OFFICE OF MEDICAID
BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved in part; Dismissed in part	**Appeal Number:**	1019516
Decision Date:	5/16/11	**Hearing Date:**	February 3, 2011 Taunton
	Hearing Officer:	Suzanne S. Davis	

Appellant Representatives:

MassHealth Representative:

Justine Ferreira

Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, 6th Floor
Quincy, MA 02171

APPEAL DECISION

Appeal Decision:	Approved in part; Dismissed in part	**Issue:**	130 CMR 520.019; 520.007(J)(4); 610.035(A)
Decision Date:	5/16/11	**Hearing Date:**	February 3, 2011 Taunton
MassHealth Rep.:	Justine Ferreira	**Appellant Rep.:**	

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 September 20, 2010, MassHealth notified appellant's representative that appellant was not eligible for MassHealth because there was a disqualifying transfer of assets of $103,119.08 resulting in a period of ineligibility between August 14, 2010 and August 24, 2011 (130 CMR 520.019 and Exhibit A). Appellant's representative pursuant to a General Durable Power of Attorney dated September 21, 2005 filed a timely appeal on October 15, 2010 (130 CMR 610.015 and Exhibit A). Date of eligibility is a valid ground for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth notified appellant's representative that appellant's application for MassHealth long-term-care was denied because of a disqualifying transfer.

Issue

The appeal issue is whether there has been a disqualifying transfer of assets, pursuant to

130 CMR 520.019 that renders appellant not eligible for long-term-care benefits until August 24, 2011.

Summary of Evidence

Documents were submitted into evidence (Exhibits A-R). The record was left open for appellant's attorney to submit additional documents (Exhibit S). MassHealth reviewed the documents that were timely submitted on 3/3/11 and responded (Exhibit T). The record closed on 4/29/11.

The MassHealth representative testified that appellant submitted her MassHealth long-term-care application on 8/10/10 (Exhibit B). She is single and was admitted to the nursing home on 2/12/10. The facility is seeking eligibility effective 8/14/10. There are three transfers at issue. The first is a life estate that appellant purchased in her daughter's home on 7/30/2007 for $130,000. The property was assessed at $235,600 (Exhibit G). At the time of the purchase appellant was 75-years-old (DOB 6/20/32). According to the Tiger Tables appellant should have paid $101,924.33 for the life estate so she considered the difference to be a gift of $28,075.67.

The second transfer of $50,000 was a lump sum payment to appellant's daughter on 3/31/07 pursuant to a service agreement dated 9/21/05 (Exhibit D). She considered the agreement to have no fair-market-value because it was for future performance (130 CMR 520.007(J)(4) and Exhibit F). The third transfer was $25,000 that appellant paid to her son for labor and materials working on appellant's primary residence (Exhibit E). There were no receipts to verify how that amount was calculated. The total transferred amount of was $103,075.67. She made a $43.41 math error on the notice. Dividing the transferred amount by the average nursing home daily rate as determined by the Commonwealth, $274, the penalty period is 375 days.

Appellant's attorney summarized appellant's position. Appellant and her husband resided at their Hyde Park home until 2005. Appellant was diagnosed with Alzheimer's disease at age 68. Although she was still competent in 2005, she was not able to assist her husband. He had Parkinson's disease and was s/p back surgery using a wheelchair. The family was running back and forth 40 miles each way to their home daily trying to help and finally decided to move the parents into their daughter Rebecca's home. Rebecca and her husband and 9-year-old Eva resided in a condo in Attleboro. Appellant's husband had surgery for a bowel obstruction in July 2006, developed an infection and died unexpectedly within 4 weeks in August 2006. The couple had few assets except the value of their home which needed a lot of work before it could be sold. The family and appellant and her husband agreed to a plan, reduced to writing, that they would move into the condo with Rebecca's family, pay rent of $600/month and a lump sum of $50,000 for their care (Exhibit D). They moved in September 2005. Payment could not be made, however, until the Hyde Park home sold which happened in February 2007. While appellant was

residing with Rebecca, her son Samuel was driving back and forth to the Hyde Park home doing all the work needed to prepare the house for sale. The house was put on the market in September or October 2006 and sold on 2/26/07 for $270,000 net $247,412.47. From that amount $50,000 was paid to Rebecca on 3/31/07 pursuant to the contract; Samuel was repaid $25,000 for labor and repair expenses on the Hyde Park home; appellant purchased the life estate in the condo on 7/30/07; and subsequently $58,687.52 including about $18,000 from other bank accounts has been paid to the nursing home completely depleting appellant's assets.

Appellant's attorney argued first, that the regulation requiring the use of the Tiger Tables was being applied retroactively to determine the value of the life estate. The regulation was only promulgated on 12/1/07 (Exhibit H). The amount to purchase the life estate was calculated based on HCFA tables in effect at the time. Indeed, MassHealth had used HCFA tables for 20 years. He agreed to submit the HCFA 64 Life Estate Calculation during the record-open period (see Exhibit S-1). The difference between the values calculated with different tables was not intent to gift but intent to purchase the life estate for the actuarially correct amount. Additionally, the value of the condo according to MassHealth was $235,600 but there are two higher appraisals. The 6/28/07 appraisal was for $250,000 (Exhibit N) and the 2/22/08 appraisal was for $259,000. Thus, using the correct actuarial table and the true value of the condo appellant's payment of $130,000 was the correct amount. MassHealth should revalue the life estate based on the new parameters.

Appellant's attorney argued second, that the Family Agreement has always been enforceable and represents fair market value for services rendered. He offered two cases, which he argued, support family agreements: Clark (a promissory note enforceable, Exhibit P) and Weitzel (caretaker services with no written agreement, Exhibit Q). He provided a letter from Bristol Elder Services which states that appellant was a client who received adult daycare services and a home health aide and substantiates that Rebecca was appellant's caregiver from October 28, 2005 through March 6, 2010 (Exhibit J). Appellant's attorney also provided VNA medical records between 3/2009 and 9/2009 to show how seriously advanced appellant's disease had become (Exhibit K). The family installed an outdoor ramp to the condo for their father's wheelchair and a stair lift to the second story bedrooms. Appellant's attorney submitted a document by Rebecca outlining a typical day (Exhibit L). He argued that the life expectancy was 13.8 years for appellant and 8.11 years for her husband at the time of the contract. At one-hour per day the contract for appellant's lifetime would be 5000 hours of care. The intent of the family was to care for appellant and their father for their lifetime if at all possible (130 CMR 520.019(F)). The terms of the contract were in effect for many years before appellant eventually needed a nursing home. The lump sum payment was consideration of a valid contract not an intent to qualify for MassHealth. As with the life estate, the future performance regulation 130 CMR 520.007(J)(4) is being applied retroactively since it was not in effect until 2/15/08 and the contract was signed on 9/21/05 (Exhibit I).

Appellant's attorney asked appellant's son Samuel to explain the work needed on the Hyde Park house. Samuel stated that he got several proposals for work that needed doing but there wasn't any money to have the work done. He purchased some materials with his own money and most of the work he did himself often working both weekend days (Exhibit M). His parents had lived there since 1969 and nothing had been done to it for 25 years (Exhibit C). The place needed to be cleaned out, floors done, new sheetrock, painting throughout, new faucets and fixtures and landscaping. He can submit invoices for some of the work but probably not all.

Appellant's attorney agreed to submit during the record open period: (1) the HCFA 64 Life Estate table for a 75-year-old that was used; (2) information about the value of caregiver services during 2005-2009; and (3) appellant's medical records 1/2009 – 9/2009. The MassHealth representative agreed to review work invoices about the Hyde Park house and appraisals of the condo. After review MassHealth agreed to the following: using the same Tiger Tables but a higher evaluation of $259,000 she recalculated and reduced the life estate transferred amount to $17,570.69; she added the $25,000 and the $50,000 for a total of $92,957.69 from which she subtracted expenses on the Hyde Park home for a total transferred amount of $54,802.03 resulting in a penalty period starting on 8/14/10 and ending on 3/1/11 (Exhibit T).

Findings of Fact

Based on a preponderance of the evidence, I find:

1. Appellant who is single was admitted to the nursing home on 2/12/10.

2. Appellant submitted the MassHealth long-term-care application on 8/10/10.

3. Appellant seeks eligibility as of 8/14/10 and MassHealth agrees that is the "earliest potential day of eligibility".

4. Appellant purchased a life estate in her daughter Rebecca's condo where she was residing on 7/30/07 for $130,000.

5. Appellant's calculation of the value of the life estate was based on an appraisal of the condo dated 6/28/07 for $250,000 and the use of the HCFA 64 Life Estate Tables.

6. Appellant's date of birth is 6/20/32 and was 75-years-old when she purchased the life estate.

7. MassHealth initially used the condo tax assessment of $235,600 to derive a life estate value but after the hearing applied the 2/22/08 appraisal of $259,000. In both cases

MassHealth used the Tiger Tables (Exhibits O & T).

8. Appellant and her late husband signed a Family Agreement on 9/21/05 (Exhibit D):
    - To live in Rebecca's condo with her family for a monthly rent of $600 (paragraph 1);
    - Rebecca and her husband to care for appellant and her husband or arrange for and supervise their care including but not limited to shopping, meal preparation, errand running, transportation, bathing, grooming, dressing, feeding, administering medications, providing bathroom assistance and other physical assistance for a lump sum of $50,000 (paragraph 4);
    - The agreement was subject to change if the parties agreed (paragraph 2);
    - The agreement could be terminated for any reason whatsoever by any party upon 90 days notice at which point appellant and her husband would move from the house (paragraph 6).

9. Appellant paid the $50,000 to her daughter on 3/31/07 from the proceeds of her Hyde Park home which was sold in February 2007.

10. Appellant resided in Rebecca's condo from approximately September 2005 until her nursing home admission in February 2010.

11. During the time that she resided with Rebecca and her family appellant became increasingly debilitated from Alzheimer's disease which had been diagnosed in 2001. She attended adult day care initially 4 to 5 times a week from 7:30am – 4:30pm. She needed assistance with activities of daily living (dressing, medications, showering, and incontinence care) and instrumental activities of daily living (transportation to appointments and daycare, meal preparation, laundry and shopping) (Exhibit S-2).

12. In March 2009 appellant developed wounds on her legs and began receiving VNA wound care.

13. Appellant and her husband had resided in their Hyde Park home since 1969. After they moved out in 2005 it needed a lot of work to prepare for sale. It needed to be cleaned out, floors done, painting throughout, and needed new faucets and fixtures. Appellant's son Samuel did most of the work and submitted invoices to MassHealth.

14. On or about 3/31/07 appellant paid her son Samuel $25,000 for his work and materials to prepare the house for sale.

15. After review MassHealth agreed to the following: using the same Tiger Tables but a higher evaluation of $259,000 the MassHealth representative recalculated and reduced the life estate transferred amount to $17,570.69; she added the $25,000 and

the $50,000 for a total of $92,957.69 from which she subtracted expenses on the Hyde Park home for a total transferred amount of $54,802.03 resulting in a penalty period starting on 8/14/10 and ending on 3/1/11 (Exhibit T).

16. The average cost of nursing home care in Massachusetts at the time of this application as calculated by MassHealth is $274/day.

Analysis and Conclusions of Law

Pursuant to 130 CMR 520.019(C), a disqualifying transfer occurs when a resource is transferred within the look-back period for less than fair market value 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). Appellant was admitted to the nursing home on 2/12/10 and submitted her application for long-term-care on 8/12/10. The facility is requesting long-term-care coverage as of 8/14/10. For transfers occurring on or after 2/8/06 the look-back period is a phased-in 60 months "beginning on the first date the individual is both a nursing facility resident and has applied for (or is receiving) MassHealth Standard" (130 CMR 520.019(B)). MassHealth has calculated a series of actions that it considers disqualifying transfers: the calculation of the cost of a life estate, now $17,570.69; the payment of $50,000 pursuant to the Family Agreement; and the payment of $25,000 to the son for work and materials not verified until the hearing. From a newly calculated disqualifying transfer amount for these three activities of $92,570.69 the MassHealth representative further agreed that verification of the cost of home improvements and labor for appellant's Hyde Park home in preparation for sale represented a cure of $37,768.66. The new total amount that MassHealth considers disqualifying is $54,802.03.

(Family Agreement)

Appellant, her husband and their daughter Rebecca and her husband Todd entered into a caregiver agreement on September 21, 2005. If the $50,000 lump sum payment in consideration of the agreement had been made on 9/21/05 there would be no issue because the payment would have fallen outside of the 60-month look-back period. However, the payment couldn't be made until appellant's Hyde Park home was sold providing liquid assets. The home was finally sold in February 2007 and the $50,000 payment made on 3/31/07 within the look-back period.

MassHealth regulations address service agreements at 130 CMR 520.007(J)(4) when clarifying transactions involving future performance. The regulation states:

> 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.

Although this MassHealth regulatory language was not promulgated until 2/15/08 the effective date is 2/8/06 with the change in federal Medicaid law[1], service agreements have always been scrutinized using various other regulations. They are suspect because they can appear to be a valid contract between parties for a reasonable rate for a service that appears to be needed but in actuality are a mechanism to explain the transfer (gifting) of an applicant's resources to a family member. Future performance means pay now for services that will be provided in the future. Appellant paid a lump sum of $50,000 in March 2007 for services that had been provided since September 2005 and were contemplated to continue to be provided for as long as possible into the unknown future as stated in Paragraph 4 "…agree to provide care…or arrange for and supervise such care as needed in the future". There is no doubt that this is a contract for future performance. Troubling language of the agreement is found in paragraphs 2 which provides the parties the right to change its terms and paragraph 6 which allows termination in which case appellant would have to move out, that after she had already paid the $50,000. Thus, there is no enforcement mechanism available to appellant since the agreement could have been terminated "for whatever reason". Another troubling element of the agreement is the vague list of potential types of care to be provided with no concomitant hourly, daily, monthly or per-activity payment rate for the care. The payment of $50,000 in one lump sum may have been much too much (if the contract had been cancelled shortly thereafter) or as it turns out in retrospect was much too little for the care provided. Thus, there is no discernable fair-market value within the continuum of the agreement between September 2005 and February 2010. Finally, there are no daily, weekly or monthly logs verifying that some, any or all of the listed care was indeed provided.

All that having been said I do not conclude that the transfer of $50,000 was intended to be a gift to Rebecca and her husband. I conclude that the parents and their daughter and son were not intending to impoverish appellant in order that she might qualify for MassHealth (130 CMR 520.019(F)(1)(2)). Certainly, the Family Agreement was entered into with the knowledge that appellant had Alzheimer's disease, which is fatal but progresses slowly. Much of this case reflects assistance of an attorney, specifically deeds, appraisals and contracts so there was some estate planning involved. It was also known that appellant would have increasing care needs perhaps eventually needing nursing home care. However, in 2005 when decisions were being made about appellant and her husband, the intent from the believable testimony of appellant's children was "to keep appellant home as long as possible" which turned out to be nearly 5 years. It must have been a major imposition to move the aging and disabled couple

[1] The same change that created the 60-month look-back period, the Deficit Reduction Act of 2005.

into Rebecca's three bedroom condo. From the medical documentation submitted appellant needed and received a lot of care and support throughout. Appellant certainly received fair-market value for her housing and care. It was only a matter of financial circumstances that the $50,000 was not paid contemporaneously with the signing of the agreement in September 2005. Thus, I conclude that appellant's payment of $50,000 to Rebecca on 3/31/07 was not a disqualifying transfer.

(Labor and Materials for Hyde Park home)

After nearly 1 ½ years of work to make it saleable, appellant's Hyde Park home finally sold on 2/27/07. That was the first time there was cash on hand to meet obligations incurred prior to the sale. On 3/31/07 appellant paid her daughter $50,000 due and owing on the Family Agreement and on 3/31/07 appellant's son presented appellant a bill for labor and materials used to complete the work on the Hyde Park home (Exhibit E). Appellant and her husband had lived there since 1969 and had done very little to the home during the previous 25 years. When they moved out in the summer of 2005, it needed to be cleaned out, floors done, painting throughout, and needed new faucets and fixtures. Appellant's son Samuel did most of the work on weekends and paid for most of the materials. When appellant submitted her MassHealth application in August 2010 she provided a copy of the invoice for $25,000. That apparently was a rough estimate of costs incurred and the value of his labor. Because there were no invoices or other forms of verification to support the $25,000 figure the MassHealth representative correctly considered the transfer a gift from appellant to her son. However, during the appeal process bills and estimates for the work that was done were provided to MassHealth. After review, the MassHealth representative reversed her opinion and decided not only that there was no gift to appellant's son of $25,000 because he had earned it but that he had actually incurred a greater expense. She concluded that the value of the work and expenses was $37,768.66. Since that exceeded the amount of the specific reimbursement to appellant's son, she subtracted as a partial cure the difference ($12,768.66) from the $50,000 payment on the Family Agreement. For the purposes of this decision I conclude that MassHealth has agreed that there was no transfer involving payment to appellant's son and, thus, I DISMISS this portion of the appeal because there is no longer an issue of law or fact (130 CMR 610.035(A)).

(Life estate)

The Family Agreement states in paragraph 5 that Rebecca's house shall continue to serve as appellant's primary residence even if Rebecca predeceases her. Rebecca and Todd legally fulfilled that portion of the agreement when they sold appellant a life estate in the condo on July 30, 2007. MassHealth does not contest the life estate purchase because appellant resided there for several years after its purchase (130 CMR 520.019(I)(3)). MassHealth contests the amount that appellant paid for the life estate arguing that she paid more than fair-market-value. Appellant paid $130,000 for the life

estate. That value was derived by applying the HCFA 64 Table in common use in July 2007 and for many prior years. Appellant was 75-years-old in 2007 and the life estate interest at that age according to the HCFA Table was .52149 (Exhibit S-1). Prior to the transaction Rebecca had the condo appraised. Pursuant to a report dated 6/28/07 the condo was worth $250,000 (Exhibit N). $250,000 x .52149 = $130,372.50. The amount that appellant paid for the life estate is consistent with one valid method of determining the price.

MassHealth calculated the value of the life estate differently. Initially the MassHealth representative used the tax assessment of $235,600. She then applied the Tiger Tables which were adopted by MassHealth effective December 1, 2007 (Exhibit H). She calculated that the fair-market value of the life estate was $101,924.33. Since appellant paid $130,000 she considered the difference to be a gift of $28,075.67. After appellant's attorney provided appraisals the MassHealth representative adopted the 2/22/08 appraised value of $259,000 and calculated using the Tiger tables that the "gifted" difference was $17,570.69. I do not understand why the MassHealth representative used the 2/22/08 appraisal when a more contemporaneous appraisal dated 6/28/07 was available. MassHealth has the discretion to determine which table to apply in the calculation of life estate values (130 CMR 520.019(I)(1)). Eligibility Operation Memo (EOM) 07-18 was published on 12/1/07 and was effective immediately. The EOM states: "effective 12/1/07…MassHealth will be using the Internal Revenue Service (IRS) Table S, "Single Life Factors Based on Life Table 90 SM" …" (Exhibit H). There is no specific language in the EOM stating whether or not it was to be applied to transfers of life estate interests which occurred prior its publication although it may have been intended to capture any transfers within the look-back period. Appellant purchased her life estate on 7/30/07 four months prior to publication of the EOM and over three years prior the application of the Tiger Tables in this case. Clearly appellant had legal assistance in determining what price she should pay for the life estate. There was an attempt to calculate the value within the regulatory framework that was in use at the time. There was no intent to gift any more than the true value of the life estate (130 CMR 520.019(F)(1)(2)). While the fair-market-value differs depending on which table is applied I conclude that there was no intent to select the most advantageous table in order to maximize the purchase price. I conclude instead that the choice of the table was determined because that was what MassHealth was using in July 2007. There was no intent to pay other than fair-market-value for the life estate (130 CMR 520.019(F)(2)). Thus, there is no gift and no disqualifying transfer. This portion of the appeal is APPROVED.

Order for MassHealth

Review eligibility start date pursuant to this decision and send appropriate notice.

Implementation of this Decision

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

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 were you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Suzanne S. Davis
Hearing Officer
Board of Hearings

cc: