

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2401708
Decision Date:	5/8/2024	Hearing Date:	03/05/2024
Hearing Officer:	Scott Bernard	Record Open to:	04/30/2024

Appearance for Appellant:



Appearance for MassHealth:

Ana Costa (Taunton MEC) *via* telephone



*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:	Long Term Care (LTC)/Assets/Disqualifying Transfer
Decision Date:	5/8/2024	Hearing Date:	03/05/2024
MassHealth's Rep.:	Ana Costa	Appellant's Rep.:	[REDACTED]
Hearing Location:	Taunton MassHealth Enrollment Center	Aid Pending:	N/A

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 January 24, 2024, MassHealth denied the appellant's application for MassHealth long term care (LTC) benefits because it determined that the appellant had given away or sold assets for less than fair market value, to become eligible for MassHealth LTC benefits. (See 130 CMR 520.018; 520.109; and Exhibit (Ex.) 1; Ex. 2, p. 3). The appellant, through her attorney-at-law, filed this appeal in a timely manner on February 2, 2024. (See 130 CMR 610.015(B) and Ex. 2). Denial of assistance is valid grounds for appeal. (See 130 CMR 610.032).

The record was left open until April 30, 2024 in order to allow the appellant's attorney to submit further information into the record at which time it closed. (See Ex. 9).

Action Taken by MassHealth

MassHealth denied the appellant's application because the appellant gave away or sold assets for less than fair market value to become eligible for LTC benefits.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.018 and 520.019, in determining that the appellant transferred resources for less than fair market value and whether a period of ineligibility should be imposed.

Summary of Evidence

Representing MassHealth, a worker from the Taunton MassHealth Enrollment Center (MEC) provided testimony. The appellant, who was not present, was represented by her attorney and her daughter, who is also the appellant's power of attorney. All persons present participated in the hearing via telephone.

The MassHealth representative testified as follows: The appellant, aged [REDACTED], entered a nursing facility on [REDACTED] (Testimony). Subsequently, she submitted a Long-Term Care (LTC) services application on June 23, 2023, with a requested start date of May 22, 2023. (Testimony). During the pendency of the MassHealth application, on July 27, 2023, the appellant, through her power of attorney, sold her home for \$195,720.00. (Testimony). At that juncture, the nursing facility had already invoiced the appellant, establishing her obligation to cover the costs. (Testimony). However, instead of fulfilling this obligation, the proceeds from the home sale were transferred to the appellant's daughter, who held the appellant's power of attorney. (Testimony). Consequently, MassHealth deemed this transfer a disqualifying asset transfer, undertaken with the intention of qualifying for LTC benefits. (Testimony). In the notice dated January 24, 2024, MassHealth denied the appellant's application for MassHealth LTC benefits because it determined that by loaning her daughter the money, the appellant had given away or sold assets to become eligible for MassHealth LTC benefits. (Ex. 1; Testimony). The appellant was duly notified of the denial of her LTC application, along with ineligibility for benefits from May 22, 2023 through August 22, 2024. (Testimony; Ex. 1). The MassHealth representative stated that she was also concerned that the appellant may not have had the capacity to enter into the promissory note at the time it was executed. (Testimony).

In the appellant's attorney's memorandum of law, submitted prior to the hearing, and through his subsequent testimony, the following points were presented: The appellant, born on [REDACTED] was admitted to the nursing facility on [REDACTED] (Ex. 7, p. 1). The appellant applied for LTC benefits on June 23, 2023, seeking coverage from May 22, 2023. (Ex. 7, pp. 1, 4). On [REDACTED] the appellant sold her home and received \$195,720.00 in proceeds. The appellant's attorney notes that on July 27, 2023, the appellant loaned her daughter \$195,720.00 receiving a promissory note in return. (Ex. 7, p. 1).

The promissory note contained the following relevant terms. (Ex. 7, pp. 5-6). The appellant's daughter agreed to repay the appellant \$195,720.00 in 114 equal monthly installments of

\$2,074.81 each month¹ at an interest rate of 4.09%. (Ex. 7, p. 5). The note prohibited cancellation of the balance upon the death of the lender (the appellant) or the borrower (the appellant's daughter). (Id.).

The crux of the appellant's attorney's argument lay in the contention that the appellant did not transfer assets for less than fair market value. (Testimony). Rather, acting through the holder of her power of attorney, the appellant lent her daughter the sum of \$195,720.00, for which the appellant received a duly executed promissory note on July 27, 2023. (Testimony; Ex. 7, pp. 1, 5-6).

The appellant's attorney cited regulation 130 CMR 520.007(J)(3), which outlines conditions for considering outstanding balances on promissory notes, loans, or mortgages as disqualifying asset transfers. (Testimony; Ex. 7, p. 2). According to this regulation, such transfers are permissible if three conditions are met: the repayment terms must be actuarially sound, based on MassHealth's actuarial tables; the note must mandate equal payments throughout its duration, without deferral or balloon payments; and the note must not permit cancellation of the balance upon the lender's death. (Id.). The appellant's attorney argued that the promissory note in question satisfied all three stipulations. (Testimony).

Furthermore, the attorney argued that, pursuant to the terms of the promissory note, the appellant received fair market value for the loan extended to her daughter. (Testimony; Ex. 7, pp. 5-6). Notably, according to the Social Security Administration's (SSA's) Actuarial Table², the term of the note, 9.5 years, did not exceed the appellant's life expectancy, 9.7 years. (Testimony; Ex. 7, pp. 7-10). The monthly installments outlined in the note (\$2,074.81 per month for 114 months) were consistent with this assessment. (Testimony; Ex. 7, p. 4). Additionally, the promissory note explicitly prohibited cancellation upon the lender's or borrower's death, ensuring compliance with the regulatory requirements. (Id.).

Emphasizing the legally enforceable nature of the promissory note, the appellant's attorney stated that if the hearing officer disregarded the express terms of the agreement, it would render any contract involving family members or any private contract a disqualifying transfer regardless of compliance with the provisions of the regulation. (Testimony). He stated that such a position would constitute an error of law, would be arbitrary and capricious and would not be supported by substantial evidence. (Testimony).

The appellant's attorney also argued that the promissory note was not an annuity contract. (Testimony). MassHealth differentiates between the two instruments, which have different requirements for ensuring that a transfer of resources into the respective instruments is non-

¹ The note, however, also states that the last payment of \$2,074.81 is due by February 18, 2029, which is about 47 months shy of 114 months. (See Ex. 7, p. 5).

² The appellant's attorney cited to <https://www.ssa.gov/oact/STATS/table4c6.html>, which is the SSA Office of the Chief Actuary's Actuarial Life Table for 2020. According to this website, this is the most recent Actuarial Table available.

disqualifying. (Testimony). Finally, the appellant's attorney asked that the hearing officer take notice and consider the holding of Board of Hearings Appeal No. 1809589, which had a similar set of facts. (Testimony; Ex. 8).

The appellant's attorney responded to the MassHealth representative's assertion concerning the appellant's capacity. He stated first that the appellant did, in fact, have the capacity to agree to the promissory note. (Testimony). He continued by stating that the appellant was acting through her power of attorney, who executed the promissory note on her behalf. (Testimony).

At the conclusion of the hearing, the record was left open in order for the appellant's attorney to submit pages missing from his initial hearing submission and to answer questions from the hearing officer. (See Ex. 7; Ex. 9). After several extensions, the hearing record closed on April 30, 2024. (Id.).

Findings of Fact

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

1. The appellant is an individual who was born on [REDACTED] (Testimony; Ex. 7, p. 1).
2. The appellant entered the nursing facility in early [REDACTED] (Testimony; Ex. 7, p. 1).
3. The appellant submitted an application for LTC services on June 23, 2023, seeking a start date of May 22, 2023. (Testimony; Ex. 7, pp. 1, 4).
4. The appellant's daughter is her power of attorney.
5. On July 27, 2023 the appellant sold her home for \$195,720.00. (Testimony).
6. On the same date, the monies from that sale were transferred to the appellant's power of attorney/daughter in exchange for a promissory note executed by the appellant's power of attorney/daughter. (Testimony; Ex. 7, pp. 1, 5-6).
7. The promissory note stated the appellant's daughter was required to repay equal installments of \$2,074.81 per month for 114 months or 9.5 years at an interest rate of 4.09%. (Testimony; Ex. 7, p. 5).
8. The note also states that the last payment of \$2,074.81 is due by February 18, 2029, which is about 47 months shy of 114 months.
9. The note prohibited cancellation of the balance upon the death of both the lender (the appellant) and the borrower (the appellant's daughter). (Testimony; Ex. 7, p. 5).
10. According to the most recently published Actuarial Table from the SSA's Office of the

Chief Actuary, the appellant's life expectancy at the time the note was executed was 9.7 years. (Testimony; Ex. 7, p. 2).

11. MassHealth treated the promissory note as a disqualifying transfer of assets with intent to qualify for LTC benefits and denied the appellant's LTC application. (Testimony; Ex. 1).

Analysis and Conclusions of Law

Countable assets are all assets that must be included in the determination of eligibility. (130 CMR 520.007). 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. (Id.). 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. (Id.). To be eligible for MassHealth nursing-facility services the total value of assets owned by an institutionalized single individual or by a member of an institutionalized couple must not exceed \$2,000. (130 CMR 520.003(A)(1); 130 CMR 520.016(A)). MassHealth denies payment for nursing-facility services to an otherwise eligible nursing-facility resident who transfers countable assets for less than fair-market value during or after the period referred to as the look-back period. (130 CMR 520.018(B)). The look-back period is 60 months and begins on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard. (130 CMR 520.019(B)(2)). MassHealth considers any nursing facility resident's transfer of an asset³, or interest in an asset, owned by or available to the nursing-facility resident for less than fair-market value during the appropriate look-back period as a disqualifying transfer unless it is listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(K)⁴. (130 CMR 520.019(C)). MassHealth may consider any action taken to avoid receiving an asset to which the nursing-facility resident is or would be entitled if such action had not been taken as a disqualifying transfer. (Id.). Action taken to avoid receiving an asset may include, but is not limited to, waiving the right to receive an asset, not accepting an asset, agreeing to the diversion of an asset, or failure to take legal action to obtain an asset. (Id.). A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available. (Id.).

The regulations at 130 CMR 520.019(F) state the following regarding determining whether a nursing facility resident intended to make a disqualifying transfer:

³ 130 CMR 520.019(C) actually uses the term "resource" here, but for the sake of clarity and consistency with other cited regulations I have chosen to use the term "asset" since MassHealth considers the terms synonymous, at least in this context. (See 130 CMR 515.001).

⁴ The regulation cites to paragraph (J), which is entitled "Home Equity Loans and Reverse Mortgages." This appears to be an error, since paragraph (K) is concerned with exemptions, and for that reason I have made this substitution.

(F) Determination of Intent...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.

The assets that MassHealth considers include the following:

(J) Annuities, Promissory Notes, Loans, Mortgages, and Similar Transactions.

- (1) Treatment of Annuities Established Before February 8, 2006...
- (2) Treatment of Annuities Established on or after February 8, 2006...
- (3) Promissory Notes, Loans, or Mortgages. The value of any outstanding balance due on a promissory note, loan, or mortgage is considered a disqualifying transfer of assets, unless all of the following conditions are met:
 - (a) the repayment terms of the promissory note, loan, or mortgage are actuarially sound, based on actuarial tables as determined by the MassHealth agency⁵;
 - (b) the promissory note, loan, or mortgage provides for equal payment amounts during the life of the loan, with no deferral and no balloon payments; and
 - (c) the promissory note, loan, or mortgage prohibits cancellation of the balance upon the death of the lender.
- (4) Transactions Involving Future Performance. Any transaction that involves a promise to provide future payments or services to an applicant, member, or spouse, including but not limited to transactions purporting to be annuities, promissory notes, contracts, loans, or mortgages, is considered to be a disqualifying transfer of assets to the extent that the transaction does not have an ascertainable fair-market value or if the transaction is not embodied in a valid contract that is legally and reasonably enforceable by the applicant, member, or spouse. This provision applies to all future performance whether or not some payments have been made or services performed.

(130 CMR 520.007(J)).

⁵ As MassHealth does not identify which actuarial tables are used to determine soundness, it may be surmised that MassHealth means that soundness is determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration as stated at 42 USC § 1396p(c)(1)(I)(i).

The record shows that on [REDACTED] the appellant sold her house for \$195,720.00. The appellant had \$195,720.00 with which to pay her nursing facility expenses and her power of attorney took action to make such assets no longer available to the appellant. On July 27, 2023, the appellant's power of attorney, transferred the appellant's assets of \$195,720.00 to herself. In exchange for this transfer, the appellant's power of attorney gave the appellant a promissory note. According to the terms of the promissory note, the appellant's power of attorney was required to repay the loan in equal installments of \$2,074.81 per month for 114 months or 9.5 years at an interest rate of 4.09%. The note, however, also states that the last payment of \$2,074.81 is due by February 18, 2029, which is less than 6 years from the note's origination date and would result in less than full repayment of the loan, or necessitate a balloon payment. (See Ex. 7, p. 5). The note stated that it would not be cancellable upon the appellant's death. At the time the note was executed, the appellant was [REDACTED] years old. The appellant's life expectancy was 9.7 years according to one of the actuarial publications of the Office of the Chief Actuary of the SSA. Although the note states that monthly payments will be made over 9.5 years, which is less than the appellant's life expectancy of 9.7 years, the clause about the last payment being due by February 18, 2029 raises questions regarding full repayment and/or balloon payments. This may be a typographical error which the appellant's attorney intends to remedy.

However, even if the language regarding payment by February 19, 2029 is removed, the real questions occur when considering 130 CMR 502.007(J)(4), which also applies. Any transaction involving a promise to provide future payments to an applicant, which includes transactions purporting to be promissory notes, is considered to be a disqualifying transfer of assets to the extent that the transaction does not have an ascertainable fair-market value or if the transaction is not embodied in a valid contract that is legally and reasonably enforceable by the applicant. The record does not show that the transaction is embodied in a valid contract that is legally and reasonably enforceable by the applicant. The appellant's daughter, as the appellant's power of attorney, stands on both sides of the transaction. In her office as the appellant's power of attorney, the appellant's daughter transferred \$195,720.00 to herself as the appellant's daughter. The appellant's power of attorney then gave the appellant the promissory note. The appellant's daughter, in the office of the appellant's power of attorney, would have no incentive to enforce the promissory note if she, as recipient of the proceeds, were to violate the terms of the note. The transfer and promissory note give the appearance of a self dealing transaction. The appellant's daughter, as power of attorney, reaps the benefit of receiving \$195,720.00 in return for a note of which enforcement would be detrimental to her. The note offers no incentive for enforcement by the daughter as power of attorney, thereby offering no enforceable benefit to the appellant. Pursuant to 130 CMR 520.007(J)(4), the appellant made a disqualifying transfer of \$195,720.00. MassHealth's calculation of a period of ineligibility is correct.

For the above stated reasons, the 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.

Scott Bernard
Hearing Officer
Board of Hearings

cc:

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

