COMMONWEALTH OF MASSACHUSETTS

COUNTY OF SUFFOLK

SUPERIOR COURT
DOCKET NO: 1884CV00129

JEAN MAAS, and
HENRY and EVA HIRVI,

Plaintiffs

v.

MARYLOU SUDDERS,
Secretary of the Executive Office of
Heath and Human Services,

And

KIM LARKIN,
Director of the Board of Hearings
of the Office of Medicaid of the
Executive Office of Health and
Human Services

Defendants

AFFIDAVIT OF COUNSEL

NOW COMES John D. Welch, in support of the named Plaintiffs' Motion for Class Certification 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 70 Washington Street, Suite 402, Salem, Massachusetts.

2. I currently represent an elder, age 81, who was a resident of the German Centre Nursing Home. He filed for MassHealth shortly before recently passing away.

3. More than five years prior to the application he established an irrevocable trust, the provisions of which incontrovertibly place the trust principal beyond the reach and control of the settlor. A copy of the trust was submitted with the application.

4. His application was denied stating only that the application was denied for excess assets in a specific amount. The notice cites the regulation regarding the asset limit of $2,000, 130 CMR 520.003. The notice also contains information as to how to appeal the adverse decision.

6. The notice fails to give a clear statement of the specific reasons for the denial of benefits with the result that eligibility for benefits will not be granted until the alleged excess assets are spent down to $2,000.00.

7. The notice is unlawful and defective in violation of federal Medicaid law at 42 CFR 431.210(b), which requires that notice of an action by MassHealth "give a clear statement of the specific reasons for the action" by the agency. It is also in violation of MassHealth's own regulations which provide at 130 CMR 610.026(A)(2) that the notice must contain "the reasons for the intended action."

8. I am able to infer that the alleged excess assets constitute the trust principal but there is no clear statement as to why the trust principal is countable.

9. I have filed a notice of appeal but am at a disadvantage because I am uncertain as to how to respond to or challenge the denial; it is my custom to prepare a memorandum of fact and law for the appeal hearing, but the unlawful lack of specifics makes the task impossible.

10. The caseworker who is assigned to the case was willing to tell me the reasons for the holding that the trust assets are countable, apparently reading from a memorandum issued by the MassHealth Legal Department.

11. She said that the decision was based on two provisions in the trust. The first pretext for the denial is the provision that the settlors <u>retained the right to choose a successor trustee in the event of a vacancy</u>. The second pretext for the denial is the provision that the trustee's powers include the powers, <u>"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 grantor, any beneficiary or any other person for the benefit of the beneficiary and to pay the premiums and costs therefor from the principal or income of the trust."</u>

12. These stated "reasons" are pretexts because they do not render any trust principal available to the settlors and, furthermore, there have been prior fair hearing decisions that have rejected the legal theories espoused by the agency. (see approved Appeals 1603430, 1602142, 1512120, 1501446, 14093991406520. 1303305 regarding the issue of the ability to name a trustee, and approved appeals 1408319,1405241, 1318543, and 1311906 regarding the ability to invest in life insurance)

13. I have handled many hearings before the Board of Appeals where MassHealth claims a trust is countable. In these cases, I have never received a notice with sufficient specificity for me to know why a trust was considered invalid.

14. I have been told by caseworkers that they have a memorandum in their possession which they cannot share with me.

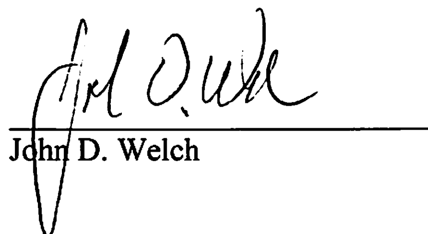
15. It is routine to go to a hearing and be handed a memorandum from the caseworker. As part of this routine I will ask that the record be kept open and as a routine the Hearing Officer keeps the record open. A meaningful hearing is not generally held and I am relegated to responding to a memorandum from MassHealth. This is not only horribly inefficient, but it also diminishes my clients' rights to present oral testimony.

16. I routinely ask for more specificity or for a copy of the memorandum and am routinely denied.

17. I am aware that the MassHealth caseworker also knows the name of the Hearing Officer to whom the case has been assigned prior to hearing. When I have asked for that same information I am denied.

18. The agency and the hearing officers dealing with the administrative appeals pursuant to G.L. c. 118E section 48, have a duty to strive to act on bases that are uniform and predictable. *Hercules Chemical Company v. Department of Environmental Protection,* 76 Mass. 627, 636 (2005). If the agency has acted for reasons that are extraneous to the prescriptions of the regulatory scheme, but are related, rather, to an ad hoc agenda, then the agency has acted arbitrarily because the basis for the action is not uniform, and, it follows, is not predictable. *Faford v. Conservation Commission of Reading,* 41 Mass.App.Ct. 565, 568 672 N.E.2d 21 (1996)

SIGNED under the pains and penalties of perjury this 4th day of May, 2018.



John D. Welch