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COMMONWEALTH OF MASSACHUSETTS

**Supreme Judicial Court**

WORCESTER, SS.

No. SJC-12200

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MARY E. DALEY,

*Plaintiff-Appellant,*

v.

KRISTIN THORN,

Director of the Office of Medicaid,

and

MARYLOU SUDDERS,

Secretary of the Executive Office of Health and Human Services,

*Defendants-Appellees.*

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ON APPEAL FROM A JUDGMENT ENTERED  
IN WORCESTER COUNTY SUPERIOR COURT

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**BRIEF OF AMICUS CURIAE  
THE REAL ESTATE BAR ASSOCIATION  
FOR MASSACHUSETTS, INC.**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

This Brief of Amicus Curiae is submitted by The Real Estate Bar Association for Massachusetts, Inc., ("REBA" or "Amicus"). REBA is the largest specialty bar in the Commonwealth. It is a nonprofit corporation that has been in existence for over one hundred years. It has approximately 2,000 members practicing in cities and towns throughout the Commonwealth. Through its meetings, educational programs, publications, and committees, REBA members keep current with the developments in the field of real estate law and practice, and share in the effort to improve that practice. REBA works toward the improvement of real estate law and practice through educational programs. REBA also promulgates title standards, practice standards, ethical standards and real estate forms, providing authoritative guidance to its members and the real estate bar generally as to the application of statutes, cases, and established legal principles to a wide variety of circumstances practitioners face in evaluating title and handling real estate transactions.

One of REBA's many committees is the Estate Planning, Trusts, and Estate Administration

Committee. The goal of this committee is to ensure the proper administration of real estate interests when they intersect with trusts and estates. Many of the attorneys associated with REBA also practice estate planning and administration of trusts and estates. This case, therefore, is of the utmost importance to the interests of REBA generally and to the clients represented by REBA's members.

#### **QUESTION PRESENTED**

Although amicus briefs have been solicited regarding "use and occupy" language in a trust,<sup>1</sup> Amicus has identified a separate issue in Daley that is equally pressing and should be analyzed by this Court:

Where a settlor conveys real property into a self-settled irrevocable trust that does not include "use and occupy" language, but the settlor reserves a life estate in the deed on the settlor's primary residence, whether the property interest retained by the settlor (i.e., the life estate) is a countable

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<sup>1</sup> Several amicus have submitted or will submit briefs concerning this question, either in Daley or in Nadeau v. Thorn, as Director of the Office of Medicaid, No. SJC-12205 ("Nadeau").

asset for purposes of determining his or her eligibility for MassHealth benefits.

Amicus submits briefing on this question.

#### **ARGUMENT**

The question addressed by Amicus here is whether the Daleys' retained life estate in their home is a countable asset for MassHealth eligibility purposes. The Superior Court concluded that the life estate was countable, holding as follows:

"Property held in an irrevocable trust is a countable asset where it is 'available according to the terms of the trust[.]'" 130 Code [Mass. Regs. §] 520.023(C)(1)(d). If a Medicaid applicant can use and occupy her home as a life tenant, then her home is 'available.'"

(emphasis added). This is an incorrect statement of the law, and it treats the life estate as a trust interest, contrary to centuries of law holding that a life estate is a property interest. Because the Daleys retained a life estate in their home, this value is noncountable under MassHealth regulations. This Court should reverse the judgment of the Superior Court for this reason alone. If it does so, any questions in Daley regarding the terms of the trust are moot.

The Daleys reserved a life estate in the deed, meaning that they owned the present possessory interest and their self-settled irrevocable trust owned only a future remainder interest. The Daleys, therefore, resided in the home pursuant to this life estate, so the trust terms are irrelevant in analyzing whether the Daleys' home is countable—as are the MassHealth regulations regarding assets held in irrevocable trusts.

The retained life estate is not a countable asset, and the Director of the Office of Medicaid (“Director” or “MassHealth”) has conceded as much in a recent case before the Appeals Court:

“The [Director] makes no argument that the life estate retained by Roche might itself have a value that could affect her eligibility for benefits, stating in its brief that it is ‘a correct statement of the law under Cohen [v. Commissioner of the Div. of Med. Assistance, 423 Mass. 399 (1996), cert. denied sub nom. Kokoska, by Kokoska v. Bullen, 519 U.S. 1057 (1997),] and its progeny’ that retention of a life estate does not render an individual ineligible for benefits. We do not consider the question.”

Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312, 313 n.3 (2016).

The judge below did not have the benefit of Heyn, and so was unaware of the Director's concession. Instead, the judge reviewed the retained



life estate under 130 Code Mass. Regs. § 520.023, which concerns whether an asset owned by a trust is available to the applicant.<sup>2</sup> This was error. The present real-property interest in Daley was never part of the trust corpus, so the analysis never should have reached § 520.023. Rather, the present real-property interest in the Daleys' condominium was held by them as life tenants, and accordingly should be analyzed under § 520.008, which concerns the value of the applicant's home.<sup>3</sup> It provides that the home

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<sup>2</sup> The regulation provides:

"The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will. Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual."

130 Code Mass. Regs. § 520.023 (emphasis added).

<sup>3</sup> The relevant portion of the regulation provides:

"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:

(A) The Home. The home of the applicant or member and the spouse and any land appertaining to the home, as determined by the MassHealth agency, if located in Massachusetts and used as the principal place of residence, are considered noncountable assets, except when the equity interest in the home exceeds the amount

is noncountable if it is the applicant's primary residence and the applicant's spouse continues to reside there after the applicant's admission to the nursing facility.

The judge below conflated regulations for assets owned by the applicant himself (i.e., the life tenant) with the regulations for evaluating the availability under the terms of the trust of assets held by a self-settled irrevocable trust. Put another way, the judge treated it as though the life estate was part of the trust corpus. This was incorrect, as the Daleys themselves owned the present

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described in 130 CMR 520.007(G)(3). The home is subject to the lien rules at 130 CMR 515.012: Real Estate Liens. If the home is placed in a trust or in an arrangement similar to a trust, the MassHealth agency will apply the trust rules at 130 CMR 520.021 through 520.024."

130 Code Mass. Regs. § 520.008. Since Mrs. Daley continued to reside in the home after Mr. Daley's admission, the home is noncountable regardless of its value. But even if Mr. Daley were single at the time of his application (and after his admission to the nursing facility), the home would be noncountable so long as he indicated his intention to return home and the equity value in the home was under \$814,000. See id. § 520.007(G)(8). The equity limit is adjusted for inflation each year, see id. § 520.007(G)(3), and the amount is publicized annually by the federal government. See, e.g., 2014 SSI and Spousal Impoverishment Standards. Because Mr. Daley applied for MassHealth benefits effective January 19, 2014, the equity limit in the home at that time was \$814,000. See ibid.

possessory real property interest in the condominium due to the retained life estate, while the self-settled irrevocable trust owned only a remainder interest in the condominium but no presently possessory real property interest. Therefore, the terms of the trust, or whether there are any circumstances under which trust principal can be paid to the settlor, are entirely irrelevant to the analysis. The Daleys, as life tenants, had exclusive ownership of the real property interest, entitling them to possession of the property during their lives. Accordingly, the value of the life estate should not have been analyzed as if it were a trust asset, but rather as a property interest. The judgment in Daley should therefore be reversed.

1. Life estates are property interests, not trust interests.

It is well-established law that a life estate is a property interest. The life tenant has a present possessory interest in the property—indeed, the only present possessory interest; the remainderman has no present possessory interest, nor any obligation to, or fiduciary relationship with, the life tenant. See

Hershman-Tcherepnin v. Tcherepnin, 452 Mass. 77, 88 & n.20 (2008).

Like other interests in land, the life estate is an alienable property interest; the life tenant may convey his estate to a third party, mortgage it, or lease it, all without the approval or even the knowledge of the remainderman. See ibid.; Kent v. Morrison, 153 Mass. 137, 140 (1891). The life tenant also receives all the income generated by the property during his lifetime, see Hinckley v. Clarkson, 331 Mass. 453, 454-455 (1954), and is responsible for paying all expenses attributable to the property, including property taxes, maintenance costs, and general upkeep. See Matteson v. Walsh, 79 Mass. App. Ct. 402, 406 (2001). The remainderman has none of these responsibilities. Ibid.<sup>4</sup>

There are numerous rights and benefits afforded to life tenants, due to their present possessory interest, that are not available to remaindermen. A life tenant has standing to bring a petition for partition of the property, see G. L. c. 241, § 1, but

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<sup>4</sup> The only restriction on the life tenant is that he may not commit waste. If he does, the remainderman has a cause of action for divestment of the life interest. See G. L. c. 242, § 1; Matteson, supra.

a remainderman does not have standing to initiate a partition proceeding, since his interest is neither present nor possessory. See Bernat v. Kivior, 22 Mass. App. Ct. 957, 957 (1986). Similarly, a life tenant may claim a Massachusetts homestead exemption; a remainderman may not. See In re Gordon, 479 B.R. 9, 14 (Bankr. D. Mass. 2012), aff'd 487 B.R. 600 (B.A.P. 1st Cir. 2013).

Put succinctly, "[t]he owner of a possessory life estate, i.e., the life tenant, has a right to the exclusive possession of the land," Hershman-Tcherepnin, supra at 88 n.20, citing Tinkham v. Wind, 319 Mass. 158, 160 (1946), and "during the existence of the life estate the remainderman is not entitled to possession until the death of the life tenant." Ibid., citing Daley v. Daley, 308 Mass. 293 (1941).

The fact that a life estate is a property interest has even been recognized in the context of MassHealth benefits and elder-law planning. See Brissette v. Ryan, 88 Mass. App. Ct. 606 (2015). There, a jury had found that an estate planning attorney committed malpractice by improperly structuring a real estate transaction that would be protected from Medicaid liens, but the judge entered

judgment notwithstanding the verdict in favor of the attorney. Id. at 609-610. The Appeals Court sided with the jury: "the jury were entitled to conclude that as a proximate and reasonably foreseeable result of Ryan's negligence, Marie failed to obtain a valuable property interest she otherwise would have: a life estate in the Springfield house." Id. at 610 (emphasis added).

These cases show that a life estate is, and always has been, a property interest—even in the context of MassHealth. This is consistent with centuries of Commonwealth case law and with long-standing common-law tradition. The life tenant is, in all respects, treated as the absolute present possessory owner of the property during the term of the estate, and the remainderman does not have a present or possessory interest until the death of the life tenant.

2. MassHealth's stated positions demonstrate that it too understands that a life estate is a property interest for purposes of MassHealth eligibility.

Through its regulations and its stated positions over the years, the Director recognizes that a life

estate is a property interest and not a trust interest.

Most importantly, the Director conceded this issue in its brief in Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312, 313 n.3 (2016). The Appeals Court, quoting the Director's brief, stated: "[I]t is 'a correct statement of the law under Cohen . . . and its progeny' that retention of a life estate does not render an individual ineligible for benefits." Ibid. (quoting the Director's brief).

MassHealth regulations themselves define "life estate" consistent with its commonly understood meaning:

"[A] life estate is established when all of the remainder legal interest in a property is transferred to another, while the legal interest for life rights to use, occupy, or obtain income or profits from the property is retained."

130 Code Mass. Regs. § 515.001.<sup>5</sup> Moreover, the regulations provide rules for valuing a life estate

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<sup>5</sup> Compare the following definitions for "life estate" as used in the General Laws and in Black's Law Dictionary. See G. L. c. 184, § 5 ("If land is granted or devised to a person and after his death to his heirs in fee . . . , an estate for life only shall vest in such first taker, and a remainder in fee simple in his heirs."); Black's Law Dictionary 628 (9th ed. 2009) (defining "life estate" as "[a]n

when real property is sold and for apportioning the proceeds between the life tenant and the remainderman. See 130 Code Mass. Regs. § 520.019(I) ("The MassHealth agency will calculate the values of the remainder interest and the life estate in accordance with the life-estate tables."). This is also reflected in the Eligibility Operations Memorandum 07-18, which provides the following guidance on valuing the life estate and remainder interest when real estate is sold:

"When a MassHealth applicant or member owns or transfers a life estate or remainder interest in real estate, MassHealth must calculate the value of the life estate or remainder interest in order to determine the applicant's or member's eligibility for MassHealth."

The Director's practice with respect to placing liens on life estates likewise confirms that life estates are property interests for purposes of MassHealth. See 130 Code Mass. Regs. § 515.012 (describing procedure for placing liens). It is common practice for MassHealth to place a lien on an applicant's life estate in the event the property is sold during the applicant's life. If the lien property is sold, MassHealth may recover funds it has

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estate held only for the duration of a specified person's life, usu[ally] the possessor's").



paid on behalf of the applicant.<sup>6</sup> Nothing in the regulations specifically allows MassHealth to place a lien on a life estate, referring instead to “any property in which the member has a legal interest.” Ibid. This supposes that a life estate is a property interest. If the life estate were not a separate property interest, MassHealth would be unable to place a lien on it.

Taken together, these regulations, memorandums, briefs, and practices show that MassHealth follows the standard definition of life estate as understood throughout common-law history—that it inherently is an interest in property. This also confirms the Director’s concession in Heyn: “that [the] retention of a life estate does not render an individual ineligible for benefits.” Heyn, 89 Mass. App. Ct. at 313 n.3.

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<sup>6</sup> If the entire fee is sold, the life tenant (who would net an otherwise-disqualifying amount of cash, which would be countable) may spend down the sale proceeds within a certain amount of time so that he will not lose MassHealth benefits. See 130 Code Mass. Regs. § 515.012.

3. Having shown that a life estate is a property interest, it must be analyzed under 130 Code Mass. Regs. § 520.008, and not under § 520.023, in a determination of MassHealth eligibility.

In the Superior Court decision in Daley, the judge did not analyze the Daleys' life estate as an interest in real property, but rather as if it were an asset held by the trust under 130 Code Mass. Regs. § 520.023.<sup>7</sup> The judge conflated the assets held by the applicant (i.e., the life estate) and the assets held by the trust (i.e., the remainder interest), treating the life estate as though it was part of the trust corpus or as though it did not exist. As

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<sup>7</sup> The Superior Court's entire analysis regarding the property was as follows:

"Property held in an irrevocable trust is a countable asset where it is 'available according to the terms of the trust[.]' 130 Code [Mass. Regs. §] 520.023(C)(1)(d). If a Medicaid applicant can use and occupy her home as a life tenant, then her home is 'available.'" See Doherty v. Dir. of the Office of Medicaid, 74 Mass. App. Ct. 439, 441 (2009) (home was available because applicant retained right to reside there during her lifetime.).

This court concludes that Mr. and Mrs. Daley's condominium was available to them because they retained life estates under the deed, and continued to use and live in it after establishing the Trust. It is undisputed that they lived together at the condominium for about six years after they established the Trust until Mr. Daley was required to be admitted to the nursing facility. It is also undisputed that Mrs. Daley continues to live in the property."

discussed above, a life estate is a property interest separate and apart from the remainder interest in trust, and the Daley trust held no present interest in the real property.

The judge also cited to Doherty v. Director of the Office of Medicaid, 74 Mass. App. Ct. 439, 441 (2009), for the proposition that the right to use and occupy the home made it available and thus countable. Doherty, however, did not involve a retained life estate. Ibid. The settlor in Doherty deeded the entire fee into the trust, and was thus residing in the home pursuant to the "use and occupy" language in the trust.<sup>8</sup> Ibid. The distinction is critical.

Contrary to the reasoning of the judge below, the Daleys were not residing in the home pursuant to the terms of the trust; they were residing there

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<sup>8</sup> This, too, misses a critical distinction. Unlike the Doherty trust (or the Nadeau trust), the Daley trust does not include "use and occupy" language within its terms. Thus, even if the Daleys had conveyed the entire fee into the trust, the home would not be "available according to the terms of the trust" under 130 Code Mass. Regs. § 520.023(C)(1)(d). In such a hypothetical, the Daleys would be living in the trust-owned home pursuant to an implied lease with the trust, outside the express purview of 130 Code Mass. Regs. § 520.023(C)(1)(d). The home, therefore, would not be countable. See Vergados v. Sudders, No. 15-00880 (Suffolk Super. Ct. Oct. 19, 2016).

pursuant to their retained property right as holders of the life estate. See Hershman-Tcherepnin v. Tcherepnin, 452 Mass. 77, 88 n.20 (2008). The trust, which holds only a remainder interest, has no input on who may live in the home or how the life tenants may use the home. That right belongs exclusively to the Daleys in their capacity as life tenants. See ibid. ("The owner of a possessory life estate . . . has a right to the exclusive possession of the land."). The terms of the trust are irrelevant to this analysis.

The fact that a self-settled irrevocable trust is the remainderman has no bearing on the eligibility determination of a MassHealth applicant. If the applicant had deeded the property to his children while reserving a life estate (and the five-year lookback has expired), there would be no question that the applicant would qualify for MassHealth benefits. From the perspective of the MassHealth regulations, whether the remaindermen are other persons or whether the remainderman is a trust has no bearing on the life tenant's eligibility.

Further, it has been demonstrated above that a life tenant is, in all respects, treated as an

absolute owner of the property during the tenancy. Thus, from the perspective of the MassHealth regulations, an applicant who owns a life estate in real property must be treated no differently from an applicant who owns the entire fee in real property. The life estate is analyzed as if it were a property interest, precisely because it is a property interest.

Once it is understood that a life estate is a property interest, the analysis is simple. The condominium was the Daleys' home, as they were the present equity owners pursuant to the life estate and it was their primary residence. Since Mrs. Daley continued to reside in the condominium after Mr. Daley's admission to the nursing facility, the countability of the condominium is analyzed under 130 Code Mass. Regs. § 520.008, which provides in relevant part:

"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:

(A) The Home. The home of the applicant or member and the spouse and any land appertaining to the home, as determined by the MassHealth agency, if located in Massachusetts and used as the principal place of residence, are considered

noncountable assets, except when the equity interest in the home exceeds the amount described in 130 CMR 520.007(G)(3). The home is subject to the lien rules at 130 CMR 515.012: Real Estate Liens. If the home is placed in a trust or in an arrangement similar to a trust, the MassHealth agency will apply the trust rules at 130 CMR 520.021 through 520.024.”

As is clear from the regulation itself, the value of the condominium, being the primary residence, is not a countable asset for purposes of MassHealth eligibility.<sup>9</sup> The analysis ends there. There is no need to look to § 520.023 or any other regulations involving trusts, because the trust does not own any present possessory interest in the real estate.

The Superior Court erred in its analysis of the Daleys assets. This Court may reverse the Superior Court without even reaching the question whether the terms of the trust cause the trust assets to be countable. This Court should do so.

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<sup>9</sup> As discussed above, even if Mr. Daley were single at the time of the application (and he indicated his intention to return home), the condominium would not be countable because the equity value of the retained life estate was less than \$814,000. See 130 Code Mass. Regs. § 520.007(G)(8).

4. The Superior Court decision has created significant confusion in this area of the law and has cast doubt on the continued legal viability of life estates.

The Superior Court decision in Daley has caused widespread confusion among elder-law practitioners and among members of REBA given its treatment of life estates. In fair hearings since Daley was issued, MassHealth has cited it for the proposition that a life estate retained by the applicant (with the remainder interest in a self-settled irrevocable trust) causes the home to be includible through the trust regulations. As shown above, this analysis is incorrect, and even MassHealth acknowledged so earlier this year. See Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312, 313 n.3 (2016). But the Superior Court decision in Daley has caused a significant shift for elder-law clients who may be deprived of a real-property benefit they previously had enjoyed and who may be deprived of certain protection the retained life estate provides. See Brissette v. Ryan, 88 Mass. App. Ct. 606, 610 (2015).

Elder-law practitioners had long believed it settled law that a client could reserve a life estate

(and deed the remainder interest into a self-settled irrevocable trust or to other individuals) and still ensure eligibility for MassHealth benefits, understanding that the reserved property right of the life estate would not cause eligibility concerns. The Superior Court in Daley has cast doubt on this long-established practice, and this Court should clarify the law regarding life estates for elder-law practitioners. As stated above, if the settlor reserves a life estate, the question regarding availability under the trust terms becomes moot.

Accordingly, Amicus requests that this Court reverse the judgment of the Superior Court in Daley for the reason that the retained life estate in the primary residence, being a property interest, should not be analyzed under the trust provisions of § 520.023, but rather should be analyzed as an asset of the applicant, which would be noncountable under § 520.008.

#### **CONCLUSION**

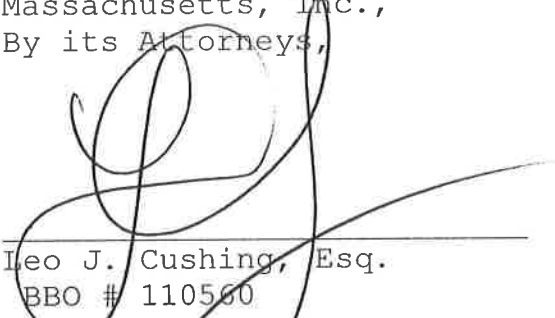
In conclusion, the Superior Court decision in Daley is based on faulty premises of property law, trust law, and the MassHealth regulations. Where, as



in Daley, the settlor reserves a life estate in the deed, the settlor resides in the house pursuant to that present possessory real property interest in the condominium; and the trust, which holds the remainder interest only, has no right to exclude the settlor. The analysis for MassHealth financial eligibility should never have reached 130 Code Mass. Regs. § 520.023, which concerns assets held in trust. The analysis should have stopped at § 520.008: the Daleys owned a life estate in their home, and at the time of Mr. Daley's admission, Mrs. Daley continued to reside in the home as her primary residence. The home, therefore, is not a countable asset.

Amicus Curiae The Real Estate Bar Association for Massachusetts, Inc., respectfully requests that this Court reverse the judgment of the Superior Court in Daley.

Respectfully submitted,  
The Real Estate Bar  
Association for  
Massachusetts, Inc.,  
By its Attorneys,



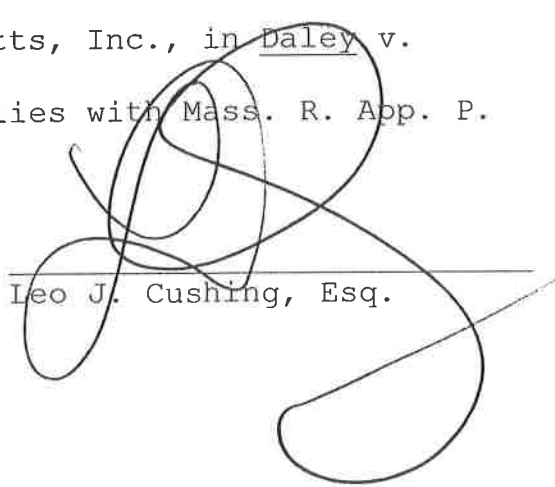
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Dated: December 20, 2016

**CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(k)**

I, Leo J. Cushing, Esq., do hereby certify that  
this Brief of Amicus Curiae The Real Estate Bar  
Association for Massachusetts, Inc., in Daley v.  
Thorn, No. SJC-12200, complies with Mass. R. App. P.  
16(k).



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Leo J. Cushing, Esq.

Dated: December 20, 2016

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COMMONWEALTH OF MASSACHUSETTS  
THE SUPERIOR COURT

WORCESTER, ss.

CIVIL ACTION NO. 15-CV-0188-D

MARY DALEY<sup>1</sup>

v.

MARYLOU SUDDERS et al<sup>2</sup>

**MEMORANDUM OF DECISION AND ORDER ON THE  
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

The Office of Medicaid denied James Daley's application for long-term Medicaid benefits, and his wife, Mary Daley, acting as his Personal Representative, appeals that decision.

The Office of Medicaid, known as MassHealth because it administers the Massachusetts Medicaid program (*see* G. L. c. 118E, § 9A) falls under the authority of the Secretary of the Executive Office of Health and Human Services. (*See* G. L. c. 6A, §§ 16, 16B.) Mrs. Mary Daley, acting as the Personal Representative of her husband James Daley's estate, brings this action for judicial review of MassHealth's decision under G. L. c. 30A, § 14. Mrs. Daley has moved for judgment on the pleadings to vacate MassHealth's decision. A hearing has been held on that motion.

For the following reasons, Mrs. Daley's motion for judgment on the pleadings must be **DENIED**.

**BACKGROUND**

Judicial review of an agency decision is confined to the administrative record. G. L. c. 30A, § 14(4), (5). The record before MassHealth contained the following facts. Over eight years ago, on December 19, 2007, Mr. and Mrs. Daley established the "*James Daley and Mary Daley Irrevocable Trust*" and appointed their son James Daley and their daughter Patricia Tubaj as its trustees. (The trust's applicable provisions are discussed below.)

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<sup>1</sup> As the Personal Representative of James Daley's estate.

<sup>2</sup> Marylou Sudders, in her official capacity as the Secretary of the Executive Office of Health and Human Services, and Kristin Thorn in her official capacity as Director of the Office of Medicaid.

That same day, Mr. and Mrs. Daley conveyed their interest in their condominium located at 215 Mill Street, Unit 103 in Worcester to the Trust. They retained life estates under the property's deed and continued to live there together for about six years until health reasons required that Mr. Daley be admitted to the Millbury Health Care Center on December 20, 2013.

On February 21, 2014, Mr. Daley applied for long-term care Medicaid benefits effective January 19, 2014.<sup>3</sup> On April 14, 2014, MassHealth denied Mr. Daley's application after it concluded that his assets exceeded Medicaid's \$2,000 eligibility limit. MassHealth determined he was financially ineligible for benefits because his assets included the Trust's principal, valued at \$150,943. The Trust's principal was the value of the Daleys' condominium. Mr. Daley appealed that decision to the Office of Medicaid Board of Hearings.

After a hearing, the Office of Medicaid Board of Hearings affirmed MassHealth's determination in a decision dated October 22, 2014. The Board counted the Trust's principal as an asset because: (1) Mr. and Mrs. Daley's deed explicitly reserved their right to occupy and use the condominium; and (2) their Trust granted them the right to convert the Trust's principal into income.

Mr. Daley died on November 13, 2014 – about seven years after the establishing the Trust. Mrs. Daley then filed a request for a rehearing, which the Board denied for failure to show good cause. On February 11, 2015, Mrs. Daley filed a complaint seeking judicial review of MassHealth's decision under G. L. c. 30A, arguing that she and her husband were essentially indigent and eligible for public benefits because their assets are held by an irrevocable trust. On October 15, 2015, Mrs. Daley filed this motion for judgment on the pleadings. MassHealth filed its opposition motion, contending that the Daleys were financially ineligible for Medicaid benefits. Mrs. Daley continues to live at the condominium.

## DISCUSSION

### I. Standard of Review

Under G. L. c. 30A, § 14 (7), this court must uphold MassHealth's decision unless it is unsupported by substantial evidence, is arbitrary or capricious, constitutes an abuse of discretion, or is otherwise not in accordance with the law. See *eVineyard Retail Sales-Mass., Inc. v. Alcoholic Bev. Control Comm'n*, 450 Mass. 825, 828 (2008). This court "must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Thomas v. Commissioner of the Div. of Med. Assistance*, 425 Mass. 738, 746 (1997) (Citation omitted.) Moreover, this "court will not substitute its own judgment concerning the penalty the [agency] imposes." *Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 842 (2005) (Citation omitted.) Consequently, as a matter of law, as the party appealing MassHealth's decision, Mrs. Daley bears the heavy burden of demonstrating the

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<sup>3</sup> MassHealth initially denied the Daleys' application on April 7, 2014 because they failed to respond to a verification request issued on February 28, 2014. The Daleys reapplied for Medicaid benefits the next day.

decision's invalidity. See *Ten Local Citizen Group v. New Eng. Wind, LLC*, 457 Mass. 222, 228 (2010) (Internal quotation and citation omitted.)

This court gives substantial deference to an agency's interpretation of those statutes with which it is charged with enforcing. This is "[e]specially [ ] so when the case involves interpretation of a complex statutory and regulatory framework such as Medicaid." *Sbelales v. Dir. of the Office of Medicaid*, 75 Mass. App. Ct. 636, 640 (2009) (Citation omitted.) Deference is particularly appropriate when the statute in question grants broad-rule making authority to the agency, contains an ambiguity or gap, or broadly sets out a legislative policy that must be interpreted by the agency." *Souza v. Registrar of Motor Vehicles*, 462 Mass. 227, 229 (2012) (Citations omitted).

## II. Analysis

The Massachusetts Medicaid program, MassHealth, "is a joint [s]tate and [f]ederal program designed to pay the cost of medical care for those who are otherwise unable to afford it." *Normand v. Dir. of the Office of Medicaid*, 77 Mass. App. Ct. 634, 636 (2010) (Citations omitted.) See also 130 Code of Massachusetts Regulations section 515.002(A).<sup>4</sup> "Because MassHealth is a joint [f]ederal and [s]tate program, the Massachusetts statutes and regulations governing the program must be consistent with the requirements of [f]ederal [Medicaid] law." *Normand*, 77 Mass. App. Ct. at 637 n.8. Consequently, as required by federal law, MassHealth applicants must meet certain financial eligibility requirements to qualify for benefits. *Tarin v. Commissioner of Div. of Med. Assistance*, 424 Mass. 743, 747 (1997).

MassHealth provides nursing home benefits in the form of long-term care coverage for individuals who have \$2,000 or less in "countable assets." 130 Code of Massachusetts Regulations § § 519.006(A)(2) and 520.003(A)(1).<sup>5</sup> "Countable assets are all assets that must be included in a determination of [Medicaid] eligibility." 130 Code of Massachusetts Regulations §520.007. Here, it is undisputed that Mr. and Mrs. Daley are financially ineligible for MassHealth benefits if the Trust is considered a countable asset. This court is constrained to conclude that the Office of Medicaid Board of Hearings correctly determined that the Daleys' Trust was a countable asset because: (1) their condominium property remained available for their use after they deeded it to the Trust; and (2) they had the right to condominium-generated income (a situation here that was theoretical only.) Both grounds are addressed below.

### A. Availability of Property

Property held in an irrevocable trust is a countable asset where it is "available according to the terms of the trust[.]" 130 Code of Massachusetts Regulations section 520.023 (C) (1)(d). If a Medicaid applicant can use and occupy her home as a life tenant, then her home is

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<sup>4</sup> "The MassHealth agency is responsible for the administration and delivery of health-care services to low- and moderate-income individuals and couples." 130 Code of Massachusetts Regulations section 515.002(A).

<sup>5</sup> State regulations require that "the total value of countable assets owned by or available to individuals applying for or receiving MassHealth [benefits] . . . may not exceed . . . \$2,000." 130 Code of Massachusetts Regulations § 519.006(A)(2).

“available.” See *Doherty v. Dir. of the Office of Medicaid*, 74 Mass. App. Ct. 439, 441 (2009) (home was available because applicant retained the right to reside there during her lifetime).

This court concludes that Mr. and Mrs. Daley’s condominium was available to them because they retained life estates under the deed, and continued to use and live in it after establishing the Trust. It is undisputed that they lived together at the condominium for about six years after they established the Trust until Mr. Daley was required to be admitted into the nursing facility. It is also undisputed that Mrs. Daley continues to live in the property.

## **B. Right to Income**

The plain language of 130 Code of Massachusetts Regulations section 520.023 (C) (1)(a) provides that a countable asset includes:

**[a]ny portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual [.]**

It does not legally matter whether the grantor or donor actually exercises his or her discretion to take income from the Trust. As the Supreme Judicial Court has noted:

**[I]f there is *any* state of affairs, at *any* time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets will count in calculating the grantor’s Medicaid eligibility.**

*Elbow v. Commissioner of the Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2001) (Emphasis in original.) Consequently, if there is any way for the Trustees to distribute either Trust principal or income to the Daleys, then those assets are countable for purposes of determining their Medicaid eligibility. Compare *Guerriero v. Commissioner of the Div. of Med. Assistance*, 433 Mass. 628, 629 (2001) (applicant completely separated herself from the trust by waiving all rights to income as well as principal).<sup>6</sup>

Fairly construed, the Trust allows the Daleys to access both its principal and income generated from the home. Paragraph A of the First Article of the Trust, entitled “*Distributions During the Donors’ Lifetime*,” specifically grants to the Daleys the right to any net income generated by the Trust and requires the Trustee to provide such income. The First Article provides, in part, that: “So long as either of the Donors are living, the Trustee shall pay either Donor so much of the net income of the Trust as either Donor shall request in writing delivered to the Trustee.”<sup>7</sup> In addition, Article Five authorizes the Trustee to “hold,

<sup>6</sup> In *Guerriero*, the plaintiff signed a document in which she declared that she did “irrevocably and [unequivocally] waive, renounce and refuse to accept any and all right, title or interest which [she] may have now or in the future in the principal of” her irrevocable trust. *Guerriero*, 433 Mass. at 629. The Court concluded that the document effectively transferred any interest she may have had in the trust back to the trust for the benefit of the remaining beneficiaries and deprived the trustee was deprived of any legal discretion to pay trust principal to the plaintiff. *Id.* at 633.

<sup>7</sup> For example, if the condominium was rented then the Trustee would be required to give the Daleys rental income upon request. See 130 Code of Massachusetts Regulations section 520.024 (A)(1) (“The assets and



retain, purchase, dispose of or otherwise deal with life insurance, annuities, endowment policies or other forms of insurance on the life of the Donors . . . and to pay the premiums and costs therefore from the principal or income of the Trust.”<sup>8</sup> Finally, Article Eight authorizes the Trustees to “pay such amounts of income or principal of the Trust as the Trustee deems necessary to satisfy [the Daleys’] tax obligation” for the Trust and allows the Daleys to “reacquire the principal of this Trust by substituting property of an equivalent value.”<sup>9</sup> In light of these provisions, the court must, by law, conclude that the Daleys had access to both the Trust principal and income generated by the Trust.

Mrs. Daley emphasizes that paragraph A of the First Article provides that “[t]he Trustee shall have no authority or discretion to distribute principal of the Trust to or for the benefit of either Donor.” It is well-settled, however, that “this clause may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole.” See *Doherty*, 74 Mass. App. Ct. at 441.

This case is analogous to *Doherty*, where the Appeals Court concluded the trust’s principal was a countable asset because the trust, despite some language restricting the grantor’s access to the principal, allowed the trustees to invade the trust’s principal and income when necessary to ensure the grantor’s “quality of life,” “comfort,” and “respond to her changing life needs.” See *id.* at 441-442. There, as here, the trust, as structured, would “allow[] the trustees a degree of discretionary authority that would, if sanctioned, permit [the grantor] to enjoy her assets, preserve those assets for her heirs, and receive public assistance, to, in effect, have [her] cake and eat it too.” See *id.* at 443, quotation and citation omitted.

## ORDER

For these reasons, Mrs. Daley’s motion for judgment on the pleadings must be **DENIED**.

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income held in an irrevocable trust established by the individual or spouse that the trustee is required to distribute to or for the benefit of the individual are countable.”).

<sup>8</sup> Article Five, entitled “Trustee Powers,” states in paragraph nine that the Trustee shall have the power to “hold, retain, purchase, dispose of or otherwise deal with life insurance, annuities, endowment policies or other forms of insurance on the life of the Donors, any beneficiary or any other person for the benefit of any beneficiary and to pay the premiums and costs therefore from the principal or income of the Trust.”

<sup>9</sup> The Eighth Article of the Trust, entitled “Grantor Trust,” provides that:

**All income distributed, held, or accumulated by this Trust generates a tax liability for the Donors. The Trustee may, to the extent that the income of the Trust generates a tax liability for the Donors, pay such amounts of income or principal of the Trust as the Trustee deems necessary to satisfy such tax obligation. The Donors retain the right to reacquire the principal of this Trust by substituting property of an equivalent value.**

BY THE COURT.

DENNIS J. CURRAN  
Associate Justice

December 23, 2015

**Part II** REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS**Title I** TITLE TO REAL PROPERTY**Chapter 184** GENERAL PROVISIONS RELATIVE TO REAL PROPERTY**Section 5** CONVEYANCE VESTING LIFE ESTATE AND REMAINDER TO HEIRS

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Section 5. If land is granted or devised to a person and after his death to his heirs in fee, however the grant or devise is expressed, an estate for life only shall vest in such first taker, and a remainder in fee simple in his heirs.

**Part III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL  
CASES

**Title III** REMEDIES RELATING TO REAL PROPERTY

**Chapter 241** PARTITION OF LAND

**Section 1** PERSONS ENTITLED TO PARTITION

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Section 1. Any person, except a tenant by the entirety, owning a present undivided legal estate in land, not subject to redemption, shall be entitled to have partition in the manner hereinafter provided. If such estate is in fee, he shall be entitled to partition in fee; if a life estate or a term for years, he shall be entitled to partition thereof to continue so long as his estate endures. A life tenant or a tenant for years of whose term at least twenty years remain unexpired may, in the discretion of the court, have partition of the fee. The existence of a lease of the whole or a part of the land to be divided shall not prevent partition, but such partition shall not disturb possession of a lessee under a lease covering the interests of all the co-tenants.

**Part III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL  
CASES

**Title III** REMEDIES RELATING TO REAL PROPERTY

**Chapter 242** WASTE AND TRESPASS

**Section 1** WASTE; PERSONS ENTITLED TO MAINTAIN; JURY TRIAL

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Section 1. If a tenant in dower, by the curtesy, for life or for years commits or suffers waste on the land so held, the person having the next immediate estate of inheritance may have an action of waste against such tenant to recover the place wasted and the amount of the damage, and such action shall be subject to the provisions of law relative to trial by jury. An heir may bring such action for waste done in the lifetime of his ancestor.

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**MASSEALTH: GENERAL POLICIES**

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515.001: Definition of Terms

The terms listed in 130 CMR 515.001 have the following meanings for purposes of MassHealth, as described in 130 CMR 515.000 through 522.000: *MassHealth: Other Division Programs*.

Activities of Daily Living (ADLs) – self-care activities including, but not limited to, bathing, grooming, dressing, eating, and toileting.

Affidavit – a written or printed statement of fact sworn to or affirmed before a person having legal authority to administer such an oath.

American Indian or Alaska Native – a person who

- (1) is a member of a federally recognized tribe, band, or group as defined in Title 25 of U.S.C.;
- (2) is an Eskimo, Aleut, or other Alaska Native enrolled by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act at 43 U.S.C. 1601 et seq.; or
- (3) has been determined eligible to receive health-care services from Indian Health Care Providers as an Indian pursuant to 42 CFR 136.12 or Title V of the Indian Health Care Improvement Act.

Annuity – a legal instrument that makes payments for a designated period of time or for life, regardless if the payments are principal, interest, or both.

Appeal – a written request, by an aggrieved applicant or member, for a fair hearing.

Appeal Representative – a person who

- (1) is sufficiently aware of the appellant's circumstances to assume responsibility for the accuracy of the statements made during the appeal process, and who has provided the Office of Medicaid Board of Hearings with written authorization from the appellant to act on the appellant's behalf during the appeal process;
- (2) has, under applicable law, authority to act on behalf of an appellant in making decisions related to health care or payment for health care. An appeal representative may include, but is not limited to, a guardian, conservator, executor, administrator, holder of power of attorney, or health-care proxy;
- (3) is a licensed attorney who notifies the MassHealth Board of Hearings that he or she represents the appellant in an appeal. This shall also include a non-lawyer supervised by a licensed attorney; or
- (4) is an authorized representative meeting the requirements of 130 CMR 501.001: Appeal Representative (1), (2), or (3).

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Applicant – a person who completes and submits an application for MassHealth, and is awaiting the decision of eligibility.

Application – see Senior Application.

Asset Limit – the maximum dollar value of assets that can be owned by, or available to, the applicant, member, or the spouse, which if exceeded, results in ineligibility.

Assets – property including, but not limited to, real estate, personal property, and funds. This term has the same meaning as “resources” as defined in 42 U.S.C. 1396p(e)(5).

Authorized Representative –

- (1) a person or organization designated as the authorized representative of an applicant or member in a completed, signed Authorized Representative Designation Form or similar designation document submitted to the MassHealth agency in which the authorized representative agrees to comply with rules regarding confidentiality in the course of representing the applicant or member, provided that such person or organization must satisfy one of the following criteria:
  - (a) an authorized representative may be a person or organization appointed by the applicant or member to act responsibly on his or her behalf in connection with the eligibility process and other ongoing communications with the MassHealth agency. Such person or organization shall have the authority to complete and sign an application on the applicant’s behalf, select a health plan, complete and sign a renewal form, receive copies of the applicant or member’s notices and other communications from the MassHealth agency which may include protected health-care information, personal data and financial information and unless otherwise specified, act on behalf of the applicant or member in all other matters with the MassHealth agency or the Health Connector;
  - (b) an authorized representative may be a person acting responsibly on behalf of the applicant or member who is sufficiently aware of such applicant’s or member’s circumstances to assume responsibility for the accuracy of the statements made on his or her behalf during the eligibility process and in other communications with the MassHealth agency. Such person shall have the authority to complete and sign an application on the applicant’s behalf, select a health plan, complete and sign a renewal form, receive copies of the applicant or member’s notices and other communications from the MassHealth agency which may include protected health-care information, personal data and financial information; or
  - (c) an authorized representative may be a person acting responsibly on behalf of the applicant or member who has, under applicable law, authority to act on behalf of such applicant or member in making decisions related to health care or payment for health care including, but not limited to, a guardian, conservator, executor, administrator, holder of power of attorney, or health-care proxy. The extent of such person’s authority to act on behalf of the applicant or member is determined by the applicable law or underlying legal document, and:

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(2) As a condition of any organization serving as an authorized representative under 130 CMR 515.001: Authorized Representative (1)(a), a provider or staff member or volunteer of such organization must not have a conflict of interest and must affirm that he or she will adhere to 42 CFR part 431, subpart F.

Blindness – a visual impairment as defined in Title XVI of the Social Security Act. Generally, “blindness” means visual acuity with correction of 20/200 or less in the better eye, or a peripheral field of vision contracted to a 10-degree radius or less, regardless of the visual acuity.

Burial Trust – a trust established by an individual solely for funeral expenses, burial expenses, or both.

Business Day – any day during which the MassHealth agency’s offices are open to serve the public.

Caretaker Relative – an adult who is the primary caregiver for a child, is related to the child by blood, adoption, or marriage, or is a spouse or former spouse of one of those relatives, and lives in the same home as that child, provided that neither parent is living in the home.

Case File – the permanent collection of written documents and electronic information required to determine eligibility and to provide benefits to applicants and members.

Certified Application Counselor (CAC) – an individual who is certified by the MassHealth agency and the Connector to provide assistance in completing applications and renewal forms.

Citizen – see 130 CMR 518.002: *U.S. Citizens*.

Commonwealth Health Insurance Connector Authority, Health Connector, or Connector – the entity established pursuant to M.G.L. c. 176Q § 2.

Community Resident – a person who lives in a noninstitutional setting in the community.

Competent Medical Authority – a physician or psychiatrist licensed by any state, a psychologist licensed by the Commonwealth of Massachusetts, or both.

ConnectorCare – The program administered by the Health Connector pursuant to M.G.L. c. 176Q to provide premium assistance payments and points-of-service cost-sharing subsidies to eligible individuals enrolled in health plans.



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Countable Income – the types of income that are considered in the determination of eligibility.

Countable-Income Amount – gross income less certain business expenses and income deductions.

Couple – two persons married to each other according to the laws of the Commonwealth of Massachusetts.

Coverage Date – the date medical coverage begins.

Coverage Type – a scope of medical services, other benefits, or both that is available to members who meet specific eligibility criteria. MassHealth coverage types include the following: MassHealth Standard (Standard), MassHealth Limited (Limited), MassHealth Family Assistance (Family Assistance), MassHealth Senior Buy-In (Senior Buy-In), and MassHealth Buy-In (Buy-In). The scope of services or covered benefits for each coverage type is found at 130 CMR 450.105: *Coverage Types*.

Curing of a Transfer – the return, following the transfer for less than fair-market value of a portion of, or the full uncompensated value of, a resource to the individual.

Day – a calendar day unless a business day is specified.

Deductible – the total dollar amount of incurred medical expenses that an applicant whose income exceeds MassHealth income standards must be responsible for before the applicant is eligible for MassHealth, as described at 130 CMR 520.028: *Eligibility for a Deductible*.

Deductible Period – a specified six-month period within which an applicant for MassHealth, whose income exceeds MassHealth income standards, may become eligible through incurred and/or paid medical expenses equaling or exceeding the deductible of the applicant or the spouse.

Disability Determination Unit – a unit that consists of physicians and disability evaluators who determine permanent and total disability using criteria established by the Social Security Administration under Title XVI, and criteria established under state law. This unit may be a part of a state agency or under contract with a state agency.

Disabled – having a permanent and total disability.

Eligibility Process – activities conducted for the purpose of determining, redetermining, and maintaining the eligibility of a MassHealth applicant or member.

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Fair Hearing – an administrative, adjudicatory proceeding conducted according to 130 CMR 610.000: *MassHealth: Fair Hearing Rules* to determine the legal rights, duties, benefits, or privileges of applicants and members.

Fair-Market Value – 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.

Family Group – a family, couple, or individual.

Federal Poverty Level (FPL) – income standards issued annually in the *Federal Register* to account for the last calendar year's increase in prices as measured by the Consumer Price Index.

Fee-for-Service – a method of paying for medical services provided by any MassHealth participating provider with no limit on provider choice.

Global Developmental Skills – a child's average developmental skill level, taking into account the physical, psychological, motor, intellectual, emotional, communicative, and social aspects of the child's functional capabilities.

Grantor – an individual or spouse who creates a trust.

Gross Income – the total money earned or unearned, such as wages, salaries, rents, pensions, or interest, received from any source without regard to deductions.

Guardian – an individual or entity appointed as guardian by the probate and family court under the provisions of M.G.L. c. 201.

Guardianship Fees and Related Expenses – fees for guardianship services and incurred expenses that are essential to enable an incompetent applicant or member to gain access to or consent to medical treatment.

Health Insurance – coverage of health-care services by a health-insurance company, a hospital-service corporation, a medical-services corporation, a managed care organization, or Medicare. Coverage of health-care services by MassHealth, Health Safety Net (HSN), or Children's Medical Security Plan (CMSP) is not considered health insurance.

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Health Safety Net (HSN) – a source of funding for certain health care under 101 CMR 613.00: *Health Safety Net Eligible Services* and 614.00: *Health Safety Net Payments and Funding*.

Incarceration – the confinement in a penal institution of an individual. An individual is not incarcerated if he or she is on parole, probation, or home release, and does not return to the institution for overnight stays.

Income Deductions – specified deductions, as described in 130 CMR 520.011: *Standard Income Deductions* through 520.014: *Long-Term-Care Earned-Income Deductions* that may be made from the gross income of an applicant or member.

Incompetent Applicant or Member – an applicant or member who has been adjudicated as incompetent and in need of a guardian by the probate and family court under the provisions of M.G.L. c. 201.

Institution (Medical) – a public or private facility providing acute, chronic, or long-term care, unless otherwise defined within 130 CMR 515.000 through 522.000: *Other Division Programs*. This includes acute inpatient hospitals, licensed nursing facilities, state schools, intermediate-care facilities for the mentally retarded, public or private institutions for mental diseases, freestanding hospices, and chronic-disease and rehabilitation hospitals.

Institutionalization – placement of an individual in one or more medical institutions, where placement lasts or is expected to last for a continuous period of at least 30 days.

Interpreter – a person who translates for an applicant or member who has limited English proficiency or a hearing impairment.

Irrevocable Trust – a trust that cannot be in any way revoked by the grantor.

Jointly Held Resources – resources that are owned by an individual in common with another person or persons in a joint tenancy, tenancy-in-common, or similar arrangement.

Lawfully Present Immigrants – see 130 CMR 518.003(A): *Lawfully Present Immigrants*.

Life Estate – a life estate is established when all of the remainder legal interest in a property is transferred to another, while the legal interest for life rights to use, occupy, or obtain income or profits from the property is retained.

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Limited English Proficiency – persons who are unable to communicate effectively in English because their primary language is not English and they have not developed fluency in the English language.

Look-Back Period – a period of consecutive months that the MassHealth agency may review for transfers of resources to determine if a period of ineligibility for payment of nursing-facility services should be imposed.

Lump-Sum Payment – a one-time only payment that represents either a windfall payment, or the accumulation of recurring countable income, such as retroactive unemployment compensation or federal veterans' retirement benefits.

MassHealth Agency – the Executive Office of Health and Human Services in accordance with the provisions of M.G.L. c. 118E.

Medical Benefits – payment for medical services provided to a MassHealth member.

Member – a person determined by the MassHealth agency to be eligible for MassHealth.

Navigator – an individual who is certified by the Health Connector to assist an applicant with electronic and paper applications to establish eligibility and enroll in coverage through the Health Connector. In addition, a navigator provides outreach and education about insurance options offered through the Health Connector.

Nonqualified Individuals Lawfully Present – see 130 CMR 518.003(A)(3): *Nonqualified Individuals Lawfully Present*.

Nonqualified Person Residing under Color of Law (nonqualified PRUCOL) – see 130 CMR 518.003(C): *Nonqualified Persons Residing under Color of Law (nonqualified PRUCOLs)*.

Nursing-Facility Resident – an individual who is a resident of a nursing facility, is a resident in any institution, including an intermediate-care facility for the mentally retarded (ICF/MR), for whom payment is based on a level of care equivalent to that received in a nursing facility, is in an acute hospital awaiting placement in a nursing facility, or lives in the community and would be institutionalized without community-based services provided in accordance with 130 CMR 519.007(B): *Home- and Community Based Services Waiver*.

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Other Noncitizens – see 130 CMR 518.003(D): *Other Noncitizens*.

Patient-Paid Amount – the amount that a member in a long-term-care facility must contribute to the cost of care under the laws of the Commonwealth of Massachusetts.

Period of Ineligibility – the period of time during which the MassHealth agency denies or withholds payment for nursing-facility services because the individual has transferred resources for less than fair-market value.

Permanent and Total Disability – a disability as defined under Title XVI of the Social Security Act or under applicable state laws.

(1) For Adults and 18-Year-Olds.

(a) The condition of an individual, 18 years of age or older, who is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that

(i) can be expected to result in death; or

(ii) has lasted or can be expected to last for a continuous period of not less than 12 months.

(b) For purposes of 130 CMR 515.001: Permanent and Total Disability, an individual 18 years of age or older is determined to be disabled only if his or her physical or mental impairments are of such severity that the individual is not only unable to do his or her previous work, but cannot, considering age, education, and work experience, engage in any other kind of substantial gainful work that exists in the national economy, regardless of whether such work exists in the immediate area in which the individual lives, whether a specific job vacancy exists, or whether the individual would be hired if he or she applied for work. "Work that exists in the national economy" means work that exists in significant numbers, either in the region where such an individual lives or in several regions of the country.

(2) For Children Younger Than 18 Years Old. The condition of an individual younger than 18 years old who has any medically determinable physical or mental impairment, or combination of impairments, that causes marked and severe functional limitations, as defined in Title XVI of the Social Security Act, and can be expected to cause death or can be expected to last for a continuous period of not less than 12 months. Disability for children eligible for MassHealth CommonHealth under 130 CMR 519.012(B): *Certain Institutionalized Immigrant Children* is determined in accordance with the definition for permanent and total disability for children younger than 18 years old in 130 CMR 501.001: *Definition of Terms*.

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Personal Needs Allowance (PNA) – the designated portion of monthly income that a person in long-term care is allowed to retain for personal expenses. In some instances, the MassHealth agency pays all or a portion of the PNA to the member. The PNA must not be used for payment of any item included in the daily rate at the long-term-care facility.

Personal Needs Allowance (PNA) Account – an account administered by a long-term-care facility on behalf of a member. Regulations regarding the administration of PNA accounts are contained in 130 CMR 456.601: *Personal Needs Allowance Account* through 456.615: *Annual Accounting to the Division of PNA Balance*.

Pooled Trust – a trust that meets all the following criteria as determined by the MassHealth agency.

- (1) The trust was created by a nonprofit organization.
- (2) A separate account is maintained for each beneficiary of the trust, but the assets of the trust are pooled for investment and management purposes.
- (3) The account in a pooled trust was created for the sole benefit of the individual by the individual, the individual's parents or grandparents, or by a legal guardian or court acting on behalf of the individual.
- (4) The trust provides that the Commonwealth of Massachusetts will receive amounts remaining in the account upon the death of the individual up to the amount paid by the MassHealth agency for services to the individual. The trust may retain reasonable and appropriate amounts as determined by the MassHealth agency.
- (5) The individual was disabled at the time his or her account in the pool was created.

Premium Tax Credit – payment made pursuant to 26 U.S.C. § 36B on behalf of an eligible individual to reduce the costs of a health benefit plan premium to the individual.

Promissory Note – a written promise to pay another.

Protected Noncitizens – see 130 CMR 518.003(B): *Protected Noncitizens*.

Qualified Health Plan (QHP) – a health plan licensed under M.G.L. chs. 175, 176A, 176B, or 176G that has received the Commonwealth Health Insurance Connector's Seal of Approval as meeting the criteria under 45 CFR §155.1000 and is offered through the Health Connector in accordance with the provisions of 45 CFR §155.1010.

Qualified Noncitizens – see 130 CMR 518.003(A)(1): *Qualified Noncitizens*.

Qualified Noncitizens Barred – see 130 CMR 518.003(A)(2): *Qualified Noncitizens Barred*.

Quality Control – a system of continuing review to measure the accuracy of eligibility decisions.

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Reapplication – the MassHealth agency’s reopening of the application process when the application has been denied pursuant to 130 CMR 516.001(D): *Receipt of Corroborative Information*.

Redetermination – a review of a member’s circumstances to establish whether or not he or she remains eligible for benefits.

Resources – all income and assets owned by the individual or the spouse. For the purposes of determining eligibility, resources include income and assets to which the individual or the spouse is or would be entitled whether or not they are actually received. This term has the same meaning as “assets” as defined in 42 U.S.C. 1396p(e)(1).

Reverse Mortgage – a loan on the equity value of a house paid in installments by a lender to the homeowner who is 60 years of age or older.

Revocable Trust – a trust whose terms allow the grantor to take action to regain any of the property or funds in the trust.

Senior Application or Application – the request for health benefits for an individual who is 65 years of age and older, or not living in the community that is received by the MassHealth agency and includes all required information and a signature by the applicant or his or her authorized representative.

Senior Care Organization – an organization that participates in MassHealth under a contract with the MassHealth agency and Centers for Medicare & Medicaid Services (CMS) to provide a comprehensive network of medical, health-care, and social-service providers that integrates all components of care, either directly or through subcontracts. Senior care organizations are responsible for providing enrollees with the full continuum of Medicare- and MassHealth-covered services.

Skilled-Nursing Services – the planning, provision, and evaluation of goal-oriented nursing care that requires specialized knowledge and skills acquired under the established curriculum of a school of nursing approved by a board of registration in nursing. Such services include only those services that must be provided by a registered nurse, a licensed practical nurse, or a licensed vocational nurse.

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Special-Needs Trust – a special-needs trust is one that meets all the following criteria as determined by the MassHealth agency.

- (1) The trust was created for a disabled individual younger than 65 years old.
- (2) The trust was created for the sole benefit of the individual by the individual's parent, grandparent, legal guardian, or a court.
- (3) The trust provides that the Commonwealth of Massachusetts will receive amounts remaining in the account upon the death of the individual up to the amount paid by the MassHealth agency for services to the individual.
- (4) When the member has lived in more than one state, the trust must provide that the funds remaining upon the death of the member are distributed to each state in which the member received Medicaid based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on the member's behalf.

Spouse – a person married to the applicant or member according to the laws of the Commonwealth of Massachusetts.

Stream of Income – income received on a regular basis.

Substantial Gainful Activity – generally, employment that provides a set amount of gross earnings as determined by the Social Security Administration (SSA) under Title XVI of the Social Security Act.

Supplemental Security Income (SSI) Program – a program that provides financial assistance to needy persons who are 65 years of age or older, blind, or disabled. This program is established under Title XVI of the Social Security Act and is administered by the Social Security Administration. Such persons automatically receive MassHealth.

Tax Dependent – a qualifying child or qualifying relative, other than the taxpayer or spouse, who entitles the taxpayer to claim a dependency exemption. An individual who files a return but is claimed as a dependent by someone else is still a tax dependent.

Tax Filer – any individual, including his or her spouse if married filing jointly, who intends to file a federal tax return for the year in which a member of the tax household is seeking or receives benefits and who claims an exemption for him or herself. An individual who files a return but is claimed as a dependent by someone else is still a tax dependent.

Tax Household – all members who are claimed on the tax return, including the tax filer(s) and all dependents.



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Third Party – any individual, entity, or program that is or may be responsible to pay all or part of the expenditures for medical benefits.

Trust – a legal device satisfying the requirements of state law that places the legal control of property or funds with a trustee. It also includes, but is not limited to, any legal instrument, device, or arrangement that is similar to a trust, including transfers of property by a grantor to an individual or a legal entity with fiduciary obligations so that the property is held, managed, or administered for the benefit of the grantor or others. Such arrangements include, but are not limited to, escrow accounts, pension funds, and similar devices as managed by an individual or entity with fiduciary obligations.

Trustee – any individual or legal entity that holds or manages a trust.

Uncompensated Value – the difference between the fair-market value of the resource or interest in the resource at the time of transfer less any outstanding debts and the actual amount the individual received for the resource. The MassHealth agency uses the uncompensated value in the calculation of the period of ineligibility.

515.002: Introduction to MassHealth

(A) The MassHealth agency is responsible for the administration and delivery of health-care services to low- and moderate-income individuals and couples.

(B) 130 CMR 515.000 through 522.000: *Other Division Programs* provide the MassHealth requirements for persons who are institutionalized, 65 years of age or older, or who would be institutionalized without community-based services in accordance with all applicable laws, including Title XIX of the Social Security Act.

(C) 130 CMR 501.000: *Health Care Reform: MassHealth: General Policies* through 508.000: *Health Care Reform: MassHealth: Managed Care Requirements* provide the MassHealth requirements for children, young adults, parents and caretaker relatives, adults, pregnant women, disabled persons, persons who are HIV positive, individuals with breast or cervical cancer, and certain other individuals or couples who are younger than 65 years old and not institutionalized. These requirements are prescribed in accordance with all applicable laws, including Title XIX and Title XXI of the Social Security Act and MassHealth's 1115 Medicaid Research and Demonstration Waiver.

(D) The MassHealth agency will determine eligibility for low-income subsidies under Medicare Part D, as set forth in the Medicare Prescription Drug and Improvement and Modernization Act of 2003 and as described at 20 CFR Part 418.

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(2) Protection of non-trust property described in 130 CMR 515.011(G)(1) is limited to circumstances when it passes from an Indian, as defined in section 4 of the Indian Health Care Improvement Act, to one or more relatives (by blood, adoption, or marriage), including Indians not enrolled as members of a tribe and non-Indians, such as spouses or stepchildren, that their culture would nevertheless protect as family members, to a tribe or tribal organization, or to one or more Indians.

515.012: Real Estate Liens

(A) Liens. A real estate lien enables the MassHealth agency to recover the cost of medical benefits paid or to be paid on behalf of a member. Before the death of a member, the MassHealth agency will place a lien against any property in which the member has a legal interest, subject to the following conditions:

- (1) per court order or judgment; or
- (2) without a court order or judgment, if all of the following requirements are met:
  - (a) the member is an inpatient receiving long-term or chronic care in a nursing facility or other medical institution;
  - (b) none of the following relatives lives in the property:
    - (i) a spouse;
    - (ii) a child younger than 21 years old, or a blind or permanently and totally disabled child; or
    - (iii) a sibling who has a legal interest in the property and has been living in the house for at least one year before the member's admission to the medical institution;
  - (c) the MassHealth agency determines that the member cannot reasonably be expected to be discharged from the medical institution and return home; and
  - (d) the member has received notice of the MassHealth determination that the above conditions have been met and that a lien will be placed. The notice includes the member's right to a fair hearing.

(B) Recovery. If property against which the MassHealth agency has placed a lien under 130 CMR 515.012(A) is sold during the member's lifetime, the MassHealth agency may recover all payment for services provided on or after April 1, 1995. This provision does not limit the MassHealth agency's ability to recover from the member's estate in accordance with 130 CMR 515.011.

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- (C) Exception. No recovery for nursing-facility or other long-term-care services may be made under 130 CMR 515.012(B) if the member
- (1) was institutionalized;
  - (2) notified the MassHealth agency that he or she had no intention of returning home; and
  - (3) on the date of admission to a long-term-care institution had long-term-care insurance whose coverage met the requirements of 130 CMR 515.014 and the Division of Insurance regulations at 211 CMR 65.09(1)(e)(2).
- (D) Repayment Deferred.
- (1) In the case of a lien on a member's home, repayment under 130 CMR 515.012 is not required while any of the following relatives are still lawfully living in the property:
    - (a) a sibling who has been living in the property for at least one year before the member's admission to the nursing facility or other medical institution; or
    - (b) a son or daughter who
      - (i) has been living in the property for at least two years immediately before the member was admitted to a nursing facility or other medical institution;
      - (ii) establishes to the satisfaction of the MassHealth agency that he or she provided care that permitted the parent to live at home during the two-year period before institutionalization; and
      - (iii) has lived lawfully in the property on a continual basis while the parent has been in the institution.
  - (2) Repayment from the estate of a member that would otherwise be recoverable under any regulation is still required even if the relatives described in 130 CMR 515.012(D) are still living in the property.
- (E) Dissolution. The MassHealth agency will discharge a lien placed against property under 130 CMR 515.012(A) if the member is released from the medical institution and returns home.
- (F) Verification. The applicant or member must cooperate in providing verification as to whether the conditions under 130 CMR 515.012(A) exist, and in providing any information necessary for the MassHealth agency to place a lien.
- (G) Recording Fee. The MassHealth agency is not required to pay a recording fee for filing a notice of lien or encumbrance, or for a release or discharge of a lien or encumbrance under 130 CMR 515.012.

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- (f) why the applicant or member is listed on the account;
- (4) certification of ownership;
- (5) financial-institution records indicating the establishment of an account that accurately reflect the ownership interest of funds from the joint account;
- (6) other documentation that indicates ownership, asset value, and restrictions on access;
- (7) a notarized affidavit, sworn to under penalty of perjury, signed by all owners of the asset, and attesting to the distribution of ownership; or
- (8) the self-declaration of the individual who is applying solely for MassHealth Buy-in, as described at 130 CMR 519.011(B): *MassHealth Buy-in for Qualifying Individuals*. The MassHealth agency may, at its discretion, request additional verification.

520.006: Inaccessible Assets

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

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

- (1) property, the ownership of which is the subject of legal proceedings (for example, probate and divorce suits); and
- (2) the cash-surrender value of life-insurance policies when the policy has been assigned to the issuing company for adjustment.

(C) Date of Accessibility. The MassHealth agency considers accessible to the applicant or member all assets to which the applicant or member is legally entitled

- (1) from the date of application or acquisition, whichever is later, if the applicant or member does not meet the conditions of 130 CMR 520.006(C)(2)(a) or (b); or
- (2) from the period beginning six months after the date of application or acquisition, whichever is later, if
  - (a) the applicant or member cannot competently represent his or her interests, has no guardian or conservator capable of representing his or her interests, and the authorized representative (which may include a provider) of such applicant or member is making a good-faith effort to secure the appointment of a competent guardian or conservator; or
  - (b) the sole trustee of a Medicaid Qualifying Trust, under 130 CMR 520.022(B), is one whose whereabouts are unknown or who is incapable of competently fulfilling his or her fiduciary duties, and the applicant or member, directly or through an authorized representative (which may include a provider), is making a good-faith effort to contact the missing trustee or to secure the appointment of a competent trustee.

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 the 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 must verify the total value of countable assets. However, if he or she is applying solely for MassHealth Buy-in, as described at 130 CMR 519.011(B): *MassHealth Buy-in for Qualifying Individuals*, verification is required only upon request by the MassHealth agency. 130 CMR 520.007 also contains the verification requirements for certain assets. The assets the MassHealth agency considers include, but are not limited to, the following.

- (A) Cash.
  - (1) Definition. Cash is defined as currency, checks, and bank drafts in the possession of or available to the applicant, member, or spouse.
  - (2) Verification. The applicant's or member's declaration on the application or redetermination form stating the amount of cash available to him or her is sufficient verification.

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(B) Bank Accounts.

(1) Definition. Bank accounts are defined as deposits in a bank, savings and loan institution, credit union, or other financial institution. Bank accounts may be in the form of savings, checking, or trust accounts, term certificates, or other types of accounts.

(2) Determination of Ownership and Accessibility. The MassHealth agency considers funds in a bank account available only to the extent that the applicant or member has both ownership of and access to such funds. The MassHealth agency determines the ownership of and access to the funds in accordance with 130 CMR 520.005 and 520.006.

(3) Verification of Account Balances. The MassHealth agency requires verification of the current balance of each account at application, during eligibility review, and at times of reported change.

(a) Noninstitutionalized individuals excluding the individuals described at 130 CMR 519.007(B): *Home- and Community-based Services Waiver Frail Elder* must verify the amount on deposit by bank books or bank statements that show the bank balance within 45 days of the date of application or the date that the eligibility review is received in a MassHealth Enrollment Center or outreach site.

(b) Nursing-facility residents as described at 130 CMR 515.001: *Definition of Terms* must verify the amount on deposit by bank books or bank statements that show the current balance and account activity during the look-back period.

(c) If during an eligibility review the member states either orally or in writing that an account other than a checking account contains a balance of \$25 or less, the MassHealth agency does not require verification provided that, in combination with other countable assets, it would not affect continued eligibility.

(d) If lack of either access to or ownership of funds in an account is verified, the MassHealth agency will not consider the funds a countable asset.

(C) Individual Retirement Accounts, Keogh Plans and Pension Funds.

(1) Individual Retirement Accounts. An Individual Retirement Account (IRA) is a tax-deductible savings account that sets aside money for retirement. Funds in an IRA are counted as an asset in their entirety less the amount of penalty for early withdrawal.

(2) Keogh Plans. A Keogh Plan is a retirement plan established by a self-employed individual. A Keogh Plan may be established for the self-employed individual alone or for the self-employed individual and his or her employees. If the Keogh Plan was established for the self-employed individual alone, the funds in the Plan are counted as an asset in their entirety less the amount of penalty for early withdrawal. If the Keogh Plan was established for employees other than the spouse of the applicant or member, the MassHealth agency does not count the funds as an asset.

(3) Pension Funds. A pension fund is a retirement plan established by an employer to provide benefit payments to employees upon retirement or disability. Pension funds that are being set aside by an individual's current employer are not countable as an asset. Pension funds from an individual's former employer are countable in their entirety less any penalties for withdrawal provided such funds are accessible. (*See* 130 CMR 520.006.)

(D) Securities. Securities include, but are not limited to, stocks, bonds, options, futures contracts, debentures, mutual funds including money-market mutual funds, and other financial instruments. Tradable securities are valued at the most recent closing-bid price, and nontradable securities are valued at current equity value. A security for which there is no market value or that is inaccessible in accordance with 130 CMR 520.006 is noncountable.

(E) Cash-surrender Value of Life-insurance Policies.

(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.

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(F) Vehicles as Countable Assets.

(1) Requirements. In determining the assets of an individual (and the spouse, if any), the countability of a vehicle is determined as follows.

(a) One vehicle per household is noncountable regardless of its value if it is for the use of the eligible individual or couple or a member of the eligible individual's or couple's household.

(b) The equity value of all other vehicles is a countable asset.

(2) Exemption.

(a) Three-month Exemption. The MassHealth agency does not count the value of nonexempt vehicles exceeding the asset limit for three calendar months provided the applicant or member signs an agreement with the MassHealth agency to dispose of the vehicles at fair-market value.

(b) Additional Exemption for Good Cause. The MassHealth agency may grant an additional three-month extension if the disposition was prevented by an event beyond the control of the individual who was making a good-faith effort to dispose of the property during the initial three-month period.

(c) Proceeds. The proceeds from the sale of the vehicle after payment of loans or other encumbrances and expenses of sale such as taxes, fees, and advertising costs are a countable asset in the month received and in subsequent months. The equity value of a vehicle that has not been sold three calendar months after the date of the written agreement (or six calendar months after the date of the written agreement if an extension has been granted) is a countable asset.

(d) Equity Value. Equity value is determined by subtracting the balance of any loans, liens, encumbrances, and expenses of sale, such as taxes, fees, and advertising costs, from the fair-market value of the vehicle.

(e) Fair-market Value. Fair-market value is the price for which the vehicle will sell on the open market.

(f) Verification. The applicant or member must verify the fair-market value and equity value of all vehicles. Verification must be a written document providing reasonable evidence of value. Acceptable verification includes, but is not limited to, the following:

1. the wholesale value (for cars and trucks) and finance value (for recreational vehicles) tables in the most recent vehicle valuation book that is used by the MassHealth agency;
2. the low value in an older car valuation book (for cars and trucks). If the car or truck is too old to be listed in an older car valuation book, the MassHealth agency will assign a value of \$250;
3. the written appraisal of a licensed automobile dealer who deals with classic, custom-made, or antique vehicles, if the vehicle is considered a classic, custom-made, or antique; or
4. for recreational vehicles, the projected loan value as quoted by a bank or other lending institution; documents showing the value of the vehicle for insurance purposes; or a written estimate of the cash value of the vehicle from a licensed recreational vehicle dealer.

(g) Specially Equipped Vehicles. Special equipment for the handicapped, other optional equipment, or low mileage do not increase the value of the vehicle.

(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). Business or nonbusiness property as described in 130 CMR 520.008(D) is a noncountable asset.

(2) Nine-month Exemption. The value of such real estate is exempt for nine calendar months after the date of notice by the MassHealth agency, provided that the individual signs an agreement with the MassHealth agency within 30 days after the date of notice to dispose of the property at fair-market value. The MassHealth agency will extend the nine-month period as long as the individual or the spouse continues to make a good-faith effort to sell, as verified in accordance with 130 CMR 520.007(G)(4).

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(3) 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.

(a) 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.

(b) In the event that a current property-tax assessment is not available or the applicant or member wishes to rebut the fair-market value determined by the MassHealth agency, a comparable market analysis or a written appraisal of the value of the property from a knowledgeable source will establish the fair-market value. A knowledgeable source is a licensed real-estate agent or broker, a real-estate appraiser, an official of a bank, a savings-and-loan association, or a similar lending organization, or an official of the local real-estate tax jurisdiction.

(c) A copy of the loan instruments or other binding documents that show evidence of the payment schedule and the outstanding balance of the loan will verify the equity value of the property.

(d) The MassHealth agency may waive the period of ineligibility due to excess equity value in real estate if the individual meets the conditions described at 130 CMR 520.007(G)(13).

(4) Good-faith Effort to Sell Real Estate. The individual or the spouse must verify his or her good-faith effort to dispose of countable real estate by evidence such as advertisements or documentation of the listing of the real estate with licensed real-estate agents or brokers, including a report of any offer from prospective buyers. The MassHealth agency will terminate eligibility if, at any time, the individual rejects a reasonable offer to buy the real estate. An offer to buy real estate is considered reasonable if it is at least two-thirds of the fair-market value, unless the individual proves otherwise to the MassHealth agency's satisfaction.

(5) Proceeds from the Sale of Real Estate. The proceeds from the sale of the real estate, after the payment of loans, liens, or other encumbrances, and expenses of sale such as taxes, fees, and advertising costs, are a countable asset in the month received and in subsequent months.

(6) Right to Recovery. If a member fails to report the acquisition of real estate within ten days after taking title to the real estate and the equity value of the real estate, when added to all other countable assets, exceeds the MassHealth asset standard, the MassHealth agency has the right to recover overpayment in accordance with 130 CMR 515.010: *Recovery of Overpayment of Medical Benefits* and to initiate any and all other legal remedies available.

(7) Former Home of a Community-based Individual. If an applicant or member (or spouse, if any) moves out of his or her home for reasons other than institutionalization without the intent to return, the home, whether or not held in trust, becomes a countable asset because it is no longer used as the individual's principal place of residence. The former home is subject to the requirements described in 130 CMR 520.007(G)(2).

(8) Former Home of an Institutionalized Individual. If an applicant or member moves out of his or her home to enter a medical institution, the MassHealth agency considers the former home a countable asset that is subject to 130 CMR 520.007(G)(2), provided all of the following conditions are met. If the former home of a nursing-facility resident as defined in 130 CMR 515.001: *Definition of Terms* is placed in a trust, the MassHealth agency will apply the trust rules in accordance with 130 CMR 520.021 through 520.024.

(a) The individual is institutionalized as defined in 130 CMR 515.001: *Definition of Terms*.

(b) None of the following relatives of the individual is living in the property:

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1. a spouse;
  2. a child who is younger than 21 years old or who is blind or permanently and totally disabled;
  3. a sibling who has a legal interest in the home and who was living there for a period of at least one year immediately before the applicant's or member's admission to the medical institution;
  4. a son or daughter who was living in the applicant's or member's home for a period of at least two years immediately before the date of the applicant's or member's admission to the medical institution, and who establishes to the satisfaction of the MassHealth agency that he or she provided care to the applicant or member that permitted him or her to live in the home rather than in a medical institution; or
  5. a dependent relative. A dependent relative is any of the following who has any kind of medical, financial, or other dependency: a child, stepchild, or grandchild; a parent, stepparent, or grandparent; an aunt, uncle, niece, or nephew; a brother, sister, stepbrother, or stepsister; a half brother or half sister; a cousin; or an in-law.
- (c) The applicant or member (and spouse, if any) moves out of his or her home without the intent to return.
- (d) The applicant or member does not own long-term-care insurance with coverage that meets the requirements of 130 CMR 515.014: *Long-term-care Insurance Minimum Coverage Requirements for MassHealth Exemptions* and the Division of Insurance regulations at 211 CMR 65.09(1)(e)2.
- (9) Verification of Dependency and Residence of Relative Living in the Former Home.
- (a) Relationship. The institutionalized individual must verify his or her relationship to the relative living in the former home by birth certificates, marriage licenses, or any other documents necessary to establish the relationship.
  - (b) Dependency. The institutionalized individual must verify the relative's dependency on the institutionalized individual by a signed statement from the relative attesting to the existence and duration of the dependency. The MassHealth agency may require additional evidence if the relative's claim of dependency is questionable or self-contradictory.
  - (c) Residence. The institutionalized individual must verify the relative's residence in his or her former home only if there is conflicting or contradictory evidence regarding the relative's residence.
- (10) Option to Liquidate to Pay for Medical Care. Instead of selling the countable former home, the individual may liquidate its equity value to pay for his or her medical care. If the individual chooses this option, the home will be noncountable until the equity value is liquidated, but not longer than nine calendar months after the date of the MassHealth agency's notice.
- (11) Undue Hardship: Jointly Owned Assets.
- (a) The MassHealth agency will continue to exclude otherwise countable property, including a former home, when it is jointly owned and the sale of the property by an individual would cause the other owners to lose housing.
  - (b) Loss of housing would result when the property serves as the principal place of residence for one (or more) of the other owners, and sale of the property would result in loss of that residence, and no other housing would be readily available for the displaced other owner. If undue hardship as defined in 130 CMR 520.007(G)(11) ceases to exist, the property becomes a countable asset.
- (12) Lien. The MassHealth agency will place a lien before the death of a member against any real estate in which the member has a legal interest. This lien will be placed only if all of the conditions of 130 CMR 515.012: *Real Estate Liens* are met.
- (13) Waiver of the Period of Ineligibility Due to Excess Equity Value in the Principal Place of Residence Causing Undue Hardship.
- (a) The MassHealth agency may waive the denial of payment of long-term-care services for excess equity value in the principal place of residence if ineligibility would cause the individual undue hardship when the following conditions exist:
    1. the denial of long-term-care services would deprive the nursing-facility resident of medical care such that his or her health or life would be endangered, or the nursing-facility resident would be deprived of food, shelter, clothing, or other necessities such that he or she would be at risk of serious deprivation; and



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2. the institution has notified the nursing-facility resident of its intent to initiate discharge the resident because the resident has not paid for his or her institutionalization; and
  3. there is no less costly noninstitutional alternative available to meet the nursing-facility resident's needs.
- (b) Undue hardship does not exist when imposition of the period of ineligibility would merely inconvenience or restrict the nursing-facility resident without putting the nursing-facility resident at risk of serious deprivation.
- (c) Where the MassHealth agency has issued a denial notice based on the equity value in the principal place of residence, the individual may request a hardship waiver.
1. The individual must submit a written request for consideration of undue hardship and supporting documentation to the MassHealth Enrollment Center listed on the notice of denial within 15 days after the date on the notice.
  2. Within 30 days after the date of the request, the MassHealth agency informs the individual in writing of the decision and of the right to a fair hearing. The MassHealth agency extends this 30-day period if the MassHealth agency requests additional documentation or if extenuating circumstances, as determined by the MassHealth agency, require additional time.
- (d) The nursing-facility resident may appeal the MassHealth agency undue-hardship decision and denial of payment of long-term-care services by submitting a request for a fair hearing to the Office of Medicaid Board of Hearings within 30 days after the receipt of the MassHealth agency written undue-hardship notice, in accordance with 130 CMR 610.000: *MassHealth: Fair Hearing Rules*. If the denial occurs pursuant to 130 CMR 520.007(G)(13)(c)1., the nursing-facility resident may instead appeal the denial of eligibility for long-term-care services by submitting a request for a fair hearing to the Office of Medicaid Board of Hearings, in accordance with 130 CMR 610.000: *MassHealth: Fair Hearing Rules*, while the resident also submits a written request for consideration of undue hardship. If the request for the hardship waiver is later denied, the nursing-facility resident may appeal the MassHealth agency's undue hardship decision by submitting a request for a fair hearing to the Office of Medicaid Board of Hearings within 30 days after the receipt of the MassHealth agency written undue hardship decision notice, in accordance with 130 CMR 610.000: *MassHealth: Fair Hearing Rules*.

(H) Retroactive SSI and RSDI Benefit Payments.

- (1) Requirements. Retroactive SSI and RSDI benefit payments are noncountable in the month of receipt and for six months after the month of receipt. Such payments must be readily identifiable as retroactive SSI or RSDI payments, and should be deposited in a separately identifiable account. If commingled with other funds, and not separately identifiable according to the MassHealth agency, the MassHealth agency considers the total amount on deposit a countable asset. Any amount of the benefit payment still retained on the first day following the excluded periods described in 130 CMR 520.007(H)(1) is a countable asset.
- (2) Verification. The applicant or member must verify the amount of the benefit and the date of receipt. The preferred source of verification is the notification letter from the Social Security Administration. The amount on deposit may be verified by a bank book or bank statement that shows that the benefit payment is not commingled with other funds.

(I) Trusts. The MassHealth agency counts the value of the principal and income of a revocable or irrevocable trust in accordance with 130 CMR 520.021 through 520.024.

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

- (1) Treatment of Annuities Established Before February 8, 2006. Payments from an annuity are countable income in accordance with 130 CMR 520.009. If the annuity can be converted to a lump sum, the lump sum, less any penalties or costs of converting to a lump sum, is a countable asset. Purchase of an annuity is a disqualifying transfer of assets for nursing-facility residents as defined at 130 CMR 515.001: *Definition of Terms* in the following situations:

- (a) when the beneficiary is other than the applicant, member, or spouse;

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- (b) when the beneficiary is the applicant, member, or spouse and when the total present value of projected payments from the annuity is less than the value of the transferred asset (purchase price). In this case, the MassHealth agency determines the amount of the disqualifying transfer based on the actuarial value of the annuity compared to the beneficiary's life expectancy using the life-expectancy tables as determined by the MassHealth agency, giving due weight to the life-expectancy tables of institutions in the business of providing annuities;
- (c) when the terms of the annuity postpone payment beyond 60 days, the MassHealth agency will treat the annuity as a disqualifying transfer of assets until the payment start date; or
- (d) when the terms of the annuity provide for unequal payments, the MassHealth agency may treat the annuity as a disqualifying transfer of assets. Commercial annuity payments that vary solely as a result of a variable rate of interest are not considered unequal payments under 130 CMR 520.007(J)(1)(d).
- (2) Treatment of Annuities Established on or after February 8, 2006. In addition to the requirements in 130 CMR 520.007(J)(1), the following conditions must be met.
- (a) The purchase of an annuity will be considered a disqualifying transfer of assets unless
1. the Commonwealth of Massachusetts is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual;
  2. the Commonwealth of Massachusetts is named as such a remainder beneficiary in the second position after the community spouse, or minor or disabled children; or
  3. the Commonwealth of Massachusetts is named as such a remainder beneficiary in the first position if the community spouse or the representative of any minor or disabled children in 130 CMR 520.007(J)(2)(a)2. disposes of any such remainder for less than fair-market value.
- (b) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(1) and (2)(a) and is irrevocable and nonassignable, or unless the annuity satisfies 130 CMR 520.007(J)(2)(c).
- (c) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(2)(b), or unless the annuity names the Commonwealth of Massachusetts as a beneficiary as required under 130 CMR 520.007(J)(2)(a) and the annuity is
1. described in section 408(b) or (q) of the Internal Revenue Code of 1986;
  2. purchased with the proceeds from an account or trust described in section 408(a), (c), or (p) of the Internal Revenue Code of 1986;
  3. purchased with the proceeds from a simplified employee pension described in section 408(k) of the Internal Revenue Code of 1986; or
  4. purchased with the proceeds from a Roth IRA described in section 408A of the Internal Revenue Code of 1986.
- (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 agency;
  - (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.
- (5) Additional Regulations About Transfers of Assets. Transfers of assets are further governed by 130 CMR 520.018 and 520.019.

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.

(A) The Home. The home of the applicant or member and the spouse and any land appertaining to the home, as determined by the MassHealth agency, if located in Massachusetts and used as the principal place of residence, are considered noncountable assets, except when the equity interest in the home exceeds the amount described in 130 CMR 520.007(G)(3). The home is subject to the lien rules at 130 CMR 515.012: *Real Estate Liens*. If the home is placed in a trust or in an arrangement similar to a trust, the MassHealth agency will apply the trust rules at 130 CMR 520.021 through 520.024.

(B) Assets of an SSI Recipient. The assets of an SSI recipient are exempt from consideration as countable assets.

(C) Proceeds from the Sale of a Home. The proceeds from the sale of a home used by the applicant or member as the principal place of residence, provided the proceeds are used to purchase another home to be used as the principal place of residence, are considered noncountable assets. Such proceeds are exempt from consideration as countable assets for the three calendar months following the month of receipt. The MassHealth agency places a lien before the death of the member against any real estate in which the member has a legal interest in accordance with 130 CMR 515.012: *Real Estate Liens*.

(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.

(E) Any Loan or Grant. Any loan or grant including, but not limited to, scholarships, the terms of which preclude their use for current maintenance, is considered a noncountable asset.

(F) Funeral or Burial Arrangements.

(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:
  - 1. a separately identifiable amount not to exceed \$1,500 expressly reserved for funeral and burial expenses; or
  - 2. 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.

(G) Veterans' Payments. Veterans' payments for aid and attendance, unreimbursed medical expenses, housebound benefits, and enhanced benefits retained after the month of receipt, provided these payments are separately identifiable, are considered noncountable assets. Appreciated value and earned interest are also noncountable.

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(H) Special-needs Trust. A special-needs trust in accordance with the trust rules at 130 CMR 520.021 through 520.024 is considered a noncountable asset.

(I) Pooled Trust. A pooled trust in accordance with the trust rules at 130 CMR 520.021 through 520.024 is considered a noncountable asset.

(J) ICF/MR Trust. A trust established before April 7, 1986, solely for the benefit of a resident of an intermediate-care facility for the mentally retarded (ICF/MR) is considered a noncountable asset.

(K) Other Assets. Any other assets considered noncountable for Title XIX eligibility purposes is considered a noncountable asset.

520.009: Countable-income Amount

(A) Overview.

(1) An individual's and the spouse's gross earned and unearned income less certain business expenses and standard income deductions is referred to as the countable-income amount. In determining gross monthly income, the MassHealth agency multiplies the average weekly income by 4.333 unless the income is monthly.

(2) For community residents, the countable-income amount is compared to the applicable income standard to determine the individual's financial eligibility.

(3) For institutionalized individuals, specific deductions described in 130 CMR 520.026 are applied against the individual's countable-income amount to determine the patient-paid amount.

(4) The types of income that are considered in the determination of eligibility are described in 130 CMR 520.009, 520.018, 520.019, and 520.021 through 520.024. These include income to which the applicant, member, or spouse would be entitled whether or not actually received when failure to receive such income 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 income is reasonably considered to result from such action or inaction, the MassHealth agency will consider the specific circumstances involved.

(B) MassHealth Income Standards. Generally, financial eligibility is based on a percentage of the federal poverty level. The monthly federal poverty level standards are determined according to annual standards published in the *Federal Register*. The MassHealth agency adjusts these standards annually using the following formula.

(1) Divide the annual federal poverty level income standard as it appears in the *Federal Register* by 12.

(2) Multiply the unrounded monthly income standard by the applicable federal poverty level percentage.

(3) Round up to the next whole dollar to arrive at the monthly-income standards.

(C) Types of Earned Income. Earned income is the total amount of compensation received for work or services performed. Earned income includes wages, self-employment income, and payment from roomers and boarders.

(1) Self-employment Income. Gross income for the self-employed is the total amount of income listed on the most recent tax return before adjustments to income are made. A real-estate dealer, if engaged in the business of selling real estate to customers for profit, is considered to have self-employment earned income. Income from property that is owned by an individual who is not a real-estate dealer or is owned by the individual's spouse is considered unearned income.

(2) Income from Roomers and Boarders. Payment for room and meals received from anyone other than the spouse of the applicant or member is countable earned income. Gross income from roomers and boarders is the amount received for the room and board, less business expenses as described at 130 CMR 520.010(B).

(3) Verification of Earned Income. The applicant or member must verify gross earned income. However, if he or she is applying solely for MassHealth Buy-in, as described at 130 CMR 519.011(B): *MassHealth Buy-in for Qualifying Individuals*, verification is required only upon the request of the MassHealth agency. Verifications include

520.018: Transfer of Resources Regardless of Date of Transfer

(A) The provisions of 42 U.S.C. 1396p apply to all transfers of resources. In the event that any portion of 130 CMR 520.018 and 520.019 conflicts with federal law, the federal law supersedes.

(B) The MassHealth agency denies payment for nursing-facility services to an otherwise eligible nursing-facility resident as defined in 130 CMR 515.001: *Definition of Terms* who transfers or whose spouse transfers countable resources for less than fair-market value during or after the period of time referred to as the look-back period.

(C) The denial of payment for nursing-facility services does not affect the individual's eligibility for other MassHealth benefits.

(D) Circumstances giving rise to disqualifying transfers of resources are also described at 130 CMR 520.007(J).

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

(A) Payment of Nursing-facility Services. The MassHealth agency applies the provisions of 130 CMR 520.018 and 520.019 to nursing-facility residents as defined at 130 CMR 515.001: *Definition of Terms* requesting MassHealth agency 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): *Home- and Community-based Services Waiver Frail Elder*.

(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.

(1) For transfers occurring before February 8, 2006, this period generally extends back in time for 36 months.

(2) For transfers of resources occurring on or after February 8, 2006, the period generally extends back in time for 60 months. The 60-month look-back period will begin to be phased in on February 8, 2009. Beginning on March 8, 2009, applicants will be asked to provide verifications of their assets for the 37 months prior to the application. As each month passes, the look-back period will increase by one month until the full 60 months is reached on February 8, 2011.

(3) For transfers of resources from or into trusts, the look-back period is described in 130 CMR 520.023(A).

(C) Disqualifying Transfer of Resources. The MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J). The MassHealth agency may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident or spouse is or would be entitled if such action had not been taken. Action taken to avoid receiving a resource may include, but is not limited to, waiving the right to receive a resource, not accepting a resource, agreeing to the diversion of a resource, or failure to take legal action to obtain a resource. In determining whether or not failure to take legal action to receive a resource is reasonably considered a transfer by the individual, the MassHealth agency considers the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.

(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.

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- (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 agency 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 younger than 65 years old 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 younger than 21 years old, 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.
- (7) The resources were transferred to a separately identifiable burial account, burial arrangement, or a similar device for the nursing-facility resident or the spouse in accordance with 130 CMR 520.008(F).

(E) Repayment of Financial and Medical Assistance. A nursing-facility resident who has received or will be receiving payment from a third party as a result of an accident, injury, or other loss must first repay the MassHealth agency for medical assistance under M.G.L. c. 118E, § 22 and 42 U.S.C. 1396a(a)(25)(A) and (B) and the Department of Transitional Assistance for financial assistance under M.G.L. c. 18, § 5G, before the MassHealth agency will consider whether a transfer of such third-party payments may be permissible under 130 CMR 520.019(D), (F), or (J).

(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.

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(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.

(2) Determination of the Period of Ineligibility in Special Circumstances. The MassHealth agency determines the periods of ineligibility in the following situations.

(a) Transfers in the Same Month. When a number of resources have been transferred in the same month, the MassHealth agency calculates the period of ineligibility by dividing the total value of the transferred resources 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. The period of ineligibility begins on the first day of the month in which the resources were transferred.

(b) Periods of Ineligibility that Overlap. When transfers of resources result in periods of ineligibility that overlap, the MassHealth agency adds the value of all the transferred resources and divides the total 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. The result is a single period of ineligibility beginning on the first day of the month in which the first transfer was made.

(c) Periods of Ineligibility that do not Overlap. In the case of multiple transfers where the periods of ineligibility for each transfer do not overlap, the MassHealth agency considers each transfer as a separate event with its own period of ineligibility. For non-overlapping multiple transfers occurring on or after February 8, 2006, *see* 130 CMR 520.019(G)(2)1.

(d) Periods of Ineligibility of less than One Month. If the calculated period of ineligibility is less than one month, the MassHealth agency imposes a partial-month period of ineligibility and does not round down or disregard any fractional period of ineligibility.

(e) Transfer of Lump-sum Income. When income has been transferred as a lump sum, the MassHealth agency calculates the period of ineligibility on the lump-sum value.

(f) Transfer of Stream of Income. When a stream of income has been transferred, the MassHealth agency calculates the period of ineligibility for each income payment that is periodically transferred. The MassHealth agency may impose partial-month periods of ineligibility.

(g) Transfer of the Right to a Stream of Income. When the right to a stream of income has been transferred, the MassHealth agency calculates the period of ineligibility based on the total amount of income expected to be transferred during the nursing-facility resident's life, according to the life-expectancy tables as determined by the MassHealth agency.

(h) Transfer by the Spouse. When a transfer by the spouse results in a period of ineligibility for the nursing-facility resident, and the spouse later becomes institutionalized and applies for MassHealth agency payment of nursing-facility services, the MassHealth agency apportions the remaining period of ineligibility equally between the spouses. If both spouses become nursing-facility residents in the same month, the MassHealth agency divides the period of ineligibility equally between them. When one spouse is no longer subject to a penalty, any remaining penalty must then be imposed on the remaining nursing-facility-resident spouse.

(i) Multiple Transfers Occurring on or after February 8, 2006. For transfers occurring on or after February 8, 2006, the MassHealth agency adds the value of all the resources transferred during the look-back period and divides the total by the average monthly cost to a private patient receiving long-term-care services in the Commonwealth of Massachusetts at the time of application, as determined by the MassHealth agency. The result will be a single period of ineligibility beginning on the first day of the month in which the first transfer was made or the date on which the individual is otherwise eligible for long-term-care services, whichever is later.

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(3) Begin Date. For transfers occurring before February 8, 2006, the period of ineligibility begins on the first day of the month in which resources have been transferred for less than fair-market value. For transfers occurring on or after February 8, 2006, the period of ineligibility begins on the first day of the month in which resources were transferred for less than fair-market value or the date on which the individual is otherwise eligible for MassHealth agency payment of long-term-care services, whichever is later. For transfers involving revocable trusts, the date of transfer is the date the payment to someone other than the nursing-facility resident or the spouse is made. For transfers involving irrevocable trusts, the date of transfer is

- (a) the date that the countable trust resources are transferred to someone other than the nursing-facility resident or spouse; or
- (b) the latest of the following:
  1. the date that payment to the nursing-facility resident or the spouse was foreclosed under the terms of the trust;
  2. the date that the trust was established; or
  3. the date that any resource was placed in the trust.

(H) Transfers of Jointly Held Resources. The MassHealth agency will determine the amount of the nursing-facility resident's ownership interest of jointly held resources as defined in 130 CMR 515.001: *Definition of Terms* in accordance with the ownership rules at 130 CMR 520.005. The MassHealth agency will consider as a transfer any action taken by any person that reduces or eliminates the nursing-facility resident's ownership or control of the resource. The MassHealth agency then will determine whether the transfer was made at less than fair-market value in accordance with the transfer rules.

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

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

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

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

(J) Home Equity Loans and Reverse Mortgages. Proceeds from a home equity loan or a reverse mortgage that are transferred in the month of receipt will be considered a disqualifying transfer of resources if transferred for less than fair-market value.

(K) Exempting Transfers from the Period of Ineligibility.

(1) During the Eligibility Process. To avoid the imposition of a period of ineligibility, the nursing-facility resident may take action during the determination of eligibility before the issuance of a notice of a period of ineligibility as follows.



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(a) Revising a Trust. During the eligibility process, the nursing-facility resident may revise a trust to comply with the criteria of a special-needs trust or a pooled trust, as defined in 130 CMR 515.001: *Definition of Terms*. The use of resources to create these trusts are permissible transfers, in accordance with 130 CMR 520.019(D). The MassHealth agency will use the original application date if during the eligibility process the nursing-facility resident provides proof that the trust has been revised accordingly.

(b) Curing a Transfer. During the eligibility process, the full value or a portion of the full value of the transferred resources may be returned to the nursing-facility resident. The MassHealth agency will use the original application date and consider the transfer to have been eliminated or adjusted. The MassHealth agency will apply the countable assets rules at 130 CMR 520.007 and the countable income rules at 130 CMR 520.009 to the returned resources in determining eligibility.

(2) After Issuance of the Notice of the Period of Ineligibility. After the issuance of the notice of the period of ineligibility, the nursing-facility resident may avoid imposition of the period of ineligibility in the following instances.

(a) Revising a Trust. If the nursing-facility resident revises a trust to comply with the criteria of a special-needs trust or a pooled trust as defined in 130 CMR 515.001: *Definition of Terms* and exempted in 130 CMR 520.019(D), the MassHealth agency will rescind the period of ineligibility as follows.

1. The MassHealth agency will use the original application date if within 60 days after the date of the notice of the period of ineligibility, the nursing-facility resident provides proof that the trust has been revised to comply with the criteria of a special-needs trust or a pooled trust. The MassHealth agency may extend the original 60-day period for an additional 120 days, if court action is required to revise the trust, as long as the court action is filed within the 60-day period after the date of the notice of the period of ineligibility.

2. If after the 60<sup>th</sup> day after the date of the notice of the period of ineligibility, the nursing-facility resident provides proof that the trust has been revised to comply with the criteria of a special-needs trust or a pooled trust, the MassHealth agency will consider the trust revised as of the date the trust has been both revised and notarized.

(b) Curing a Transfer. If the full value or a portion of the full value of the transferred resources is returned to the nursing-facility resident, the MassHealth agency will rescind or adjust the period of ineligibility and will apply the countable-assets rules at 130 CMR 520.007 and the countable-income rules at 130 CMR 520.009 to the returned resources in the determination of eligibility. The MassHealth agency will rescind or adjust the period of ineligibility as follows.

1. The MassHealth agency uses the original application date if the nursing-facility resident provides proof within 60 days after the date of the notice of the period of ineligibility that the transfer has been fully or partially cured. In the case of a partial cure, the MassHealth agency recalculates the period of ineligibility based on the transferred amount remaining after deducting the cured portion, beginning with the date of transfer or, for cures of transfers occurring on or after February 8, 2006, the later of the date of transfer or the date on which the individual would have otherwise been eligible.

2. If the nursing-facility resident provides proof later than the 60<sup>th</sup> day after the date of the notice of a period of ineligibility that the transfer has been fully or partially cured, the nursing-facility resident must reapply. The MassHealth agency recalculates the period of ineligibility based on the amount of the transfer remaining after the cure, beginning with the date of transfer or, for cures of transfers occurring on or after February 8, 2006, the later of the date of transfer or the date on which the individual would have otherwise been eligible.

(L) Waiver of the Period of Ineligibility Due to Undue Hardship. In addition to revising a trust and curing a transfer, the nursing-facility resident may claim undue hardship in order to eliminate the period of ineligibility.

(1) The MassHealth agency may waive a period of ineligibility due to a disqualifying transfer of resources if ineligibility would cause the nursing-facility resident undue hardship. The MassHealth agency may waive the entire period of ineligibility or only a portion when all of the following circumstances exist.

520.019: continued

(a) The denial of MassHealth would deprive the nursing-facility resident of medical care such that his or her health or life would be endangered, or the nursing-facility resident would be deprived of food, shelter, clothing, or other necessities such that he or she would be at risk of serious deprivation.

(b) Documentary evidence has been provided that demonstrates to the satisfaction of the MassHealth agency that all appropriate attempts to retrieve the transferred resource have been exhausted and that the resource or other adequate compensation cannot be obtained to provide payment, in whole or part, to the nursing-facility resident or the nursing facility.

(c) The institution has notified the nursing-facility resident of its intent to initiate a discharge of the resident because the resident has not paid for his or her institutionalization.

(d) There is no less costly noninstitutional alternative available to meet the nursing-facility resident's needs.

(2) Undue hardship does not exist when imposition of the period of ineligibility would merely inconvenience or restrict the nursing-facility resident without putting the nursing-facility resident at risk of serious deprivation.

(3) Where the MassHealth agency has issued a notice of the period of ineligibility due to a disqualifying transfer of resources, the nursing-facility resident may request a hardship waiver. For transfers occurring on or after February 8, 2006, nursing facilities may apply for a hardship waiver on behalf of a resident, with the consent of the nursing-facility resident or the resident's authorized representative.

(4) If the nursing-facility resident feels the imposition of a period of ineligibility would result in undue hardship, the nursing-facility resident must submit a written request for consideration of undue hardship and any supporting documentation to the MassHealth Enrollment Center listed on the notice of the period of ineligibility within 15 days after the date on the notice. Within 30 days after the date of the nursing-facility resident's request, the MassHealth agency will inform the nursing-facility resident in writing of the undue-hardship decision and of the right to a fair hearing. The MassHealth agency will extend this 30-day period if the MassHealth agency requests additional documentation or if extenuating circumstances as determined by the MassHealth agency require additional time.

(5) The nursing-facility resident may appeal the MassHealth agency's undue-hardship decision and the imposition of a period of ineligibility by submitting a request for a fair hearing to the Office of Medicaid Board of Hearings within 30 days after the nursing-facility resident's receipt of the MassHealth agency's written undue-hardship notice, in accordance with 130 CMR 610.000: *MassHealth: Fair Hearing Rules*.

(6) The nursing-facility resident's request for consideration of undue hardship does not limit his or her right to request a fair hearing for reasons other than undue hardship.

(M) Fraudulent Transfer or Sale. If a nursing-facility resident whose estate would be subject to a claim under 130 CMR 515.011: *Estate Recovery* transfers or sells any property including a home or an interest in the property for less than fair-market value, the MassHealth agency may consider the transfer or sale that does not meet the conditions of 130 CMR 520.019(D)(6) to be fraudulent under the Uniform Fraudulent Conveyance Act (M.G.L. c. 109(A)) and take appropriate legal action to set aside the transfer or sale.

(N) No Double Penalty. In the event that application of the transfer rules and the trust rules in 130 CMR 520.000 results in a nursing-facility resident being subject to a transfer penalty twice for actions involving the same resource, the trust rules will supersede the transfer rules in the determination of eligibility.

#### 520.021: Treatment of Trusts

130 CMR 520.021 through 520.024 explains how to treat the principal of and payments from a revocable or irrevocable trust established by the individual or by the spouse. 130 CMR 520.024(A) also includes trusts established by other than the individual or spouse and trusts whether or not established by will. In the event that a portion of 130 CMR 520.021 through 520.024 conflicts with federal law, the federal law supersedes.

520.022: Trusts or Similar Legal Devices Created before August 11, 1993

- (A) Revocable Trust. The assets and income of an individual or spouse in a revocable trust are countable. The fair-market value of the home or former home of the nursing-facility resident or spouse in a revocable trust is a countable asset. Where the home or former home is an asset of the trust, the home or former home is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).
- (B) Medicaid Qualifying Trust.
- (1) A Medicaid qualifying trust is a revocable or irrevocable trust or similar legal device, created or funded by the individual or spouse, other than by a will, under which
    - (a) the individual is a beneficiary of all or part of the discretionary or required payments or distributions from the trust; and
    - (b) a trustee or trustees are permitted to exercise any discretion to make payments or distributions to the individual.
  - (2) The maximum amount of payments or fair-market value of property that may be permitted under the terms of the trust to be distributed to the individual assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the individual is countable in the determination of eligibility.
  - (3) The fair-market value of the home or former home of the nursing-facility resident in a Medicaid qualifying trust is a countable asset and is not subject to the exemptions described at 130 CMR 520.007(G)(2) or 520.007(G)(8).
- (C) Certain Trusts Created before April 7, 1986. A trust created before April 7, 1986, solely for the benefit of a resident in an intermediate-care facility for the mentally retarded (ICF/MR) is not considered a Medicaid qualifying trust.

520.023: Trusts or Similar Legal Devices Created on or after August 11, 1993

The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will. Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual.

- (A) Look-back Period for Transfers into or from Trusts.
- (1) Look-back Period.
    - (a) For transfers made before February 8, 2006, the look-back period is 36 months for trusts where all or any portion of the income or principal of an irrevocable trust can be paid to or for the benefit of the nursing-facility resident, but is paid instead to someone else.
    - (b) The look-back period is 60 months
      1. for transfers made on or after February 8, 2006, subject to the phase-in described in 130 CMR 520.019(B)(2), if all or any portion of the income or principal of a trust can be paid to or for the benefit of the nursing-facility resident, but is instead paid to someone else;
      2. if payments are made from a revocable trust to other than the nursing-facility resident and are not for the benefit of the nursing-facility resident; or
      3. if payments are made into an irrevocable trust where all or a portion of the trust income or principal cannot under any circumstances be paid to or for the benefit of the nursing-facility resident.
  - (2) Period of Ineligibility Due to a Disqualifying Transfer. The MassHealth agency determines the amount of the transfer and the period of ineligibility for payment of nursing-facility services in accordance with the rules at 130 CMR 520.019(G).
- (B) Revocable Trusts.
- (1) The entire principal in a revocable trust is a countable asset.
  - (2) Payments from a revocable trust made to or for the benefit of the individual are countable income.
  - (3) Payments from a revocable trust made other than to or for the benefit of the nursing-facility resident are considered transfers for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

520.023: continued

(4) The home or former home of a nursing-facility resident or spouse held in a revocable trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or (G)(8).

(C) Irrevocable Trusts.

(1) Portion Payable.

(a) Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset.

(b) Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income.

(c) Payments from the income or from the principal of an irrevocable trust made to another and not to or for the benefit of the nursing-facility resident are considered transfers of resources for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(d) The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or (G)(8).

(2) Portion not Payable. Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could not be paid under any circumstances to or for the benefit of the nursing-facility resident will be considered a transfer for less than fair-market value and treated in accordance with the transfer rules at 130 CMR 520.019(G).

(D) Exemptions to the Trust Rules.

(1) Special-needs Trusts and Pooled Trusts. Under federal trust exemption regulations at 42 U.S.C. 1396(p)(d)(4) special-needs trusts and pooled trusts as defined in 130 CMR 515.001: *Definition of Terms* are not subject to the income and asset countability rules at 130 CMR 520.023(B) and (C).

(2) Revision of a Trust to Comply with the Criteria of a Special-needs or Pooled Trust. The MassHealth agency will not deny or terminate MassHealth due to excess assets if a trust is revised to comply with the criteria of a special-needs trust or a pooled trust in accordance with the rules at 130 CMR 520.019(J).

(3) Burial Trust. A burial trust is a trust established to pay solely for various funeral and burial expenses of the individual or the spouse. An irrevocable burial trust meeting the criteria of 130 CMR 520.008(F) is not a countable asset.

520.024: General Trust Rules

130 CMR 520.024 applies to trusts whether or not established by will and whether or not established by the individual or spouse.

(A) Irrevocable Trust.

(1) The assets and income held in an irrevocable trust established by the individual or spouse that the trustee is required to distribute to or for the benefit of the individual are countable.

(2) Payments from the income or principal of an irrevocable trust established by the individual or spouse to or for the benefit of the individual are countable.

(3) The assets and income held in an irrevocable trust established by other than the individual or spouse that the trustee is required to distribute to the individual are countable.

(4) Payments from the income or the principal of an irrevocable trust established by other than the individual or spouse to the individual are countable.

(B) Home in Trust: Community-based Individuals. For an applicant or member who is not a nursing-facility resident, the principal place of residence held in a revocable or irrevocable trust is a noncountable asset. A home that is not the principal place of residence is countable and not subject to the exemptions of 130 CMR 520.007(G)(2) while an asset of the trust.

520.024: continued

(C) Home in Trust: Cure.

(1) If the MassHealth agency has denied or terminated MassHealth because the home or former home in trust is considered an excess asset, the MassHealth agency will rescind that action if the home or former home has been removed from the trust and returned to the nursing-facility resident in accordance with the full cure rules at 130 CMR 520.019(K).

(2) When the home or former home is removed from a trust, as determined by the MassHealth agency, the MassHealth agency will redetermine eligibility using the rules at 130 CMR 520.007(G)(8) and the full cure rules at 130 CMR 520.019(K).

(3) When the home or former home has been removed from the trust, the MassHealth agency may place a *lien* in accordance with 130 CMR 515.012: *Real Estate Liens*.

(D) Repayment of Financial and Medical Assistance. An individual who has received or will be receiving payments from a third party as a result of an accident, injury, or other loss must first repay the MassHealth agency for medical assistance under M.G.L. c. 118E, § 22 and 42 U.S.C. 1396a(a)(25)(A) and (B) and the Department of Transitional Assistance for financial assistance under M.G.L. c. 18, § 5G, even if such third-party payments have been or will be placed in a special-needs or pooled trust in accordance with 42 U.S.C. 1396p(d)(4).

(E) Waiver of the Trust Rules: Undue Hardship. When the MassHealth agency denies or terminates MassHealth due to excess assets, the individual may request, in accordance with 130 CMR 520.019(L), that the MassHealth agency rescind the denial or termination because such action would result in undue hardship.

(F) Verification of a Trust. The individual must provide the MassHealth agency with a copy of the trust or similar legal device or, when appropriate, a will and any information detailing investments, holdings, and distributions, as determined by the MassHealth agency.

(G) No Double Penalty. The MassHealth agency will apply the rules at 130 CMR 520.019(N) to prevent double penalty.

520.025: Long-term-care Income Standard

The MassHealth income standard for long-term-care residents is \$72.80 per month.

520.026: Long-term-care General Income Deductions

General income deductions must be taken in the following order: a personal-needs allowance; a spousal-maintenance-needs allowance; a family-maintenance-needs allowance for qualified family members; a home-maintenance allowance; and health-care coverage and incurred medical and remedial-care expenses. These deductions are used in determining the monthly patient-paid amount.

(A) Personal-needs Allowance.

(1) The MassHealth agency deducts \$72.80 for a long-term-care resident's personal-needs allowance (PNA).

(2) If an individual does not have income totaling the standard, the MassHealth agency will pay the individual an amount up to that standard on a monthly basis.

(3) The PNA for SSI recipients is \$72.80.

(B) Spousal-maintenance-needs-deduction. If the community spouse's gross income is less than the amount he or she needs to live in the community (minimum-monthly-maintenance-needs allowance, MMMNA) as determined by the MassHealth agency, the MassHealth agency may deduct an amount from the institutionalized spouse's countable-income amount to meet this need. This amount is the spousal-maintenance-needs deduction. 130 CMR 520.026(B) applies to the first month of eligibility in an institution and terminates the first full calendar month in which the spouse is no longer in an institution or no longer has a spouse in the community. This deduction is the amount by which the minimum-monthly-maintenance-needs allowance exceeds the community spouse's gross income.



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10/25

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2015-00880-H

GEORGE VERGADOS

vs.

MARYLOU SUDDERS,  
Secretary of Executive Office of Health and Human Services,  
& another<sup>1</sup>

MEMORANDUM OF DECISION AND ORDER ON  
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

This action is an appeal from a final decision of the Office of Medicaid ("MassHealth") pursuant to G. L. c. 30A, § 14. In that decision, MassHealth determined that Plaintiff George Vergados was not eligible for long term care benefits because a home he put into an irrevocable trust constituted an "available asset" for purposes of determining his eligibility for benefits. The matter is now before the Court on Vergados' Motion for Judgment on the Pleadings. For the reasons that follow, the motion is **ALLOWED**.

BACKGROUND

A. Statutory and Regulatory Framework

To be eligible for long term care benefits under the MassHealth program, an applicant may not have more than \$2,000 in "countable assets." 130 Code Mass. Regs. § 520.003(A)(1). "Countable assets" can include assets placed in trust by the applicant. In discussing the treatment of trust assets, the federal Medicaid statute provides that:

<sup>1</sup> Daniel Tsai, Director of the Office of Medicaid

In the case of an irrevocable trust ... if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income ... to or for the benefit of the individual shall be considered income of the individual ...

42 U.S.C. § 1396p(d)(3)(B)(i)(I). The parallel state regulation, 130 Code Mass. Regs. § 520.023, provides that: “Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual.” The regulation then goes on to more specifically describe what trust assets are considered countable in connection with an irrevocable trust:

(C) Irrevocable Trusts.

(1) Portion Payable.

(a) Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset.

(b) Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income.

(c) Payments from the income or from the principal of an irrevocable trust made to another and not to or for the benefit of the nursing-facility resident are considered transfers of resources for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(d) The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).

130 Code Mass. Regs. § 520.023(C)(1).

B. Factual and Procedural Background

Vergados established the George N. Vergados Irrevocable Trust (“Trust”) in May 2007. On the same day the Trust was established, Vergados conveyed to the Trust his one-half share in a home located at 18 Thorndike Street, Lowell, Massachusetts. At that time, Vergados was living

in the home with his wife. He continued to live there until he entered a nursing facility almost seven years later in March 2014.

In June 2014, Vergados submitted an application seeking MassHealth long term care benefits to cover services he was receiving at the nursing facility. MassHealth denied the application on the basis that Vergados had excess countable assets, including bank accounts held in the Trust and real estate held in the Trust (his one-half interest in the home). Vergados appealed the denial of benefits to the Board of Hearings, which conducted an adjudicatory hearing in October 2014.

At the hearing, MassHealth argued that the entire trust corpus (i.e., the bank accounts and home) was countable. With respect to the home, MassHealth contended that because Vergados was living in the home after it was placed in the Trust and before he entered the nursing facility, the home was “available” to him and was thus countable under 130 Code Mass. Regs. § 520.023(C)(1)(d). As mentioned above, Section 520.023(C)(1)(d) provides that “[t]he home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset.” MassHealth asserted that the word “available” in Section 520.23(C)(1)(d) meant “available for use.”

In February 2015, the Hearing Officer granted Vergados’ appeal in connection with the bank account assets, finding that these assets were not available to him under the terms of the Trust. With respect to the home, however, the Hearing Officer denied Vergado’s appeal, finding that the home was available to Vergados and was therefore countable under 130 Code Mass. Regs. § 520.023(C)(1)(d) because he continued to live in the home after the Trust was established. In reaching this conclusion, the Hearing Officer found that MassHealth’s interpretation of the term available in Section 520.023(C)(1)(d) as meaning available for use was



entitled to deference.

Because the interest in the home was valued at \$127,600 and thus above the \$2,000 asset limit, the hearing officer's determination meant that Vergados was not eligible for benefits.

Vergados subsequently appealed the determination to this Court.<sup>2</sup>

## **DISCUSSION**

### **I. Standard of Review**

Pursuant to G. L. c. 30A, § 14(7), this court may reverse, remand, or modify an agency's decision only if the decision is based on an error of law, made on an unlawful procedure, in excess of the agency's statutory authority or jurisdiction, arbitrary and capricious, unsupported by substantial evidence, or contains one of two other enumerated defects. G. L. c. 30A, § 14(7). As the party appealing the administrative decision, the plaintiff bears the burden of demonstrating the decision's invalidity. Andrews v. Division of Med. Assistance, 68 Mass. App. Ct. 228, 231 (2007).

When determining whether an agency has properly applied its own regulations or governing statute, the agency is afforded considerable leeway. Shelales v. Director of the Office of Medicaid, 75 Mass. App. Ct. 636, 640 (2009). The Court may not "overturn an agency's interpretation of its own regulation and statutory mandate unless that interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious." Id. (internal quotes omitted). This is particularly true "when the case involves interpretation of a complex statutory and regulatory framework such as Medicaid." Id.

### **II. Analysis**

The parties engage in considerable argument over what "available" means in the context

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<sup>2</sup> Vergados, of course, does not appeal the hearing officer's determination with respect to the bank accounts.

of 130 Code Mass. Regs. § 520.023(C)(1)(d). MassHealth argues that its interpretation is entitled to deference, while Vergados contends that the interpretation is patently incorrect. The Court, however, need not resolve the issue.<sup>3</sup> Even assuming that MassHealth’s reading of the term is reasonable, the hearing officer nevertheless committed an error of law when concluding that the home was a countable asset.

The opening paragraph of 130 Code Mass. Regs. § 520.023 provides that: “[g]enerally, resources held in trust are considered available if under any circumstances *described in the terms of the trust*, any of the resources can be made available to the individual.” (Emphasis added). The language in 130 Code Mass. Regs. § 520.023(C)(1)(d) similarly provides that: “[t]he home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available *according to the terms of the trust* is a countable asset.” (Emphasis added). Therefore, under the regulations, an availability determination must be based solely on the language of the trust document itself.

The hearing officer did not ground her ruling on the terms of the Trust. Instead, she found that the home was available based only on the fact that Vergados continued to live in the home after it had been placed in the Trust. The terms of the Trust, however, provided Vergados with no equitable or legal right to live in the home. It did not, for example, expressly state that Vergados retained a life estate in the property.<sup>4</sup> Accordingly, even assuming that available means available for use as MassHealth contends, the home at issue here could not have been considered

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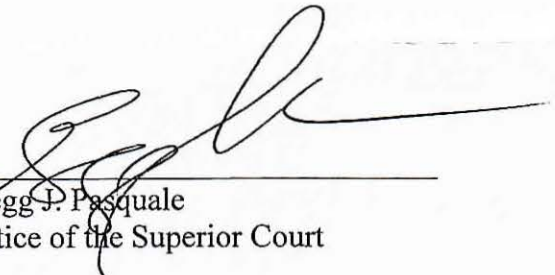
<sup>3</sup> The meaning of the term appears to be largely unsettled even within the Board of Hearings. Vergados points to other decisions where hearing officers rejected a similar interpretation by MassHealth.

<sup>4</sup> MassHealth cites three Superior Court decisions in which the Court found that a home was available and countable. Nadeau v. Thorn, WOCV2014-02278, slip op. at 5-6 (Mass. Super. December 29, 2015) (Frison, J.); Daley v. Sudders, WOCV2015-00188, slip op. at 3-4 (Mass. Super. December 23, 2015) (Curran, J.); Parsons v. Office of Medicaid, NOCV2011-01564, slip op. at 7 (Mass. Super. November 5, 2012) (Fishman, J.). They are inapposite. In each of these cases, the trust at issue expressly provided that the plaintiff had a right to occupy and use the residence placed in the trust.

available under Section 520.023(C)(1)(d) and the hearing officer committed an error of law by finding otherwise.

**ORDER**

For the forgoing reasons, the Plaintiff's Motion for Judgment on the Pleadings is **ALLOWED** and MassHealth's decision is **VACATED** to the extent it concluded that the George N. Vergados Irrevocable Trust's one-half share in the home located at 18 Thorndike Street, Lowell, Massachusetts was a countable asset.



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Gregg J. Pasquale  
Justice of the Superior Court

Dated: October 19<sup>th</sup>, 2016

**legal estate.** An interest enforced in law rather than in equity.

**legal life estate.** See *life estate*.

**life estate.** (18c) An estate held only for the duration of a specified person's life, usu. the possessor's. • Most life estates — created, for example, by a grant "to Jane for life" — are beneficial interests under trusts, the corpus often being personal property, not real property. — Also termed *estate for life*; *legal life estate*; *life tenancy*. See LIFE TENANT. [Cases: Life Estates ↷1.]

**life estate pur autre vie** (pər oh-trə vee). (1888) A life estate for which the measuring life — the life whose duration determines the duration of the estate — is someone's other than the possessor's. — Also spelled *life estate per autre vie*. [Cases: Life Estates ↷1.]

**marital estate.** See *marital property* under PROPERTY.

**next eventual estate.** (1836) An estate taking effect upon an event that terminates the accumulation of undisposed rents and profits; an estate taking effect when the existing estate terminates.

**nonancestral estate.** An estate from any source other than the owner's ancestors. — Also termed *nonancestral property*.

**nonfreehold estate.** Any estate in real property without seisin, such as an estate for years, from period to period, at will, or at sufferance; any estate except a fee simple, fee tail, or life estate.

**original estate.** An estate that is the first of one or more derivative estates, bearing to each other the relation of a particular estate and a reversion.

**particular estate.** An estate or interest less than a fee simple, such as a fee tail, a life estate, or a term for years. • It is so called because the estate is a mere part (*particula*) of the fee simple.

**periodic estate.** See *periodic tenancy* under TENANCY.

**possessory estate.** (18c) An estate giving the holder the right to possess the property, with or without an ownership interest in the property.

**present estate.** An estate in immediate possession; one vested at the present time, as distinguished from a future estate. See *present interest* under INTEREST (2).

**qualified estate.** Any estate that is not absolute and unconditional; a limited or conditional estate.

**reversionary estate.** See REVERSION.

**separate estate.** The individual property of one of two persons who stand in a marital or business relationship. See SEPARATE PROPERTY. [Cases: Divorce ↷252.3(3); Husband and Wife ↷110-202.]

**settled estate.** An estate created or limited under a settlement; an estate in which the powers of alienation, devising, and transmission according to the ordinary rules of descent are restrained by the settlement's terms.

**stipendiary estate** (sti-pen-dee-er-ee). *Hist.* An estate granted in return for services, usu. of a military kind.

**vested estate.** (18c) An estate with a present right of enjoyment or a present fixed right of future enjoyment.

2. All that a person or entity owns, including both real and personal property.

**bankruptcy estate.** See BANKRUPTCY ESTATE.

3. The property that one leaves after death; the collective assets and liabilities of a dead person. [Cases: Executors and Administrators ↷38-73.]

"The word 'estate' was probably adopted because in early days it was possible to ascertain a man's status or position in life by discovering the particular kind of tenure by which he held his lands. The *quality* of his tenure gave a clue to his status. The baron for example ought in theory to be the holder of a barony; he has the status of a baron because he has the estate of a baron. . . . [O]ne of the distinguishing marks of [the] freehold estates was the uncertainty of their duration. They were invariably held either for life, or for some other space of time dependent upon an event which might not happen within a lifetime, and thus a freehold estate came to be regarded as one which involved the performance of free services only, but as one which endured for an uncertain time. In this way, the word 'estate' came to denote the *quantity* of a man's interest in land." G.C. Cheshire, *Modern Law of Real Property* 26 (3d ed. 1933).

**adjusted gross estate.** 1. The total value of a decedent's property after subtracting administration expenses, funeral expenses, creditors' claims, and casualty losses. • The value of the adjusted gross estate is used in computing the federal estate tax. Cf. *net probate estate* under PROBATE ESTATE. 2. See *gross estate* (1).

**ancestral estate.** An estate that is acquired by descent or by operation of law with no other consideration than that of blood.

**augmented estate.** A refinement of the elective share to which a surviving spouse is entitled, whereby the "fair share" is identified as something other than the traditional one-third of the probate estate. • The current version of the Uniform Probate Code uses a sliding scale that increases with each year of marriage. Under the UPC, a surviving spouse has accrued full marital-property rights after 15 years of marriage. This percentage of spousal entitlement is applied to a reconceptualization of the decedent's estate to take into account more than just the assets remaining in the probate estate at death. Also added into the calculation are the value of certain inter vivos transfers that the decedent made to others in a way that depleted the probate estate; the value of similar transfers made to others by the spouse as well as the value of the marital property owned by the spouse at the decedent's death; and the value of inter vivos transfers of property made by the decedent to the spouse. The Uniform Probate Code adopted this version of the augmented-estate concept in an attempt to equalize the treatment of surviving spouses in non-community-property states vis-à-vis community-property states. Unif. Probate



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Eligibility Operations Memo 07-18  
December 1, 2007

TO: MassHealth Eligibility Operations Staff

FROM: Russ Kulp, Director, MassHealth Operations

RE: **Calculating the Value of a Life Estate or Remainder Interest in Real Estate**

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**Introduction**

When a MassHealth applicant or member owns or transfers a life estate or remainder interest in real estate, MassHealth must calculate the value of the life estate or remainder interest in order to determine the applicant's or member's eligibility for MassHealth.

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**Revised Procedure To Determine Value**

Effective December 1, 2007, MassHealth has revised the procedure to be used to determine the life estate or remainder interest. This procedure applies to transfers subject to penalty periods, sales of a remainder interest or life estate, and the value of the interest for asset determinations. Central Processing Unit (CPU) and MassHealth Enrollment Center (MEC) staff should use the revised process for all applications and redeterminations.

MassHealth will be using the Internal Revenue Service (IRS) Table S, "Single Life Factors Based on Life Table 90 SM," in accordance with the interest rates under IRS code 7520 as of the date of the transfer or sale.

**Revised Procedure**

1. Determine the interest rate that is applicable for the month and year the real estate was transferred or sold. The interest rate can be found in Tiger Tables (an actuarial rate Web site) for IRS code 7520 at [www.tigertables.com/7520.htm](http://www.tigertables.com/7520.htm).
2. Once you have determined the interest rate, go to [www.unclefed.com/IRS-Forms/2001/p1457.pdf](http://www.unclefed.com/IRS-Forms/2001/p1457.pdf). You must have Adobe Acrobat to read this 880-page document. Scroll through the introductory pages until you reach page 1, which is the beginning of Table S.

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(continued on next page)

**Revised Procedure  
To Determine  
Value  
(cont.)**

3. The heading on page 1 is "Table S (2.2)." The number in parentheses represents the interest rate. Scroll through the pages until you reach the page of Table S for the interest rate you determined in step 1.
  4. Once you are at the correct Table S page, find the applicant's age at the time of transfer or sale. Look across for the factor for the life estate or remainder interest, depending upon what you are valuing.
  5. When the applicant has transferred an interest in real estate, multiply the appropriate life estate or remainder interest factor by the fair-market value as of the date of transfer. This is the figure to be used to determine the period of ineligibility.
  6. When real estate in which the applicant or member holds a life estate is being sold, multiply the appropriate life estate factor by the sale price. This figure is the value of the applicant's life estate, and the amount he or she should receive from the proceeds of the sale or the amount that will be attributed to the applicant or member.
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**Examples**

The following examples are for illustrative purposes only.

**Example A**

In June of 2005, an applicant transferred his real estate to his children and retained a life estate. The tax-assessed value of the property in June 2005 was \$250,000.00 and the applicant was 75 years old at that time.

The Tiger Tables Web site shows the interest rate in June 2005 was 4.8%, and Table S (4.8), on page 14, shows that the factor for a remainder interest for a 75-year-old person is .62575.

The calculation is as follows.

$$\begin{array}{r} \$250,000.00 \\ \times \quad .62575 \\ \hline \$156,437.50 \end{array}$$

\$156, 437.50 is the value of the transferred real estate and the figure that should be used to calculate the period of ineligibility (penalty period).

**Example B**

A MassHealth member owns a life estate in real estate and, in August 2007, the real estate is sold for \$300,000.00. The member is 80 years old.

The Tiger Tables Web site shows the interest rate in August 2007 was 6.2%. Table S (6.2), on page 21, shows the life estate factor for an 80-year-old person is .36418.

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(continued on next page)

**Examples**  
(cont.)

The calculation is as follows.

$$\begin{array}{r} \$300,000.00 \\ \times \quad .36418 \\ \hline \$109,254.00 \end{array}$$

\$109,254.00 is the portion of the sales proceeds to which the member is entitled.

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**Questions**

If you have any questions about this memo, please have your MEC designee contact the Policy Hotline.

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# 2014 SSI and Spousal Impoverishment Standards

## Supplemental Security Income (SSI)

*Effective 1-1-14*

	SSI Federal Benefit Benefit Rate (FBR)	SSI Resource Standard	Income Cap Limit (300%)	Earned Income Break Even Point	Unearned Income Break Even Point
Individual	721.00	2,000.00	2,163.00	1,527.00	741.00
Couple	1,082.00	3,000.00	N/A	2,249.00	1,102.00

**Substantial Gainful Activity (SGA) Limit:** 1,070.00 (Blind SGA: 1,800.00)

**CPI Increase for 2014:** 1.2%

**CPI Increase, Since September 1988:** 95.4%

## Spousal Impoverishment

*Effective 1-1-14 Unless Otherwise Noted*

**Minimum Monthly Maintenance Needs Allowance (MMMNA):**

*(Effective 7-1-14)*

1966.25	All States (Except Alaska and Hawaii)
2457.50	Alaska
2261.25	Hawaii

**Maximum Monthly Maintenance Needs Allowance:**

2,931.00

**Community Spouse Monthly Housing Allowance:**

*(Effective 7-1-14)*

589.88	All States (Except Alaska and Hawaii)
737.25	Alaska
678.38	Hawaii

**Community Spouse Resources:**

Minimum Resource Standard:	23,448.00
Maximum Resource Standard	117,240.00

**Home Equity Limits:**

Minimum:	543,000.00
Maximum:	814,000.00



