

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	APPROVED	Appeal Number:	0903166
Decision Date:	7/3/09	Hearing Date:	04/29/2009
Hearing Officer:	Kenneth Brodzinski	Record Open to:	05/22/2009

Appellant Representative:

MassHealth Representative:

Lisa Pimentel



*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:	APPROVED	Issue:	Asset Transfer
Decision Date:	7/3/09	Hearing Date:	04/29/2009
MassHealth Rep.:	Lisa Pimentel	Appellant Rep.:	
Hearing Location:	Taunton 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 February 10, 2009, MassHealth determined that Appellant made a disqualifying transfer of assets and assessed a disqualifying period which expired on February 12, 2009 (Exhibit A). Appellant filed this appeal in a timely manner on February 13, 2009 (see 130 CMR 610.015(B) and Exhibit A). Determining a disqualifying transfer and assessing a disqualifying period constitute valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth determined that Appellant made a disqualifying transfer of assets and assessed a disqualifying period which expired on February 12, 2009.

Issue

The appeal issue is whether MassHealth correctly applied the controlling law to accurate facts when it determined that Appellant made a disqualifying transfer of assets and assessed a disqualifying period which expired on February 12, 2009.

Summary of Evidence

The MassHealth representative testified that Appellant filed an application for MassHealth long-term care benefits on November 24, 2008 requesting a coverage start date of November 1, 2008. The application included a copy of a care agreement executed between Appellant and her adult daughter (Exhibit D). The MassHealth representative explained that the care agreement was sent to MassHealth's legal department for an opinion. MassHealth's legal department issued a written opinion on April 13, 2009 which concluded that Appellant's countable assets had been improperly transferred to the daughter through the care agreement resulting in a disqualification period extending on and between January 1, 2008 and February 12, 2009. Appellant was approved for MassHealth benefits effective February 13, 2009.

Appellant was represented by counsel who filed a written memorandum (Exhibit C). Counsel clarified that Appellant seeks a start date of November 1, 2008 not November 22, 2008 as incorrectly stated in his memorandum.

Counsel argued that the care agreement executed between Appellant and her daughter constitutes a valid contract for which Appellant received fair market value. He testified that Appellant and her daughter had consulted with an attorney prior to entering into the care agreement. The attorney helped ensure that the amount at which the daughter was being compensated for the care she rendered to Appellant was based on actual care costs typical for Bristol County where Appellant resides. Counsel asserts that according to the care agreement, Appellant's daughter was actually being compensated at a rate below what it would have cost to provide such care to Appellant in the community.

Upon questioning by the hearing officer, counsel testified that the daughter is in her 50's and is an ordained minister. Prior to caring for her mother, she had been employed at an insurance agency and then a staffing company. She paid income taxes relative to both jobs. She left the workforce to care for Appellant full time.

Counsel highlighted the fact that Appellant paid her daughter as services were rendered and did not receive a lump sum payment for future performance or for services rendered prior to the care agreement.

Upon the hearing officer's request for additional information and verification, the record was left open to allow Appellant to file an affidavit from her daughter explaining the nature of the employment she left prior to caring for Appellant. MassHealth was given the opportunity to forward Appellant's legal memorandum to MassHealth's legal department for review and comment.

Appellant filed a timely post hearing submission (Exhibit E). MassHealth filed a follow-up memorandum prepared by its legal department (Exhibit F). These memoranda,

along with the parties' original submissions is *briefly* summarized as follows:

MassHealth's first memorandum recites sections 1 through 18 of the care agreement. MassHealth indicates that it conducted its own research concerning the conveyance of Appellant's legal interests in her former home to her daughter (through two deeds in 1994 and 1997). MassHealth raises the notion of possible legal flaws in the chain of title which may cloud the daughter's legal ownership of the property. MassHealth disputes that the daughter provided Appellant with room and board, accommodations, furnishings, etc., under the care agreement given that the conveyance is defective and Appellant remained the life tenant of the property. Consequently, Appellant could not be expected to pay rent to the daughter if the daughter did not actually own the property.

MassHealth also argues that Appellant has failed to evidence that she received fair market value for the funds that she transferred to her daughter presumably pursuant to the care agreement.

MassHealth also argued that certain sections of the agreement such as section 13.2, potentially provide the daughter with windfalls which would provide the daughter with payment regardless of whether or not services were rendered.

MassHealth asserts that because the care agreement fails to specify the amount of time that the daughter is supposed to devote to caring for Appellant, the agreement is essentially discretionary and creates no binding obligation. MassHealth also asserts that the agreement imposes few if any real obligations on the daughter.

MassHealth argues that Appellant failed to assert or evidence the number of hours that the daughter actually performed her duties under the care agreement; therefore, there is no way to measure fair market value.

MassHealth asserts that the care agreement does not constitute a contract that is valid, binding or reasonably enforceable by Appellant who is the mother of the very person who would need to seek enforcement.

Appellant's original memorandum asserts that care agreement between relatives are supported by federal and state laws and regulations. Appellant asserts that the daughter provided services pursuant to the care agreement which included all meals, lodging and services such as laundry, housekeeping, and personal assistance. Appellant asserts that the compensation provided to the daughter pursuant to the agreement was "*well below*" the prevailing market rate for home health services or assisted living.

Appellant cited the results of a survey conducted by her counsel of local care costs which included: the Overlook Visiting Nurse Association in New Bedford which charges

\$27.25 per hour during the week and \$29.25 per hour on weekends and after 5 p.m.; Preferred Home Services, Inc., in New Bedford which charges \$20.00 per hour on weekdays and \$22.00 per hour on weekends and after 5 p.m. Similarly Homestead Senior Care in Dartmouth, Massachusetts charges \$22.50 per hour of home health care services; Premier Home Health Care of Massachusetts in Fall River charges \$22.95 per hour on weekdays and \$23.69 per hour on weekends and after 5 p.m. With regard to assisted living facilities, Whalers Cove in New Bedford, Massachusetts charges \$3900.00-\$4200.00 per month for a one bedroom which includes 45 minutes per day of assisted living. The Cedars in Dartmouth Massachusetts costs \$4500.00 per month for one bedroom which includes 45 minutes per day of assisted living. The Atria in Fairhaven Massachusetts charges \$4,200.00 - \$4,400.00 per month for a one bedroom which includes two meals per day.

Appellant's follow-up memorandum (Exhibit E) argues that the 1994 and 1997 deeds properly conveyed all of Appellant's legal interests in her home to her daughter noting that MassHealth's argument fails to understand the difference between "words of conveyance" and a "description of the premises" contained in deeds.

Appellant faults MassHealth's argument regarding the adequacy of the care agreement for unduly focusing on some provisions which MassHealth claims to be superfluous or unnecessary while disregarding the remainder of the document which does impose actual duties on the daughter.

On the matter of reasonable rent, Appellant attached a listing from the "*Standard Times*" purporting to show that the \$1,000.00 per month rental charge is consistent with the prevailing local rate for similar units. Lastly, Appellant argues that MassHealth's position is extreme in that it argues from specific to general attempting to invalidate the whole because of alleged inadequacies of some parts. In particular Appellant argues that if one provision of the agreement were deemed to be invalid they should not render the entire care agreement invalid. Similarly, if any part of the payments made to the daughter were excessive, that alone should not invalidate all amounts paid to the daughter under the agreement.

Appellant's post-hearing submission also contains a signed affidavit from the daughter attesting to the following: From 1995 through 2002 the daughter was employed at a staffing service during which time she received various promotions including being made area manager of sales and operations for all of Rhode Island and Southern Massachusetts. This work required long hours and daily travel.

The daughter explained that Appellant's cognitive abilities began to fail and she began to place increasing personal demands upon the daughter. In June 2002 the daughter accepted a position with a local insurance agency for reduced hours and a more flexible schedule. This change allowed the daughter to assist Appellant with her daily needs such as paying her bills, balancing the checkbook, shopping, preparing meals,

scheduling and attending medical appointments, etc.

The daughter explained that Appellant continued to mentally decline and grew prone to wondering, leaving appliances on, etc. The daughter decided to leave her work in the beginning of the Summer of 2003 in order to stay home with Appellant until she could figure out how to meet Appellant's care needs.

In 2005 Appellant fell in her home fracturing her arm and multiple facial bones. Pins were surgically placed in Appellant's arm, she suffered dramatic weight loss dropping below 100 pounds and required constant care. While Appellant's arm eventually healed her cognitive abilities continue to decline.

In July 2005 the daughter became an ordained minister and began performing wedding ceremonies in an effort to supplement her household income. She explains that weddings were mostly performed on weekends when she was able to get someone to tend to Appellant for an hour or two. The daughter further explained that by the Spring of 2007 her savings account was nearly depleted and she was forced to consider returning to work, however, Appellant expressed her fear of being placed in a nursing home.

The daughter sought legal counsel and learned that she could be compensated for the care that she was providing to Appellant. She executed the care agreement with Appellant in May 2007. The daughter states that she treated it as a "*real, binding contract*" and reported all compensation for care and rent on Schedule C of her 2007 and 2008 federal tax forms.

Appellant's post hearing submission also includes a copy of the daughter's Social Security Statement dated April 7, 2009. This statement shows yearly earnings steadily rising from \$14,398.00 in 1995 to \$82,858.00 in 2000. Earnings dropped to \$72,694 in 2001; \$38,706.00 in 2002; \$3,398.00 in 2003; \$0.00 in 2004 and 2005; \$1,530.00 in 2006; and finally, \$17,868.00 in 2007 (Exhibit E). The submission also contains copies of the daughter's 2007 and 2008 tax filings.

In its follow-up memorandum, MassHealth reiterates its position that the care agreement does not constitute a valid contract that is binding or reasonably enforceable by Appellant and that has no ascertainable fair market value. According to MassHealth, the care agreement was merely a mechanism to systematically transfer Appellant's assets to her daughter. MassHealth asserts that absent concrete, verifiable, contemporaneous evidence as to what services were performed, for how long and how often, fair market value cannot be established. MassHealth noted that Appellant has the burden to establish that payment was fair and reasonable and not excessive.

MassHealth noted that there was no evidence presented that Appellant had been paying the daughter rent as of 1997 when all of Appellant's legal interest in the property

was purportedly transferred to the daughter. Instead, it appears that rent only began with the commencement of the care agreement. Also Appellant has failed to substantiate exactly what personal care services were provided to Appellant. MassHealth notes that the only evidence it has received to date has been the contract itself and bank statements showing payments made to the daughter.

MassHealth argues that if caring for Appellant was the daughter's primary employment then she should've paid Social Security taxes, workers compensation coverage and other expenses typically attendant upon an employment arrangement. MassHealth also argues that the comparison Appellant makes between the services rendered by her daughter and those of care facilities is not appropriate in so far as care facilities and home health aides render professional services and the daughter does not. MassHealth also noted that charges for rest homes and assisted living facilities include overhead costs which Appellant's daughter would not have incurred. Additionally while Appellant cited various hourly costs for the local professional services, no comparison can be made with the payment to her daughter because Appellant has failed to provide any information about her hours of service.

Findings of Fact

1. Appellant entered a long-term care facility on or about August 20, 2008 (Exhibit B).
2. Appellant filed an application for MassHealth long-term care benefits on November 24, 2008.
3. Appellant seeks a MassHealth coverage start date of November 1, 2008.
4. Appellant's application included a copy of a care agreement executed on January 8, 2007 between Appellant and her adult daughter (Exhibit D).
5. MassHealth concluded that Appellant's countable assets had been improperly transferred to the daughter through the care agreement resulting in a disqualification period extending on and between January 1, 2008 and February 12, 2009.
6. Appellant was approved for MassHealth benefits effective February 13, 2009.
7. Appellant purchased a home in 1980.
8. In 1994, Appellant retained, by deed, a life estate in her home and transferred the remainder to the daughter.

9. In 1997, Appellant transferred, by deed, all of her remaining interest in her home to the daughter.
10. Appellant's daughter is currently in her 50's.
11. From 1995 through 2002 the daughter was employed at a staffing service during which time she received various promotions including being made area manager of sales and operations for all of Rhode Island and Southern Massachusetts.
12. Around 2002, Appellant's cognitive abilities began to fail and she began to place increasing personal demands upon the daughter.
13. In June 2002 the daughter accepted a position with a local insurance agency for reduced hours and a more flexible schedule which allowed the daughter more time to help her mother.
14. Appellant continued to decline mentally and grew prone to wondering, leaving appliances on, etc.
15. The daughter left her job in the beginning of the Summer of 2003 in order to stay home with Appellant until she could figure out how to meet Appellant's care needs.
16. In 2005 Appellant fell in her home fracturing her arm and multiple facial bones.
17. Pins were surgically placed in Appellant's arm, she suffered dramatic weight loss dropping below 100 pounds and required constant care.
18. While Appellant's arm eventually healed, her cognitive abilities continued to decline.
19. In July 2005 the daughter became an ordained minister and began performing wedding ceremonies in an effort to supplement her household income.
20. The daughter performed weddings on weekends when she was able to get someone to tend to Appellant for an hour or two.
21. By the Spring of 2007, the daughter's savings account was nearly depleted and she was forced to consider returning to work; however, Appellant expressed her fear of being placed in a nursing home.
22. The daughter sought legal counsel and was told that she could be compensated for the care that she was providing to Appellant.

23. Appellant and her daughter executed a care agreement in May 2007.
24. The daughter reported all compensation for care and rent she received under the care agreement on Schedule C of her 2007 and 2008 federal tax forms.
25. Under the care agreement, Appellant was paying the daughter \$1,000.00 per month in rent.
26. In addition to rent, Appellant also paid her daughter \$3,000.00 each month for a total monthly payment of \$4,000.00.
27. The daughter provided services pursuant to the care agreement which included all meals, lodging and services such as laundry, housekeeping, medical appointments and general personal assistance.
28. Payments to the daughter under the care agreement were made as services were rendered; the daughter did not receive a lump sum payment for future performance.
29. The daughter's Social Security Statement shows: yearly earnings steadily rising from \$14,398.00 in 1995 to \$82,858.00 in 2000. Earnings dropped to \$72,694 in 2001; \$38,706.00 in 2002; \$3,398.00 in 2003; \$0.00 in 2004 in 2005; \$1,530.00 in 2006; and finally \$17,868.00 in 2007 (Exhibit E).

Conclusions of Law

For MassHealth eligibility purposes, a “resource” is defined under 130 CMR 515.001 as:

all income and assets owned by the individual or the spouse. For the purposes of determining eligibility, resources include income and assets to which the individual or the spouse is or would be entitled whether or not they are actually received. This term has the same meaning as “assets” as defined in 42 U.S.C. 1396p(e)(1).

Regulation 130 CMR 520.019(C) defines a *disqualifying transfer of resources* as follows:

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

Regulation 130 CMR 520.019(F), which governs intent, states:

(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.

Typically, when countable assets have been spent within the look-back period for the provision of care services, MassHealth requires proof that the compensation was made pursuant to a contemporaneous, binding written agreement executed between the applicant and the caregiver. The terms of such an agreement would allow MassHealth to assess whether or not the applicant had received fair market value for the expenditures or whether expenditures exceeded fair market value thereby evidencing an effort to divest funds in order to qualify for public assistance.

Care agreements have typically failed to satisfy MassHealth transfer regulations when non-refundable, lump sums payments are first made to the caregiver and performance of services is prospective. In such cases fair market value cannot be determined because the duration of services is undefined since the applicant could die or require nursing home placement within a day or years after the agreement is executed.

Care agreements also fail when their terms are too vague or illusory as to the nature of the services that are to be provided or the rate of compensation to be paid. Again, the critical point is that fair market value cannot be determined by such ill-defined terms.

Care agreements will fail in part, on their face, when their terms are explicit, yet compensation is deemed too generous and fair market value has not been received for the monies paid.

Lastly, care agreements will fail when they are found not to be binding and enforceable; however this would not invalidate actions taken under the terms of such an agreement relative to past performance where such performance is quantifiable and defined and

fair market value can be determined. The central point governing all of these scenarios is the same, can fair market value be determined and was fair market value received in exchange for the monies paid?

The requirement that care agreements be contemporaneous is to prevent an applicant from being able to divest his or herself of countable assets during the look-back period (usually by means of a single or several large payments) by merely claiming that the transfer was for services rendered in the past. If this practice were allowed, then anyone could divest themselves of all excess countable assets shortly before applying for public assistance by citing any and all instances of help or assistance rendered by friends or family members over the course of the applicant's lifetime. This would effectively defeat the purpose of the asset and transfer regulations.

In this case, the daughter's Social Security statement evidences that in 2001 she was earning a salary in excess of \$72,000.00. The daughter left that position in 2002 for a lesser paying job with fewer hours and more flexibility in order to be available to tend to Appellant's increasing care needs. The daughter left the workforce altogether in 2004 to tend to Appellant full time. By this time Appellant had already sustained a serious fall requiring hospitalization. The evidence shows that the daughter only entered into a care agreement in 2007 on the advice of counsel who the daughter approached because she did not know what she could do because her own savings were being depleted and she did not want to place Appellant in a nursing facility.

Using a base salary of \$72,000.00 and assuming no advancement or promotion, I calculate that the daughter lost more than \$300,000.00 in earnings in an effort to care for Appellant in the community. The daughter also lost a portion (not determined here) of her personal savings which were expended while she was not working. These losses far exceed the transfer amount of approximately \$108,000.00 (See, Exhibit A, transfer period multiplied by daily rate of \$265.00).

The facts also show that under the care agreement executed in May 2007, Appellant was paying the daughter \$48,000.00 a year to essentially forgo work (with a yearly salary of \$72,000.00) and stay home to live with Appellant. It is clear that the daughter gave up far more financially than she received from Appellant under the care agreement.¹

¹ MassHealth expressed considerable concern with the fact that the daughter and Appellant lived in Appellant's former home which Appellant transferred to the daughter in 1997. That transaction is far outside the look-back period; therefore, it should not count as a strike against Appellant relative to matters that fell within the look-back period. Additionally, I find no merit in MassHealth's reservations about the legal adequacy of Appellant's transfer of her remaining legal interest in the property to the daughter in 1997. The words of conveyance are clear and the descriptive elements of the property are obvious enough to me that I am not going to find as a matter of fact

On these facts I find that the care agreement is an enforceable contract supported by more than adequate consideration – namely, the earnings the daughter forewent. I find nothing in the agreement itself, or in the facts surrounding it, that would render it unenforceable by either party. MassHealth’s argument that it is not enforceable because of the familial affinity of the parties is not persuasive. If such an argument were persuasive, then no family members, or even close friends, could enter into valid care agreements capable of passing muster for MassHealth eligibility purposes.

I further find that Appellant has demonstrated that she received fair-market value for the monies paid to her daughter under the agreement. The daughter was essentially a full-time, live-in care giver. The daughter performed general care duties of maintaining a home and caring for Appellant in that home which included preparing meals, shopping, laundry, and tending to Appellant’s finances and medical scheduling and appointments. Given Appellant’s mental and physical frailty, it is reasonable to conclude that the daughter was needed twenty-four hours per day seven day a week as needs arose. No hourly accounting is needed under these particular circumstances. Additionally, I am satisfied with the survey information reported by Appellant relative to the cost of generally assistive, non-medical care rendered within Appellant’s locality and find that it exceeds what was paid to the daughter.

When considered individually, item by item, one could persuasively argue that many of the individual task that the daughter performed for Appellant – such as preparing her meals, are the kinds of assistance we could, and should, expect a child to do for his/her ailing parent without compensation. But when considered together in their totality, coupled with the fact that the daughter surrendered her earning capacity by leaving a well-paid position for several years and used some of her owns savings to compensate for the loss, I find no grounds to suspect, let alone find, that the care agreement was meant to mask a spend-down of countable assets.

Moreover, considering the earnings the daughter lost to care for Appellant as well as the fact that she did not immediately seek to use Appellant’s assets either in 2003 when she scaled back her work earnings or in 2004 when she left the workforce, I find that the effort to enter into a care agreement in 2007 was undertaken exclusively for a purpose other than to qualify for MassHealth. Appellant only meant to secure a way to financially support her daughter so she could remain out of the workforce and home with her in order to avoid being placed in a nursing facility. Accordingly, even if a transfer had been shown, I find it would not have been disqualifying pursuant to the intent exception set forth at 130 CMR 520.019(F).

On these limited and specific facts, the appeal is APPROVED.

any legal deficiencies absent some competent official legal ruling to the contrary.

Order for MassHealth

Rescind transfer notice of February 10, 2009. Re-determine start date and issue new notice.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

Kenneth Brodzinski
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Sherry Anderson