Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

[redacted]

Appeal Decision:	Denied	**Appeal Number:**	2306083
Decision Date:	10/11/2023	**Hearing Date:**	08/22/2023
Hearing Officer:	Casey Groff, Esq.		

Appearance for Appellant:

[redacted]

Appearance for MassHealth:
Jamie Lapa, Springfield MEC

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:	Denied	**Issue:**	Eligibility for LTC; Disqualifying Transfer or Resources
Decision Date:	10/11/2023	**Hearing Date:**	08/22/2023
MassHealth's Rep.:	Jamie Lapa	**Appellant's Rep.:**	[redacted]
Hearing Location:	Board of Hearings (Remote)	**Aid Pending:**	No

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 June 8, 2023, MassHealth denied Appellant's application for long-term care benefits due to a finding that Appellant made a disqualifying transfer of resources and imposed a period of ineligibility from March 8, 2023 to September 9, 2023. See Exhibit (Exh.) 1; 130 CMR §§ 520.018, 520.019. On June 29, 2023, Appellant, through her son/power of attorney (POA), filed a timely notice of appeal to challenge the MassHealth action. See Exh. 2. Denial and/or suspension of assistance is valid grounds for appeal. See 130 CMR 610.032.

Action Taken by MassHealth

MassHealth imposed a period of ineligibility due to finding that Appellant made a disqualifying transfer of resources.

Issue

The appeal issue is whether MassHealth correctly determined that Appellant made disqualifying transfers of resources, and on this basis, correctly imposed a period of ineligibility for long-term care benefits.

Summary of Evidence

A MassHealth representative appeared at the hearing telephonically and provided the following information by testimony and through documentary evidence: Appellant is over the age of 65 and was admitted to a nursing home on [redacted] 2023. On December 29, 2022, MassHealth received an application, submitted on behalf of Appellant, seeking MassHealth long-term care (LTC) coverage with a requested benefit start date of March 8, 2023. On June 8, 2023, MassHealth denied Appellant's application for benefits due to a determination that Appellant "recently gave away or sold assets to become eligible for MassHealth long-term care services..." See Exh. 1, p. 3. As a result of the disqualifying transfers, MassHealth imposed a period of ineligibility from the requested start date of March 8, 2023 through September 9, 2023. See id.

The MassHealth representative explained that the period of ineligibility was based upon two large transfers from Appellant's checking account totaling $79,000. Bank records show that on [redacted] 2021, Appellant deposited a single check into her checking account in the amount of $99,817.84. See Exh. 4, p. 8. MassHealth indicated that this check was an inheritance Appellant received from her stepmother's estate. On September 29, 2021, Appellant made an electronic transfer of $50,000 into a savings account owned by her son, [redacted] Id. The following day, on September 30, 2021, a second transfer was made to her son in the amount of $29,000. Id.

The MassHealth representative testified that during the application process, [redacted] who is also Appellant's power of attorney (POA), submitted an affidavit and accounting sheet to explain that Appellant made the transfer as retroactive rental payments. In the affidavit, [redacted] attested to the following, in relevant part:

> ….
>
> 4) Prior to my mother's admission to [the nursing facility], she resided with me from [redacted] 2004 through [redacted] 2022. We discussed and agreed that she would pay rent to me at the monthly rate for apartments in the surrounding area, which ranged between $1,400.00 - $1,750.00.
>
> 5) Due to my mother's monthly income and expenses, the monthly rent payment to me resulted in a shortfall of between $600.00 - $1,700.00 each month (see attached spreadsheet).
>
> 6) On [redacted] 2021, my mother received an inheritance from [the estate of] her stepmother…

> 7) On September 29, 2021, I transferred $50,000.00 and September 30, 2021, I transferred an additional 29K of the total 99K to my account…as payment for the rent shortfall totaling $145,400.00 for the period [redacted] 2004 through [redacted] 2020.
>
> 8) The transfers outlined above were not made for the purpose of qualifying for MassHealth benefits. As such, these transfers should not incur any disqualification period relative to MassHealth benefits for my mother.

See Exh. 4, p. 10.

In support of these statements, Appellant provided MassHealth with a ledger (as referred to in paragraph 5 of his affidavit) that he purportedly kept for purposes of tracking the monthly rental payments his mother made to him between [redacted] 2004 and [redacted] 2020 when she occupied one of two units in the duplex he owned. Id. at 12-16. In addition, the ledger included rental payments Appellant made to her son between 8/1/2021 and 11/1/2022– which mainly occurred after the $79,000 transfer - when they moved into a single-family residence. See id. The ledger, which [redacted] created using a computer-generated spreadsheet, lists four columns consisting of: 1) the monthly rental period, 2) the "rent paid" by Appellant for that month, 3) the "rent underpaid" amount, which was the purported fair market value (FMV) for the unit and what Appellant's son claimed was the "agreed-upon" rental amount, and 4) the "debt" Appellant owed for that month's rent, specifically the difference between the amounts listed in the "rent underpaid" and the "rent paid" columns. In summary, the ledger reflected the following:

- Between August 2004 and June 2011, Appellant primarily paid [redacted] $800 per-month for rent, except for two months where she did not pay any rent, five months where she paid slightly less than $800, and one month where she paid $1,000. In this seven-year period, the "rent underpaid" column (the purported FMV and agreed-upon rent) ranged from $1,400 to $1,550.

- From July 2011 through May 2015, Appellant made consistent rental payments to [redacted] of $1,000 per month with the adjacent column showing a FMV between $1,550 and $1,650.

- Between June 2015 and July 2020, Appellant primarily paid $750 per-month in rent except for six months where she paid less than $750, one month where she paid no rent, and seven months where she paid $1,000. The purported FMV and agreed-upon rent during this period ranged between $1,650 and $1,750.

- In the final four months of renting the unit from her son, i.e., [redacted] 2020 to [redacted] 2020, Appellant made consistent monthly rental payments of $1,250, which per the spreadsheet, indicate a FMV at that time of $1,750.

- The "debt" Appellant accrued from unpaid rent between [redacted] 2004 and [redacted] 2020,

(i.e., the difference between the amount paid and the FMV) totaled $145,400.00.

- Upon moving into the new residence Appellant paid [redacted] $1,000 per-month in rent between August 1, 2021 and November 1, 2022, with the "rent-underpaid" column showing the agreed-upon FMV of the property at $1,250, resulting in a debt of $4,000, for a combined total debt of $149,400.00.

See id.

The MassHealth representative testified that the affidavit and submissions did not demonstrate that the transfer of $79,000 in September of 2021 was made as past-due rent. There was no signed agreement of what Appellant agreed to pay for rent or the actual amount of rent that was expected to be owed. Therefore, MassHealth treated the transfer as a disqualifying transfer of assets.

To calculate the period of ineligibility, MassHealth divided the total disqualifying transfer amount of $79,000 by the average daily nursing home cost in Massachusetts of $427. This resulted in a 186-day period of ineligibility beginning from the requested start date of March 8, 2023, through September 9, 2023.

An attorney appeared on behalf of Appellant, as well as [redacted] and his long-time partner, [redacted] The attorney first acknowledged that Appellant did not dispute the facts as stated by MassHealth and that the basis for appeal turned on the issue of Appellant's intent when transferring a portion of her inheritance to her son. Citing 130 CMR 520.019(F), counsel argued that a period of ineligibility should not be imposed when a transfer was made for a purpose exclusively other than to qualify for MassHealth or if the intent was to dispose of the resources at fair market value. Here, Appellant's full intent in making the transfer was to pay her son the outstanding balance of rent. Specifically, the two had a long-standing mutual agreement that [redacted] would provide the entire unit of the duplex at a rental rate consistent with the applicable prevailing FMV for the property at the given time. For example, when he first bought the duplex in August 2004, the agreed upon rental rate was $1,400 – the prevailing FMV for the property in 2004 – and thus the amount he would have received if renting it to a third party. The lower rental payments that Appellant made, as reflected in the ledger, do not represent the agreed-upon rate, but the amount that [redacted] was willing and able to subsidize while Appellant paid off other outstanding debts, medical bills, and utilities.

To demonstrate that the figures under the "rent underpaid" column reflected the FMV of the unit, counsel submitted into evidence two listings of comparable properties, which she explained where located in the same town where Appellant resided. See Exh. 5 at 10. The two listings, which comprised a single page within Appellant's submission, included the street addresses and a single black and white picture of each unit, with rental rates of $1,595 and $1,895, respectively. The dates of the listings were not identified on the page, but it was suggested that the listings were recent and correlated with the fair rental values of the unit occupied by Appellant at $1,400.00

and $1,750.00.

Counsel further highlighted the fact that no lawyers were involved in the rental arrangement between Appellant and her son. This was an agreement between two family members and because of this, the two never signed a written contract to otherwise establish the agreed-upon rate. They did, however, have a valid oral contract such that if, and when, Appellant came into money or became more financially stable, she would pay the unpaid balance of rent. The ledger reflects the deficits that accrued over the course of the rental period.

Counsel next referred to Appellant's documentary submission that was entered into evidence as Exhibit 5. The submission included a second updated version of the original ledger sent to MassHealth (as referred to in Exh. 4, pp. 12-16). See id. at 4-8. The updated ledger, which still included the same rental payment information as the initial version, added two new categories of debts Appellant owed to [redacted] consisting of (1) outstanding payment for caretaking taking services provided by [redacted] and his partner and (2) itemized expenses for "Misc. Items" [redacted] made on behalf of Appellant that had not been repaid. Id. According to counsel and as reflected in the ledger, [redacted] and his partner provided Appellant with three hours of "cleaning & errand" services per week at an agreed upon rate of $10 per-hour, which equated to $120 per month - from August 2004 through November 2021. Id. Each line item under this category showed the full $120 balance for each month remained outstanding; meaning, Appellant had not made any past payments for "cleaning & errand" services received, resulting in a total debt of $24,600.00. The second additional category containing "Misc. Items," lists six purchases [redacted] made on behalf of his mother from February 2005 through January 2018, including a new exhaust, laptop, elliptical, TV, refrigerator, and kindle, which totaled $6,942.00. None of the receipts for the purchases were included in the submission. The total combined debts reflected in the spreadsheet, including the debt for rent, came to $184,942.00. Id.

According to counsel, the purpose of this spreadsheet was to demonstrate the totality of care given, and expenses incurred, by [redacted] on behalf of his mother to ensure his mother/Appellant – who had significant mental health challenges and physical issues - could live safely and independently. Counsel argued that [redacted] was an exceptionally dedicated son who worked through an extremely difficult situation to care for Appellant, but in doing so, suffered personal relationships, job advancement, and significant financial hardship. The ledger was offered as evidence that the payment of $79,000 was actually a small percentage of the total debt owed to her son.

Next, [redacted] who appeared at the hearing, provided a detailed history of his mother's mental health difficulties and the efforts he made to take care of her when she was unable to properly care for herself. [redacted] explained that his mother, who had a Ph.D. and CPA degree and was a [redacted] had a long history of [redacted] with her first [redacted] occurring around 1990. She spiraled into depression, was denied tenure, began frivolously spending money, and ultimately became unemployed and in significant debt. In the

early 2000's, [redacted] took a leave of absence from his job at [redacted] to purchase a home for his mother and get her settled; however, she was ultimately unable to maintain the home on her own. In 2004, [redacted] sold his home, purchased a large duplex allowing his mother to occupy one unit so that he could help care for her by residing in the neighboring unit. Appellant continued to have significant mental health difficulties and "shut herself in." Around this time, [redacted] helped Appellant purchase an annuity with funds from her 401K and helped her apply for social security income. With the income from her annuity, which ranged from around $1,000 to $1,244 per month and her social security income, Appellant had a stable but fixed income that allowed her to pay for living expenses, including rent, utilities, and medical expenses. At the property, he assisted in equipping her unit with a ramp, grab bars and a walk-in-tub.

[redacted] explained that he made a deal with his mother when she moved in; that he would subsidize her rent under the expectation that if she ever came into money, such as inheritance, she would repay the balance of the subsidized rent. In 2004, when she started paying rent, he created the ledger, as reflected in Exhs. 4 and 5. [redacted] testified that he would update the spreadsheet periodically to keep track of the amounts Appellant paid and the amounts owed – it was a "living spreadsheet."

[redacted] testified that each year, around Christmas and New Years, he and Appellant would review the spreadsheet, which showed not only the rent she paid, but the "agreed-upon" rates, which were consistent with rent of comparable properties in the area. [redacted] testified that they next would review her income and budget and assess what amount of the actual rental rate she could afford. [redacted] stated that at that time, he made a decent living and could afford to subsidize her, as long as she agreed to maintain her finances and stay properly medicated. In the following years his mother became more ill and forgetful, she could no longer drive, had no depth perception and poor coordination, and for a period of time she was believed to have [redacted] although this was later deemed a misdiagnosis.

[redacted] testified that in 2015, he changed jobs so that he could work closer to home and be more available to care for his mother. The new position, however, did not work out and his career track has not moved up since then. In 2020 he could no longer afford the duplex and sold it to a buyer, who agreed to rent it back to them for a year while he looked to purchase a new residence. In August of 2021, he purchased a less expensive single-family home that allowed Appellant to still have an "in-law suite" that consisted of her own bedroom and bathroom. Again, [redacted] installed handicap ramp access, grab-bars, and a lift chair to make the house accessible to his mother.

[redacted] testified that in September 2021, after Appellant received the unexpected inheritance from her late stepmother, he made sure that Appellant complied with her end of their rental agreement to pay the outstanding balance. [redacted] who was also listed on his mother's account, was with Appellant to help her make the online transfers totaling $79,000 into his account. While Appellant was initially "not happy" with making the transfers, she understood their long-standing agreement and ultimately satisfied her end of the promise. Because Appellant wanted to retain some of the funds for future needs, she kept the remaining $20,000 inheritance for herself. [redacted] testified that despite

her mental health, Appellant was lucid at the time the transfers were made and noted that her "dementia didn't set in until we moved [to the new house]."

Finally, [redacted] testified that around September of 2021, they were not contemplating Appellant's need for LTC or nursing facility assistance. His agreement was always to take care of her at home for as long as he could. At that time, he had a more flexible schedule as he was doing consulting work from home. When asked about her state of health at the time of the transfer, [redacted] explained that she would have been about [redacted] years old and was "not particularly needy." He explained that she was mostly depressed and living in bed; she was able to make frozen meals and get prepackaged foods from the kitchen, but unable to stand for more than a few minutes to cook; she walked slowly with a walker; she was fearful of falling backwards due to balance issues; she was incontinent but independent enough to change her diapers. [redacted] testified that it was not until [redacted] of 2022 that her health began to rapidly decline. She was hospitalized for having overdosed on medications, and following her discharge, she was re-hospitalized with covid-19. Upon discharge, her state of health was poor, her dementia was advanced, and she was confused. After a final incident at home, she returned to the hospital and from there was admitted to the nursing facility in [redacted] 2023.

Also appearing at the hearing on behalf of Appellant, was [redacted] partner, [redacted]. [redacted] testified that she works as a licensed social worker and that she began her relationship with [redacted] in 2010. At the outset of the relationship, it was clear how much of a commitment it was to take care of Appellant. She reiterated that she and [redacted] would provide at least 3 hours per-week of caretaking services to Appellant, including errands, shopping, and cleaning. She noted that [redacted] had a previous marriage that ended in divorce shortly after he and his then-wife moved into the duplex with Appellant. She described that Appellant was paranoid, delusional, and very difficult to live with. While she did not come into their lives until 2010, she was aware that they would review finances and rent on an annual basis around the new year. She would often hear from [redacted] how Appellant was paying less than she should have been. According to [redacted] no one had any expectation that Appellant would come into money or receive an inheritance. The possibility of such an event, however, was always recognized such that the two had a clear oral agreement that if Appellant were to come into money, she would use it to repay her son. When she did eventually receive an inheritance, Appellant was initially not happy about having to transfer it, but ultimately made good on her promise. She stated that Appellant was fully capable of agreeing to the transaction, noting that despite her mental illness, she had been a CPA accountant and was lucid and aware of her obligation. She explained that [redacted] "gave up half his life" to care for his mother, and in doing so he has sacrificed his health, relationships, and career advancement.

Findings of Fact

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

1. Appellant is over the age of 65 and was admitted to a nursing home on [redacted] 2023.

2. Between 2004 through 2020 Appellant's son rented a unit of his duplex to Appellant; there was no written rental agreement.

3. During the rental period, Appellant made monthly rental payments to her son at amounts that are reflected in Exh. 4, pp. 12-16.

4. On [redacted] 2021, Appellant received an inheritance from her stepmother's estate in the amount of $99,817.84, which was deposited into her checking account.

5. Pursuant to two online transactions on [redacted] of 2021, Appellant, with [redacted] present, transferred a total of $79,000 from her checking account into [redacted] savings account.

6. On December 29, 2022, MassHealth received Appellant's application for long-term care coverage with a requested benefit start date of March 8, 2023.

7. As of the application date, the average daily private rate for a nursing home cost in Massachusetts was $427.

8. On June 8, 2023, MassHealth denied Appellant's application for benefits due to a determination that Appellant made a disqualifying transfer of resources in the amount of $79,000.

9. As a result of the disqualifying transfer, MassHealth calculated a period of ineligibility beginning on the requested start date of March 8, 2023, through September 9, 2023.

10. During the application process, Appellant's son provided MassHealth with a written affidavit stating the following:

> ….
> 4) Prior to my mother's admission to [the nursing facility], she resided with me from [redacted] 2004 through [redacted] 2022. We discussed and agreed that she would pay rent to me at the monthly rate for apartments in the surrounding area, which ranged between $1,400.00 - $1,750.00.
> 5) Due to my mother's monthly income and expenses, the monthly rent payment to me resulted in a shortfall of between $600.00 - $1,700.00 each month (see attached spreadsheet).
> 6) On [redacted] 2021, my mother received an inheritance from [the estate of] her step-mother…
> 7) On September 29, 2021, I transferred $50,000.00 and September 30, 2021, I

transferred an additional 29K of the total 99K to my account…as payment for the rent shortfall totaling $145,400.00 for the period [redacted] 2004 through [redacted] 2020.
8) The transfers outlined above were not made for the purpose of qualifying for MassHealth benefits. As such, these transfers should not incur any disqualification period relative to MassHealth benefits for my mother. See Exh. 4, p. 10.

Analysis and Conclusions of Law

To qualify for MassHealth long-term care coverage, the assets of the institutionalized applicant cannot exceed $2,000.00. See 130 CMR 520.016(A). In determining whether an applicant qualifies for benefits, MassHealth will assess whether he or she has transferred any resources for less than fair market value (FMV). If the individual or their spouse has made a transfer for less than FMV, the applicant, even if "otherwise eligible," may be subject to a period of disqualification in accordance with its transfer rules at 130 CMR §§520.018 520.019. MassHealth's "strict limitations on asset transfers," which were adopted pursuant to federal law, are intended to "prevent individuals from giving away their assets to their family and friends and forcing the government to pay for the cost of nursing home care." See Gauthier v. Dir. of the Office of Medicaid., 80 Mass. App. Ct. 777, 779 (2011) (citing Andrews v. Division of Med. Assistance,68 Mass. App. Ct. 228, 229, (2007).

With respect to transfers of resources, regardless of the date of transfer, MassHealth provides the following, in relevant part:

> The MassHealth agency will deny payment for nursing facility services to an otherwise eligible nursing-facility resident … 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.

See 130 CMR 520.018(B)

The "look back period", referred to in § 520.018(B), above, is sixty months, or 5-years, before the first date the individual is both a nursing facility resident *and* has applied for, or is receiving, MassHealth Standard.[1] See 130 CMR 520.019(B). MassHealth will deem the individual to have made a "disqualifying transfer" if it finds that during the look-back period, the individual (or their spouse) transferred resources for less than FMV, or, if they have taken any action "to avoid receiving a resource to which the resident or spouse would be entitled if such action had not been taken." 130 CMR 520.019(C). If it is determined that a resident or spouse made a disqualifying

[1] Effective February 8, 2006, the look-back period for transfer of assets was extended from 36 months to 60 months and the beginning date for a period of ineligibility will be the date the applicant would otherwise be eligible or the date of the transfer, whichever is later. See MassHealth Eligibility Letter 147 (July 1, 2006)

transfer or resources, MassHealth will calculate a period of ineligibility in accordance with the methodology described in 130 CMR 520.019(G).

The transfer provisions also have several exceptions to the general rule governing disposition of assets, which are detailed in § 520.019(D) (permissible transfers), § 520.019(J) (exempted transfers), and § 520.019(F) (exemptions based on intent). See 130 CMR 520.019(C). In the instant case, the only applicable exception, and the sole regulatory exception raised by Appellant at hearing, is found in 130 CMR 520.019(F), which states, the following [2]

....

(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.

130 CMR 520.019 (emphasis added).

In this case, MassHealth imposed a period of ineligibility based on two online transfers totaling $79,000 from Appellant's bank account (collectively "the transfer"), to her son, [redacted] both of which occurred in September of 2021 and were within the 5-year look-back period.[3] The only explanation for the transfer that was offered is through the personal recounting of [redacted] regarding a payback arrangement he established with his mother. [redacted] explained that starting in 2004 he agreed to subsidize Appellant's rent, upon the condition that if Appellant ever came into money, she would repay [redacted] the remaining balance of rent that he would have received had she been capable of paying him the actual FMV for the unit. In support thereof, [redacted] submitted what he referred to as a "living spreadsheet" – an electronic document that he created and maintained that allegedly reflected their rental arrangement. While the first column of the spreadsheet captured the monthly rental payments Appellant made between 2004 and 2020, the second column, entitled "rent underpaid," purported to represent the actual rental rates the two agreed to and which was consistent with the prevailing FMV for the unit. The third column, which

[2] Appellant's representatives did not argue that that the transfer was either "permissible" under 130 CMR 520.019(D) or "exempted" under 130 CMR 520.019(J), nor was any evidence presented to suggest these exceptions would apply to the transfer at issue.

[3] Evidence indicated that the five-year look-back period started on [redacted] 2023 – the date by which Appellant was both a resident of a nursing facility *and* had already applied for MassHealth benefits. Thus, a transfer of resources made in September 2021 was within the five-year look-back period.

captures the difference in amounts between the two columns represents Appellant's debt to [redacted] which, her representatives asserted, served the basis for the retroactive transfer of $79,000 following her receipt of an unexpected inheritance.

In determining whether the transfer of $79,000 was a disqualifying transfer, the first question is whether Appellant made a transfer of resources for less than FMV. In requiring state Medicaid agencies to adopt the federally mandated transfer regulations, the Centers for Medicare & Medicaid Services (CMS), formerly Health Care Financing Administration Transmittal (HCFA), published mandatory instructions, now complied in the federal agency's State Medicaid Manual (SMM) which included the following instruction for making determinations on whether a transfer was made for less than FMV:

> 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, [CMS] 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.***

See SMM, Department of Health and Human Services (DHHS) HCFA, Transmittal No. 64, § 3258.1(A) (11-94) (emphasis added).[4]

In applying MassHealth's transfer regulations and the federal mandatory instructions to the present case, Appellant has not successfully demonstrated that MassHealth erred in concluding the transfer of $79,000 was made for less than FMV. See 130 CMR §§ 520.018(B), 520.019(B). Here, there was no evidence that Appellant ever made a contemporaneous payment at the alleged "agreed-upon" FMV rate, nor does the record reflect that Appellant ever made a retroactive payment for this debt prior to September 2021.[5] In accordance with the federal

[4] The SMM is a compilation of federal resources and procedural material needed by States to administer the Medicaid Program. The instructions provided therein are CMS's "official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies." See SMM, Foreword § B(1); see also 130 CMR § 515.002(B).

[5] Moreover, Appellant did not sufficiently demonstrate that the amounts in the "rent underpaid" column, were in fact consistent with the actual FMV at the time. There was little detail provided on how and when [redacted] added these figures to the spreadsheet. Additionally, the rental listings Appellant submitted as proof of the unit's FMV were undated and lacked any substantive detail to show they were comparable to Appellant's rental unit.

instruction, MassHealth must presume that services provided for free at the time (in this case, use of property at a subsidized rent) were intended to be provided without compensation. To rebut this presumption, the individual must provide tangible evidence, such as a payback arrangement in writing, at the time the services were provided. See SMM, § 3258.1(A). Here, no such evidence exists. It is undisputed that the parties never put the alleged agreement in writing or otherwise memorialized Appellant's agreement to pay rent for the unit at a higher rate than what she actually paid. Moreover, the ledger, while helpful in assisting [redacted] detail his version of events, does not constitute "tangible" evidence as contemplated by CMS. Rather, it is a self-created and self-maintained document that offers no probative value as to whether Appellant consented to the "rent underpaid" rates or terms of payback, nor does it offer evidence of her intention when making the 2021 transfer. All the ledger demonstrates, is what Appellant actually paid each month for rent. Where the transaction history shows that [redacted] accepted the rent Appellant actually paid, and absent a written payback agreement to establish the payments were subject to any caveat or condition, MassHealth correctly determined that Appellant's subsequent payment to [redacted] was a transfer for less than FMV.

At hearing, counsel explained that the absence of a written contract was understandable given that this was an agreement between two family members. It is not solely the absence of a written agreement that is problematic, however, but also the lack of clear parameters surrounding the agreement. Other than testimony that Appellant and her son would review the ledger at the beginning of each year, there were no details to indicate when the two definitively entered the agreement, what the terms would be, how much debt Appellant agreed to pay or whether it would be a percentage of the money she potentially was to come into. While counsel correctly asserts that no lawyers were involved in the transaction, both parties were well-educated with careers specializing in finance and accounting. If the two truly desired an enforceable agreement that would require Appellant to repay rent if and when she became capable, it would seem reasonable, especially given the parties' backgrounds, to either execute a contract, or at a minimum, clarify any ambiguities with more specific terms on repayment. It is for this reason that MassHealth deems a resource transfer made by an applicant in exchange for a future performance a "disqualifying transfer" as such agreements lack an ascertainable fair market value. See 130 CMR 520.007 (J)(4).[6]

Counsel argued that even if the transfer was not made at FMV, Appellant should not be penalized for having made the transfer because she meets the "intent" exceptions listed 130 CMR 520019(F); specifically, that the transfer was made exclusively for a purpose other than to qualify

[6] This provision states in full that "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." 130 CMR 520.007(J)(4).

for MassHealth, or that she intended to dispose of the resource at either FMV or for other valuable consideration. CMS has published instructions to assist agencies in interpreting and applying this specific exemption from the disqualifying transfer rules, which include, the following:

> 1. Intent to Dispose of Assets for Fair Market Value or for Other Valuable Consideration. … In determining whether an individual intended to dispose of an asset for fair market value or for other valuable consideration you should require that the individual establish***, to your satisfaction, the circumstances which caused him or her to transfer the asset for less than fair market value. Verbal statements alone generally are not sufficient. Instead, require the individual to 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.***
>
> 2. Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid. --Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. ***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***.

See SMM, DHHS-HCFA, Transmittal No. 64, § 3258.10(C).

Citing the above provision, the Massachusetts Appeals Court has recognized that "federal law mandates a heightened evidentiary showing on [the issue of demonstrating intent when making a transfer for less than fair market value." See Gauthier, 80 Mass. App. Ct. at 785-786.

Addressing the first "intent" exception listed above, which correlates to subpart (2) of § 520.019(F) in the MassHealth regulation, Appellant failed to demonstrate that she *intended* to dispose of assets for FMV *or other valuable consideration*. According to CMS, "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." See SMM § 3258.1(A)(2). This exception allows applicants to avoid a disqualifying period for a transfer for less than FMV, *if* the individual demonstrates that their intention was to transfer assets at FMV or other valuable consideration and there has been satisfactory evidence to show the circumstances that caused the transfer. As stated above, there was tangible corroboration to establish that Appellant agreed to pay rent at a higher rate than she did, nor was there documentation that Appellant agreed to pay for caretaking services or reimburse her son for purchases bought on her behalf, as he detailed in the ledger. Absent a written contract to solidify their agreement, it would then seem more imperative that Appellant would, after coming into money, document

the basis for transferring most of her inheritance to her son.[7] Here there was no evidence provided beyond the "verbal statements" of [redacted] and his partner to explain Appellant's intent in making the transfer. The evidence submitted did not satisfy the heightened evidentiary requirement to show the transaction in question was not a "disqualifying transfer" of resources.

Next, addressing the second "intent" exception listed in the above instructions, which correlates with subpart (1) of 130 CMR 520.019(F), Appellant has not sufficiently demonstrated that she made the transfer "exclusively" for reasons other than to qualify for MassHealth. See 130 CMR 520.019(F)(1). The element of "exclusivity" under this provision, means that the possibility of needing public assistance for medical care must not have weighed at all upon Appellant's mind at the time the decision was made. Appellant's representatives argued that they had no expectation that Appellant would require nursing facility care at the time she made the transfer and that it was not until December of 2022 – a year later – that the need for nursing facility care became clear when Appellant experienced a significant decline in health. Once again, the federal instruction requires a convincing level of evidence, i.e., evidence beyond "verbal assurances," to show the individual was not considering Medicaid at the time the asset was disposed. Id. at § 3258.10(C). Appellant's representatives did not provide convincing evidence that LTC planning was not a consideration when Appellant made the transfer. There were no medical records offered at hearing to demonstrate Appellant's state of health in or around September 2021**.** While the testimony indicated Appellant was "not too needy" at this time, it also indicates that she was far from independent. The testimony shows that on or around September of 2021, Appellant was [redacted]; she spent most of the day in bed; she was incontinent; and was physically limited such that she required accommodations in the form of grab bars, a chair lift, and walk-up ramp. Additionally, the evidence showed that in August 2021, one month prior to the transfer, Appellant and her son moved from their individual units in the duplex and into a single-family home. [redacted] explained the move was due to his financial inability to maintain the duplex; however, it is unclear whether Appellant's increased care needs played a role in the decision to combine living spaces. Essentially, the verbal assurances offered at hearing did not rise to the level of convincing evidence that is necessary to demonstrate the transfer was made "*exclusively* for a purpose other than to qualify for MassHealth." 130 CMR 520.019(F)(1) (emphasis added). Because the transfer was made for less than FMV and absent evidence that the transfer met one of the exceptions, MassHealth correctly determined that Appellant made a disqualifying transfer of resources.

[7] While Appellant's representatives were firm in their position that the transfer was made to repay the FMV rent that had been agreed to, they also provided significant testimony regarding the breadth of care that [redacted] provided to Appellant, which was not only limited to providing her with affordable rent, but also hours of caretaking services he and [redacted] rendered, providing accommodations to make her home physically accessible, and making purchases on her behalf. It does not go unrecognized that [redacted] dedicated a large portion of his life to ensure his mother was well taken care of despite her mental and physical struggles. Even if the totality of care provided in a general sense amounted to "valuable consideration," Appellant would still have to provide satisfactory evidence to demonstrate her intent at the time of transfer. As this paragraph discusses, there was no evidence beyond verbal assurances to demonstrate her intent in making the transfer of resources.

Once it has been established that an applicant has made a disqualifying transfer of resources, MassHealth calculates the period of ineligibility by adding "the value of all the resources transferred during the look-back period and divid[ing] the total by the average monthly cost to a private patient receiving long-term-care services in the Commonwealth of Massachusetts at the time of application, as determined by the MassHealth agency." See 130 CMR 520.019(G)(2). MassHealth then applies the period of ineligibility "beginning on the first day of the month in which the first transfer was made or the date on which the individual is otherwise eligible for long-term-care services, whichever is later." Id.

Based on the above, the disqualifying transfer amount is $79,000. At the time of her application in December 2022, the average monthly nursing home rate in Massachusetts was $427.00. See MassHealth Eligibility Operations Memo 22-13 (Nov. 2022). In accordance with 130 CMR 520.019(G)(2)(i), MassHealth correctly imposed a 185-day period of ineligibility (79,000 / 427) beginning on Appellant's otherwise eligible date of March 8, 2023 and lasting until September 9, 2023.

As Appellant did not demonstrate beyond a preponderance of the evidence that MassHealth erred in imposing a period of ineligibility for a disqualifying transfer of resources, this appeal is DENIED.

Order for MassHealth

None.

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.

Casey Groff, Esq.

Hearing Officer
Board of Hearings

cc:
MassHealth Representative: Dori Mathieu, Springfield MassHealth Enrollment Center, 88 Industry Avenue, Springfield, MA 01104, 413-785-4186

Appellant Attorney: [redacted]