

COMMONWEALTH OF MASSACHUSETTS

AFFIDAVIT OF COUNSEL

NOW COMES Laura McDowell-May, of Laura McDowell-May, P.C., first being sworn, deposes and says:

1. That I am an attorney in good standing, licensed to practice in the Commonwealth of Massachusetts since 1991, with a principal place of business located at 567A Main Street, Dennis, Barnstable County, Massachusetts.

2. Since 1993, a substantial portion of my law practice involves assisting elders and their families with long term care planning, including submission of MassHealth long term care applications. I have processed over 500 MassHealth applications over my career and have advised over two thousand clients on long term care, estate, MassHealth and home health care planning. I have attended numerous administrative fair hearings during the past 25 years of practicing in elder law.

3. Since 1993, I have experienced that an application process that in the early years, was on average a three months process with prompt and concise requests from the Commonwealth. Currently, the process is on average, nine months, with generalized requests, yet worse denials that are unexplained.

4. Generally once a MassHealth long term care application is filed, typically the applicant waits to receive his or her notice of approval or denial with verification requests in between the decision of approval or denial. Currently, when the applicant receives a notice of denial for excess countable assets, the notice will simply state that the application was denied, will reference in general terms a regulation which MassHealth deems applicable and then will state the amount of the applicant's assets which exceed the standard allowance of \$2,000.00 with the information regarding the right to appeal the decision. There is no other information disclosing how that number was calculated, how the applicant violated the referenced regulation or how MassHealth came to its determination; in other words, the MassHealth denial notice does not provide a clear statement of the specific reasons for the denial of benefits.

5. Due to lack of clarity, reasoning and excessive delays in processing of benefits, I routinely file appeals to preserve the original application date. This causes great stress on the client and a waste of resources for both the Commonwealth and the client as much energy is needlessly consumed investigating the true status of the application.

6. Despite submitting multiple requests for such clarity, in my experience, I have rarely if ever received additional information giving my client a clear statement of the reasons for the denial before the fair hearing, and this lack of information adversely impacts my ability to prepare for the hearing.

7. The common pattern and practice of MassHealth is to decline or refuse to disclose additional information, which forces appellants to go to an appeal hearing to learn for the first time why the application was denied and how the amount of disqualifying excess assets was calculated.

8. At the hearing it is common practice and procedure for the MassHealth representative to deliver a legal memorandum, usually written by the Legal Department of MassHealth, to the appellant who sees it for the first time. The memo is usually delivered to the worker prior to the date of the hearing but the worker is instructed not to put the memorandum in the appellant's file or not to make it available to the appellant or appellant's counsel prior to the start of the appeal hearing. As a result, the applicant has absolutely no ability to prepare and present challenge to the denial of the application before the hearing officer.

9. Although the hearing officer will often leave the record open for the appellant to file a responsive brief, this pattern and practice leads to additional delays and gives MassHealth an unfair advantage during the presentation before the hearing officer at the time scheduled for the fair hearing.

9. This situation is even more egregious for individuals who proceed without counsel as they are unlikely to know enough regarding MassHealth procedures to request that the Hearing Officer leave the record open for opportunity to respond to the memorandum on the record after reviewing its contents.

10. This pattern and practice is particularly problematic when dealing with more complicated matters such as trusts. Often the appellant is forced to go to the hearing with no understanding

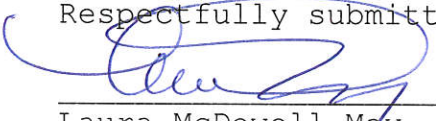
of what trust provision MassHealth has deemed to violate MassHealth law or regulations and rendered the trust assets to be deemed countable.

11. My clients are often in extremely vulnerable positions. They are concerned and unsettled in whether they can meet their financial obligations through MassHealth as they cannot afford to privately pay and whether they will be able to remain in the skilled nursing facility. They are concerned about the delays, lack of response as their time and energy is limited. This pattern and practice of failing to give a clear statement of the specific reasons for the denial in the notice, of engaging in information withholding, of forcing a hearing to proceed for which the appellant cannot adequately prepare, not only violates their due process rights but also adds additional stress at a time when appellants are vulnerable.

12. In my experience, I have represented appellants whose applications were denied on a legal theory that had been discredited in prior hearing decisions or even court decisions, and in such cases the memorandum failed to disclose the existence of such contrary authorities.

13. Many other lawyers have told me that they had similar experiences as I have described above. I have also heard from other lawyers that their subpoena requests to the hearing officer are routinely denied; that MassHealth applicants' case files routinely do not contain the reasons for the denial, especially on cases involving trusts and other complicated countable assets; that MassHealth workers often cite attorney-client privilege as their reason for not providing the reasons for the denial before the scheduled fair hearing; and that MassHealth denials are automatically computer-generated if the MassHealth worker does not timely complete work on the case file.

May 14, 2018  
Date

Respectfully submitted  
  
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Laura McDowell-May  
BBO# 559261

Sworn to before me, under pains and penalties of perjury:

Maura J. Gallop  
Notary Public/My Commission expires: 6/29/2023