

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]

September 16, 2009
CERTIFIED MAIL

NOTICE OF DECISION
PARTY

[REDACTED]
[REDACTED]
[REDACTED] re
[REDACTED]

REASON FOR HEARING

On April 13, 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 June 23, 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 the appellant's interests at the hearing, as the appellant was unable to participate in the proceedings due to her medical condition.

The hearing record closed June 20, 2009.

PRESENT AT HEARING

Patricia Petosa, appellant's attorney-in-fact (daughter)
George B. Bickford, appellant's counsel
Robert Bligh, appellant's witness (husband)
Shelley Starr, Department's representative
Robley Newton, Department's witness
Eva Tar, hearing officer

STATEMENT OF ISSUE

The issues are:

1. the fair market value of the non-home property at the time of its January 8, 2006 transfer to the couple's children; and

2. whether the January 8, 2006 transfer subjected the appellant to a penalty period of ineligibility for payment of long-term care services with respect to the Medicaid program.

FINDINGS OF FACT

1. The appellant and her spouse have three adult children, a daughter and two sons. (Appellant husband testimony)
2. The appellant's daughter holds the appellant's general power of attorney. (Appellant Ex. A-I: pages 9-10)
3. The appellant has been institutionalized since March 16, 2007. (Dept. Ex. B: Institution Screen, 6/16/09)
4. The appellant resides at Countryside Manor, a long-term care facility in Bristol, Connecticut. (Dept. Ex. V: Requested pick up date, 2/20/09)
5. Prior to the appellant's being institutionalized, the appellant resided with her husband at their home in Bloomfield, Connecticut. (Appellant husband testimony)(Appellant daughter testimony)
6. The appellant's daughter resides in Bristol, Connecticut. (Appellant daughter testimony)
7. The appellant's daughter is employed full-time as a healthcare risk manager. (Appellant daughter testimony)
8. Prior to January 8, 2006, the appellant and her family owned real property ("the non-home property") located at 70 Wamisco Road, North Eastham, in Cape Cod, Massachusetts. (Dept. Ex. D: [Investigator report], 6/23/09)
9. The appellant's family used the non-home property during the summer season for several decades. (Appellant daughter testimony)(Appellant husband testimony)
10. As recently as May 2009, the appellant's husband has stayed in the non-home property. (Appellant daughter testimony)(Appellant husband testimony)
11. The town of Eastham assesses the value of real properties in its jurisdiction for tax purposes on an annual basis for one hundred percent of value. (Department witness testimony)
12. The town of Eastham assessed the value of the non-home property to be \$384,600.00 for fiscal year 2006. (Dept. Ex. D)
13. In late 2005, a licensed real estate agent determined that the non-home property would sell for \$250,000.00 during the winter 2005-2006 market. (Appellant Ex. A-II: pages 14-17)

14. The licensed real estate agent's determination took into account that the properties in the area were all seasonal summer homes and the roads were not always plowed and kept clean in those months, making it difficult to advertise or sell a summer home. (Appellant Ex. A-II: page 17)
15. On January 8, 2006, the appellant and her husband transferred the non-home property by quit claim deed to their three children in consideration for one dollar. (Dept. Ex. D)(Appellant Ex. A-I: pages 3-4)
16. The couple received \$75,111.00 from one of their sons as a partial return of monies with respect to the transfer of the non-home property. (Dept. Ex. L: [Check images], varying dates)(Appellant Ex. A-III: pages 83-87)
17. On February 25, 2008, the Department received an application on behalf of the appellant for Medicaid to pay for long-term care services. (Dept. Ex. A: Narrative-NARR, 5/6/09)(Dept. Ex. Q: *Application Requirements List*, 2/26/08)
18. On March 17, 2008, the appellant's spouse and the appellant's daughter signed an employment and services agreement. (Dept. Ex. O: *Employment and Services Agreement*, signed 3/17/08)(Appellant Ex. A-III: pages 88-90)
19. On June 9, 2008, the Department sent an internal referral to its resources unit to determine the fair market value at the time of the January 8, 2006 transfer of the non-home property. (Dept. Ex. A)
20. On July 22, 2008, the Department's resources unit accepted the town of Eastham's assessment of the value of the non-home property to be the non-home property's fair market value. (Dept. Ex. D)
21. On August 15, 2008, the Department notified the appellant in writing that the determination that the non-home property had been transferred for the purpose of qualifying for Medicaid. (Dept. Ex. R: *Transfer of Assets/Preliminary Decision Notice*, 8/15/08)
22. On November 5, 2008, the Department notified the appellant in writing that the transfer of the non-home property established a penalty period of ineligibility for Medicaid coverage of long-term care medical services from January 8, 2006 through September 29, 2008. (Dept. Ex. S: *Transfer of Assets/Notice of Response to Rebuttal*, 11/5/08)
23. On February 9, 2009, the Department notified the appellant in writing that the transfer of the non-home property established a penalty period of ineligibility for Medicaid coverage of long-term care medical services from January 1, 2006 through September 29, 2008. (Dept. Ex. U: *Transfer of Assets/Notice of Response to Rebuttal*, 11/5/08)
24. On February 20, 2009, Countryside Manor notified the Department by email that the facility was seeking a January 1, 2008 effective date of coverage with respect to the appellant's case. (Dept. Ex. V)

25. On February 20, 2009, the Department notified the appellant in writing that the transfer of the non-home property established a penalty period of ineligibility for Medicaid coverage of long-term care medical services from January 1, 2006 through September 29, 2008. (Dept. Ex. W: *Transfer of Assets/Final Decision Notice*, 2/20/09)
26. On February 20, 2009, the Department notified the appellant in writing that Medicaid would begin to pay nursing home room and board effective September 22, 2008. (Dept. Ex. X: [Correspondence], 2/20/09)

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.

RELEVANT STATE REGULATIONS

Uniform Policy Manual (UPM) 1570.25(C) lists the administrative duties of the fair hearing official. This section notes in part that the fair hearing official determines the issue of the hearing; considers all relevant issues; and requests, receives, and makes part of the fair hearing record all evidence necessary to decide the issues being raised.

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. "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.. "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. "Transfer of an asset" is the conveyance of interest in property, the disposal of an asset in some way or the failure to exercise one's right to property. "Transferee" is an individual to whom ownership of an asset is conveyed by another individual. "Transferor" is an individual of any age who conveys the ownership of an asset to another individual. "Uncompensated value" is the difference between the fair market value of an asset and the compensation received.

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 3028.03 provides that the Department uses the policy contained in this chapter to evaluate asset transfers, including the establishments of certain trusts, if: the individual is requesting Medicaid benefits for October 1, 1993 or later; and the transfer occurred or the trust was established on or after August 11, 1993 but prior to February 8, 2006.

UPM 4030.65(D) provides in part that non-home property that was not the appellant's primary residence is excluded as long as the individual is making a bona fide effort to sell it. The exclusion period begins with the first month in which all of the following conditions are met: 1) the assistance unit is otherwise eligible for assistance; 2) the assistance unit owns the property; 3) the property is available to the assistance unit; and the assistance unit is making a bona fide effort to sell the property. The Department places a lien against all non-home property.

UPM 3028.05(A) states in part 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 individuals 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. The penalty period begins 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 the transfer of assets; or the first day following a period of ineligibility caused by a previous transfer of assets, if the transfer under examination occurred during a period of ineligibility caused by a previous transfer of assets.

UPM 3028.05(F) provides for the length of the penalty period. This section notes 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 by the average monthly cost to a private patient for long-term care services in Connecticut. For applicants, the average monthly cost for long-term care services is based on the figure as of the month of application. In multiple transfers occur in the same month, the uncompensated values are added together and the transfers are treated as a single transfer for that month; a single penalty period is then calculated. Each transfer that does not occur in the same month is evaluated separately and a penalty period established consisting of a number of whole months and/or a partial month based on that particular transfer.

UPM 3028.05(G) provides for Medicaid eligibility during the penalty period. During the penalty period, the following services are not covered: long-term care services; and services provided by a medical institution which are the equivalent to those provided in a long-term care facility; and home and community based services under a Medicaid waiver. Payment is made for all other Medicaid services during a penalty period if the individual is otherwise eligible for Medicaid.

UPM 3028.10 addresses transfers not resulting in a penalty period.

UPM 3028.10(E) provides that an institutionalized individual or his or her spouse may transfer an asset without penalty if he or she provides clear and convincing evidence that the transfer was made exclusively for a purpose other than qualifying for assistance.

UPM 3028.10(F) provides that an institutionalized individual or his or her spouse may transfer an asset without penalty if the individual demonstrates with clear and convincing evidence that he or she intended to dispose of the asset at fair market value.

UPM 3028.10(G) states that an institutionalized individual or his or her spouse may transfer an asset without penalty if it is demonstrated with 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.

UPM 3028.10(H) states in part that an institutionalized individual is not penalized based on the transfer of an asset if the entire asset has been returned prior to the date on which Medicaid is requested. A penalty period caused by the transfer of an asset ends as of the date that the entire asset is returned to the individual. If only part of the transferred asset is returned, the penalty period is adjusted and expires as of the later of the following dates: the date that the partial asset is returned; or the last day of the adjusted penalty period. The adjusted penalty period is based on the uncompensated value of the original transfer minus the value of the part of the asset which is returned.

UPM 3028.15 addresses transfers made exclusively for reasons other than qualifying for Medicaid. This section notes in part that an institutionalized individual or the individual's spouse is considered to have transferred an asset exclusively for a purpose other than qualifying for assistance under circumstances that include, but are not limited to, undue influence; foreseeable needs met; transferred asset would not affect eligibility if retained; and post-eligibility transfers made by the institutionalized individual's spouse, with specific limitations.

UPM 3028.20 addresses transfers made in return for other valuable consideration. Other valuable consideration may be received either prior to or subsequent to the transfer. If the transfer occurred on or after July 1, 2001, the value of the other valuable consideration, as computed in this section, must be equal to or greater than the value of the transferred asset in order for the asset to be transferred without penalty. The value of the other valuable consideration is equal to the average monthly cost to a private patient for long-term care services in Connecticut, multiplied by the number of months the transferee avoided the need for the transferor to be institutionalized. Other valuable consideration must be in the form of services or payment for services which meet all of the following conditions: the services rendered are of the type provided by a homemaker or a home health aide; and the services are essential to avoid institutionalization of the transferor for a period of at least two years; and the services are either provided by the transferee while sharing the home of the transferor; or paid for by the transferee.

UPM 3028.30(A) states that compensation exchanged for a transferred asset is counted when it is received at the time of the transfer or any time thereafter. When an asset is transferred, compensation is counted when it is received at the time of the transfer or any time thereafter. Compensation received prior to the time of the transfer is counted if it were received in accordance with a legally enforceable agreement. Compensation may include the return of the transferred asset to the extent described at UPM 3028.10.

UPM 3028.30(B) states that each form of compensation is assigned a dollar value to compare with the fair market value of the transferred asset. In determining the dollar value of services rendered directly by the transferee, the Department uses the following amounts: for all services of the type normally rendered by a homemaker or home health aide, the current state minimum hourly wage for such services; for all other types of services, the actual cost. Out-of-pocket payment by the transferee may include capital alterations necessary to allow the transferor continued use of the home to avoid institutionalization. Compensation in the form of real or personal property is compared using its fair market value. The value of a note of indebtedness is the total amount owed.

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

RELEVANT DEPARTMENT PROCEDURES

UPM P-3028.20 provides guidance to determining fair market value with respect to the transfer of assets. This section notes in part that in determining the fair market value of an asset, the agency should use sources such as, but not limited to: 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.

DISCUSSION

The Department's policy defines "fair market value" as 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.¹

On January 8, 2006, the appellant and her husband transferred a non-home property located in North Eastham, Massachusetts, on Cape Cod, to their three adult children. The couple had used the property for several decades as a summer vacation home.

The appellant established that the fair market value of the non-home property at the time of the transfer equaled \$250,000.00. The appellant submitted documentation that a licensed real estate agent acquainted with the area had viewed the property and determined that price based on the condition of the property and the difficulty marketing seasonal properties in the winter market.

However, the hearing officer did not find the testimony of the appellant's husband as to the couple's reasons for transferring the non-home property to the three adult children credible. The hearing officer also did not find the husband's testimony as to the nature and scope of the services provided by the couple's daughter to the couple to be credible. The husband's testimony throughout the hearing proceeding was disingenuous and inconsistent.

The hearing officer also did not find the testimony of the appellant's daughter as to the existence of a January 8, 2006 oral contract between herself and the couple, the scope of the services she provided to the couple after the transfer, or the frequency that she provided the

¹ [UPM 3000.01; UPM 4000.01]

services to be credible. The daughter's testimony was self-serving, vague, and contradicted documents submitted for the hearing record.

The daughter valued the services she provided to the couple at \$116,398.20, or \$48,399.32 to the appellant in an undefined period and \$66,998.88 to the appellant's husband from January 2006 through December 2008. As submitted for the June 23, 2009 hearing, the daughter's records of the hours of services she had provided consisted of two, single page invoices. This cursory and undeveloped recordkeeping did not inspire the hearing officer to any confidence in the invoices' accuracy.²

Overall, the hearing officer found that there was a marked lack of reliable, credible, and probative evidence to support the daughter's assertion that she provided the specified services to the couple at the frequency indicated on her invoices.

The evidence and testimony with respect to the couple's intent at the time of the January 8, 2006 transfer was ambiguous, inadequate, and unconvincing. The appellant did not meet her burden to establish with clear and convincing evidence that the couple had transferred the non-home property for reasons other than qualifying for Medicaid assistance.

CONCLUSIONS OF LAW

Based on the *Findings of Fact* as set herein, this hearing officer must conclude:

1. the fair market value of the non-home property at the time of its January 8, 2006 transfer to the couple's children equaled \$250,000.00;
2. the couple transferred the non-home property on January 8, 2006 for the purposes of becoming eligible for Medicaid services;
3. an oral agreement that incorporated the transfer of one-third of the non-home property to the couple's daughter in exchange for various services to be provided by the daughter to the couple did not exist at the time of or prior to the January 8, 2006 transfer of the non-home property;
4. the daughter did not establish with credible, reliable, and probative evidence that she provided contracted services to the couple prior to and subsequent to the appellant's March 16, 2007 institutionalization;
5. the couple received \$75,111.00 in monies as a partial return of the January 8, 2006 transfer from one of the couple's children;

² The invoices were also inconsistent with the timelines involved.

Ex. The daughter's invoice with respect to services she allegedly provided the appellant (and to the appellant alone) charged the appellant for a mileage reimbursement to Bloomfield, Connecticut, twice a week, during a period when the appellant was institutionalized in Bristol, Connecticut. The daughter resided in Bristol, Connecticut.

6. the appellant is subject to a penalty period of ineligibility for long-term care services through the Medicaid program for the uncompensated value of the January 8, 2006 transfer, or \$174,889.00.

DECISION

With respect to the first issue, the Department is **NOT UPHELD** in the agency's determination that the fair market value of the non-home property equaled \$384,600.00.

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

ORDER

1. The Department is hereby ordered to update its records to show that the fair market value of the non-home property was \$250,000.00 at the time of the January 8, 2006 transfer.
2. The Department will recalculate the appellant's penalty period of ineligibility for coverage of long-term care services through the Medicaid program, based on the uncompensated value of the January 8, 2006 transfer equaling \$174,889.00. The Department will notify the appellant in writing of the amended penalty period of ineligibility.
3. Within 21 calendar days of the date of this decision, or October 5, 2009, documentation of compliance with this order is due to the undersigned.

Eva Tar
Hearing Officer

Pc: Patricia Petosa, 146 Harmony Road, Bristol, CT 06010
George B. Bickford, Bickford, Kraner & Hess, LLC, 12 Church Road, P.O. Box 410, East Granby, CT 06026
George Chamberlin, Operations Manager, RO #52

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.