

STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES
OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS
25 SIGOURNEY STREET
HARTFORD, CT 06106-5033

ID: [REDACTED]
Req.: [REDACTED]

April 2, 2009
CERTIFIED MAIL

NOTICE OF DECISION
PARTY

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

REASON FOR HEARING

On December 17, 2009, the appellant, [REDACTED] requested an administrative hearing as she disagreed with the Department of Social Services ("the Department")'s implementation of a penalty period of ineligibility for long-term care services through the Medicaid program, as arising from the agency's determination that the appellant had transferred an asset for less than fair market value.

A hearing was held on February 23, 2009, in accordance with sections 17b-60, 17b-61, and 4-176e to 4-184 of the Connecticut General Statutes. The hearing record closed February 24, 2009.

PRESENT AT HEARING

[REDACTED]
Ben Kiniry, appellant's counsel
John F. Kearns, appellant's counsel

[REDACTED]
James Toce, Department's representative
Carlos Bonett, Department's witness
Eva Tar, hearing officer

STATEMENT OF ISSUE

The issues are: 1) whether the appellant's June 13, 2006 sale of her non-home property was for fair market value; and 2) whether the Department's September 5, 2008 determination that the June 13, 2006 sale of the appellant's non-home property resulted in a penalty period of ineligibility for payment of long-term care services through the Medicaid program was in accordance with state statutes and regulations.

FINDINGS OF FACT

1. Prior to January 5, 2006, the appellant resided in the second floor apartment of her two-family home in the community, located at 860-862 New Britain Avenue, Hartford, Connecticut ("the property"). (Appellant conservator testimony)
2. On or around January 5, 2006, Hartford Hospital admitted the appellant as a patient. (Appellant conservator testimony)
3. On January 5, 2006, Hartford Hospital discharged the appellant to Wethersfield Health Care Center, a skilled nursing facility. (Dept. Ex. 3: W-352, signed 2/22/08)
4. [REDACTED] is the appellant's cousin. (Appellant conservator testimony)
5. On January 6, 2006, the appellant assigned power of attorney to her cousin. (Appellant Ex. 6: *Facsimile* [w/attachments], 2/24/09)
6. On or around March 6, 2006, the appellant's cousin hired a licensed real estate broker to sell the property. (Appellant expert witness testimony)(Appellant Ex. 2: *Fax* [w/attachments], 2/17/09)
7. The appellant's cousin and the broker toured the property on or around March 6, 2006. (Dept. Ex. 5: M-2T, 6/19/09)
8. At the time that the broker toured the property, the property's first floor was occupied by the appellant's tenants and was in "live-able" condition. (Appellant expert witness testimony)
9. At the time that the broker toured the property, the property's second floor apartment had several years' worth of dried human feces on the walls and furniture, did not have a functioning bathroom, had a kitchen in poor condition with deteriorated linoleum, holes in the walls; and rotted window frames with peeling paint. (Appellant expert witness testimony)(Appellant conservator testimony)
10. At the time that the broker toured the property, the property had two furnaces, one of which was an asbestos-covered coal furnace (that had been converted to oil heat) that was not functioning; and a roof covering the house and the garage that was in fair to poor condition. (Appellant expert witness testimony)
11. At the time that the broker toured the property, the property had four dumpsters' worth of trash in the basement and abandoned vehicles parked on the lawn. (Appellant expert witness testimony)
12. At the time that the broker toured the property, the exterior of the house was covered with aluminum siding in fair-to-good condition. (Appellant expert testimony)
13. The broker rated the property as "Poor," on a scale of "Very Poor" to "Very Good"; he did not rate the property as "very poor," as the first floor of the property was in live-able condition. (Appellant expert witness testimony)

14. The broker determined that the property had a value of \$147,000.00, based on his tour of the property in 2006. (Appellant expert witness testimony)(Dept. Ex. 5)
15. The broker suggested a listing price of \$166,900.00 to the appellant's cousin. (Appellant Ex. 2)
16. The broker showed the property to prospective buyers approximately 25 times in the period between March 6, 2006 and June 13, 2006. (Appellant Ex. 2)
17. The broker received five written bids for the property ranging from \$150,000.00 to \$166,000.00. (Appellant Ex. 2)
18. Of the five written bids received by the broker, three were not viable as they were contingent on the property passing a home inspection, obtaining financing, no money down, and the removal of the tenants from the property's first floor apartment. (Appellant expert witness testimony)
19. On June 13, 2006, appellant's cousin sold the property for \$157,000.00 to [REDACTED] ("the buyer"), acting in her capacity as the holder of the appellant's power of attorney. (Dept. Ex. 4: M-2T, signed 4/7/08)(Appellant conservator testimony)
20. The buyer purchased the property for cash in "as is" condition. (Appellant Ex. 5: *Affidavit*, notarized 2/18/09)
21. As no bank was involved in the purchase of the property through a mortgage, there was no certified bank appraisal at the time of sale. (Appellant expert witness testimony)
22. The buyer is not related to the appellant by blood or marriage. (Appellant conservator testimony)
23. The buyer is not a personal friend of the appellant or the appellant's conservator. (Appellant conservator testimony)
24. The June 13, 2006 sale of the property was an arm's-length¹ transaction.
25. The appellant's cousin used the majority of the funds she received from the sale of the appellant's non-home property toward the appellant's care at the skilled nursing facility; what monies were not used toward the appellant's long-term care expenses were used for the appellant's behalf. (Department representative testimony)
26. On January 22, 2008, the Hartford Probate Court appointed the appellant's cousin to be the appellant's conservator, effective June 26, 2006. (Appellant Ex. 6)

¹ arm's-length, adj. Of or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship. Black's Law Dictionary, Deluxe Seventh Edition. St. Paul: West Group, 1999.

27. On March 13, 2008, the Department received an application on behalf of the appellant for Medicaid to pay for long-term care services. (Dept. Ex. 1: W-1, signed 3/13/08)
28. On April 7, 2008, the Department sent an internal referral to its Resources Unit to determine whether the June 13, 2006 sale of the appellant's non-home property was for fair market value. (Dept. Ex. 4)
29. On April 11, 2008, a Department Resources Unit worker reviewed comparable sales of three nearby properties in June 2006 and assessed the fair market value of the property to be \$226,000.00. (Dept. Ex. 4)
30. On April 11, 2008, the Department mailed a notice to the appellant that stated that the agency had determined that the appellant had transferred \$64,000.00 for less than fair market value with respect to the June 13, 2006 sale of the property to become eligible for assistance. (Dept. Ex. 7: *Transfer of Assets/Preliminary Decision Notice*, 4/11/08)
31. On June 19, 2008, the Department submitted a second internal referral to its Resources Unit to review its April 11, 2008 determination that the fair market value of the property was \$226,000.00 in June 2006, attaching the broker's March 6, 2006 market analysis of the property. (Dept. Ex. 5)
32. On September 2, 2008, a Department Resources Unit worker determined that the property had a fair market value of \$221,000.00 in June 2006. (Dept. Ex. 5)
33. On September 5, 2008, the Wethersfield Health Care Center notified the Department that the appellant had privately paid for her care for periods running from February 2006 through February 2008 in the amount of \$199,203.34. (Dept. Ex. 6: [Email], 9/5/08)
34. On September 5, 2008, the Department mailed a notice to the appellant that stated that the agency had determined that the appellant had transferred \$64,000.00 for less than fair market value with respect to the June 13, 2006 sale of the property to become eligible for assistance. (Dept. Ex. 8: *Transfer of Assets/Preliminary Decision Notice*, 6/13/06)
35. On September 25, 2008, the Department mailed a notice to the appellant that stated that the agency would impose a penalty period of ineligibility for payment of long-term care services through the Medicaid program of 7.03 months. (Dept. Ex. 9: *Transfer of Assets/Notice of Response to Rebuttal...*, 9/25/08)
36. On November 6, 2008, the Department mailed a notice to the appellant that stated that her penalty period of ineligibility for payment of long-term care services through the Medicaid program would run from March 1, 2008 through September 30, 2008. (Dept. Ex. 10: *Transfer of Assets/Final Decision Notice*, 11/6/08)
37. On December 1, 2008, the Department mailed the appellant's cousin a notice that stated that the agency had granted her March 13, 2008 Medicaid application.
38. As of February 23, 2009, the appellant continues to reside at the Wethersfield Health Care Center. (Appellant conservator testimony)

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-262 provides in part that the Commissioner may make such regulations as are necessary to administer the medical assistance program.

Conn. Gen. Stat. §17b-261(a) states in part that medical assistance shall be provided for any otherwise eligible person whose income, including any available support from legally liable relatives and the income of the person's spouse or dependent child, is not more than 143% of the benefit amount paid to a person with no income under the temporary family assistance program in the appropriate region of residence and if such person is an institutionalized individual as defined in Section 1917(c) of the Social Security Act, 42 USC 1396p(c), and has not made an assignment or transfer or other disposition of property for less than fair market value for the purpose of establishing eligibility for benefits or assistance under this section. Any such disposition shall be treated in accordance with Section 1917(c) of the Social Security Act, 42 USC 1396p(c). Any disposition of property made on behalf of an applicant or recipient or the spouse of an applicant or recipient by a guardian, conservator, person authorized to make such disposition pursuant to a power of attorney or other person so authorized by law shall be attributed to such applicant, recipient or spouse.

Conn. Gen. Stat. §17b-261(c) notes in part that for the purposes of determining eligibility for the Medicaid program, an available asset is one that is actually available to the applicant or one that the applicant has the legal right, authority or power to obtain or to have applied for the applicant's general or medical support.

Conn. Gen. Stat. §17b-261a(a) states 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.

Conn. Gen. Stat. §17b-261a(b) provides that any transfer or assignment of assets resulting in the establishment or imposition of a penalty period shall create a debt, as defined in section 36a-645, that shall be due and owing by the transferor or transferee to the Department of Social Services in an amount equal to the amount of the medical assistance provided to or on behalf of the transferor on or after the date of the transfer of assets, but said amount shall not exceed the fair market value of the assets at the time of transfer. The Commissioner of Social Services, the Commissioner of Administrative Services and the Attorney General shall have the power or authority to seek administrative, legal or equitable relief as provided by other statutes or by common law.

Conn. Gen. Stat. §17b-261a(c) states that the Commissioner may waive the imposition of a penalty period when the transferor (1) in accordance with the provisions of section 3025.25 of the department's Uniform Policy Manual, suffers from dementia at the time of application for medical assistance and cannot explain transfers that would otherwise result in the imposition

of a penalty period; or (2) suffered from dementia at the time of the transfer; or (3) was exploited into making such a transfer due to dementia. Waiver of the imposition of a penalty period does not prohibit the establishment of a debt in accordance with subsection (b) of this section.

RELEVANT STATE REGULATIONS

Uniform Policy Manual (UPM) 4000.01 provides definitions:

Equity value is the fair market value of an asset, minus encumbrances.

Fair market value is the amount at which an asset can be sold on the open market in the geographic area involved at the time of the sale as a result of reasonable, bona fide efforts to gain the highest possible price in an arm's length transaction.

Non-home property is real property which a person owns but is not using as principal residence.

UPM 3029.03 provides that the Department uses the policy contained in this chapter to evaluate asset transfers, including the establishment of certain trusts and annuities, if the transfer occurred, or the trust or annuity was established, on or after February 8, 2006.

UPM 3029.05(A) provides that there is 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 UPM 3029.05(C). This period is called the penalty period, or period of ineligibility.

UPM 3029.05(B) states that the policy contained in this chapter pertains to institutionalized individuals and their spouses. An individual is considered institutionalized if he or she is receiving long-term care facility services; or services provided by a medical institution which are equivalent to those provided in a long-term care facility or home and community-based services under a Medicaid waiver.

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: the individual is institutionalized and the individual is either applying for or receiving Medicaid.

UPM 3029.05(D) notes in part that the Department considers transfers of assets made within the time limits described in UPM 3029.05(C), on behalf of an institutionalized individual or his or her spouse by a guardian, conservator, person having power of attorney or other person or entity so authorized by law, to have been made by the individual or spouse.

UPM 4030.65(D) provides in part that property previously used as a primary residence becomes non-home property when the individual enters a long-term care facility and no relative of acceptable relationship is lawfully residing in the home; and the individual cannot reasonably be expected to return to the home. Non-home property that was the recipient's primary residence prior to entering the nursing home is excluded for as long as the individual is making a bona fide effort to sell it.

UPM 3029.05(E) notes that the penalty period begins as of the later of the following dates: 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 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 long-term care services described in UPM 3029.05(B) based on an approved application for such care, but for the application of a penalty period, and which is not part of any other period of ineligibility caused by a transfer of assets.

UPM 3029.05(F) provides in part 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 UPM 3029.05(C) by the average monthly cost to a private patient for long-term care services in Connecticut. Once the Department imposes a penalty period, the penalty runs without interruption, regardless of any changes to the individual's institutional status.

UPM 3029.05(G) notes in part that during the penalty period, the following Medicaid services are not covered: long-term care facility services, services provided by a medical institution which are equivalent to those provided in a long-term care facility, and home and community based services under a Medicaid waiver.

UPM 3025.25 provides for special circumstances when the transfer of an asset which would otherwise be considered to be for the purpose of qualifying for assistance does not cause ineligibility. This section addresses undue hardship and incompetence.

UPM 3029.10(F) 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 at fair market value.

RELEVANT DEPARTMENT PROCEDURES

UPM P-3029.17 provides procedures for evaluating intent to receive fair value or other valuable consideration. This section notes in part that the transfer should be disregarded if the transferor intended to transfer the asset at fair market value. Consider the following factors when evaluating this argument: Did circumstances at the time of the transfer prevent the transferor from getting a better price for the asset? Was the transferee a friend or relative of the individual? If not, give more credibility to the claim that the transferor attempted to obtain the best price possible. Did the transferor make a bona fide effort to get the best price possible? Did the transferor use all reasonable means to market the asset?

UPM P-3029.20 provides procedures for determining fair market value. This section notes in part that the following sources may be used to determine the fair market value of an asset: NADA "blue" book of trade-in values for automobiles; real estate conveyance records; marketing appraisals; bank records; passbooks; records of stock transactions; property appraisals performed by the Department; and tax assessment records.

UPM P-3029.30 provides procedures for the calculation and imposition of a penalty period.

DISCUSSION

On March 6, 2006, a licensed real estate broker toured the appellant's non-home property and determined gave a market analysis that the property had a fair market value of

\$147,000.00; he suggested that the property be listed at \$166,900.00, to allow for negotiation with potential buyers.

The appellant sold the property on June 13, 2006 for \$157,000.00 in "as is" condition, for cash, to an individual with whom neither she nor her representative had a relationship by blood, marriage, friendship, or prior business arrangement. There was no official building inspection² or certified bank appraisal completed at the time of sale, as a mortgage was not a part of the transaction.

On September 25, 2008, the Department notified the appellant that the agency had estimated the fair market value of the property to be \$221,000.00. With respect to the appellant's March 13, 2008 application for Medicaid, the agency implemented a penalty period of 7.03 months of ineligibility for long-term care services through the Medicaid program, to equal the uncompensated \$64,000.00 difference between the agency's estimate of the property's fair market value and the actual sale price of the property.

The hearing officer found the testimony of the appellant's conservator and expert witness as to the condition of the appellant's non-home property at the time of its June 13, 2006 sale to be credible. The hearing officer gave significant weight to their first-hand testimony as to the unsanitary and decrepit condition of the second story interior of the two-family home, non-working bathroom, broken, asbestos-covered furnace, deteriorating roof, outdated electrical system, and rotting window frames. The expert witness stated that the basement was full of broken furniture and that there were abandoned, broken vehicles that had been left on the property.

The hearing officer gave less weight to the testimony of the Department's witness. The Department's witness testified that he had viewed the property's exterior in 2008 and acknowledged that the roof "looked new." The Department's witness had calculated his \$221,000.00 estimate by comparing the sales of three comparable houses in the area in 2006 and deducting \$5,000.00 in permit applications for heating and electrical alterations that had been made to the property by the buyer following its June 13, 2006 purchase. The Department's witness stated that the buyer had resold the property eight months after its purchase for \$238,000.00.

It is reasonable to conclude that the sale price of a property eight months after substantial cleanup and improvements are made to the residence, some of which may be licensed, some of which may have been completed by the buyer without a permit, are irrelevant in the calculation of the fair market value of the residence prior to the cleanup and improvements.

CONCLUSIONS OF LAW

Based on the *Findings of Fact* as set herein, this hearing officer must conclude: 1) the appellant's June 13, 2006 sale of her non-home property for \$157,000.00 was for fair market value; and 2) the Department's September 5, 2008 determination that the June 13, 2006 sale

² The appellant's expert witness indicated at the hearing that it was his opinion that had the city's inspectors viewed the second floor of the property at the time of the sale, they would have condemned it as a public health hazard, due to the human feces on the walls, floor, and furniture. (Appellant expert witness testimony)

of the appellant's non-home property resulted in a penalty period of ineligibility for payment of long-term care services through the Medicaid program was not in accordance with state statutes and regulations.

DECISION

The Department is **NOT UPHELD**.

ORDER

1. The Department is hereby ordered to remove the penalty period of ineligibility for long-term care services through the Medicaid program that the agency had placed on the appellant's case with respect to the June 13, 2006 sale of her non-home property.
2. Upon the Department's removal of the penalty period, the agency will notify the appellant's conservator, her attorneys, and the skilled nursing facility in which the appellant resides of its action.
3. Within 21 calendar days of the date of this decision, or April 23, 2009, documentation of compliance with this order is due to the undersigned.

Eva Tar
Hearing Officer

Pc: Adele McGuire, 60 Williams Street, Noank, CT 06340
Ben Kiniry, Esq., Kearns and Kearns, 1121 New Britain Avenue, West Hartford, CT 06110
John F. Kearns, Esq., Kearns and Kearns, 1121 New Britain Avenue, West Hartford, CT 06110
Silvana Flattery, Regional Administrator, RO #10

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 request for reconsideration is granted, the appellant will be notified within 25 days of the request date. No response within 25 days means that the request for reconsideration 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: Department of Social Services, Director, Office of Legal Counsel, Regulations, and Administrative Hearings, 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 of the Department of Social Services in writing no later than 90 days from the mailing of the decision. Good cause circumstances are evaluated by the Commissioner or his designee in accordance with §17b-61 of the 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.