



## APPEAL DECISION

Appeal Decision:	Approved	Issue:	130 CMR 520.003; 520.008(F)(1)(d)
Decision Date:	JUL 25 2012	Hearing Date:	June 19, 2012 Taunton
MassHealth Rep.:		Appellant Rep.:	

### 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 March 29, 2012, MassHealth notified appellant that her application for long-term-care was denied because her assets exceeded the program limit by \$4181 (130 CMR 520.003 and Exhibit A). Appellant through her attorney filed this appeal in a timely manner on April 13, 2012 (130 CMR 610.015 and Exhibit A). Denial of eligibility is a valid ground for appeal (130 CMR 610.032).

### Action Taken MassHealth

MassHealth denied appellant's application for long-term-care because her assets exceeded the program limit by \$4181.

### Issue

The appeal issue is whether two funeral trusts valued at \$5000 each represent countable assets pursuant to 130 CMR 520.008(F)(1)(d).

## Summary of Evidence

Documents were submitted into evidence (Exhibits A-H). The record was left open for appellant's attorney to submit a memo which was submitted timely (Exhibit I). The record closed on 7/10/12.

The MassHealth representative testified that appellant is married and was admitted to the nursing home on or about 10/1/11. She submitted an application for long-term-care on 1/31/12 seeking eligibility as of "the earliest possible date" (Exhibit B). The application was denied on 3/09/12 for failing to provide verifications but the information came in and this denial dated 3/29/12 is about the funeral trusts. The couple's total assets are \$119,821 (including the value of the trusts) and the community spouse is entitled to keep \$113,640 while appellant can keep \$2000 so the excess assets are \$4181 (Exhibit A).

\* The MassHealth representative continued that MassHealth isn't accepting burial trusts anymore. She submitted a legal memo by Attorney Katy Schelong (Exhibit E). The MassHealth representative stated that the legal opinion concludes that the two policies (one for the husband and one for appellant) are identical and valued at \$5000 and are countable. \*

Appellant's attorney stated that she has tried since the denial notice to find out from MassHealth what was wrong with the trusts (see letters sent to MassHealth Exhibits F-H). She was only given the MassHealth legal opinion today. This hearing officer agreed to leave the record open for Attorney Flynn's response (Exhibit I). The attorney further clarified that the documents are not identical because appellant's husband's is not signed as immediately irrevocable.

## Findings of Fact

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

1. Appellant is married and was admitted to the nursing home on or about 10/1/11.
2. Appellant submitted an application for long-term-care on 1/31/12 seeking eligibility as of "the earliest possible date" (Exhibit B).
3. The couple's total uncontested assets are \$109,821 in bank accounts.
4. Appellant's spouse is entitled to keep up to \$113,640 in assets and appellant is entitled to keep \$2000.

5. On 10/03/11 appellant's husband applied for and paid a single premium \$5000 life insurance policy with National Guardian Life Insurance Company (NGL) naming NGL Funeral Expense Trust as the beneficiary (Exhibit C, p.3).
6. On the same day (10/03/11) appellant's husband signed a document entitled Irrevocable Assignment of Ownership to NGL Funeral Expense Trust in which effective 45 days from NGL receiving the form assigned ownership and changed the beneficiary of his policy # NPL0371546 to the trust (Exhibit C, p.2).
7. On 10/28/11 the trustee accepted the assignment (Exhibit C, p.2). Without evidence to the contrary the assignment of ownership became irrevocable on or about 12/12/11.
8. On the assignment form there is a box "To be used for the purposes of Immediate Medicaid Eligibility ONLY" that was not signed by appellant's husband (Exhibit C, p.2).
9. On 10/03/11 appellant applied for and paid a single premium \$5000 life insurance policy with National Guardian Life Insurance Company (NGL) naming NGL Funeral Expense Trust as the beneficiary (Exhibit D, p.3).
10. On the same day (10/03/11) appellant signed a document entitled Irrevocable Assignment of Ownership to NGL Funeral Expense Trust in which effective 45 days from NGL receiving the form assigned ownership and changed the beneficiary of her policy # NPL0371704 to the trust (Exhibit D, p.2).
11. On the assignment form there is a box "To be used for the purposes of Immediate Medicaid Eligibility ONLY" that was signed by appellant on 10/03/11 (Exhibit D, p.2). Appellant's assignment of ownership became irrevocable on 10/03/11.
12. On 10/16/00 National Guardian Life Insurance Company of Wisconsin as settler created a trust entitled the NGL Funeral Expense Trust for the purpose of receiving irrevocable assignments of life insurance policies the company issues to its customers (Exhibit F, pp.12-15 and attached forms).
13. The purpose of the trust is to hold the policies and to pay for funeral and burial expenses of NGL customers who have made irrevocable assignments (of their life insurance policy) to the trust upon notification of the death of the insured (Exhibit F, p.12).
14. The trust has no rights to the proceeds of the assigned policies (Exhibit F, p.12 (2)).
15. The trustee appoints an administrator, in this case Advest Bank and Trust Company (Exhibit F, p.18). The trustee can appoint a successor administrator (p.19).

16. The trust can be modified or amended but such changes shall not adversely affect the rights of any beneficiary under any policy assigned to the trustee prior to the effective date of such amendments or modifications (Exhibit F, p.14).
17. The trust will terminate in respect to any policy on the death of the insured and issuance of direction to pay the proceeds and on the cancellation due to lapse, surrender or other termination of such policy. The trust will terminate automatically when all policies assigned to the trustee have been terminated by lapse, surrender or death of the last remaining insured under the policies.
18. The Irrevocable Assignment of Ownership to NGL Funeral Expense Trust forms specifically state in part:
  - The change in ownership (of the life insurance policy to the trust) is permanent;
  - The right to cancel the life insurance policy and receive a return of premium is renounced;
  - The right to surrender the policy for cash or take a loan against it is renounced;
  - The right to change beneficiaries is renounced;
  - Policy proceeds that exceed the cost of approved goods and services for the insured funeral, burial or cremation are to be paid to the State, if required by the applicable State's Medicaid recovery program; and
  - There is a long list of authorized possible funeral and burial related goods and services qualifying for reimbursement (Exhibits C-D).
19. Appellant's choice of a funeral trust rather than a contract with a specific funeral home was a guard against the possibility of a specific funeral home going out of business (Exhibit I, p.2).
20. MassHealth legal department did not review the trust involved in this case but instead relied upon a previous review of a trust entitled Amended NGL Funeral Trust dated 7/14/08 (Exhibit E, p.1).
21. The MassHealth legal department did not review the single pay whole life insurance policies involved in this case (Exhibit E, p.1).
22. The single pay whole life insurance policies at issue in this case are not in evidence, just the front sheet, the schedule of benefits and premiums and the simplified application for insurance (Exhibits C-D).
23. The cover page of the single pay whole life insurance policies at issue in this case states that cancellation of the prearranged funeral plan does not automatically cancel the policy and provides a right to cancel the policy up to midnight of the 30<sup>th</sup> day after the date the owner receives the policy (Exhibits C-D).

## Analysis and Conclusions of Law

The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Standard, Essential, or Limited may not exceed \$2000 for an individual (130 CMR 520.003(A)). Treatment of a married couple's assets when one spouse is institutionalized is described in 130 CMR 520.016(B) (130 CMR 520.003(C)). The combined total assets of the institutionalized spouse and the community must not exceed \$115,640 of which \$2000 is allocated to the institutionalized spouse (130 CMR 520.016(B)(2)(b)). In this case, appellant and her spouse have assets in bank accounts that total \$109,821. Appellant would be asset eligible if her financial eligibility were based on that uncontested amount. However, MassHealth is counting the value of the two life insurance policies purchased on 10/03/11 for \$5000 each. That \$10,000 causes the total assets of the couple to exceed the asset limit by \$4181.

Without reviewing the specific life insurance policies or the funeral trust at issue in this case, MassHealth's legal unit has concluded, according to the MassHealth representative, that it "isn't accepting burial trusts anymore". This is a problem because, as far as this hearing officer is aware, the regulation allowing burial trusts has not changed since the last revision on 2/10/06.

Regulation 130 CMR 520.008(F) Funeral or Burial Arrangements states:

(1) The following funeral or burial arrangements for the applicant, member, or spouse are considered noncountable assets:

(a) any burial space, including any burial space for any immediate family member;

(b) one of the following:

(i) a separately identifiable amount not to exceed \$1,500 expressly reserved for funeral and burial expenses; or

(ii) life-insurance policies designated exclusively for funeral and burial expenses with a total face value not to exceed \$1,500;

(c) the cash-surrender value of burial insurance; and

(d) prepaid irrevocable burial contracts or irrevocable trust accounts designated for funeral and burial expense.

(2) Appreciated value or interest earned or accrued and left to accumulate on any contracts, accounts, or life insurance is also noncountable. If the applicant, member, or spouse uses any of these assets, including the interest accrued, for other than funeral or burial arrangements of the applicant, member, or spouse, the MassHealth agency considers the asset available and countable under the provisions of 130 CMR 520.007, 520.018, and 520.019.

(3) The applicant, member, or spouse has the right to establish a burial arrangement or change the designation of his or her funds to a burial arrangement described in 130 CMR 520.008(F). If such arrangement is made within 60 days after the date that the applicant or member was notified of his or her right to do so, then the MassHealth agency considers the arrangement to

have been in existence on the first day of the third month before the application (emphasis added).

Additionally, it has long been MassHealth's practice to allow applicants to assign the ownership and beneficial interest of a whole life insurance policy to a funeral home to pay for a pre-paid burial contract. And MassHealth does not count the value of burial insurance.

Regulation 130 CMR 520.007(E) Cash-Surrender Value of Life-Insurance Policies states:

- (1) The cash-surrender value of a life-insurance policy is the amount of money, if any, that the issuing company has agreed to pay the owner of the policy upon its cancellation. An individual may adjust the cash-surrender value of life insurance to meet the asset limit. The MassHealth agency will consider the cash-surrender-value amount an inaccessible asset during the adjustment period.
- (2) If the total face value of all countable life-insurance policies owned by the applicant, member, or spouse exceeds \$1,500, the total cash-surrender value of all policies held by that individual is countable. The MassHealth agency does not count the face value of burial insurance and the face value of life-insurance policies not having cash-surrender value (for instance, term insurance) in determining the total face value of life-insurance policies. Burial insurance is insurance whose terms specifically provide that the proceeds can be used only to pay the burial expenses, funeral expenses, or both of the insured.

MassHealth's legal memorandum focuses on the cover page of the life insurance policies which state that cancellation of the prearranged funeral plan does not automatically cancel the policy and provides a right to cancel the policy up to midnight of the 30<sup>th</sup> day after the date the owner receives the policy. I agree that the language would provide for cancellation within 30 days but that time had expired several months before appellant's application dated 1/31/12 and there is no evidence whatsoever that the policies were cancelled. I note too that there is no prearranged funeral plan, just a list of services that can be purchased with the death benefit as listed on the Irrevocable Assignment. MassHealth argues that owning the life insurance policies allows appellant and her spouse to surrender the policies at any time so the value of the policies is countable. MassHealth continues its argument that the Irrevocable Assignments of Ownership to the NGL Funeral Expense Trust does not render the policies or the trust non-countable because the policies allow cancellation of the prearranged funeral plan.

This hearing officer has found, and the Irrevocable Assignment of Ownership to the NGL Funeral Expense Trust, includes the following language:

- The change in ownership (of the life insurance policy to the trust) is permanent;
- The right to cancel the life insurance policy and receive a return of premium is renounced;
- The right to surrender the policy for cash or take a loan against it is renounced;

- The right to change beneficiaries is renounced;
- Policy proceeds that exceed the cost of approved goods and services for the insured funeral, burial or cremation are to be paid to the State, if required by the applicable State's Medicaid recovery program; and
- There is a long list of authorized possible funeral and burial related goods and services qualifying for reimbursement (Exhibits C-D).

Appellant assigned her ownership in the life insurance policy irrevocably on 10/03/11 and on that date retained no rights whatsoever to cancel the policy, the beneficiary (which is the trust) or any right to obtain a loan or surrender the policy for cash. As of 10/03/11 appellant had no further right to act upon the policy. She was no longer the owner or the beneficiary. Her husband's interest in his life insurance policy lasted longer. His renounced interest in the policy became effective on or about 12/12/11, approximately 6 weeks before appellant applied for MassHealth long-term-care.

Having renounced any interest whatsoever in their fully paid-up single premium whole life policy appellant's rely on the trust to act in their behalf at the time of their death. While the terms of the trust can be amended or modified such changes would not adversely affect appellant and her husband's rights to have their death benefit applied pursuant to the authorized expense directive because any policy assigned to the trustee prior to the effective date of such amendments or modifications are not affected by the change (see Finding 16). The trust will terminate automatically when all policies assigned to the trustee have been terminated by lapse, surrender or death of the last remaining insured under the policies. Since appellant and her husband have paid the premium in full the policies cannot lapse. Since the irrevocable assignment prohibits surrender, loan or cancellation I conclude that the trust is irrevocable as it relates to appellant and her husband's Funeral Expense Trust. Nothing in regulation 130 CMR 520.008(F)(1)(d) requires the applicant to verify which services within the panoply of those offered by funeral homes and listed in the Authorized Expense Directive to be listed for MassHealth's scrutiny when an irrevocable trust account designated for funeral and burial expense is used. Lastly, the irrevocable assignment provides for MassHealth's estate recovery program to receive any amount not spent on the funeral goods and services purchased by the trust.

Since irrevocable trust accounts designated for funeral and burial expense are allowed by regulation 130 CMR 520.008(F)(1)(d) and are not considered a countable asset I conclude that the \$10,000 cannot be counted in determining appellant's total assets. Thus, her assets are below the allowable total limit of \$115,640 and appellant is financially eligible for MassHealth. Pursuant to 130 CMR 520.008(F)(3) MassHealth considers the arrangement to have been in existence on the first day of the third month before the application so appellant's application date should be preserved for the purpose of determining appellant's eligibility and the date of such eligibility. This appeal is APPROVED.



## Order for MassHealth

Review appellant's eligibility based on the application dated 1/31/12 in consideration of this decision which renders the value of the two funeral expense trusts non-countable.

## Implementation of this Decision

If this decision is not implemented within 30 days after the date of this notice, you should contact the Taunton MassHealth Enrollment Center (MEC). If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, Office of Medicaid, at the address on the first page of this decision.

CC: [REDACTED]

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