

## AFFIDAVIT OF COUNSEL

NOW COMES Susan M. Smith, Esq. of Great Barrington, Massachusetts, and hereby deposes and states that:

1. I am an attorney in good standing, licensed to practice in the Commonwealth of Massachusetts, with a principal place of business at 32 Corser Hill Road, Great Barrington, MA 01230.
2. I have been licensed since 1991. My legal practice is concentrated in the areas of estate planning and administration, elder law and real estate conveyancing.
3. A portion of my practice involves assisting elders with MassHealth long term care applications. Over the last several years I have processed and advised clients on over forty (40) MassHealth applications. I have attended several administrative fair hearings to challenge wrongful denials. Most recently, I have personally witnessed pervasive and universal due process violations throughout the long-term care MassHealth application and appeal process. The due process violations I have witnessed have occurred since 2006.
4. In my most recent case, filed with MassHealth on February 19, 2016, my client received a Notice of Denial dated May 25, 2016 which stated: "MassHealth has reviewed your application for MassHealth long-term-care services which you filed on 4/12/2016. **You are not eligible** for MassHealth long-term-care services for the following reasons: You have more countable assets than MassHealth benefits allow. 130 CMR 515.003 520.004." The Notice then included the following statement: "You must spend \$163,757.87 of your assets. You can spend the excess assets on your needs, but you cannot give them away." The Notice then included information regarding the right to appeal the decision. There was 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 did not provide a clear statement of the specific reasons for the denial of benefits.
5. As a result of this lack of any clear statement of the specific reason for the action, I contacted the caseworker who advised me, "It was the Trust." Upon further inquiry on my part as to why the irrevocable trust that the applicant transferred her primary residence to in 1999, sixteen (16) years prior to her application for long-term-care benefits, violated 130 CMR 515.003, I was told I would need to wait until the Fair Hearing.

6. Consequently, I filed a Request for Fair Hearing on June 8, 2016. I was told by Brook Padgett, a Hearing Officer, to request a telephone hearing as MassHealth, through its legal department, would submit a memorandum as to why the application was denied a day or two, or perhaps the day of, the hearing. I would then be able to ask for a continuance of the fair hearing for an opportunity to respond to the MassHealth memorandum. Karyn Boutin, a worker at the MassHealth Enrollment Center in Springfield was present during this conversation and confirmed the process the Hearing Officer described.

7. Exactly what Hearing Officer Padgett described occurred. The Fair Hearing was scheduled for 2:00PM on August 17, 2016. At around 11:00AM on August 17, 2016, I received a copy of a 15 page, single-spaced, memorandum dated August 16, 2016 and written by Katy Schelong, Assistant General Counsel for MassHealth. I was given until September 19, 2016 to respond to MassHealth's legal memorandum.

8. Despite the fact that MassHealth denied my client's application on May 25, 2016, it took two and one-half months for MassHealth to provide a clear statement of the reasons for the denial before the fair hearing. The lack of information adversely impacted my ability to prepare for the hearing.

9. This obvious common pattern and practice of MassHealth to decline or refuse to disclose additional information, 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.

10. Although the hearing officer left the record open for the appellant to file a responsive brief, this pattern and practice has led to additional delays, and gave MassHealth an unfair advantage during the presentation before the hearing officer at the time scheduled for the fair hearing.

11. This situation is even more egregious for individuals who proceed without counsel as they are unlikely to know enough regarding MassHealth procedures to request a fair hearing to gain the specific reasons for the denial of their application; and further, if they proceed with a fair hearing, to request that the hearing Officer leave the record open in order to have the opportunity to respond to MassHealth's legal memorandum on the record after reviewing its contents.

12. This pattern and practice is particularly problematic when dealing with complicated matters such as trusts, in my case. An appellant should not be forced to go to the hearing with absolutely no understanding of what trust provision MassHealth has deemed to violate Medicaid law or regulations, rendering the trust assets to be deemed countable.

13. The elderly are often in extremely vulnerable positions. They are concerned about not being able to stay in the nursing home. They are concerned about the delays, as their time is often 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 an individual's due process rights but also adds additional stress at a time when appellants are vulnerable.

14. In my experience, my client's applications were denied on a legal theory that had been discredited in prior hearing decisions and court decisions, and in all of such cases the memorandum failed to disclose the existence of such contrary authorities.

15. I have heard from many other lawyers 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.

16. Automatically generated denial notices have increased over the past year and result in additional time, resources and stress to all involved since a denial notice cannot be ignored, even if the caseworker provides a verbal promise that they will deal with the case shortly.

SIGNED under the pains and penalties of perjury on this 5th day of May, 2018.



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Susan M. Smith  
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