevant part:

Summary of Work

The scope of work has been discussed by all parties listed above and will consist of finishing the basement space located at [REDACTED]. . . The existing basement has studs and insulation where needed. The basement bathroom has no plumbing or any finished walls. . .

⁵ For two of the cash withdrawals, \$6,000.00 on August 25, 2020, and \$8,000.00 on October 22, 2020, an unknown person added handwritten annotations stating, "home construction to allow for [the appellant] to move in with [REDACTED]" (Exh. 11).

⁶ No onset date for any of these diagnoses is listed.

⁷ Although there is evidence in the record that [REDACTED] was the appellant's attorney-in-fact, the construction contract was signed by [REDACTED] as an individual, and not in his capacity as attorney-in-fact for the appellant (Exh. 16).

Schedule of Payments

An initial mobilization and deposit payment of \$5,000.00 will be due at the end of day one which is April 26, 2021, followed by another payment of \$5,000.00 after the plumber has finished the rough plumbing in the bathroom. The other two remaining payments of \$5,000.00/each or more will be made at 75% and 95% of job completion. Any remaining balance above the \$20,000.00 will be made at 100% of job completion and final walkthrough. . . .

(*Id.*).

Although not specifically requested by the hearing officer, the estate's attorney also forwarded via e-mail a letter dated September 19, 2022 from the contractor, asserting that "conversations" with [REDACTED] and [REDACTED] about the intended renovation started in about December, 2020, despite that no contract was signed until April, 2021 (Exh. 12C). The contractor wrote that the intent was to make the basement "suitable and self-sufficient for an elderly tenant" (*Id.*). He noted that the work was completed for \$21,000.00 (*Id.*).

With his post-hearing submission, the estate's attorney asserted in an e-mail that the progress note regarding the appellant's diagnosis of Alzheimer's Disease "was made a full year after the discussions begun (*sic*) regarding the contract" (Exh. 12).⁸

On September 27, 2022, the MassHealth representative sent comments on the estate's record-open submissions by e-mail to the hearing officer and to the estate's attorney, as follows:

MassHealth has reviewed the submission from the applicant/representatives, MassHealth is not changing our position that the transfers made were to improve a property the applicant does (*sic*) not have ownership interest in.

(Exh. 14)

Pursuant to 130 CMR 610.081, "Reopening Before Decision," on September 28, 2022, the hearing officer briefly reopened the record of this appeal via e-mail to the parties to obtain additional information concerning whether the appellant ever appointed anyone as her attorney-in-fact during her lifetime (Exh. 15).⁹ MassHealth responded to this inquiry with responsive information (Exh. 16). Thereafter, the hearing officer closed the record of the appeal on

⁸ The estate's attorney wrote in an e-mail dated September 20, 2022 that he would not be filing any comments on MassHealth's post-hearing submission (Exh. 13).

⁹ The Fair Hearing Rules at 130 CMR 610.081, "Reopening Before Decision," state in pertinent part: "After the close of the hearing and before a decision, the hearing officer may reopen the record or, if appropriate, the hearing if he or she finds need to consider further testimony, evidence, materials or legal rules before rendering his or her decision. . . ."

September 28, 2022.

Findings of Fact

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

1. The appellant, who was over age 65, filed an application for MassHealth long-term care coverage on December 16, 2021 (Testimony, Exh. 6).
2. The appellant entered a nursing facility on [REDACTED] and is seeking coverage for her nursing home stay on that date (*Id.*).
3. The appellant passed away on February 6, 2022 (Exh. 3).
4. MassHealth initially denied the appellant's application by notice dated February 1, 2022 due to her failure to verify her income and assets (Exh. 9).
5. MassHealth issued a new, substantive eligibility determination on March 25, 2022, reflecting that the appellant made disqualifying transfers of assets in 2020 and 2021, ostensibly for improvements made to someone else's home, in the total amount of \$26,500.00 (Exh. 1).
6. The appellant had assets of \$8,108.00 in an account with [REDACTED] as of October 21, 2021, and \$1,649.00 in assets at [REDACTED] as of October 13, 2021, equivalent to \$9,757.00 in total assets (Exh. 6).
7. MassHealth determined that the appellant had excess assets as of the date coverage was sought, October 21, 2021, and divided her total assets by \$515.00 per day, the actual daily private pay rate at the nursing facility where the appellant resided, to calculate a spenddown, yielding an "otherwise eligible" date of November 9, 2021 (*Id.*).
8. Next, MassHealth divided \$26,500.00 (amount of disqualifying transfers) by the average daily cost to a private patient receiving nursing-facility services in the Commonwealth at the time of application, or \$410.00 per day (Exh. 6, MassHealth Eligibility Operations Memo 21-20 (December, 2021)).
9. This yielded a 65-day penalty period, so the coverage start-date for the appellant's nursing facility stay is [REDACTED] (Exh. 1, Exh. 6).
10. MassHealth should have subtracted \$2,000.00 from the appellant's total assets of \$9,757.00 and divided this sum, \$7,757.00, by the actual daily private pay rate at the nursing facility where the appellant resided to calculate a spenddown, prior to applying the disqualifying

transfers penalty period (Testimony).

11. The appellant's estate timely filed appeals of both the February 1, 2022 and March 25, 2022 MassHealth notices with the BOH (Exh. 2).
12. The appellant's primary residence was in [REDACTED] (Testimony).
13. The appellant had no close relatives living nearby (Testimony).
14. In 2019, the appellant's nephew, [REDACTED], introduced the appellant to [REDACTED], with whom [REDACTED] is close friends (Testimony).
15. [REDACTED] lives in [REDACTED] but began to assist the appellant with her activities of daily living, such as bathing and cooking, at the appellant's apartment in [REDACTED] (Testimony).
16. The appellant did not pay [REDACTED] for her assistance (Testimony).
17. At some point in 2019, the appellant added [REDACTED] as a co-owner of her bank accounts (Testimony, Exh. 10).
18. As the appellant's health declined in 2019 and 2020, [REDACTED] and [REDACTED] began discussing with the appellant the possibility of the appellant moving into a basement apartment in [REDACTED] home (Testimony).
19. The appellant's bank accounts were used to fund a renovation of the basement unit of [REDACTED] home, including adding a functional bathroom (Testimony, Exh. 7, Exh. 12A).
20. [REDACTED] made the following cash withdrawals from the appellant's bank accounts: (a) \$6,000.00 on August 25, 2020; (b) \$8,000.00 on October 22, 2020; (c) \$7,000.00 on January 21, 2021; and (d) \$5,500.00 on April 16, 2021 (Exh. 6, Exh. 11).
21. [REDACTED] and the contractor executed a contract for the basement renovation on April 25, 2021 (Exh. 12B).
22. Cash was withdrawn from the appellant's bank accounts as early as August, 2020, even though work was not commenced on the renovation until April, 2021 (Testimony, Exh. 11).
23. [REDACTED] placed the cash withdrawn from the appellant's bank accounts in a safe in her home (Testimony).
24. The contractor documented that the work for the basement renovation was completed for

\$21,000.00, and that the intent was to make the basement “suitable and self-sufficient for an elderly tenant” (Exh. 12B).

25. [REDACTED] and [REDACTED] paid the contractor in cash (Testimony).
26. The renovation work was completed in approximately October, 2021 (Testimony).
27. The appellant fell in the community in October, 2021, injured her hip, was admitted to a rehabilitation facility, and subsequently to a long-term care facility (Testimony).
28. The appellant never moved into [REDACTED] basement apartment (Testimony).
29. [REDACTED] and [REDACTED] did not explain how the difference between the value of cash withdrawals from the appellant’s accounts totaling \$26,500.00, and the amount paid to the contractor, \$21,000.00, was used.
30. At the time of her admission to the nursing facility in [REDACTED], the appellant’s diagnoses included Alzheimer’s Disease; hypothyroidism; emphysema; chronic kidney disease; and secondary malignant neoplasm of ovary, liver, lung, bladder, and bone (Exh. 12).
31. It is unclear when the appellant received a diagnosis of Alzheimer’s Disease, or whether she was aware of the withdrawals made from her bank accounts.
32. The appellant did not document in writing her wishes to pay for a renovation of [REDACTED] basement and did not sign the construction contract (Testimony).
33. Following the appeal hearing, MassHealth recalculated the appellant’s “otherwise eligible” coverage date, taking into account assets in her bank accounts as of October 21, 2021, less the cost of a funeral home contract entered into by [REDACTED] on the appellant’s behalf with a value of \$2,550.00 (Exh. 11).
34. MassHealth revised the appellant’s “otherwise eligible” date to October 24, 2021; the disqualifying transfers of \$26,500.00 remain unchanged, with 65-day period of ineligibility. Therefore, the new coverage start-date is December 28, 2021, according to the revised MassHealth calculation (*Id.*).

Analysis and Conclusions of Law

MassHealth 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(K).¹⁰

MassHealth 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. A disqualifying transfer may include any action taken which would result in making a formerly available asset no longer available (130 CMR 520.019(C)).

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

(A) Payment of Nursing-Facility Services. The MassHealth agency will apply the provisions of 130 CMR 520.018 and 520.019 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).

(B) Look-Back Period. Transfers of resources are subject to a look-back period, beginning on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard. This period generally extends back in time for 36 months. **For transfers of resources occurring on or after February 8, 2006, the period extends back in time for 60 months.** The look-back period for transfers of resources from a revocable trust to someone other than the nursing-facility resident, or transfers of resources into an irrevocable trust where future payment to the nursing-facility resident is prevented, is 60 months.

(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

¹⁰130 CMR 515.001 defines fair-market value 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.”

failure to take legal action to receive a resource is reasonably considered a transfer by the individual, the MassHealth agency will consider the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.

(D) Permissible Transfers. The MassHealth agency considers the following transfers permissible. Transfers of resources made for the sole benefit of a particular person must be in accordance with federal law.

(1) The resources were transferred to the spouse of the nursing-facility resident or to another for the sole benefit of the spouse. A nursing-facility resident who has been determined eligible for MassHealth payment of nursing-facility services and who has received an asset assessment from the MassHealth agency must make any necessary transfers within 90 days after the date of the notice of approval for MassHealth in accordance with 130 CMR 520.016(B)(3).

(2) The resources were transferred from the spouse of the nursing-facility resident to another for the sole benefit of the spouse.

(3) The resources were transferred to the nursing-facility resident's permanently and totally disabled or blind child or to a trust, a pooled trust, or a special-needs trust created for the sole benefit of such child.

(4) The resources were transferred to a trust, a special-needs trust, or a pooled trust created for the sole benefit of a permanently and totally disabled person who was under 65 years of age at the time the trust was created or funded.

(5) The resources were transferred to a pooled trust created for the sole benefit of the permanently and totally disabled nursing-facility resident.

(6) The nursing-facility resident transferred the home he or she used as the principal residence at the time of transfer and the title to the home to one of the following persons:

(a) the spouse;

(b) the nursing-facility resident's child who is under age 21, or who is blind or permanently and totally disabled;

(c) the nursing-facility resident's sibling who has a legal interest in the nursing-facility resident's home and was living in the nursing-facility resident's home for at least one year immediately before the date of the nursing-facility resident's admission to the nursing facility; or

(d) the nursing-facility resident's child (other than the child described in 130 CMR 520.019(D)(6)(b)) who was living in the nursing-facility resident's home for at least two years immediately before the date of the nursing-facility resident's admission to the institution, and who, as determined by the MassHealth agency, provided care to the nursing-facility resident that permitted him or her to live at home rather than in a nursing facility.

...

(F) Determination of Intent. In addition to the permissible transfers described in 130 CMR 520.019(D), the MassHealth agency will not impose a period of ineligibility for transferring resources at less than fair-market value if the nursing-facility resident or the spouse demonstrates to the MassHealth agency's satisfaction that:

- (1) the resources were transferred exclusively for a purpose other than to qualify for MassHealth; or**
- (2) the nursing-facility resident or spouse intended to dispose of the resource at either fair-market value or for other valuable consideration. Valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.**

(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.

(Emphases added)

In addition, the State Medicaid Manual (HCFA Transmittal letter 64) at Section 3258.10 sets forth the following guidance to address transfers exclusively for a purpose other than qualifying for Medicaid:

2. Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid. -- Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. **Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred.**

(Emphasis added)

See also, Gauthier v. Director of the Office of Medicaid, 80 Mass. App. Ct. 777, 785-786 (2011) (Massachusetts Appeals Court held, *inter alia*, that hearing officer correctly affirmed MassHealth's decision that applicant made a disqualifying transfer of resources during the application lookback period; the applicant failed to show that the transfer was made exclusively for a purpose other than to qualify for MassHealth, because applicant did not present convincing

evidence as the specific purpose for which the asset was transferred, as is required under federal law).

First, the MassHealth denial notice dated February 1, 2022 premised on missing verifications, although timely appealed, is now moot. MassHealth acknowledges all verifications were received, and MassHealth preserved the appellant's application date of December, 2021. A substantive eligibility decision was subsequently issued, and was the subject of this appeal hearing.

Therefore, this portion of the appeal is DISMISSED.

Next, regarding the start-date of the appellant's coverage, apart from the issue of the purported disqualifying transfers, MassHealth revised its asset spenddown calculation following the hearing to reflect an "otherwise eligible" date for the appellant of October 24, 2021. The disqualifying transfer penalty of 65 days (\$26,500.00 divided by \$410.00 per day) was then applied, resulting in a coverage start-date of December 28, 2021.

Regarding the calculation of the "otherwise eligible" date for the appellant's coverage, this issue is resolved, and this portion of the appeal is also DISMISSED.

The appellant filed a MassHealth application in December, 2021. In August, 2020, October, 2020, January, 2021, and April, 2021, the appellant, or someone acting on her behalf, made transfers of resources from her bank accounts totaling \$26,500.00, ostensibly to fund a renovation of [REDACTED] basement that the appellant could then move into.

None of these transfers are considered "permissible" under 130 CMR 520.019(D)(1) through (6).

The record shows that the appellant met [REDACTED] in 2019 and added her to her bank accounts shortly thereafter. [REDACTED] provided care to the appellant for which [REDACTED] was not compensated. [REDACTED] and [REDACTED] executed an agreement with a third-party contractor in April, 2021 to commence work on the basement. This work was not completed until October, 2021, by which time the appellant had already entered a nursing facility.

While the amount of the transfers at issue was \$26,500.00, the renovation work was completed for \$21,000.00. There was no evidence presented as to how the additional \$5,500.00 was used. Unfortunately, since the appellant passed away in February, 2022, she was unable to provide hearing testimony on this issue. And there is no written documentation of the appellant's intent to fund the basement renovation; the appellant was not a party to the construction contract.

The estate's attorney argues that the appellant's intent when she made the transfers in question was, unquestionably, to receive FMV for the transfers, in the form of receipt of supervision and care from [REDACTED], in a better living space. There is no question that the appellant needed care and

assistance with her activities of daily living during the relevant time frame. The estate argues that because the appellant fully intended to receive FMV, the transfers at issue cannot be considered disqualifying.

The appellant's state of mind when she made these transfers is difficult to infer. It is not known whether the appellant was even aware of the transfers at issue. The appellant's health was in decline for a lengthy time period, beginning in 2015 with a cancer diagnosis. At some point, the appellant also received a diagnosis of Alzheimer's Disease. While the estate's attorney argues that this diagnosis was received in October, 2021, well after discussions among [REDACTED], [REDACTED], and the appellant to move into [REDACTED] renovated basement had commenced, this is not supported by the evidence. The date of onset of the appellant's Alzheimer's Disease is simply not documented.

Most important, the timeline of the transfers at issue does not align with the timeline of the basement renovation. It defies logic that the cash withdrawn from the appellant's accounts in 2020 (totaling \$14,000.00) would have been placed in a safe until needed to pay the contractor. The funds withdrawn in 2020 could have remained in the appellant's bank accounts, and continued to earn some modest interest, until needed to pay the contractor six to eight months later. Even the cash withdrawal from the appellant's bank of \$7,000.00 in January, 2021 was well before a construction contract was signed.

Simply put, it cannot be concluded that the appellant's intent when she made these transfers of resources was exclusively for a purpose other than to qualify for MassHealth; nor can it be definitively concluded that the appellant intended to dispose of these resources at FMV or for other valuable consideration.

MassHealth's decision that the appellant made disqualifying transfers of resources was correct.

For these reasons, this portion of the appeal must be DENIED.

Order for MassHealth

None, other than to notify the appellant's estate of her coverage start-date of December 28, 2021, if MassHealth has not already done so.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Implementation of this Decision

If you experience problems with the implementation of this decision, you should report this in writing to the Acting Director of the Board of Hearings at the address on the first page of this decision.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Sylvia Tiar, Appeals Coordinator, Tewksbury MEC

cc: [REDACTED]