

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

April 7, 2009  
CERTIFIED MAIL

CL ID # [REDACTED]  
Request # [REDACTED]

NOTICE OF DECISION

PARTY

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

REASON FOR HEARING

On June 25, 2008, an administrative hearing was requested on behalf of the appellant, [REDACTED] because the Department imposed a penalty due to an alleged improper transfer of assets, and determined an effective date of September 22, 2008 for Title XIX long-term care coverage. A hearing was held on August 5, 2008 in accordance with Connecticut General Statutes 17b-60 to 17b-64, and 4-176e to 4-184. The hearing record was closed on September 15, 2008.

PRESENT AT THE HEARING

[REDACTED]  
Attorney Amy LaChance, Appellant's Son's Representative  
Melissa Garvin, Eligibility Services Worker  
Attorney Hugh Barber, Assistant Attorney General  
Alan Noske, Hearing Officer

STATEMENT OF ISSUE

At issue in this case is whether the appellant transferred assets without receipt of fair market value or other valuable considerations, the amount of the transfer, and the penalty period imposed on the appellant's Title XIX long term care eligibility.

## THE HEARING RECORD

The hearing record consists of the testimony and the following exhibits:

### Exhibits presented by the Regional Office:

In addition to the Hearing Summary, the Department submitted the following:

- A. Narrative – NARR printouts covering October 1, 2007 through July 30, 2008.
- B. Notice Content – NCON printout dated May 1, 2008.
- C. Correspondence from Czepiga Law Group to the Department dated October 9, 2007 and November 13, 2007.
- D. ~~Enes Naldi~~ Irrevocable Trust Agreement dated September 25, 2007 and the ~~Enes Naldi~~ Irrevocable Trust Agreement No. 2 dated October 31, 2007.
- E. Resource Investigation Referral and Memorandum from the Department of Social Services Principal Attorney, Daniel T. Butler, dated March 20, 2008, and a Revised Memorandum from Attorney Butler dated July 3, 2008.
- F. Institution – INST printout.
- G. Gift List and documentation of gifts/funding of trust.
- H. ~~Enes Naldi~~ Irrevocable Trust statements showing distributions.
- I. W-495A Transfer of Assets Preliminary Decision Notice, dated April 4, 2008 with a rebuttal from Attorney Paul Czepiga dated April 9, 2008.
- J. A revised W-495A Transfer of Assets Preliminary Decision Notice, dated April 21, 2008 with a rebuttal from Attorney Paul Czepiga dated April 28, 2008, a W-495B Transfer of Assets Notice of Response to rebuttal/Hardship Claim dated May 1, 2008, a W-495C Transfer of Assets Final Decision Notice, dated May 1, 2008, and a revised W-495C Transfer of Assets Final Decision Notice, dated July 11, 2008.
- K. Income and applied income calculation sheet and verification of income.
- L. Uniform Policy Manual Sections 3029.10 and 5045.20.

On August 27, 2008, the Department submitted a Brief of the New Britain Regional Office in Support of Its Denial of Assistance. In addition to the Brief, the Department submitted the following, noted as Department's Exhibits:

- M. Income and applied income calculation sheet.
- N. Questions and answers regarding Medicaid treatment of annuities, from the website of the Center for Medicare and Medicaid Services of the Department of Health and Human Services.
- O. 3 A C.J.S. section on Annuities.
- P. A copy of Hughes v. Sun Life Assur. Co., 159 F.2d 110, 113 (7<sup>th</sup> Cir. 1946).

### Exhibits presented by the Appellant:

On August 5, 2008, the appellant's representative submitted a Legal Memorandum in Support of the Application of Enes Naldi for Medicaid Benefits, including Appellant's Exhibit C (3).

On August 7, 2008, the appellant's representative submitted another copy of the memorandum and all of the noted exhibits from the memorandum. They are noted as Appellant's Exhibits:

1. [REDACTED] Irrevocable Trust Agreement dated September 25, 2007.
2. [REDACTED] Irrevocable Trust Agreement No. 2 dated October 31, 2007.
3. July 29, 2008 correspondence from Czepiga & Daly to the Department regarding transfers made for reasons other than to qualify for Medicaid assistance.
4. Internal Revenue Code § 2702(b)(1).
5. Internal Revenue Code Regulations §§25.2702-2(a)(6), 25.2702-3(b), and 25.2702-3(d).
6. Calculation of Whether Gift Results Under Federal tax Law.
7. HCFA Transmittal 64.
8. I.R.S. Actuarial Table 90CM.
9. Buckner v. Maher.
10. Connecticut Law Journal, April 10, 2007, Department of Social Services Notice of Intent to Amend Regulations.

On August 12, 2008, the appellant's representative submitted a Supplemental Information on Transfers Made for Reasons Other Than to Qualify for Medicaid Benefits. Attached were the following, noted as Appellant's Exhibit:

- 11a. Value Health Care Services Statement of Account due November 30, 2007.
- 11b. Bank of America Cashier's Check for \$637.44 dated November 20, 2007.
- 11c. Receipt from Apple Healthcare Incorporated (Ledgest) for \$208.00 and payment of \$9,540.00.
- 11d. Bank of America Cashier's Check for \$208.44 dated December 5, 2007.
- 11e. Value Health Care Services Statement of Account due December 30, 2007.
- 11f. Bank of America Cashier's Check for \$205.73 dated December 19, 2007.
- 11g. Invoice for Dr. Morris H. Kotick for dental services, dated December 10, 2007.
- 11h. Bank of America Cashier's Check for \$125.00 dated December 19, 2007.
- 11i. invoice from Anthem Blue Cross Blue Shield with amount due by January 1, 2008.
- 11j. Bank of America Cashier's Check for \$565.14 dated December 19, 2007.
- 11k. Ledgest Healthcare Patient Needs Account covering October 1, 2007 through December 31, 2007, with a deposit of \$150.00 on December 31, 2007.
- 11l. Receipt from Ledgest Business Office for \$150.00 dated December 24, 2007.
- 11m. Bank of America Cashier's Check for \$150.00 dated December 24, 2007.
- 11n. Invoice from Apple Healthcare Incorporated (Ledgest) showing payments of \$558.00 and \$9,300.00 received on January 9, 2008.
- 11o. Bank of America Cashier's Check for \$558.00 dated January 7, 2008.
- 11p. Connecticut General Statute §12-48.

On September 8, 2008, the appellant's representative submitted an e-mail of the Applicant's Rebuttal to Brief of the New Britain Regional Office, and on September 15, 2008, she submitted a hard copy of the brief. On September 15, 2008, the hearing record was officially closed.

FINDINGS OF FACT

1. The Department received an application for Title XIX long-term care benefits on behalf of the appellant on September 25, 2007.
2. The appellant was admitted to Ledgecrest Health Care Center on August 13, 2007.
3. On May 1, 2008, the Department denied long-term care for the months of September 2007 through January 2008 due to excess assets, and granted Title XIX long-term care benefits as of February 1, 2008 (Exhibit B).
4. The appellant's cost of care at the long-term care facility was paid privately through February 21, 2008 (Exhibits 11c and 11n).
5. On April 21, 2008, the Department sent a revised W-495A Transfer of Assets Preliminary Decision Notice alleging that the appellant transferred assets of \$43,000.00 on September 24, 2007, \$3,360.22 on July 11, 2006, \$2,500.00 on December 22, 2006, \$15,087.66 on October 29, 2007 and \$37,589.52 on September 27, 2007 in order to be eligible for assistance. The appellant was not asset eligible until February 20, 2008 and a penalty period would begin on February 21, 2008 (Exhibit J).
6. On May 1, 2008, the Department established a penalty period covering 11.2 months, from February 21, 2008 through January 6, 2009, based on the uncompensated value of the transfers (\$101,537.40) divided by \$9,096.00 (the average cost of private LTCF care in CT as of July 2007). A W-495C Transfer of Assets Final Decision Notice, dated May 1, 2008 was sent to the appellant (Exhibit J).
7. On July 11, 2008, the Department sent a revised A W-495C Transfer of Assets Final Decision Notice, reducing the penalty period 7.03 months, from February 21, 2008 through July 22, 2008, based on the uncompensated value of the transfers (\$63,947.88) divided by \$9,096.00 (the average cost of private LTCF care in CT as of July 2007). The Department removed \$37,589.52 transferred on September 27, 2007 (Exhibits A and J).
8. On September 25, 2007, the appellant created the [REDACTED] Irrevocable Trust Agreement with her son [REDACTED] di, as Trustee. The appellant funded the trust using her own funds (\$24,200.00) with the intent to receive "qualified interest" as defined in Section 27(b)(1) of the Internal Revenue Code, with payments of \$8,066.67 to be made to her or for her use, on the 5<sup>th</sup> of October, November, and December 2007 (Exhibits D and 1 – Article I and Article III).
9. On October 31, 2007, the appellant created the [REDACTED] Irrevocable Trust Agreement No. 2 with her son [REDACTED] di, as Trustee. The appellant funded the trust using her own funds (\$13,389.52) with the intent to receive "qualified interest" as defined in Section 27(b)(1) of the Internal Revenue Code, with payments of \$8,066.67 to be made to her or for her use, on the 5<sup>th</sup> of January and February 2008 (Exhibits D and 2 – Articles I and III).

10. The creation and funding of the trusts by the appellant was not a transfer of assets as the self-settled trust corpus was available to the appellant (UPM Section 3029.11).
11. The appellant's trusts created on September 25, 2007 and October 31, 2007 were self-funded trusts and were not purchased as annuity contracts. The total amount of disbursements is equal to the amount that she funded the trusts. The trusts are not annuities.
12. On October 5, 2007, November 5, 2007, and December 5, 2007, the Trustee of the [REDACTED] Irrevocable Trust Agreement disbursed \$8,066.67 to the appellant for payment of the nursing home (Exhibit G).
13. As of December 5, 2007, the value of the [REDACTED] Irrevocable Trust Agreement was reduced to zero (Exhibit G).
14. Per Article III (A) of the [REDACTED] Irrevocable Trust Agreement No. 2, "[I]f the Grantor should die prior to the distribution of all monthly payments over the Trust Term, the Trustee shall first distribute to the State of Connecticut Department of Social Services an amount equal to the total medical assistance paid to, or on behalf of, Grantor." (Exhibit D).
15. On January 5, 2008, the Trustee of the [REDACTED] Irrevocable Trust Agreement No. 2 disbursed \$8,066.67 to the appellant for payment of the nursing home and on February 12, 2008, the Trustee of the [REDACTED] Irrevocable Trust Agreement disbursed \$5,332.84 to the appellant for payment of the nursing home (Exhibit G).
16. As of February 12, 2008, the value of the [REDACTED] Irrevocable Trust Agreement No. 2 was reduced to zero (Exhibit G).
17. With the monthly payments from the trusts, to or for the benefit of the appellant from October 5, 2007 to February 12, 2008, the trusts are available assets to the appellant (UPM Section 3029.11).
18. The counted value available to the appellant from the trusts exceeded the \$1,600.00 asset limit for the Title XIX program, from September 25, 2007 through February 12, 2008 (Exhibit G).
19. In the months of October 2007 through December 2007, the appellant received \$1,221.50 per month in gross Social Security plus \$155.30 per month from a pension (Exhibit K).
20. Combined with the monthly trust payments of \$8,066.67, the appellant's gross, monthly income in October 2007 through December 2007 was \$9,443.47 (Exhibits G and K).
21. Deducting personal needs of \$63.00, Medicare B premium of \$93.50, and the appellant's medical insurance premiums of \$182.24 per month, the appellant's monthly, applied income was \$9,104.73 for October 2007 through December 2007 (Exhibit K).

22. The appellant's applied income of \$9,104.73 exceeded her cost of care at the Medicaid rate of \$220.92 per day for the months of October 2007 through December 2007. The cost of care for October and December was \$6,484.52 ( $\$220.92 \times 31$ ) and the cost of care for November 2007 was \$6,627.60 ( $\$220.92 \times 30$ ) (Exhibit K).
23. In January 2008, the appellant received \$1,249.40 in gross Social Security, \$155.30 from a pension, plus the monthly trust payment of \$8,066.67, totaling \$9,471.37 (Exhibit G and K).
24. Deducting the personal needs of \$63.00, the Medicare B premium of \$96.40, and the appellant's medical insurance premiums of \$182.24 per month, the appellant's applied income was \$9,129.73 for the month of January 2008 (Exhibit K).
25. The appellant's applied income of \$9,129.73 exceeded her cost of care at the Medicaid rate of \$220.92 per day for the month of January 2008. The cost of care for January 2008 was \$6,484.52 ( $\$220.92 \times 31$ ) (Exhibit K).
26. In February 2008, the appellant received \$1,249.40 in gross Social Security, \$155.30 from a pension, plus the monthly trust payment of \$5,332.84, totaling \$6,737.54 (Exhibits G and K).
27. Deducting the personal needs of \$63.00, the Medicare B premium of \$96.40, and the appellant's medical insurance premiums of \$182.24 per month, the appellant's applied income was \$6,395.90 for the month of February 2008 (Exhibit K).
28. The appellant's applied income of \$6,395.90 was less than her cost of care at the Medicaid rate of \$220.92 per day for the month of February 2008. The cost of care for February 2008 was \$6,406.68 ( $\$220.92 \times 29$ ) (Exhibit K).
29. The appellant was ineligible for Title XIX long-term care through January 31, 2008 due to her applied income exceeding the cost of care.
30. On July 11, 2006, the appellant transferred \$3,360.22 to her son Roger. The transfer was to reimburse him for the real estate taxes on the property for which she had life use (Exhibits G and 3).
31. The appellant received fair market value for the transfer of \$3,360.22 to her son Roger on July 11, 2006 (Exhibit 3).
32. The \$3,360.22 transferred on July 11, 2006 was not an improper transfer of assets.
33. On December 22, 2006, the appellant transferred \$2,500.00 to Kara Elizabeth Roberts. The transfer was a baptism gift and was consistent with a pattern of gifts and amounts to the family going back to 2002 (Exhibits G and 3).

34. The \$2,500.00 transferred on December 22, 2006 was not an improper transfer of assets.
35. On September 24, 2007, the appellant transferred \$43,000.00 as a gift to her sons [REDACTED] (Exhibit G).
36. The appellant received no fair market value or other valuable considerations for the transfer of \$43,000.00 to her son(s) on September 24, 2007. The transfer was made for the purpose of qualifying for assistance.
37. On October 29, 2007, the appellant transferred \$15,097.66 to her son [REDACTED] (Exhibits G and 3).
38. Of the \$15,097.66 transferred to her son on October 29, 2007, \$2,449.41 was used to pay bills on the appellant's behalf (Exhibits 3 and 11).
39. Of the \$15,097.66 transferred to her son on October 29, 2007, \$12,648.35 was a gift (Exhibit 3).
40. The appellant received no fair market value or other valuable considerations for the transfer of \$12,648.35 to her son on October 29, 2007. The transfer was made for the purpose of qualifying for assistance.
41. The total of transferred assets without receipt of fair market value or other valuable considerations is \$55,648.35 (\$43,000.00 on September 24, 2007 plus \$12,648.35 on October 29, 2007).
42. Based on the uncompensated value of the asset transfers of \$55,648.35 on September 24, 2007, and October 31, 2007, divided by \$9,096.00 (the average cost of private long term care in CT as of the July 2007 application month) a period of ineligibility is established for 6.12 months.
43. The appellant became asset eligible and income eligible for Title XIX long-term care as of February 1, 2008.
44. The 6.12 month period of ineligibility for long-term care benefits covers February 1, 2008, the first of the month in which the appellant would otherwise be eligible for Title XIX long-term care, through August 4, 2008.

#### **PERTINENT STATE STATUTE**

Section 17b-2 of the Connecticut General Statutes designates the department of social services as the State agency for the administration of the Medicaid program pursuant to Title XIX of the Social Security Act.

Section 17b-260 of the Connecticut General Statutes authorizes the commissioner of social services 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.

17b-261 allows for the provision of medical assistance for eligible persons.

Section 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.

Section 38a-432. (Formerly Sec. 38-154). Annuities. Any domestic insurance company empowered to make contracts contingent upon life may grant and issue annuities either in connection with or separate from contracts of insurance predicated upon life risks.

Section 38a-1(3) "Annuities" means all agreements to make periodical payments where the making or continuance of all or some of the series of the payments, or the amount of the payment, is dependent upon the continuance of human life or is for a specified term of years. This definition does not apply to payments made under a policy of life insurance.

### **PERTINENT DEPARTMENTAL REGULATION**

Uniform Policy Manual Section 3029 states, in part: "This chapter describes the technical eligibility requirement in the Medicaid program pertaining to the transfer of an asset for less than fair market value. The policy material in this chapter pertains to transfers that occur on or after February 8, 2006." The effective date of the policy is April 1, 2007.

Ibid., Section 3029.05 A. states: "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 3029.05 C. This period is called the penalty period, or period of ineligibility." Subsection B. states: "1. The policy contained in this chapter pertains to institutionalized individuals and their spouses. 2. 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)." Subsection C. states: "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." Subsection D. 1. states: "The Department considers transfers of assets made within the time limits described in 3029.05 C, on behalf of an institutionalized individual or her spouse by a guardian, conservator, person having



power of attorney or other entity so authorized by law, to have been made by the individual or spouse.” Subsection E. addresses the start of the penalty period. “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.” Subsection F., addressing the length of the penalty period, states: “1. 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. 2. 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. 3. 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.” [Hearing Officer note: the Procedures section of the Uniform Policy identifies \$9,096.00 as the average cost of care to a private patient in a LTCF for the period of July 1, 2007 to June 30, 2008.] Subsection G states: “1. 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.”

Ibid., Section 3029.10 addresses transfers not resulting in a penalty. Subsection E. states 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.” Subsection F. states: “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.” Subsection G. states: “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 equal to or greater than the value of the transferred asset in order for the asset to be transferred without penalty. (Cross Reference: 3029.20)

Ibid., Section 3029.11 addresses transfers involving trusts. Subsection A. states: “1. The Department considers the converting of an asset into the form of a trust or similar asset to be a transfer to the extent that it is no longer available to the individual. 2. The Department considers payments made from trusts other than those made to or for the benefit of the individual to be transfers of assets.” Subsection C. states, in part: “1. The Department does not consider the converting of an asset into the form of an irrevocable trust to be a transfer to the extent that payments from the trust can be made to the individual under any circumstances, and are therefore considered available assets. 2. The Department considers payments from that portion of the corpus or income generated by the corpus of an irrevocable trust described in paragraph 1

other than those made to or for the benefit of the individual to be a transfer of assets by the individual as described in this chapter.”

Ibid., Section 4000.01 provides the definitions of an available asset, and counted assets. “An available asset is cash or any item of value which is actually available to the individual or which the individual has the legal right, authority or power to obtain, or to have applied for, his or her general or medical support.” “A counted asset is an asset which is not excluded and either available or deemed available to the assistance unit.” It also defines a trust as “an oral or written agreement in which someone (the trustee) holds the legal title to an asset for the benefit of another person (the beneficiary).” An annuity is defined as “an asset that may produce income either annually or at regular intervals pursuant to the terms of the annuity contract.”

Ibid., Section 4005.05 B. 1. states: “The Department counts the assistance unit’s equity in an asset toward the asset limit if the asset is not excluded by state or federal law and is either: a. available to the unit; or b. deemed available to the unit.” Paragraph B. 2. states: “Under all programs except Food Stamps, the Department considers an asset available when actually available to the individual or when the individual has the legal right, authority or power to obtain the asset, or to have it applied for, his or her general or medical support.” Paragraph D. states: “1. The Department compares the assistance unit’s equity in counted assets with the program asset limit when determining whether the unit is eligible for benefits. 2. An assistance unit is not eligible for benefits under a particular program if the unit’s equity in counted assets exceeds the asset limit for the particular program, unless the assistance unit is categorically eligible for the program and the asset limit requirement does not apply.”

Ibid., Section 4005.10 A. 2. provides the asset limit of \$1,600.00 for a needs group of one in the AABD and MAABD programs.

Ibid., Section 4030.47 addresses annuities and states, in part: “Annuities are evaluated as both an asset representing an investment and as income that the beneficiary may receive on a regular basis (cross reference 5050, Treatment of Specific Types). The assistance unit’s equity in an annuity is a counted asset to the extent that the assistance unit can sell or otherwise obtain the entire amount of equity in the investment. Any payments received from an annuity are considered income. Additionally, the right to receive income from an annuity is regarded as an available asset, whether or not the annuity is assignable.”

Ibid Section 4030.80 A. addresses the general principals for the treatment of trust. It states: “1. The Department evaluates an individual’s interest in a trust as: a potentially counted asset in determining whether the individual’s assets are within the program limits (Cross Reference:4005); and b. a potential source of income in determining whether the individual’s income is within the program limits, and in computing the amount of benefits for which the individual may be eligible (Cross Reference:5000); and c. a possible transfer of asset by the individual or by his or her spouse in determining whether the individual will be subject to a penalty period (Cross Reference: 3025, 3028,3029). 2. For all programs except Food Stamps, if the assistance unit is a beneficiary of a trust, but the funds in the trust are inaccessible to the unit, the unit shall cooperate with the Department in attempting to gain

access to the funds as a condition of eligibility. 3. The Department considers the corpus of a trust that an individual can revoke as an available asset to him or her. 4. The Department considers payments from a trust to or for the benefit of the individual to be the individual's income. 5. The term 'trust' includes any legal instrument or device like a trust, such as an annuity."

Ibid., Section 4030.80 D. addresses the treatment of inter-vivos trusts established on or after August 11, 1993 in the Medicaid program. Subsection D. 1. states, in part: "The Department considers an individual to have established a trust if the individual's assets were used to form all or part of the corpus of the trust and if any of the following individuals established the trust by means other than a will: a. the individual;" Subsection D. 3. states: "The Department evaluates trusts described in paragraph D regardless of: a. why the trust was established; or b. whether the trustees have or exercise any discretion under the trust; or c. any restrictions on when or whether distributions may be made from the trust; or d. any restrictions on the use of the distributions from the trust." Subsection D. 5., states: "With respect to an irrevocable trust, the following principles apply: a. The Department considers the portion of the corpus of an irrevocable trust, or the income generated by the corpus of such trust to be an available asset of the individual if there are any circumstances under which a payment from the trust could be made to or on behalf of the individual. b. The Department considers payments from that portion of the corpus or income generated by the corpus of a trust described in paragraph a to be: (1) the individual's income, if the payments are to or for the benefit of the individual; and (2) a transfer of assets by the individual, as described in chapters 3028 and 3029, if the payments are for any other purpose. c. The Department considers any portion of a trust from which, or any income generated by the corpus from which, no payment could be made to the individual under any circumstances as a transfer of assets, as described in chapters 3028 and 3029.

Ibid., Section 5045.20 provides that assistance units who are residents of Long Term Care Facilities (LTCF) or receiving community based services (CBS) are responsible for contributing a portion of their income toward the cost of their care. For LTCF cases only, the amount to be contributed is projected for a six month period.

Ibid., Section 5045.20 D. addresses the amount of benefits paid by the Department and states that the difference between the assistance unit's contribution and the Medicaid rate of the LTCF or CBS is the amount of benefits paid by the Department.

### **CONCLUSIONS OF LAW**

Based on the Findings of Fact, Discussion, and regulations set forth herein, it is concluded that the appellant's creation and self-funding of two irrevocable trusts on September 24, 2007 and October 31, 2007 were not transfers of assets. The corpus of each trust was available to appellant in equal monthly installments, thus making the trusts available assets. The trusts are not annuities and were not purchased as annuity contracts. The appellant's counted assets from the available trusts exceeded the \$1,600.00 Title XIX asset limit from September 24, 2007 through February 12, 2008.

The appellant's applied income from the trusts, her Social Security, and her pension, exceeded the cost of care (based on the Medicaid rate per day) at the facility through January 31, 2008. She became asset and income eligible as of February 1, 2008.

The appellant made two transfers of assets totaling \$55,648.35 on September 24, 2007 and October 29, 2007 as gifts, for no fair market value or other valuable considerations. The uncompensated value of the transfers results in a penalty period of 6.12 months (\$55,648.35 divided by \$9,096.00). The appellant's first date of eligibility for long-term care was February 1, 2008. Therefore, the penalty period resulting from the transfer of assets begins on February 1, 2008 and ends August 4, 2008.

### **DISCUSSION**

Based on the information and evidence presented at the hearing, the undersigned finds that the Department was correct in its action to deny the appellant's Title XIX long-term care benefits, and establish a penalty period, due to transfers of assets without receipt of fair market value or other valuable considerations. The period of ineligibility for LTCF benefits is 6.12 months, from February 1, 2008 through August 4, 2008.

The primary issue in this case is the appellant's creation of two, self-funded irrevocable trusts and the Department's treatment of those trusts in the determination of the appellant's eligibility for Title XIX long-term benefits.

The appellant funded the two trusts on September 24, 2007 and October 31, 2007 from her own assets. Each of the trusts, with her son as Trustee, directed monthly payments to, or on behalf of the appellant, beginning October 5, 2007. The first trust disbursed \$8,066.67 per month to the appellant on the fifth of each month, with the corpus of the trust depleted as of December 5, 2007. The second trust directed monthly payments of \$8,066.67 in January and February 2008. The Trustee disbursed \$8,066.67 on January 5, 2008, and the remaining balance of the second trust, \$5,332.84, in February 2008.

Initially, the Department treated the trusts as transfers of assets, with partial returns of the asset in each month. However, in review of the Department's regulations, the undersigned finds that the trusts are assets available to the appellant in each month of existence. Under Uniform Policy Manual 3029.11 C., "[t]he Department does not consider the converting of an asset into the form of an irrevocable trust to be a transfer to the extent that payments from the trust can be made to the individual under any circumstances, and are therefore considered available assets." The corpus of each trust was clearly available to the appellant, and was paid to her, or on her behalf, from October 2007 through February 2008. When the last payment was made in February 2008, the appellant's available assets from the trusts was reduced to zero. Until that time, the amount of available asset in each trust exceeded the \$1,600.00 asset limit.

The appellant argued that the trusts created by the appellant are best characterized as annuities, and that no penalty should be imposed as the assets of each trust was not accessible to the appellant. The undersigned finds that the trusts created by the appellant were just that, trusts. There is no language in either trust that would satisfy the definition of an annuity. Agency policy defines an annuity as "an asset that may produce income either annually or at regular intervals pursuant to the terms of the annuity contract." There was no contract purchased with an individual or a commercial or business entity, and there was no investment or interest to be paid. The trusts were created simply by the appellant transferring her funds to an individual, as the Trustee, with her right to receive monthly payments in return. The total of the monthly payments was equal to the amount funded in the trusts by the appellant.

The Department considers the payments from the trusts be the individual's income. The appellant's income from the trusts, combined with her Social Security and pension, was \$9,443.47 for the months of October 2007 through December 2007. Subtracting the personal, Medicare B, and her private medical insurance premiums, her applied income was \$9,104.73 for those months. Her cost of care at the long-term care facility was the daily Medicaid rate \$220.92. For October and December 2007, the cost of care was \$6,848.52 ( $\$220.92 \times 31$ ), and for November 2007 the cost of care was \$6,627.60 ( $\$220.92 \times 30$ ). In January 2008, the appellant's applied income increased to \$9,129.73, and her cost of care for the month was \$6,848.52 ( $\$220.92$ ).

Under agency policy the amount of benefits paid by the Department is the difference between the assistance unit's contribution and the Medicaid rate of the LTCF. From October 1, 2007 through January 31, 2008, the appellant's applied income was greater than the cost of care at the Medicaid rate. Therefore, she was not eligible for benefits.

For the month of February 2008, the last trust payment was \$5,332.84, and after appropriate deductions, her applied income was \$6,395.90. Her cost of care for February was \$6,406.68 ( $\$220.92 \times 29$  days). The appellant was eligible for Title XIX, based on her income, beginning February 1, 2008.

The appellant made transfers of assets that were considered by the Department to be for the purpose of qualifying for assistance. The Department determined a total of \$63,947.88 in improper assets transfers, and calculated a penalty period of 7.03 months, beginning February 21, 2008. The undersigned finds that a transfer of \$3,360.22 to her son on July 11, 2006 was not an improper transfer, as the money was to reimburse him for tax on the home in which she lived, with life use. Fair market value was received. An additional transfer of \$2,500.00 on December 22, 2006 is also found to be made for a purpose other than qualifying for assistance. That payment was a baptism gift to a family member and was consistent with previous family gifts going back to 2002.

The appellant also transferred \$15,097.66 to her son on October 29, 2007. Of that amount, \$2,449.35 has been documented as payment for bills on behalf of the appellant. The remainder of that transfer, \$12,648.35 was a gift to the appellant's son. The appellant also transferred \$43,000.00 to her son(s) Roger Naldi Sr., or Richard Naldi on September 24, 2007.

In the matter of the transfer of assets and subsequent penalty period, the undersigned finds that appellant's transfers of assets (gifts of \$43,000.00 on September 24, 2007 to her son(s) and \$12,648.35 on October 29, 2007, totaling \$55,648.35) were made for no fair market value or other valuable considerations, and for the purpose of qualifying for assistance. No 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.

The transfers occurred within the 60-month look-back period from the appellant's application date. Per the Uniform Policy Manual (UPM) Section 3029.05 F. 3., multiple transfers are added together and the transfers are treated as a single transfer, and a single penalty period is then calculated. The total amount of assets transferred was \$55,648.35. To calculate the penalty period, the Department divides the uncompensated value of the transfers by the average cost of private long-term care in CT as of the September 2007 application month, in this case \$9,096.00.

The penalty period in this case is 6.12 months (\$55,648.25 divided by \$9,096.00).

The UPM establishes the start date of a penalty period as the later of "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 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." The penalty period, in this case, begins on January 1, 2008, the date the appellant was eligible for Medicaid payment of long-term care services.

The appellant was ineligible for long-term care services until February 1, 2008 because her counted assets exceeded the \$1,600.00 asset limit and her applied income exceeded the cost of care, through January 31, 2008. The penalty period ends on August 4, 2008.

### DECISION

**The Department is upheld in its determination of an improper asset transfer, and the establishment of a penalty period. However, the amount of the improper transfer is \$55,648.35, and the penalty period is now set at 6.12 months. This decision also establishes the beginning of the penalty period as February 1, 2008, with the ending date of August 4, 2008.**

### ORDER

The Department is directed to correct the amount of the improper transfer to \$55,648.35, correct the penalty period to 6.12 months, and correct the start date of the penalty period to February 1, 2008. Final administrative action is due by April 21, 2009.

Compliance will be met by submission of EMS printouts or documentation showing the corrective action.

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Alan Noske  
Hearing Officer

c: Michele Farieri, Social Service Operations Manager, R.O. # 52, New Britain

Roger Naldi, 24 Mountain View Dr., Kensington, CT 06037

Hugh Barber, Assistant Attorney General, 55 Elm St., Hartford, CT

### **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. Even if a reconsideration has been requested, there are still only **45** days to file an appeal. 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.