

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]

August 24, 2009
CERTIFIED MAIL

NOTICE OF DECISION
PARTY

[REDACTED]

REASON FOR HEARING

On April 7, 2009, [REDACTED], the appellant, requested an administrative hearing as she disagreed with the Department of Social Services ("the Department")'s implementation of a penalty period of ineligibility for her long-term care services through the Medicaid program.

A hearing was held on May 11, 2009, in accordance with sections 17b-60, 17b-61, and 4-176e to 4-184 of the Connecticut General Statutes. The appellant's attorney-in-fact represented her interests at the hearing, as the appellant was unable to attend the hearing in person due to her physical limitations.

The hearing record closed June 16, 2009.

PRESENT AT HEARING

Marcia E. Skuret, appellant's representative
James Tyma, appellant's counsel
[REDACTED], appellant's witness
Brenda James, Department's representative
Eva Tar, hearing officer

STATEMENT OF ISSUE

The first issue of this hearing is whether the Department's February 26, 2009 determination that the appellant was subject to a penalty period of ineligibility for payment of long-term care services through the Medicaid program from August 1, 2008 through December 28, 2008 was in accordance with state statutes and regulations.

The second issue of this hearing is whether the appellant's countable assets in October 2008 and November 2008 exceeded the \$1,600.00 Medicaid program limit.

FINDINGS OF FACT

1. [REDACTED] ("the daughter") is the appellant's attorney-in fact. (Dept. Ex. 1: *Power of Attorney*, 5/9/06)
2. In December 2005, the appellant owned [REDACTED] Connecticut ("the real property"). (Appellant representative testimony)
3. On December 29, 2005, the appellant quit claimed 50 percent of the real property to the daughter. (Dept. Ex. 13: [Quit claim], 12/29/05)
4. On January 10, 2006, the appellant quit claimed 50 percent of the real property to the daughter. (Dept. Ex. 13)
5. The real property's fair market value at the time of the December 29, 2005 and January 10, 2006 transfers equaled \$237,571.00. (Department representative testimony)(Dept. Ex. 15: [Correspondence], 10/1/08)
6. On July 27, 2006, the daughter and the appellant borrowed \$151,500.00 from Wachovia Bank, using the real property as collateral. (Dept. Ex. 14: Mortgage, signed 7/27/06)
7. On August 1, 2006, Wachovia Bank deposited \$150,000.00 to Wachovia Bank account - [REDACTED], held jointly by the daughter and the appellant. (Appellant Ex. B: [Correspondence w/attachments], 5/5/09)
8. The \$150,000.00 deposited to Wachovia Bank account [REDACTED] were the loan proceeds of the July 27, 2006 loan agreement. (Appellant Ex. B)
9. The daughter and the appellant agreed to repay the \$151,500.00 loan to Wachovia Bank at a rate of \$1,010.64 per month, effective September 14, 2006, for 36 months. (Appellant Ex. C: [Correspondence w/attachments], stamped as received 5/26/09)
10. The daughter and the appellant were liable to pay off the \$151,500.00 loan to Wachovia Bank. (Dept. Ex. 14)
11. On June 25, 2008, Shady Knoll Health Care Center admitted the appellant as a long-term care patient. (Dept. Ex. 4: *Admission Notice*, 8/8/08)
12. On July 30, 2008, the Department received an application for Medicaid coverage of the appellant's long-term care services that had been signed by the daughter, acting in her capacity as the appellant's attorney-in-fact. (Dept. Ex. 3: *Application Part 2*, marked as received 7/30/08)
13. For the purposes of the Medicaid program, the penalty period of ineligibility for long-term care services based on the transfer of 50 percent of the real property on December 29, 2005 ran from December 29, 2005 through January 14, 2007. [\$118,785.50, fair market value of 50 percent of real property; divided by \$9,464.00, average cost of long-term care in effect at time of application; equaled 12.55 months][UPM 3028.05(F); UPM P-3028.30]

14. For the purposes of the Medicaid program, the penalty period of ineligibility for long-term care services based on the transfer of 50 percent of the real property on January 10, 2006 ran from January 14, 2007 through January 30, 2008. [(\$118,785.50, fair market value of 50 percent of real property; divided by \$9,464.00, average cost of long-term care in effect at time of application; equaled 12.55 months)][UPM 3028.05(F); UPM P-3028.30]
15. On December 5, 2008, the Department determined that the appellant had transferred \$46,686.29 for less than fair market value in the period from September 2006 through July 2008. (Dept. Ex. 11: *Transfer of Assets*, 12/5/08)
16. The Department's calculation of the \$46,686.29 transfer incorporated the \$1,010.64 monthly repayments of the July 27, 2006 mortgage from September 2006 through June 2008 and a lump sum payment of \$22,430.93 toward the mortgage. (Department representative testimony)
17. On December 10, 2008, Shady Knoll Health Care Center notified the Department that the facility was seeking Medicaid coverage for the appellant's long-term care services effective August 23, 2008. (Dept. Ex. 5: *Facsimile Transmission Form*, 12/10/08)
18. On February 26, 2009, the Department determined that the appellant was ineligible for long-term care services for the period from August 1, 2008 through December 28, 2008. (Dept. Ex. 11)
19. On March 1, 2009, the Department mailed a notice to the appellant stating that it was granting the appellant's Medicaid application for long-term care services effective December 29, 2008, with a penalty period to run from August 1, 2008 through December 28, 2008. (Dept. Ex. 2: *Notice Content-NCON*, 3/1/09)
20. The March 1, 2009 notice stated that the Department had denied the appellant's Medicaid application for long-term care services for October 2008 and November 2008 for the reason that the appellant's assets exceeded the program limit. (Dept. Ex. 2)
21. On May 22, 2009, the appellant submitted additional documents to the Department regarding the status of the appellant's assets in October 2008 and November 2008. (Appellant Ex. C)

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) 3000.01 provides definitions. "Compensation" is all money, notes, real or personal property, food, shelter, or services received in exchange for something of value. "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 or the amount actually obtained as a

result of bona fide efforts to gain the highest possible price. "Secured note" is a written acknowledgement of a debt for which repayment is guaranteed through the assignment of collateral. "Transfer of an asset" is the conveyance of interest in property, the disposal of an asset in some other way or the failure to exercise one's right to property. "Uncompensated value" is the difference between the fair market value of an asset and the compensation received.

UPM 4000.01 provides definitions. "Asset limit" is the maximum amount of equity in counted assets which an assistance unit may have and still be eligible for a particular program administered by the Department. "Assignment" is the act of transferring one's interest in an asset to another person or entity. "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. "Counted asset" is an asset which is not excluded and is either available or deemed available to the assistance unit. "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 arms'-length transaction. "Legal owner" is "The legal owner of an asset is the person who is legally entitled to enjoy the benefit and use of the asset."

UPM 3028 states in part that this chapter describes the technical eligibility requirement in the Medicaid program pertaining to the transfer of an asset for less than fair market value, for transfers that occur prior to February 8, 2006.

UPM 4030.40 states that unless specifically excluded, money borrowed by the assistance unit is considered income in the month it is received, and, to the extent the money is retained, an asset as of the following month.

UPM 4030.05(B) states that the part of the checking account to be considered as a counted asset during a given month is calculated by subtracting the actual amount of income the assistance unit deposits into the account that month from the highest balance in the account for that month.

UPM 4030.05(C) states that money which is received as income during a month and deposited into an account during the month is not considered an asset for that month, unless the source of the money is an income tax refund; or cash received upon the transfer or sale of property; or a security deposit returned by the landlord.

UPM 4010.10 (A) addresses the treatment of assets held jointly. This section notes in part that subject to certain limitations, personal property such as a bank account held jointly by the assistance unit and by another person is counted in full toward the asset limit. An individual other than the spouse of an assistance unit member is considered merely the record owner of an account or similar asset held jointly with the unit member. This is true regardless of the time period that the individual has been the joint holder of the asset. The assistance unit may rebut the Department's finding by providing clear and convincing evidence that the individual is the legal owner of the asset. If the assistance unit proves that it is merely the record owner of part or all of the asset, the Department counts only the portion of the asset legally owned by the assistance unit.

UPM 4099.10(A) addresses verification with respect to the determination of ownership. The assistance unit must verify that it is not the legal owner of an asset if the unit claims to be merely the record owner of the asset. If the unit is unable to verify that it is merely the record owner, and not the legal owner of an asset, the Department counts the asset as owned by the assistance unit.

UPM 4010.10(C) states in part that the Department investigates whether an improper transfer of assets has occurred if the assistance unit removes its name from a jointly held asset; or the spouse of an assistance unit member becomes a joint holder of an asset previously held solely by the assistance unit, and the spouse subsequently liquidates the asset; or a joint holder, other than the spouse, liquidates an asset of which the assistance unit is also a joint holder. This is true regardless of the length of time the joint holder has held the asset jointly with the assistance unit.

UPM 3028 states in part that this chapter describes the technical eligibility requirement in the Medicaid program pertaining to the transfer of an asset for less than fair market value, for transfers that occur prior to February 8, 2006.

UPM 3028.5(A) states 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. This period is called the penalty period, or period of ineligibility.

UPM 3028.05(B) addresses the individual affected.

UPM 3028.05(C) provides for the look-back date for transfers.

UPM 3028.05(D) provides in part that the Department considers transfers of assets within the look-back period 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. In the case of an asset that the individual holds in common with another person or persons in joint tenancy, tenancy in common, or similar arrangement, the Department considers the asset (or affected portion of such asset) to have been transferred by the individual when the individual or any other person takes an action to reduce or eliminate the individual's ownership or control of the asset.

UPM 3028.05(E) addresses the start of the penalty period.

UPM 3028.05(F) provides for the length of the penalty period.

UPM 3028.10 addresses transfers not resulting in a penalty period.

UPM 3029 states in part that this chapter describes the technical eligibility requirement in the Medicaid program pertaining to the transfer of an asset for less than fair market value, for transfers that occur 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 3029.10(E) provides that an otherwise eligible institutionalized individual is not ineligible for Medicaid payment of long-term care services if the individual, or his spouse, provides clear and convincing evidence that the transfer was made exclusively for a purpose other than qualifying for assistance.

UPM 3029.10(F) provides that an institutionalized individual, or his spouse, may transfer an asset without penalty if the individual provides clear and convincing evidence that he intended to dispose of the asset at fair market value.

UPM 4005.10(A) states in part that the Medicaid asset limit for an aged, blind, or disable individual who is categorically and medically needy is \$1,600.00.

RELEVANT DEPARTMENT PROCEDURES

UPM P-3028.30 addresses calculating and imposing the penalty period. This section notes in part that the average monthly cost of care to a private patient in a long-term care facility is \$9,464.00 on or after July 1, 2008.

DISCUSSION

The appellant is disputing two actions by the Department: 1) the establishment of a Medicaid penalty period of ineligibility for long-term care services as arising from payments made from a joint checking account to pay a loan held by a bank; and 2) the determination by the Department that the appellant's countable assets in October 2008 and November 2008 exceeded the \$1,600.00 Medicaid program limit.

With respect to the first issue, the Department's establishment of a penalty period, some background is required.

On July 27, 2006, Wachovia Bank lent the appellant's daughter and the appellant \$151,500.00. The loan agreement designates the two as the "borrowers," and the appellant's daughter and the appellant's signatures are on the document. The appellant's daughter and the appellant agreed to repay the bank \$1,010.64 per month for 36 months, effective September 14, 2006.

On August 1, 2006, the bank deposited the \$150,000.00 proceeds of that loan into a joint account in the names of the daughter and the appellant.

The Department treated the monthly repayments of that loan in the amount of \$1,010.64 and a lump sum of \$22,430.93 paid to the bank from a joint account as a transfer from the appellant to her daughter for less than fair market value.

At the May 11, 2009 hearing the Department argued that the appellant's daughter was solely liable for the loan and that the payments from the joint account therefore were improper transfers for which the appellant's daughter received the sole benefit (by reducing her debt to the bank) and for which the appellant did not receive fair market value.

The Department's action is not supported by the evidence submitted for the hearing record.

The Department's argument that the appellant was not liable to repay the loan is unsupported by the language of the loan agreement. As both the appellant and her daughter are liable for the loan, payments from the joint account toward paying off that liability are not transfers for less than fair market value. The Department must remove the penalty period the agency imposed with respect to this loan and its repayment.

With respect to the second issue, as part of a May 22, 2009 correspondence to the hearing officer, the appellant submitted documents addressing the appellant's assets in October 2008 and November 2008. This information had not been submitted to the Department prior to its March 1, 2009 determination that the appellant's assets exceeded the program limits in those months.

The Department must review the documents and determine whether the new information would require it to change its March 1, 2009 finding.

CONCLUSIONS OF LAW

With respect to the first issue of this hearing, the undersigned hearing officer must conclude, based on the *Findings of Fact*, the following: 1) the appellant and her daughter were liable to repay a \$151,500.00 loan they took out with Wachovia Bank on July 27, 2006; 2) the monies the appellant and her daughter used to repay the \$151,500.00 debt to Wachovia Bank were not transfers for less than fair market value; and 3) the Department's February 26, 2009 determination that the appellant was subject to a penalty period of ineligibility for payment of long-term care services through the Medicaid program from August 1, 2008 through December 28, 2008 due to the payments toward the \$151,500.00 debt was not in accordance with state statutes and regulations.

With respect to the second issue of this hearing, the undersigned hearing officer must remand the matter to the Department to review the appellant's additional information, as submitted for this hearing proceeding, so as to determine the countable value of the appellant's assets in October 2008 and November 2008.

DECISION

With respect to the first issue, the Department is NOT UPHELD.

The second issue is REMANDED to the Department for further action.

ORDER

1. The Department is hereby ordered to remove the penalty period of ineligibility for long-term care services from August 1, 2008 through December 28, 2008 and update its records accordingly. The Department will notify the appellant in writing that the penalty period has been removed in accordance with this hearing decision.

2. The Department will review the documents submitted by her attorney as part of his May 22, 2009 correspondence with respect to its calculation of the appellant's countable assets in October 2008 and November 2008. The Department will determine, based on this review and the agency's policy, whether the appellant's assets were within the program limits in those months. The Department will notify the appellant in writing of its decision, preserving the appellant's right to appeal that decision, should she timely file an appeal in accordance with state statutes and regulations.
3. Within 21 calendar days of the date of this decision, or September 14, 2009, documentation of compliance with this order is due to the undersigned.

Eva Tar
Hearing Officer

cc: Marcia E. Skuret, 110 Estate Acres Drive, Orange, CT 06477
James Tyma, Esq., Law Office of Shawn K. Splan, LLC, P.O. Box 225, 215 Coram Avenue, Shelton, CT 06484
Ron Roberts, Regional Administrator, RO #20

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.