

STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES
OFFICE OF LEGAL COUNSEL, REGULATIONS AND ADMINISTRATIVE HEARINGS
25 SIGOURNEY ST. 12TH FLOOR
HARTFORD CT 06106

October 23, 2009
CERTIFIED MAIL

CLIENT ID# [REDACTED]

Hearing ID# [REDACTED]

NOTICE OF DECISION

PARTY

[REDACTED]

REASON FOR HEARING

On June 25, 2009, an administrative hearing was requested on behalf of [REDACTED] [REDACTED], because she disagreed with the start date of her eligibility for long term care payments under Medicaid, arising from a transfer of asset penalty. A hearing was held on August 3, 2009, in accordance with Connecticut General Statutes 17b-60 to 17b-64, and 4-176e to 4-184. The record was left open for the submission of evidence and a response from the Department and closed on August 11, 2009.

PRESENT AT THE HEARING

[REDACTED] BOA
Sandy Sandford, Appellant's Representative
Larry Knotowicz, Department's Representative
Luz Velez, Hearing Officer

STATEMENT OF ISSUE

The issue to be decided is whether the Department's denial of long term care payments due to a transfer of asset penalty is correct.

FINDINGS OF FACT

1. On October 17, 2008, the Department received an application for Medicaid for long term care for the Appellant. (Hearing Summary)
2. The Appellant was admitted to Geer Nursing and Rehabilitation Center on December 28, 2007. (Hearing Summary)

3. The Appellant is seeking a pick-up date for payment to the nursing home of October 24, 2008. (Hearing Summary)
4. The Appellant had COPD and a history of lung cancer. (Testimony of POA, Appellant's Ex. B Medical Evaluation)
5. The Appellant passed away on April 4, 2009. (Hearing Summary)
6. A three year look-back of the Appellant's assets was completed, with a finding that the Appellant's assets were below the \$1,600.00 asset limit on October 1, 2008. (Hearing Summary)
7. During the three year look-back period the Appellant made gifts totaling \$7,500.00 to her two sons. (Ex. 2 Account Worksheet for Transfers)
8. On April 6, 2007, the Appellant made a gift to her son [REDACTED] of \$3,500.00 to pay off his loan for his motorcycle. The \$3,500.00 represented the payoff amount on the re-possession of the motorcycle. (Ex. 2, Testimony of POA)
9. On November 21, 2007, the Appellant gifted \$1,000.00 to her son [REDACTED] to help with his fuel costs. The gift was and to help him for expenses associated with his brother moving into his home. (Ex. 2, Testimony of POA)
10. On March 5, 2008, the sum of \$3,000.00 was transferred to the bank account of the Appellant's son [REDACTED], to help him avoid filing bankruptcy, because he was out of work. (Ex. 2 Testimony of POA)
11. On April 14, 2009, the Department issued three preliminary decision notices regarding three transfers for less than fair market value. (Ex. 1 W-495A Transfer of Asset Preliminary Decision Notices, dated 4/14/09)
12. On April 28, 2009, the Department issued a Transfer of Assets Final Decision Notice regarding the transfers for less than fair market value. (Ex. 4 W-495C Transfer of Asset Final Decision Notice, dated 4/28/09)
13. The W-495C informed the Appellant that the Department had determined that transfers totaling \$7,500.00 were made for the purpose of her becoming eligible for Medicaid. (Ex. 4)
14. The W-495C also informed the Appellant that she would be eligible for certain Medicaid benefits beginning 10-1-08, but that that a penalty period was set up starting 10-24-08 and ending 11-15-08, during which time Medicaid would not pay for her long term care services. (Ex. 4)
15. The penalty period was based on the uncompensated value of the \$7,500.00 transfer divided by \$9,096.00, the average cost of private LTCF care in CT. (Hearing Summary)

16. On April 28, 2009, the Department granted community Medicaid effective October 1, 2008 and imposed a penalty for the payment of long-term care, which was due to expire on November 15, 2008. (Hearing Summary, Ex. 5 4/28/09 Notice of Action, Appellant's Ex. A 4/28/09 Grant Letter to the Appellant)
17. Subsequent to the April 28, 2009 action, the Department adjusted the penalty end date to November 14, 2009, due to the application of the private LTCF care rate of \$9,446.00, which was in effect as of the application date. (Hearing Summary, Ex. 6 Managed Care-MANC screen)
18. The Appellant's son [REDACTED] resided with her in Florida from the spring of 2002 through the spring of 2007. He assisted the Appellant with transportation to and from doctor's appointments, handled her finances, ran errands, ordered her medications, shopped for groceries, performed maintenance chores around the house and assisted his mother during hospitalizations and short-term rehabilitation stays. (Testimony of POA)
19. When he returned to his home state in the spring of 2007, the Appellant's son secured employment with Package Pavement Co. in Stormville, NY on April 30, 2007. He subsequently left this employment on October 3, 2007 when he moved back to Florida temporarily, to help his mother once again. (Testimony of POA, Appellant's Ex. E Letter from Package Pavement Co)
20. The Appellant's son remained in Florida from October 2007 until January 23, 2008. He arranged for the Appellant's admission to an assisted living facility in New York State and her eventual admission to a long term facility in Connecticut. (Testimony of POA)
21. The Appellant's son made the necessary repairs to his mother's home in Florida, in preparation for the sale of the property. He did the work himself and paid for the paint and cleaning supplies either out of pocket or through his mother's checking account. (Testimony of POA)
22. The Appellant's son was not employed during the two periods of time he lived with the Appellant in Florida. (Testimony of POA)
23. The Appellant's earned \$15,096.42 in 2007 from his employment with Package Pavement Co. (See Fact #19) (Appellant's Ex. D 2007 W-2 Wage and Tax Statement)
24. The Appellant's son suffered a loss of income when he returned to Florida to help his mother secure assisted living and nursing home placements ,as well as, the preparation of her home property for sale.
25. The Appellant's home was sold in February 2008 and the proceeds were paid to the nursing home. (Testimony of POA)

26. The Appellant paid for her stay in the assisted living facility for the month of November 2007 and for her nursing home stay from the date admission until October 23, 2008. (Testimony of POA)
27. The Appellant's son helped his mother because he believed it was the right thing to do. He did not keep records or receipts for his expenditures or for the cost of his labor. (Testimony of POA)
28. There is an outstanding balance owed to the nursing home of \$5,102.18. (Testimony of POA, Appellant's Ex. C Billing Statement from Geer Nursing and Rehab Center, dated 6/30/09)
29. The Appellant's son is unable to pay the outstanding balance owed to the nursing. Paying this bill would create an extra hardship for him. (Testimony of POA)

RELEVANT FEDERAL LAW

Title 42, U.S. Code section 1396p addresses liens, adjustments and recoveries as well as transfers of assets. Subsection (c)(1)(A) states that in order to meet the requirements of this subsection for the purposes of section 1396a(a)(18) of this title, the State plan must provided that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a non- institutionalized individual or the spouse of such individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or in the case of a non-institutionalized individual, for the services described in subparagraph (C)(ii) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

42 USC 1396p(c)(1)(C)(i) provides that the services described in this subparagraph with respect to an institutionalized individual are the following:

- (I) Nursing facility services.
- (II) A level of care in any institution equivalent to that of nursing facility services.
- (III) Home or community-based services furnished under a waiver granted under subsection (c) or (d) of section 1396n of this title.

42 USC 1396p subsection (c)(1)(D)(ii) states that in the case of a transfer of asset made on or February 8, 2006, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level of care described in subparagraph (C) based on an approved application for such care but for the application of a penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection."

42 USC 1396p(c)(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that:

(C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual.

42 USC 1396p(e) provides some definitions. Subdivision (3) notes that the term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) of this title.

RELEVANT STATE STATUTES

Section 17b-2 of the Connecticut General Statutes in part designates the Department as the state agency for the administration of the Medicaid program pursuant to Title XIX of the Social Security Act.

Conn. Gen. Stat. §17b-260 states that the Commissioner is authorized to take advantage of the medical assistance programs provided in Title XIX, entitled "*Grants to States for Medical Assistance Programs*," contained in the Social Security Amendments of 1965 and may administer the same in accordance with the requirements provided therein, including the waiving, with respect to the amount paid for medical care, of provisions concerning recovery from beneficiaries or their estates, charges and recoveries against legally liable relatives, and liens against property of beneficiaries.

Conn. Gen. Stat. §17b-261b(a) provides in part that the Department shall be the sole agency to determine eligibility for assistance and services under programs operated and administered by said department.

Conn. Gen. Stat. §17b-261a(a) provides that any transfer or assignment of assets resulting in the imposition of a penalty period shall be presumed to be made with the intent, on the part of the transferor or the transferee, to enable the transferor to obtain or maintain eligibility for medical assistance. This presumption may be rebutted only by clear and convincing evidence that the transferor's eligibility or potential eligibility for medical assistance was not a basis for the transfer or assignment.

RELEVANT STATE REGULATIONS

UPM § 3029.05 (A) provides that there a period established subject to the conditions described in this chapter, during which institutionalized individuals are not eligible for certain Medicaid services when they or their spouses dispose of assets for less than fair market value on or after the look-back date specified in 3029.05C. This period is called the penalty period, or period of ineligibility.

UPM § 3029.05(B)(2) provides that an individual is considered institutionalized if he or she is receiving:

- (a) LTCF services; or
- (b) services provided by a medical institution which are equivalent to those provided in a long-term care facility; or
- (c) home and community-based services under a Medicaid waiver (cross references: 2540.64 and 2540.92).

UPM § 3029.05(C) provides that the look-back date for transfers of assets is a date that is 60 months before the first date on which both the following conditions exist:

- (1) the individual is institutionalized; and
- (2) the individual is either applying for or receiving Medicaid.

UPM § 3029.05(E) provides that the penalty period begins as of the later of the following dates:

- (1) the first day of the month during which assets are transferred for less than fair market value, if this month is not part of any other period of ineligibility caused by a transfer of assets; or
- (2) the date on which the individual is eligible for Medicaid under Connecticut's State Plan and would otherwise be eligible for Medicaid payment of the LTC services described in 3029.05 B based on an approved application for such care but for the application of the penalty period, and which is not part of any other period of ineligibility caused by a transfer of assets.

UPM § 3029.05(F)(1) provides that the length of the penalty period consists of the number of whole and/or partial months resulting from the computation described in 3029.05 F. 2.

UPM § 3029.05(F)(2) provides that the length of the penalty period is determined by dividing the total uncompensated value of all assets transferred on or after the look-back date described in 3029.05 C by the average monthly cost to a private patient for LTCF services in Connecticut.

- (a) For applicants, the average monthly cost for LTCF services is based on the figure as of the month of application.

UPM § 3029.05(F)(3) provides that uncompensated values of multiple transfers are added together and the transfers are treated as a single transfer. A single penalty period is then calculated, and begins on the date applicable to the earliest transfer.

UPM § 3029.10 E pertains to transfers made exclusively for reasons other than qualifying and provides that an otherwise eligible institutionalized individual is not ineligible for Medicaid payment of LTC services if the individual, or his or her spouse, provides clear and convincing evidence that the transfer was made exclusively for a purpose other than qualifying for assistance.

UPM § 3029.10 G pertains to transfer made for other valuable consideration and provides that an institutionalized individual, or his or her spouse, may transfer an asset without penalty if the individual provides clear and convincing evidence that he or she intended to dispose of the asset in return for other valuable consideration. The value of the other valuable consideration must be greater than the value of the transferred asset in order for the asset to be transferred without penalty.

UPM § 3029.05(G)(1) provides that during the penalty period, the following Medicaid services are not covered:

- (a) LTCF services; and
- (b) services provided by a medical institution which are equivalent to those provided in a long-term care facility; and
- (c) home and community-based services under a Medicaid waiver.

UPM § 3029.05(G)(2) provides that payment is made for all other Medicaid services during a penalty period if the individual is otherwise eligible for Medicaid.

UPM § 3029.10(I) provides that the Department waives the penalty period associated with the transfer of an asset if the Department determines that denial of payment for services would create an undue hardship. In such cases, the Department may pursue recovery against the transferee, if appropriate (Cross Reference: 3029.25).

DISCUSSION

Based on the information and evidence presented at the hearing, I find that there is clear and convincing evidence that the transfers made by the Appellant totaling \$7,500.00, were made for purposes other than to qualify for Medicaid. The Department was incorrect in its action to impose a penalty and deny payment for the Appellant's long term care for the period of October 24, 2008 through November 14, 2008.

The transfers in question occurred after the enactment of the Deficit Reduction Act on February 8, 2006, thus any penalty resulting from an improper transfer would render an applicant ineligible for certain Medicaid payments during the penalty period. In the present case, the Department determined that Appellant was ineligible for the payment of her long term care services from October 24, 2008 (the Medicaid pick-up date) through November 14, 2008.

The Appellant's son testified that he resided with his mother in Florida for a period of five years, from the 2002 to 2007, during which he provided companionship and assistance to his mother. He states that he provided transportation to and from doctor's appointments, ran errands, shopped for groceries, made home repairs and upkeep of her home. He also testified that he had helped her financially over the years by making payments on a home improvement loan for a new roof and paid toward her medical coverage. He testified that he never kept receipts for any of the things he purchased or repaired because he was doing these things to help his mother.

The Appellant's, son, [REDACTED], experience a financial hardship when he returned to Florida to care for the Appellant and make the necessary arrangements for her eventual admission to the nursing home. When he returned to New York state in the spring of 2007, he had secured employment. He subsequently had to leave this employment when he returned to Florida in October 2007. He also testified the he was unemployed while he lived with his mother and as a result in 2007 his motorcycle was in the process of being re-possessed. The Appellant paid the \$3,500.00 settlement amount of the son's loan and the motorcycle was re-possessed.

With respect to the other two transfers the Appellant's son testified that the \$3,000.00 gift in March 2008 was made in order for him to avoid filing bankruptcy, because he was unemployed at the time. The \$1,000.00 gift to the Appellant's other son was to help him pay for fuel. The Appellant's POA also stated that the \$1,000.00 was to help his brother defray some of the expenses associated with his having to move into his brother's home, upon his return to New York State in November 2007.

Clear and convincing evidence was presented at the hearing to establish that the transfers were made exclusively for a purpose other than qualifying for assistance. In making this determination the undersigned considered the explanation of the reasons for the transfers; the relatively small dollar amount of the transfers; the financial hardship of the transferee; the work the transferee performed in preparing the home for sale; the period of time the transferee resided with the Appellant and provided care; and the fact the Appellant retained sufficient funds to pay for her nursing and assisted living care for approximately one year.

CONCLUSION OF LAW

Based on the Findings of Fact, Discussion, and regulations set forth herein, it is concluded that clear and convincing evidence was presented that the transfers totaling \$7,500.00 were not made for the purpose of the Appellant qualifying for Medicaid.

It is further concluded that the penalty imposed by the Department for the period of October 24, 2008 through November 14, 2008 is incorrect.

DECISION

The Appellant's appeal is **GRANTED**.

ORDER

The Department is hereby directed grant the Appellant Medicaid effective the pick up date of October 24, 2008, based on the findings of this decision.

Compliance with this decision is due no later that November 13, 2009 and should include copies of the STAT, MAFI and case narrative computer screens, showing that the Medicaid has been granted.

Luz Velez
Hearing Officer

cc: John Souchuns, Field Operations Manager, Western Region, Torrington
Robert Haselkamp, 67 Poplar Hill Road, Wassaic, NY 12592

RIGHT TO REQUEST RECONSIDERATION

The appellant has the right to file a written reconsideration request within **15** days of the mailing date of the decision on the grounds there was an error of fact or law, new evidence has been discovered or other good cause exists. If the reconsideration request is granted, the appellant will be notified within 25 days of the request date. No response within **25** days means that the reconsideration request has been denied. The right to request a reconsideration is based on §4-181a(a) of the Connecticut General Statutes.

Reconsideration requests should include specific grounds for the request; for example, indicate what error of fact or law, what new evidence, or what other good cause exists.

Reconsideration requests should be sent to the Director, Office of Administrative Hearings and Appeals, 25 Sigourney Street, Hartford, CT 06106.

RIGHT TO APPEAL

The appellant has the right to appeal this decision to Superior Court within 45 days of the mailing of this decision, or 45 days after the agency denies a petition for reconsideration of this decision, provided that the petition for reconsideration was filed timely with the Department. The right to appeal is based on §4-183 of the Connecticut General Statutes. To appeal, a petition must be filed at Superior Court. A copy of the petition must be served upon the Office of the Attorney General, 55 Elm Street, Hartford, CT 06106 or the Commissioner of the Department of Social Services, 25 Sigourney Street, Hartford, CT 06106. A copy of the petition must also be served on all parties to the hearing.

The **45**-day appeal period may be extended in certain instances if there is good cause. The extension request must be filed with the Commissioner in writing no later than **90** days from the mailing of the decision. Good cause circumstances are evaluated by the Commissioner or his or her designee in accordance with §17b-61 of Connecticut General Statutes. The Agency's decision to grant an extension is final and is not subject to review or appeal.

The appeal should be filed with the clerk of the Superior Court in the Judicial District of New Britain or the Judicial District in which the appellant resides.