Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Denied	**Appeal Number:**	0809900
Decision Date:	12/11/08	**Hearing Date:**	September 4, 2008
Hearing Officer:	Thomas J. Goode	**Record Open:**	October 16, 2008; November 4, 2008

Appellant Representative:

MassHealth Representative: Andrea Pelczar

Appellant Representative:

Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
Two Boylston Street
Boston, MA 02116

APPEAL DECISION

Appeal Decision:	Denied	**Issue:**	130 CMR 520.019, 520.007
Decision Date:	12/11/08	**Hearing Date:**	September 4, 2008
MassHealth Rep.:	Andrea Pelczar	**Appellant Rep.:**	
Hearing Location:	Tewksbury MassHealth Enrollment Center		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated July 2, 2008 MassHealth denied appellant's MassHealth application due to a disqualifying transfer of assets (see 130 CMR 520.019 and Exhibit A). The appellant filed this appeal in a timely manner on July 18, 2008 (see 130 CMR 610.015(B) and Exhibit B). Denial of a MassHealth application is valid grounds for appeal (see 130 CMR 610.032). A hearing was originally scheduled for August 14, 2008, and was rescheduled at appellant's representative's request subject to a finding of good cause.

Action Taken by MassHealth

Pursuant to 130 CMR 520.019, MassHealth denied appellant's MassHealth application due to a disqualifying transfer of assets.

Issue

The appeal issue is whether MassHealth was correct in denying appellant's MassHealth application pursuant to 130 CMR 520.019, due to a disqualifying transfer of assets.

Summary of Evidence

The MassHealth representative testified that appellant was admitted to a long-term care facility on December 17, 2007. Appellant does not have a spouse residing in the community. A MassHealth application was submitted on appellant's behalf on March 27, 2008. The application was denied on May 9, 2008 due to excess assets. MassHealth was notified of asset reduction on June 16, 2008. The March 27, 2008 application was denied on July 2, 2008 for a disqualifying transfer of resources totaling $97,633 resulting in a 381-day disqualification period from July 1, 2008 through July 17, 2009.

At issue is a caregiver agreement entered into on January 7, 2006 by appellant's daughter and attorney-in-fact, which appointed appellant's son caregiver, with a retroactive effective date of December 1, 2005. The contract reads in pertinent part:

1. The employer hereby agrees to engage the caregiver and the caregiver hereby agrees to accept the employment described in this agreement. The caregiver agrees to provide the following services. Services to include but not be limited to the following:

   > Bed making, laundry/change linens, garbage removal, errand running, grocery shopping, transportation to medical, dental and other appointments, meal preparation, companionship, bathing/grooming, dressing, medication reminders each day as necessary. In addition, the Caregiver agrees to provide the Employer with her own, fully furnished (13' x 15'2") and handicap accessible bath along with full access to all other areas of the Caregiver's home. The cost of heating and utilities is included in this agreement.
   >
   > The goal of this contract is to provide the employer with care, which she would otherwise require in an assisted living facility, in the home of her son, the caretaker, and his family at a reduced cost.

2. The employer will pay the caregiver monthly, at the following rate: $3,600 per month, subject to annual renegotiation.

3. Additionally, the employer agrees to reimburse the caregiver for the expenses, including but not limited to the following that may be incurred by the caregiver in fulfilling his duties:

   Personal items including but not limited to incontinence materials, etc.

4. This agreement shall begin on December 1, 2005 and shall continue automatically for the remainder of the employer's life or unless she requires nursing home placement at which time it will terminate.

   This is a legally binding contract. Each party has read the above agreement before signing it, each party understands the agreement he or she is making, having had the opportunity to ask to have each term that the party does not understand fully explained.

See Exhibit D, Tab C2.

The agreement is signed by appellant's daughter acting in her capacity as power of attorney for appellant, and by appellant's son as caregiver.

The following payments were made from appellant's funds by appellant's daughter acting in her capacity as power of attorney to appellant's son as caregiver:

6/26/2007	$10,000
6/23/2007	$10,000
2/27/2007	$22,000
1/12/2007	$21,600
7/7/2006	$5,000
7/5/2006	$5,000
4/5/2006	$22,000
1/25/2006	$3,600

MassHealth argues in a legal memorandum that appellant's assets were available to pay nursing home costs before assets were transferred to appellant's son. The transfers under the agreement were considered disqualifying transfers pursuant to 130 CMR 520.019, and 520.007(J)(4), because MassHealth contends that the contract is not valid, has no fair market value, and is not reasonably enforceable. MassHealth argues that an anticipatory personal services contract has no fair market value due to factors such as the relationship of the parties and the circumstances under which the document was executed, lack of valid consideration, and the fact that illusory promises cannot form the basis for a valid contract. Payments actually made under the agreement totaling $99,200 do not reflect the terms of the agreement which called for $3,600 per month to be paid every month, and

were instead paid in sporadic lump sums. As the parties to the agreement did not adhere to the terms of the agreement, it demonstrates that there was no intent to be so bound.

Moreover, MassHealth argues that the agreement has no ascertainable fair market value under 130 CMR 520.007(J)(4) as the agreement fails to impose any sort of tangible duty on the caregiver because it does not state the number of hours services were required to be performed, and does not justify the rent of $3,600 per month for a bedroom in the son's home. In addition, services to be provided including garbage removal and grocery shopping are considered superfluous functions that would be performed whether or not the applicant was living in the son's home, and cannot be used as justification for payments of $3,600 per month by appellant.

Appellant has provided no evidence of the number of hours of personal care services such as bathing, grooming, dressing etc. the caregiver purportedly provided; and there is no way to ascertain fair market value based on an hourly wage. The stated goal of the contract is to provide the applicant with care she would otherwise require in an assisted living facility, in the home of her son, the caretaker, and his family at a reduced cost. However, MassHealth asserts that the applicant has provided no evidence that the price of $3,600 per month is a reduced cost compared to the cost of an assisted living facility; nor can the care provided under the agreement be likened to an assisted living facility that is duly licensed and regulated by the Commonwealth, and employs trained and licensed professionals, the cost of which is reflected in the daily rate.

MassHealth also argues that the contract is unenforceable because it is a personal services contract, and as such specific performance is not an available remedy for breach. Enforcement of the contract would fall to appellant's daughter as attorney-in-fact; and as she is also the caregiver's sister, this would make it unlikely that the daughter would sue her brother on appellant's behalf for failing to perform under the agreement. MassHealth concluded that the contract is not valid, binding, or reasonably enforceable by the applicant with an ascertainable fair market value; and therefore payments made under the agreement are disqualifying transfers pursuant to 130 CMR 520.007(J)(4), and 130 CMR 520.019(C).

Two additional transfers were also considered disqualifying transfers by MassHealth. On January 24, 2006 appellant's daughter, in her capacity as power of attorney, transferred to herself $5,650, as a gift from appellant to help pay for appellant's daughter's college tuition. On January 25, 2008 appellant's daughter transferred $2,033 to herself purportedly for reimbursement for Christmas gifts purchased in 2007 (Exhibit E, at Tab 11).

Appellant’s power-of-attorney was represented at hearing by an attorney, and appellant's son appeared as a witness. Counsel agreed that $15,080 under the agreement was overpaid to the caregiver, and that $84,120 paid between January 7, 2006 and December 17, 2007 is at issue. Appellant's son testified that appellant moved to his home in June 2005, and lived there until she entered the nursing facility in December 2007. Prior to this period, appellant had been living alone in her home, and then temporarily living with her sister who was also in poor health and has since

died. For the two-year period that appellant lived with her son under the agreement, appellant's son maintained full-time employment outside of the home, and generally left for work by 5:30 a.m. He added that his wife, who is a registered nurse and who also worked outside the home, generally provided care in his absence, or they arranged to have another family member stay with appellant. He testified that payments were made sporadically because his sister managed the payments and she became overwhelmed with everything and decided to pay in six-month increments because it was easier for her.

At hearing, appellant counsel stated that her initial memorandum prepared for hearing did not afford her an opportunity to respond to the MassHealth legal memorandum submitted at hearing. The hearing record remained open to allow appellant counsel to submit a revised memorandum, and additional time was allowed for MassHealth to respond. Appellant counsel submitted a revised legal brief, and indicated that appellant is now seeking eligibility for MassHealth benefits retroactive to August 19, 2008 as the $15,080 overpayment has been paid to the nursing home. Counsel asserts that appellant's son and his wife provided an assisted living level of care for appellant in their home at a cost substantially less than an assisted living facility, and provided all meals, housekeeping, errand running, and transportation to medical appointments in addition to love and companionship.

Counsel argues that the CMS [Center for Medicare and Medicaid Services] State Medicaid Manual expressly provides that family members can be paid for care provided to an individual if a payback arrangement had been agreed to in writing at the time services were provided. Citing Social Security POMS SI 01150.005 D.3.c,D4, counsel asserts that a personal-care contract with a relative for future services is an allowable transfer for value and will not trigger a disqualification period as long as the terms are commercially reasonable. As such, personal services contracts are allowable under the federal framework; and counsel asserts that MassHealth may not interpret its own regulations in a more restrictive manner to preclude such agreements. Further, counsel argues that the Social Security POMS Section SI01150.005 B.2, defines fair market value to include services to be provided to an individual because of a transfer. In this case, the caregiver contract meets the requirements of 130 CMR 520.007(J)(4) because it has an ascertainable fair market value, is embodied in a contract which is enforceable by the appellant and provides for future performance. With regard to fair market value, counsel asserts that when the contract was entered into the cost of a private for-profit corporation that provided assisted-living services was between $136 per day and $191 per day. The per-day cost of care provided by appellant's son was $120, or five dollars per hour for 24-hour care which is substantially less than the minimum wage, and represents a bargain for the level of care she received and the added benefit of having a registered nurse, her daughter-in-law, on site.

Appellant also argues that services provided to appellant included more than rent for a bedroom, and included all services outlined in the agreement. Pursuant to POMS SI 01150.001B.4, there is a presumption absent evidence to the contrary, that an individual gets fair market value when he or she spends cash resources. Thus, counsel argues that appellant is entitled to the benefit of a

presumption that the caregiver agreement in consideration for which she transferred substantial sums of money, has a fair market value. Appellant maintains that any fair reading of the agreement leads a reasonable person to the conclusion that it provided for round-the-clock residential care and treatment analogous to the care and treatment that would be received in an assisted living or similar inpatient facility. Council asserts that there is no requirement in federal or state statutes and regulations that require a caregiver agreement to state the number of hours services are required to be performed. Absent the caregiver agreement, appellant's son would have been under no obligation to provide services to appellant including taking out the garbage or doing grocery shopping. Appellant argues that although appellant moved into her son's house in June 2005, the agreement was executed in January 2006 in anticipation of appellant's long-term needs, and compensation began at that time based on future performance rather than past performance. The contract was executed by the appellant through her attorney-in-fact under a durable power of attorney executed by appellant in 1999 well before the contract was contemplated. Thus, counsel asserts that appellant's daughter has the utmost duty of loyalty to appellant in this capacity and is empowered to bring suit against the caregiver for any breach of performance and to cease payment under the contract.

Counsel argues that the caregiver agreement is analogous to the caregiver agreement at issue in *Carpenter v. State of Louisiana Department of Health*, 944 So. 2d 604 (2006), in which the caregiver deferred accepting payment from her mother until after the mother entered the nursing facility and the benefits application had been filed.

Appellant compares the services to be provided under the caregiver agreement with the list of caregiver responsibilities under the "Caring Homes" program for non-MassHealth individuals. *See* Exhibit E, at Tab12. Appellant asserts that under the Caring Homes program the Commonwealth of Massachusetts has determined that these services are compensable services when performed on behalf of a needy elder. Appellant argues that the MassHealth position would result in no caregiver agreement being upheld that does not involve placement in a state licensed and regulated assisted living facility which is the opposite of the result intended by CMS State Medicaid manual section 3258.1.A.1, which permits such in-home care of the elderly by their "private, untrained, unregulated" family members, and would be contrary to the public policy of the Commonwealth under the "Caring Homes" initiative. Appellant concludes the $84,120 transferred to appellant's son should not be characterized as a disqualifying transfer as it was rightfully transferred under the caregiver agreement that complies with 130 CMR 520.007(J)(4).

With regard to the additional transfers made by appellant's daughter in her capacity as power of attorney, to herself in the amounts of $5,650 as a gift from appellant to help pay for appellant's daughter's college tuition and $2,033 to herself as reimbursement for Christmas gifts purchased in 2007, counsel asserts that the funds were transferred for a purpose other than to qualify for MassHealth, and should not be considered disqualifying under 130 CMR 520.019(F), or in the alternative the disqualification period should be deemed expired on the transfer made before February 8, 2006.

By counter brief, MassHealth argues that bringing the appellant to live in the personal residence of her son and daughter-in-law cannot credibly be likened to an assisted living facility nor does it establish fair market value for this arrangement. MassHealth argues that assisted living facilities and rest homes are regulated by both the Department of Public Health and the Executive Office of Elder Affairs, and regulations promulgated by these agencies impose strict standards of care to be rendered to elders and cannot be compared to care provided by a private individual not subject to oversight. Although appellant's daughter-in-law may have utilized her knowledge in helping to care for appellant, care was rendered as a private individual not subject to oversight by a hospital, assisted living facility, private duty nursing arrangement, or licensing agency. Counsel also points to fees charged by a commercial assisted living facility that relate to upfront costs that do not apply in private arrangements such as cost for the facility and its staff to be licensed by the Commonwealth, commercial liability insurance for the premises, professional liability insurance for the staff, workers compensation insurance, inspections, OSHA compliance, staffing of physicians, registered nurses, dietary aides etc. Counsel concludes that the fees a licensed, regulated, fully staffed assisted living facility might charge have no evidentiary value toward the private contract between appellant and her son for services provided in a personal residence, and do not establish fair market value for personal care services provided in appellant's son's home.

Moreover, MassHealth asserts that there is no evidence that the son actually performed services 24 hours per day seven days a week that justify payment of five dollars per hour, or $3,600 per month, particularly in light of the son's and his wife's employment outside the home. With regard to reimbursement rates under the Caring Homes Program for Non-MassHealth Members, MassHealth Counsel asserts that appellant's son was paid $3,600 per month or $120 per day, which is more than twice what Elder Affairs allocates to an at-home caregiver. *See* Exhibit E, at Tab 12, p.7. Counsel adds that under the contract, appellant's son was paid $43,200 per year without an assessment of the actual level of care appellant purportedly needed.[1] MassHealth reiterates that appellant has not verified that appellant received $84,120 worth of personal care services from the caregiver son, and that the fee is inflated as it is predicated on what a licensed assisted living facility would charge.

The MassHealth's legal counsel noted that the written agreement between the mother and daughter in *Carpenter v. State of Louisiana Department of Health* is not analogous as the agreement involved clearly expressed a meeting of the minds signifying a binding contract, and rebutted the presumption of gratuitous family care. She asserts that in the case at hand, appellant's son received more than three times the monthly fee agreed to in the *Carpenter* case; that the payments in *Carpenter* were not based on a faulty premise as in the instant case[2]; that the transfer of funds in *Carpenter* was payment of a debt for past services and was substantially less than the amount to

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[1] The legal memorandum points out that if the caregiver has evidence of direct costs incurred on the appellant's behalf, these may be allowed as partial cures if verified Exhibit F, p. 8, ft.nt.1).

[2] Presumably, the faulty premise alleged by MassHealth is the comparison of the cost of an assisted living facility used to calculate the amount paid to appellant's son for care provided in his home.

which the parties had originally agreed. MassHealth also asserts that the determination that the contract has no fair market value does not mean that the methodology for assessing assets in determining eligibility is more restrictive than that used by the SSI program, as the Social Security POMS gives way to federal law; and citing 42 USC §1396p, in certain instances Medicaid law is more restrictive than SSA guidelines. *See* Exhibit F, at Ex. A. Council asserts that because there is a specific federal law applicable to nursing facility residents, the MassHealth agency cannot violate this law by approving an application for long-term care benefits when the agency has found there has been a transfer for less than fair market value.

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. Appellant was admitted to a long-term care facility on December 17, 2007.

2. Appellant does not have a spouse residing in the community.

3. A MassHealth application was submitted on appellant's behalf on March 27, 2008. The application was denied on May 9, 2008 due to excess assets. MassHealth was notified of asset reduction on June 16, 2008.

4. The March 27, 2008 application was denied on July 2, 2008 for a disqualifying transfer of resources totaling $97,633 resulting in a 381-day disqualification period from July 1, 2008 through July 17, 2009.

5. A caregiver agreement was entered into on January 7, 2006 by appellant's daughter as attorney-in-fact, which appointed appellant's son caregiver, with a retroactive effective date of December 1, 2005.

6. In return for the services to be rendered by the caregiver, appellant agreed to pay $3,600 per month.

7. Payments made under the contract are as follows:

6/26/2007	$10,000
6/23/2007	$10,000
2/27/2007	$22,000
1/12/2007	$21,600
7/7/2006	$5,000
7/5/2006	$5,000
4/5/2006	$22,000
1/25/2006	$3,600

8. Appellant's son was paid $84,120 between January 7, 2006 and December 17, 2007.

9. Appellant is now seeking eligibility for MassHealth benefits retroactive to August 19, 2008 as the $15,080 overpayment has been paid to the nursing home. *See* Exhibit E, Tab 15.

10. For the two-year period that appellant lived with her son under the agreement, appellant's son maintained full-time employment outside of the home, and generally left for work by 5:30 a.m. (testimony).

11. The caregiver's wife, who is a registered nurse and who also worked outside the home, generally provided care in his absence, or they arranged to have another family member stay with appellant. (Testimony).

12. When the contract was entered into the cost of a private for-profit corporation that provided assisted-living services was between $136 per day and $191 per day.

13. The per-day cost of care provided by appellant's son was $120, or five dollars per hour for 24-hour care.

14. Appellant's son was paid more than twice what Elder Affairs allocates to an at-home caregiver. *See* Exhibit E, at Tab 12, p.7.

15. There was no clinical assessment of the actual level of care appellant needed before the Caregiver Agreement was signed on her behalf.

16. On January 24, 2006 appellant's daughter, in her capacity as power of attorney, transferred to herself $5,650, as a gift from appellant to help pay for appellant's daughter's college tuition.

17. On January 25, 2008 appellant's daughter transferred $2,033 to herself as purportedly for reimbursement for Christmas gifts purchased in 2007 (Exhibit E, at Tab 11).

Analysis and Conclusions of Law

Appellant counsel has documented that she was on vacation for the initial hearing date of August 14, 2008, and has shown good cause for the rescheduled hearing. 130 CMR 610.048 and Exhibit G.

The central issue in the case at hand is whether or not the caregiver agreement entered into by appellant's daughter in her capacity as appellant's power-of-attorney, and appellant's son as

caregiver, is an agreement for fair market value, or whether the agreement represents a disqualifying transfer of assets.

Fair market value is defined for MassHealth purposes as 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. 130 CMR 515.001. The CMS State Medicaid Manual reads at section 3258.1.A.1, 2:

A. Definitions.--The following definitions apply to transfers of assets.

1. Fair Market Value.--Fair market value is an estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria you use in appraising the value of assets for the purpose of determining Medicaid eligibility. NOTE: For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the compensation received for the asset must be in a tangible form with intrinsic value. A transfer for love and consideration, for example, is not considered a transfer for fair market value. Also, while relatives and family members legitimately can be paid for care they provide to the individual, HCFA presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption with tangible evidence that is acceptable to the State. For example, you may require that a payback arrangement had been agreed to in writing at the time services were provided.

2. Valuable Consideration.--Valuable consideration means that an individual receives in exchange for his or her right or interest in an asset some act, object, service, or other benefit which has a tangible and/or intrinsic value to the individual that is roughly equivalent to or greater than the value of the transferred asset.

Regulation 130 CMR 520.007(J)(4) provides:

> 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.

First, MassHealth asserts that the caregiver agreement is not a reasonably enforceable contract entered into for fair market value due to the relationships between the contracting parties. One need only look to the payment stream between January 2006 and June 2007 to conclude, prima facie, that either the parties did not intend to be bound by the terms of the contract, or did not deem the contract legally or reasonably enforceable. The following payments were made by appellant's daughter acting in her capacity as power of attorney for appellant to appellant's son as caregiver:

6/26/2007	$10,000
6/23/2007	$10,000
2/27/2007	$22,000
1/12/2007	$21,600
7/7/2006	$5,000
7/5/2006	$5,000
4/5/2006	$22,000
1/25/2006	$3,600

As MassHealth asserts, there was only one payment made in accordance with the terms of the contract. To accept the contract as reasonably enforceable, one would have to assume that appellant's daughter acting as her power-of-attorney, or appellant's son in his capacity as caregiver, would be as prepared to sue on the contract to protect either appellant's interest or the caregiver's interest as though the contract represented a true arm's-length transaction. Setting aside the issue of specific performance on a personal services contract, it is clear that the terms of the contract were not adhered to by the parties; and payments appear to be intermittent dispositions of assets rather than payments stemming from a contractual obligation.

Next, appellant asserts that the contract was entered into with the intent of providing appellant an assisted living level of care at a reduced cost, and that the services provided are adequately enumerated within the body of the contract. As a comparison, appellant points to the Caring Homes Program as evidence that the services provided are compensable services when performed on behalf of the needy elder. As a foundation for this premise, appellant determined that an assisted living facility would cost between $136 per day and $191 per day, and that it therefore follows that appellant's son and his wife who is a nurse, and both of whom work outside of the home, should be compensated $120 per day for providing what they contend was an assisted living level of care and their home. Yet as MassHealth asserts, there is no objective documentation beyond the caregiver agreement with regard to the services actually provided to appellant on a daily basis that supports this premise. Looking to the Caring Homes Program for comparison, a caregiver participating in this program must consent to myriad rules and criteria that include clinical screening to determine whether the program is appropriate for the participating elder, ongoing monitoring and oversight of the case by the ASAP nurse and care manager, ongoing review and revision of the care plan, 24-hour a day care provided by the caregiver, a requirement that the caregiver complete training necessary to meet the client's

specific needs, and the requirement that the caregiver maintain documentation related to the client's care, as specified by Elder Affairs. In addition, payment to the caregiver is capped at $1,500 per month, or approximately $50 per day, with an additional $1,000 allocated for administrative, clinical, subcontracting and respite services. *See* Exhibit E, at Tab 12, pp. 1-6. There is no documentation that appellant's son acting as caregiver provided services that comport with the Caring Homes Program, much less provided a setting comparable to an assisted living facility.

As appellant counsel notes, Social Security POMS SI 01150.001B.4, states that there is a presumption, absent evidence to the contrary, that an individual gets fair market value when he or she spends cash resources. However, guidance under the Social Security POMS gives way to federal and state laws governing Medicaid. *See* Exhibit F, at Ex. A. In addition, the evidence to the contrary in this case is that there is no objective evidence other than the terms of the agreement and affidavits from appellant's son and daughter to support the claim that appellant received over $84,000 worth of care over a two-year period, or that her son provided an assisted living level of care in his home. As already stated, there was no clinical assessment performed before services were rendered; there is no care plan or ongoing revisions of the care plan to meet appellant's needs, no oversight from outside the home, no information concerning the need for assistance with activities of daily living, etc. Absent this kind of documentation and oversight, I find no evidence to support the claim that appellant's son and his wife provided an assisted living level of care.

Looking to the State Medicaid Manual at section 3258.1.A.1, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption with ***tangible evidence that is acceptable to the State*** (Emphasis added). Within this context, the state concluded that there is no acceptable tangible evidence that appellant received an assisted living level of care in her son's home. As MassHealth counsel notes, assisted living facilities are regulated by both the Department of Public Health and the Executive Office of Elder Affairs to ensure standards for care, training, and oversight of the facility. Appellant's son was not subject to any regulatory or clinical oversight that by statute and regulation defines an assisted living environment. *See generally* G.L. c. 19D, §3, c. 111, §§71, 72W; 150 CMR 105.000 *et seq*. A comparison between a private residence and an assisted living facility cannot be based solely on cost. The fact that appellant's daughter-in-law is a registered nurse may have been beneficial to appellant; however, this cannot supersede the regulatory and clinical oversight mandated in a licensed assisted living facility. The letter written by appellant's physician, Mark J. Messenger, M.D., and dated September 19, 2008, states that appellant needed an assisted living level of care in 2005; however, this in no way demonstrates that appellant received an assisted living level of care with all the concomitant clinical and regulatory attributes and safeguards noted above. As MassHealth counsel noted, it is certainly commendable that appellant's son and his wife cared for appellant in their home; however, for the foregoing reasons I find that MassHealth correctly determined that appellant has not carried

the burden of proving that the Caregiver Agreement represents a transaction for fair market value, is legally binding or reasonably enforceable.[3]

A disqualifying transfer of resources is defined at 130 CMR 520.019:

> (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 will consider the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.
> (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.

Appellant had approximately $99,000 in resources available to pay for nursing home care. Although appellant lived with her son for a two-year period, I conclude on the facts at hand that the transfer of

[3]The facts and conclusions set forth in *Carpenter v. LA Dept. Health & Hospitals*, do not parallel the circumstances of this case as the issue involves payment of a smaller amount of money than what was agreed to by the parties, was payable on demand, involved care provided by the daughter over a 15-year period, and has nothing to do with the level of care purportedly provided as a basis for the fair market value of the underlying agreement.

appellant's available resources to appellant's son in exchange for care was a transfer for less than fair market value.

With regard to the additional transfers, pursuant to 130 CMR 520.019(G)(3), 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. Appellant's daughter in her role as power-of-attorney, transferred $5,650 to herself to pay her daughter's college tuition. While this is clearly a gift constituting a disqualifying transfer of resources, the period of ineligibility would begin to toll on January 24, 2006, and would have expired before appellant was admitted to the nursing facility on December 17, 2007. For the same reason, the payment of $3,600 on January 25, 2006 would also result in an expired ineligibility period. The transfer of $2,033 on January 25, 2008 purportedly for reimbursement for Christmas gifts bought by appellant for her family is a disqualifying transfer of resources as if falls within the applicable look-back period. The documentation submitted shows a variety of purchases made between September 16, 2007 and December 19, 2007 commingled with many other purchases made with appellant's daughter's credit cards. There is no documentation of what was actually purchased other than to show that purchases were made. Therefore, I conclude that the documentation is insufficient to show that the purchases were made on appellant's behalf. Pursuant to 130 CMR 520.019(G)(3), for transfers made 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 payment of long-term-care services, whichever is later. As appellant is seeking a revised Medicaid start date effective August 19, 2008, the disqualification period must begin on August 19, 2008 for all resources transferred after February 8, 2006.

The appeal is denied.

Order for MassHealth

Recalculate the period of ineligibility to begin on August 19, 2008 for all resources transferred after February 8, 2006.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc: Appeals Coordinator: Dorothy Zamora