Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved in Part	**Appeal Number:**	1107194
Decision Date:	9/4/12	**Hearing Dates:**	07/18/2011 & 11/18/2011
Hearing Officer:	Zohra Aziz	**Record Open to:**	12/30/2011

Appellant Representatives:

MassHealth Representative:
Patrick Devlin, Supervisor; MEC at Tewksbury

Witnesses:

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 in Part	**Issue:**	LTC Disqualifying Transfer of Assets
Decision Date:	9/4/12	**Hearing Dates:**	07/19/2011 & 11/18/2011
MassHealth Rep.:	Patrick Devlin	**Appellant Reps.:**	Daughter/Guardian with Counsel
Hearing Location:	Tewksbury 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 22, 2011 MassHealth denied the appellant's long-term care (LTC) application due to a disqualifying transfer of resources in the amount of $204,888.50 resulting in a period of ineligibility from October 18, 2010 through November 2, 2012. (see 130 CMR 520.019 and exhibit 2). The appellant filed this appeal in a timely manner on April 19, 2011. (see 130 CMR 610.015(B) and exhibit 1). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's LTC application due to a disqualifying transfer of resources in the amount of $204,888.50 resulting in a period of ineligibility from October 18, 2010 through November 2, 2012.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.019, in determining that a disqualifying transfer of resources in the amount of $204,888.50 resulting in a period of ineligibility beginning October 18, 2010 through November 2, 2012.

Summary of Evidence

The appellant was represented by Attorney Dowley, accompanied by a number of witnesses in support of the appellant's position (a social worker, the appellant's daughter/guardian JS, the guardian's spouse MS, the appellant's daughter JM, the appellant's granddaughter AL [daughter JM's daughter], the appellant's physician RP and Attorney Cleary who was involved in the guardianship proceedings).[1] MassHealth was represented by a supervisor from the Long-Term Care (LTC) unit at the Tewksbury MassHealth Enrollment Center (MEC).

The initial hearing took place on July 19, 2011 and the re-convene hearing date took place on November 18, 2011. After the hearings, the remaining issues for the hearing hearing officer are the (1) rate of compensation for services provided and (2) the start date for MassHealth eligibility.

At the initial hearing, the MassHealth representative testified that on December 31, 2010 MassHealth received a long-term care (LTC) application on behalf of the appellant. The appellant entered a nursing facility on March 5, 2009 and the nursing facility is seeking coverage effective September 1, 2010. MassHealth requested verification of information, appellant timely complied. Based on the verifications provided, MassHealth determined a disqualifying transfer of resources in the amount of $204,888.50 results in a period of ineligibility from October 18, 2010 through November 2, 2012. (exhibit 1). The appellant is 90 years old; there is no community spouse.

By way of background, the appellant has been under a permanent decree of guardianship since April 3, 2007. The appellant's guardian is her daughter JS. The basis of the penalty period is transactions regarding personal care agreements. On April 3, 2007 the appellant entered into a "Stipulation" (the Stipulation) with daughter JM who provided care to the appellant 49 hours per week at a rate of $10.00 per hour. (exhibit 8). Thereafter, the appellant entered into three "Care Agreements" (the Agreements),[2] two dated January 4, 2008 and the third dated March 5, 2008 for a total of $204,888.50.[3] The terms of each of the Agreements are identical except for the named

[1] Initials are being utilized to preserve confidentiality.

[2] These care agreements replaced the Stipulation dated April 3, 2007.

[3] The appellant submitted 1099 tax forms for each of her caregivers. In all, the caregivers were paid a total of $204,888.50 between the years of 2007 to 2009. Specifically, daughter JM was paid a total of $99,847.50 (2007: $21,820.00, 2008: $67,730.00, 2009: $10,297.50), son-in-law MS was paid a total of $65,955.50 (2008: $58,070.00, 2009: $7,885.50) and granddaughter AL was paid a total of $39,085.50 (2008: $31,660.00, 2009: $7,425.50). (see exhibit 8).

caregivers, each to be paid at a rate of $20.00 per hour.[4] (see exhibit 8).
At the re-convened hearing the MassHealth representative testified that after extensive review of the evidence (testimony and documentary) submitted at the initial hearing, MassHealth is satisfied that the care provided was necessary and appropriate; however MassHealth does not agree with the rate of $20.00 per hour charged for the services rendered. It is MassHealth's position that the services provided by the caregivers are comparable to that provided by a personal care attendant (PCA), a MassHealth program and it is these rates that accurately reflect the fair market value (FMV) of the services provided. In support of MassHealth's position, the MassHealth representative referenced Appeal No. 0917330 (*Morrison*) where the MassHealth PCA rates were utilized in determining FMV for the caretaker services provided by a family member. (see exhibit 13).

The MassHealth representative stated that effective April 6, 2008 the gross hourly rate of pay for PCA services was $10.84. Effective July 1, 2008 the gross hourly rate increased to $11.60. (see exhibit 13). It is these rates that are also most consistent with the rate selected by the appellant in the Stipulation dated April 3, 2007 and MassHealth is prepared to approve the services provided by the appellant's caregivers at the PCA rate of pay stated above. (exhibit 13).

The MassHealth representative continued that the amount paid to daughter JM in 2007 (via the Stipulation), $21,820.00, is no longer at issue as the rate of compensation ($10.00 per hour) is within the MassHealth PCA rate. This reduces the disqualifying transfer amount from $204,888.50 to $183,068.50 ($204,888.50 - $21,820.00). MassHealth will also allow additional transfers in the amount of $103,183.06[5] reducing the overall disqualifying amount to $79,885.44 resulting in a period of ineligibility of 291 days from October 18, 2010 to August 4, 2011. (see exhibit 13).

With regards to the start date of coverage, the MassHealth representative testified that while a cashier's check made out to the Family Trust of Massachusetts was obtained on August 31, 2010, this date is not controlling with respect to the appellant's reduction in assets. Rather, MassHealth's position is that the controlling date is October 18, 2010, the date the Family Trust was approved by the Court and funded.[6] MassHealth asserts that by obtaining the cashier's check prior to the establishment of the pooled trust, the appellant divested herself of funds that were otherwise available to her to use for her care and these assets are countable up until the point in time the pooled trust was approved and funded, that is October 18, 2010.

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[4] The appellant's daughter/guardian JS was listed as the employer. The named caregivers were (1) daughter JM, (2) son-in-law MS (the appellant's daughter/guardian JS's husband) and (3) the appellant's granddaughter AL (daughter JM's daughter). (exhibit 8).

[5] In 2008, the appellant paid her caregivers a total of $157,460.00 (7,873.00 hours x $20.00 per hour). Utilizing the MassHealth PCA rates, the allowable amount from January 2008 to June 2008 is $42,671.66 (3,936.50 hours x $10.84 per hour) and from July 2008 to December 2008, the allowable amount is $45,663.40 (3,936.50 hours x $11.60 per hour) for a total of $88,335.06 for 2008. In 2009, the appellant paid her caregivers a total of $25,608.50 (1,280.00 hours x $20.00 per hour). Utilizing the MassHealth PCA rates, the allowable amount is $14,848.00 (1,280.00 hours x $11.60 hours). (see exhibit 13).

[6] The pooled trust document states an amount of $42,982.62. (exhibit 8).

Counsel for the appellant submitted three memoranda in support of the appellant's position. (see exhibits 9, 14 and 25). The first memo argues the necessity of services provided by the caregivers, although this is no longer at issue. (see exhibit 9). The second memo mirrored the first with additional argument regarding the validity of the care agreement contracts at issue. (exhibit 14). Counsel referenced a Superior Court opinion, *Morrison v. Dehner*, slip op. Sup. Ct. Civil Action No. 2010-1530, in which the Court found that the care agreement between a mother and her daughter was a legal and binding contract and the transfers therein were permissible.

Counsel for the appellant asserted that the initial $10.00 rate contracted was for companion care at a time when the level of care needed was less than what became apparent in late 2007/early 2008 at which time both the level of care required and rate of pay was reassessed. Counsel stated that with regards to rate of compensation an independent counsel, Attorney Cleary, was consulted as were other agencies that were in the business of providing similar care and the range of hourly rates varied from $18.00 to $25.00 per hour.[7] (exhibit 22). A rate of $20.00 per hour was selected and unlike caregivers employed by the agencies, the appellant's caregivers were offered no benefits such as health insurance, overtime pay and/or vacation/sick pay and the appellant's caregivers were only paid for the time they were physically there and then only after the work was completed. Furthermore, each of the caregivers was held responsible for securing their own health insurance policies and paying taxes on the income received. Counsel asserted that the rate of $20.00 per hour took into consideration all of these factors and was actually a fair rate at the lower end given the amount of work and sacrifice involved. (exhibits 9, 14 and 25). Counsel for the appellant asserted that if benefits were offered, it would result in a higher rate of compensation and had the appellant hired caregivers from any of these agencies, she would have most likely paid the same rate as she paid her family caregivers but would have paid extra for overtime in excess of 40 hours per week, holiday and weekend care resulting in funds being used at a faster rate. (exhibit 22).

The appellant's caregivers testified that the appellant was quite difficult to control and needed to be coaxed for activities of daily living (ADLs) and instrumental activities of daily living (IADLs). Each of the caregivers provided accounts of the care that was needed and provided to the appellant. (exhibit 9).

The appellant's daughter/guardian JS and caregivers testified that other options were explored for the appellant such as assisted living and a traditional rest home, both of which proved to be inappropriate for the appellant because the appellant needed a higher level of care than what could be provided at these facilities. (exhibit 19). Elder service was also consulted and after taking all into consideration, this plan of care was chosen at the rate indicated as it was the most appropriate for the appellant.

The appellant's daughter/guardian JS testified that the apartment that the appellant was living in

[7] Caregiver/daughter JM testified that she is in the business of providing such care to individuals and at her last place of employment, she was being paid $14.00 per hour; however that was a while back as she had been out of work for a period of time prior to being employed as a caregiver for her mother/the appellant. She did not testify to any specific training and/or experience as a caregiver nor did she submit any documentary evidence to this effect.

was foreclosed upon in November 2007 forcing the appellant to move to a new location, a process that caused a great deal of hardship for the appellant. Not only was the appellant afflicted with dementia and preferred her solitary life, she now had to adjust to a new environment, which was trying for her. The appellant's caregivers were not only charged with providing care but also to assist the appellant through this transition. This proved to be taxing on both the appellant and the caregivers. However, the appellant was most afraid of being placed in a nursing facility and it her wish that she be able to remain in the community. The family did all they could for the appellant to be able to remain in the community safely.

Attorney Cleary testified that he specializes in elder law and has engaged in personal care agreements for which he was consulted in the appellant's case and was comfortable with the rate set at $20.00 per hour. Attorney Cleary indicated that he not did consult the MassHealth PCA rates testified to by the MassHealth representative and his involvement in the setting the rate of compensation was minimal, although he was consulted.[8]

At the request of Counsel for the appellant, the hearing record remained open December 9, 2011 for the appellant to submit a memorandum as well as additional documentation in support of her position and until December 31, 2011 for MassHealth to respond. (exhibit 24). Submissions from both parties were received timely. (exhibits 25 and 26).

In her submission Counsel for the appellant submitted a third memorandum in support of the appellant's position that in part mirrors the two previous memos already a part of the record with the additional argument regarding the validity of the rate agreed upon in the Care Agreement contracts as well as inaccessibility of assets while the pooled trust was being considered by the Court. (exhibit 25). With regards to the pooled trust Counsel asserted that the assets at issue were the subject of a Court proceeding and inaccessible to the appellant from August 27, 2010 through October 18, 2010 in accordance with MassHealth regulation 130 CMR 520.006. Counsel indicated that a motion was presented to the Court on behalf of the appellant, which was approved determining that the appellant's assets were to be frozen from August 31, 2010 through October 18, 2010. The appellant is seeking a MassHealth eligibility date of September 1, 2010 as that is the date her countable assets were reduced to the regulatory limit of $2,000.00. With regard to the rate, Counsel reiterated what was asserted at the initial and re-convened hearings. (exhibit 25).

MassHealth responded that it stands by its position asserted at the initial and the reconvene hearings with regards to the date the appellant is otherwise eligible for MassHealth benefits. The new additional point raised by MassHealth is that it is not bound by a judicial determination of when funds are inaccessible and/or unavailable to the appellant. MassHealth has the authority to determine eligibility based its interpretation of regulations (see *Young v. Dept. of Public Welf*are). MassHealth further stands by its position stated at the reconvened hearing regarding the rate of pay. (exhibit 26).

[8] There was no explanation provided for why, when he specializes in this area of law for which he was consulted, that Attorney Cleary did not consult with the MassHealth PCA rates when assisting in establishing the rate of compensation.

Findings of Fact

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

1. On December 31, 2010 MassHealth received a long-term care (LTC) application on behalf of the appellant.

2. The appellant entered the nursing facility on March 5, 2009 and the nursing facility is seeking coverage effective September 1, 2010.

3. The appellant is 90 years old; there is no community spouse.

4. MassHealth requested verification of information; the appellant timely complied.

5. Based on the verifications provided, MassHealth determined a disqualifying transfer of resources in the amount of $204,888.50 resulting in a period of ineligibility from October 18, 2010 through November 2, 2012. (exhibit 1).

6. The appellant entered into a total of 4 personal care agreements resulting in total asset transfers in the amount of $204,888.50.

7. On April 3, 2007 the appellant entered into a Stipulation which indicated that daughter, JM, will provide care to the appellant 49 hours per week at a rate of $10.00 per hour. (exhibit 8).

8. On January 4, 2008 the appellant entered into two Care Agreements, one with daughter JM (replacing the Stipulation) and another with son-in-law MS. (exhibits 8 and 23).

9. On March 5, 2008 the appellant entered into the fourth Care Agreement with granddaughter AL. (exhibits 8 and 23).

10. The 2008 caregiver agreements replaced the Stipulation entered into on April 3, 2007.

11. The terms of each of the Care Agreements are the same and indicate appellant's daughter JS/guardian as the employer and (1) daughter JM, (2) son-in-law MS (the appellant's daughter JS/guardian's husband) and (3) the appellant's granddaughter AL (daughter JM's daughter) as the caregivers; each to be paid at a rate of $20.00 per hour. (exhibits 8 and 23).

12. The Care Agreements indicate that the services to be provided include but are not limited to assistance with activities of daily living (ADLs) such as bathing, grooming; instrumental

activities of daily living (IADLs) such as housekeeping, cleaning, making beds, laundry; in additional to running errands, monitoring health by daily observation and social visits. (exhibits 8 and 23).

13. The Care Agreements also call for overnight stays as well as social calls. (exhibits 8 and 23).

14. The appellant submitted 1099 tax forms for each of her caregivers. (exhibit 8).

15. In all, the caregivers were paid a total of $204,888.50 between the years of 2007 to 2009.

    - The appellant's daughter JM was paid a total of $99,847.50 (2007: $21,820.00, 2008: $67,730.00, 2009: $10,297.50),
    - The appellant's son-in-law MS was paid a total of $65,955.50 (2008: $58,070.00, 2009: $7,885.50),
    - The appellant's granddaughter was paid a total of $39,085.50 (2008: $31,660.00, 2009: $7,425.50). (see exhibit 8).

16. Prior to the hearing, no evidence/documentation of actual services performed, dates therein, duration or scope of services provided were submitted for any of the caregivers and MassHealth determined these transfers disqualifying.

17. At the initial hearing, Counsel for the appellant presented evidence, both testimonial and written, regarding the appellant's medical condition and all four care agreements including duties and responsibilities. (exhibit 9).

18. The appellant has a primary diagnosis of dementia.

19. Alternative placements, such as an assisted living facility and/or rest homes were considered and determined inappropriate for the appellant. (exhibit 19).

20. The appellant required a greater level of care than what was offered by the alternatives considered. (exhibits 19).

21. At the reconvened hearing, MassHealth indicated that the agency agrees that the care provided to the appellant was necessary and appropriate; however MassHealth does not agree that the appellant received FMV at the rate of $20.00 per hour but instead the MassHealth PCA rates more accurately reflect FMV. (exhibit 13).

22. Effective April 6, 2008, the gross hourly rate of pay for MassHealth PCA services was $10.84. Effective July 1, 2008 the gross hourly rate increased to $11.60. (see exhibit 13).

23. The funds transferred to daughter JM in 2007 pursuant to the Stipulation in the amount of $21,820.00 are no longer at issue. (see exhibit 13).

24. This reduces the disqualifying transfer amount from $204,888.50 to $183,068.50 ($204,888.50 - $21,820.00). (see exhibit 13).

25. In 2008, the appellant paid her caregivers a total of $157,460.00 (7,873.00 hours x $20.00 per hour).

26. If utilizing the MassHealth PCA rates, the allowable amount from January 2008 to June 2008 is $42,671.66 (3,936.50 hours x $10.84 per hour) and from July 2008 to December 2008, the allowable amount would be $45,663.40 (3,936.50 hours x $11.60 per hour) for a total of $88,335.06 for 2008. (see exhibit 13).

27. In 2009, the appellant paid her caregivers a total of $25,608.50 (1,280.00 hours x $20.00 per hour).

28. If utilizing the MassHealth PCA rates, the allowable amount would be $14,848.00 (1,280.00 hours x $11.60 hours). (see exhibit 13).

29. Utilization of the MassHealth PCA rates would reduce the overall disqualifying amount to $79,885.44 resulting in a period of ineligibility of 291 days from October 18, 2010 to August 4, 2011. (see exhibit 13).

30. The appellant relied upon the market rate charged by various homemaker/personal care agencies in the Commonwealth of Massachusetts when selecting its rate. (exhibits 9, 14, 22 and 25).

31. Elder Services of the Merrimack Valley (ESMV) lists several Homemaker/PCA agencies and their rates which range from $18.92 to $27.50 per hour depending on the type and duration of assistance needed. (exhibit 22).

32. Home Instead Senior Care indicates rates ranging from $22.00 to $37.00 per hour for a single person. (exhibit 22).

33. Both printouts list higher rates for overnight stays, overtime hours and at least one agency charges a fee for transport. (exhibit 22).

34. Around the clock care was provided to the appellant between the three caregivers resulting in some of the caregivers working in excess of 40 hours per week and also working on weekends/holidays.

35. None of the appellant's caregivers were paid at rate higher than $20.00 per hour even if they

worked overtime, on weekends/holiday pay nor were they provided with vacation pay. (exhibits 9, 14, and 25).

36. On August 31, 2010 the appellant obtained a Cashier's Check made out to the Family Trust of Massachusetts. (exhibit 8).

37. Counsel for the appellant asserted that she was holding these funds in escrow on behalf of the appellant pending approval of the petition for the Pooled Trust.

38. On October 18, 2010, the trust pooled trust was approved and funded. (exhibits 9 and 25).

39. The establishment and terms of the pooled trust is acceptable to MassHealth.

Analysis and Conclusions of Law

RATE OF COMPENSATION

The MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) for less than fair-market value (FMV) a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J). The MassHealth agency may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident or spouse is or would be entitled if such action had not been taken. Action taken to avoid receiving a resource may include, but is not limited to, waiving the right to receive a resource, not accepting a resource, agreeing to the diversion of a resource, or failure to take legal action to obtain a resource. In determining whether or not failure to take legal action to receive a resource is reasonably considered a transfer by the individual, the MassHealth agency considers the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available. (see 130 CMR 520.019(C)).

Permissible Transfers. The MassHealth agency considers the following transfers permissible. Transfers of resources made for the sole benefit of a particular person must be in accordance with federal law:

> (1) The resources were transferred to the spouse of the nursing-facility resident or to another for the sole benefit of the spouse. A nursing-facility resident who has been determined eligible for MassHealth payment of nursing-facility services and who has received an asset assessment from the MassHealth agency must make any necessary

transfers within 90 days after the date of the notice of approval for MassHealth in accordance with 130 CMR 520.016(B)(3).

(2) The resources were transferred from the spouse of the nursing-facility resident to another for the sole benefit of the spouse.

(3) The resources were transferred to the nursing-facility resident's permanently and totally disabled or blind child or to a trust, a pooled trust, or a special-needs trust created for the sole benefit of such child.

(4) The resources were transferred to a trust, a special-needs trust, or a pooled trust created for the sole benefit of a permanently and totally disabled person who was under 65 years of age at the time the trust was created or funded.

(5) The resources were transferred to a pooled trust created for the sole benefit of the permanently and totally disabled nursing-facility resident.

(6) The nursing-facility resident transferred the home he or she used as the principal residence at the time of transfer and the title to the home to one of the following persons:

(a) the spouse;

(b) the nursing-facility resident’s child who is under age 21, or who is blind or permanently and totally disabled;

(c) the nursing-facility resident’s sibling who has a legal interest in the nursing-facility resident's home and was living in the nursing-facility resident’s home for at least one year immediately before the date of the nursing-facility resident’s admission to the nursing facility; or

(d) the nursing-facility resident’s child (other than the child described in 130 CMR 520.019(D)(6)(b)) who was living in the nursing-facility resident’s home for at least two years immediately before the date of the nursing-facility resident’s admission to the institution, and who, as determined by the MassHealth agency, provided care to the nursing-facility resident that permitted him or her to live at home rather than in a nursing facility.

(see 130 CMR 520.019(C)).

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.

(see 130 CMR 520.019(F))

If the MassHealth agency has determined that a disqualifying transfer of resources has occurred, the MassHealth agency will calculate a period of ineligibility. The number of months in the period of ineligibility is equal to the total, cumulative, uncompensated value as defined in 130 CMR 515.001 of all resources transferred by the nursing facility resident or the spouse, divided by the average monthly cost to a private patient receiving nursing-facility services in the Commonwealth of Massachusetts at the time of application, as determined by the MassHealth agency. (see 130 CMR 520.019(G)).

There is no dispute that the level of care and services provided were appropriate for the appellant. What is at dispute is the value of the services provided. I conclude that the appellant has evidenced that the fair market value for the rate of compensation is $17.50 per hour. MassHealth contends that the FMV of services provided is the MassHealth PCA rates. (see exhibit 13). The appellant asserts that the FMV is the market rate. (see exhibit 22).

In support of its position, MassHealth references the *Morrison* case where the hearing officer ruled that the fair market value (FMV) of the services provided by the appellant's daughter (caregiver) was the MassHealth PCA rate in effect at that point in time.[9] However, the *Morrison* case differs factually from the case at hand on many points. In *Morrison* case, the appellant's daughter was the power of attorney and also the caregiver where for years she provided services gratuitously but then began assessing a fee for those services. The appellant's daughter/POA was not living with the appellant, the appellant was living in a unit in the appellant daughter's multi-unit dwelling for which the appellant's paid monthly rent. The duties and tasks to be performed as well as an hourly rate were not clearly identified. Instead a blanket monthly fee was instituted with no oversight for the services performed and no logs being maintained by the caregiver or any detail accounting of the tasks perform.

Unlike the *Morrison* case, here, there no indication that the appellant's caregivers previously provided services gratuitously but later charged for them nor did the appellant's caregivers live in the same dwelling as the appellant except when providing care. The tasks/duties to be performed as well as the hourly rate were clearly identified and delineated in the Care Agreements. The caregivers kept routine logs of the services rendered which was reviewed by the appellant's daughter/guardian JS, an indication of oversight. The caregivers were paid only after the work was performed and not in advance, which further differentiates it from the *Morrison* case.

MassHealth contends that similar to the *Morrison* case, the appellant's caregivers are not in the business of providing such care and do not have the same overhead expenses as such private agencies (e.g., expenses such as rent, administrative staff, expenses related to training and retaining professional staff, cost of professional insurance). The appellant's caregivers cannot be expected to be paid at the same rate that such agencies charge. Furthermore, the caregivers from an agency would be paid a lesser rate by the agency; most likely closer to the MassHealth PCA rates. MassHealth also contends that the appellant's caregivers have not received the training that a

[9] While a prior fair hearing decision may be viewed as persuasive authority, it is not binding on this hearing officer.

caregiver from an agency would receive and cannot be expected to be compensated at that higher rate.

I have carefully reviewed all of the evidence in the record, including the logs regarding care provided to the appellant. (see exhibit 9). The level of care and services provided by the appellant's caregivers are comparable to the level of care that would be provided by a personal care attendant (PCA) participating in the MassHealth PCA program with the additional tasks of overnight stays and social visits. (see 130 CMR 422.401, *et al*). The appellant's caregivers are not in the business of providing care and there is no indication of formal training, however they are family members of the appellant and the evidence supports that they were attuned to the appellant's needs and provided sufficient care enabling the appellant to remain in the community. The appellant's caregivers kept detailed logs of the care provided and were only paid after the services were rendered.

At first blush, I am inclined to adopt MassHealth's position that family members who provide care cannot be expected to receive compensation at the same rate that professional agencies charge. However, as I consider the facts as a whole on the one hand, I find that the manner in which these contracts were executed, overseen and the care provided were comparable to that offered by the agencies with the added benefits that the care was provided by family members known to the appellant, adding a sense of trust and security that may not otherwise have existed. On the other hand, the appellant's caregivers did not have the overhead that the professional agencies have, the caregivers were not provided with overtime pay when working in excess of 40 hours per week nor were they provided with vacation, sick and/or holiday pay. The fact, as asserted by Counsel for the appellant, that the caregivers were not provided with health insurance and were responsible for their own taxes is of little evidentiary value because the same would be apply even if they were employed by an agency where health insurance may be offered but at an additional cost and most likely not gratuitously . Furthermore, the appellant's caregivers were apprised of all of the terms and conditions, including that relating to the availability of benefits such as health insurance, prior to entering into the contract (and chose to do so regardless) and thus cannot be given the weight asserted by Counsel for the appellant.

I recognize MassHealth's contention that initially the appellant retained only one caregiver at a rate of $10.00 per hour and month's later two additional caregivers were contracted with and the rate was increased to $20.00. However, I also recognize the appellant's explanation for the rate increase and the need for additional caregivers.

The appellant's medical condition/diagnoses were known at the time that the Care Agreements were entered into. It was also known that the care needed exceeded that which could be provided by assisted living facilities and rest homes. (see exhibit 19). At the time that the Care Agreements were entered into the appellant was not seeking MassHealth assistance and it is reasonable that the MassHealth PCA rates were not considered when selecting the rate of compensation. However, Attorney Cleary was consulted and it is unclear why he, who specializes in this area of law, did not consider the MassHealth PCA rates when advising the appellant and her family on the rate of compensation. While the majority of the services contracted to were comparable to those

referenced in the MassHealth PCA regulations, there were areas that the appellant sought assistance with that were not only not covered by the MassHealth PCA program but also was not limited to just hands-on assistance. The additional assistance was in the areas of prompting, cueing, supervision, companionship, social visits and overnight stays; in essence providing care 24 hours a day, seven days a week.

While the MassHealth PCA rates may not wholly apply to the case at hand, the rate selected by the appellant would also not apply because the appellant's caregivers do not have the overhead costs incurred by the agencies that the rate was based upon. Therefore, the appellant's caregivers cannot be expected to be paid at the same rate that such agencies charge. The cost of health insurance and taxes would always be incurred by the caregivers in either scenario and I do not find this assertion persuasive as to the value received by the appellant. I recognize that the contract called for overnight stays and that to some extent care was provided during the night, perhaps causing some disruption in the lives of the caregivers but this does not overcome the fact the appellant's caregivers were not subject to the overhead costs that the agencies are faced with. Furthermore, caregivers employed by an agency would be trained by the agency which further speaks to the rates charged by the agencies.[10] Based on the evidence before me, I find the rate of compensation that more accurately reflects FMV is an hourly rate of $17.50.[11]

REDUCTION IN ASSETS

Countable assets are all assets that must be included in the determination of eligibility. Countable assets include assets to which the applicant or member or their spouse would be entitled whether or not these assets are actually received when failure to receive such assets results from the action or inaction of the applicant, member, spouse, or person acting on his or her behalf. In determining whether or not failure to receive such assets is reasonably considered to result from such action or inaction, the MassHealth agency considers the specific circumstances involved. The applicant or member and the spouse must verify the total value of countable assets. However, if he or she is applying solely for MassHealth Buy-In, as described at 130 CMR 519.011(B), verification is required only upon request by the MassHealth agency. 130 CMR 520.007 also contains the verification requirements for certain assets. The assets that the MassHealth agency considers include, but are not limited to, the following: (1) Cash, (2) Bank Accounts, (3) Individual Retirement Accounts, Keogh Plans, and Pension Funds, (4) Securities, (5) Cash-Surrender Value of Life-Insurance Policies, (6) Vehicles as Countable Assets, (7) Real Estate, (8) Retroactive SSI and RSDI Benefit Payments, (9) Trusts and (10) Annuities, Promissory Notes, Loans, Mortgages, and Similar Transactions. (see 130 CMR 520.007).

An inaccessible asset is an asset to which the applicant or member has no legal access. The MassHealth agency does not count an inaccessible asset when determining eligibility for

[10] There is no evidence that the appellant provided for training of her caregivers.

[11] This rate accounts for the lack of overhead costs discussed above, is more in line with the MassHealth PCA rates buts takes into consideration overtime, vacation and holiday pay that the MassHealth PCA rates call for. (see exhibit 13).

MassHealth for the period that it is inaccessible or is deemed to be inaccessible under 130 CMR 520.006.

Examples of Inaccessible Assets. Inaccessible assets include, but are not limited to

> (1) property, the ownership of which is the subject of legal proceedings (for example, probate and divorce suits); and
>
> (2) the cash-surrender value of life-insurance policies when the policy has been assigned to the issuing company for adjustment.

The MassHealth agency considers accessible to the applicant or member all assets to which the applicant or member is legally entitled:

> (1) from the date of application or acquisition, whichever is later, if the applicant or member does not meet the conditions of 130 CMR 520.006(C)(2)(a) or (b); or
>
> (2) from the period beginning six months after the date of application or acquisition, whichever is later, if
>
> > (a) the applicant or member cannot competently represent his or her interests, has no guardian or conservator capable of representing his or her interests, and the eligibility representative (which may include a provider) of such applicant or member is making a good-faith effort to secure the appointment of a competent guardian or conservator; or
> >
> > (b) the sole trustee of a Medicaid Qualifying Trust, under 130 CMR 520.022(B), is one whose whereabouts are unknown or who is incapable of competently fulfilling his or her fiduciary duties, and the applicant or member, directly or through an eligibility representative (which may include a provider), is making a good-faith effort to contact the missing trustee or to secure the appointment of a competent trustee.

(see 130 CMR 520.006).

The evidence in this case demonstrates that the appellant's pooled trust was funded on October 18, 2010 once court approval of the trust was obtained.[12] I conclude the appellant evidenced a reduction in her assets as of October 18, 2010 in accordance with the MassHealth regulations, it was on this date that the appellant evidenced a reduction in her assets to the allowable program limits.

The appellant's argument that the funds were inaccessible once she had obtained a cashier's check on August 31, 2010 is not persuasive. That the funds were held in escrow between August 31, 2010 and October 18, 2010 did not make them inaccessible to the appellant as defined in 130 CMR 520.006. Additionally, Counsel's assertion that she would not have returned the funds to the appellant or the appellant's guardian even if requested to do so is also insufficient to demonstrate inaccessibility. Indeed, had the appellant (or her guardian) desired to cancel the trust and have the funds returned to the appellant's, there is no legal barrier to this. In short, the appellant still owned

[12] The parties agree that the appellant's trust qualifies as a pooled trust pursuant to 130 CMR 515.001.

the funds and did not relinquish her ownership rights simply by placing them in escrow.

The appellant's Counsel also avers she obtained a motion from a relevant court deeming the appellant's assets inaccessible from August 31, 2010 to October 18, 2010. As an initial matter, I note that this document was not submitted into evidence at hearing.[13] However, even if the motion had been submitted as an exhibit, it would not alter the conclusion on this issue. While this hearing officer provides court orders and motions with the appropriate respect, they simply cannot override duly enacted statutes or regulations such as 130 CMR 520.006, *et al.* that govern the analysis on the question of the appellant's reduction of assets.

Finally, a contrary finding would seemingly allow any prospective MassHealth recipient to evidence a reduction in assets simply by placing the assets in escrow along with an expressed (although inchoate) desire to establishing a future permissible transfer. Such a situation would essentially vitiate the governing regulations and result in every "transfer" or "reduction" in assets being deemed appropriate.

The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Standard, Essential, or Limited may not exceed the following limits:

> (1) for an individual — $2,000; and
> (2) for a couple living together in the community where there is financial responsibility according to 130 CMR 520.002(A)(1) — $3,000.

(see 130 CMR 520.003(A))

An applicant whose countable assets exceed the asset limit of MassHealth Standard, Essential, or Limited may be eligible for MassHealth

> (a) as of the date the applicant reduces his or her excess assets to the allowable asset limit without violating the transfer of resource provisions for nursing-facility residents at 130 CMR 520.019(F); or
> (b) as of the date, described in 130 CMR 520.004(C), the applicant incurs medical bills that equal the amount of the excess assets and reduces the assets to the allowable asset limit within 30 days after the date of the notification of excess assets.

In addition, the applicant must be otherwise eligible for MassHealth.

(see 130 CMR 520.003(B)).

The appellant evidenced a reduction in her assets as of October 18, 2010 and that is the date the appellant is otherwise eligible for MassHealth LTC benefits.

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[13] In a submission dated and received via facsimile by the Board on December 9, 2011, Counsel indicated that said motion was enclosed. This submission was also received via mail on December 12, 2011. This hearing officer could not locate the referenced motion in either submission (see exhibit 25).

For the foregoing reasons, this appeal is APPROVED IN PART.

Order for MassHealth

Rescind the denial notice dated March 22, 2011. Determine rate of compensation at $17.50 per hour and redetermine amount of the disqualifying transfer of resources. Proceed to a determination of financial eligibility.

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.

Implementation of this Decision

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

Zohra Aziz
Hearing Officer
Board of Hearings

cc: MassHealth Representative: Sylvia Tiar

MassHealth Legal