Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved in Part; Denied in Part	**Appeal Number:**	0917330
Decision Date:	3/24/10	**Hearing Date:**	01/19/2010
Hearing Officer:	Kim M. Larkin	**Record Open to:**	02/23/2010

Appellant Representative:

MassHealth Representative:
Rose Folan, MEC at Revere

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 in Part; Denied in Part	**Issue:**	Disqualifying Asset Transfer
Decision Date:	3/24/10	**Hearing Date:**	01/19/2010
MassHealth Rep.:	Rose Folan, MEC at Revere	**Appellant Rep.:**	
Hearing Location:	Revere 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 notice dated September 28, 2009, MassHealth denied the appellant's application for MassHealth long term care benefits because MassHealth determined that appellant transferred $155,536.00 between September 2007 and July 2008 for less than fair market value and a period of disqualification was calculated (see 130 CMR 520.018; Exhibit 1). The appellant filed this appeal in a timely manner on October 1, 2009 (see 130 CMR 610.015(B); Exhibit 2). Denial of assistance is valid grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied appellant's application for MassHealth long term care benefits because it determined appellant transferred $155,536.00 between September 2007 and July 2008 for less than fair market value and a period of disqualification was calculated.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.018, in determining that appellant transferred $155,536.00 for less than fair market value and calculating a period of disqualification.

Summary of Evidence

The MassHealth representative testified that appellant, through her power of attorney as her designated MassHealth eligibility representative, applied for MassHealth long term care benefits on July 27, 2009 seeking an eligibility start date for MassHealth long term care benefits of July 25, 2009 (Exhibit 6 at pp. 2, 10, 15-18). The appellant was admitted to the nursing facility on June 10, 2009 after an acute care hospitalization (Id.).

The appellant's daughter individually as Caregiver and as appellant's attorney in fact executed a care employment contract ("the Contract") on September 5, 2007. The stated purpose of the Contract was to set forth the terms and conditions for room and board, services to be performed by the Caregiver, meals, lodging, materials, utilities, furnishings, laundry, housekeeping, personal assistance, visitors and communications, medical care and costs, the obligation of the Parent, theft and loss, incompetence of the Parent, damages caused by Parent, compensation, change in monthly care fees, agreement terms, cancellation by the Parent and termination by the Caregiver (Exhibit 6 at pp. 32-37). The appellant remained in the same rental unit before and after the Contract was executed. The contract has no start date, the Contract states the Caregiver is to be available 24 hours per day/7 days per week but there are no designated hours per day, week or month the Caregiver will provide care. Appellant paid $550.00 per month in rent until September 1, 2007, when the appellant began paying $750.00 per month for unit 30R Fifth Street, Medford, MA. Appellant made monthly payments under the Contract as follows: September 1, 2007 $750.00 check memo section "Sept Rent"; September 5, 2007 $14,904.00 check memo section "Sept 2007"; October 2, 2007 $15,654.00 check memo section "Oct 2007"; October 31, 2007 $15,654.00 check memo section "Nov 2007"; December 3, 2007 $15,654.00 [no entry in check memo section]; January 2, 2008 $15,654.00 check memo section "January 2008"; February 2, 2008 $15,654.00 check memo section "February 2008"; March 1, 2008 $15,654.00 check memo section "March caregiver"; April 1, 2008 $15,654.00 check memo section "April 2008"; May 1, 2008 $15,654.00 check memo section "May 2008" June 2, 2008 $13,750.00 check memo section "June 2008"; and July 26, 2008 $5746.00 check memo section "July 2008 caregiver I.O.U. – partial payment".

The appellant provided a memorandum to the agency attached to her application stating that she lived in an in-law apartment in her daughter's home from May 2003 until her admission to the nursing facility in June 2009 (Id at exhibit A). Appellant also submitted a copy of the Contract (Id. at exhibit B). In the Contract, the appellant is referred to as the Parent, her daughter as Caregiver (Id. at exhibit B). The Contract was executed on September 5, 2007 by the appellant's daughter individually as the Caregiver and on behalf of the appellant as her attorney in fact and provided for payments of $15,654.00 per month ($750.00 for rent and $14,904.00 for care services) (Id., exhibit B at Section 17 Compensation). The services to be performed by the Caregiver as set forth in Section 2 include furnishing the Parent with room, board, services, and incidentals as specified in the Contract (Id. at Section 2). MassHealth asserted that there is no provision in the Contract requiring the Caregiver to perform services beginning at any specific time or for any designated number of hours per day, week or month and appellant did not attach timesheets or independent evidence of performed services (Exhibit 5 at p. 4).

After completing its eligibility review, MassHealth determined that payments totaling $155,536.00 under the Contract made between October 2007[1] and July 2008 are disqualifying transfers of resources (Exhibit 5). MassHealth determined the Contract is not a valid and binding instrument that is reasonably enforceable by the appellant, nor does it have an ascertainable fair market value (Exhibit 5, *citing* 130 CMR 520.019(C)). Because of this, the agency determined the appellant failed to demonstrate that monthly payments from September 2007 to July 2008[2] for $750.00 for rent and $14,904.00 for personal care services is fair market value (Id., *citing* 130 CMR 515.001).

By memoranda, MassHealth legal unit submitted the agency's legal analysis before and after hearing as follows:

- An applicant for MassHealth benefits has the burden to prove his or her eligibility, including, among other things, that a transfer of resources within the look-back date was legitimate, not gratuitous or for less than fair market value (130 CMR 515.001; 520.007; and G.L. c.. 118E, §20);
- Federal Medicaid law, 42 USC §1396p(c)(1)(A) states that if an institutionalized individual (or spouse) transfers assets for less than fair market value on or after the look-back date[3] the

[1] MassHealth's September 28, 2009 notice states the date of the impermissible transfers began in September, 2007. Because the rental payment of $750.00 per month to live in the rental unit was also at issue and the Contract was executed in September 2007, it appears that is the basis for when MassHealth determined the transfers occurred; this month the rent and personal care payments were made by separate checks. Appellant provided copies of checks from as early as 2/2007 which evidence rental payments of $550.00/month until September 2007. The first payment of $15,654.00 was made on October 2, 2007 and monthly thereafter until June 2, 2008 when the account balance was less than the $15,654.00 payment and a check for $13,750.00 was written. On July 1, 2008, there is payment of $750.00 per month for rent and a payment of $5,746.00 for "July 2008 caregiver I.O.U. – partial payment." The joint account balance was under $2,000.00 as of August 2008 (Exhibit 6).

[2] See fn. 1.

[3] 520.018: Transfer of Resources Regardless of Date of Transfer

> (A) The provisions of 42 U.S.C. 1396p apply to all transfers of resources. In the event that any portion of 130 CMR 520.018 and 520.019 conflicts with federal law, the federal law supersedes.
>
> (B) The MassHealth agency denies payment for nursing-facility services to an otherwise eligible nursing-facility resident as defined in 130 CMR 515.001 who transfers or whose spouse transfers countable resources for less than fair-market value during or after the period of time referred to as the look-back period.
>
> (C) The denial of payment for nursing-facility services does not affect the individual's eligibility for other MassHealth benefits.
>
> (D) Circumstances giving rise to disqualifying transfers of resources are also described at 130 CMR 520.007(J).

130 CMR 520.019(B) states:

> (B) Look-Back Period. Transfers of resources are subject to a look-back period, beginning on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard.

applicant is ineligible for medical assistance [payment] of services for a defined period;

- The federal law is reflected in MassHealth regulation 130 CMR 520.019, which provides that any transfer of resources during the appropriate look-back period by a nursing facility resident of an interest owned, or available for less than fair market value is a disqualifying transfer. If an applicant or member has transferred resources for less than fair market value, MassHealth long term care benefits may not be paid until a period of ineligibility has been imposed and expires (42 USC §1396p(c)(1)(A); G.L. 118E, §28);
- While appellant lived in an in-law apartment in her daughter's residence since 2003, it is not known if payments for services were made to her daughter prior to September 5, 2007. Federal HCFA [Health Care Finance Administration n/k/a Centers for Medicare & Medicaid ("CMS")] Transmittal No. 64 states that the transfer regulations presume that services provided for free at the time were intended to be provided without compensation. While this is a rebuttable presumption, an applicant must rebut the presumption with tangible evidence that is acceptable to the state. Appellant's Contract executed 4 years after she began living in the rental unit does not provide tangible evidence to rebut the presumption that the appellant's daughter intended to provide the services without compensation and without the benefit of a contractual agreement;
- The appellant has failed to establish that the payments under the Contract have fair market value. Fair market value is defined by the agency at 130 CMR 515.001 as "an estimate of the value of a resource if sold at the prevailing rate at the time of transfer." All applicable MassHealth regulations presuppose a valid, legally binding agreement exists. As an aid to determine fair market value, MassHealth offers Social Security Administration (SSA) POMS [Program Operations Manual System] SI 01150.005(C)(2) which states that "[a] transferer receives compensation when [he/she] receives something of value pursuant to a legally binding agreement…" Additionally, MassHealth regulation 130 CMR 520.007(J)(4) specifically states that transactions involving a promise to pay future payments is considered to be a disqualifying transfer of assets to the extent the transaction does not have ascertainable fair market value or is not embodied in a valid contract that is legally and reasonably enforceable;
- MassHealth also questions the relationship of the parties and the circumstances under which the document was executed, its lack of valid consideration, and its illusory promise, thus

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(1) For transfers occurring before February 8, 2006, this period generally extends back in time for 36 months.
(2) For transfers of resources occurring on or after February 8, 2006, the period generally extends back in time for 60 months. The 60-month look-back period will begin to be phased in on February 8, 2009. Beginning on March 8, 2009, applicants will be asked to provide verifications of their assets for the 37 months prior to the application. As each month passes, the look-back period will increase by one month until the full 60 months is reached on February 8, 2011.
(3) For transfers of resources from or into trusts, the look-back period is described in 130 CMR 520.023(A).

rendering the contract invalid and non-binding [citations not included];

- MassHealth argues that many of the provisions of the agreement impose no duty on the Caregiver and cannot be used to justify payment (e.g., Sections 9, 12 and 13);
- Based on the payment schedule, it is clear the parties to the agreement did not intend to create, bind or comply with the contract;
- Sections of the Contract contain provisions which existed prior to the existence of the Contract and other sections limit appellant to circumstances inconsistent with the appellant's rights as a rent paying tenant (e.g., visiting times);
- The Contract is unenforceable in that it is a unilaterally signed contract, with no bargained for terms due to appellant's incompetence and it is not likely the appellant's daughter would seek enforcement against herself as Caregiver in her duty as the appellant's power of attorney;
- MassHealth does assert that even if the Contract were considered to be valid, legally binding and enforceable, it does not have ascertainable fair market value because it fails to impose any tangible duty on the Caregiver (i.e., no start date, it does not specify the number of hours per day, week or even month services are to be performed), therefore it is discretionary on the part of the Caregiver. The failure to create binding obligations would prohibit any remedy for a failure for any lack of performance and thus fails to justify the monthly payments of $15,654.00;
- There is no evidence of what services were needed, the services performed, or the fees charged. Absent concrete, quantifiable, contemporaneous evidence as to what services were needed and performed, for how long/often fair market value cannot be established [citations not included);
- The actual payments are inflated;
- There is nothing in the Contract that any portion of the funds paid were being allocated for payment of past services or services that pre-date the execution of the agreement. In fact, the appellant argues that the Contract was signed on September 5, 2007 for monthly payments of rent and care and were claimed on 2007 and 2008 income taxes;
- Payments were made monthly in advance of services. Payments were made from September 2007 through June 2008 but appellant lived in the rental unit until June 2009. Therefore the payments are prospective and as such do not establish that the payments were intended to cover services provided before the Contract;
- The appellant failed to provide independent evidence of the attorney's claims about compensation and the provisions fail to have any semblance to industry or Agency practices;
- Appellant's argument that the Contract evidences a payment scheme of $2.90/ per hour for 24 hours per day over 6 years does not account for the lack of any specific mention/rate in the Contract or the fact that other services were available and were utilized by the appellant; and
- MassHealth distinguishes the following facts to the facts in Weitzel and asserts the standard of precedent set by other hearing decisions and Superior Court opinions.

(Exhibits 5 & 14).

Appellant was represented by legal counsel retained by her power of attorney, appellant's daughter. Appellant's daughter and son-in-law also offered testimony[4] as witnesses as follows: in 2003, appellant sold her home for approximately $180,000.00. Appellant's daughter stated her mother did not want the continued responsibility of her home. Appellant's daughter did not assist with the sale of the property, but did provide assistance with moving the appellant after the sale of her home. The appellant moved into one of the rental unit's in the appellant's four unit home[5]. Appellant and her family lived in a separate unit upstairs from the appellant's unit. The other two units were also rented. At the time of the move appellant was 76 years of age and in good health, but, according to her daughter, now looking back her mother had some memory issues. The rental unit has a separate address and entrance, with a living room, full bathroom, kitchen and bedroom. In 2003, the appellant was able to independently perform activities of daily living (e.g., bathing, dressing) and instrumental activities of daily living (e.g., light housekeeping, shopping). Appellant had a driver's license, a car, and was driving independently from 2003 through the end of 2006 or early 2007. Appellant did come to her daughter's unit for evening meals with the family and appellant's daughter testified she took her mother to physician appointments and adult day care.

According to the appellant's daughter, the appellant did not want the continued responsibility of maintaining her home, but did not want to go into a nursing facility. Apparently appellant feared a nursing facility placement and according to her daughter, she and her mother agreed the daughter would provide care to her mother if she needed care for as long as she was able as long as her mother was not a burden. The appellant and her daughter were joint bank account holders[6]. Appellant's monthly income was from Social Security and a pension.

Appellant's daughter continued that there was a change in her mother's condition in 2006 that prompted her to seek an evaluation by a neurologist. At that time, appellant's daughter testified appellant was tested and diagnosed with mild to moderate Alzheimer's disease. At some time at or near the end of 2006 into 2007, the appellant began to require assistance with activities of daily

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[4] Appellant's counsel had appellant's grandchildren introduce themselves for the record. Neither child was sworn in to testify, nor despite their young age did they undergo a minimal test to entertain their ability to testify truthfully. While I found no basis for introducing the children at hearing to elicit any testimony, counsel insisted as part of creating his hearing record. I will accept their introduction to the extent it established the relationship of the minor children to the appellant, their grandmother.

[5] What type of living arrangement the appellant had after the sale of her home is described in a variety of terms, "in-law apartment" (exhibit 4) and "took her mother into her [daughter's] home" (exhibit 7). Appellant's daughter's tax returns reveal the she owns a four unit building; she and her family reside in one unit and three other units are rented. Appellant rented the unit below her daughter for $550.00/month in 2003 through August 2007 when the rent was increased to $750.00/month in September 2007. Appellant provided copies of calendar year 2010 apartment listings and costs/month in the north shore of Massachusetts in support of her claim that the monthly rental payment as evidence of fair market value, if not below fair market value (Exhibit 13 at exhibit 2).

[6] Appellant submitted two documents entitled "Bank Account Statements". Appellant maintained various accounts in her name only until at least January 2007. There appears to be activity either closing accounts and/or transferring funds to the joint account in 2006 and 2007 (Exhibit 6 pp. 38-143 & 144-184).

living (daughter was setting out clothes for the day and prompting appellant to perform self care tasks). There was an incident in 2007 where appellant was disoriented in the night and wandered from her apartment and was returned by the police. Appellant's daughter then purchased a monitor to allow her to hear her mother from her unit and an alarm for appellant's door. Appellant's daughter described appellant experiencing some night time disorientation in 2007 and occasions that she got up to provide her mother reassurance and comfort.

Appellant's mother had begun attending an adult day care program once a week in 2003 for cognitive stimulation. By 2007, the appellant was attending the adult day program 4 days per week from 8:30 am to 2:30 pm. This progressed to 6 days per week by 2009. Appellant's daughter stated that either she or her husband drove and picked up the appellant for adult day care, although transportation was available through the adult day care program. The focus of adult day care was to provide cognitive stimulation, the appellant was not receiving physical therapy, occupational therapy or skilled nursing services. According to her daughter, there was no other help in the home[7].

Appellant's daughter testified in late 2006 to 2007, appellant became increasingly in need of assistance and was receiving assistance with personal care from either her or her husband. The appellant's daughter noted that although she worked two days per week, her husband was at home on the days that she worked (there are two minor children in the home who were aged 3 & 5 years in 2003). By 2009, appellant's daughter was bringing appellant's breakfast to her in her rental unit downstairs and the stove had been disconnected. Appellant ate her mid day meal at adult day care and the evening meal with the family. While initially quite engaged with her grandchildren, appellant was noted to be increasingly short and impatient with the children. Appellant remained in her apartment until her acute hospitalization and admission to the nursing facility in June 2009.

Appellant argues that the Contract is a codification of a previous oral agreement where the appellant and her daughter agreed that appellant would pay rent and her daughter would care for her for as long as the appellant was not a burden. The appellant's daughter sought legal counsel in 2006 after the appellant's diagnosis of mild to moderate Alzheimer's disease because while the daughter thought she could take care of appellant, the situation was worse and she wanted to investigate maximizing available resources. The appellant's daughter became the appellant's power of attorney on September 19, 2006 (Exhibit 10). There was discussion at the time of retaining counsel that appellant's daughter did not think that she had to do anything legal regarding the money held jointly with the appellant, that she could take the money as payment for caring for her mother. Appellant's counsel asserts the Contract was executed to codify a previous oral agreement, the monies held jointly were not gifts to the appellant's daughter from the appellant and payments reflect appellant's intent to utilize available funds to pay for her care.

[7] Appellant's counsel submitted copies of checks written by appellant's daughter from May 2007 through 2009. There are monthly checks written to "Mystic Valley Elder Services, Inc." with memos noting invoice dates. Appellant was attending an adult day program at Community Family, Inc. Appellant's daughter testified there were no services in the home, but that Mystic Valley subsidized the day care hours.

In a prehearing memorandum and post hearing rebuttal memorandum, appellant's counsel argued that the Contract is valid. Specifically, appellant's care payments reflect payment for care from 2003 up through the date of her admission in 2009 at a rate of $10.00/hr for 18 hours per day (testimony; Exhibit B). Counsel argued that appellant's daughter and her husband had to take additional leave time to care for the appellant. According to the appellant the testimony and evidence demonstrate:

- Appellant lived with her daughter, son in law and two grandchildren from 2003 until 2009;
- The appellant intended to compensate her daughter for services and her daughter agreed to care for her mother indefinitely, avoiding nursing facility costs;
- The appellant's daughter did not feel there was a need to draft a formal contract or make contemporaneous payments;
- The payments made for rent and care were legitimate payments;
- Appellant's daughter claimed the funds and rental income received on her income taxes for tax years 2007 and 2008;
- The transfers were fair market value payments for services made "exclusively for a purpose other than to qualify for MassHealth" and appellant "intended to dispose of the resources at fair market value or for other valuable consideration";
- The appellant argued that this matter is analogous to Weitzel v. Thomas Dehner and the care agreement is valid;
- Appellant submitted a letter from her neurologist post hearing[8] and argues that the physician letter and testimony of the parties indicate appellant could not care for herself and but for her daughter's care she would have been placed in a nursing facility six years earlier;
- Appellant's attorney asserts that appellant's daughter believed that when her mother placed all of her funds in appellant's and the daughter's name, jointly, that the funds were the daughter's in exchange for taking her in and caring for her;
- Appellant's attorney refutes the assertions made by MassHealth about the burden of providing evidence of a fair market exchange of funds arguing both testimony and corroborating evidence (e.g., the physician statement) evidence care for a period of six years, 18 hours per day, at competitive rates; that record keeping is not necessary; and that the intent was to provide compensation for services rendered.

(Exhibits 4, 7 & 13).

Findings of Fact

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

1. The appellant was residing in her home in the community until the date of the sale of her home in 2003.

[8] The letter from appellant's treating neurologist was not produced in appellant's filings at hearing. The physician letter is dated January 19, 2010, and was made a part of the hearing record in appellant's post hearing rebuttal memorandum (Exhibit 13).

2. The appellant sold her home for approximately $180,000.00.

3. In 2003, appellant completed the sale of her home independently but did receive assistance with moving to a rental unit at 30R Fifth Street, Medford, MA in her daughter's four unit house at 30 Fifth Street, Medford, MA.

4. Appellant sold her home because she did not want the continued responsibility of maintaining a home.

5. The appellant did not want to ever go into a nursing facility and she rented an apartment in her daughter's home initially for $550.00 per month and planned to stay in the community with the support of her daughter, if needed, unless and until she became a burden.

6. At the time of the move to the rental unit in 2003, the appellant had hypertension and high cholesterol and was independent with activities of daily living and instrumental activities of daily living.

7. Appellant had a driver's license and a car and she was still driving through at least 2006. Appellant made payment to the City of Medford on March 1, 2007 for the registration of a car plate number 56LW17; payment to Commerce Insurance Co. on April 23, 2007; payment to the Registry of Motor Vehicles on June 19, 2007 for plate number 56LW17; appellant made payment for insurance on July 23, 2007; appellant paid for a "Camry" inspection sticker on August 23, 2007; and car excise taxes on February 29, 2008 to the City of Medford (Exhibit 6).

8. Appellant joined her daughter and daughter's family for the evening meal.

9. Appellant was accompanied by her daughter to physician appointments. Appellant visited her primary physician every 3-6 months and after 2006, additionally saw a neurologist once a year.

10. In hindsight, appellant's daughter recalls that the appellant had some memory issues in 2003.

11. Appellant paid for and attended an adult day care program, Community Family, Inc., one day a week in 2003, with progression to six days per week in 2009.

12. In addition to Community Family, Inc., appellant made payments for services from Mystic Valley Elder Service, Inc.

13. There was a change in appellant's condition in 2006 that prompted appellant's daughter to seek a neurological evaluation with Dr. Edgar Robertson; appellant was diagnosed with mild to moderate Alzheimer's disease.

14. In late 2006 and into 2007, appellant became increasingly in need of prompting and reminders for personal care.

15. In 2007, appellant experienced some night time confusion and had one episode of wandering prompting her daughter to purchase an apartment door alarm and a monitor to allow her to listen from her apartment into the appellant's apartment.

16. Appellant's daughter worked part-time and her husband worked full time; they alternated their schedule so there was always someone at home; Appellant's daughter has two minor children.

17. Appellant's daughter began preparing appellant's breakfast and appellant was eating breakfast in her rental unit in 2008 to 2009, she ate lunch at adult day health and continued the evening meal with her daughter and her daughter's family.

18. Appellant's daughter retained legal counsel in 2006 to discuss maximizing available resources for the appellant.

19. The appellant designated her daughter as her attorney in fact on September 19, 2006.

20. Through 2006 – 2007, appellant through her attorney in fact transferred funds from various sources into a joint account held with her daughter.

21. The appellant's daughter individually as Caregiver and as appellant's attorney in fact executed a care employment contract ("the Contract") on September 5, 2007.

22. The stated purpose of the Contract was to set forth the terms and conditions for room and board, services to be performed by the Caregiver, meals, lodging, materials, utilities, furnishings, laundry, housekeeping, personal assistance, visitors and communications, medical care and costs, the obligation of the Parent, theft and loss, incompetence of the Parent, damages caused by Parent, compensation, change in monthly care fees, agreement terms, cancellation by the Parent and termination by the Caregiver (Exhibit 6 at pp. 32-37).

23. The appellant remained in the same rental unit before and after the Contract was executed.

24. The contract has no start date, the Contract states the Caregiver is to be available 24 hours per day/7 days per week but there are no designated hours per day, week or month the Caregiver will provide care.

25. Appellant paid $750.00 per month in rent for unit 30R Fifth Street, Medford, MA beginning September 1, 2007.

26. Appellant made monthly payments under the Contract as follows:

September 1, 2007 $750.00 check memo section "Sept Rent"

September 5, 2007 $14,904.00 check memo section “Sept 2007”
October 2, 2007 $15,654.00 check memo section “Oct 2007”
October 31, 2007 $15,654.00 check memo section “Nov 2007”
December 3, 2007 $15,654.00 [no entry in check memo section]
January 2, 2008 $15,654.00 check memo section “January 2008”
February 2, 2008 $15,654.00 check memo section “February 2008”
March 1, 2008 $15,654.00 check memo section “March caregiver”
April 1, 2008 $15,654.00 check memo section “April 2008”
May 1, 2008 $15,654.00 check memo section “May 2008”
June 2, 2008 $13,750.00 check memo section “June 2008”
July 26, 2008 $5746.00 check memo section “July 2008 caregiver I.O.U. – partial payment”

27. Appellant resumed monthly rental payments of $750.00 per month on August 1, 2008.

Analysis and Conclusions of Law

The central issue is whether or not the care agreement entered into by appellant's daughter in her capacity as Caregiver and appellant's power-of-attorney, is a valid and enforceable agreement for fair market value, or whether the agreement represents a disqualifying transfer of assets.

Under federal Medicaid law at 42 USC §1396p(c)(1)(A), if an institutionalized individual (or their spouse) transfers assets for less than fair market value on or after the look-back date, the individual is ineligible for payment of medical assistance services for a defined period. MassHealth has codified federal law at 130 CMR 520.019 which provides that any transfer of resources 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 for less than fair market value to be a disqualifying transfer. Specifically Medicaid long-term care benefits may not, under federal or state law, be paid when an applicant has transferred resources for less than fair market value unless and until a period of ineligibility has been imposed and expired (42 USC §1396p(c)(1)(A); G.L. c. 118E, §28).

The appellant was admitted to a long term care facility on June 10, 2009 after an acute hospital admission. The appellant lived in a rental unit in her daughter’s four unit home beginning in 2003 at the age of 76 in relatively good health but for hypertension and high cholesterol. Appellant may have demonstrated some memory issues, but the appellant’s daughter offered no testimony on the appellant’s inability to care for herself at least through 2006 or 2007. The evidence reveals that in 2003, the appellant no longer desired the responsibility of maintaining her home and her daughter had a rental unit that was ideal to address the appellant’s needs at that time. The claim of 24 hour per day care from 2003 until her nursing facility admission in 2009 and payment for any care is simply not supported by any contemporaneous evidence to support that claim. Appellant had a primary care physician in 2003 that could have offered evidence of her needs. Appellant made no arrangements in 2003 to appoint an attorney in fact, and funds were in her name managed by her. Appellant offered nothing to support the existence of a verbal

agreement for payments to her daughter in 2003. Indeed the only clear intent was to stay in the community as long as she was not a burden and had funds available to do this and in fact accessed and paid for services contemporaneous to receiving services (e.g., adult day care).

The execution of the Contract as a codification of a previous oral agreement is not supported by any evidence. There was no contemporaneous transfer of bank funds or account statements showing transfers by appellant to her daughter in 2003. The power of attorney appointment did not occur until 2006 and a number of appellant's resources were not transferred into joint accounts until some time in late 2006 through 2007. Appellant's neurologist's letter which she relies on as evidence of her care needs was not made available at hearing, however, according to the appellant's daughter, the neurologist did not evaluate the appellant until 2006 and the diagnosis was mild to moderate Alzheimer's disease. To say otherwise would question her ability to enter into the agency agreement in 2006. That appellant's dementia is now severe is not in dispute, it is a progressive disease. The claim of the need for care prior to that time period lacks clinical credibility in light of the testimony elicited at hearing and the absence of contemporaneous clinical information (appellant's daughter testified appellant was seen by her primary physician every three to six months). What the evidence does reflect is that the appellant attended adult day care with a need for cognitive stimulation, no need for physical therapy, occupational therapy or unskilled or skilled needs through at least 2006 when she began to need assistance by prompting and eventually prior to admission to a nursing facility in 2009, unskilled physical care. Appellant paid for, maintained and drove her own car at least through 2007; she entered the routines and life of her daughter's family and enjoyed her evening meal with the family. The rental unit proved to provide appellant with the ability to remain in the community and she accessed and paid for the rent and community based services specific to meet her needs.

The Contract was executed on September 5, 2007. There was no evidence presented that any payments were made to the appellant's daughter prior to September 2007 (except rental payments of $550.00/month). Nor can one determine what if anything payment would have been for. The design of the Contract is puzzling as the payments would have to reflect payment for past services based on an oral agreement where actual services were not needed or performed, or payments were for future needs made in advance of the actual needs and/or paid for as anticipatory. Either way, the appellant has the burden to produce tangible evidence that the services were provided, that the intent was to provide her daughter with compensation without the benefit of a contract or that the payments were contemporaneous to actual services performed (*see specifically,* Federal HCFA Transmittal No. 64).

The appellant must establish that the payments of $15,654.00 for the months of September 2007 through July 2008 have fair market value. 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.

MassHealth is correct that regulation 130 CMR 515.001, which defines fair market value presupposes a legally binding agreement exists (*citing* SSA Program Operations Manual (POMS) SI 01150.005(C)(2)). Additionally, the necessity of a valid and legally binding contract is stated in MassHealth regulation at 130 CMR 520.007(J)(4) which states:

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.

One need only look to the payment stream of September 2007 through June 2008 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; appellant remained in the community until 2009. The following payments were made by appellant's daughter acting in her capacity as power of attorney for appellant to herself as Caregiver:

September 1, 2007 $750.00 check memo section “Sept Rent”

September 5, 2007 $14,904.00 check memo section “Sept 2007”
October 2, 2007 $15,654.00 check memo section “Oct 2007”
October 31, 2007 $15,654.00 check memo section “Nov 2007”
December 3, 2007 $15,654.00 [no entry in check memo section]
January 2, 2008 $15,654.00 check memo section “January 2008”
February 2, 2008 $15,654.00 check memo section “February 2008”
March 1, 2008 $15,654.00 check memo section “March caregiver”
April 1, 2008 $15,654.00 check memo section “April 2008”
May 1, 2008 $15,654.00 check memo section “May 2008”
June 2, 2008 $13,750.00 check memo section “June 2008”
July 26, 2008 $5746.00 check memo section “July 2008 caregiver I.O.U. – partial payment”

That appellant’s daughter claimed the payments as business income on her 2007 and 2008 income tax is not dispositive that there was a contractual agreement. Whether the income is earned or a gift it would have to be reported. What is dispositive is there is no beginning date for the Contract, no rates are discussed, and no time frame to account for when other services were accessed and available. As to rates specifically, appellant provided other company’s hourly payment rates as evidence to justify the payments. However, appellant had every opportunity to state a payment scale in the contract and did not. The payments are actual depletion of resources for care needs not explained, defined or inclusive of actual performance for the time period asserted or they were payments reflecting payment in advance of services performed because appellant remained in the community until 2009. It is evident that the terms of the contract are intermittent dispositions of assets rather than payments stemming from a contractual obligation because of the lack of any specificity to support the monthly payments.

Appellant’s counsel’s blanket statement that MassHealth’s position is that a family is expected to provide care without compensation absent a formal written agreement is not correct. However, his reliance on Weitzel is not persuasive.[9] As is noted Social Security 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. However, guidance under the Social Security POMS gives way to federal and state laws governing Medicaid. In addition, in this case there is no objective evidence to support the claim that appellant received $155,536.00 worth of care for a period from 2003 to 2009, or that she had personal care needs prior to 2006 or 2007 that she did not access and pay for services to meet her needs. As already stated, there was no presentation of a clinical assessment to support the need for services rendered as early as 2003. That information could have been derived from either her treating primary physician in 2003 or the neurologist upon initial evaluation in 2006. There is no care needs asserted for most of the period that appellant rented the

[9] While MassHealth is correct that like Board of Hearings proceedings, Superior Court actions have no precendential value, one may argue that the cases may carry some persuasive value. In this instance, there is simply nothing persuasive about the facts in this matter and that of Weitzel and appellant points to none. Additionally, there is indeed some concern about the Courts discussion in Weitzel about the burden of producing evidence by an individual when applying for federal and state entitlement benefits where significant resources have been transferred during the look-back period.

apartment, no ongoing revisions of any type of care plan to meet appellant's needs that could have been evidenced from assessments from adult day care, no information concerning when the need for assistance with activities of daily living arose and were addressed. By this, I do not mean to assert that some type of complicated record keeping or documentation need be presented. Information to support the appellant's claims was available to her and absent such a presentation I find no evidence to support the claim that appellant received care 24/7 from 2003 through to her admission in 2009 that could account for the total amount transferred in the period of that time the transfers occurred. Additionally, I find curious the assertion that care provided to the appellant allowed her to remain in the community from 2003 through 2009 and not need medical assistance benefits to pay for her care until 2009. Appellant had significant resources available to pay for her care whether at home or in an institutional setting.

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.

I must conclude the appellant has not met her burden to overcome the agency's determination.

The evidence does not support that the Contract is valid and binding or for fair market value. Additionally, there is ample evidence that the transfer was not done exclusively for a purpose other than to qualify for MassHealth. Appellant, upon diagnosis in 2006, began transferring her funds to joint accounts and sought advice on available resources that would have to have included long term care and MassHealth eligibility. It is worth noting and acknowledging that the agency is not claiming that appellant's daughter and/or son in law did not provide services or care for the appellant. It was clear at hearing that appellant's daughter demonstrated a kindness and loving commitment to her mother in what during the latter years of the appellant residing in the rental apartment did appear to be difficult. But as is amply stated and evidenced by the discussion herein, there is no way to determine what services were provided, if there were a number of hours provided or when they were provided and what the fair market value of services was where there is no documentation, evaluation or valid contractual agreement. That burden rests squarely on the appellant and she has failed to meet that burden (Exhibit 14 *citing* 130 CMR 520.007; G.L. c. 118E, §20 [10]).

Because MassHealth no longer asserts that the amount of payment for monthly rent (payments that were made contemporaneous to actual rental) are impermissible transfers, monthly payment for rent during the applicable look-back period should not be considered impermissible transfers and MassHealth should adjust any period of disqualification accordingly.

The appellant's appeal is approved in part to allow an adjustment to the asset transfer amount to reflect the rental payments as transfers for fair market value and denied in part as to the amounts transferred for personal care pursuant to the Contract.

Order for MassHealth

Recalculate the period of ineligibility after adjustment of the total transfer amount after allowing the rental payments as transfers for fair market value.

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.

[10] MassHealth discusses the issue as set forth in Andrews v. Division of Medical Assistance, 68 Mass. App. Ct. 228, 233 (2007), where the Court notes that "[t]he value of services rendered and the reasonableness of the amount paid for them are separate issues and are entirely independent of the question of the intent of the appellant to pay for them. To avoid over-inflating the value of the services, once a contemporaneous intent to pay has been established, the applicant has the burden to establish that payment was fair and reasonable and not excessive."

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.

Kim M. Larkin
Director
Hearing Officer
Board of Hearings

cc: MEC at Revere
MassHealth Legal