Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	APPROVED	**Appeal Number:**	1503799
Decision Date:	7/20/15	**Hearing Date:**	07/08/2015
Hearing Officer:	Christopher S. Taffe		

Appearances for Appellant:

Appearances for MassHealth:
JoAnn Araujo-Moniz of the Taunton MEC
(MassHealth Representative, in person)

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

APPEAL DECISION

Appeal Decision:	APPROVED	**Issue:**	LTC – Disqualifying Transfer – Look-back Period – Real Estate Transfer – Non-recorded deed
Decision Date:	7/20/15	**Hearing Date:**	07/08/2015
MassHealth Rep.:	J. Araujo-Moniz	**Appellant Reps.:**	
Hearing Location:	Taunton MassHealth Enrollment Center		

Authority

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

Jurisdiction

Through a notice dated March 24, 2015, MassHealth denied Appellant's application for Standard benefits for a Long-Term Care resident (hereafter "LTC benefits") by stating the following reason "*You transferred assets within 60 months of application. Period of ineligibility was determined by taking the total value of assets transferred (est value of property $280,000.00) and dividing by cost of private nursing home ($310.00 a day). Penalty expires 7/24/2017.*" See Exhibit 1 and 130 CMR 520.019. Appellant, through her attorney-in-fact, filed a timely request for a Fair Hearing with the Board of Hearings on March 30, 2015. See Exhibit 1; 130 CMR 610.015(B). Challenging a MassHealth denial of assistance is a valid ground for appeal to the Board of Hearings. See 130 CMR 610.032. The hearing was originally scheduled to occur on May 26, 2015, but was postponed until July 8, 2015 due to a request of Appellant which constituted good cause. See Exhibits 2 through 4; 130 CMR 610.048.

Action Taken by MassHealth

MassHealth imposed a penalty period due to a $280,000.00 transfer of real property which MassHealth believed was a disqualifying transfer.

Issue

Is there sufficient evidence to support Appellant's claim that the $280,000 transfer should not be treated as a disqualifying transfer?

Summary of Evidence

Appellant is a widowed female who was admitted to her current nursing facility in Weymouth, Mass. on December 19, 2014; she has been continuously medically institutionalized since that date. On February 13, 2015, an application was filed with MassHealth on Appellant's behalf; Appellant is currently seeking MassHealth LTC benefits with a retroactive start date of February 6, 2015 to assist with the cost of her nursing facility stay.

On March 24, 2015, MassHealth denied the application by announcing a penalty for LTC benefits due to a disqualifying transfer of $280,000 involving Appellant's former residential home. The denial notice indicated that the penalty period would expire on July 24, 2017.[1]

MassHealth indicated that the transfer in question related to a deed that it received during the application process, which Appellant signed (and had notarized) on January 23, 2015. That 2015 deed reserved a life estate for herself but transferred the remainder interest to her three sons as tenants-in-common for $100 in consideration and was recorded in the Norfolk County Land Court on January 29, 2015. Because this 2015 transaction occurred within the regulatory lookback period, MassHealth assessed the penalty for a potential disqualifying transfer of resources; specifically Appellant did not receive fair market value for this transaction involving an asset of her.

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[1] The denial notice indicated that the number of days was calculated by taking the value of assets transferred ($280,000) and divided it by the regulatory appropriate average private daily rate for nursing facilities in the Commonwealth ($310/day). However, $280,000 ÷ $310/day equals 903.2 days and the penalty announced (February 6, 2015 through July 24, 2017) is only 900 days.
Additionally, the MassHealth documents in Exhibit 6 also include a printout from homes.com showing the Appellant's former community residence with an estimated value of $284,000. It is unclear how MassHealth arrived at $280,000 for the penalty and/or whether a calculation of the value of the remainder interest was done as opposed to the value of the entire fee estate.
Both of these two issues discussed in this footnote however are moot due to the ultimate outcome of this decision.

Appellant's representatives explained that while the deed in question was recorded in 2015, the property had actually been transferred years earlier. Specifically, at some point prior to 2004, Appellant became the sole titleholder of the house which had previously been in the name of Appellant and her sister and before that it was owned by Appellant's ancestors; Appellant herself spent approximately 70 years of her life living in the home. Appellant's late husband was never a title holder to the property, but shortly after his death, the Appellant went to a law office in 2004 to have some legal paperwork done. That law practice was a partnership or association involving Attorney Gray (the current Appeal Representative) and Attorney Hamill. Attorney Hamill is currently in Florida and is no longer formally associated with Attorney Gray.

Appellant's representatives provided testimony that, in September of 2004, Appellant and her three sons met with and retained Attorney Hamill to draft certain documents including a Last Will and Testament, a "Living Will" with instructions on her medical care, a Health Care Proxy, a document creating Power of Attorney in one of her sons, and a Deed which carved out a Life Estate and created a remainder interest for her three sons. Ms. Slicis, a paralegal for Attorney Hamill in 2004 was present at the current hearing, and she testified that these documents would constitute some of the usual paperwork done for basic estate planning requested by certain clients. Copies of the five documents described above, all of which are dated September 14, 2004 and were notarized by Ms. Slicis as of that same date, were produced into the record as parts of Exhibit 5 and 7. Exhibit 7 consists of a copy of the deed dated and signed by Appellant on September 14, 2004 reserving the life estate; this paper in Exhibit 7 was the copy of the paper found by one of Appellant's sons in his paperwork, and was used as the basis for the deed language in January 2015. The three sons all testified that they were at the law office in September of 2004 with their mother and they were all under the impression that the life estate had been created back then. In January of 2015, after their mother's admission, one or two of the sons went to the nursing facility and Ms. Flynn, a nursing facility representative informed them that no such life estate deed had ever been recorded in 2004. Shortly thereafter, on January 22, 2015, two of the sons went to Attorney Gray drafted the new deed, which was recorded in 2015. Attorney Gray stated that he could not draft a "Confirmatory Deed" as the original of the 2004 Quitclaim Deed has never been recorded and was effectively lost. (The paperwork located by the son in Exhibit 7 was presumably a copy he received years ago.) Affidavits from both Attorney Gray and Attorney Hamill were submitted during the application process stating that there was no information as to who was responsible for recording the Deed; the legal files from that time period were stored in the basement of the Quincy law office, but were destroyed 3-4 years ago due to flooding resulting from inclement weather that led to an insurance claim having to been filed by the law office.[2] As a result, the attorney files as to this 2004 transaction are not

[2] Attorney Gray indicated that, after the formal dissolution of the association or partnership with Attorney Hamill, he himself continued to practice law in the same physical location in Quincy. The basement which was used for storage purposes in 2004 is part of Attorney Gray's current office and files belonging to the former association of the two attorneys were presumably kept by Attorney Gray after the partnership dissolution.

available. Ms. Slicis provided testimony that the actual recording duties could have been done in a variety of ways, depending upon the client and his or her wishes, and she is not sure which one applied to Appellant's signature in 2004. Ms. Slicis is no longer employed with Attorney Hamill and/or Attorney Gray and she is not currently a notary, but her presence was requested to verify that she was the notary for the four documents in 2004.

The sons testified that, up until the time of her medical institutionalization and nursing facility admission in 2014, Appellant continued to live at the home from 2004 through 2014 where she had a life estate. Per the terms of the life estate on the deeds available in the record, Appellant remained responsible for the real estate taxes on the property, and thus there are no changes on the town's tax bills or documents like the insurance which would reflect any change in the ownership.

Findings of Fact

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

1. Appellant is a widowed female who was admitted to her current nursing facility on December 19, 2014. (Testimony and Exhibit 6)

2. On February 13, 2015, Appellant filed an application seeking MassHealth LTC benefits. Appellant is currently seeking a retroactive LTC benefit start date of February 6, 2015. (Testimony and Exhibit 6)

3. The only issue preventing eligibility at this point for Appellant is a question as to whether a non-permissible transfer of resources occurred with regard to Appellant's former residence. This led to the denial notice announcing a penalty period of approximately 900 days due to such a $280,000 transfer. (Testimony and Exhibits 1 and 6)

4. As of the beginning of 2004, Appellant was the sole owner and titleholder of her residential home. (Testimony)

5. In September of 2004, Appellant and her three sons retained a lawyer, Attorney Hamill, to assist with the drafting of certain documents including a last will and testament, a power of attorney, a health care proxy, and a living will with instructions regarding medical care. (Testimony and Exhibits 5, 6, and 7)

6. On September 14, 2004, among other documents, Appellant signed a Quitclaim deed for her real residential property, which reserved a life estate for herself but which created a remainder interest for her three sons. (Testimony and Exhibit 7)

7. For some unknown reason, the original of the September 14, 2004 Quitclaim deed was never recorded with the Norfolk County Land Court and has been presumed to be lost. (Testimony and Exhibit 7)

    a. The law office which assisted with the deed had records related to these 2004 destroyed in 2010 or 2011 due to a flood. (Testimony)

8. In January of 2015, it was discovered by Appellant's family that the September 14, 2004 Quitclaim deed had never been recorded. They contacted the current attorney who drafted a new deed in an attempt to effectively replace the lost deed, and this new deed was recorded in the Norfolk Land Court on January 29, 2015. (Testimony and Exhibits 5 and 6)

Analysis and Conclusions of Law

With regard to the alleged disqualifying transfer, to qualify for MassHealth LTC coverage and benefits, the assets of a medically institutionalized applicant with no spouse, such as Appellant, cannot exceed $2,000.00 and must conform to the regulatory restrictions about past use of such resources. See 130 CMR 520.003(A)(1); 130 CMR 520.016(A) and 130 CMR 519.006. The MassHealth Financial Eligibility regulations in 130 CMR 520.000 are quite specific as to: (1) how money and resources beyond the $2,000 limit (which may otherwise be excess assets) can be spent both before and after the date when Appellant first applies for LTC assistance, (2) how an Appellant may spenddown any excess assets and subsequently qualify for MassHealth benefits, and (3) the effect that such activity during certain timeframes may have on eligibility and any potential penalty periods. If resources in excess of the program limit are (or were) available and owned by an applicant during a relevant time period, then a strong argument can be made that, in order to comply with the general intent regarding limited Medicaid benefits, such excess funds should not have been transferred to others or used for improper purchases. Instead, such available resources should have been kept and/or spent on the applicant's long-term skilled nursing care or on other approved medical or personal needs of the applicant before that same applicant could turn to the state Medicaid program and expect to receive financial assistance. Such assistance obviously includes asking the Commonwealth's MassHealth program to step in and assist with payment for an applicant's care (1) when those formerly possessed resources of the applicant are no longer available to the applicant, or (2) when those once extra resources have been transferred in a manner not permitted by the regulations. Essentially, regulations are drafted in a way to create incentives to minimize improper spending or transferring of the resources by indicating that the state will not indirectly subsidize all such expenditures.

130 CMR 520.018 states in relevant part:

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: *Definition of Terms* **who transfers or whose spouse transfers countable resources for less than fairmarket value during or after the period of time referred to as the lookback period**....

Some relevant portions of 130 CMR 520.019(A), (B) and (C) (titled) read as follows:

130 CMR 520.019: Transfer of Resources Occurring on or after August 11, 1993
(A) Payment of Nursing-Facility Services. The MassHealth agency applies the provisions of 130 CMR 520.018 and 520.019 to nursing-facility residents as defined at 130 CMR 515.001: *Definition of Terms* requesting MassHealth agency payment for nursing-facility services provided in a nursing facility or in any institution for a level of care equivalent to that received in a nursing facility...
(B) LookBack Period. Transfers of resources are subject to a lookback period, beginning on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard. This period generally extends back in time for 36 months. **For transfers of resources occurring on or after February 8, 2006, the period extends back in time for 60 months. ...**
(C) Disqualifying Transfer of Resources. The MassHealth agency considers **any transfer during the appropriate look-back period by the nursingfacility resident or spouse of a resource, or interest in a resource, owned by or available to the nursingfacility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) for less than fairmarket 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...
(Emphasis added.)

The five year look back period rule in 130 CMR 520.019(B) suggests that transfers of resources in which occurred on after February 10, 2010 (5 years prior to the application date) are subject to possible disqualifying transfer analysis. In this case, the issue involves the transfer of the remainder interest of Appellant's home. Essentially, Appellant's side argues that this real estate transfer involving the reservation of a life estate and a remainder interest created and given to Appellant's children occurred more than 10 years ago, and that the transfer was never recorded back in 2004 due to some unknown but unfortunate error. Thus, Appellant argues that this transfer should not be subject to any disqualifying transfer possibility. In contrast, MassHealth looked at the deed which the agency received during this application process, which was recorded in January 2015, and the agency somewhat understandably concluded that the nominal transfer, made without receipt of any fair market value, occurred during the look back period.

Chapter 183, section 1 of the Massachusetts General Laws states in part the following:

> *A deed executed and delivered by the person, or by the attorney for the person, having authority therefore, shall, subject to the limitations of section four, be sufficient, without any other act or ceremony, to convey land.*

In a notable Massachusetts Appeals Court decision involving the conveyance of real property, it was stated that *"Delivery occurs where the grantor intends the deed to effect a present transfer of the property conveyed, and the grantee assents to the conveyance."* See Graves v. Hutchinson, 39 Mass.App. Ct. 634, 659 N.E.2d 1212, 1216 (1996) (abrogated on other grounds). The law of the Commonwealth does require for such transfers to be effective, the basic elements involved in a gift [such as (1) intent, (2) delivery, and (3) acceptance] must be present.

Based on the totality of evidence, I am persuaded that Appellant did effectively transfer the remainder interest of her property (after reserving a life estate for herself) in 2004 as opposed to 2015. At hearing, there was credible, consistent and plausible testimony presented in support of that conclusion. Specifically, there was not only testimony from the family and a copy of the unrecorded deed found by one of the sons purportedly from 2004, but there was also an explanation of the events in 2004 which were corroborated by the former paralegal and notary for the 2004 deed; such individual would appear to be a less vested and presumably more unbiased witness. Furthermore, the copy of the purported lost deed provided in Exhibit 7, which was discovered by the Appellant's son in his files, has signatures and a style that are consistent with other legal documents which were dated and notarized in 2004, as opposed to the deed in 2015 where the Appellant's signature appears to show more signs of shakiness than would be typically associated with some one of Appellant's current age. Perhaps more importantly, there is little evidence in the record suggesting that there was any nefarious attempt to create and illegally backdate a document in an attempt to subvert the regulatory look-back period. Instead, the chronology of events testified to at hearing, and how the Appellant used her life estate rights from 2004 until her nursing facility admission, are both credible and logical.[3]

As stated above, the law of conveying real property in Massachusetts doesn't require a deed to be recorded to make a transfer effective. While timely recordings with the appropriate county Registry of Deeds are generally done as good practice to prevent issues with third-party claims involving subsequent transfers by serving as prima facie evidence of the required legal elements for a transfer of land, in this case, it appears that the original of the 2004 deed was simply lost and/or never recorded due to some individual's carelessness. Nevertheless, I will accept the idea that the transfer of the remainder interest in Appellant's property occurred in 2004 and, therefore there was no transfer in 2015 of $280,000 of the entire property.[4] Instead I will accept the

[3] Post-hearing, I also reviewed abstracts the Norfolk Land Court's records for the residential property post-hearing and I found nothing between 2004 and 2015 in the way of mortgages, encumbrances, or other transfers which would be inconsistent with the history presented by the witnesses for Appellant at hearing. Although I personally have presided over certain Fair Hearings where there is some evidence to suggest that an individual or family member may be backdating or forging a past transaction in an effort to get LTC eligibility while passing certain resources on to the next generation, this does not appear to be one of those appeals.

[4] Even if there was such a transfer, it remains unclear why the MassHealth notice made reference to using the total value of the estimated of the entire property in 2015, as opposed to just using some actuarially sound and properly calculated portion which carved out the value of the transferred remainder interest. See paragraph 2 of fn. 1, *supra.*

explanation that what was "transferred" in 2015 was a deed document whose purpose was to clarify the historical situation, and thus the 2015 deed cannot be the basis for a finding of a transfer of resources worth $280,000.

Based on the above, I conclude that there is no disqualifying transfer and this appeal must be APPROVED. As there are no other issues preventing eligibility at this time, Appellant is entitled to receive an approval notice in accordance with the Order below. In addition, as is appropriate, such approval may be subject to MassHealth's ability to lien the life estate interest retained by Appellant in the residential property in accordance with 130 CMR 515.012.

Order for MassHealth

Rescind the March 24, 2015 denial notice, and, within 30 days of the date of this decision, send to Appellant and all parties entitled to such notice per 130 CMR 516.007(C) an approval notice with no disqualifying transfer or penalty period. As this approval notice will contain the first agency calculation of both the Patient Paid Amount obligation and the benefit start date for the Appellant, the required approval notice must have appeal rights. Subsequent to the approval determination, MassHealth may also lien the life estate interest in the real property if permitted by 130 CMR 515.012.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact the Appeals Coordinator at your MassHealth Enrollment Center who is identified below. 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.

Christopher S. Taffe
Hearing Officer
Board of Hearings

cc: Justine Ferreira, Appeals Coordinator @ Taunton MEC