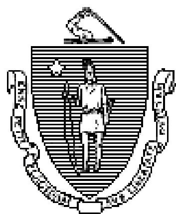
Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved in part; Denied in part	**Appeal Number:**	1200340
Decision Date:	6/11/12	**Hearing Date:**	03/26/2012
Hearing Officer:	Rebecca Brochstein	**Record Closed:**	04/17/2012

Appearances for Appellant:

Appearances for MassHealth:
Andrea Pelczar, Tewksbury MEC



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

APPEAL DECISION

Appeal Decision:	Approved in part; Denied in part	**Issue:**	Disqualifying Transfer of Resources
Decision Date:	6/11/12	**Hearing Date:**	03/26/2012
MassHealth's Rep.:	Andrea Pelczar	**Appellant's Reps.:**	
Hearing Location:	Tewksbury MassHealth Enrollment Center		

Authority

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

Jurisdiction

Through a notice dated October 6, 2011, MassHealth denied the appellant's application for MassHealth benefits because a disqualifying transfer of resources in the amount of $48,550 (Exhibit 1). The appellant filed a timely appeal of the denial on November 3, 2011 (Exhibit 2). Denial of an application for benefits is a valid basis for appeal (130 CMR 610.032). The record was held open for the parties to respond to memoranda submitted at hearing (Exhibit 13).

Action Taken by MassHealth

MassHealth denied the appellant's application for long-term care benefits because of a disqualifying transfer of resources.

Issue

The issue on appeal is whether MassHealth properly determined that the appellant transferred resources for less than fair-market value.

Summary of Evidence

The MassHealth representative appeared at the hearing and testified as follows: The appellant, who is a 76-year-old widow, was admitted a nursing facility on November 17, 2010. A MassHealth long-term care application was filed on her behalf on June 21, 2011, seeking coverage as of April 18, 2011. On October 6, 2011, MassHealth denied the application due to a disqualifying transfer of resources in the amount of $48,550. Based on this transfer amount, MassHealth imposed a 177-day period of disqualification between April 18 and October 11, 2011. The appellant was approved for coverage as of October 12, 2011.

The MassHealth representative, who also submitted a copy of a MassHealth attorney's legal brief, explained the transfer determination as follows: In September 2009, the appellant, then 74 years old and suffering from Parkinson's disease, moved into the New Hampshire home of her son and daughter-in-law. At that time they entered into a written contract under which the appellant would pay for certain modifications to the home, and the son and daughter-in-law would be paid to provide care to the appellant. MassHealth allowed the appellant's payment for the home modifications ($9,006.42 total) but considered the funds paid to the son and daughter-in-law under the personal care contract ($48,550) to be disqualifying.

A copy of the "Life Care and Service Contract" was entered into evidence. See Exhibit 8. Under the contract, executed on September 1, 2009, the son and daughter-in-law ("caregivers") were required to provide lodging, utilities, laundry, housekeeping, meals, and personal assistance. "Personal assistance" was to include "observing [her] physical and mental condition on a regular basis, and [making] arrangements as necessary to meet her health needs by arranging transportation to [her] physicians [and] carrying out the instructions of physicians, including storing, distributing, and reminding [appellant] to take prescribed medications." In addition, the caregivers were required to "provide [appellant] with personal assistance and take care of [her] needs during the day as well as during the night. [They] shall be responsible for helping [appellant] shower, bathe, dressing, hair care, care of clothing, daily exercise, and helping [her] get ready for bed. Additionally, [they] shall provide [her] with transportation to and from medical and hair appointments, shopping, and paying bills, and other incidental services."

The agreement provided that the appellant would not pay the son and daughter-in-law for these services until her home was sold. Upon the sale of the home, the caregivers would submit an invoice for services rendered between September 1, 2009, and the closing date, and would thereafter be paid on a monthly basis. The caregivers were required to "keep track of the time spent caring for [her]."

The section of the provision entitled "Compensation" states as follows (with emphasis in original):

> **The parties hereby acknowledge that due to [appellant's] declining health associated with Parkinson's disease and the natural aging process, she is no longer able to live independently at home; and therefore, she has moved in with the Caregivers.**

[Appellant] relies on the Caregivers for her health and well-being without which, she would have to move to an assisted living facility and then, most likely, a nursing home in the future.

The Caregivers acknowledge that in consideration for the room and board for [appellant], and, for their caregiving services to be rendered as set forth herein, [she] shall pay the Caregivers from the sale proceeds of her real estate . . . to be sold some time in the future. . .

[Appellant] would like to compensate the Caregivers for the fair value of room and board and caregiving services upon the following terms and conditions:

Medicaid regulations stipulate that transfers without adequate consideration result in disqualifying an applicant from Medicaid. 130 CMR 520.019(C) ("Disqualifying Transfer of Resources"). In other words, the transferor must receive something of value in return for the money spent. Since [appellant] shall benefit from living with the Caregivers and from their caregiving services, Medicaid permits the Caregivers to be compensated for the fair value of the services rendered.

The fair value of the caregiving services rendered by the Caregivers as measured by objective community standards is $25.00 per hour as determined by the following three (3) home health care agencies:

1. Visiting Angels [Beverly, MA]

2. Best Home Care [Middleton, MA]

3. Partners Home Care [Beverly, MA]

Caregiving Services. Therefore, the parties hereby agree that the Caregivers shall be paid the sum of $25.00 per hour for their caregiving services; and, there shall be no duplication of services inasmuch as the [son and daughter-in-law] are acting jointly as the Caregivers. As stated above, the Caregivers will keep track of their time and they shall provide an Invoice before payment from the sale proceeds of [appellant's] real estate. . . .

Thereafter, Caregivers will continue to keep track of their time and be paid on a monthly basis for the continued caregiving services.

Room and Board. The parties hereby agree that [appellant] shall pay Caregivers the sum of $600.00 per month for room and board reflective of the fair market rent in Pelham, New Hampshire. No lease agreement shall be necessary by and between the parties inasmuch as this Agreement satisfies their understanding of this living arrangement. [Appellant] shall pay room and board of $600.00 per month from the sale proceeds of her former . . . home

> and the Caregivers shall include the room and board on their Invoice.
>
> **<u>Caregivers' Home Modification</u>.** Any and all expenses which the Caregivers pay with their own funds in order to modify their home in order to accommodate [appellant], specifically, providing [her] with a bedroom and bathroom on the first floor, shall be reimbursed by [appellant] to the Caregivers from the sale proceeds of [her home]. The Caregivers shall maintain written receipts of said expenditures.

By its terms, the agreement was to become effective September 1, 2009. There was a "cancellation period of ninety (90) days" during which either party could cancel the agreement "without advance notice and for any reason whatsoever."[1] Otherwise, the agreement was to "continue in full force and effect . . . until [appellant's] death or until it has been determined that [she] requires long-term-care at a skilled nursing facility due to her deterioration in health." This section of the agreement ends with the following paragraph (emphasis in original):

> **HOWEVER, it is [appellant's] wish and desire to live with the Caregivers in the Caregiver's [sic] home and she enters into this Agreement with the express intent to live and remain in the Caregiver's [sic] home until her death or until her health has deteriorated so much that she requires long-term-care which the Caregivers are no longer able to provide.**

See Exhibit 8.

The appellant also executed two "Care Coordination Agreements" on September 1, 2009, one with her son and one with her daughter-in-law.[2] Much of the content is duplicative of the Life Care and Service Agreement, but contains some additional detail about the "caregiving services" to be performed. The Care Coordination Agreement executed by the appellant and the son states that the caregiving services shall include, but are not limited to:

1. Arranging for, coordinating, and overseeing my mother's medical care, including evaluation, treatment, and therapy at medical offices, outpatient facilities, hospitals, nursing homes, and rehabilitation facilities, home health care, and medications.
2. Providing room and board for my mother.

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[1] It is presumed that this refers to the first 90 days of the agreement. If so, it conflicts with the following section, which states that the caregivers shall have the right to terminate the contract within the first 90 days "by written notice to [appellant]" and that "[t]ermination shall be only for good and sufficient cause." "Good and sufficient cause" is deemed to exist only if (1) the appellant engaged in threatening behavior or (2) the caregivers were no longer able to provide caregiving services due to her deteriorating health, and she required long-term care at a skilled nursing facility.

[2] The last line in each of the agreements states that the "Care Coordination Agreement is meant to compliment [sic] the Life Care and Service Agreement" executed on the same date.

3. Providing or arranging for shopping and errands as necessary.
4. Providing or arranging for transportation and accompaniment to appointments, shopping, social visits, banking, and other errands.
5. Handling, either personally or by obtaining appropriate professional services, my mother's financial and legal matters, including, but not limit to, banking, payment of bills, investments, real estate transactions, health and medical insurance claims, benefit applications and appeals, and income tax returns.
6. Assisting my mother as necessary with her activities of daily living, either by me personally or by my wife . . . or by hiring appropriate professional services.
7. Performing, homemaking services, food preparation, house cleaning, and miscellaneous chores.
8. Providing my mother with personal assistance and taking care of her needs during the day as well as during the night, including, showering, bathing, dressing, hair care, care of clothing, daily exercise, and helping my mother get ready for bed.

The agreement between the appellant and the daughter-in-law is essentially identical, though it omits paragraph no. 5 above. See Exhibit 9.

The appellant was admitted to a nursing facility in Massachusetts on November 17, 2010. On January 31, 2011, her former home was sold and she received net proceeds of $93,073. Shortly thereafter, the son and daughter-in-law submitted an invoice for care provided between September 1, 2009, and November 15, 2010. The invoice, dated February 4, 2011, includes four separate items. Under the first item is a list of medical, dental, and physical/speech therapy appointments between January 2010 and November 2010; the appointments are listed by date, doctor's name, and number of hours (the majority are either two or three hours). The total number of hours claimed is 148, which at $25 per hour results in a charge of $3,700. See Exhibit 5.

The second item on the invoice is for "daily personal care." The activities are enumerated on the invoice as follows:

1. Helping her dress
2. Preparing all meals
3. Daily exercise
4. Helping her shower
5. Helping her get ready for bed
6. Changing her bed
7. Doing her laundry
8. Preparing and giving her daily medications
9. Getting up at night for toileting and repositioning in bed

The invoice states that the caregivers spent four hours per day on these activities, but there is no breakdown of the frequency or duration of any individual task. The caregivers charged a total of

$44,100, which represents four hours per day (at $25 per hour) for each of the 441 days at issue.

Item 3 on the invoice is for "trips to retrieve mail." It states that a total of twenty trips were made, though there is no detail as to when these trips were made. At 1.5 hours per trip, and $25 per hour, the total charge was $750. Finally, the last item on the invoice is for the modifications to the home. The appellant provided a list of specific costs associated with the renovation, which totaled $9,006.42. See Exhibit 5.

The total amount charged on the invoice was $57,556.42. On February 9, 2011, the appellant wrote a check to her son and daughter-in-law for this amount. See Exhibit 5. MassHealth allowed the $9,006.42 spent on home renovations, but considered the remainder ($48,550 for personal services) to be a disqualifying transfer of resources.

The appellant was represented at the hearing by her son and an attorney, who also submitted a written brief. See Exhibit 7. The son testified that he spent a "significant amount of time" caring for his mother, and that it ended up being more than four hours per day. He stated that he is self-employed and works out of his home, and that his business was less profitable than in the past because he was devoting time to caring for his mother. As her health deteriorated, the amount of attention she required increased. He indicated that his wife works outside the home but that she helped with bathing, dressing, cooking, and laundry.

The appellant's attorney contended that the appellant received fair market value for her payment to the son and daughter-in-law. She stated that the $25 per hour was an objective, customary standard according to home health agencies they consulted, and that $600 per month in room and board was also consistent with the area where they were living. The attorney also argued that the payment to the son and daughter-in-law was exclusively for a purpose other than to qualify for MassHealth. She argued that the appellant's intention at the time she entered into the contract was to remain living with her son and daughter-in-law for the rest of her life, and that she never intended to move to a nursing facility. The attorney pointed out that the contract predated her admission to the facility by over a year.

Findings of Fact

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

1. In September 2009, the appellant, then 74 years old and suffering from Parkinson's disease, moved into the New Hampshire home of her son and daughter-in-law.

2. At the time the appellant moved in with her son and daughter-in-law, they executed a "Life Care and Service Contract" under which the son and daughter-in-law (the caregivers) would be paid to provide daily care to her.

a. The duties of the caregivers were to provide the appellant with lodging, utilities, laundry, housekeeping, meals, and personal assistance. "Personal assistance" included observing her mental and physical condition, arranging transportation to medical appointments, assisting her with medications, assisting her with showering/bathing, dressing, hair care, laundry, exercise, and helping her get ready for bed. In addition, they were to provide her with transportation to and from medical and hair appointments, shopping, paying bills, and other incidental services.

b. In exchange for these services, the appellant was to pay the caregivers $25 per hour. This figure was based on the hourly rates of three home health care agencies Beverly and Middleton, Massachusetts.

c. The son and daughter-in-law were required to keep track of the time spent caring for the appellant, and to provide an invoice before receiving payment.

d. A separate provision in the contract stated that the appellant would pay the son and daughter-in-law $600 per month as room and board. The caregivers were to include this item on their invoice.

e. The caregivers were also entitled to compensation under the contract for modifications made to their home in order to accommodate the appellant.

f. No payment was due under the contract until after the appellant's former home was sold. Upon the sale of the property, the caregivers would submit in invoice for services rendered between September 1, 2009, and the date of the real estate closing, and would thereafter be paid on a monthly basis.

g. The contract became effective September 1, 2009, and was to continue until the appellant's death or until it was determined that she required long-term care at a skilled nursing facility.

3. The appellant also executed two "Care Coordination Agreements" on September 1, 2009, one with her son and one with her daughter-in-law. The content is largely duplicative of some of the provisions of the Life Care and Service Agreement, but provides some additional detail of the types of services to be provided.

4. The appellant was admitted to a nursing facility in Massachusetts on November 17, 2010.

5. On January 31, 2011, the appellant's former home was sold. She received net proceeds of $93,073.

6. On February 4, 2011, the son and daughter-in-law submitted an invoice for care provided between September 1, 2009, and November 15, 2010. The total amount claimed on the invoice was $57,556.42.

    a. The first item on the invoice is for transportation to medical, dental, and physical/speech therapy appointments between January and November 2010. The appointments were identified by date, provider, and number of hours spent (most are two or three hours). The total number of hours claimed is 148, which at $25 per hour results in a charge of $3,700.

    b. The second item on the invoice was for daily personal care. The son and daughter-in-law listed nine activities which they claim to have performed on a daily basis, for a total of four hours per day. There is no breakdown of the frequency or duration of any individual task, and no day-to-day documentation. For four hours per day, at $25 per hour, the caregivers charged a total of $44,100 for the 441 days at issue.

    c. The third item on the invoice is for trips to retrieve the appellant's mail. The invoice states that a total of twenty trips were made, at 1.5 hours per trip, for a total (at $25 per hour) of $750. There is no detail as to when the trips were made.

    d. The fourth item on the invoice is for modifications to the home. There is an attached list of specific costs associated with the renovation, resulting in a total of $9,006.42.

7. On February 9, 2011, the appellant wrote a check to her son and daughter-in-law for $57,556.42.

8. On June 21, 2011, a MassHealth long-term care application was filed on the appellant's behalf, seeking coverage as of April 18, 2011.

9. In considering the $57,556.42 payment, which was made during the regulatory look-back period, MassHealth allowed $9,006.42 to account for the cost of the home renovations. MassHealth determined that the remaining $48,550 was a disqualifying transfer.

10. On October 6, 2011, MassHealth denied the application due to a disqualifying transfer of resources in the amount of $48,550. Based on this transfer amount, MassHealth imposed a 177-day period of disqualification between April 18 and October 11, 2011.

11. The appellant was approved for MassHealth long-term care coverage as of October 12, 2011.

12. The son and daughter-in-law's claim that they spent four hours per day on personal care

tasks detailed in the care agreement is credible.

13. The contractual pay rate of $25 per hour was excessive.

14. The wage rate for personal care attendants (PCAs) under MassHealth's PCA program reflects the fair market value of the services provided by the son and daughter-in-law under the care agreement.

    a. Under the PCA union contract, PCAs earned $12.00 per hour as of July 1, 2009.

    b. The PCA wage rate increased to $12.48 as of July 1, 2010.

15. Using the PCA contract rate, the son and daughter-in-law were entitled to a total of $21,432.96 for personal care services.

16. The son and daughter-in-law were entitled to $1,847.04 for transporting the appellant to medical appointments.

17. The son and daughter-in-law are not entitled to any compensation for trips to retrieve the appellant's mail.

18. The services provided by the son and daughter-in-law have a total fair market value of $23,280.

19. The difference between the payment ($48,550) and the fair market value of the services provided ($23,280) is $25,270. This amount represents a disqualifying transfer of resources.

20. The evidence does not support the appellant's claim that she transferred resources exclusively for a purpose other than to qualify for MassHealth.

21. The evidence does not support the appellant's claim that she intended to receive fair market value for the transfer.

Analysis and Conclusions of Law

MassHealth considers any transfer during the appropriate look-back period by the nursing-facility resident . . . of a resource, or interest in a resource, owned by or available to the nursing-facility resident . . . 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). A disqualifying transfer may include any action taken which would result in making a formerly available asset no longer available. 130 CMR 520.019(C).

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. 130 CMR 520.019(F).

In this case, MassHealth determined that the appellant transferred assets when she paid her son and daughter-in-law for services under a personal care contract. Of the $57,556.42 that she paid, MassHealth allowed only $9,006.42 that was linked to home improvements that the son and daughter-in-law made to their home to enable the appellant to move in with them. MassHealth considered the remaining $48,550, paid as compensation for a variety of personal services, to be a disqualifying transfer of resources. See Exhibits 1 and 5. The appellant contends that she did in fact receive fair market value for the full amount transferred (or, at the very least, that MassHealth erred in assigning no value at all to the services she received). In the alternative, she argues that if there was a transfer, it was exclusively for a purpose other than to qualify for MassHealth, and that she also intended to receive valuable consideration for her payment. See 130 CMR 520.019(F); Exhibit 7.

The first issue is whether the appellant did in fact receive fair market value for the payment to the son and daughter-in-law. For reasons discussed infra, I find that the services she received were not worth the $48,550 that she paid. However, I disagree with MassHealth's position that the services had no value – a view that is reflected in its determination that the entire $48,550 payment was a disqualifying transfer. Rather, only the uncompensated value of the transfer – the difference between the amount paid and the value actually received for the services – should be used to calculate the penalty period. See 130 CMR 515.001; Gauthier v. Director of Office of Medicaid, 80 Mass. App. Ct. 777, 788-89 (2011).[3]

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[3] Under 130 CMR 520.007(J)(4), any transaction that involves a promise to provide future payments or services to an applicant 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* (emphasis added). It is fair for MassHealth to question the reasonable enforceability of this contract, which is between the appellant and her own power of attorney. It seems unlikely, under the circumstances, that the appellant would be in a position to sue her son and daughter-in-law for enforcement. At the same time, the promises made under the contract do not appear to be illusory. MassHealth allowed the funds spent to renovate the son and daughter-in-law's home to allow the appellant to move in with them. Furthermore, it seems clear that the appellant did receive significant care and services pursuant to the contract for an extended period of time. See Gauthier, supra at 789-90. As such, I do not see the provisions of 130 CMR 520.007(J)(4) as a basis for according zero value to the contract in this case.

It is therefore necessary to determine the actual value of the services provided by the son and daughter-in-law. According to the invoice, the large majority of the transfer – $44,100 – was for daily personal care tasks such as assistance with dressing, bathing, toileting, meal preparation, and laundry. The son and daughter-in-law indicated that they performed these tasks for exactly four hours every day that the appellant lived in their home (441 days total). MassHealth justifiably takes issue with the "flat allocation" of time per day, questioning "whether it is credible to believe that the applicant required exactly the same number of hours of personal care services for each day, for more than a year." See Exhibit 5. Although the contract required the son and daughter-in-law to keep track of the time spent caring for her, there is no evidence that they kept any records of what they did. Nevertheless, under the circumstances – where the appellant lived in their home and appears to have been primarily dependent on them for her daily needs – the assertion that they in fact performed these tasks is credible. Furthermore, while the use of a flat hourly figure for 441 consecutive days is questionable, I do not find the rate of four hours per day to be unreasonable per se in light of the appellant's needs.[4]

On the other hand, I do agree with MassHealth that the pay rate of $25 per hour, based on the amount charged by local home health agencies, is excessive.[5] MassHealth persuasively argued that the figure quoted by home health agencies would include overhead and administrative fees, and that the individual actually providing the care would be paid far less. However, neither side has offered any evidence as to how much such an individual might earn. In the absence of this important information, it is useful to look to the rate paid to personal care attendants (PCAs) under MassHealth's PCA program.[6] The collective bargaining agreement governing PCA wages set the rate at $12.00 per hour as of July 1, 2009, and increased the rate to $12.48 per hour as of July 1, 2010. See Exhibit 16.[7] As the type of services provided by the son and daughter-in-law

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[4] MassHealth did not argue that the tasks articulated in the care agreement would, if performed, take less than four hours per day.

[5] MassHealth also took issue with the appellant's reliance on home health agencies in Massachusetts, as the care was provided at the children's home in New Hampshire. During the record-open period, the son submitted a rate list from an agency in Amherst, NH, showing a range of rates (between $22 and $40 per hour) depending on the length of visit and type of services required. See Exhibit 14.

[6] PCAs provide assistance with activities of daily living (e.g., transferring, taking medications, bathing, grooming, dressing/undressing, engaging in passive range of motion exercises, eating, and toileting) as well as instrumental activities of daily living (e.g., meal preparation, shopping, laundry, housekeeping, transportation to medical providers, and maintenance of medical equipment). See 130 CMR 422.402.

[7] Information about the Commonwealth's PCA Workforce Council and the collective bargaining agreement with the PCA union are publicly available on the Commonwealth's website at www.mass.gov/pca. See 130 CMR 610.065(A)(6), 610.071(A)(1).

are in line with those typically performed by a PCA, I find these wage rates to be a more accurate reflection of the fair market value of their work under the contract.

Using the PCA contract rate, services for the first 303 days of the 441-day period (September 1, 2009 – June 30, 2010) would be paid at a rate of $12.00 per hour, or $48.00 per day, for a total of $14,544. The remaining 138 days (July 1 – November 16, 2010) would be paid at the higher rate of $12.48 per hour, or $49.92 per day, for a total of $6,888.96. The total due to the son and daughter-in-law for the four hours per day of personal services under this formula is $21,432.96.

The son and daughter-in-law also claimed reimbursement for transportation to medical, dental, and physical/speech therapy appointments. They provided a list of appointments by date, along with the provider name and the number of hours spent. See Exhibit 10. Once again, I find the rate of $25 per hour for this service to be excessive, and instead apply the rates under the PCA contract set forth above. See Exhibit 16. According to the list, the son and daughter-in-law provided a total of twenty-six hours of transportation services between September 1, 2009, and June 30, 2010. At a rate of $12.00 per hour, they would be entitled to $312. For the 123 hours of transportation services provided between July 1 and November 16, 2010, paid at the rate of $12.48 per hour, they can claim an additional $1,535.04. The total due for transportation to medical appointments is $1,847.04.[8]

Finally, the invoice includes a charge of $750 for twenty trips to retrieve the appellant's mail. However, there is no detail as to when these trips were made. More importantly, the contract contains no specific provision under which the son and daughter-in-law may claim compensation for such a service. See Exhibit 8. As such, I find mail retrieval services to be beyond the scope of the contract.

Based on the foregoing, I find that the services provided by the son and daughter-in-law have a total fair market value of $23,280.[9] As the appellant paid them $48,550 for these services, the difference of $25,270 represents a transfer.

The matter then turns to whether this transfer is allowable under either of the two "intent"

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[8] The portion of the invoice which lists the specific medical appointments shows a total number of hours as 148. However, the individual figures add up to 149 hours. See Exhibit 10.

[9] The contract also calls for the appellant to pay room and board of $600 per month, and requires the son and daughter-in-law to include this item on their invoice. See Exhibit 8. Inexplicably, the invoice reflects no such charge. See Exhibit 10. It is not clear whether this omission was deliberate (e.g., whether the son and daughter-in-law opted not to charge the appellant for room and board, whether the appellant paid for room and board from other funds, etc.). In any case, as the transfer at issue did not include payment for room and board, it is not necessary to address the issue any further.

exceptions of 130 CMR 520.019(F): That the transfer was made "exclusively for a purpose other than to qualify for MassHealth," or that the appellant "intended to dispose of the resource at either fair-market value or for other valuable consideration." The appellant bears the burden of establishing her intent to the MassHealth's agency's satisfaction and, under Federal law, must make a heightened evidentiary showing on this issue: "Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred." Gauthier, supra at 785, citing the State Medicaid Manual, Health Care Financing Administration Transmittal No. 64, s. 3258.10(C)(2).

The appellant contends that language in the care agreement suggests that the transfer to the son and daughter-in-law was for the singular purpose of allowing her to remain in the community, and that MassHealth was not a consideration because she never intended to enter a nursing facility. See Exhibit 7. At the outset, it must be pointed out that the care agreement does in fact contemplate the possibility that the appellant would require nursing care, expressing the appellant's intent to live with the son and daughter-in-law "until her death or until her health has deteriorated so much that she requires long-term-care which the Caregivers are no longer able to provide." See Exhibit 8. Additionally, the agreement explicitly invokes the MassHealth transfer regulation, 130 CMR 520.019. Including this reference, apparently to emphasize that the appellant was not thinking about MassHealth eligibility, actually proves the opposite point. It is clear that the appellant was at least aware, at the time of the agreement,[10] of the possibility that she would eventually need to apply for MassHealth long-term care benefits. The facts do not support her contention that the transfer was exclusively for a purpose other than to qualify for MassHealth.

As to claims that an applicant intended to dispose of assets for fair market value or other valuable consideration, once again, verbal statements alone generally are not sufficient. Instead, the individual must "provide written evidence of attempts to dispose of the asset for fair market value, as well as evidence to support the value (if any) at which the asset was disposed." See HCFA Transmittal No. 64, s. 3258.10(C)(1). The appellant here has failed to demonstrate that she intended to get fair market value for her transaction. As set forth earlier, the ultimate transfer figure ($25,270) represents the difference between what the appellant paid her son and daughter-in-law ($48,550) and the fair market value of the services that they provided to her ($23,280). The reason that there is a disqualifying transfer is that the appellant chose to pay her son and daughter-in-law at an excessive hourly rate. Her bare reliance on the rates charged by home health agencies, without regard to what the individuals providing the service would actually receive, was misplaced. Under these circumstances, the appellant has not met her burden of proving that she intended to receive fair market value.

For the foregoing reasons, this appeal is approved in part and denied in part. The matter will be

[10] The appellant was already in the nursing facility by the time of the actual transfer.

remanded to MassHealth to redetermine the period of ineligibility.

Order for MassHealth

Adjust the total amount of the disqualifying transfer from $48,550 to $25,270. Redetermine the period of disqualification in accordance with the amended transfer figure.

Implementation of this Decision

If this decision is not implemented within 30 days after the date hereon, 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.

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.

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Rebecca Brochstein
Hearing Officer
Board of Hearings

cc: Tewksbury MEC