

## AFFIDAVIT OF COUNSEL

NOW COMES Daniel M. Surprenant, of New Bedford, MA, 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 35 Arnold Street, New Bedford, MA. My practice consists of exclusively estate planning, with a large part of that assisting clients in the preparation, filing and appeal of applications for Medicaid benefits. I estimate that I have filed hundreds of Medicaid applications and represented clients in dozens of appeal hearings, including several 30A appeals to the Superior Court. I am a Certified Elder Law Attorney, as designated by the National Elder Law Foundation and have practiced in the elder law field since 2006. Prior to that time I practiced in litigation and as an Assistant District Attorney. I have practiced as an attorney for over 21 years. I am a past-president of the Massachusetts Chapter of the National Academy of Elder Law Attorneys and am named in Boston Magazine on their list of Super Lawyers for Estate Planning.

2. In applying for Medicaid benefits, I have reviewed dozens of Medicaid denials which require appeal for various reasons. I have also, in my role as Board Member and President of MassNAELA, discussed received input from with dozens of other estate planning attorneys regarding their experience with the MassHealth denial notices, MassHealth's refusal to clarify the reason for the denial and MassHealth's refusal to provide their memorandum of law supporting their decision until we are in the appeal hearing itself. My experiences below are typical of these reoccurring issues.

SAMPLE CASE #1:

3. On June 29, 2017, a denial notice was issued against my client, who we shall call "Mr. Dever." As to the reason for denial, MassHealth notice stated simply that "You have more countable assets than MassHealth benefits allow. 130 CMR 520.003 520.004" and listing excess assets as \$707,488. (See Denial Notice.) The regulation cited simply lists the asset limits for Medicaid applicants.

4. Upon seeking clarification for the reasoning of the denial, the MassHealth caseworker would only say that the reason was "language in the trust," and refused to point to any provision or language in the trust which was problematic.

5. However, MassHealth has made numerous different arguments at hearing against Medicaid trusts, including but not limited to arguments regarding the following provisions:

- a. investment in income producing property,
- b. to make unsecured loans,
- c. administrative investment powers,
- d. implied revocability,

- e. to invest in annuities,
- f. to surrender life insurance policies,
- g. pay taxes of the Grantors
- h. intended estate tax inclusion,
- i. life estate in trust
- j. IRC section 121
- k. Implied support for settlor,
- l. Oral agreement not in trust
- m. Nominee trust
- n. Payment of operating cost by Grantors
- o. Grantor's power of appointment,
- p. Power to appoint trustees
- q. Power to substitute assets
- r. Breach of fiduciary duty
- s. Ability to receive real estate tax deduction
- t. Retained control over trust.
- u. Special needs trust language
- v. Termination clauses
- w. Trustee ability to allocate between income and principal,
- x. Ability to invest in life insurance
- y. Trustee compensation
- z. Trustee could pay debts of probate estate
- aa. Usage of home renders it unavailable
- bb. Veto power over principal distribution of trust
- cc. Veto power over sale of real estate,

6. Despite requests for the Medicaid Legal Memorandum (which would explain their issues with the trust), no memo was produced prior to hearing. In fact, two days before the hearing, Appellant again requested any legal memorandum that MassHealth intended to submit at hearing, and was told that MassHealth "did not have any legal memorandum and that it was [the CaseWorker's] usual practice to submit to the Board of Hearings any materials [the CaseWorker] want[s] entered into the record the day before the hearing."

7. At the appeal hearing held on October 11, 2017, with only the above information as to the reason for the denial, counsel for Appellant was met by an attorney for MassHealth who made several arguments against the specific terms of the trust.

8. The MassHealth attorney had in his hand the MassHealth legal memorandum (dated the previous day), but argued that he need not produce it.

9. At the close of the hearing, the record was left open, first for MassHealth to produce their legal memorandum (and 2 other documents) within 2 days.

10. Two weeks later, the MassHealth legal memorandum had not been produced. Upon the request, again, that MH produce the memo, the attorney for MassHealth stated that he was

confused and “thought we were not submitting that memo.” (See email of 10-27-17, attached as Exh 4.)

11. The Hearing Officer (again) directed that the memorandum to be produced, which was produced on October 27, 2017.

12. I understand that “the explanation in the notice itself must be more than a “general explanation” or “conclusory statement,” and must provide at least “a brief statement of ... factual underpinning.” Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970). Barnes v. Healy, 980 F.2d 572, 579 (9th Cir. 1992). The notice requirement “lies at the heart of due process,” Gray Panthers v. Schweiker, 652 F.2d 146, 168 (D.C. Cir. 1980), “for if notice is inadequate other procedural protections become illusory,” David v. Heckler, 591 F.Supp. 1033, 1042 (E.D.N.Y. 1984).

13. My office receives the type of denial notice described above on a regular basis. It does not allow me to sufficiently prepare for the hearing, to organize an argument, consider witnesses or cross examination or the gathering of supporting documentation prior to the hearing. Simply put, the vague notice does not allow for the effective preparation for hearing.

#### SAMPLE CASE #2:

14. In July 2014, I represented a client in a 30A appeal of an administrative decision. Mendonca v. Thorn. In that matter, MassHealth argued (and the hearing officer agreed, requiring further appellate review), that an applicant’s purchase of a joint tenancy in her child’s home was a disqualifying transfer, despite three previous Superior Court rulings to the contrary. (See Foley v. Dehner (Mass. Sup. Hampden, No. 2008-00850-A, June 3, 2009), Cardon v. Dehner (Mass. Sup. Suffolk, NO. SUCV2008-03749-C, February 3, 2010 (attached hereto as Exhibit “F”) and Nogrady et al v. Doherty, Middlesex Sup. Ct. No. MICV2010-04007, June 22, 2012 (attached hereto as Exhibit “G”).


15. In each of the cases cited, MassHealth had the opportunity to Appeal the Court’s decision if they did not agree. They did not, making approval of MassHealth benefits the final agency decision. However, in subsequent cases, MassHealth acted with administrative inconsistency, denying similarly situated applicants (like my Mendonca client) and arguing the same arguments that had lost in the previous cases.

16. More specifically, in the Mendonca matter, MassHealth repeatedly argued that the purchase of a Joint Tenancy has “avoided a resource.” By contrast, the Court in Foley specifically stated that, “Despite the deferential standard of review, it was unreasonable for the Agency to find that Foley took action ‘to avoid receiving a resource’ because the language of the regulation clearly suggests a different set of circumstances.

17. Additionally, the Agency ignored the plain language of 130 CMR 520.109(1) (3) and argued that the purchase of a joint tenancy was analogous to that of a life estate.” See Foley at p. 3. Despite MassHealth’s insistence that asset is no longer “available,” repeated caselaw and their own eventual allowance of benefits after appellate loses bears out the opposite conclusion. See Foley, Cardon, Nogrady and Giambo v. Harris.

18. Eventually my client prevailed in the 30A appeal and MassHealth issued a decision awarding her benefits, as they did in Foley, Cardon and Nogrady, supra.

SIGNED under the pains and penalties of perjury on this 11<sup>th</sup> day of May, 2018.



Daniel M. Surprenant, Esq.