

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2205652
Decision Date:	9/8/2022	Hearing Date:	08/19/2022
Hearing Officer:	Christine Therrien	Record Open to:	08/22/2022

Appearance for Appellant:



Appearance for MassHealth:

Dianne Braley, Taunton



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

APPEAL DECISION

Appeal Decision:	Denied	Issue:	LTC disqualifying transfer
Decision Date:	9/8/2022	Hearing Date:	08/19/2022
MassHealth's Rep.:	Dianne Braley	Appellant's Rep.:	[REDACTED]
Hearing Location:	Telephonic		

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 7/21/22, MassHealth calculated a period of ineligibility from 5/9/22 to 5/16/23 because MassHealth determined that the appellant recently gave away or sold assets. (130 CMR 520.018 and 520.019 and Exhibit 1). The appellant filed this appeal in a timely manner on 7/29/22. (130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth calculated a period of ineligibility 5/9/22 to 5/16/23.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.018 and 520.019, in determining that the appellant gave away or sold assets and imposed a period of ineligibility from 5/9/22 to 5/16/23.

Summary of Evidence

The appellant was represented by her attorney at the hearing. The appellant, an [REDACTED] long-term care resident (LTC), entered a LTC facility on [REDACTED]. (Exhibit 4). The appellant applied for MassHealth LTC benefits on 5/18/15, with a requested start date of 5/7/15. (Exhibit 4). The

appellant's application was approved for MassHealth LTC benefits with the requested start date. (Exhibit 4). The appellant's MassHealth application states that the appellant owns two real estate properties: a primary residence in NH, and an income property in FL. The application states that the NH property was in the process of being placed in a revocable trust for the appellant's care-taker child and the FL property was in the same revocable trust. (Exhibit 4).¹ The FL property was transferred from the revocable trust, where the appellant and her son were the trustees, to the appellant on 6/24/15. (Exhibit 8). The MassHealth representative stated that the appellant was allowed to retain the FL property because the appellant was receiving rental income, otherwise it would be considered an asset. (Exhibit 7). The MassHealth representative testified that after an annual review was submitted on 6/25/22 MassHealth learned that the appellant, by her POA, had transferred the FL income property to her child and his spouse for \$10.00 on 5/9/22, as recorded on the deed. (Exhibit 4).² The MassHealth representative testified that the assessed value of the FL property in 2022 was \$152,900. (Exhibit 4). The MassHealth representative testified that no monies were transferred to the appellant from her child and his spouse. The MassHealth representative testified that the assessed value of \$152,900 divided by the state daily nursing home rate of \$410.00 per day equals 372 days ineligibility period. The ineligibility period is 5/9/2022 to 5/16/2023.

The appellant's attorney testified that on 5/9/22 the appellant was deeded a 1/3 interest with her child and his spouse as joint tenants for a property owned by her child and his spouse in MA in exchange for \$104,300. The appellant's attorney testified that the MA property is the appellant's primary residence which she intends to return to therefore it is excluded from her assets. The appellant's attorney submitted a brief which argued that the MA property is the only property the appellant has ownership rights to, and it is her primary residence. The appellant's attorney argued that the appellant paid fair market value for her joint tenancy in the MA property and thus no penalty can be applied because: a) MassHealth must accept the tax assessed value as FMV; b) It is irrelevant if the asset is subject to estate recovery if FMV is paid; c) Intent is only considered where FMV was not paid therefore no penalty can be assessed. (Exhibit 6).

The appellant's attorney argued that MassHealth erred and must accept the tax assessed value of an asset and may not impose a penalty per 42 U.S.C. 1396(p)(c)(1)(A); 130 CMR 520.019(c); Mendonca v. Harris, Bristol Superior Court No. 147CV00379, November 26, 2014; Nogrady v. Dougherty, 30 Mass.L.Rptr. 203 (2012); and Foley v. Dehner, Hampden Superior Court No. 2008-0850, June 3, 2009, Kinder, J.³ In addition, the appellant's attorney points to MassHealth's own regulation which

¹130 CMR 520.019(D)(6) Transfer of Resources Occurring on or after August 11, 1993 Permissible Transfers: 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: (d) the nursing facilities 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 Division, provided care to the nursing-facility resident that permitted him or her to live at home rather than in a nursing facility.

² The appellant's POA is the same child who was deeded the property in FL.

³ 130 CMR 520.019(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,

states the tax assessed value must be considered FMV. (130 CMR 520.007(G)(3)(a); Nogrady v. Dougherty, 30 Mass.L.Rptr. 203 (2012); Foley v. Dehner, Hampden Superior Court No. 2008-0850, June 3, 2009, Kinder, J., and Cardon v. Dehner, Suffolk Superior Court No. 08-3749-C, February 3, 2010, Cratsley, J).⁴ The appellant's attorney stated that in exchange for the appellant's joint tenancy in the MA property the appellant paid \$104,300 in the form of a property transfer of the FL rental property, which is slightly less than 1/3 of tax assessed value of the MA property. The appellant's attorney argues that MassHealth is prohibited from imposing a penalty period as the appellant paid FMV. (Exhibit 6).

The appellant's attorney cited four Massachusetts Superior Court cases in which the court found that the applicants, who purchased a joint tenancy in family property for FMV, made an allowable transfer of assets. In Nogrady v. Dougherty, the applicant lived with her daughter and son-in-law for 26 years before entering a LTC facility. Two months after entering the facility the applicant, by her POA, purchased a 1/2 interest in her daughter and son-in-law's home for 1/2 the tax assessed value. Two months after this transfer the applicant applied for MassHealth. The court found that the applicant paid FMV for her 1/2 interest in the property which was not a disqualifying transfer and the home was noncountable as the applicant's primary residence. In Foley v. Dehner, the applicant entered a LTC facility and nine months later he transferred liquid assets in exchange for a joint tenancy in property owned by his niece. Five weeks after the transfer the applicant applied for MassHealth. The court found that the applicant paid FMV for his joint tenancy because he paid 1/2 of the tax assessed value of the property. The court was not persuaded by MassHealth's argument that the assets were no longer available to the applicant because as a joint tenant the applicant has a right to partition. In Cardon v. Dehner, the applicant lived with his son in his son's home for 11 years until he entered a LTC facility. Four months after entering the LTC facility the applicant paid cash for a 1/2 interest as a joint tenant in his son's home. The applicant applied for MassHealth four months later. The court again found that the applicant paid FMV for the 1/2 interest as a joint tenant in his son's home because he paid 1/2 of the tax assessed value of the home therefore it was not a disqualifying transfer. In Mendonca v. Harris, the applicant owned her own primary residence when she entered a LTC facility, but she intended to live with her daughter when she left the facility. The month the applicant entered the facility she transferred her own property and cash to her daughter in exchange for a 1/2 interest as a joint tenant in her daughter's home. The total value of the property

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.

⁴ 130 CMR 520.007(G)(3)(a) Real Estate Fair-market Value and Equity Value. The fair-market value and equity value of all countable real estate owned by the individual and the spouse must be verified at the time of application and when it affects or may affect eligibility. For applications received on or after January 1, 2006, equity interest in the principal place of residence exceeding \$750,000 renders an individual ineligible for payment of nursing facility and other long-term-care services, unless the spouse of such individual or the individual's child who is younger than 21 years old or who is blind or permanently and totally disabled resides in the individual's home. The allowable equity interest amount will be adjusted annually, beginning in January 2011. The adjustment will be based year-to-year on the percentage increase in the Consumer Price Index. The applicant or member must verify the fair-market value by a copy of the most recent tax bill or the property tax assessment that was most recently issued by the taxing jurisdiction, provided that this assessment is not one of the following: 1. a special purpose assessment; 2. based on a fixed-rate-per-acre method; or 3. based on an assessment ratio or providing only a range.

and cash was equal to ½ of the tax assessed value of the daughter's home. The following month the applicant applied for MassHealth. The court held that the applicant paid FMV for the joint tenancy because she paid ½ of the tax assessed value of the property and the MassHealth regulations do not impose a period of time in which an applicant must live in a property in order to call it their primary residence. (Exhibit 6).

Lastly, the appellant's attorney argued that determination of intent to qualify for MassHealth is only relevant when the applicant transfers assets for less than FMV. The appellant's attorney argued that if it is determined that FMV was not paid and the appellant's intent must be determined that the appellant; 1) intended to pay FMV, and 2) the appellant's "sole purpose is to secure the ability to live in her son's home with the care and support of her family, should she leave the nursing facility." (Exhibit 6).

The appellant's attorney concluded that the appellant should be allowed to keep her primary residence. The appellant secured a residence where she could receive assistance with activities of daily living, she protected her interest from potential creditors of her child and his spouse, she protected herself in the event her child predecease her, became disabled or changed his mind about taking in his mother. (Exhibit 6).

Findings of Fact

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

1. The appellant is [REDACTED] and entered a LTC facility on [REDACTED].
2. The appellant applied for MassHealth LTC benefits on 5/18/15 with a requested start date of 5/7/15.
3. The appellant's application was approved for MassHealth LTC benefits with the requested start date.
4. The appellant's MassHealth application states that the appellant owns two real estate properties: a primary residence in NH, and a property in FL.
5. The application states that the NH property was in the process of being placed in a revocable trust for the appellant's care-taker child and the FL property was in the same revocable trust.
6. The FL property was transferred from the revocable trust, where the appellant and her son were the trustees, to the appellant on 6/24/15.
7. The appellant was allowed to retain the FL property because the appellant was receiving rental income, otherwise it would have been considered an asset.
8. After an annual review was submitted on 6/25/22, MassHealth learned that the appellant, by

her POA, had transferred the FL income property to her child and his spouse for \$10.00 on 5/9/22, as recorded on the deed.

9. The assessed value of the FL property in 2022 was \$152,900.
10. No monies were transferred to the appellant from her child and his spouse.
11. MassHealth determined a disqualifying period by using the assessed value of the FL income property in 2022 of \$152,900, divided by the state daily nursing home rate of \$410.00 per day, which equals 372 days. The ineligibility period is 5/9/2022 to 5/16/2023.
12. On 5/9/22 the appellant was deeded a 1/3 interest with her child and his spouse as joint tenants for a property owned by her child and his spouse in MA in exchange for \$104,300.

Analysis and Conclusions of Law

An applicant for MassHealth benefits has the burden to prove his or her eligibility, including that a transfer of resources was legitimate, not gratuitous, or for less than fair-market value. (130 CMR 515.001, 520.007; M.G.L. ch. 118E, § 20). Federal Medicaid law, 42 USC §1396p(c)(1)(A), states that if an institutionalized individual transfers assets for less than fair-market value on or after the look-back date the applicant is ineligible for long-term-care services for a defined period. If an applicant or member has transferred resources for less than fair-market value, MassHealth long-term-care benefits may not be paid until a period of ineligibility has been imposed and expires. (42 USC §1396p(c)(1)(A) (2010); M.G.L. 118E, § 28).

MassHealth will deny payment for nursing facility services to an otherwise eligible resident of a nursing facility who transfers “countable resources for less than fair-market value during or after the period of time referred to as the look-back period,” or who takes any action that would result in making a formerly available asset no longer available. (130 CMR 520.018(B) and 130 CMR 520.019(C)). MassHealth considers any transfer of a resource “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)].”⁵ (130 CMR 520.019(C)).

130 CMR 520.007: Countable Assets

Countable assets are all assets that must be included in the determination of eligibility. Countable assets include assets to which the applicant or member or his or her spouse would be entitled whether or not these assets are actually received when failure to receive such assets results from the action or inaction of the applicant, member, spouse, or person acting on his or her behalf. In determining whether or not failure to receive such assets is reasonably considered to result from such action or inaction, the MassHealth agency considers the specific circumstances involved. The applicant or member and the spouse

⁵ As published, the last cross-reference is to subsection (J). This is likely a typographical error. Subsection (J) specifically **includes** home equity loans and reverse mortgages as disqualifying transfers if transferred for less than fair-market value. Subsection (K), however, **exempts** listed transactions from the period of ineligibility.

must verify the total value of countable assets...The assets that the MassHealth agency considers include, but are not limited to, the following.

...

(G) Real Estate.

(1) Real Estate as a Countable Asset. All real estate owned by the individual and the spouse, with the exception of the principal place of residence as described in 130 CMR 520.008(A), is a countable asset. The principal place of residence is subject to allowable limits as described in 130 CMR 520.007(G)(3).⁶ **Business or nonbusiness property as described in 130 CMR 520.008(D) is a noncountable asset.**

(Emphasis added.)

130 CMR 520.008: Noncountable Assets

Noncountable assets are those assets exempt from consideration when determining the value of assets. In addition to the noncountable assets described in 130 CMR 520.006 and 520.007, the following assets are noncountable.

...

(D) Business and Nonbusiness Property. Business and nonbusiness property essential to self-support and property excluded under an SSA-approved plan for self-support are considered noncountable assets.⁷

20 C.F.R. § 416.1220 list houses for rent as a nonbusiness income-producing property essential to self-support, thus a noncountable asset. On 5/9/22, the appellant's POA signed a Warranty Deed transferring the appellant's nonbusiness income-producing property in FL to the appellant's child and his spouse for \$10. The record shows that the property had a tax assessed value of \$152,900 at the time of the transfer. (Exhibit 4). The FL rental property was a noncountable asset that became a countable asset when the appellant was no longer using it as a nonbusiness income producing property. The sales proceeds from the FL rental property must be treated as a countable asset because it was turned into a liquid resource and ceased to be property essential for self-support. (20 CFR § 416.1220). MassHealth uses the tax assessed value of real estate as the FMV. (130 CMR 520.007(G)(3)(a)).

Further, the transfer of the FL rental property, which was deemed essential for self-support because it provided income for the appellant, also falls into the category of "transfer of income." *The State Medicaid Manual*, Health Care Financing Administration Pub. 45-3, Transmittal 64 (Nov. 1994) (a document commonly referred to as "HCFA 64") speaks directly to the requirement of a penalty period for the transfer of income.⁸ Section 3258.6 of HCFA 64, reads as follows:

⁶ 130 CMR 520.008(A) states a primary residence must be real estate in Massachusetts.

⁷ 20 C.F.R. § 416.1220 (2021). Property essential to self-support; general. When counting the value of resources an individual (and spouse, if any) has, the value of property essential to self-support is not counted, within certain limits. There are different rules for considering this property depending on whether it is income-producing or not. Property essential to self-support can include real and personal property (for example, land, buildings, equipment and supplies, motor vehicles, and tools, etc.) used in a trade or business (as defined in § 404.1066 of part 404), nonbusiness income-producing property (houses or apartments for rent, land other than home property, etc.) and property used to produce goods or services essential to an individual's daily activities. Liquid resources other than those used as part of a trade or business are not property essential to self-support. If the individual's principal place of residence qualifies under the home exclusion, it is not considered in evaluating property essential to self-support.

⁸ *The State Medicaid Manual*, Health Care Financing Administration Pub. 45-3, Transmittal 64 (Nov. 1994) (a document

3258.6 Treatment of Income as Asset. -- Under OBRA 1993, income, in addition to resources, is considered to be an asset for transfer (and trust) purposes. Thus, **when an individual's income is given or assigned in some manner to another person, such a gift or assignment can be considered a transfer of assets for less than fair market value.**

...

When you find that income or the right to income has been transferred, a penalty for that transfer must be imposed for institutionalized individuals (if no exceptions apply).⁹

(emphasis added)

MassHealth determines periods of ineligibility in several special circumstances including transfers of lump-sum income. (130 CMR 520.019(G)(2)(e)). When determining the ineligibility period for transfers of income MassHealth uses the total amount of the lump-sum income. The sale of a business or nonbusiness property generates a lump-sum of income. Since MassHealth uses the tax assessed value of the real-estate to determine FMV, the FMV of \$152,900 is used to determine the period of ineligibility for the transfer of income.

Whenever MassHealth determines that a resource was transferred for less than FMV MassHealth will consider the issue of intent before imposing a period of ineligibility. (130 CMR 520.019(F)). The appellant has been eligible for MassHealth LTC benefits since 2015 with countable income from the appellant's nonbusiness income property. If not for the nonbusiness income property status of the FL real estate the appellant would have had to have sold the real estate and spend down the excess assets before becoming eligible for MassHealth. The requirements for MassHealth eligibility surrounding real estate have not changed since the appellant was determined eligible in 2015. The appellant transferred the property that was no longer being used as a nonbusiness income property and therefore no longer a noncountable asset thus the appellant's assets must be spent down to the allowable asset limit. (130 CMR 520.004(A))¹⁰ The appellant's POA, and attorney knew the requirements when the appellant applied for MassHealth, to imply that the transfer of the now countable asset is for purposes other than to qualify for MassHealth is disingenuous. The applicant

commonly referred to as "HCFA 64"), and Section 3258.6 specifically, for support for this portion of the analysis. The MassHealth agency has an obligation to give weight to HCFA 64, which is an interpretive communication of the "State Medicaid Manual" published by HCFA (the Health Care Financing Administration, which is now known as the Center for Medicare and Medicaid Services (CMS), the federal agency under the Department of Health and Human Services with the responsibility of helping the 50 states to administer their Medicaid programs). The Massachusetts Appeals Court has previously looked at this interpretive communication for guidance on many issues related to eligibility for LTC benefits. (See e.g., Andrews v. Division of Medical Assistance, 68 Mass.App.Ct. 228 (2006)). The contents of HCFA 64 are also found in the Social Security Administration's Programs Operations Manual System (POMS).

⁹ No exceptions apply in this case, per 130 CMR 520.019(K), as there is not a trust to revise nor has the transfer been cured.

¹⁰ 130 CMR 520.004: Asset Reduction (A) Criteria. (1) An applicant whose countable assets exceed the asset limit of MassHealth Standard, Family Assistance, or Limited may be eligible for MassHealth (a) as of the date the applicant reduces his or her excess assets to the allowable asset limit without violating the transfer of resource provisions for nursing-facility residents at 130 CMR 520.019(F); or (b) as of the date, described in 130 CMR 520.004(C), the applicant incurs medical bills that equal the amount of the excess assets and reduces the assets to the allowable asset limit within 30 days after the date of the notification of excess assets.

has the burden of proof to present credible evidence for eligibility. The appellant has not carried the burden of demonstrating that MassHealth eligibility was not contemplated when depleting \$152,900 in assets, so that the cost of the appellant's long term care should be shifted from the appellant to the publicly funded Medicaid/MassHealth program; a program that was "designed to provide health care for indigent persons," with the expectation that individuals deplete their own resources before obtaining assistance from the government. (Lebow v Comm'r of the Div of Med. Assistance, 433 Mass. 171, 172 (2001)).¹¹

While MassHealth did not provide a brief for this appeal the MassHealth representative did state the pertinent facts of the case succinctly. Conversely, the appellant's attorney supplied a very thorough brief, but it does not speak to facts of this case. All the Superior Court cases cited in the appellant's attorney's brief are distinguish from this case because they do not concern the conversion of a previously noncountable business or nonbusiness property into a countable asset after receiving MassHealth LTC benefits for a number of years. In Nogady, Foley, and Cardon, the transfers in question concern each applicant's use of cash or other liquid assets to purchase their interest in a primary residence. In Mendonca, the transfer in question occurred when the applicant used the proceeds from the sale of her primary residence to purchase an interest in a new primary residence. The issue addressed in each of these Superior Court cases is not the issue here, therefore the appellant's attorney's arguments as to why the appellant should not be assessed a period of ineligibility are not persuasive.

MassHealth was correct in determining there was a disqualifying transfer of the appellant's income or assets for less than FMV. MassHealth correctly used the tax assessed value of the FL income property in 2022 of \$152,900 to calculate the period of ineligibility from 5/9/22 to 5/16/23. divided by the state daily nursing home rate of \$410.00 per day, which equals 372 days.

This appeal is denied.

Order for MassHealth

None.

Notification of Your Right to Appeal to Court

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

¹¹ Regardless, of whether the resource was considered income or assets.

Christine Therrien
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Justine Ferreira, Taunton MassHealth Enrollment Center, 21 Spring St.,
Ste. 4, Taunton, MA 02780.

